Can a Lower Bid for a Debtor's Assets Be Approved as "Better" Because It Saves More Jobs than the Higher Bid?

*By Russell C. Silberglied**

Bidding procedures orders entered by bankruptcy courts typically state that offers attempting to top a stalking horse bid must be "higher and better" than any competing bids. Offers have been found to be "better" even though they have a lower cash "headline" dollar value, where (1) the lower cash offeror also agrees to assume certain liabilities; (2) the lower cash offeror can close more quickly, resulting in a reduction of the debtor's cash burn; or (3) the lower cash offeror is more certain to close because the higher offer contains a financing contingency, the need to complete due diligence, potential antitrust issues, proposed closing requirements that the debtor cannot meet, or other delays that take the debtor beyond its available liquidity.

Every one of these long-recognized rationales can be conceived of as an argument that what seems higher might not actually be higher. If the lower bid assumes certain liabilities, or closes a month sooner so as to stem operating losses, it might be higher on a net basis. The closing risk cases present a similar economic paradigm: a theoretically higher offer will not actually be higher if the deal never closes. One could therefore conceive of the analysis as still asking what is the higher offer, this time on a risk-adjusted rather than a net basis.

But can an offer be considered better even if there is no way to characterize it as higher or providing the best economic outcome for the estate, but it saves more jobs than the higher offer? The only reported opinion addressing this issue is dicta in a twenty-seven-year-old case. But the theory has been asserted in recent bankruptcy cases, especially in the current environment when so many people are out of work.

This article explores what standards a court should apply if faced with this argument and analogizes to fiduciary duty caselaw in the field of mergers and acquisitions of solvent corporations organized in states that (unlike Delaware) have a constituency statute, thereby permitting the court to consider what is in the best interests of constituencies other than just stockholders.

The article also explores how these issues would be analyzed if the entity is a public benefit corporation, or if the Protecting Employees and Retirees in Business Bankruptcies Act of 2020 were adopted.

---

* Russell C. Silberglied is a director of Richards, Layton & Finger, PA ("RL&F") in Wilmington, Delaware. The views expressed in this article are those of the author and not necessarily of RL&F or its clients. The author thanks former Judge Kevin Gross of the United States Bankruptcy Court for the District of Delaware, and now a director at RL&F, and C. Stephen Bigler, a director at RL&F, for their invaluable insight for this article. He also thanks RL&F associates Nikolaus Albright and Garrett Eggen and summer associate Edmond Kim for their extensive research assistance for this article.

In a pandemic-stricken economy with extraordinarily high unemployment rates, it is no surprise that preservation of jobs has become a topic of much discussion. In a bankruptcy sale case, can a debtor support and a court approve a sale at a lower price than a competing offer if the lower offer saves jobs?

Bankruptcy court orders that establish procedures governing the sale of assets usually state that the prevailing bid must be "higher and better" than any competing bids. Cases have recognized that "better" must mean something other than "higher"; otherwise the phrase would be nothing but excess verbiage. Thus, courts have frequently approved sales that might have a lower cash "headline" dollar value but are "better" for various reasons, such as: (1) the lower cash offeror also agreeing to assume certain liabilities; (2) the ability of the lower offeror to close more quickly, resulting in a reduction of the debtor's cash burn; or (3) the relative likelihood of closing due to, *inter alia*, the higher offeror having a financing contingency, the need to complete due diligence, potential antitrust issues, proposed closing requirements that the debtor cannot meet, or other delays that take the debtor beyond its available liquidity.

Every one of these long-recognized rationales can be conceived of as an argument that what seems higher might not actually be higher. If the lower bid assumes certain liabilities, or closes a month sooner so as to stem operating losses, it might be higher on a net basis. The closing risk cases present a similar economic paradigm: a theoretically higher offer will not actually be higher if the deal never closes. One could therefore conceive of the analysis as still asking what is the higher offer, this time on a risk-adjusted rather than a net basis.

But can an offer be considered better even if there is no way to characterize it as higher or providing the best economic outcome for the estate? It appears that no reported opinion has ever grappled with this issue, other than dicta from a case twenty-seven years ago (which never has been followed) that indicated that a lower offer could be approved because it saved jobs.[1]

Recently, however, given the current environment of high unemployment, some have suggested that, faced with competing bids, a bankruptcy court should pick the bid that saves jobs. For example, in one recent case, the secured lender's credit bid unquestionably was higher than a competing bid, but the competing bid purported to preserve ten more jobs than the credit bid. The debtor, over the lender's objection, argued that the preservation of jobs made the lower bid better.[2] It is not far-fetched to think this scenario will recur. Consider a debtor in the manufacturing business whose margins were very thin and has a buyer who thinks it can turn a substantially higher profit by moving the plant to Mexico or Asia and employing substantially cheaper labor. A competing bidder might emerge who promises to keep local jobs, but it will be left with a business whose profit margins remain small, so the business will be worth less. Presumably, therefore,

---

1. *In re* After Six, Inc., 154 B.R. 876, 882 (Bankr. E.D. Pa. 1993) (debtor chose the higher offer and the court approved that bid, deferring to the debtor's judgment, but stated in dicta that if the debtor had accepted the lower bid, it would have been "not only appropriate but socially responsible" because the lower bid would result in hiring the former employees).

2. *See infra* text accompanying notes 39–42.

it will offer less. While certainly unusual, may the debtor decide that accepting less is better because it wants to provide for its former employees and does not want the jobs to go overseas?

If the debtor does make that decision, what standard should the court apply to decide the issue?[3] After all, while the prospect of saving local jobs is attractive, it is not a zero sum game—doing so would take money out of the pocket of creditors, which the dearth of case law demonstrates is close to unprecedented.

One approach is for bankruptcy courts to look, by way of analogy, to how state and federal courts apply "constituency statutes" to the fiduciary duties of directors of companies that are for sale outside of bankruptcy. Unlike Delaware, which requires directors of a corporation that has decided to sell control to obtain the highest bid for the benefit of stockholders,[4] a significant majority of states have adopted a "constituency statute" that permits directors also to consider the interests of many other corporate constituencies, including employees.[5] There are very few reported opinions that examine the board's exercise of its business judgment in deciding between a higher bid and a bid providing benefits to other corporate constituencies such as employees, but as described below, there are some cases that are informative. In a similar vein, if the debtor is a "public benefit corporation"—a relatively new type of entity whose purpose at least in part is to create a positive impact on society, the environment, or certain other types of public interests—maximization of value is not the sole purpose of the entity, so it is unclear how the board of such an entity should weigh an economically superior offer against one that serves the public benefit in a better way. No case law examining the issue exists yet, but articles addressing the subject are discussed below.

Additionally, a recently introduced House bill, the Protecting Employees and Retirees in Business Bankruptcies Act of 2020[6] and a related Senate bill by the same name[7] (collectively, with the House bill, the "Protecting Employees Act") would not only permit but require that the lower bid be accepted: "If there are two or more offers to purchase or lease property of the estate under this section or a plan under chapter 11, the court *shall* approve the offer of the prospective purchaser or lessee" that preserves jobs.[8] Thus, if this bill passes, the guidance to boards and courts would be clear, but the playing field would be significantly altered; after all, the bill could be read to require that the job-saving proposal

---

3. This article focuses on competing offers where the lower offer would save jobs, but the same issue presents itself if the lower offer would promote some other societal benefit. For example, the *In re United Healthcare Systems, Inc.* case, described *infra*, concerned not only saving local jobs but preserving a local hospital. The consideration of any such non-economic factor likely would be treated similarly.

4. *See infra* text accompanying notes 43–44.

5. *See infra* text accompanying notes 45–47.

6. H.R. 7370, 116th Cong. (2020) [hereinafter H.R. 7370].

7. S. 4089, 116th Cong. (2020).

8. H.R. 7370, *supra* note 6, § 203 (emphasis added) (proposing a modification to section 363 by adding a new subsection (q)).

must be approved no matter how much lower it is than the competing offer. Creditor recoveries could be substantially eroded.

These issues are explored in more detail below.

A. The Business Judgment Test

While the Bankruptcy Code authorizes the sale of assets outside the ordinary course of business after notice and a hearing, it is completely silent concerning how a bankruptcy court should go about deciding whether to approve a sale.[9] No standard is provided in the Code; indeed, the Code does not even state what goal a sale is meant to achieve.

Instead, the standard that courts have applied comes not from the Bankruptcy Code itself, but from case law. While sometimes stated in different ways,[10] in general bankruptcy courts apply a form of the business judgment rule: a sale should be approved if it is a product of the trustee's or debtor in possession's sound business judgment.[11] There is some question as to whether this business judgment test is identical to or differs from the state corporate law business judgment rule. The leading treatise states: "The 'business judgment' test here differs from the general corporate law business judgment rule, which protects corporate directors from liability where they exercised due care and were not self-interested in the transaction. Here, by contrast, the bankruptcy court reviews the trustee's (or debtor in possession's) business judgment to determine independently whether the judgment is a *reasonable* one."[12] Whether the decision is "reasonable" would not be considered in a corporate law business judgment rule case; the sole questions are the process (due care) and disinterestedness (duty of loyalty) issues.[13] However, at least some bankruptcy court cases have specifically invoked Delaware corporate law opinions in holding that as long as a debtor demonstrates a valid business justification for a decision, the presumption is that the business decision was made "on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company."[14] Even under the test articulated by *Colliers*, though, "[t]he court should not substitute its judgment for the trustee's but should determine only whether

9. *See* 11 U.S.C. § 363(b)(1) (2018) (simply stating that "[t]he trustee, after notice and a hearing, may use, sell or lease, other than in the ordinary course of business, property of the estate").

10. *See In re* Bakalis, 220 B.R. 525, 531 (Bankr. E.D.N.Y. 1998) (collecting the "myriad ways" in which the standard has been phrased, at least until more recent years).

11. *See, e.g.*, Meyers v. Martin (*In re* Martin), 91 F.3d 389, 395 (3d Cir. 1996) (citing *In re* Schipper, 933 F.2d 513, 515 (7th Cir. 1991)); *In re* Chateaugay Corp., 973 F.2d 141, 143 (2d Cir. 1992); Stephen Indus., Inc. v. McClung, 789 F.2d 386, 390 (6th Cir. 1986); Comm. of Equity Sec. Holders v. Lionel Corp. (*In re Lionel* Corp.), 722 F.2d 1063, 1071 (2d Cir. 1983).

12. 3 Collier on Bankruptcy ¶ 363.02[4] (Richard Levin & Henry J. Sommer eds., 16th ed. 2020) (emphasis added).

13. *See, e.g.*, Cede & Co. v. Technicolor, Inc., 634 A.2d 345, 360–61 (Del. 1993).

14. Official Comm. of Subordinated Bondholders v. Integrated Res. Inc. (*In re* Integrated Res., Inc.), 147 B.R. 650, 656 (S.D.N.Y. 1992) (quoting Smith v. Van Gorkom, 488 A.2d 858, 872 (Del. 1985)).

the trustee's judgment was reasonable and whether a sound business justification exists supporting the sale and its terms."[15]

The business judgment test is a standard of review, but it does not specifically indicate what goal a sale should seek to achieve. However, courts across the country almost universally agree that the trustee or debtor in possession, in exercising its fiduciary duties, must attempt to maximize value for the benefit of the estate and its creditors.[16] As a result, the focus of the trustee's or debtor in possession's exercise of its business judgment should be on attempting to maximize value. Thus, in practice, ordinarily the business judgment test boils down to a judicial review of whether the trustee is appropriately seeking approval of a sale of the highest, or otherwise conceived of as the best, offer on the table. Accordingly, nearly every motion to approve bidding procedures for a section 363 sale specifically asks the court to approve the "highest and best" offer, even though those words do not appear in the Bankruptcy Code or Rules; if a stalking horse bidder has been identified, the motion will seek approval of the sale to the stalking horse, "subject to the receipt of a higher and better offer," or words to that effect.

B. "Higher and Better"

If a competing offer emerges, determining whether an offer is higher typically is not difficult; "higher" is conceived of as simply which bidder offered the most for the assets. But the debtor in possession or trustee is not required to "mechanistically recommend[] the facially higher bid."[17] While it certainly is the case that the highest offer will typically prevail, "overemphasis of this usual outcome overlooks a fundamental truism, i.e., a 'highest' bid is not always the 'highest and best' bid. The inclusion of 'best' in that conjunction is not mere surplusage."[18]

While bidding procedure orders and cases typically use the words "higher and better," it would be far less confusing and more grammatically correct to say "higher or better" or "higher or otherwise better." If an offer must be higher *and* better, then in all of the situations described below, there would be confusion about what to do, because one offer might be considered higher and the other better, so neither would be higher and better.

The ability to accept a better offer that arguably is not higher is exactly why the business judgment test exists. Take, for example, a case where the debtor in possession chooses a facially lower bid that has certainty of quickly closing, rather than a facially higher bid that entails a significant closing risk. Absent a conflict,

15. 3 Collier on Bankruptcy ¶ 363.02.

16. *See, e.g.*, *In re* S.N.A. Nut Co., 186 B.R. 98, 104 (Bankr. N.D. Ill. 1995) ("When a debtor or trustee conducts a sale under § 363(b), it has an obligation to maximize revenues for the estate.").

17. *In re* Bakalis, 220 B.R. 525, 532 (Bankr. E.D.N.Y. 1998) (approving of a trustee's business judgment where the trustee "carefully weighed the competing bids [including their risk factors and other provisions] rather than mechanistically recommending the facially higher bid"); *see also* *In re* Family Christian, LLC, 533 B.R. 600, 622 (Bankr. W.D. Mich. 2015) (debtor is not required to "mechanically accept a bid with the highest dollar amount").

18. *Bakalis*, 220 B.R. at 533.

the debtor's board of directors—not the court—is the right body to carefully weigh whether the closing risk is worth the higher bid. Once the non-conflicted board has made that decision and can articulate its rationale to the bankruptcy judge, the judge should not second guess the board's decision.

C. Recognized Scenarios Where Lower Bids Have Been Accepted

Facially lower bids that have been advanced by the debtor in possession or trustee and approved by the court can be categorized into the three following groups.

First, if the lower bid for the assets also assumes liabilities or has other attributes that make it higher on a net basis, it is uncontroversial that the facially lower bid will be accepted.[19] Indeed, most bankruptcy practitioners would conceive of such a bid not only as better but also as higher because it is higher on a net basis. Occasionally, disputes arise about whether a buyer's agreement to assume or waive certain types of liabilities should be credited dollar-for-dollar in an analysis of which bid is higher on a net basis. For example, if a bid is insufficient to pay all priority unsecured claims, priority unsecured creditors will not value the assumption or waiver of general unsecured claims as much as they value cash.[20] These might be circumstances where a court would be required to determine if one offer is better than the other.[21]

Second, courts have upheld a debtor in possession's or trustee's acceptance of a facially lower bid that can close significantly more quickly than the higher bid where the debtor's cash burn is significant enough such that pursuing the facially higher offer will actually net the estate less.[22] This scenario is similar to the one of assumed liabilities; in each case, the lower bid winds up netting more to the

19. *See, e.g.*, Emerald Capital Advisors Corp. v. Karma Auto. LLC (*In re* FAH Liquidating Corp.), 567 B.R. 464, 467 (Bankr. D. Del. 2017) (noting that earlier in the case the court approved a bid valued at "$149.2 million comprised of the following: $126.2 million in cash, $8 million of assumed liabilities, and a 20% equity interest in a company to be formed").

20. *See, e.g.*, *In re* United Healthcare Sys., Inc., Civil Action No. 97-1159, 1997 WL 176574, at *6 (D.N.J. Mar. 26, 1997) ("Even looking at the price differential, appellant's bid of $13 million is superior. The Bankruptcy Court held that [appellee's] bid was higher because it offered to waive a $1.2 million unsecured debt . . . , thereby increasing the bid to $13.2 million. The Court is satisfied that the $1.2 million unsecured debt was virtually worthless because [debtor] was insolvent, unable to pay the debt, and about to file bankruptcy. In fact, [debtor's] financial advisor ascribed a value of zero to the forgiven debt."); *see also* Acela Invs. LLC v. DiFalco, C.A. No. 2018-0558-AGB, 2020 WL 1987093, at *9–10 (Del. Ch. Apr. 27, 2020) (upholding receiver's determination that a facially lower offer was in fact higher and better because the facially higher offer included a component that credit bid an unsecured claim and, due to liquidity issues and the possibility of future claims, it was not clear that unsecured claims would be paid in full).

21. Theoretically this would also be the case if the offer did not fully pay secured claims and assumed general unsecured claims. However, secured creditors have stronger arguments than challenging business judgment: they can refuse to consent to the release of their liens and refuse to consent to the continued use of their cash collateral.

22. *See*, *e.g.*, *In re* LeBlanc Inc., 299 B.R. 546, 552 (Bankr. N.D. Iowa 2003) (approving the trustee's proposed sale of a lower offer and stating that "accepting the [higher] offer . . . would delay closing. The value to the trustee of closing sooner on the [lower] offer detracts from [the] incremental offer of $ 25,000.00.").

estate for the benefit of its creditors. The only real difference is that in the case of assumed liabilities, the buyer is providing a direct economic benefit, whereas in the case of closing sooner to cut off the bleed of cash-burn, the benefit can be thought of as indirect. But from the estate's perspective, the result is the same: it receives the highest value on a net basis, which also is the best offer. In addition, the bid that closes sooner might be considered better if the earlier closing allows it to comply with an order entered earlier in the case permitting the use of cash collateral only through a certain date.

Third, ample case law upholds the business judgment of a debtor or trustee that chooses a lower offer because of a perceived risk that the higher offer will not close, or at least the closing will be delayed. Indeed, some cases refer to the avoidance of risk as a duty running alongside the duty to seek the highest value: "[the] trustee's duty is to maximize the value obtained from a sale, but he must also avoid undue risk."[23] The debtor in possession could be concerned that the higher bid will not close for any number of reasons. The most common are financing contingencies or other reasons to doubt the bidder's financial ability to close,[24] due diligence contingencies,[25] and antitrust or other regulatory approval concerns.[26] Courts have also upheld the debtor in possession's or trustee's business judgment to choose a guaranteed set price or floor price over a possibly higher price with no floor.[27] Some opinions have even upheld a debtor's business judgment to accept a lower offer when the higher offeror has a history of litigiousness or other bad behavior with the debtor that caused doubt as to whether it would close.[28]

23. *In re* Scimeca Found., Inc., 497 B.R. 753, 779 (Bankr. E.D. Pa. 2013) ("trustee's duty is to maximize the value obtained from a sale, but he must also avoid undue risk" (quoting *In re* Buerge, 479 B.R. 101, 107 (Bankr. D. Kan. 2012)); *see also Bakalis*, 220 B.R. at 532 (trustee "must also seek to avoid undue risk"); *In re* Tresha-Mob, LLC, No. 18-52420-RBK, 2019 Bankr. LEXIS 1333, at *5 (Bankr. W.D. Tex. Apr. 3, 2019) ("In determining whether the highest bid is the 'best bid,' the fiduciary and reviewing court must consider factors such as 'the risks associated with each bid and the probabilities that the proposed terms will come to fruition' as well as 'contingencies, conditions, timing, or other uncertainties in an offer that may render it less appealing.'" (citation omitted)).

24. *See, e.g.*, *Scimeca Found.*, 497 B.R. at 779 (financing contingency); G-K Dev. Co. v. Broadmoor Place Invs., L.P. (*In re* Broadmoor Place Invs., L.P.), 994 F.2d 744, 745 (10th Cir. 1993) (financing contingency); *In re* Quality Stores, Inc., 272 B.R. 643, 647 (Bankr. W.D. Mich. 2002) (doubt about financial ability to close).

25. *See, e.g.*, *In re* TransWorld Airlines, Inc., No. 01-00056 (PJW), 2001 WL 1820326 (Bankr. D. Del. Apr. 2, 2001).

26. *See, e.g.*, *Bakalis*, 220 B.R. at 533–34.

27. *See, e.g.*, *In re* Family Christian, LLC, 533 B.R. 600, 624 (Bankr. W.D. Mich. 2015) (debtor was justified in choosing the lower bid because the lower bid came with a guaranteed minimum whereas the higher bid was wholly dependent on inventory levels and had no guaranteed minimum); Lawsky v. Condor Capital Corp., 14 CIV. 2863 (CM), 2015 U.S. Dist. LEXIS 96347, at *11, *27 (S.D.N.Y. July 21, 2015) (receivership case noting that identical principles applied as in a bankruptcy sale; approving receiver's acceptance of lower bid, in part because the higher bid was contingent on the bidder meeting performance metrics, whereas the lower bid included an offer of up-front cash payment).

28. *See, e.g.*, *In re* 160 Royal Palm, LLC, 600 B.R. 119, 129–30 (S.D. Fla. 2019) (upholding rejection of bid worth potentially $1 million more than the winning bid where the higher bidder was known to be litigious and had previously defaulted in a settlement and sale with the debtor), *aff'd*, 785 F. App'x 829 (11th Cir. 2019), *cert. denied*, 141 S. Ct. 553 (2020); *see also* Video Concepts,

While the perceived risk cases are perhaps not as easily characterized as a higher offer in disguise than the net benefit to the estate cases, they still are economic in nature. One could conceive of them as presenting a mathematical equation, where each offer is multiplied by a risk factor before a determination is made as to which was higher: Price x Risk = Expected Value of Bid. While fact or expert opinion (such as testimony from the debtor's financial advisor) might be needed to solve this mathematical equation, it unquestionably is an issue about what is in the best economic interest of the estate.

Other times, a lower bid has prevailed for other reasons related to the Bankruptcy Code or practice. For example, in *In re Dewey Ranch Hockey, LLC*,[29] the bankruptcy court rejected a significantly higher bid for a professional hockey team than the bid submitted by the NHL because the higher bid could not and did not provide adequate protection of the NHL's non-economic interests—in that case, the right to control where teams play their home games, as required by Bankruptcy Code section 363(e). In addition, many cases have rejected late bids submitted after an auction to protect the integrity of a court-approved bidding procedure and discourage bidders from holding their best bid until the eleventh hour.[30]

But very little reported case law addresses what types of offers might be considered better despite being facially lower other than in the economic (i.e., net basis or risk adjustment) cases or the Bankruptcy Code or practice scenarios described above. In one of the only reported opinions, *In re United Healthcare Systems, Inc.*,[31] the district court reversed the bankruptcy court, which had rejected a bid advocated by the debtor. According to the bankruptcy court, the competing bid provided a higher net price and also saved more jobs and contracts. But on appeal, the district court reversed, holding that the bankruptcy court should not have substituted its judgment for that of the debtors, who instead focused on (a) the need for an immediate sale to avoid a healthcare emergency, (b) the fact that the Commissioner of Health and Senior Services of New Jersey ("Commissioner") had granted emergency certificates of need (otherwise known as "CONs") to one bidder but not others, and (c) only the bidder who had been granted CONs committed to keeping the hospital in one location and providing $5 million in future investments. The district court held that the debtor's board's decision should have been upheld under the business judgment rule. It stated that price is not paramount and "the sound business reason for the transaction

LLC v. Volpe Indus., Inc. (*In re* Volpe Indus., Inc.), No. 13-10300-DPW, 2013 U.S. Dist. LEXIS 120052, at *15–16 (D. Mass. Aug. 23, 2013) (holding that the bankruptcy court did not abuse its discretion in holding that an auction was not required where the possible competing bidder had a "history of unseemly behavior" among other things).

29. 414 B.R. 577, 591 (Bankr. D. Ariz. 2009).

30. *See, e.g.*, *In re* Del. & Hudson Ry. Co., 124 B.R. 169 (D. Del. 1991); 3 Collier on Bankruptcy ¶ 363.02[4] (Richard Levin & Henry J. Sommer eds., 16th ed. 2020) ("[The] court should not reopen bidding even to obtain a higher price for the estate, because doing so undermines bidder expectations, encourages bidders to hold their best bids until the court approval hearing after the auction and undercuts confidence and faith in the integrity of the judicial system.").

31. *In re* United Healthcare Sys., Inc., Civil Action No. 97-1159, 1997 WL 176574, at *5 (D.N.J. Mar. 26, 1997).

was the need to sell a bankrupt hospital to ensure attendance to critical public health needs."[32] However, it also specifically disagreed with the bankruptcy court that the competing bidder had offered a higher price, because the price only could have been perceived of as higher if one included the bidder's waiver of worthless unsecured debt.[33] In addition, while the opinion only briefly mentions this fact, if the competing bidder was unable to get CONs from the Commissioner, the competing deal might not have closed. Thus, while this opinion reads like one that permitted a debtor, in its business judgment, to reject a higher bid due to non-economic factors such as the community's healthcare needs, arguably that is dicta because the court considered the bid that preserved the hospital in the community also to be both higher and the safer bid to close. Moreover, the case is distinguishable from most cases that come before bankruptcy courts because the debtor was a not-for-profit entity. The court noted that "the officers and directors of a non-profit organization are charged with the fiduciary obligation to act in furtherance of the organization's charitable mission."[34] In this case, that mission was furthered by maintaining centralized hospital services—a factor wholly separate from wealth maximization. Thus, *United Healthcare* likely does not provide precedent for most competing bid cases that bankruptcy courts decide.

D. Saving Jobs as a Rationale for Accepting a Lower Bid

One reported case directly addresses whether a lower offer might be deemed preferable because it would save jobs: *In re After Six, Inc.*[35] However, the discussion is entirely *dicta*, and no case in the ensuing twenty-seven years has used *After Six* as precedent for accepting a lower bid to save jobs.

In *After Six*, the debtor ceased operations and laid off employees. The debtor moved to sell substantially all of its remaining assets to AS, and a competing bidder emerged, Genesco. Genesco's bid was indisputably lower, but it agreed (albeit apparently without a formal commitment) to employ the debtor's former union member employees. The debtor moved to approve the higher AS offer, but the committee and union objected, arguing that the lower Genesco offer should have been accepted so as to provide employment opportunities to union members, especially because the AS offer would provide "only slightly higher dividends to its constituents."[36] The bankruptcy court held that the debtor *could* have chosen the lower Genesco offer, and the court would have approved it "when that lower bidder had other factors, including even an element as lacking in direct economic impact as 'societal needs,' in its favor."[37] But the debtor did not do so, and it chose the higher offer. The court made clear that

32. *Id.* at *5.
33. *Id.* at *6.
34. *Id.* at *5.
35. 154 B.R. 876 (Bankr. E.D. Pa. 1993).
36. *Id.* at 881.
37. *Id.* at 882.

it thought that the debtor made the wrong choice, but nevertheless had no option but to approve the debtor's choice of the higher bid under the business judgment standard:

> Frankly, we were somewhat appalled at [the debtor's] unwillingness to consider employment prospects for the Debtor's former employees as at least a factor in the Debtor's choice of a successful bidder. However, our differences with the weighing process utilized by the Debtor do not rise to the level of our branding the Debtor's own weighing processes as "bad faith."
>
> ***
>
> Our heart is heavy in rendering this decision, because we would not have been inclined to exercise our discretion as the Debtor did. One of the underlying rationales for the enactment of Chapter 11 is its potential to preserve jobs for the employees of the DIPs. It is disturbing to perceive a DIP which appears to accord so little consideration to this element. However, the discretion in what we find is a relatively close case is not, as we perceive it, ours to exercise.
>
> Thus, however morally reprehensible we find the Debtor's conduct, we nevertheless cannot conclude that the prospects of Genesco's employment of the Debtor's former employees is so clear that it necessarily outweighs the rather clear economic factors to the contrary. Some exercise of discretion and judgment in measuring this factor among the other factors was appropriate. We cannot find that the level of proof presented at the June 3, 1993, hearing established that the Debtor's exercise of discretion and judgment was abused. Therefore, we conclude that we must defer to the Debtor's discretion and approve its requested approval of the sale of its assets to AS.[38]

It seems clear that the *After Six* court would have approved the lower bid had the debtor chosen it. But since it did not, the discussion is dicta.

Moreover, we do not know how the *After Six* court would have analyzed the case if the debtor's and committee's positions had been reversed. If the debtor said that it was unconcerned about maximizing value and only cared about saving jobs, but the committee said that it was the financial constituency that bore the brunt of such a decision and objected to creditors receiving a lower return, how would the court have weighed which factor was more important? How much of a discrepancy in price could be tolerated—could the lower bidder offer 50 percent of the price (arguing, perhaps, that the bid would have to be lower if it were to commit to a future payment stream to employees) and still be better? This hypothetical is not far-fetched. Suppose that the winning bidder planned to move operations to Mexico or Asia, where labor is less expensive. If local jobs are to be saved, it well might be that the margins of the business are significantly less, and therefore the business is not worth nearly as much. Additionally, the buyer might be required to fund a significantly higher level of working capital. Such concerns certainly justify a substantially lower offer.

38. *Id.* at 883–84.

Another question that *After Six* leaves unanswered, because the issue was not before it, is whether the standard the court would apply if the debtor's decision had been the opposite would have remained the business judgment standard, such that the court would have deferred to the debtor's decision as long as it was made with due care and without conflict—no matter what other key constituencies might prefer. While *After Six* was quite clear in expressing which offer the court thought the debtor should have chosen, it was not forced to confront what standard it would have applied if the debtor agreed and chose the lower offer. Would it still have said that the deferential business judgment standard applied to the debtor's decision to take money out of creditors' pockets?

Recently, in a case pending in the Bankruptcy Court for the Southern District of Texas, a debtor teed up just such an issue in one of the sale motions before the court, with a wrinkle adding a second level of complexity.[39] The debtor was selling certain equipment to a bidder who offered $1 million and made a soft offer to save up to ten jobs.[40] The secured creditor, at an auction, credit bid $1.1 million. The debtor chose the lower offer, and the secured lender objected. The bankruptcy court ordered more briefing on the issue of whether the secured lender's credit bid right could be denied "for cause"[41] on the basis that the lower cash offer preserved jobs. In the briefs, in addition to briefing the credit bid issue, the parties also addressed whether the debtor could choose the lower offer as a matter of business judgment in order to save jobs.[42] The briefs located no relevant cases other than *After Six*. The parties settled before the court could render a decision.

Given the global pandemic and high unemployment rates, these issues are likely to recur. So faced with a lower offer that promises to save more jobs, if a court were to find that saving jobs is a relevant factor, how should a debtor in possession or trustee weigh the competing offers, and what standard should the court use to review the debtor's decision?

E. Looking to State Law Constituency Statutes for Guidance

Because there is little case law analyzing these issue for debtors, it is useful to consider whether any guidance can be gleaned from non-bankruptcy sale scenarios. Outside of bankruptcy, when a corporation is "in play"—i.e., it has agreed to merge with or be acquired by another corporation—the board of directors of the target corporation frequently is faced with competing offers and

39. *In re* BJ Servs., LLC, Case No. 20-33627 (MI) (Bankr. S.D. Tex.).

40. The parties disagreed about the level of commitment to save those jobs. The credit bidding secured lender argued that the cash bidder only offered to attempt to save jobs and that was not enough to warrant considering an offer to be better. The debtor argued that the jobs would be saved, citing post-auction amendments to the proposed asset purchase agreement.

41. *See* 11 U.S.C. § 363(k) (2018).

42. *See* GACP Finance Co., LLC's Post-Hearing Brief, *In re* BJ Servs., LLC, Case No. 20-33627 (MI) (Bankr. S.D. Tex. Aug. 24, 2020); Debtors' Brief Regarding Public Policy Considerations as "Cause" Under 11 U.S.C. § 363(k) and Related Matters, *In re* BJ Servs., LLC, Case No. 20-33627 (MI) (Bankr. S.D. Tex. Aug. 24, 2020).

must exercise its fiduciary duties to determine which offer to accept. In Delaware, which is the state of incorporation of so many corporations, the answer is clear cut: once directors have put the corporation in play,[43] they must choose the offer with the highest price, for the benefit of stockholders. This is often referred to as "*Revlon* duties," after the seminal case of *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*[44]

But in response to *Revlon*, forty-four states have adopted what is referred to as a "constituency statute."[45] Constituency statutes permit directors, in exercising their fiduciary duties, to consider the interests of other corporate constituencies in addition to stockholders. While the precise contours of constituency statutes differ from state to state, they typically specify that directors may, consistent with their fiduciary duties, consider the interests of, among others, employees, suppliers, creditors, the community, and the long-term and short-term interests of the corporation.[46] Constituency statutes are permissive rather than mandatory, meaning that directors may, but are not required to, consider non-shareholder interests.[47]

Because constituency statutes permit the consideration of interests other than shareholders, whose sole interest is to achieve the highest price in a merger or acquisition, situations may arise that are akin to a bankruptcy sale, where creditors' sole interest is the offer obtaining the highest price, but the debtor in possession or trustee might also choose an offer that is viewed as better but not higher.

While the constituency statute case law in the context of competing offers is somewhat sparse,[48] there are some opinions of note. Generally speaking, the cases fall into two somewhat opposing categories: cases that uphold a board's business judgment in accepting a lower bid because of a determination that other constituencies outweigh the higher price, and cases that, while not directly considering the issue, note that the other constituents may be considered but are not as important as the primary duty to stockholders.

---

43. Directors are not, however, necessarily required to put the company in play. *See, e.g.*, C & J Energy Servs., Inc. v. City of Miami Gen. Emps.' & Sanitation Emps.' Ret. Tr., 107 A.3d 1049, 1067 (Del. 2014) ("*Revlon* made clear that when a board engages in a change of control transaction, it must not take actions inconsistent with achieving the highest immediate value reasonably attainable. But *Revlon* does not require a board to set aside its own view of what is best for the corporation's stockholders and run an auction whenever the board approves a change of control transaction." (footnote omitted)). Determining when *Revlon* duties commence is beyond the scope of this article.

44. 506 A.2d 173 (Del. 1986).

45. *See* Francis J. Aquila, *Considering the Corporate Purpose*, PRAC. L.: TRANSACTIONS & BUS., Feb./Mar. 2020, at 24.

46. *Id.* at 76.

47. *Id.* at 96. Some states do mandate that directors consider both long-term as well as short-term interests, but no state's constituency statute mandates that directors must consider the other constituencies, like employees, creditors, and suppliers. In contrast, directors of a public benefit corporation are required to consider the interests of certain non-shareholders. *See infra* text accompanying notes 85–96.

48. Much of the case law concerning constituency statutes involves whether to sell the company at all. That case law is generally not relevant to a bankruptcy scenario where the debtor or trustee has determined that it must sell.

1. Cases Approving a Transaction with a Lower Bidder Under a Constituency Statute and Related Cases

Of the cases that have permitted the acceptance of a lower bid, *Safety-Kleen Corp. v. Laidlaw Environmental Services, Inc.*[49] presents the issue most squarely in a reported opinion. The board was in negotiations with two corporations, Laidlaw Environmental Services ("Laidlaw") and Philip Services ("Philip"). Laidlaw submitted a bid valued at $25.70 per share, but the board chose not to accept it and instead authorized exclusive negotiations with Philip because of certain non-price attributes of Philip's offer that the directors viewed favorably.[50] Specifically, Laidlaw had plans to close Safety-Kleen's Elgin headquarters facility and move the company to South Carolina, substantially reduce the number of Safety-Kleen employees, and radically reduce Safety-Kleen's separate ongoing operations.[51] Philip, in contrast, stated an intention to keep the Elgin headquarters in operation and continue Safety-Kleen's charitable commitments and community involvement.[52] Safety-Kleen and Philip signed a merger agreement valued at $27 per share.[53] Laidlaw responded by raising its offer to $30 per share.[54] Despite the higher value, Safety-Kleen's board rejected Laidlaw's offer, based in part upon its consideration of the interests of the non-shareholder constituencies such as employees.[55] Safety Kleen's stockholders sued. The court concluded that the board did not act unreasonably in prioritizing these employee and other issues in accepting a lower offer.[56] The court therefore denied a motion for a mandatory injunction to force the removal of a poison pill, holding that Laidlaw "ha[d] not established a likelihood of success on its contention that the Board breached its fiduciary obligations by not lifting [the] poison pill and moratorium."[57]

Norfolk Southern Corp. v. Conrail also squarely presented the issue, albeit there is no written opinion so the accounts herein come from articles and a hearing transcript. Conrail and CSX entered into a merger agreement whereby CSX would acquire Conrail's stock for $8.1 billion.[58] Thereafter, Norfolk announced a $9.1 billion all-cash tender offer of Conrail's stock and filed suit challenging the Conrail-CSX merger agreement, alleging that Conrail's directors breached their fiduciary duties when they agreed to CSX's proposal.[59] Norfolk argued

49. No. 97 C 8003, 1999 WL 601039 (N.D. Ill. Feb. 4, 1998).
50. *Id.* at *6.
51. *Id.*
52. *Id.* at *11.
53. *Id.* at *6.
54. *Id.* at *8.
55. *Id.* The board also was concerned that the $30 per share offer should be valued lower because it was partially a stock offer. *Id.*
56. *Id.* at *11.
57. *Id.* at *19.
58. Robert Goodyear Murray, *Money Talks, Constituents Walk: Pennsylvania's Corporate Constituency Statute Can Maximize Shareholders' Wealth*, 48 Buff. L. Rev. 629, 647 (2000).
59. *Id.*; Vincent F. Garrity, Jr. & Mark A. Morton, *Would the CSX/Conrail Express Have Derailed in Delaware? A Comparative Analysis of Lock-Up Provisions Under Delaware and Pennsylvania Law*, 51 U. Miami L. Rev. 677, 682 (1997).

that the attempted merger with CSX and disregard for Norfolk's offer was "without regard for the best interests of its shareholders or other constituencies."[60] In defense of their decision to accept the lower offer, Conrail's directors argued that they were protecting the long-term interests of the corporation and the corporation's stakeholders, including the interests of employees and the local economy.[61] The court denied Norfolk's request for an injunction, holding that directors have wide discretion under Pennsylvania's constituency statute to consider other constituencies beyond the shareholders.[62] Thus, the court refused to enjoin the board from accepting the lower offer despite the fact that the higher offer would have maximized value for shareholders in the short term.

Keyser v. Commonwealth National Financial Corp.[63] presents the same issue, but ultimately denies summary judgment on a factual issue and therefore does not decide the issue, but provides revealing dicta. Commonwealth's shareholders alleged that the board of directors breached fiduciary duties in defending against a hostile offer from Meridian Bancorp by entering into a "white knight" arrangement to be purchased instead by Mellon Bank.[64] The board accepted Mellon's $40 per share offer over Meridian's previous $39 per share offer despite Meridian's potential willingness to raise its offer to as high as $43 per share and Goldman Sach's valuation of the company at $42–$45 per share.[65] The court explained that unlike Delaware's obligation to obtain the best price under *Revlon*, "Pennsylvania law . . . permits directors to consider factors other than price," including "social issues" such as the effects of an offer on employees, customers, and the community.[66] The court emphasized that board members had "expressed their concern for the employees of Commonwealth and the community . . . , believing that employee opportunity would be much greater with Mellon than it would be with Meridian," and suggested that this evidence was relevant to the board's compliance with the duty of care.[67] However, in ruling on the board member defendants' motion for summary judgment, the court held that "[t]he extent to which price could be sacrificed for these so called social issues in the factual context of this case is not a proper determination for the court."[68] Thus, the court ultimately denied the motion for summary judgment.[69]

60. Murray, *supra* note 58, at 647 (citation omitted).

61. Murray, *supra* note 58, at 647; David N. Hecht, *The Little Train that Couldn't: Did the Pennsylvania Anti-Takeover Statute Fail to Protect Conrail from a Hostile Suitor?*, 66 FORDHAM L. REV. 931, 956 (1997) (explaining that the terms of the original merger agreement suggest that Conrail was attempting to protect other constituencies, including employees and the local economy); Nathan E. Standley, *Lessons Learned from the Capitulation of the Constituency Statute*, 4 ELON L. REV. 209, 223–24 (2012).

62. Murray, *supra* note 58, at 647–48; Norfolk S. Corp. v. Conrail Inc., Nos. 96-7167, 96-7350 (E.D. Pa. Nov. 19, 1996) (Transcript).

63. 675 F. Supp. 238 (M.D. Pa. 1987).

64. *Id.* at 240.

65. *Id.* at 259–61.

66. *Id.* at 265 (citing Baron v. Strawbridge & Clothier, 646 F. Supp. 690, 697 (E.D. Pa. 1986)).

67. *Id.*

68. *Id.* at 266. The court noted that "material factual issues preclude[e] summary judgment." *Id.* at 266 n.28.

69. *Id.*

While not a competing offer case, *Kloha v. Duda*[70] also is instructive. The plaintiff shareholder alleged that the director defendants breached their fiduciary duties by "not . . . exit[ing] unprofitable operations in order to continue employment of Duda family members."[71] The court held that "[d]irectors may, under Florida law, consider how a business decision will affect employees."[72] The court therefore granted summary judgment for the defendant directors, holding that the record established that the directors "properly considered [t]he impact on employees, including family members, as one of many factors" in deciding not to exit the failing vegetable and citrus operations of the company.[73] Thus, the board action was upheld even though the unprofitable operations likely decreased the shareholders' value and the employees whose jobs were being saved were insiders.

2. Cases Indicating that Shareholder Concerns Remain Paramount

In contrast to the cases described in the previous section, some cases have indicated that traditional *Revlon* duties continue to apply even in states that have constituency statutes—albeit the statement in each case was dicta and neither case involved the court rejecting the board's business judgment to accept a lower bid because of concerns for other constituents.

In *Flake v. Hoskins*,[74] the court discussed the interrelation of Missouri's constituency statute and *Revlon*, and stated:

> The only noticeable difference is that [the constituency statute] allows the board to consider the effect of the sale on other constituencies, without expressly requiring a link to general shareholder interests. This difference does not appear to be significant, however, because in all business actions, a corporate board of directors owes a fiduciary duty to shareholders and must generally operate for their benefit. Any consideration of other constituencies must therefore have at least a reasonable relationship to the general interests of shareholders.[75]

The court therefore concluded that "Missouri law does not differ in any way that would eliminate the duties of the JCN Board under *Revlon*."[76] However, the court concluded that even under *Revlon*, the company would not have been considered "in play" and the duty to obtain the highest price would not have been invoked.[77] It therefore granted the directors' motion to dismiss.

Similarly, in *Hilton Hotels Corp. v. ITT Corp.*,[78] the court discussed the relation between Nevada's constituency statute and Delaware's takeover law. The context

70. 246 F. Supp. 2d 1237 (M.D. Fla. 2003).
71. *Id.* at 1241.
72. *Id.* at 1246.
73. *Id.*
74. 55 F. Supp. 2d 1196 (D. Kan. 1999).
75. *Id.* at 1214.
76. *Id.*
77. *Id.* at 1214–16.
78. 978 F. Supp. 1342, 1347 (D. Nev. 1997).

was Hilton's attempt to enjoin the implementation by ITT of a shareholder rights plan (the "Comprehensive Plan") that would split ITT into three companies, one of which would have a poison pill. ITT's board attempted to adopt the Comprehensive Plan prior to an annual meeting without shareholder approval. When Hilton argued that the action was a breach of fiduciary duty, ITT's board argued "that Nevada does not follow Delaware case law since [its constituency statute] provides that a board, exercising its powers in good faith and with a view to the interests of the corporation, can resist potential changes in control of a corporation based on the effect to constituencies other than the shareholders."[79] The court disagreed, holding that "the corporate rights provided under [the constituency statute] are not incompatible with the duties articulated in *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985), *Revlon* . . . , and *Blasius Indus[tries], Inc. v. Atlas Corp.,* 564 A.2d 651 (Del. Ch. 1988). Delaware case law merely clarifies the basic duties established by the Nevada statutes."[80] The court went on to state that "[o]ther constituencies may be considered . . . . , but nothing in that statute suggests that the interests of third parties are as important as the right of shareholder franchise. While the two interests are not exclusive, neither are they equal."[81] While this language seems on the surface to suggest shareholder primacy, it bears noting that it specifically references "shareholder *franchise*"—i.e., voting. Indeed, the next sentence reads: "The right of shareholders to vote on directors at an annual meeting is a fundamental principle of corporate law, and it is not outweighed by the interests listed in [the constituency statute]."[82] It is not clear whether the court would have considered shareholder interests to be more important than those of other constituencies if the issue was weighing two offers instead of prohibiting a shareholder vote in the name of looking out for other constituencies.

Indeed, two years after *Hilton*, Nevada's legislature limited the *Hilton* holding to circumstances involving shareholder voting and clarified that the business judgment rule applies to director actions in takeover defenses unless shareholder voting rights are implicated.[83]

3. Applying Constituency Statute Opinions to Section 363 Sale Cases

As shown above, two of the constituency statute cases, *Safety-Kleen* and *Norfolk Southern*, invest a board with wide latitude to choose a lower offer that saves

79. *Id.* at 1346–47.
80. *Id.* at 1347.
81. *Id.* at 1351.
82. *Id.*
83. *See* Christopher Geczy et al., *Institutional Investing When Shareholders Are Not Supreme*, 5 Harv. Bus. L. Rev. 73, 115 (2015) (citing Nev. Rev. Stat. Ann. § 78.139 (2013)). Other cases also have rejected a board's attempt to justify cutting off shareholder voting rights by reference to other constituencies' interests. *See, e.g.*, Shoen v. AMERCO, 885 F. Supp. 1332, 1335–38 (D. Nev. 1994), *modified*, No. CV-N-94-0475-ECR, 1994 WL 904199 (D. Nev. Oct. 24, 1994); Warehime v. Warehime, 777 A.2d 469, 477 (Pa. Super. Ct. 2001), *rev'd on other grounds*, 580 A.2d 201 (Pa. 2004).

more jobs or benefits for non-stockholder constituents. Another two cases, *Flake* and *Hilton Hotels*, contain dicta that could be read to cut the other way, because they indicate that *Revlon* still applies after the adoption of a constituency statute and that the rights of other constituencies might be of less importance than stockholder rights, at least in certain circumstances. And a fifth case, *Keyser*, denied summary judgment because, while it held that the board was entitled in the exercise of its business judgment to weigh non-price factors, it also held that the court was unable to weigh the price discrepancy with the non-price factors on the record before it and under a summary judgment standard.

The *Keyser* court's observation that the board was warranted in considering both price and non-price factors, but that the challenge is weighing the two, accurately states the same problem a bankruptcy court might face. But the *Keyser* court's procedural out will not be available in a section 363 sale case: the summary judgment standard will not be in play, and the bankruptcy court will be required to hold a hearing quickly, during which it likely will hear and admit evidence and render a *final* ruling. The weighing of the price and non-price factors such as saving jobs would need to occur right then—assuming that the court believes the non-price factors are relevant at all under the "and better" standard.

So if confronted with a debtor that is advocating a lower, job-saving offer, what guidance do these constituency statute cases provide a bankruptcy court in approaching its decision-making? It appears that there are two possible camps: (a) applying the business judgment rule and therefore solely analyzing whether the board exercised due care in its decision-making and acted in a disinterested manner, or (b) requiring at least some weighing *by the court* of the competing interests. It appears that the latter approach is more consistent with the level of review that a bankruptcy court typically employs on a section 363 sale motion, given that bankruptcy courts review whether the trustee's or debtor in possession's decision is "reasonable."[84]

4. Public Benefit Corporations

The foregoing discussion assumed that the target corporation or debtor is a traditional corporate entity. Over the last ten years a new type of entity, the public benefit corporation, has been created and has started to gain some measure of popularity. There are two main varieties of public benefit corporations: the Delaware statute[85] and states that have adopted a version of a Model Act.[86] The Delaware statute provides that "a public benefit corporation shall be managed in a manner that balances the stockholders' pecuniary interests, the best interests of those materially affected by the corporation's conduct, and the public benefit or public benefits identified in its certificate of incorporation."[87] The import of that

84. *See supra* Part A.
85. Del. Code Ann. tit. 8, §§ 361–368 (2021).
86. *Model Benefit Corporation Legislation*, Benefitcorp.net (Apr. 27, 2017), https://benefitcorp.net/sites/default/files/Model%20benefit%20corp%20legislation%20_4_17_17.pdf [hereinafter Model Act].
87. Del. Code Ann. tit. 8, § 362(a).

last phrase, “identified in its certificate of incorporation,” means that a Delaware public benefit corporation must articulate in its certificate of incorporation a specific public benefit that it aims to pursue. Public benefit is defined to be “a positive effect (or reduction of negative effects) on . . . communities or interests . . . including . . . effects of an artistic, charitable, cultural, economic, educational, environmental, literacy, medical, religious, scientific or technological nature.”[88]

In contrast, under the Model Act, the corporation must “have a purpose of creating *general* public benefit,”[89] and additionally may, but is not required to, identify in its certificate of incorporation a “specific public benefit.”[90] “General public benefit” is broadly defined to mean “impact on society and the environment, taken as a whole.”[91]

Because public benefit corporations are relatively new, there does not appear to be any case law yet, inside or outside of bankruptcy, on competing offers for the sale of a public benefit corporation. If and when a court is faced with such a situation, it appears that the public benefit corporation statutes would alter both a *Revlon* and a constituency statute analysis. In a typical corporation, either obtaining the highest price is mandatory for states applying *Revlon* (to the extent a *Revlon* situation has been triggered) or the board is permitted but not required to consider the interests of other constituencies in addition to stockholders. In contrast, in a public benefit corporation, the consideration of non-shareholder interests is *mandatory*. In Delaware, the board would be required to “balance” interests,[92] while the guidance for boards of Model Act states is more ambiguous.[93]

Articles have been divided on how courts would approach a competing bid scenario for a public benefit corporation. Some have argued that once a public benefit corporation has decided to sell, it should obtain the highest price available,[94] while others have concluded that “courts should look to how the proposed sale will affect the blended profit and social purpose of the benefit corporation.”[95] Similarly, articles have noted that questions would arise if such competing offers were presented in a bankruptcy case.[96] On a practical level, outside of bankruptcy, only shareholders have the right to vote on a merger or sale, so if the board chooses the lower offer because it is more in line with

88. *Id.* § 362(b).

89. Model Act § 201(a) (emphasis added).

90. Model Act § 201(b).

91. Model Act § 102.

92. DEL. CODE ANN. tit. 8, § 365.

93. *See* Model Act § 301(a)(3) (directors “need not give priority to a particular interest or factor . . . unless the benefit corporation has stated in its articles of incorporation its intention to give priority to certain interests or factors”).

94. *See* J. Haskell Murray, *Defending Patagonia: Mergers and Acquisitions with Benefit Corporations*, 9 HASTINGS BUS. L.J. 485, 511–12 (2013).

95. Brett H. McDonnell, *Committing to Doing Good and Doing Well: Fiduciary Duty in Benefit Corporations*, 20 FORDHAM J. CORP. & FIN. L. 19, 54 (2014) (quoting Alicia E. Plerhoples, *Can an Old Dog Learn New Tricks? Applying Traditional Corporate Law Principles to New Social Enterprise Legislation*, 13 TENN. J. BUS. L. 221, 262–63 (2012)).

96. *See* Gary M. Schildhorn & Brya M. Keilson, *The Unresolved Dilemma of Creditors’ vs. Stakeholders’ Rights*, 32 AM. BANKR. INST. J. 58 (2013); Steve A. Peirce, *Adding “Public Benefit” to the Bankruptcy Mix Raises Thorny Issues*, J. CORP. RENEWAL, Sept. 2013, at 26.

the identified public benefit, the shareholders could vote down the recommendation in addition to initiating litigation for an injunction. In bankruptcy, however, shareholder approval is not required for a section 363 sale, and it would be up to the court to hear any objections to the sale.

F. Proposed Bankruptcy Legislation

On September 29, 2020, the House and Senate each introduced the Protecting Employees Act. The act was ordered to be reported (i.e., amended) in the House after it was advanced by the House Judiciary Committee to the full Chamber, and in the Senate it was referred to the Judiciary Committee. If enacted, the Protecting Employees Act would make a series of very significant changes to the Bankruptcy Code, most of which are beyond the scope of this article. But one provision of the proposed act would bear directly on the issue of whether a debtor in possession could choose a lower, job-saving offer; indeed, it would *require* that the debtor in possession do so. Section 203 of the Protecting Employees Act would amend section 363 of the Bankruptcy Code by adding a new subsection (q):

> (1) In approving a sale or lease of property of the estate under this section or a plan under chapter 11, the court shall give substantial weight to the extent to which a prospective purchaser or lessee of the property will—
>
> (A) preserve the jobs of the employees of the debtor;
>
> (B) maintain the terms and conditions of employment of the employees of the debtor; and
>
> (C) assume or match the pension and health benefit obligations of the debtor to the retirees of the debtor.
>
> (2) If there are two or more offers to purchase or lease property of the estate under this section or a plan under chapter 11, the court *shall* approve the offer of the prospective purchaser or lessee that will best carry out the actions described in subparagraphs (A) through (C) of paragraph (1).[97]

If enacted, this provision would significantly alter the playing field. It would change sale cases from a regime where a lower offer that saves jobs could be approved but there is no precedent for it, to one where approving such an offer is required. While the implications undoubtedly are manifold and would play out over time, some significant ones are:

- Does this mean that the court must accept a job-saving offer even if the discrepancy in price is significant? What if it is 50 percent less? 90 percent less?

97. H.R. 7370, *supra* note 6, § 203.

- Bidders will undoubtedly structure their bids to take full advantage of this bill if it is enacted. If a cash purchaser is bidding against a credit bidding purchaser, it would offer a significant opportunity: take a set dollar amount that would have just been part of the general offer, and therefore would have gone to creditors, and instead reserve it for employees who might have been laid off; after all, cash is fungible. The credit bidder does not have the same opportunity. Thus, the credit bidder could wind up being at a disadvantage.
- The Bankruptcy Code provides that credit bids are permitted "unless the court for cause orders otherwise."[98] If a credit bidder offers more and a cash bidder offers less but preserves more jobs, how will a court square these two mandatory Bankruptcy Code provisions? Will courts try to create a fiction that the new subsection (q) can constitute "cause" under subsection (k)? Or will the courts determine that subsection (q) cannot apply in such a circumstance?
- Subsection (q), by its terms, would also apply to sales in a plan, not just section 363 sales (even though it would be a subsection of section 363). What if the job-saving offer is so much lower that a plan based on it is not feasible? Or what happens if the creditor classes do not vote in favor of such a plan, but do vote in favor of a plan based on the higher offer?

These and many other issues would need to be sorted out if the Protecting Jobs Act is enacted.

G. Weighing the Competing Bids

In the meantime, unless the Protecting Jobs Act is enacted, fiduciaries and the court might, like in the *In re BJ Services, LLC* case,[99] be faced with weighing these types of competing offers with increasing frequency. How should they approach weighing a lower, job-saving offer against a higher offer—an apples-to-oranges comparison?

The first thing to consider is that the paradigm in both bankruptcy sales under section 363 and the fiduciary duty analysis under constituency statutes is the business judgment rule (with certain discrepancies between the two, as described above).[100] But weighing obtaining the highest price in a sale of substantially all assets against saving jobs in the sale is *not* a business decision in a traditional sense; it is a policy choice. If a company is reorganizing but selling certain assets, it is easier to accept the notion that the directors of the ongoing business might have *business* reasons for saving jobs that might lead them to

98. 11 U.S.C. § 363(k) (2018).
99. *See supra* note 39.
100. *See supra* Part A.

choose a lower sale price—for example, employee morale, which could lead to higher productivity. But once the company has decided that it will be selling substantially all of its assets, it is difficult to see the *business* case (as opposed to a moral one) for accepting a lower price in the name of saving jobs.[101]

The concept of the business judgment rule is that boards of directors have more expertise in making business decisions than do judges, and therefore judges should not readily second guess the board's business decision.[102] For example, if the board decides that a potentially higher bidder's due diligence contingency is a significant risk because while the debtor waits for the bidder to perform its diligence the debtor could run out of cash and be forced to liquidate, thereby losing value, that is the type of decision that a board is well positioned to make and a court should give deference to. It does not appear that a board's decision to accept less money and pay creditors more of a discount because it wants to see its employees land on their feet is the same type of decision. It might be a very praiseworthy goal, but it is not about what will make the business succeed or which risks it can survive and which it cannot.

Conceived of this way, if the debtor in possession or trustee decides that an offer is better although not higher because it saves jobs, that decision should not be afforded the deference of the business judgment rule; a court is just as, if not more, capable of making that policy decision as is the board. That is not to say that a debtor in possession or trustee cannot pursue the lower, job-saving offer. It would be entitled to make that choice, but it would bear the burden of demonstrating to the court that the choice should be approved, even assuming the decision was well informed and disinterested.

An exception to this rule should be considered for public benefit corporations. On a conceptual level, if a corporation has elected to be a public benefit corporation, it has already articulated publicly, long before it filed for bankruptcy, that the primary purpose of the firm is not necessarily wealth maximization. It therefore should not surprise expectations if, during the course of a bankruptcy sale, its directors choose to pick an offer that best furthers its stated public benefit.[103] Moreover, the Judicial Code provides that "a debtor in possession, shall manage and operate the property in his possession . . . according to the requirements of the valid laws of the State in which such property is situated."[104] This seems to

101. Of course, if the buyer agrees to take on employees and assume their accrued vacation and sick days, there could be a net economic benefit to the estate; but if that makes the bid more valuable on a net basis than the facially higher cash bid, the bids would be analyzed as described in *supra* Part C, rather than as one that might or might not be better despite being economically lower due to the societal benefit of the saving of jobs.

102. *See* Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 954 (Del. 1985) ("A hallmark of the business judgment rule is that a court will not substitute its judgment for that of the board if the latter's decision can be 'attributed to any rational business purpose.'" (citing Sinclair Oil Corp. v. Levien, 280 A.2d 717, 720 (Del. 1971))).

103. *See* Schildhorm & Keilson, *supra* note 96, at 59 (asking, in any attempt by a secured creditor to credit bid, "Would the fact that the creditor knew that it was lending to a benefit corporation where stakeholders' rights must be considered be cause to deny credit-bidding or at least require credit-bidders to include provisions to benefit stakeholder interests as part of the bid?").

104. 28 U.S.C. § 959(b) (2018).

indicate that the board must comply with the public benefit corporation statute,[105] which in turn would require (at least under the Delaware statute) the "balancing" of interests. It therefore would be entirely consistent with such balancing to determine that in a bankruptcy sale, the lower bid might be better because it more closely aligns to the stated public benefit.

But for traditional corporations, if the court should not defer to the debtor in possession's business judgment, what standard should it apply? It is instructive to look to the various iterations of standards that courts applied before settling on the business judgment test. As the leading treatise summarizes:

> Some earlier decisions describe the standard as one of "good faith" or of whether the transaction is "fair and equitable" or whether the sale is "in the best interest of the estate." However, the more recent cases tend to focus on whether a sale is supported by a sound business reason and is based on a sound exercise of business judgment.[106]

The court could make a finding that a lower, job-saving bid is better under certain of these standards, but not others. There is no reason why proceeding with such a sale would not be in good faith. Of course, if that were the entirety of the standard, almost any sale to someone other than an insider could be approved, so there likely must be more to it than that. On the other side of the spectrum, if the sale must be in the "best interest *of the estate*," that does not appear to leave open consideration of the interests of other constituencies. Somewhere in the middle is a "fair and equitable" standard. If the bid is minimally lower than a competing bid and saves jobs, in common parlance one might think it is "fair and equitable" to accept the lower offer. But this begs the question of fair and equitable *to whom*. Because the same phrase is used in section 1129(b)(2) of the Bankruptcy Code, it is reasonable to look to that section for guidance. It provides that a plan is fair and equitable as to an impaired dissenting class of creditors if the creditors in that class receive or retain property of the same value as the amount of their allowed claim or, alternatively, that no creditor of a lesser priority or shareholder receives any distribution. While perhaps not directly on point, one could conceive of forcing a creditor class to receive less than it could have to allow certain employees to keep their jobs not to meet the fair and equitable standard of section 1129(b)(2).[107]

But because this has not been the standard usually identified in recent years for approval of the sale, it likely would not be employed here; and in the absence of a conceptual justification to use the business judgment rule, this still leaves judges in search of a standard to employ.

---

105. *Id.*

106. 3 COLLIER ON BANKRUPTCY ¶ 363.02[4] (Richard Levin & Henry J. Sommer eds., 16th ed. 2020) (collecting cases); *accord In re* Bakalis, 220 B.R. 525, 531–32 (Bankr. E.D.N.Y. 1998) (collecting cases).

107. Of course, if the value went to employees in their capacity as pre-petition creditors as opposed to saving their ongoing jobs, that would directly implicate section 1129(b)(2) because it would be a class skipping issue.

Perhaps the most likely result is that courts would apply something akin to the dicta in two of the constituency statute cases: "Other constituencies may be considered . . . , but nothing in that statute suggests that the interests of third parties are as important as the right of [the] shareholder [or in a bankruptcy case, creditor] franchise. While the two interests are not exclusive, neither are they equal."[108] That standard would imply that perhaps if the offers are close, the court might entertain the notion that the bid that saves more jobs could be considered, but otherwise maximizing value would be paramount.

Finally, no matter what standard the court applies, it should not apply it in a manner that alters other rights under the Bankruptcy Code. Thus, if the higher bidder is a credit bid, the court should not approve a lower bid and force the secured creditor to release its liens unless there is some other cause to do so under section 363(k) and the debtor can prove it meets the standards of section 363(f).

H. Conclusion

In the current environment of record unemployment caused by COVID-19, courts will be sympathetic to any effort to save jobs. When that comes at the expense of creditor recoveries, however, two key constituencies of a bankruptcy case collide. There is no easy framework for weighing competing offers, one of which saves more jobs than others. The two bright-line possibilities are (a) that a sale is solely to maximize value (albeit with latitude to determine, e.g., that minimizing risk and delays in fact maximizes value) and therefore consideration of employees is legally irrelevant; and (b) as set forth in the proposed Protecting Employees Act, the court must approve the bid that saves jobs, no matter how much that erodes creditor recoveries. Each approach will have its detractors. This article attempts to provide at least some framework for a possible middle ground, but as long as the door is open for something other than one of the two bright-line rules, disputes and litigation will be inevitable.

108. Hilton Hotels Corp., 978 F. Supp. 1342, 1351 (D. Nev. 1997); *see also* Flake v. Hoskins, 55 F. Supp. 2d 1196, 1214 (D. Kan. 1999) ("Any consideration of other constituencies must therefore have at least a reasonable relationship to the general interests of shareholders.").