

OUTSIDE COUNSEL

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Specific Disclosures for Auctions

Sellers engaged in corporate and real property auctions should take note of a recent decision by the U.S. District Court for the Southern District of New York in which a losing bidder's fraud claims against the seller of a commercial high-rise building in midtown Manhattan were allowed to proceed.

In *Solow v. Conseco Inc.*,¹ defendant Conseco Inc. (Conseco), through its broker Eastdil Realty Company LLC (Eastdil), initiated an auction of the General Motors Building pursuant to a Bankruptcy Court order permitting it to sell the building "for the best available price." Potential purchasers were required to execute a confidentiality agreement in which Conseco expressly reserved the right, in its sole discretion, to terminate discussions with any bidder at any time. On behalf of Conseco, Eastdil also sent out invitations to potential bidders specifying detailed procedures and deadlines for the submission of first and second round bids. In addition, the second-round bid letter contained a disclaimer that the building's owner "reserves the right, in its sole and absolute discretion, to accept or reject any offer for any reason."

Sheldon H. Solow was selected for both first- and second-round bidding. After executing the confidentiality agreement, Mr. Solow submitted timely first and final bids, eventually offering a bid of \$1.4 billion, which Mr. Solow alleged was the highest bid. However, the building was ultimately sold to Harry Macklowe, who allegedly submitted his bid after the specified deadline and in contravention of a number of other auction rules, whose previous "final" bid was \$35



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million less than Mr. Solow's, and who was given an additional opportunity to match Mr. Solow's bid.

Mr. Solow brought suit in the Southern District of New York, asserting claims for breach of duty to hold a fair auction, fraud, promissory estoppel, and unjust enrichment, and seeking a declaratory judgment declaring that the sale to Mr. Macklowe was void as contrary to public policy. Although Mr. Solow's claims for promissory estoppel and unjust enrichment, as well as his request for a declaratory judgment, were denied, Judge Barbara S. Jones refused to dismiss the remaining claims.

While the case was not decided on the merits, that it was allowed to proceed at all should raise concerns for sellers who have engaged in or intend to engage in similar auctions. In particular, the court's decision emphasizes that a contract provision giving the seller absolute discretion to accept or reject bids may not adequately protect sellers who deviate from the rules of the auction.

Duty to Hold a Fair Auction

A noteworthy aspect of the Southern District's decision in *Solow* is that it is one of only a handful of New York cases to consider the fairness of property or business auctions. Because case law concerning a seller's duty to conduct a fair auction is surprisingly silent, in making his case Mr. Solow relies in large part on public policy considerations, citing to the general proposition in New

York law that "[a]uction sales should be conducted with full and fair opportunity for competition among bidders, and that "[a]ny conduct, artifice, agreement, or combination, the purpose and effect of which is to stifle fair competition and chill the bidding, is contrary to public policy and will cause the sale to be set aside."²

In his briefs, Mr. Solow also relies on *Valeo Engine Cooling Inc. v. Atkinson Co. of Cal.*,³ one of the few reported cases to explicitly, albeit briefly, treat the issue of the fairness of auctions. There, the First Department allowed a potential buyer's claims against a seller of a subsidiary to proceed where the potential buyer alleged that the seller had induced it into spending nearly \$300,000 investigating and evaluating the subsidiary, only to unfairly use the potential buyer's offer as a "foil" to get a higher bid. Citing no precedent, the court concluded that "once the parties agreed to a private auction to select potential purchasers who submitted written bids, the auction had to be conducted fairly pursuant to its terms."⁴ Thus, as Mr. Solow argues, *Valeo* may indeed suggest that once a seller agrees to a private auction, that auction must be conducted fairly pursuant to its terms.

Specific Disclaimers

The more interesting point to make concerning the court's decision in *Solow* relates to the role of specific disclaimers. In its motion to dismiss the complaint, defendant Conseco argues that where an owner has expressly reserved its right to conduct the sale process in any manner or "to accept or reject any offer for any reason," that reservation of rights precludes the existence of any duty to conduct an auction, fair or otherwise.

It is a well-settled principle of contract law that while "exculpatory provisions drawn in broad and sweeping language [are] not given effect," parties "may contract away their liability...on the condition that

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