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## Delaware Bankruptcy Court Limits Credit Bid to Loan Buyer's Purchase Price

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On Friday, a bankruptcy court in Delaware issued a memorandum decision in the chapter 11 case of Fisker Automotive Holdings, Inc., severely limiting the credit bid rights of an entity that purchased the first lien holder's secured debt at a deep discount. U.S. Bankruptcy Judge Kevin Gross decided that Hybrid Tech Holdings, LLC, which purchased \$168.5 million of secured debt from the U.S. Department of Energy for \$25 million—and for all practical purposes succeeded to the government's position as Fisker's senior secured lender—could not credit bid at the auction for substantially all of the assets of the bankrupt electric vehicle venture for more than the price it paid for the debt.

In concluding that *cause* existed under Section 363(k) of the Bankruptcy Code to limit Hybrid's credit bid rights to \$25 million, the court pointed to a stipulation between Fisker and the Official Committee of Unsecured Creditors that painted a bleak picture if Hybrid's credit bid rights were not capped:

[If Hybrid's]... credit bidding were capped at \$25 million, there is a strong likelihood that there would be an auction that has a material chance of creating material value for the estate over and above the present Hybrid bid....[I]f Hybrid's ability to credit bid is not capped, it appears to both the Debtors and the Committee that there is no realistic possibility of an auction.

Based upon the stipulation, the court concluded that bidding would be "frozen" if Hybrid's credit bid rights were not capped. Hybrid was not a party to the stipulation.

Additionally, a section of the stipulation indicated in somewhat vague terms that the government's debt was likely the subject of a *bona fide* dispute. Relying on this aspect of the stipulation, the court found additional support for its ruling based upon perceived uncertainty as to how much of Hybrid's purchased claim would ultimately be deemed an allowed secured claim.

Although the court stated in its decision that it was following established precedent, the ruling may come as a surprise to the distressed debt market and to those planning M&A transactions in the bankruptcy setting. Acquisition of first lien positions has become a popular strategy for potential stalking horse bidders in chapter 11 cases. The impact of this decision, which of course will be limited to its facts, remains to be seen. Potential purchasers and their advisors, however, may want to consider the impact of the ruling, pending Hybrid's effort to appeal the ruling.

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**For more information**, please contact one of the authors of this update, listed below, or any other member of Robinson & Cole's [Business Reorganizations and Bankruptcy Practice Group](#).

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