

Distressed Company M&A: A Primer on Key Legal Issues

Prepared for Association for Corporate Growth

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I. Introduction

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& BYRON, P.A.

Focus for Today

- A private company target still operating to be acquired
- Target's liabilities more than (current) enterprise value
- Target is not (yet) in bankruptcy
- Today:
 - Distressed Company M&A Outside of Bankruptcy
 - Distressed Company M&A In a Bankruptcy
 - Comparison Chart

II. Distressed Company M&A Outside of Bankruptcy

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Non-Bankruptcy

- Impact on Buyers: Equity Deals
 - Negotiated workouts with creditors
- Impact on Buyers: Asset Deals
 - Creditor Successor Liability Claims
 - Creditor Fraudulent Transfer Claims
 - Claim that Buyer did not pay reasonably equivalent value
 - Creditor leverage and Buyer defenses
 - Buying from a Secured Creditor
 - Friendly Foreclosure
 - Commercially reasonable sale requirements

Non-Bankruptcy

- Other Impacts
 - Owners
 - Reps and Indemnities
 - Process

III. Distressed Company M&A in Bankruptcy

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Bankruptcy

- Overview
 - Focus on cash for creditors
 - Process driven
 - Filing may be needed for a “stay” and to facilitate transfer
- “363” Asset Sale
 - Subject to final court approval
 - Legal test for approval drives competitive process
 - No real exclusivity—multiple parties to manage

Bankruptcy

- Impact on/ Advantages for Buyers
 - Bid Protections
 - Process Protections
 - Break-up fees
 - Free and clear transfer.
 - “Good title” to assets
 - Most liabilities left behind if not assumed
 - No fraudulent transfer and limited successor liability risk
 - Facilitate transfer of contracts and leases

IV. Comparison

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Process & Deal Terms

Legend
Positive
Neutral
Negative

<i>Matter</i>	Non-Bankruptcy Sale	Bankruptcy-363 Sale
Target and Buyer Control Over Process	Substantial (subject to potentially reaching accommodations with creditors)	Limited (dictated by the Court with substantial input from creditors)
Buyer Deal Exclusivity	Common to grant Buyer exclusivity	None (or very limited for Stalking Horse)
Public Deal Process	Private or semi-private	Very public
Timetable to Closing	Varies but can be very fast	Typically weeks or months
“Stalking Horse” Buyer	Not used	Very common (may be Overbid anytime)
Reps and Indemnities for Benefit of Buyer	Possible (but Owners may have no incentive to provide)	-May be some reps pre-closing for DD -Typically no reps survive closing
Escrows, Holdbacks and Earnouts	Possible (but disfavored by creditors)	Typically none (highest and best bid)
DD Importance	Very important to critical	Critical (and often constrained other than for Stalking Horse Buyer)

Protections & Results

Legend
Positive
Neutral
Negative

<i>Matter</i>	Non-Bankruptcy Sale	Bankruptcy-363 Sale
<i>Creditor Stay Pre-Closing</i>	None	Yes (which can be critical to keeping the business alive until closing)
<i>Third Party Consents to Assign Desired Contracts</i>	Required if anti-assignment clause	Limited rights of contract parties to object if cure amounts addressed
<i>Equity Deal-Buyer Exposure for Unpaid</i>	Full exposure to all creditors, so requires creditor accommodations pre-closing	N/A (363 involves asset sale)
<i>Asset Deal- Creditor Priorities & Payments</i>	Often requires Buyer involvement	Not a Buyer concern (Court process determines distributions post-closing)
<i>Asset Deal-Buyer Exposure for Unpaid</i>	Risks of fraudulent transfer claims post-closing (if no accommodation pre-closing)	None (with limited exceptions)
<i>Buyer Certainty on Getting Clear Title</i>	Risks of fraudulent transfer claims post-closing (if no accommodation pre-closing)	Full with Court order approving the sale free and clear

F&B



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