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## WEATHERING THE STORM Great Deals Now Available in Bankruptcy Court

Whether you are interested in purchasing assets or a going concern, bankruptcy court can be a land of opportunity. Assets may be sold by a trustee, or someone the trustee retains, in a Chapter 7 liquidation, or by a Debtor-in-Possession (a "DIP") in a Chapter 11 reorganization case. In either case, you should expect a competitive bidding process. Going concerns are typically sold in Chapter 11 cases where the debtor determines, often after trying to reorganize, that it lacks the resources to reorganize and continue operating. In some cases, a Chapter 11 debtor sells a division or a portion of an enterprise to raise capital so that the remaining enterprise can reorganize.

Section 363 of the Bankruptcy Code allows the trustee or DIP to sell assets free and clear of all liens, claims, encumbrances and interests in property. The result is that the purchaser, with the help of his bankruptcy lawyer, can obtain a court order that assures the best possible title to the assets purchased and, in the case of a going concern, significantly limits any potential exposure to successor liability. **This is the single most important benefit of buying assets out of a bankruptcy estate.** Typically, third parties with claims or liens in the asset or enterprise must assert their claims prior to the hearing on approval of the sale and, to the extent objections to a free and clear sale cannot be resolved by agreement, the judge resolves the dispute. The purchaser need not close the transaction if the trustee or DIP cannot convince the court to enter an order in the form required by the purchaser.

Because of the requirements for a competitive sale process, most asset sales are done by some form of auction with sufficient notice to draw interested parties. However, an auction of a going concern or substantially all of a debtor's operating assets (e.g., its inventory, intellectual property, contract rights, etc.) differs significantly from what most people anticipate at an auction. In all but the most desperate situations, the debtor will usually find a prospective purchaser who will serve as a "stalking horse." This party will negotiate a purchase agreement with the debtor that is "subject to" higher and better offers secured in the auction process.

Because the stalking horse comes forward and establishes a price floor for the assets or concern, the stalking horse purchaser demands certain protections in the event that he is overbid. The stalking horse negotiates the form of the purchase agreement and typically requires that all competing bidders use the same form. Having control over the form of the purchase agreement is a huge benefit of being a stalking horse. The purchase agreement typically dictates the amount of overbid increments. For example, a requirement that any competing bid be at least \$10,000 or \$100,000 more than the previous best bid. The stalking horse negotiates to have its attorneys' fees paid out of the sale proceeds if it is not the winner at the auction. A multitude of other protections for the purchaser can often be negotiated.

Auctions of going concerns or significant asset packages are usually not public auctions. Often competing bidders sit in separate rooms and the debtor's representatives move between the bidders encouraging a higher bid or more valuable package of consideration. The process can be tedious and, because it lacks the transparency of a public auction, frustrating. However, patience can result in a successful acquisition.

How does a purchaser find the types of assets that interest him? As usual, an internet search engine is a good starting place. The National Association of Bankruptcy Trustees maintain a site at [www.nabt.com](http://www.nabt.com) that has a section describing current asset sales. When purchasers are interested in a going concern, they typically follow the debtor company's press releases and bankruptcy filings. These sources should provide notice of prospective sales. In

larger Chapter 11 cases, the debtor will retain financial advisors who, in the event of a sale, will solicit interest from parties they think will be interested in the debtor's operations or assets based on the possible purchaser's industry or past participation in purchases of troubled assets.

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