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# ENSURING ASSET PURCHASES CLEANSED THROUGH BANKRUPTCY STAY FREE AND CLEAR

*Purchases made under a bankruptcy court sale order are supposed to be free and clear of all legacy liabilities, except those expressly assumed by the transactional agreements. However, assuring that result, the authors write, is also dependent on careful drafting and attention to the notice process mandated by due process. Writing from a litigator's perspective, the authors outline the substantive risks that allow claims to revive and be asserted well after closure of the transaction approved by the bankruptcy court.*

Patrick L. Hughes, Martha B. Wyrick, and Kelsey L. Zottnick *

*"Bankruptcy separates the past and future of an enterprise, satisfying claims attributable to yesterday's activities out of existing assets. . . [until it doesn't]."*[1]

Title 11 of the United States Code (the "Bankruptcy Code") offers a unique opportunity to minimize the inevitable risks that come with buying a distressed business. Specifically, buying assets under the Bankruptcy Code's sale provisions[2] avoids exposure to "after the fact" claims that the pre-bankruptcy deal was so good for the buyer it comprised a fraudulent transfer. The sale provisions also enable buyers to, in effect, derivatively benefit from the seller's bankruptcy by allowing the successor business operations to obtain a "fresh start . . . from further liability for old debts."[3] By utilizing Section 363 of the Bankruptcy Code, which can occur under a motion or through a reorganization plan, debtors can sell their assets "free and clear" of liens. Through corresponding confirmation orders that allow for discharge of pre-petition claims, purchasers are able to minimize exposure to legacy liabilities. These benefits, however, do not come easily — because the relevant motions, plans, and orders must be crafted with effective diligence both through the drafting of the "assumed liabilities" provisions of the Purchase and Sale Agreement ("PSA"), and by a legal process that must necessarily pass constitutional due process to the extent it seeks to forever cut off existing claims. Otherwise, this intended fresh start for a buyer can be challenged well after the selling debtor exits bankruptcy, such as

[1] *In re UNR Indus. Inc.*, 20 F.3d 766, 771 (7th Cir. 1994) (Easterbrook, J.).

[2] 11 U.S.C. Sections 363, 365.

[3] *Central Virginia Cmty. Coll. v. Katz*, 546 U.S. 356, 363–64 (2006).

* *PATRICK L. HUGHES is a partner in the Restructuring Section of Haynes and Boone, LLP, and is a resident in the Houston and Denver offices. MARTHA B. WYRICK and KELSEY ZOTTNICK are both associates in the firm's Houston office. Their e-mail addresses are patrick.hughes@haynesboone.com, martha.wyrick@haynesboone.com, and kelsey.zottnick@haynesboone.com*