

SUCH A DEAL

SAVVY SHOPPERS CAN FIND SWEET SAVINGS IN 363 SALES
—IF THEY KNOW HOW TO REDUCE THE RISKS—



QUICK TAKE

- Section 363 of Bankruptcy Code can protect buyers of distressed assets
- Bankruptcy court order should make sure purchase is free of liens, claims, and encumbrances

Looking for a bargain on business assets? Look no further than recent bankruptcy filings, where tempting deals abound for those willing to exercise good judgment, conduct due diligence, and engage the advice of experienced counsel.

Section 363 of the Bankruptcy Code gives debtors the ability to liquidate all or part of their assets through court-supervised sales. And that can mean deep discounts and favorable terms for smart buyers.

The key is to acquire the assets without the baggage. In other words, make certain the purchase is free and clear of any liens and encumbrances.

Outside of bankruptcy, used asset sales can carry risks under continuity or successor liability doctrines, which transfer certain seller liabilities to a buyer. But Section 363 offers buyer protection.

Of course, that protection assumes Code conditions are met. For example, if a buyer expressly or impliedly agrees to assume certain debts or liabilities, or the buyer is merely a continuation of the seller, the protection would not apply.

Successor liability protection begins with the language contained in the Bankruptcy Court Order, which approves the sale. The Order should:

- Absolve the purchaser of future liability
- Enjoin any holder of interest, claim, or lien from taking action against the buyer
- Explain the purchaser's reliance on the determination that it will not be subject to successor liability

- Specifically identify any liabilities being assumed by the purchaser, and those not assumed
- Declare the buyer to be a "good faith" purchaser
- Reserve the bankruptcy court's jurisdiction to enforce the sale order



Finally, to help prevent a successor liability challenge, both the sale notice and the sale order should be provided to all creditors, interest holders, and other involved parties. Widespread publication of the sale notice—especially in areas where potential claimants may be found

—can aid in defending any future challenges to due process.

With the growing number of bankruptcy filings out there, your business could strike a deal. Just be certain you seek the advice of qualified counsel to see you through the process and complete a successful 363 sale. If you're interested in learning more about 363 opportunities, please contact Miller Canfield's Bankruptcy, Restructuring, and Insolvency Group.

Bankruptcy, Insolvency + Restructuring
Eric D. Carlson 313.496.7567