

Key Takeaways From "Buyer Beware: Issues and Strategies for Addressing Dangers in Acquiring Financially Distressed Companies"

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COVID-19 and the resulting downturn economy presents opportunities for well-capitalized businesses to acquire troubled or failing companies, which mere months ago were fiscally sound. However, buyers must beware that the opportunity to acquire companies at bargain prices may include the unwitting assumption of the seller's debt and liabilities. We discussed legal theories holding buyers responsible for a seller's liabilities, drafting and negotiation strategies to protect buyers, and post-sale options available under the bankruptcy code in this webinar. Below are our key takeaways.

Key Takeaways:

1. Buyers of distressed companies can potentially be held liable for the seller's debt, even if they never expressly agreed to be responsible for it.
2. A buyer should perform heightened due diligence on the selling company's assets and liabilities and clearly document specific assets acquired or retained and specific liabilities being assumed or excluded. Include covenants obligating the seller or its owners to satisfy all excluded liabilities and confirm there are resources to satisfy them through existing assets, directing purchase price to payment, escrows or other holdbacks.
3. Implied assumption of debt is more difficult to prove in court if the buyer makes changes to the business it now owns (*i.e.*, does not occupy the same space or retain the same employees of the seller).
4. If purchasing a distressed business outside of the bankruptcy courts, risks of fraudulent transfer claims can be reduced by (1) engaging an outside appraiser to appraise assets, (2) engaging an investment banker to hold an auction for the business, and (3) by performing due diligence on a seller's liabilities.
5. For maximum protection from successor liability, a bankruptcy court-approved sale under Section 363 remains the gold standard and has become more accessible to small business due to the recent Small Business Reorganization Act (Subchapter V of Chapter 11).

[View the recorded program here.](#)

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