

# Strategies for acquiring assets in U.S. bankruptcy cases

## Changes in the law



By Leslie A. Berkoff  
and Marc L. Hamroff

A key strategy in acquiring assets from a bankruptcy estate is by utilizing existing debt and liens to credit bid for the assets that may be in play. However, over the past few years the ability of secured creditors to evaluate this strategy in a case based upon the value of their lien position has been undercut by several developing areas of the law.

Two recent cases, *In re: Fisker Automotive Holdings Inc.*, No. 13-13087 (KG) 2014 and *The Free Lance-Star Publishing Co. of Fredricksburg Va.*, No. 14-30315 (KRH) 2014 have capped a creditor's right to credit bid. Noting that the right to credit bid is not absolute, these courts pointed to controlling actions by the secured creditors during the development of the bidding process to justify limiting the creditor's right to credit bid under Section 363(k) for "cause". Additionally, courts continue to remain split over as to the meaning of "aggregate value of all liens" under Section 363(f).

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One group of decisions holds that a sale cannot be approved if the sale price is equal to or less than the aggregate amount of all claims held by creditors holding a lien in the property being sold, while other courts have held

that a sale satisfies Section 363(f) (3) if the sale price is equal to or greater than the aggregate economic value of the liens asserted against the collateral.

Combined these changes place

more uncertainty in this process than has existed for some time and perhaps may impact how strongly a creditor approaches the sale process to avoid having their rights under the Bankruptcy Code altered.

# Financing of recent big corporate transactions in Spain

By Higini Marsal

Transactions such as CVC and Deoleo and the merger of the IDC Salud (Capiro) and Quirón hospital groups have been possible thanks to the application of the covenant lite or cov-lite formula, a structure which, for its nature and characteristics, tends to be associated with situations in which excess cash flow and a lack of opportunities has forced lenders to relax guarantees in order to ensure profitability and the survival of their business.

The most relevant aspect of this formula is that the creditor's contractual protection is minimalised in the case of deterioration of either ratios or the debtor's payment capacity. Guarantees are virtually non-existent. A financial model is built on the acquired business generating sufficient future revenue to meet the ongoing interest payments and the return of the principal loan amount. Additionally, there are two specific design characteristics that make them even more interesting.

First, funds are supplied directly by the end investors while the structuring agent merely performs the initial analysis and acts as mediator. The risk therefore does not appear on their

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balance sheet. The debt is carved up and divided in accordance with market interests.

Second, repayment of the funding before the final due date, normally being between seven and ten years, is never a consideration. The later the deadline, the greater volatility these

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fixed-rate securities introduce into the portfolios of those subject to periodical mark-to-market valuation of their positions. Greater risk should be translated into a demand for increased profit.