

# Why Buyers Are Increasingly Turning to **STATE LAW** to Acquire Distressed Assets

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**F**or companies and stakeholders seeking to execute distressed asset sales with speed, certainty, cost control, and surgical execution, state law regimes may offer attractive alternatives to Chapter 11 bankruptcy sales. These state law regimes can facilitate distressed M&A transactions with significantly lower administrative costs, tighter timelines, and greater process control, especially where secured creditors or other key stakeholders cooperate to drive a coordinated strategy.

## **UCC Article 9 Sales**

One such state law mechanism, Uniform Commercial Code (UCC) Article 9, implements a secured creditor's statutory right to enforce against defaulted personal property-type collateral by taking possession or disabling collateral as provided in UCC Sections 9-607 and 9-609. The secured creditor may then dispose of the collateral via public or private sale under UCC Section 9-610. In a public sale, notice is given to the debtor, obligors, and record lienholders, and

the auction is advertised to enable competitive bidding. In a public sale, secured parties may credit bid and purchase the collateral at auction. The buyer takes free of the foreclosing and subordinate liens. Private sales can be faster but require strong evidentiary backing, potentially relying on marketing efforts and independent valuations to substantiate the reasonableness of the sale price as a substitute for price discovery through a public auction. A secured creditor's right to credit bid in private sales is limited absent a recognized market for the assets (such as stocks or commodities sold on standard public markets). The secured creditor should also maintain a defensible record to preserve deficiency rights.

Article 9 sales are subject to the overarching requirement that every aspect of the disposition be "commercially reasonable." Relevant factors can include the duration and scope of any marketing process, the provision of data room access and diligence materials to potential bidders,

and the method, manner, time, and place of any auction (or justification for a private sale). The determination of the winning bid, the final terms of the sale, and the use of independent parties such as brokers, auctioneers, and appraisers may also be considered.

Article 9 also permits secured creditors to take control of collateral via strict foreclosure under Sections 9-620 and 9-622. Strict foreclosure is a debt-for-collateral exchange that can occur at the equity level (a faster process that retains liabilities) or the asset level (which leaves liabilities behind, but raises potential anti-assignment, successor-liability, and fraudulent transfer concerns). Strict foreclosure requires debtor consent and notice to, and no objection from, junior lienholders, guarantors, and similar interested parties.

## **Assignments for the Benefit of Creditors**

Another state law mechanism that can facilitate the transfer of distressed assets

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is an assignment for the benefit of creditors (ABC). The debtor in an ABC—the assignor—assigns virtually all of its assets to an independent fiduciary—the assignee—who takes control of the business with powers analogous to those of a bankruptcy trustee, with practice varying meaningfully by jurisdiction. For example, Delaware, New York, and Florida have some of the more developed ABC statutes and related common law. California does not have an ABC statute, but its ABCs are governed by a robust common law regime. Depending on the jurisdiction, the assignee files a deed of assignment, court petition, or county clerk recordation and may have to post a bond. The assignee is responsible for selling the assets for the benefit of creditors under state law priority rules and notifies all known creditors of the assignment and sale, with notice periods and requirements varying by state (e.g., reasonable notice in Delaware, 10 days in New York, and 21 days in Florida).

Asset sales in an ABC may be conducted through a public sale or auction, or privately to a buyer to the extent the assignee believes a private sale will maximize value. To streamline the ABC and enhance certainty, the company, the proposed assignee, and the company's secured lenders can work together with respect to a pre-ABC marketing and solicitation process. Some states allow credit bidding by secured creditors in ABC sales. Court oversight of the sale process also varies—Delaware and Florida provide moderate oversight, while California's purely common-law regime offers no formal court supervision of the ABC itself. New York requires court approval for all auction procedures and sales. Importantly, an ABC can sell all types of assets, including both collateral and non-collateral assets and both personal property and real estate, providing broader asset reach than an Article 9 sale.

### Chapter 11 vs. State Law Regimes

Companies and senior lenders may choose Article 9 sales and ABCs to maximize value through a going concern sale while minimizing cost, delay, and publicity relative to Chapter 11 bankruptcy. Article 9 and ABC regimes can be faster and cheaper than a Chapter 11 bankruptcy sale, and they offer adaptable playbooks

when cooperatively pre planned among lenders and borrowers (e.g., joint selection of an assignee). They may be especially attractive where liquidity is too tight to fund a Chapter 11 process but sufficient to support a targeted, pre marketed sale of a going concern business.

Article 9 sales are typically the lowest cost, fastest path, with narrow notice requirements and strong secured lender rights. However, they are weaker on contract assignment and “free and clear” breadth relative to a Chapter 11 bankruptcy sale. Article 9 sales cut off subordinate liens, but do not extinguish unsecured claims as a matter of law. Successor liability and fraudulent transfer risks may survive the sale, although these risks can be mitigated through process rigor, separation from the seller, and limited assumed liabilities. Anti-assignment contractual provisions remain generally enforceable, with only limited statutory ability to override them for certain receivables and general intangibles under UCC Sections 9-406 and 9-408. Article 9 cannot reach real estate or certain licenses, potentially necessitating parallel processes (e.g., mortgage foreclosure or a follow-on ABC) to execute a comprehensive going-concern sale.

ABCs provide a middle ground—more process protection than Article 9 and broader asset reach (including non collateral assets), although still less uniform and less cleansing than bankruptcy. In some states, ABCs offer enhanced liability cleansing compared to Article 9. In particular, ABC orders obtained through in-court processes can secure some protections to the extent permitted under state law, although these protections rarely equal bankruptcy's free-and-clear relief. As with Article 9, anti-assignment clauses and landlord and permit consents remain enforceable in an ABC, so counterparties' consent or alternative arrangements may be required for key contracts. Article 9 sales can also be combined with an ABC process through which a buyer (either a secured lender or third party) acquires all operating assets of the debtor, with the secured lender (if serving as the buyer) potentially offering cash consideration for the value of non-collateral assets.

Article 9 sales and ABCs generally work well where creditors have liens on substantially all operating assets or

are otherwise positioned to coordinate a commercially reasonable marketing and sale process and business continuity strategy (for example, TSAs, key employee retention).

### Case Studies

In 2025, a pet food and supplies distributor and logistics partner that serves thousands of retail locations completed a going concern sale to a strategic buyer via an Article 9 Sale, followed by an ABC. The business was not generating sufficient cash to fund a Chapter 11 process and secured lenders supported the expedited, out-of-court sale. The buyer was able to negotiate with key vendors, landlords, and trade creditors on a case-by-case basis to maintain key relationships, contracts, and leases. The ABC assignee also provided several months of transition services during the ABC process to ensure business continuity while the business transitioned to the buyer. The sale incurred significantly less professional fees and other administrative expenses than would be expected for a Chapter 11 bankruptcy sale of the same assets.

On the other hand, Chapter 11 may sometimes be the ideal or only viable path forward where contract assignability or liability cleansing proves essential to maximizing the value of the business. For example, in 2024, a major hardware wholesaler and distributor that supports a network of thousands of independently owned retail stores relied on an expedited (six-week) Chapter 11 process to sell its business to a strategic stalking horse bidder. The business was generating enough cash to fund a Chapter 11 (once cash dominion was disregarded due to the automatic stay). The secured lenders initially did not consent to the debtor's proposed sale process, so the automatic stay and other bankruptcy protections were necessary to pursue a going concern sale process (until lender consent was ultimately obtained through a cash collateral resolution). The company also had significantly more prepetition trade claims and a more complicated footprint than the pet food and supplies example. The sale incurred significantly more professional fees and administrative costs.

### Implications for Deal Practice

Buyers of distressed assets should consider a menu of options and best practices to execute efficient going-concern acquisitions, including



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these state law regimes. To preserve going-concern value and operational continuity, stakeholders should act early to coordinate with the company, its secured lenders, and other key creditors and vendors, to the extent feasible. For transaction certainty, it is often important to conduct a credible marketing and valuation process to satisfy "commercially reasonable," "good faith," and "arm's-length" standards and deter fraudulent transfer claims. If the buyer is a secured creditor, a credit bidding strategy should be considered early—credit bidding is broadly available in public Article 9 sales and many ABCs, but is more constrained in private Article 9 dispositions. Buyers can anticipate necessary contract assignment consents and identify real estate or other assets that may require sequenced or parallel processes to transfer all asset classes efficiently. Ultimately, parties can evaluate a potential pivot to Chapter 11 if contract assignment or liability cleansing proves essential. ■

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