

Acquisition Mode

The lawyers of Anthony & Partners assist clients in the acquisition of distressed assets in a rebounding economy.

Signs of nationwide economic rebound can be seen in the stock market, in demand for commercial real estate and in the uptick in business lending. The recovery is not as brisk or broad as many had anticipated; however, the current climate provides a perfect opportunity for prudent investors to acquire distressed assets for successful repositioning.

The lawyers of Anthony & Partners represent buyers, secured lenders and sellers in the liquidation of distressed assets in any number of contexts. The firm's managing partner, John Anthony, recently provided a legal overview of distressed asset transactions and the issues that he and his partners address in representations of this kind.

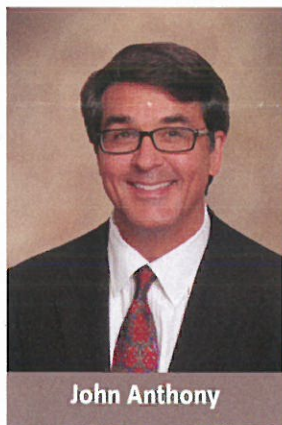
How does a potential investor go about acquiring distressed assets from a financial institution?

There are several scenarios. Most commonly, financial institutions large and small have OREO (other real estate owned) departments that are responsible for administering real estate assets that are not used in the ordinary course of the banking function. Most of these assets are acquired by financial institutions in loan enforcement activities with respect to collateral securing non-performing loans.

Many institutions are also receptive to sale of loan documents at a discount commensurate with perceived risk of legal, business and financial obstacles to resolution. Our team routinely represents both financial institutions and purchasers in both "note sale" and OREO transactions. The goals and objectives of a potential investor in such transactions are different from those of the lender and the owner/obligor, so the representation needs to be tailored accordingly.

If a distressed asset is in bankruptcy, what factors might impact a potential investor's strategy to acquire the asset in question?

First, one needs to know who the seller might be, and how that potential seller might be motivated. A trustee in chapter 7 liquidation has the authority to sell assets of the bankruptcy estate with Bankruptcy Court approval and is highly incentivized to promptly and efficiently recover something approaching "orderly liquidation" value for assets under Bankruptcy Court jurisdiction.



John Anthony



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By contrast, in chapter 11 reorganizations, a “debtor-in-possession” commonly consists of management of the debtor entity, that often times are closely related to equity. In chapter 11, there is deference to the decisions of management, whether in favor or opposed to liquidation of an asset, so long as the debtor is functioning with some success in reorganization and is sincerely attempting to move forward and emerge from chapter 11 under a confirmed plan.

Whether or not the chapter 7 trustee, the debtor-in-possession or some other fiduciary is in charge of administering the distressed asset in question, final authority is almost always subject to Bankruptcy Court approval. The Bankruptcy Court will analyze a potential sale of a distressed asset in terms of the compliance with procedural requirements designed to maximize fairness and results. Accordingly, various creditor constituencies have a right to be heard by the Bankruptcy Court, and some may have a right to “credit bid.”

There are a number of procedural, due diligence and substantive business considerations that play out when an asset is transferred out of a bankruptcy case to a prudent investor. Our lawyers have

experience in providing representation tailored to the unique goals and circumstances of each client and each case.

What advice can you offer to anyone participating in a bankruptcy auction?

The most important advice is to assemble the right team. First, the chief decision maker must have a good business sense to determine whether an asset can be repaired, repositioned or properly capitalized to move forward profitably in the hands of a new owner.

Second, the team must include financial professionals who can be relied upon to analyze financial data that is easily derived from bankruptcy records and other sources in the context of a bankruptcy case.

Third, the team must include legal representation capable of verifying that the auction is procedurally compliant and fundamentally fair. For example, legal considerations might include the following:

1. Is the bidding open or closed?
2. Is there a mandatory form contract?
3. Are there representations or warranties from seller?
4. Is there a minimum bid?

5. Is there an earnest money requirement?
6. What are the bidding increments?
7. Is the Court conducting the auction, or someone else?
8. How close is closing to the auction?
9. Is there a mechanism to preapprove backup bidders?
10. What is the posture of management to the auction process, and what is expected of management in terms of closing and post-closing requirement?
11. What can honest bidders do to address collusive activity of others?
12. What safeguards can be requested to prevent reversal of a bankruptcy sale order on appeal?

With the right team in place, these obstacles can be turned into opportunities. The very things that might drive off an uninformed investor can position an informed investor perfectly for acquisition of a distressed asset on favorable terms.

Counsel’s experience in the full range of contexts involving acquisition of distressed assets can impact buyers, secured lenders and sellers.