

# Trading up to a New Model: Rolling out Revisions to the ABA Model Asset Purchase Agreement for Bankruptcy Sales

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# Letter of Intent & “No Shop” Provision

Charles Rubio

# Purpose of Letter of Intent

- Allows parties to test waters before incurring costs of drafting definitive deal documents
- Creates a moral (if not legal) obligation on the parties to complete the transaction
  - Parties should not insist on terms that do not conform with LOI; this may violate duty to negotiate in good faith

*See e.g., In re Matterhorn Grp., Inc.*, No. 97 B 41274 (SMB), 2002 WL 31528396, at \*11 (Bankr. S.D.N.Y. 2002)

- LOI may be a condition for the Buyer to get financing
- Buyer may desire to stop Seller from negotiating alternative deals with other potential buyers, known as a “**No Shop**” or “**Exclusive Dealing**” provision

# “No Shop” Provision

- A No-shop provision is a covenant in a letter of intent or asset purchase agreement that is designed to prevent seller’s management for seeking out or cooperating with another bidder
- Purpose of No-Shop provision is to give buyer a deal protection by giving the buyer the exclusive right to the deal
- A No Shop provision restricts the seller from one or all of the following:
  - Soliciting competing bids
  - Providing information to competing bidders
  - Encouraging or negotiating a competing transaction
  - Notifying buyer of any inquiry, request for information or competing bid it receives.
- No-shop provision generally not used in bankruptcy sales

# Enforceability of No-Shop

- “No-shop” provision that prevents the exercise of the fiduciary duty to maximize value is not enforceable against a bankrupt entity
  - The same is true under Delaware law and other state law

*See e.g., In re Los Angeles Dodgers LLC*, 468 B.R. 652, 660 (Bankr. D. Del. 2011) *citing In re Big Rivers Elec. Corp.*, 233 B.R. 739 (W.D. Ky. 1998).

- To make no-shop provisions enforceable, parties will agree to exceptions

*See In re Big Rivers Elec. Corp.*, 233 B.R. 739, 752 (W.D. Ky. 1998) (*citing Consumer News and Business Channel Partnership v. Financial News Network Inc. (In re Financial News Network Inc.)*, 980 F.2d 165 (2nd Cir.1992); *In re Integrated Resources Inc.*, 135 B.R. 746 (Bankr. S.D.N.Y.), *aff'd* 147 B.R. 650 (S.D.N.Y. 1992), *appeal dismissed*, 3 F.3d 49 (2nd Cir. 1993); *In re Crowthers McCall Pattern Inc.*, 114 B.R. 877 (Bankr. S.D.N.Y. 1990); *see generally* C.R. Bowles & John Egan, *The Sale of the Century or a Fraud on the Creditors?: The Fiduciary Duty of Trustees and Debtors in Possession Relating to the “Sale” of a Debtor’s Assets in Bankruptcy* 28 U.Memp.L.Rev. 789, 819–828; *but see In re Bidermann Indus. U.S.A. Inc.*, 203 B.R. 547 (Bankr. S.D.N.Y. 1997))

# Exceptions to No-Shop

- Most common exception to no-shop provision is the **window-shop** or **go-shop** provision
  - A window-shop provision softens a no-shop provision by permitting seller, subject to certain conditions, to respond to unsolicited, alternative transaction proposals by providing confidential information to, and entering into negotiations with, the third party bidder
  - A go-shop provision more significantly carves back the no-shop provision to allow the seller to actively solicit competing bids and negotiate with third parties for a limited period of time after the signing of the transaction agreement (usually, 30 to 60 days)
- Another exception is the “**fiduciary out**” that allows the seller to respond to alternative proposals if it is required to do so in order to discharge its fiduciary duties under applicable law
  - Usually requires this determination to be made by the seller’s external counsel
- In bankruptcy, Buyer’s generally negotiate for **bid protections**

# Effect of No-Shop After Seller Files for Bankruptcy

- Once Seller files for bankruptcy, Buyer cannot compel the Debtor to comply with “no-shop” provision

*See In re Rega Properties, Ltd.*, 894 F.2d 1136, 1140 (9th Cir. 1990) (finding that specific performance was not an available against debtor) *quoting Lubrizol Enter., Inc. v. Richmond Metal Finishers, Inc. (In re Richmond Metal Finishers, Inc.)*, 756 F.2d 1043, 1048 (4th Cir. 1985).
- Therefore, if Buyer is negotiating LOI with Seller intending to file bankruptcy, avoid no shop provision
- Instead, negotiate framework for a bidding process and bid protections
  - Examples of bid protections: Break-up fee, expense reimbursement, bidder qualifications, form APA, minimum bid increments, etc.

# Does Buyer have any recourse if Seller files for bankruptcy and breaches No Shop?

- If Buyer believes Seller is only using bankruptcy process to eliminate its obligations, Buyer may seek dismissal of case  
Section 1112(b) of the Bankruptcy Code authorizes a bankruptcy to dismiss a chapter 11 bankruptcy case if doing so is in the best interests of the debtor's creditors and the estate upon a showing of “cause”
- Buyer may have a claim against the Debtor for breach
  - Expectation damages (the benefit of the deal in the LOI) or reliance damages (costs of negotiating after entry of LOI)?
  - Depends on underlying state law
    - *See In re 131 Liquidating Corp.*, 44 F.Supp.2d 552 (S.D.N.Y.) (finding under New York law that if no definitive deal documents then no expectation damages while under Illinois law possibility for expectation damages without definitive deal documents)
  - Substantial contribution claim?





# Conducting Diligence on Litigation Claims

# Litigation Claims Are Property of Estate

- A cause of action arising out of events occurring prior to the filing of bankruptcy is property of the estate.

*DiMaio Family Pizza & Luncheonette, Inc. v. The Charter Oak Fire Ins. Co.*, 448 F.3d 460, 463 (1st Cir.2006); *Jackson v. Novak (In re Jackson)*, 593 F.3d 171, 176 (2d Cir.2010); *In re Emoral, Inc.*, 740 F.3d 875, 879 (3d Cir. 2014), cert. denied sub nom. *Diacetyl Plaintiffs v. Aaroma Holdings, LLC*, 135 S. Ct. 436, 190 L. Ed. 2d 328 (2014); *Wilson v. Dollar Gen. Corp.*, 717 F.3d 337, 342 (4th Cir. 2013); *Kane v. Nat'l Union Fire Ins. Co.*, 535 F.3d 380, 385 (5th Cir.2008) (per curiam); *Bauer v. Commerce Union Bank*, 859 F.2d 438, 441 (6th Cir.1988); *Cable v. Ivy Tech State Coll.*, 200 F.3d 467, 472-73 (7th Cir.1999); *In re Ozark Restaurant Equipment Co.*, 816 F.2d 1222, 1225 (8th Cir.1987), cert. denied, 484 U.S. 848, 108 S.Ct. 147, 98 L.Ed.2d 102 (1987); *Willess v. United States*, 560 Fed. Appx. 762, 763 (10th Cir. 2014), cert. denied, 135 S. Ct. 202, 190 L. Ed. 2d 131 (2014), reh'g denied, 135 S. Ct. 746, 190 L. Ed. 2d 468 (2014); *Johnson, Blakely, Pope, Bokor, Ruppel & Burns, P.A v. Alvarez (In re Alvarez)*, 224 F.3d 1273, 1279-80 (11th Cir. 2000)

- Since a cause of action arising pre-petition is property of the estate, it may be sold pursuant to 11 U.S.C 363

*In re Moore*, 608 F.3d 253, 258 (5th Cir.2010) (A trustee may sell litigation claims that belong to the estate, as it can other estate property, pursuant to § 363(b).); *In re Rickel Home Centers, Inc.*, 209 F.3d 291, 297 (3d Cir. 2000); *In re Parker*, 499 F.3d 616, 628 (6th Cir. 2007); *Simantob v. Claims Prosecutor, LLC (In re Lahijani)*, 325 B.R. 282, 287 (9th Cir. BAP 2005) (“Causes of action owned by the trustee are intangible items of property of the estate that may be sold.”)

# Issue: Diligence v. Privilege

- The privilege protecting attorney-client communications is generally lost when there is an intentional or inadvertent production of the communication to a third party
- One of the most vexing questions for a discloser in the due-diligence process is how to disclose sufficient information to the recipient to facilitate a meaningful evaluation of litigation related confidential information without waiving the attorney-client and other privileges that protect the information

# Common Interest Doctrine

- The common interest doctrine is an exception to waiver, meaning that communications normally waiving privilege do not because the parties to the communication share a common interest.
- The Common Interest Privilege is broadly defined in Restatement (Third) of the Law Governing Lawyers: *“If two or more clients with a common interest in a litigated or non-litigated matter are represented by separate lawyers, and, they agree to exchange information concerning the matter, a communication of any such client that otherwise qualifies as privileged . . . That relates to the matter is privileged as against third persons.” Rest. 3d 76.§*
- The party invoking the protection of the common interest doctrine must establish:
  - (1) the communication was made by separate parties in the course of a matter of common interest,
  - (2) the communication was designed to further that effort, and
  - (3) the privilege has not otherwise been waived.

*In re Leslie Controls, Inc.*, 437 B.R. 493, 496 (Bankr. D. Del. 2010).

# Contracting to Protect Privilege

- Courts have differed on when privileged information disclosed to potential third-party purchasers or funders of litigation claims loses privilege protection and becomes discoverable, but all seem to agree that a confidentiality agreement is necessary if disclosed information is to remain privileged.
- A district court in Pennsylvania found that where the documents produced to the third-party funder were subject to a “Confidentiality, Common Interest and NonDisclosure Agreement” there was no waiver of the attorney-client privilege or the work product doctrine. *Devon It, Inc. v. IBM Corp.*, CIV.A. 10-2899, 2012 WL 4748160, at \*1 (E.D. Pa. Sept. 27, 2012).
- A district court in Illinois found that waiver occurs when the protected communications are disclosed in a manner that substantially increases the opportunity for potential adversaries to obtain the information. The Court found that oral agreements could suffice but they had to go beyond “vague statements.” *Miller UK Ltd. v. Caterpillar, Inc.*, 17 F. Supp. 3d 711, 736 (N.D. Ill. 2014).

# Example Provision to Protect Privilege

“To the extent that any Confidential Information may include materials subject to the attorney-client privilege, the Discloser is not waiving and will not be deemed to have waived or diminished its attorney work-product protections, attorney-client privileges or similar protections and privileges as a result of disclosing any Confidential Information (including Confidential Information related to pending or threatened litigation) to Recipient, regardless of whether Discloser has asserted or is or may be entitled to assert such privileges and protections. “

“The parties (a) share a common legal and commercial interest in all such Confidential Information that is subject to such privileges and protections; (b) are or may become joint defendants in proceedings to which such Confidential Information covered by such protections and privileges relates; and (c) intend that such privileges and protections remain intact should either party become subject to any actual or threatened proceeding to which such Confidential Information covered by such protections and privileges relates. In furtherance of the foregoing, Recipient shall not claim or contend, in proceedings involving either party, that Discloser waived its attorney work-product protections, attorney-client privileges or similar protections and privileges with respect to any information, documents or other material not disclosed to Recipient due to Discloser disclosing Confidential Information (including Confidential Information related to pending or threatened litigation) to Recipient.”

# Limitations with Contracting To Protect Privilege

- Courts have not found the common interest doctrine to be an absolute protection against the waiver of privilege and there are inherent risks in relying on it to prevent waiver of privilege
- Attorney-client privilege and its waiver are state-law issues and the applicability of the common interest doctrine will vary state to state
- In order to reduce the risk of waiver, parties should:
  - Execute a common interest agreement;
  - Identify the common interest;
  - Limit access to any privileged information;
  - Transfer any privileged information through counsel;
  - Limit the amount of privileged information shared; and
  - Clearly mark all privileged documents.
- Debtor should seek approval of a provision in the bidding procedures order that protects attorney-client privilege with respect to litigation claims that bidders are conducting diligence on



# Designation Rights and Hot Button Issues

Shannon Nagle



# Provisions Affecting Contract Rights

- Section 2.10: Consents; Assumption and Assignment of Contracts
- Section 3.6
- Section 3.20: Seller Representations and Warranties
- Section 15: Designation Rights

# Section 2.10: Consents, Assumption, and Assignment of Contracts

- **Assignments.** Seller shall transfer and assign all Seller Contracts to Buyer, and Buyer shall assume all Seller Contracts from Seller, as of the Closing Date pursuant to, inter alia, Section 365 of the Bankruptcy Code and the Sale Order; provided, however, that Buyer may designate any Seller Contracts as an Excluded Asset in accordance with Section 2.2(f) and as set forth below (the “Excluded Contracts”). Seller Contracts not designated as Excluded Contracts are referred to herein as the “Assumed Contracts”.

# Section 2.10: Consents, Assumption, and Assignment of Contracts

- **Determination of Cure Amounts.** Schedule 2.10(a) hereto sets forth Seller's good faith estimate of the Cure Amount (as defined below) for each Seller Contract. Prior to the Sale Hearing, Seller shall commence appropriate proceedings before the Bankruptcy Court and otherwise take all necessary actions in order to (a) determine any costs necessary to cure all defaults (as required by Section 365 of the Bankruptcy Code) under each Assumed Contract (the "Cure Amounts"), and (b) resolve any disputes as to Cure Amounts prior to or at the Sale Hearing. All Cure Amounts for the Assumed Contracts shall be the sole responsibility of [Buyer/Seller], irrespective of the aggregate amount of such Cure Amounts (whether reflected on Schedule 2.10(a) or otherwise) and shall be paid by [Buyer/Seller] on or as soon as practicable following the Closing Date.

# Section 2.10: Consents, Assumption, and Assignment of Contracts

- **Exclusion of Contracts**. At any time (and from time to time) prior to the Closing, Buyer may identify any Seller Contract as one that Buyer no longer desires to have assigned to Buyer.

# Section 2.10: Consents, Assumption, and Assignment of Contracts

- **Consents; Non-Assignable Contracts; Government Authorization.** To the maximum extent permitted by the Bankruptcy Code or other applicable law, the Assumed Contracts and Government Authorization shall be assumed by Seller and assigned to Buyer as of the Closing Date. Notwithstanding anything to the contrary in this Agreement, to the extent that the assignment to Buyer of any Assumed Contract or Government Authorization is not permitted by law or is not permitted without the consent of another Person and, in the case of the Assumed Contracts and Government Authorization that are the subject of Section 365 of the Bankruptcy Code and the Sale Order, as applicable, such restriction cannot be effectively overridden or canceled by the Sale Order, or other related order of the Bankruptcy Court, then this Agreement will not be deemed to constitute an assignment or an undertaking or attempt to assign the same or any right or interest therein if such consent is not given and the Closing shall proceed with respect to the remaining Assumed Contracts and Government Authorization without any reduction in the Purchase Price; provided, however, that the foregoing shall not constitute a waiver, if any, of any closing condition of Buyer related to Material Consents or the assignment of Seller Contracts; provided, further, that Seller will use commercially reasonable efforts to obtain any such consents to assign such Assumed Contracts and Government Authorization to Buyer following the Closing; provided, further, that Seller shall not be required to incur any Liabilities or provide any financial accommodation in order to obtain any such consents.

# Section 2.10: Consents, Assumption, and Assignment of Contracts

- **Further Assurances**. Seller and Buyer shall use commercially reasonable efforts to take, or cause to be taken, all appropriate action, do or cause to be done all things necessary, proper or advisable under applicable law, and execute and deliver such documents and other papers, as may be required to consummate the transactions contemplated by this Agreement at or after the Closing, including, subject to Section 2.10(d), assistance by Seller with the transfer of the Assumed Contracts and Government Authorization; provided, however, that nothing in this Section 2.10(e) shall prohibit Seller from ceasing operations or winding up its affairs following the Closing. Buyer shall use commercially reasonable efforts to cooperate with Seller and provide Seller with information reasonably sufficient to enable Seller to demonstrate adequate assurance of future performance (as required by Section 365 of the Bankruptcy Code) as to Buyer.

## Section 3.6

- . . . Seller has a valid and enforceable leasehold interest under each of the Real Property Leases under which it is a lessee, subject to applicable bankruptcy, insolvency, reorganization, moratorium and similar laws affecting creditors' rights and remedies generally and subject, as to enforceability, to general principles of equity (regardless of whether enforcement is sought in a proceeding at law or in equity). Each of the Real Property Leases is in full force and effect. There is no default under any Real Property Lease by Seller, by any other party thereto, and no event has occurred that with the lapse of time or the giving of notice or both would constitute a default thereunder. No party to any of the Real Property Leases has exercised any termination rights with respect thereto . . .

# Section 3.20: Seller

## Representations and Warranties

- Seller has a valid and enforceable interest under each of the Contracts set forth in Part 3.20(a), subject to applicable bankruptcy, insolvency, reorganization, moratorium, and similar laws affecting creditors' rights and remedies generally and subject, as to enforceability, to general principles of equity (regardless of whether enforcement is sought in a proceeding at law or in equity). Each of the Contracts identified in Part 3.20(a) is in full force and effect. There is no default under any Contract set forth in Part 3.20(a) by Seller, by any other party thereto, and no event has occurred that with the lapse of time or the giving of notice or both would constitute a default thereunder. No party to any of the Contracts set forth in Part 3.20(a) has exercised any termination rights with respect thereto . . .



# Section 15: Designation Rights

- Any Seller Contract not designated by Buyer as either an Assumed Contract or an Excluded Asset [\_\_] days prior to the Closing Date shall constitute a Designation Rights Contract. Buyer shall have the right, by written notice to Seller within the Designation Rights Period, to specify any Designation Rights Contracts to be held by Seller and not rejected pursuant to Section 365 of the Bankruptcy Code for the duration of the Designation Rights Period; and, further, that with respect to any such Designation Rights Contract (i) Buyer shall reimburse Seller and thereby be solely responsible for all obligations associated with the continuation by Seller of such Designation Rights Contract, as set forth in a budget proposed by Seller and approved by Buyer no later than [ ] days prior to the Closing Date (such budget, the “Designation Rights Budget”), for the period from the Closing through the earlier of (A) the end of the Designation Rights Period or (B) the date of Seller’s receipt of written notice from Buyer authorizing Seller to seek the rejection of such Designation Rights Contract, (ii) all cash collected by Seller in respect of, and other benefits deriving from, such Designation Rights Contract shall be promptly delivered to Buyer, and (iii) the foregoing shall not affect the validity of the transfer to Buyer of any other Asset that may be related to such Designation Rights Contract. In the event that the costs associated with any Designation Rights Contract exceed the Designation Rights Budget (a “Designation Cost Overage”), Buyer shall have the right to include such Designation Rights Contract if Buyer increases the Designation Rights Budget in an amount equal to or exceeding the Designation Cost Overage.

# Section 15: Designation Rights

- As to each Designation Rights Contract, as soon as practical after receiving further written notice(s) (each, an “Assumption Notice”) from Buyer during the Designation Rights Period requesting assumption and assignment of any Designation Rights Contract, Seller shall, subject to Buyer’s demonstrating adequate assurance of future performance thereunder, use its best efforts to seek to assume and assign to Buyer pursuant to Section 365 of the Bankruptcy Code any Designation Rights Contract(s) set forth in an Assumption Notice, and any applicable Cure Amounts shall be satisfied in accordance with this Agreement.
- As to each Designation Rights Contract, as soon as practical after receiving further written notice(s) from Buyer during the Designation Rights Period requesting rejection of any Designation Rights Contract (each, a “Rejection Notice”), Seller shall use its best efforts to reject such contract pursuant to Section 365 of the Bankruptcy Code.
- Notwithstanding anything herein to the contrary, on the date any Designation Rights Contract is assumed and assigned to Buyer pursuant to an Order of the Bankruptcy Court, such Designation Rights Contract shall be deemed an Assumed Contract for all purposes hereunder and Buyer shall have, from and after the date of the Order of the Bankruptcy Court, no liability to Seller for any obligations accruing or becoming due thereunder.



# Consideration, Unique Assets, and Purchase Price Adjustments

Ted Dillman

# Forms of Consideration

- In Section 2.3 of the Commentary, we discuss the most common forms of consideration in bankruptcy transactions (cash, assumption of liabilities, and credit bids), and discuss the Model Agreement’s inclusion of a note payable over time as part of the purchase price, which is atypical in bankruptcy transactions.
- Among other things, we included the following sample language that could be added if a credit bid were part of the process:
  - “ . . . the release and waiver by Buyer of any obligations, claims, rights, actions, causes of action, suits, liabilities, damages, debts, costs, expenses and demands whatsoever, in law or in equity, arising under, or otherwise relating to, the [RELEVANT CREDIT AGREEMENT] against Seller and any guarantors (and their respective successors and assigns), in an aggregate amount equal to \_\_\_\_\_ dollars (\$\_\_\_\_\_). . . ”

# Sample Provisions

## **Sample Stalking Horse Provision**

“On the next Business Day following the date of this Agreement, Buyer shall execute and deliver to Seller an escrow agreement and shall deposit with the Escrow Agent \_\_\_\_\_ dollars (\$[\_\_\_\_\_]) (the “Deposit”). The Deposit shall not be subject to any lien, attachment, trustee process, or any other judicial process of any creditor of Seller or Buyer. Interest accrued on the Deposit shall become a part of the Deposit and shall be paid to the party entitled to the Deposit. The Deposit shall be credited to the Purchase Price if the Closing occurs, and otherwise distributed pursuant to the applicable escrow agreement.”

## **Sample Competing Bidder Provision**

“On the Business Day following Buyer’s receipt of notice from Seller that an Auction will occur in accordance with the Bidding Procedures, Buyer shall deposit \_\_\_\_\_ dollars (\$[\_\_\_\_\_]) (the “Deposit”), which shall be held in escrow pursuant to the Bidding Procedures Order. The Deposit shall not be subject to any lien, attachment, trustee process, or any other judicial process of any creditor of Seller or Buyer. Interest accrued on the Deposit shall become a part of the Deposit and shall be paid to the party entitled to the Deposit. The Deposit shall be credited to the Purchase Price if the Closing occurs, and otherwise distributed pursuant to the Bidding Procedures Order and terms of this Agreement.”

# Liabilities

- The Model Agreement includes assumption of a number of liabilities to facilitate the continuous operation of the business.
- But the buyer in a bankruptcy transactions often assumes only liabilities arising after Closing, so we included the following sample provision in the “Assumed Liabilities” section:  
**“([#]) any Liability to the extent occurring and arising from and after the Effective Time as a result of Buyer’s ownership and operation of the Assets.”**
- We also noted the following provision in the Retained Liabilities (a/k/a excluded liabilities), that frequently appears in bankruptcy transactions:  
**“([#]) any Liability relating to or arising, whether before, on, or after the Closing, out of, or in connection with, any of the Excluded Assets.”**

# Unique Bankruptcy Assets

## Section 2.1(j): Avoidance Actions

- **“Avoidance Action”—any and all claims, rights, or causes of action of Seller arising under Bankruptcy Code sections 544 through 551, and actions under similar state and federal laws, including fraudulent transfer or fraudulent conveyance claims.**

# Purchase Price Adjustments

- Section 2.8: Adjustment Amount and Payment
- Section 2.9: Adjustment Procedure



# Section 2.8: Adjustment Amount and Payment

- Section 2.8 of the Model Agreement contains a working capital adjustment.
- We included the following sample provision to address the bankruptcy priority of the buyer's right to recover any amounts determined to be owed to the buyer as a result of the purchase price adjustment (and discuss a variety of other issues relating to purchase price adjustments):

**“Any obligation of Seller hereunder shall constitute a super-priority administrative claim under Sections 503 and 507 of the Bankruptcy Code, and Buyer shall be deemed to have a first-priority lien on and security interest in all sale proceeds, senior to the claims of all secured and unsecured creditors, until such time as Seller has made all payments required hereunder.”**

# Section 2.9: Adjustment Procedure

- Section 2.9(c) of the Model Agreement establishes the mechanics for determining the working capital adjustment, and provides that disputes will be resolved by independent accountants.
- But because the Bankruptcy Court will generally adjudicate disputes related to the purchase price in a bankruptcy transaction, we included the following replacement provision in Section 2.9 of the Commentary:  
**“(d) If Seller duly gives Buyer such notice of objection, and if Seller and Buyer fail to resolve the issues outstanding with respect to the Closing Financial Statements and the calculation of the Closing Working Capital within thirty (30) days of Buyer’s receipt of Seller’s objection notice, Seller and Buyer shall submit the issues remaining in dispute to the Bankruptcy Court for adjudication. Seller and Buyer shall each bear its own fees and expenses relating to such adjudication.”**



# Post-Closing Claims

# Post-Closing Claims

- A post-closing claim under asset purchase agreement usually relates to a breach of a representation or warranty as to the condition of the property being sold
- Asset purchase agreement may also include post-closing adjustments whereby one party has a claim against the other as a result of post-closing performance or information

# Post-Closing Claims

- In bankruptcy sales, debtors usually provide little or no representations or warranties on the condition of the assets
  - Usually an “As Is, Where Is” sale
- Principal reason for this is Debtor is administering its estate for a limited period time with the objective of confirming a chapter 11 plan or otherwise fully administering its estate
- After debtor administers its estate it will have little or no assets to satisfy any post-closing claims
- In a non-bankruptcy sale, the equity owners may guaranty post-closing claims; however, in bankruptcy sales, the equity owners are generally out of the money and have no incentive to guaranty post-closing claims

# Addressing Post-Closing Claims in Bankruptcy Asset Purchase Agreement

- Limit Seller's representations ("As-Is, Where-Is")
- Limit survival of post-closing claims
  - Cap Buyer's damages
  - Limit time for Buy to assert claims
- Establish escrows and reserves