

## AHERN ADVISORY

### MERGERS & ACQUISITIONS - BANKRUPTCY CODE SECTION #363

I have received inquiries recently, about "the bankruptcy code section#363" sale process.

1. What is a 363 sale?
2. What is the purpose of a sale?
3. How long does the process take for a 363 sale?
4. What is the time line, for a typical 363 sale?
5. What information does a motion seek in approval of a 363 sale have to contain?
6. What are the requirements for the approval of a 363 sale?
7. Who decides whether a 363 sale is appropriate?
8. How is a 363 sale different from a plan of bankruptcy re-organization.

I've tried to take all of the above questions, and summarize them to the best of my ability.

To start with: "What is a 363 sale?" *It is a sale of assets in a bankruptcy case, generally in a Chapter 11 re-organization.*

- The assets are conveyed to a purchaser free and clear of any liens or encumbrances.
- Those liens or encumbrances will then be attached to the net proceeds of the sale and paid as ordered by the bankruptcy court.

The purpose of the 363 sale is to define the rights and powers of the bankruptcy trustee (debtor) with respect to the use, or sale of property, and the rights of other parties that have interest in the property involved. In essence, a #363 permits the disposition of assets of the bankrupt company, outside the ordinary course of business.

The process for a 363 sale takes place when the bankrupt company (known as the debtor or debtor in possession) or the bankruptcy trustee in a Chapter 11 case files a motion with the bankruptcy court, seeking the bankruptcy courts approval of the terms and conditions of the proposed sale. Opponents of the proposed sale will have a designated response time determined by the bankruptcy court (often 10-20 days, to file a written objection to a proposed sale). Frequently, although not always, this period will be considerably shorter and will be a little more than a few days.

Once a 363 sale is approved, the actual sale will take anywhere from a few days to 3 months to complete; depending upon whether there is opposition to the sale and how many parties are interested in purchasing the assets being offered. Generally speaking, the process is completed within 4-6 weeks.

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SECTION #363



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**In reference to approval for a 363 sale, various Motions and Exhibits have to be attached and provide detailed information about all the essential terms and conditions of the contemplated sale,** including the identity of the perspective purchaser, purchase price, assets that can be sold, and the like. **Frequently, the actual purchase agreement between the debtor and the perspective purchaser (sometimes referred to as a “stalking horse”) is attached to the Motion as an Exhibit.**

**Generally the Motion will also contain specific detailed provisions regarding the timing and manner applicable for the submission of any competing offers for the assets to be sold.** It also possible that the Motion will simply seek approval of an auction or other sales procedure to determine who the successful purchaser will be.

**The purpose of a “363 sale” is that the sale of assets can often be accomplished more quickly with a 363 sale rather than in the context of re-organization. A 363 sale requires only the approval of a bankruptcy judge, while a plan of a re-organization must be approved by a substantial number of creditors;** and meet certain other requirements to be “confirmed”. **Additionally, a plan of re-organization is much more comprehensive than a 363 sale, in addressing the overall financial situation of the debtor, and how its “exit” from bankruptcy, will affect creditors.**

**Once a 363 sale has been completed and the purchase price paid, the bankruptcy Court decides how the proceeds of the sale are to be allocated among secured creditors with liens on the assets sold. In the event additional proceeds exist, they will be allocated to un-secured creditors, and other claimants in accordance with the statutory provisions of the bankruptcy Court.** Once a 363 process is started the creditors no longer decide how they are going to get paid, the bankruptcy judge makes that determination.

**Occasionally, you will hear the term “stalking horse”.** This is an initial perspective Buyer who is willing to set forth a specific purchase price and terms for the purchase of a bankrupt company’s assets or asset. **The prospective Buyer usually negotiates for a payment or a “topping fee” in the event it does not wind up being the approved purchaser to ensure that any competing bid is meaningfully more value to the bankrupt company.**

**A topping fee or breakup fee is a specified amount to be paid to a stalking horse in the event that it is not the successful bidder for the assets. The theory is that it will compensate the stalking horse for certain due diligence that they undertook, and ensure that any competing bid is meaningful more value. In essence:**

- **One of the most valuable advantages in utilizing a 363 sale is to implement a sale quickly and deliver assets “free and clear of liens” or other 3<sup>rd</sup> party interest in the assets.**
- **This provides a Buyer considerable comfort. In some instances, it enhances the purchase price.**
- **The 363 process authorizes the trustee to sell the property of the bankrupt company outside the ordinary course of business, after noticing a hearing.**
- **The free and clear provision provides the means for the debtor to consummate a sale quickly, as competing interest in the property, need not be resolved for the conditions of the sale.**

**Section 363 sales are attractive to Buyers, because Buyers can obtain protection from successor liability; subject to certain exceptions. In essence, a 363 sale transfers assets, free and clear of any liens, claims and encumbrances.**

- **The power of the 363 is to “clean” troubled assets, and;**
- **Further reduce the potential “un-winding process”.**

**If you are considering a 363 sale, it is very important that you secure competent legal advice.**

1. **You need to utilize a law firm that specializes in the mechanics of a Section 363 process.**
2. **They have to understand the structure of such a process, and;**
3. **They have to understand what the potential pitfalls could be by utilizing a 363 sale.**

QUOTE OF THE WEEK: **“The secret of negotiations is to harmonize the real interests of the parties concerned.”** (Frank  
Lois)