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A Comparison Shopping Guide for 363 Sales

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Editor's Note: A Comparison Shopping Guide for 363 Sales is available for purchase at www.abiworld.org/abistore, or call (703) 739-0800. Orders can also be e-mailed to order@abiworld.org.

While A Comparison Shopping Guide for 363 Sales is not a juicy political thriller or romance novel, principal author **Kelly K. Frazier**, an attorney at Steptoe & Johnson LLP in Century City, Calif., and her co-authors write in an easy informal style with enough commentary thrown in to liven up the otherwise staid material. Co-authors include **Erin N. Brady** (Jones Day; Los Angeles), **Shirley S. Cho** (Pachulski Stang Ziehl & Jones LLP; Los Angeles), **Robbin L. Itkin** (Steptoe & Johnson LLP; Century City, Calif.), **Lori Sinanyan** (Jones Day; Los Angeles), **Bennett L. Spiegel** (Jones Day; Los Angeles), **Richard L. Wynne** (Jones Day; Los Angeles) and **Lisa Zarlenga** (Steptoe & Johnson LLP; Washington, D.C.), and **Jonathan P. Friedland** (Levenfeld Pearlstein LLC; Chicago) served as the book's editor. The book's purpose is best described in its introductory paragraph: "The best deals, however, often go to the most informed. This manual is intended to help the potential purchaser (and seller) compare terms and conditions of sale transactions conducted pursuant to §363 of the [Bankruptcy] Code, so that you know exactly what the market has to offer (and what it doesn't)."¹

¹ As this quoted purpose indicates, the Guide is just that—a guide to the purchaser, seller and counsel regarding the market, common terms and conditions, etc. The Guide is not intended to provide an in-depth analysis of the legal viability of and issues regarding 363 sales. The Guide does, however, cite and refer the reader to relevant case law and other authority as appropriate in footnotes, including the recent case of *Clear Channel Outdoor Inc. v. Krupter* (In re PW LLC), 391 B.R. 25, 37 (9th Cir. B.A.P. 2008).

About the Reviewer

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The authors do just that by analyzing 60 asset sale transactions approved in 54 bankruptcy cases filed during the period of 1998 to 2007 in at least 15 industries, including

include charts that summarize certain specific terms of the sale transactions and, in the author's words, "actual excerpts from purchase agreements or other bankruptcy pleadings." This information will assist the reader in referencing specific language used in sale agreements, and the appendices and exhibits are valuable resources that could eliminate many hours of research time.

Ms. Frazier and her co-authors were very thorough and have covered every possible aspect of §363 sales to at least some degree, even if supporting data was available in only a few of the cases researched. Each topic is presented in order of its typical appearance in an APA. The authors detailed virtually every type of provision that might be

Suggested Reading

telecommunications, transportation, metals, energy and chemical, technological, real estate, financial and manufacturing. Although the majority of cases analyzed were filed in Delaware (25 cases), the remaining cases were filed in jurisdictions as diverse as the Southern District of New York, the District of New Jersey, the Northern District of Illinois, the Northern District of Texas, the Northern District of California and the Central District of California.

For the less-experienced law practitioner as well as for nonlawyers, this book provides a wealth of information about the §363 sale process, and a step-by-step primer for drafting an asset-purchase agreement (APA). For the more experienced professional already knowledgeable of the §363 sale process, the book is an excellent analysis and summary of an immense amount of information on recent §363 sale transactions. The appendices and exhibits on the accompanying CD-ROM

contained in an APA, even including a discussion of the post-closing transition services expected of the seller, and requirements for the retention of documents. It is extremely useful to have comparable data available in a well-organized, easy-to-access format to assist in evaluating the necessity of a particular sale provision, and to compare the actual language that might be used to state such provision. Of course, it also helps to be able to double-check that nothing of significance has been left out of an agreement.

Among the highlights of this book are the chapters focused on provisions related to the consideration received by the seller, as well as buyer protections. Chapter 3 includes an analysis and summary of empirical data, comparing adjustments to the purchase price, caps, holdbacks, escrows, payment triggers and the buyer's good-faith deposit. Chapter 5 studies break-up and/or topping fees,

expense-reimbursement provisions, deposit and overbid requirements, and “no-shop” provisions. Other chapters (and the appendices) discuss such topics as the timing for bankruptcy approval (from petition date to the entry of the sale order), jurisdiction and venue, employee obligations, representations and warranties, the treatment of chapter 5 claims, the scope of permitted liens, notice and removal requirements for existing liens, the treatment of contracts (*i.e.*, provisions for the assignment, adequate protection and cure of existing defaults), the use of the material adverse effect clause, and provisions relating to conditions precedent to closing the sale transaction. *A Comparison Shopping Guide for 363 Sales* is highly recommended for the library of every restructuring professional in the practice of drafting or evaluating §363 sale agreements. ■

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