

Surprises with Life Insurance

by Dave F. Senger

Many believe that their life insurance policy will deliver at his/her death iron clad benefits to their beneficiaries. That may not be the case. Many life insurance policies are designed to stay in force only on the basis of critical (and often unrealistic) interest rate assumptions being met over the life of the policy.



Tax Cuts and Jobs Act

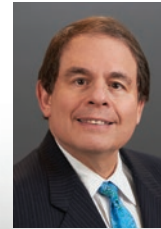
On December 22, 2017, President Trump signed the Tax Cuts and Jobs Act into law, which makes a number of changes to the federal tax laws. The recently signed Tax Cuts and Jobs Act includes far-reaching changes for all United States taxpayers, including individuals, corporations, corporations with substantial international business, and small businesses.



Section 363 of the Bankruptcy Code – A Tool for Buying and Selling Financially Distressed Assets

by Cass S. Weil

“Section 363” refers to the portion of the Bankruptcy Code that authorizes a debtor to sell its assets “outside the ordinary course of business.”



Moss & Barnett

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Surprises with Life Insurance

By Dave F. Senger | 612-877-5262 | Dave.Senger@lawmoss.com

We are currently in an economic environment that is creating increasing concerns about life insurance policies. It may not be the “all weather,” “sleep at night” contract you had imagined. Life insurance is often a misunderstood and complicated asset. We would like to bring clarity and a call to action so that your beneficiaries are assured they will receive the benefits you intend.

Many insureds are under the misperception that their life insurance policy will deliver at his/her death iron clad benefits to their beneficiaries. That may not be the case. Many life insurance policies are designed to stay in force *only* on the basis of critical (and often unrealistic) interest rate assumptions being met over the life of the policy. Based on the interest rate assumptions built into many

policies, the insured is unaware that his/her policy may be headed toward failure. How does this happen? For many (not all) policies, the premium payment alone is *insufficient* to keep the policy in force. Once received by the insurance company, the premium needs to be invested at a projected rate of return

“Many life insurance policies are designed to stay in force only on the basis of critical (and often unrealistic) interest rate assumptions.”

such that the premium plus that return are sufficient to keep the policy in force. If the assumed earnings rate is not realized, the policy may require increased premiums or, worse, be stripped away by the carrier who

will “foreclose” on the policy. This concern is magnified for second-to-die policies since those policies need to meet interest rate projections over two lifetimes in order to remain in force.

In the current low-interest rate environment, policy lapses and/or significant premium increases are not uncommon. As a result, additional funding is often required to keep the policy in force, and, in other cases, policies are becoming prohibitively expensive and forfeited.

There is a solution. Properly conducted, an “in-force policy review” or an actuarial analysis will identify those policies that are “damaged goods” and in danger of lapsing. Solutions to a failing policy can be explored

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Brian Grogan and Jim Vedder Elected to Board of Directors

Brian T. Grogan and **James J. Vedder** were recently elected to three-year terms as members of our Board of Directors. Brian serves as the firm's President, chairs the firm's communications and technology practice areas, and is a member of the firm's regulated industries; business law; and mergers, acquisitions, and corporate finance teams. Jim is a member of the firm's family law team.

Brian and Jim will each continue practicing law on a full-time basis in addition to handling their management responsibilities. They are joined on the board by co-directors, **Kevin M. Busch**, **Jana Aune Deach**, **Timothy L. Gustin**, and **Thomas J. Shroyer**.



Brian Grogan



Jim Vedder

Nick Kaster and Pat Zomer Elected Shareholders



Nick Kaster



Pat Zomer

Moss & Barnett is pleased to announce that **Nicholas J. Kaster** and **Patrick T. Zomer** have been elected shareholders of the firm.

Nick is a member of the firm's wealth preservation and estate planning and business law teams. Nick's estate planning practice is centered on advising individuals and families on estate planning, trust and estate administration and settlement, wealth

transfer, and philanthropy. In his business law practice, Nick counsels companies in general corporate legal matters, including acquisitions, mergers, shareholder relations, succession planning, contract negotiation, governance, and executive compensation. As counsel to individuals, business owners, and their families, Nick relies on his experience in multiple disciplines to assist clients with their family, business, and philanthropic concerns. Nick received his J.D., *cum laude*, from William Mitchell College of Law and his B.A. from DePauw University.

Pat is a member of the firm's regulated industries, banking and commercial transactions, business law, communications, and multifamily and commercial real estate finance teams.

He works with public utilities, banks, closely held businesses, and municipalities on utility regulation, commercial lending, and business law matters. In his regulated industries and communications work, Pat helps clients achieve positive regulatory outcomes before both state and federal regulatory bodies. In his banking and commercial transactions and commercial real estate finance practice, Pat assists banking clients with all aspects of commercial lending transactions. He also provides business law advice and counsel to clients of all sizes, focusing on business formation, financing, sales and acquisitions, and structural issues. Pat received his J.D., *summa cum laude*, from the University of St. Thomas School of Law and his B.A., *magna cum laude*, from Middlebury College.

Congratulations to Nick and Pat!

Surprises with Life Insurance - Continued from Page 1

after that policy is identified as a candidate to lapse. The owner of a policy should ask the selling insurance agent for this review or other advisors for a referral to an agent skilled in uncovering the issues and presenting remedies.

Do not let the absence of a simple, but important, review process lead to a "foreclosure" on your life insurance policy. Your family, your business, and your favorite charities are counting on the policy to produce much needed financial relief upon your passing.

Moss & Barnett has the resources to help.



Dave Senger is a trusted estate planning legal advisor and veteran business law counselor. He chairs our wealth preservation and estate planning team and is a member of our business law team. Dave

represents both individuals and businesses to negotiate and structure tax-friendly, strategically significant commercial transactions and to plan the orderly transfer of their assets across generations.

Visit: LawMoss.com/Dave-F-Senger

Call: 612-877-5262

Email: Dave.Senger@lawmoss.com

Moss & Barnett is Pleased to Recognize the Following Team Members:

Aaron A. Dean, a member of our construction litigation team, has been selected as a Fellow of the Construction Lawyers Society of America (CLSA). The CLSA is an invitation-only international honorary association composed of preeminent lawyers specializing in construction law and related fields. Fellowship is limited and selective, with lawyers being invited into Fellowship upon a proven record of excellence and accomplishment in construction law at both the trial and appellate levels.



of America (CLSA). The CLSA is an invitation-only international honorary association composed of preeminent lawyers specializing in construction

In addition, Aaron was recognized by the Minnesota Subcontractors Association (MSA) with the 2017 "Champions Award" at MSA's Annual T.O.P.S. Awards Dinner held on January 23, 2018. Eight years ago, MSA decided to recognize special individual members for their long-term work to enhance the business environment for subcontractors and for outstanding contributions to MSA. Moss & Barnett attorney, **Curtis D. Smith**, was the first recipient of the MSA Champions Award in 2010.

"Aaron has selflessly given so much time to make the Minnesota construction industry fair, transparent, and equitable," said David Bruneau, Executive Director of MSA. "We have seen Aaron in action and are grateful and honored to have him on our team."



Pictured left to right: David Bruneau, Executive Director of Minnesota Subcontractors Association, John Lloyd of Lloyd's Construction Services, Aaron Dean, and Donna Gulden of Homeco Insulation

John Rossman, chair of our creditors' remedies and bankruptcy team, was recognized by the Consumer Relations Consortium (CRC) with a "Dedicated Service Award." The mission of the CRC is to develop collaborative relationships with consumer advocacy groups and other thought leaders, along with regulators, in part to inform the ongoing debt collection rulemaking process. John has been a part of the CRC and has served on the steering committee since its founding in 2013.



John Rossman

Co-executive Director of CRC. "He will no doubt provide similar leadership when the time comes to respond to a Notice of Proposed Rulemaking."

Thomas J. Shroyer, chair of our accountant law team, was awarded an Honorary Membership by the Minnesota Society of Certified Public Accountants (MNCPA) at its 2017 Celebrate CPAs Awards Luncheon held on September 28, 2017. Only four other individuals have been granted Honorary Membership in the Society for their dedication and contributions to the MNCPA and the CPA profession, without being a licensed CPA.



Tom Shroyer

"Tom has provided countless hours providing legal advice to the MNCPA. His work with the Society has included writing court briefs, submitting regular articles for the *Public Practice e-Newsletter*, and offering guidance on regulations to help benefit the CPA profession. He has a national reputation of being one of the best," said Carolee Lindsay, Vice Chair of the MNCPA Board of Directors. "His work protecting the professional reputations of CPAs earned him the honor of *Best Lawyers* Minneapolis 'Lawyer of the Year' for Professional Malpractice Law – Defendants in 2014 and 2016. Simply put, Tom is the guy to call. We are fortunate to have Tom in our corner supporting the integrity of the profession and the MNCPA's efforts."

We extend our sincere congratulations to Aaron, John, and Tom on these well-deserved recognitions!

Tax Cuts and Jobs Act

On December 22, 2017, President Trump signed the Tax Cuts and Jobs Act into law, which makes a number of changes to the federal tax laws. The recently signed Tax Cuts and Jobs Act includes far-reaching changes for all United States taxpayers, including individuals, corporations, corporations with substantial international business, and small businesses.

Substantial changes for individuals include:

Individuals		
	2017	2018
Standard Deduction (Single)	\$6,350	\$12,000
Standard Deduction (Married)	\$12,700	\$24,000
Child Tax Credit	\$1,000	\$2,000
Personal Exemption	\$4,050 per Taxpayer / Dependent	Eliminated
State and Local Income Taxes	Deductible	Limited to \$10k for Total State Income, Sales, and Property Taxes

Substantial changes for corporations (for holdings *within* the U.S.) include:

Corporations (for holdings <i>within</i> the U.S.)		
	2017	2018
Corporate Tax Rate	35%	21%
Corporate AMT	Raised effective corporate tax rate to 20%	Eliminated
Ceiling for Cash Method of Accounting	Until \$5M	Until 3 Year Average Receipts Exceed \$25M
Net Operating Losses Allowed	Carried Backwards 2 Years, Forward 20	No carryback (except farmers). Carryforward indefinite. Limit to 80% of Annual Income Offset

Substantial changes for corporations (for holdings *outside* the U.S.) include:

Corporations (for holdings <i>outside</i> the U.S.)	
Taxation of foreign income:	
100% deduction for the foreign-source portion of dividends received from "specified 10% owned foreign corporations"	
Foreign tax credit:	
Foreign tax credit: No foreign tax credit or deduction will be allowed for any taxes paid or accrued with respect to a dividend that qualifies for the deduction	

Substantial changes for small businesses include:

Pass-Through Business
20% deduction for qualified income , then individual rates apply
Reduces flow through income from (up to) 37% to (up to) 29% ; other limitations apply

Substantial changes for estate planning include:

Estate Planning		
	2017	2018
Federal gift/estate tax exemption	\$5,490,000	\$11,200,000
Federal gift/estate tax rate	40%	40%
Federal annual gift tax exclusion	\$14,000 per recipient	\$15,000 per recipient
Federal GST exemption	40%	40%
Federal GST tax rate	\$2,100,000	\$2,400,000
Maximum Minnesota estate tax rate	16%	16%
Basis on death	Step up to fair market value on date of death	Step up to fair market value on date of death

Despite the changes, **Minnesota residents remain subject to Minnesota estate tax laws upon their deaths.** As of January 1, 2018, the Minnesota estate tax exemption is \$2.4 million, meaning that assets transferred after a person passes away having a value in excess of \$2.4 million may be subject to Minnesota estate taxes and taxed at a maximum rate of 16%. Gifts with a value greater than the annual exclusion that are made three years prior to the death of the donor will not be subject to Minnesota estate tax upon the donor's death.

Although not directly affected by the Tax Cuts and Jobs Act, for gifts made after December 31, 2017, the annual gift tax exclusion will increase to \$15,000 per person.

In light of the changes to the tax laws, this is a good time to review your tax and estate plans to determine whether changes are needed. Please note: The Tax Cuts and Jobs Act is over 1,000 pages long. We can provide only a short summary of a few highlights here. Other provisions of the Act may have a material impact on you.

Six New Attorneys Have Joined the Team

Lindsay L. Case has joined the firm's multifamily and commercial real estate finance and real estate teams. Lindsay focuses her practice on closing and delivering loans secured by multifamily projects to secondary market investors such as Freddie Mac and Fannie Mae. Prior to joining Moss & Barnett, Lindsay practiced in the area of public finance, providing counsel on municipal bond and tax increment financing transactions. Prior to that, she was with the Southwest Minnesota Housing Partnership, a developer of low income single-family and multifamily housing in rural Minnesota. She started her career as a law clerk for District Court Judge Gordon Moore in Nobles County, Minnesota. Lindsay received her J.D. from the University of St. Thomas School of Law and her B.S., *cum laude*, from Minnesota State University, Mankato.



Lindsay Case

Gina B. DeConcini has joined the firm's business law; mergers, acquisitions, and corporate finance; accountant law; and wealth preservation and estate planning teams. Gina advises clients on Minnesota, multistate, federal, and international tax planning and controversy resolution, including sales, use, property, and excise taxes; multistate and multinational income taxes; and international transaction tax planning. She also counsels nonprofit entities on tax exemption and related governance matters. In addition, she handles tax aspects of reorganizations and mergers and acquisitions for companies ranging from emerging businesses to multinational corporations. Prior to joining Moss & Barnett, Gina was a partner in a national law firm for ten years, and she practiced with a Big Four accounting firm as a tax senior manager focusing on international tax planning for 14 years. Gina received her J.D., *cum laude*, from the University of Minnesota Law School and her B.A., with honors, from the University of Wisconsin-Madison.



Gina DeConcini

Chelsy M. Jantsch has joined the firm's multifamily and commercial real estate finance, real estate, and banking and commercial transactions teams. Chelsy represents institutional and life insurance company lenders on commercial real estate transactions. She also represents lenders closing and delivering loans secured by multifamily projects to secondary market investors such as Freddie Mac and Fannie Mae. Prior to joining Moss & Barnett, Chelsy was in private practice, with a focus on general real estate matters, including purchase and sale and leasing transactions. Prior to that, she served as a commercial closer and underwriting counsel for a title insurance company. Chelsy received her J.D. from William Mitchell College of Law, where she earned her Law and Business Certificate, and her B.A. from the University of Minnesota-Twin Cities.



Chelsy Jantsch

John P. Kennedy has joined the firm's multifamily and commercial real estate finance and real estate teams. John focuses his practice on closing and delivering loans secured by multifamily projects to secondary market investors such as Freddie Mac and Fannie Mae. Prior to joining Moss & Barnett, John was Assistant Vice President and in-house counsel for Old Republic National Title Insurance Company. Prior to that, he gained extensive experience analyzing real property title matters while serving as a law clerk with the Office of the Hennepin County Examiner of Titles in Minneapolis. John received his J.D. from William Mitchell College of Law and his B.A. from the University of St. Thomas.



John Kennedy

Douglas J. Mac Arthur has joined the firm's litigation team. Doug practices primarily in construction law, helping construction industry stakeholders with dispute resolution, litigation, contract drafting, negotiation, and insurance coverage matters. He has

a strong background in the construction industry, including a B.S. in Construction Management and almost ten years as a remodeling contractor. Prior to joining Moss & Barnett, Doug practiced construction law with a law firm representing and advising general contractors, construction managers, subcontractors, developers, architects, and engineers. Prior to that, he worked under the general counsel of a large Minneapolis general contractor where he gained exposure to many legal and business matters. In addition, Doug served as a judicial extern for Minnesota Fourth Judicial District Court Judges Denise Reilly and Laurie Miller. This prior experience gives Doug a unique perspective on what is important to a company and its owners. Doug received his J.D., *magna cum laude*, from William Mitchell College of Law and his B.S. in Construction Management from Minnesota State University at Moorhead.



Doug Mac Arthur

Erik L. Romsaas has joined the firm's business law; banking and commercial transactions; and mergers, acquisitions, and corporate finance teams. Erik advises clients on a broad range of corporate and financial transactions, including corporate formation and governance, mergers and acquisitions, and corporate restructurings. Before joining Moss & Barnett, Erik worked for PricewaterhouseCoopers in its Tax and Transfer Pricing group. In that role, he worked to understand the operational side of clients' businesses and how to better align operations with company objectives. Erik continues to work with clients to understand their operations as he advises them on broader corporate matters. Erik received his J.D., *cum laude*, from William Mitchell College of Law and his B.A. from Bethel University.



Erik Romsaas

Section 363 of the Bankruptcy Code – A Tool for Buying and Selling Financially Distressed Assets

By Cass S. Weil



Cass Weil is a retired shareholder and valued colleague who served with Moss & Barnett from 1984 until 2013 in the areas of creditors' remedies and bankruptcy law.

Moss & Barnett is pleased to report that an article retired shareholder, Cass S. Weil, wrote for our Fall 2013 Firm Newsletter, "Section 363 of the Bankruptcy Code – A Tool for Buying and Selling Financially Distressed Assets," has been included in a Harvard Business School (HBS) Case Study written by Professor Nori Gerardo Leitz and Alexander W. Schultz, "The U-Turns of National Truck Stops," Case No. N9-217-062 (May 17, 2017). The HBS case study is a teaching vehicle that presents students with a critical management issue and serves as a springboard to lively classroom debate in which participants present and defend their analysis and prescriptions. It goes without saying that this is a tremendous endorsement of the quality of the article written by Cass. We are reprinting the article here.

Consider these common "distressed asset" scenarios: A business only has capital to operate for a short time. A lender or potential purchaser is willing to provide only short-term financing to a struggling business. A potential purchaser says that it will pay more for assets if it can acquire the assets "free and clear" of existing liens and interests and be assured that the sale will not be set aside by a court. A quick transaction may preserve the value of business assets, including relationships and employee loyalty, but there is resistance from one or more constituent groups.

In each of the foregoing circumstances, the provisions of Section 363 of the

Bankruptcy Code may provide a useful tool for accomplishing objectives of both buyers and sellers. Since the changes to the Bankruptcy Code in 2005, sales of assets of businesses of all sizes pursuant to Section 363 of the Bankruptcy Code, as opposed to reorganization and restructuring through the full process of Chapter 11, have become increasingly popular as a method by which buyers and sellers transfer financially distressed assets.

A Section 363 sale is a procedure by which debtors can fulfill their fiduciary obligations to creditors and ownership by maximizing value and minimizing transaction costs.

"A well-known Section 363 sale is the liquidation of Lehman Brothers Holdings, Inc., in 2008. Approximately \$639 billion dollars worth of debtor's assets, were sold to Barclays within five days of the bankruptcy filing."

Purchasers get enhanced value by proceeding quickly in often deteriorating circumstances and obtaining the protections afforded by a sale "free and clear" of preexisting liens and interests, as well as enhanced finality compared to sales outside of bankruptcy.

What is a "Section 363" Sale?

"Section 363" refers to the portion of the Bankruptcy Code that authorizes a debtor to sell its assets "outside the ordinary course of business." Sales of assets "outside the ordinary course of business" are sales that are either dissimilar to the sales that the debtor would engage in as part of its day-to-day operations or different from the type of transactions that the debtor typically engaged in before it sought

bankruptcy protection. A Section 363 sale transfers the debtor's assets to a buyer in a discrete transaction that will be approved by the bankruptcy court if the debtor can demonstrate a "substantial business justification" for the sale. Unlike a full Chapter 11, a Section 363 sale does not require the debtor to propose and gain acceptance of an overall plan of reorganization before the sale can be consummated. In fact, debtors' cases can be converted to liquidations after consummation of the Section 363 sale.

Advantages of Section 363 Sales

Because it can be accomplished quickly, the sale of a debtor's assets under Section 363 requires less cash or credit to keep the debtor's business going to preserve the value of assets by, among other things, maintaining uninterrupted business relationships and retaining employees, than would be required for a non-bankruptcy sale process or Chapter 11 reorganization. Typically, Section 363 sales can be accomplished in 60 to 90 days. Under the appropriate circumstances, however, the time from the bankruptcy filing through completion of a sale can be much shorter. A well-known example is the liquidation of Lehman Brothers Holdings, Inc., in 2008. The debtor's assets, valued at approximately \$639 billion dollars, were sold to Barclays within five days of the bankruptcy filing. Other notable examples of rapid sales of substantial amounts of assets in a short time include General Motors and Chrysler.

Section 363 permits the sale of assets "free and clear" of existing liens and interests. Another notable benefit is that the bankruptcy court approves the purchase price as fair consideration for the acquired assets, thus minimizing the chance that the sale will be challenged as a fraudulent transfer or that the purchaser will incur

successor liability. Section 363(m) protects Section 363 sales made “in good faith” from reversal on appeal unless the court stays implementation of the sale order while the appeal is pending. Section 363(m) provides a degree of finality unavailable outside of bankruptcy. The provision essentially moots the ability of any party to appeal a sale order once the sale has closed. When Section 363(m) is considered in conjunction with a sale “free and clear,” the allure of Section 363 sales to potential purchasers becomes very clear.

Finally, Section 363 allows a debtor to assign to the purchaser or a third party favorable unexpired leases and executory contracts (contracts unperformed by both parties), but does not require the purchaser to assume the debtor’s obligations under less attractive contracts. For example, a buyer can acquire a brand and production facilities along with ongoing sales contracts without assuming a union contract with employees. The ability to selectively transfer contracts is one of the most attractive facets of a full Chapter 11 reorganization that can be accomplished through a Section 363 sale, without having to satisfy Chapter 11’s voting and solicitation requirements.

Because of these benefits, some buyers may be willing to pay more for assets acquired with the protections offered by Section 363. More often, buyers may be unwilling to buy distressed assets without Section 363 sale protections.

Limitations of Section 363 Sales

Section 363 sales cannot be used to “short circuit” the reorganization process set out in detail in Chapter 11 by altering creditor rights or by providing releases beyond the typical terms applicable to a buyer of assets. Courts have struggled to differentiate between allowable Section 363 sales and disguised reorganization plans. For example, in an early

Section 363 case, the Fifth Circuit Court of Appeals, in *Pension Benefit Guaranty Corp. v. Braniff Airways, Inc.*, refused to approve a Section 363 sale because the proposed sale, which would have transferred ownership of Braniff Airways’ cash, airplanes, and terminal leases, significantly restructured the rights of its creditors and provided for-profit participation in the new company, essentially amounting to a backdoor reorganization effort. Careful consideration of the nature and extent of relief to be sought in addition to the sale of assets in light of emerging case law is a necessary step in deciding whether a Section 363 sale is a viable alternative.

A feature of the Section 363 sale process that gives pause to some potential purchasers is that it takes place in the relatively transparent atmosphere of a bankruptcy case. Although protection of sensitive information is possible, the public nature of the proceedings must be balanced against the advantages noted above.

Another limitation on Section 363 sales is provided by Section 363(f)(3), which allows sales of assets “free and clear” of all liens as long as the price at which the assets are sold is greater than the aggregate value of all liens on the property. In other words, it is not possible to sell debtor’s assets free and clear of “underwater” liens without the underwater lien holders’ consent. If the lien is subject to “*bona fide* dispute,” however, Section 363(f)(4) permits the sale of property subject to the disputed lien over the objections of the secured party.

The Section 363 Sale Process

Because both potential buyers and sellers intend to proceed rapidly once the seller/debtor files for bankruptcy, careful and thorough planning in advance of initiating bankruptcy is necessary. Because Section 363 sales are often undertaken at the behest of a creditor or potential purchaser who is

supplying the debtor with cash to continue to operate, the potential purchaser or creditor will often have completed its “due diligence” in advance of the bankruptcy filing. The initiating party often serves as the initial bidder for the debtor’s assets. The initial bid establishes a floor price for the assets to be sold. The initial bidder is called a “stalking horse.” In addition to establishing the floor price and ensuring that there is at least one bidder for the assets, the stalking horse negotiates a form asset purchase agreement that can be shopped around to other potential bidders.

To protect the stalking horse bidder if it does not become the successful purchaser of the assets, many Section 363 sales agreements contain provision for a “breakup fee,” which is a specified amount to be paid to the stalking horse in the event that it is not the winning bidder. The amount of the “breakup fee” must be approved by the bankruptcy court. The bankruptcy court will apply either a “business judgment” test or a “necessary to preserve the value of the estate” test to determine whether to approve a breakup fee. Under the “business judgment” test, breakup fees are presumably valid, and the court simply asks whether there was reasonable basis for the breakup fee and whether the amount was established in good faith and with due care. Under the “necessary to preserve” test, the court must find that the breakup fee actually benefited the estate by inducing or preserving the stalking horse bid. The test that the court will apply varies, but, under either formulation, courts will generally approve a breakup fee of two to four percent of the initial purchase price.

The identification of a stalking horse bidder and negotiation of a form asset purchase agreement is just the first step in the process. The debtor must not only apply to the bankruptcy court for approval of the

Moss & Barnett Spirit of Giving

While we pursue our professional goals, we also endeavor to improve the quality of life in our communities and around the world. Members of the Moss & Barnett team apply the same dedication to service by making significant contributions of their time and resources to charitable organizations important to all of us.

In keeping with the Moss & Barnett tradition of helping out with relief funding for major natural disasters, our board of directors determined to contribute to the **American Red Cross Relief Funds for Hurricanes Harvey, Irma, and Maria**, by matching employee contributions. The firm and its employees raised approximately \$15,000 to assist those in need after these devastating storms. To learn more about the American Red Cross, visit redcross.org.



*Additionally, our newly launched **M&B Cares** initiative participated in three service projects this past fall and winter.*

Twin Cities Walk for Water in support of Water Mission raises money and awareness to support people around the world who have to walk several miles daily to supply water to their families. On Saturday, September 16, 2017, Moss & Barnett employees and family members participated in the second annual Walk to raise awareness and funds that save lives. To learn more about Water Mission, visit watermission.org.



Pictured left to right: Bruce Berreman (holding Eugene), Martha Berreman, Rick Johnson, Debbie Weinstock, Peter Allen, Kathy Allen, Jana Aune Deach, Karen Berg, Tatiana Carvajal, Beth Boal with Fiona and Della Boal, Misty Gozola with Signe and Jonathan Gozola (not pictured: Elliot and Felix Allen)

Timber Bay seeks out kids in our midst who are too often overlooked. Some struggle silently in school; others act out in self-destructive behaviors. Timber Bay's staff develops long-term relationships with the youth they serve through a dynamic camping and community approach. On Saturday, November 18, 2017, Moss & Barnett employees, family members, retirees, and friends assisted Timber Bay with setting up 500+ Christmas trees for their annual fundraising event where 100% of the profits go to benefit youth in the community. To learn more about Timber Bay, visit timberbay.org.



Pictured left to right: Karen Berg, Gina DeConcini, Cindi Littlejohn, Jay Littlejohn, Nick Tautges, Art Glassman, Misty Gozola, and Beth Boal

Community Emergency Services (CES) Neighborhood Food Shelf is a critical part of CES's food programming, which had more than 80,000 client contacts in 2015 and distributed 516,000 pounds of food. Moss & Barnett hosted a food drive throughout the month of November 2017 to donate food for the holidays to the food shelf. To learn more about Community Emergency Services, visit cesmn.org.



M&B Cares Committee from left to right: Jeff Waldron, Shelly Doerr, Jana Aune Deach, Joe Avechucu, and Nick Tautges

Moss & Barnett Spirit of Giving

Every year, **Breaking Free** helps an average of 400-500 women and girls escape systems of prostitution and sexual exploitation through advocacy, direct services, housing, and education. This past holiday season – and for the fifth year in a row – the firm’s women attorneys “adopted” two Breaking Free families for the holidays. Our attorneys supplied gifts and gift cards according to each family’s “wishes,” helping to ensure that these families had a joyful holiday. In addition, members of the firm continue to donate various daily items in need such as pots and pans, silverware, and women and children’s clothing. To learn more about Breaking Free, visit breakingfree.net.



Pictured back row left to right: Chelsy Jantsch, Marcy Frost, Beth Gliedman, Betsy Kiernat, Jodi Johnson, Shannon Heim, Brittney Miller, Taylor Sztainer, Caroline Simonson, Nancy Kiskis; front row left to right: Katherine Pasker, Gina DeConcini, Susie King, Cindy Ackerman, Kelly McGinty and Jennifer Reussé (not pictured: Kathy Allen, Lindsay Case, Jana Aune Deach, Sarah Doerr, Maggie Garborg, Cecilia Ray, Susan Rhode, Marsha Stolt, and Terese West)

We are very grateful to have our Moss & Barnett team members, family members, and friends get behind these important community initiatives and to give generously of their time, talent, and financial support.

Moss & Barnett Congratulates its “Lawyer of the Year” For 2018

Best Lawyers® has named **Kevin M. Busch** as the Minneapolis *Best Lawyers* Financial Services Regulation Law “Lawyer of the Year” for 2018.

Best Lawyers began designating “Lawyers of the Year” in the United States in high-profile legal practice areas in conjunction with its 15th edition (2009). Only a single lawyer in each practice area and designated metropolitan area is honored as “Lawyer of the Year,” making this accolade particularly significant. Lawyers who are honored as “Lawyer of the Year” are selected based on particularly impressive voting averages received during exhaustive peer review assessments conducted with thousands of leading lawyers each year.



Kevin Busch

Designation as “Lawyer of the Year” reflects the high level of respect a lawyer has earned among other leading lawyers in the same communities and the same practice areas for his or her abilities, professionalism, and integrity.

In addition to chairing Moss & Barnett’s banking and commercial transactions team, Kevin serves as Moss & Barnett’s Chief Operating Officer, Chief Financial Officer, and is a director on its board of directors. Since 1981, Kevin has practiced in the areas of bank regulation, commercial lending, real estate lending, and UCC. He has been repeatedly listed in *The Best Lawyers in America* and *Super Lawyers*. Kevin was also named a *Best Lawyers*’ Minneapolis Financial Services Regulation Law “Lawyer of the Year” in 2015.

Congratulations, Kevin, for this well-deserved recognition!

Section 363 of the Bankruptcy Code – A Tool for Buying and Selling Financially Distressed Assets - Continued from Page 7

stalking horse bid, form of asset purchase agreement, and the breakup fee, but must also obtain approval of bidding procedures for soliciting higher and better offers. This is typically accomplished through a sales procedures motion. The sales procedures will specify, among other things, the auction time and place, the extent and manner of the notice to be given of the auction, the deadline for qualified bidders to submit bids, and the deadline for any objections to the sale. To gain approval of the sale procedures, the court and interested parties must be convinced that the sale procedures are designed to ensure a fair and competitive bidding process that maximizes the value of the assets to be sold. Other interested parties, such as secured creditors and the unsecured creditors committee, are typically engaged in negotiations about the terms of the sale procedures motion. They will get notice of the proposed sales procedures and have an opportunity to object. For that reason, having prior agreement to the proposed procedures is preferable.

Once a stalking horse bidder has stepped forward and the sales procedures have been approved by the court, other qualified bidders are afforded the opportunity to submit bids. The sales procedures order will specify where and how information about the opportunity to bid on the assets offered for sale will be made available. The order will also define who may be a “qualified bidder” and what constitutes a “qualified bid.” Generally, a “qualified bidder” is an entity that is willing and financially able to submit an irrevocable offer, in the form of a “marked up” version of the stalking horse’s purchase agreement, that is greater than the amount of the stalking horse’s bid. The sales procedure order will specify the increment by which a “qualified bid” must exceed the

stalking horse bid. To minimize the possibility of a bidder’s default, a common requirement for a qualified bid is evidence of the bidder’s financial ability to perform, payment of a deposit, or both.

Many Section 363 sales garner no bids beyond the stalking horse bid. However, it is not uncommon for there to be more than one qualified bidder. When there is more than one bidder, the assets are sold at auction. In structuring the auction, care should be taken that bidding procedures are clear, that such essential items as the time and place for submitting bids, minimum bids, and bidding increments are specified, and that the method for evaluating competing bids is understood.

Interested parties, including the debtor, the debtor’s creditors, and potential purchasers should all participate in formulating the sales procedures order to avoid any misunderstandings. Because bids can be in the form of cash, credit for existing liens, equity in the reorganized entity, or equity in the bidding entity, a method for comparing the value of bids containing differing proportions of the various allowed “currencies” is important. Failure to reach prior agreement on this issue can result in delay and a significant increase in transaction costs. A case involving the Polaroid Corporation serves as an example of what can happen if the parties do not agree on a procedure for determining the “highest and best” bid. In the Polaroid case, two bidders each proposed to fund a purchase through a combination of cash and equity in a reorganized debtor. The debtor and the unsecured creditors committee could not agree which bid was worth more. After the debtor declared a winner under the sales procedures order, the unsecured

creditors committee contested the approval of the winning bid, arguing that the equity portion of the bid that was rejected by the debtor had to be evaluated differently from the equity portion of the bid chosen as the winner by the debtor. The bankruptcy court ultimately upheld the unsecured creditors committee’s argument, observing that, because the committee members would be the future equity holders, the committee’s preference should control. The dispute over which bid was the “highest and best” added significantly to the cost of the proceeding.

Final Thoughts

A Section 363 sale is a valuable tool for anyone considering the sale or acquisition of financially distressed assets. With careful advance planning that makes use of experienced and knowledgeable financial advisors and legal counsel, a transaction that maximizes value for both buyers and sellers can be structured in many cases. Unlike a sale outside of bankruptcy, a Section 363 sale can maximize the value received for the debtor’s assets through a swift transaction that gives the successful purchaser assurances of finality and freedom from claims by existing creditors. Maximizing the value of the debtor’s assets fulfills management’s and the debtor’s fiduciary obligations to creditors. The acquiring party in a Section 363 sale gets the benefits of a speedily completed transaction and the added protections afforded by Section 363(m).

The efficacy of Section 363 sales is demonstrated by their growing popularity and their use in such iconic cases as *General Motors*, *Chrysler*, *Polaroid*, and *Kodak*. To take advantage of Section 363 sales, seek the advice of experienced financial advisors and attorneys.

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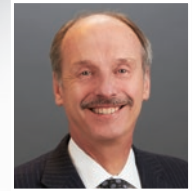
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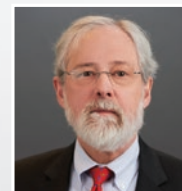
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