Corporate Restructuring & Bankruptcy

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Litigation Finance: Bankruptcy's Best-Kept Secret

BY JUSTIN BRASS

Litigation claims held by bankrupt or distressed entities pose a unique set of challenges to bankruptcy lawyers and practitioners.

The most obvious challenge is unlocking the value of pending litigation when capital and appetite for risk are scarce. As a result, potentially valuable claims may not be pursued at all—or settled for an amount far below what could be realized with proper resources—even when those claims contain extraordinary potential value or are the only means of recovery for unsecured creditors.

In bankruptcy scenarios, there may be times where little money is available for a bankruptcy estate professional (or liquidation trustee) to pay lawyers. A debtor has a duty to maximize recoveries for the benefit of the creditors, but lacking adequate cash to hire lawyers, the case cannot be brought. That means the asset cannot be realized, and the creditors are left without their entitlement. While lawyers and bankruptcy practitioners are duty-bound to maximize value to the estate, the expectation that they will work on a full- or partial-contingency basis is not always realistic—nor that they will take on the added risk of out-of-pocket expenses. Again, the result may be an inclination to settle for less than a claim is worth or to forgo claims altogether.

There is a solution, however: litigation finance.

Defining Litigation Finance

Litigation finance refers to any transaction through which the asset value of a litigation claim is used to secure financing from an outside financier. Funds are most often provided on a non-recourse basis, meaning that return of capital is tied to the successful outcome of the litigation. Thus, the non-recourse nature of financing makes it appealing to creditors who may not want to risk any of the cash currently in the estate.

> Litigation finance provides **capital solutions in bankruptcy** in a variety of ways.

Litigation finance is growing. According to the 2016 Litigation Finance Survey, the number of U.S. lawyers reporting that their firms have used litigation finance quadrupled between 2013 and 2016. Litigation finance has also evolved, moving from funding fees and expenses in connection with a single matter, to more complex arrangements such as financing litigation portfolios, which may mix plaintiff as well as defense cases.

Arguably, bankruptcy practitioners in the United States utilize litigation finance far less than they should. They don't realize that funding is available at every stage of the bankruptcy process. Estates can access significant capital from a litigation financier that purchases a claim or the right to fund and manage it. Liquidating estates and liquidation trusts can also use litigation finance to fund a liquidation plan or litigation trust. Cash-poor estates and trusts with litigation assets can access capital to launch a broad litigation strategy that can increase the value of recoveries.

How It Works

Litigation finance provides capital solutions in bankruptcy in a variety of ways.

If an estate has a single high-value claim with substantial risk, the funder can provide capital to the estate by purchasing the claim or the right to fund and manage it. The funder will make an up-front payment to the estate, and the estate will maintain substantial upside from any recovery in the claim. The financier assumes the full litigation risk of the claim, including management, funding and enforcement.

Litigation finance can also be used by liquidating estates to fund a liquidation plan or litigation trust. A funder can provide non-recourse capital to cash-strapped estates and trusts that have litigation assets, potentially allowing for a faster and more efficient recovery to the estate and creditors. Creditors may also prefer to seek funding for a litigation trust so that a bankruptcy estate may distribute more cash from a liquidating estate or, in the case of a reorganized business, use the cash to support the reorganized company's operations as opposed to funding litigation where the reorganized business will not obtain the benefits. With increased liquidity, an estate can decide to launch a broad litigation strategy that can increase creditor recovery. This option is particularly well suited for an estate or trust that has a portfolio of cases with varying levels of risk and expected duration.

Litigation finance can also provide non-recourse capital to law firms that litigate bankruptcy matters on contingency. The direct injection of capital helps smooth cash flow for the firm and lower its risk exposure. This in turn enables the firm to capitalize the expansion of its contingency business or take on litigation expense

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Buyers Beware! Second Circuit Limits Scope of 'Free and Clear' Sale

BY MICHAEL SIROTA AND FELICE YUDKIN

A sale of assets pursuant to §363 of the Bankruptcy Code has become an increasingly routine method for a distressed company to expeditiously and effectively liquidate its assets and restructure its financial affairs. Such sales, commonly known as "363 sales," provide both great value and protection to buyers.

Purchasers steadily rely on the debtor's ability to sell assets "free and clear" of claims and interests, including product liability claims against the debtor-seller. On July 13, 2016, the U.S. Court of Appeals for the Second Circuit, however, issued a ruling in the General Motors bankruptcy case (*Elliott v. Gen. Motors LLC (In the Matter of Motors Liquidation Co.)*, 2016 WL 3766237 (2d Cir. 2016)) calling into question the limits on the enforceability of these "free and clear" provisions, especially against known claimants who did not receive actual notice of the sale. The *Motors Liquidation* decision serves as an important lesson to buyers of assets in 363 sales: Actual notice to known or potential creditors is critical.

Background

In 2009, General Motors Corporation ("Old GM") filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code. Immediately after the commencement of the bankruptcy case, Old GM sought to sell its core assets to a new entity ("New GM") owned predominantly by the U.S. Treasury. Old GM provided notice of the proposed sale by direct mail to "all parties … known to have asserted any lien, claim, encumbrance, or interest in or on [the to-be sold assets]." Old GM also noticed the sale in major publications.

After extensive negotiations and hundreds of objections filed by, among others, consumer organizations, state attorneys general and accident victims, the Bankruptcy Court for the Southern District of New York (the "Bankruptcy Court") issued an order approving the sale pursuant to §363 of the Bankruptcy Code (the "Sale Order"). Except with respect to those liabilities expressly assumed by New GM, the Sale Order provided that the sale to New GM was "free and clear of all liens,

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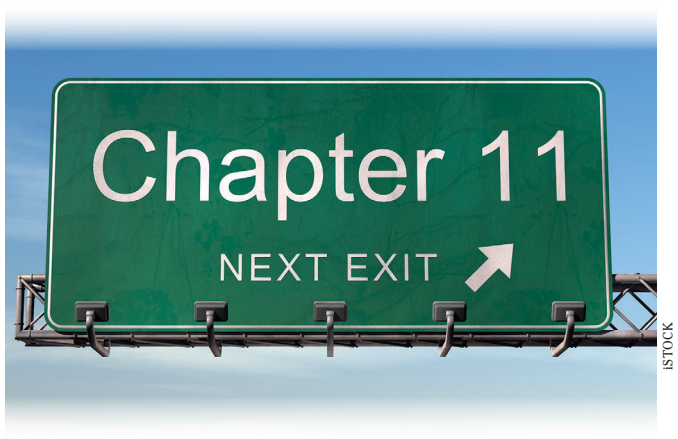
The Road To Chapter 11 Is Paved With Golden Shares: 'Intervention Energy'

BY OSCAR PINKAS AND MATT WEISS

Creditors and equity holders routinely attempt to restrict entities with whom they transact business from filing for bankruptcy protection, as bankruptcy jeopardizes the ability to fully realize on an equity interest or recover on a claim.

It is well established that contractual provisions that explicitly prohibit an entity from filing for bankruptcy protection are prohibited by the public policy underlying the Bankruptcy Code, so creditors and equity holders have devised creative ways to impede entities with whom they are dealing from filing for bankruptcy without explicitly proscribing it by contract. They have turned to more indirect mechanisms, for example, where the creditor or equity holder occupies a blocking position on the board of directors or otherwise retains interests that include a veto right.

More recently devised mechanisms akin to a "golden share" have not yet faced extensive judicial scrutiny. However, in one recent decision, *In re Intervention Energy Holdings*, No. 16-11247, 2016 WL 3185576 (Bankr. D. Del. June 3, 2016), Judge Kevin Carey drew from existing case law on blocking directors to constrict the types of bankruptcy remote structures that could survive a challenge under the Bankruptcy Code. The decision is an important one given the prestige of the court and its role as the preeminent venue for corporate restructurings. Familiarity with the decision is assumed.



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Commentary

The court's decision, along with *In re Lake Michigan Beach Pottawattamie Resort*, 547 B.R. 899 (Bankr. N.D. Ill. 2016), potentially represent a new limitation at the intersection of contract rights and federal public policy in favor of bankruptcy relief. While *Intervention Energy Holdings* is arguably just an application of analogous prior case law, it is among few decisions applying the battle-tested legal construct to a newer mechanism designed to restrict bankruptcy relief.

The retention and extent of fiduciary duties owed may be critical. *Lake Michigan Beach* invalidated provisions within a forbearance agreement stating that a secured lender obtained a position on the debtor's board of directors with a right to approve or disapprove of any "material action," including the right to institute bankruptcy proceedings. Id. at 903-04. Significantly, the lender would gain a director seat even though it had "no interest in the profits or losses of the Debtor, no right to distributions or tax consequences and [was] not required to make capital contributions to the Debtor." Id. at 904. Further, the lender was "not obligated to consider any interests or desires other than its own" and had "no duty or obligation to give any consideration to any interest of or factors affecting the [potential debtor] or the Members." Id. The court in *Lake Michigan Beach* found that because the lender was not required to consider the debtor's interests when acting as a special member of its board of directors, the lender was only required to consider its own best interests. Therefore, its position as a blocking director was too close to an outright waiver of the debtor's right to file bankruptcy and was void under both Michigan law and federal public policy. Id. at 914.

The court in *Lake Michigan Beach* stated that a "blocking director must always adhere to his or her general fiduciary duties to the debtor … . That means that, at least theoretically, there will be situations where the blocking director will vote in favor of a bankruptcy filing, even if in so doing he or she acts contrary to [the] purpose of the secured creditor from whom he or she serves." Id. at 912; see also *In re Gen. Growth Props.*, 409 B.R. 43, 64 (Bankr. S.D.N.Y. 2009) and *In re Kingston Sq. Assocs.*, 214 B.R. 713, 736 (Bankr. S.D.N.Y. 1997). Similarly, the court in *Intervention Energy Holdings* found it dispositive that the golden share was impermissible where its "sole purpose and effect" was to place into the hands of the lender "the ultimate authority to eviscerate the right of [the debtor] to seek federal bankruptcy relief," the

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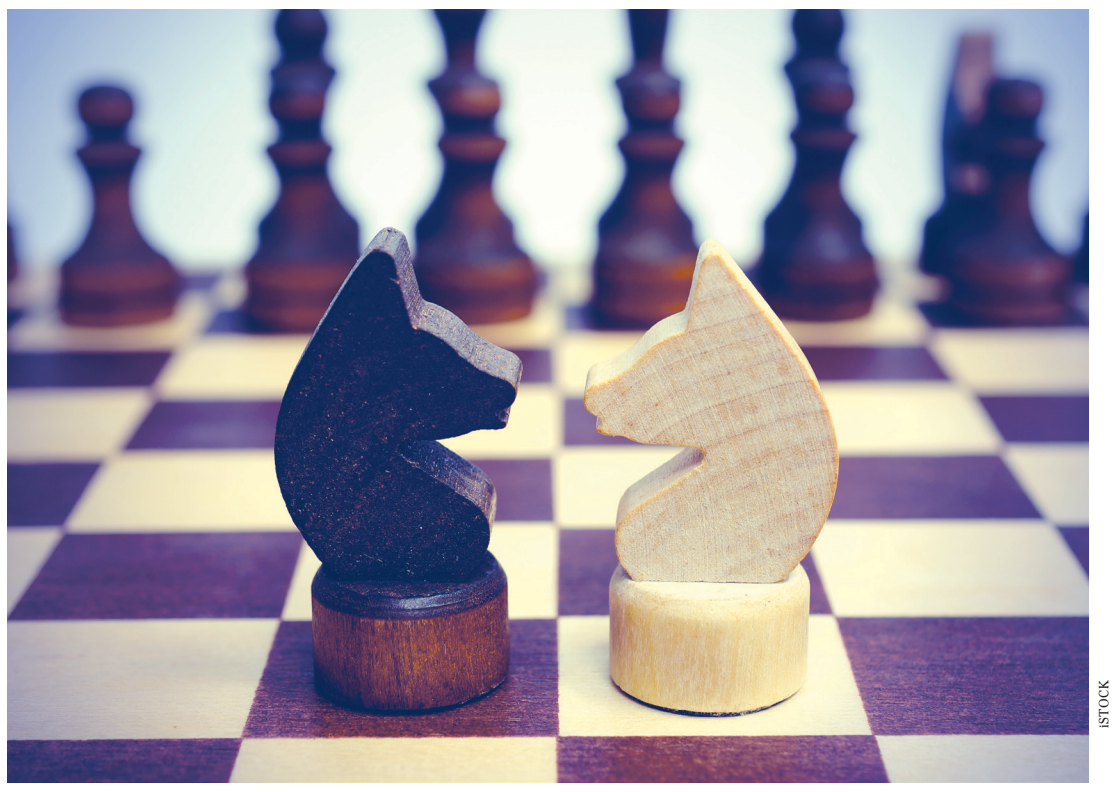
Inside



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Second Circuit, Delaware Bankruptcy Court Disagree On **Fraudulent Transfer Issue**

BY JONATHAN L. FLAXER, MARC D. ROSENBERG AND DANIEL N. ZINMAN

In a pair of recent decisions involving challenges to payments received by shareholders prior to a bankruptcy filing, the U.S. Court of Appeals for the Second Circuit and the U.S. Bankruptcy Court for the District of Delaware pointedly disagreed over whether the safe harbor contained in §546(e) of the Bankruptcy Code preempts state law fraudulent transfer claims, thereby preventing creditors from bringing fraudulent transfer claims when the trustee or other representative of the bankruptcy estate is precluded from bringing such claims.

When a company seeks bankruptcy relief following a failed leveraged buy-out, parties often seek to recover the payments made to the selling stockholders for their shares under fraudulent conveyance theories. This occurred in two recent cases: *In re Tribune Co. Fraudulent Conveyance Litig.*, 818 F.3d 98 (2d Cir. 2016) and *PAH Litigation Trust v. Water St. Healthcare P'ners L.P. (In re Physiotherapy Holdings)*, Adv. Pro. No. 15-51238 (KG), 2016 WL 3611831 (Bankr. D. Del. June 20, 2016). In both cases the lawsuits were commenced by creditors rather than a trustee or other estate representative (i.e., debtor in possession or creditors' committee), and therein lies the rub. In general, since the damages caused by the alleged fraudulent transfer harm the creditor body as a whole, the claim belongs to the bankruptcy estate and only the estate representative may bring the fraudulent transfer claims. Section 546(e) of the Bankruptcy Code, however, bars an estate representative from bringing fraudulent transfer claims that seek to recover settlement payments of securities transactions, except for claims involving actual fraudulent intent (i.e., intent to hinder, delay or defraud creditors). Thus, estate representatives cannot bring constructive fraudulent transfer claims, i.e., transfers made for less than reasonably equivalent value while the debtor was insolvent, or which rendered the debtor insolvent or left the debtor with insufficient capital, to avoid settlements of securities transactions. Generally, intentional fraudulent transfer claims are more difficult to prove since one must establish the transferor's subjective intent.

In *Tribune* and *Physiotherapy*, the creditor-plaintiffs contended that §546(e)'s proscription on avoidance of settlement payments under constructive fraudulent transfer theories did not apply since they were not estate representatives. In *Tribune*, individual creditor/plaintiffs brought their claims in various state and federal courts (later consolidated into an MDL in the Southern District of New York) after the Bankruptcy Code's two-year deadline for the estate representative to bring fraudulent transfer claims had passed. In *Physiotherapy*, the creditor/plaintiffs assigned their state law fraudulent transfer claims against the selling shareholders to a litigation trust formed pursuant to the debtor's Chapter 11 plan, which then brought the claims on the creditors' behalf. The defendants in both cases moved to dismiss, arguing (in part) that §546(e) preempts state law, thus dooming the lawsuits. *Tribune* agreed with the defendants. *Physiotherapy* did not.

The doctrine of preemption has two basic variants: (1) express preemption, where a federal statute explicitly preempts state law; or (2) implied preemption, where state laws are preempted to the extent they conflict with a federal statute, for example when "state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hillman v. Maretta*, 113 S.Ct. 1943 (2013). The text of §546(e) is devoid of express preemption, because it refers only to the trustee. Thus, both sets of defendants argued that permitting creditors to pursue state constructive fraudulent transfer claims to avoid and recover payments to selling shareholders would conflict with the purposes and objective of Congress in enacting §546(e).

The Second Circuit found an ambiguity in the statute as to whether the claims, asserted by individual creditor-plaintiffs, which such plaintiffs argued reverted back to them once the debtor's two-year limitations period expired, were barred by §546(e). To resolve the ambiguity, the Circuit looked to legislative intent to determine whether the creditors' state law claims impermissibly conflicted with the congressional purpose of §546(e). According to *Tribune*, the purpose of §546(e) is to protect participants in the settlement of securities transactions from avoidance actions, which, if allowed, would have a serious negative impact on the stability of the securities markets. Thus, allowing individual creditors to proceed with their state constructive fraudulent transfer actions in circumstances where the estate is precluded from bringing such claims would conflict with the purpose of §546(e), and was thus subject to implied preemption.

In contrast, *Physiotherapy* considered and disagreed with *Tribune*'s preemption analysis. The Delaware bankruptcy court found that the purpose of §546(e) is to protect securities markets from systemic risk, noting that "the one constant was the idea that 'certain protections are necessary to prevent the insolvency of one commodity or securities firm from spreading to other firms and [possibly] threatening the collapse of the affected market.'" *Physiotherapy*, at *8 (quoting H.R.Rep. No. 97-420, at 1). In *Physiotherapy*, the alleged fraudulent transfers consisted of payments to corporate insiders of the debtor, a private company, who were determined to have acted in bad faith. Based on this, the *Physiotherapy* court reasoned that avoiding this transaction would not affect the public markets and ruled for the creditor-plaintiffs. This, of course, leaves open the question as to whether the court would rule differently if the underlying securities were publicly traded and/or if the defendants were minority shareholders, rather than corporate insiders who acted in bad faith.

In conclusion, in the Second Circuit, it is hard to imagine any state law constructive fraudulent transfer claims surviving a bankruptcy filing by the debtor. By contrast, one decision by the Delaware Bankruptcy Court has fashioned a rule that casts doubt on the ability of defendants to obtain dismissal of these type of cases based on federal preemption, but leaves open the possibility of application of the doctrine in cases where avoidance of the settlement payment could impact the stability of the public securities markets.

The U.S. Court of Appeals for the Second Circuit and the U.S. Bankruptcy Court for the District of Delaware pointedly **disagreed over whether the safe harbor** contained in §546(e) of the Bankruptcy Code **preempts state law fraudulent transfer claims.**

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Risk Mitigation for **Private Equity Sponsors**

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BY NANCY A. MITCHELL AND MATTHEW L. HINKER

Successful private equity sponsors are often actively involved in the management of their portfolio companies. That involvement, which may include holding a majority of the board seats, providing financial analysis and modeling support, dictating the capital structure and setting business strategies, can be important to the sponsor's ability to realize on its investment.

That same involvement, however, can expose the private equity sponsor to risk in the event the portfolio company underperforms and becomes distressed. Private equity sponsors dealing with a distressed or troubled portfolio company should be conscious of the risks in dealing with their portfolio companies and employ risk mitigation strategies where appropriate.

Those risks include personal liability for officers and directors for certain actions taken by the officers or directors, including, but not limited to, improperly obtaining personal benefits, actions taken in bad faith, intentional misconduct, or acting in a grossly negligent manner. In addition to personal liability for the officers and directors, the private equity sponsor may incur liability if a plaintiff is able to successfully overcome the presumption of separateness with respect to the corporate entities. While the elements of piercing the corporate veil vary by jurisdiction, as a general rule, the private equity sponsor may incur liability if the sponsor exercised complete domination and control over the portfolio company and used that control to circumvent a statute, commit fraud or perpetuate an inequity.

Legal Overlay

The risks for private equity sponsors dealing with distressed investments arise generally from the application of the laws governing fiduciary duty and alter ego. Both are state law concepts that vary somewhat by jurisdiction and by corporate form. While a detailed analysis of those bodies of law is beyond the scope of this article, the issues posed by these legal principles for private equity sponsors dealing with troubled investments are fairly simple and can be summarized as follows:

Fiduciary Duties

Directors and officers generally owe a duty of care and a duty of loyalty (including good faith) to the entity for which they are acting. Once a company becomes insolvent, those fiduciary duties expand to include all constituents not just equity holders. As a result, directors (and officers) appointed by a private equity sponsor are charged with making decisions that maximize value for all constituents even if those decisions are inconsistent with the equity position held by the private equity sponsor. That tension is exacerbated because the law may apply a heightened scrutiny rather than simple business judgment to decisions made by conflicted boards.

Alter Ego

The legal concept of alter ego (or piercing the corporate veil) is generally applied when a person or entity so dominates and controls another as to make that other a simple instrumentality or adjunct to it. If those circumstances exist, the courts will look beyond the legal fiction of distinct corporate existence and consider the parent or dominating entity to be the same as the corporation. An alter ego argument can be made where private equity sponsors dominate and control their portfolio companies.

Where the Issue Arises

This legal overlay comes into play for private equity sponsors dealing with a troubled or distressed investment in a number of different ways. Some of the most common are:

- The portfolio company pushing toward a desired outcome without considering a range of options that might be value maximizing for all constituents.
- The private equity sponsor providing financing at various levels of the capital structure putting itself into the position of creditor and equity holder (as well as controlling the board).
- Employees of the private equity sponsor negotiating the terms of the financing or restructuring both as representatives of the portfolio company and of the private equity sponsor.
- Employees of the private equity sponsor directing management as to what creditors should be paid or how to operate the portfolio company with limited liquidity.
- Decisions being made without formal board meetings or corporate formalities due to overlay of private equity representatives and the board.

None of these are inherently wrong. In fact, in most cases the private equity sponsor brings its resources to the table in order to do the right thing for all of the constituents of the portfolio company. Yet, if the portfolio company subsequently fails or files for Chapter 11, each of these situations provides potential fodder for a creditors committee or other party to leverage the private equity sponsor through arguments based on fiduciary duty or alter ego theories.

> The **risks for private equity sponsors** dealing with distressed investments arise generally from the application of the laws governing fiduciary duty and alter ego.

Risk Mitigation

Against this backdrop, private equity sponsors with troubled portfolio companies should be vigilant in assuring that they analyze the legal overlay that applies to their particular situation and apply risk mitigation techniques as appropriate. Some of those include:

- *Board Process*: Conducting regular (and formal) board meetings, preparing and executing appropriate resolutions, maintaining separate corporate records and properly electing directors and officers.
- *Independent Directors*: Retaining an independent director (or two) with crisis experience to provide a level of independence in the board process and mitigate the conflict issues.
- *Clear Communication*: Be clear in communications with third-parties as to the role the employees of the private equity sponsor are playing (e.g., are they communicating as a lender, a representative of the company or as the PE sponsor).
- *Professionals*: Involve appropriate restructuring professionals who can advise on process and fiduciary duties.
- *Range of Options*: Consider a range of options for addressing the portfolio company issues, not just a desired outcome.
- *Involvement of Management*: Assure that the day-to-day management of the portfolio company is actively involved in the restructuring activities.
- *Structure Investments*: Assure that any rescue financing or equity contribution is structured in a way that minimizes the risk of subsequent litigation or challenge.

Most of the risk mitigation strategies available are fairly simple to implement and do not come with substantial cost. Nor are they outcome determinative. They do, however, provide material protections for private equity sponsors in the event that a portfolio company cannot be turned around or has to go through a bankruptcy process.

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Finance

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risk when a cash-poor estate is unable pay litigation expenses. The litigation financier can provide capital to firms for substantial single cases or across a portfolio of cases.

In the right circumstances, providers of finance may even take on the role of litigation trustee: The financier also provides the expertise to identify the claims most likely to yield significant recoveries, select the best lawyers and negotiate the right agreements for each claim. By having "skin in the game", the provider's interests are well aligned with the creditors to obtain the best recovery possible in the shortest timeframe.

Case Study: Financing An Insolvent Estate's Litigation Portfolio

Grant Thornton, a leading professional services company based in London, had a financing need that is not at all uncommon in the bankruptcy space, but which nevertheless had no clear-cut solution. The firm needed financing across a portfolio of bankruptcy cases in which its partners were trustees.

Burford provided an innovative $9 million facility against one insolvent estate's litigation portfolio, permitting Grant Thornton the flexibility to administer all of the claims by and against the estate instead of being limited to funding legal fees for claims. The portfolio design accommodated defense costs, declaratory matters, administration costs and importantly the insolvency practitioners' fees and expenses. It also streamlined the financing process, obviating the need to deal with financing the cases on a one-by-one basis.

Finding the Right Litigation Finance Partner

Once the decision has been made to seek outside funding, it is important to remember that all capital is not created equal. Bankruptcy practitioners and lawyers should do their due diligence and carefully assess the strengths and weaknesses of capital providers.

Ideally, they should look for outside funders with both litigation and bankruptcy expertise, because it is essential to understanding the risks of litigation assets and the unique nature of the bankruptcy process. In addition, the bankruptcy practitioner or lawyer should have confidence that the funder will be able to commit sufficient capital for the timeframes required by complex commercial litigation. An estate is better off working with a financier with its own, perpetual capital.

Golden Shares

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relationship was "that of a creditor—not equity holder," and the lender owed "no duty to anyone but itself … ." 2016 WL 3185576 at *6. The two courts' focus on whether fiduciary duties are retained, and the extent of duties required, may be an important one going forward in analyzing similar provisions, and explains the outcome in at least one case where a blocking director scheme was upheld. See *In re Global Ship Systems*, 391 B.R. 193 (Bankr. S.D. Ga. 2007).

Conclusion

Intervention Energy Holdings adapts an approach previously taken to blocking directors in a corporation to golden shares in a decision by an influential court. While the decision can be read as limited to its facts and circumstances, it is arguably a broader extension of case law regarding what level of involvement a creditor or equity holder can have to steer a potential debtor away from a bankruptcy filing. Assuming the latter, the decision is a significant development as it would put at risk similar bankruptcy-remote structures in one of the most heavily trafficked courts. Moreover, the boundaries for invalidating bankruptcy filings in similar circumstances remain undefined given the dearth of decisions considering golden shares and the many variations in factors and contractual and governance provisions to consider (such as the extent and mixture of debt/equity interests, corporate structure, the extent of fiduciary duties, in what capacity the decision is made, any other impediments such as independent director requirements, the circumstances under which the impediments were agreed upon, and any exceptions to the foregoing impediments). How *Intervention Energy Holdings* is interpreted will be critical in similar disputes going forward.

Free and Clear

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claims, encumbrances and other interests of any kind or nature whatsoever, including rights or claims based on successor or transferee liability."

Notwithstanding the "free and clear" protections in the Sale Order, class action plaintiffs filed several lawsuits against New GM asserting successor liability claims related to faulty ignition switches in vehicles manufactured by Old GM. In response to the class action lawsuits, New GM sought an order enforcing the Sale Order.

The Bankruptcy Court enforced the Sale Order protecting New GM from liability. The Bankruptcy Court agreed with the class action plaintiffs that Old GM knew or should have known of the ignition switch claims before the sale and, therefore, procedural due process entitled the plaintiffs to actual notice of the sale to New GM. The Bankruptcy Court, however, held that, under the terms of the Sale Order, New GM could not be sued for tort claims that otherwise could have been brought against Old GM, unless those claims arose from New GM's own wrongful conduct. The Bankruptcy Court reasoned that most plaintiffs were not prejudiced by the absence of actual notice of the sale because the court would have approved the sale to New GM regardless, given the high stakes at the time. The Bankruptcy Court certified the judgment for direct appeal to the Second Circuit.

The Second Circuit's Decision

On appeal, the Second Circuit addressed, among other things, (1) the scope of the power to sell assets "free and clear" of claims and interests and (2) the procedural due process requirements with respect to notice of such a sale. First, the Second Circuit held that a bankruptcy court may approve a sale pursuant to §363 of the Bankruptcy Code free and clear of successor liability claims if those claims "flow from the debtor's ownership of the sold assets." In that regard, the Second Circuit held that the plaintiff's pre-closing accident claims arising from ignition switch defects were "claims" in the bankruptcy case covered by the terms of the Sale Order because they arose from Old GM's production of cars before the bankruptcy petition date. To the contrary, certain other claims relating to New GM's post-closing conduct and used car purchaser claims were not based on a right to payment that arose before the bankruptcy case was filed and, therefore, were not barred by the Sale Order.

With respect to notice requirement and due process, the Second Circuit agreed that the plaintiffs were entitled to actual notice of the bankruptcy sale and not mere notice by publication since Old GM knew or should have known about the ignition switch defects. The Second Circuit, therefore, held that enforcing the Sale Order to enjoin pre-sale ignition switch accident claims and economical loss claims against New GM would deprive the plaintiffs of procedural due process given the lack of adequate notice of the sale. The court further found that the insufficient notice did, in fact, prejudice the holders of the pre-closing accident claims because it was not clear to the court that the key players (including the Treasury Department) would not have negotiated with those claimants given the focus on consumer confidence and the need to maintain GM's brand name, as well as the Treasury Department's interest, as a majority of New GM at the time, to protect consumers.

Impact on Future 363 Sales

While §363 of the Bankruptcy Code is an important tool that enables debtors to sell assets free and clear of claims and other encumbrances, the *Motors Liquidation* case exemplifies that the scope of such relief is not without bounds. The Second Circuit's decision should serve as a warning that proper notice and due process are essential to claimants that are known or reasonably should be known by a debtor. In fact, due process concerns may negate provisions of a bankruptcy court's sale order that purport to insulate purchasers from successor liability as was the case in *Motors Liquidation*. Thus, the decision reinforces the need for debtors to fully disclose all potential liabilities in their bankruptcy proceedings and for purchasers to protect themselves from future liability by negotiating an escrow or hold-back of the purchase price.