turnarounds & workouts

News for People Tracking Distressed Businesses

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Clear Channel Confusion

Despite Aberration, Section 363 Asset Sales Appear Final

by Julie Schaeffer

Several recent bankruptcies have confirmed traditional wisdom regarding the finality of a Section 363 asset sale – despite an aberrational 2008 decision in *Clear Channel*.

Section 363(b) of the Bankruptcy Code permits a Chapter 11 debtor that has court approval to sell assets of the estate "free and clear of any interest in such property of an entity other than the estate" prior to a Chapter 11 plan confirmation.

Moreover, the Bankruptcy Code helps ensure that the purchased assets will not become subject to appeal and prolonged litigation. "In other words, if a bankruptcy court authorizes a debtor to sell its assets to a good faith purchaser pursuant to a Section 363(b) sale order, and the bankruptcy court does not stay consummation of such sale

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A Changed Landscape?

Bankruptcy Reform Five Years Later

by Dave Buzzell

In April of 2005, the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) was enacted into law. It was commonly held at the time that the legislation would greatly change the landscape of bankruptcy filings, for consumers and businesses alike.

Now, with the five-year anniversary of the bill in the rear view mirror, it's worthwhile to consider whether the bankruptcy professional's journey these past few years has been through altered terrain and, if so, how much of that has been due to BAPCPA.

Jonathan Carson, Co-Founder and Managing Director of Kurtzman Carson Consultants, argues that the bankruptcy landscape has changed, but BAPCPA is only a small part

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What Happened to 2010?

Restructuring Pro Comments on Industry Slowdown

by Julie Schaeffer

Restructuring firms usually get very busy during recessions, but 2010 turned out to be very soft for most in the industry, says William H. Henrich, Vice Chairman of Getzler Henrich & Associates LLC. What happened to 2010 – and what can restructuring professionals expect in the coming months? Below, Henrich offers his perspective.

"There has historically been an extensive amount of work during recessions," says Henrich. "Some companies don't get ahead of the cycle and are late in terms of trimming down cost structures to re-align to the new reality."

In the most recent recession, Henrich adds, institutions stopped lending and credit markets froze, exacerbating the problem. "Banks didn't want to take any more losses, so

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pending appeal, then the sale cannot be unwound once consummated, even if the underlying sale order is later challenged on appeal," says Joseph Basile a partner at Weil, Gotshal & Manges.

Although most U.S. appellate courts have recognized this so-called "statutory mootness rule," the bankruptcy appellate panel of the Ninth Circuit U.S. Court of Appeals struck it a blow in 2008.

In *Clear Channel*, a senior creditor purchased a bankruptcy estate's assets under Section 363(b). Although the bankruptcy court's sale order permitted the senior creditor to acquire the assets free and clear of the liens previously held by a junior creditor, the bankruptcy appellate panel overturned this order, thus unwinding the "free and clear" transfer of the 363 sale.

"The bankruptcy appellate panel acknowledged that no stay was granted pending appeal, the sale was consummated during the appeals process, and the senior creditor purchased the assets in good faith," says Basile. "But it concluded that Section 363(m) did not protect all terms of the final sale, only the fundamental transfer of title to the assets."

The bankruptcy appellate panel's holding, which essentially maintained that the asset transfer was valid but made the transfer subject to the pre-existing liens of junior creditors, made the sale economically inviable – and left "the business and legal communities to wallow in uncertainty regarding whether finality can truly be obtained in a consummated sale under Section 363(b)," says Basile.

Since the *Clear Channel* ruling, other appellate courts have emphasized the importance of the statutory mootness rule.

For example, in 2009, in *Nashville Senior Living*, appellants asked the Sixth Circuit bankruptcy appellate panel whether a bankruptcy court erred in granting a motion to sell a Chapter 11 debtor's property under Section 363. The bankruptcy appellate panel ruled that because the purchaser acted in good faith and because the Section 363 sale was unstayed and had been consummated, the appeal was moot. This opinion was upheld on appeal by the Sixth Circuit Court of Appeals, which emphasized the importance of "affording finality to judgments approving sales in bankruptcy."

In 2010, in *Polaroid Corporation*, a Section 363(b) sale stripped pre-existing

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of the reason. "The macroeconomic environment primarily impacted how we perceive the evolution of Chapter 11 cases in the last five years. While bankruptcy reform played a part in its evolution, it hasn't significantly shifted the Chapter 11 landscape."

Aaron Hammer, Chair of the Bankruptcy, Reorganization and Creditor's Rights Practice Group at Freeborn & Peters, LLP, concurs, saying that, "It's hard to evaluate BAPCPA in a vacuum given that the economic circumstances have changed so much since 2005."

Those changing circumstances include, according to Hammer, a scarcity of capital in the aftermath of the credit crisis following the collapse of Lehman Brothers; the growth of online sales, which has impacted big box retailers; a sharp decline in the value of real estate and leasehold interests, which has made retail restructurings more difficult; and a growing aversion to risk on the part of lenders. Consequently, says Hammer, a conflux of economic conditions has led to far fewer attempts to reorganize, with liquidations generally being driven by the lenders. "Cases are shorter, they are more liquidation oriented, and the most successful are prepackaged reorganizations."

Both say that through all the economic turmoil, BAPCPA has actually served relatively well. "While BAPCPA has made restructurings more complex and less likely to facilitate reorganization – although the final verdict is still out on that – it has allowed restructuring professionals to be more creative," says Hammer.

To the extent that the act has changed the lay of the land, several provisions are to blame. "A few main provisions were modified," says Carson, "and the ones the industry thought would have the most impact back in 2005 were, in fact, the ones that have had the most impact."

Section 365(d)(4)

The first of these is the lease modification provisions of Section 365(d)(4). Previously, the Bankruptcy Code required debtors to assume or reject leases within 60 days of filing, but that deadline could be extended for cause, which it routinely was, often for months and sometimes for years.

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they had to determine which companies to support and which to write off," he says.

That, Henrich says, led to significant restructuring activity at the beginning of the recession. "In 2007 and 2008 there was a tremendous amount of activity for companies trying to figure out how to survive by cutting cost structures and by banks and other creditors trying to figure out how to deal with troubled borrowers," he says.

Many larger companies with complex capital structures went through Chapter 11 to clean up their balance sheets, says Henrich, but his firm also saw a significant amount of out-of-court workouts. "People have realized how significant the costs associated with bankruptcies are and want to avoid them, especially when they have cooperative parties involved."

That all changed in 2009, Henrich says. "Most of us in the industry thought 2009 and 2010 would be as active as 2007 and 2008 had been, but in fact, the opposite was the case: Late 2009 and 2010 turned out to be very soft."

That, Henrich continues, is because banks were going through a period of what the industry calls "extend and pretend." Companies may not have been performing well, he says, but as long as they were relatively stable, banks were letting them extend their lines because they didn't want to take any more losses.

"As long as companies weren't asking for more concessions or more money, perhaps in the form of interest deferral or moratoriums, banks were modifying their credit agreements," says Henrich. "After all, what were the banks going to do? Push them to a transaction that at the time couldn't get effected? Push them to a refinancing when the credit markets were tight? Push them to a sale when the values were low? Those weren't options, so restructuring activity stalled in many ways."

The result, says Henrich, is that business for many restructuring firms slowed. Getzler Henrich & Associates saw different levels of activity in 2010: Solid business through April, a lull in May and June, followed by an "opening of the floodgates" in July that extended through the fall. But many firms, particularly the larger ones, which had staffed up in 2007 and 2008, slowed to the point that they had to cut staff in 2009 and 2010. "We witnessed significant layoffs in the

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