SUPREME COURT RULES ON CREDIT BIDDING

May 30, 2012

To Our Clients and Friends:

Yesterday, the Supreme Court of the United States ruled that a Chapter 11 plan that provides for the sale of assets free and clear of a creditor's lien must allow the creditor to "credit bid" at the sale. In upholding the Seventh Circuit's decision,[1] *RadLAX Gateway Hotel, LLC v. Amalgamated Bank* resolved the circuit split on this issue between the Seventh Circuit, on the one hand, and the Third and Fifth Circuits, on the other.

BANKRUPTCY CODE

Under Section 1129(b) of the Bankruptcy Code, a Chapter 11 plan may be "crammed down," or confirmed without the consent of an impaired class of creditors, if the plan does not "discriminate unfairly" and is "fair and equitable" with respect to that class. Under Section 1129(b)(2)(A), a plan is fair and equitable with respect to a class of secured creditors if the plan provides that either: (i) the creditors retain their liens and receive deferred cash payments of a specified amount and value, (ii) the collateral is sold free and clear of the creditors' liens, but the liens attach to the sale proceeds and the creditors retain the right to bid for the assets using their debt, or credit bid, at the sale, or (iii) the creditors receive the "indubitable equivalent" of their secured claims.

BACKGROUND

In June 2010, debtors RadLAX Gateway Hotel, LLC and certain affiliates filed a Chapter 11 plan that proposed to sell, free and clear of the liens of certain lenders, substantially all of their assets in an auction. Under the plan, the lenders would receive the sale proceeds but could not credit bid at the auction. The lenders objected, arguing that the plan violated the requirement that they be allowed to credit bid in the sale. The debtors contended that the plan nonetheless satisfied Section 1129(b) by providing the lenders with the "indubitable equivalent" of their claims. The bankruptcy court agreed with the lenders. On appeal, the Seventh Circuit affirmed the

[1] *For a description of the Seventh Circuit's decision in In re River Road Hotel Partners, LLC, see our client alert dated August 16, 2011, available at* http://www.debevoise.com/newseventspubs/publications/detail.aspx?id=cae547f9-8ecb-4d1c-ba67-504f9dbf5d27.

bankruptcy court's decision and refused to follow prior Third and Fifth Circuit decisions limiting secured creditors' right to credit bid in a cramdown plan.[2]

DECISION

In a unanimous[3] opinion written by Justice Scalia, the Court, calling this an "easy case," affirmed the lower court decisions. Applying to Section 1129(b)(2)(A) the well-established "general/specific" rule of statutory interpretation, the Court held that the expansive "indubitable equivalent" clause (iii) cannot apply to a matter that can be dealt with under the more detailed "credit bidding" clause (ii). The Court rejected as "hyperliteral and contrary to common sense" the debtors' position that clause (iii) was the general rule, and that clauses (i) and (ii) merely set forth specific procedures that would always constitute an "indubitable equivalent."

* * *

Please feel free to contact us with any questions.

Jasmine Ball
+1 212 909 6845
jball@debevoise.com

Steven R. Gross
+1 212 909 6586
srgross@debevoise.com

Richard F. Hahn
+1 212 909 6235
rfhahn@debevoise.com

M. Natasha Labovitz
+1 212 909 6648
nlabovitz@debevoise.com

George E. B. Maguire
+1 212 909 6072
gebmaguire@debevoise.com

Shannon Rose Selden
+1 212 909 6082
srselden@debevoise.com

My Chi To
+1 212 909 7425
mcto@debevoise.com

Michael E. Wiles
+1 212 909 6653
mewiles@debevoise.com

---

2 *For a description of the Third Circuit's decision in In re Philadelphia Newspapers, LLC, see our client alert dated March 31, 2010, available at http://www.debevoise.com/newseventspubs/publications/detail.aspx?id=683c6248-419c-447b-9262-e6369b04c6b3.*

3 *Justice Kennedy took no part in the decision.*