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May 31, 2012

Supreme Court Upholds Credit Bidding in What it Calls an "Easy Case"

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In a decision of considerable importance for bankruptcy debtors and lenders, the Supreme Court handed down its ruling earlier today in *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, --- S.Ct. ----, 2012 WL 1912197 (2012). In this highly anticipated decision, the Supreme Court held that a debtor may not confirm a plan under the "cramdown" provision of 11 U.S.C. § 1129(b)(2)(A) where the plan proposes to sell a secured lender's collateral without affording the creditor the opportunity to credit-bid for the collateral. Credit-bidding is the practice in which a secured lender bids all or a portion of its debt in a collateral sale, as opposed to tendering cash consideration. This allows a secured lender to compete with cash bidders without spending more of its cash on a company already in bankruptcy.

The decision hinged on the Supreme Court's straightforward interpretation of § 1129(b)(2)(A), and the Supreme Court declined the parties' invitation to weigh the pros and cons of the credit-bidding practice in bankruptcy, noting "the pros and cons of credit-bidding are for the consideration of Congress, not the courts." Once the matter was reduced to an exercise of statutory construction, the Supreme Court characterized the dispute as an "easy case" and dispatched the debtors' arguments in almost summary fashion. The Court held that § 1129(b)(2)(A) provides secured creditors with specific protections which may not be abrogated by reference to general statutory purposes.

While the Court did recognize that 11 U.S.C.§ 363(k) does allow a secured creditor's collateral to be sold without allowing the creditor to credit-bid where the bankruptcy court orders otherwise "for cause," the bankruptcy court found that there was no "cause" to trigger this statutory exception, and the debtors did not appeal that decision.

The Supreme Court's *RadLAX* decision resolved the existing split between the Seventh Circuit, which had held that a debtor must allow its secured creditor to credit bid, and the Third and Fifth Circuits, which had held that a debtor may satisfy § 1129(b)(2)(A)(ii) without allowing the secured lender an opportunity to credit bid.

The exact bid procedures by which assets may be sold under a "cramdown" plan was not addressed in *RadLAX* and remains largely subject to local rules and the preferences of each

individual bankruptcy judge. These procedures may vary depending on a number of factors, including what assets are being sold, the expected sale amount, whether the assets represent the significant majority of the debtor's estate, the number of potential bidders, and the viability of the debtor after the sale. In general, Courts will require open bidding procedures that ensure the greatest return from the sale of assets. Potential terms of bid procedures include the auction date, determining who is a qualified bidder allowed to participate, the assets to be sold, whether there will be any break-up fees, the initial overbid amount and bid increments.

Endnotes

1 *RadLAX Gateway Hotel v. Amalgamated Bank, 651 F.3d 642 (7th Cir. 2011).*
2 *Respectively, In re Philadelphia Newspapers, 599 F.3d 298 (3d Cir. 2010) and Scotia Pacific Co., LLC v. Official Unsecured Creditors' Comm. (In re Pacific Lumber Co.), 584 F.3d 229 (5th Cir. 2009).*

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