“Fall Down–Go Boom!!: Lessons from the Mega Cases 2008-2010”

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Table of Contents

A. Chrysler

In late 2008 and early 2009, Chrysler Motor Company ("Chrysler") took substantial bailout funds from the United States Government, through the Trouble Asset Relief plan ("TARP") in the approximate amount of $4 billion. Chrysler attempted to workout its debt positions prior to seeking chapter 11 relief, but its efforts were failed. By March 2009, the government had determined that Chrysler was not viable as a "standalone" business and it required a financial partner or a buyer.

Prior to filing for chapter 11 protection, Chrysler, negotiated with multiple parties and interest holders, including its debt holders, interest equity holders, the United Autoworkers Union voluntary beneficiary employee association ("UAW VEBA"), Fiat (as a potential buyer) and the US Government. Pre-petition, Chrysler intended to sell its business to Fiat assuming concessions of union contracts with the UAW. Chrysler's last pre-bankruptcy proposal involved a $6.9 billion debt in exchange for $2.250 billion in cash, but only if 100 percent acceptance from all constituencies could be achieved. The largest lenders agreed, but a handful of smaller hedge funds rejected the proposal, which forced Chrysler into bankruptcy.

On April 30, 2009, Chrysler filed for chapter 11 protection. This was the same day its $4 billion in TARP funds became due. Chrysler also defaulted on its first lien $6.9 billion secured facility and its second $2 billion facility. On the petition day, Chrysler halted production completely. Support for the first day filings indicated that Chrysler had 6-8 weeks of viability in bankruptcy. It was known on the first day that Chrysler would have to sell substantially all of its assets and greatly restructure its union obligations. Three days after the petition date, Chrysler filed a motion to sell its assets to a new company that was owned by Fiat, the UAW VEBA, Canada and the US Government. The transaction was required to close by June 15, 2009, otherwise Fiat would withdraw its commitment. Canada and the US Government also agreed to provide a $6.2 billion senior secured facility to support operations after the sale.

The motion to sell garnered several objections, including from a group of lenders that held a large portion of the first lien facility, and also from several funds from Indiana which held a small portion of the first lien facility. After engaging in an expedited discovery process, within a few days the first group of lenders disbanded. The Indiana funds proceeded with their objections, including seeking to withdraw the reference and appoint a trustee or examiner. The Indiana Funds claimed that their senior secured interest would be impaired while the UAW VEBA, Fiat, the unsecured creditors and the governmental entities would receive value. Among other things, the Indiana funds argued that a finding that the buyers were good faith purchasers was inappropriate, because the US Treasury was improperly controlling the Debtors by being on both sides of the transaction – both as pre-petition lender and post-sale owner. The Indiana funds also sought to stay the sale motion pending their motions to withdraw the reference and appoint a trustee or examiner.

The bankruptcy court conducted a 3-day evidentiary hearing on the sale motion and ruled that the sale was in the best interest of the estate. On May 31, 2009, the bankruptcy court found that the sale to Fiat was Chrysler's only viable option and granted the sale motion. The bankruptcy court found that the governmental entities were not controlling the Debtors on both sides of the sales transaction and that there was no fraud or collusion by the governmental entities. The

Indiana funds first filed a direct, expedited appeal to the Second Circuit, which in turn affirmed the bankruptcy court's approval of the sale on June 5, 2009. On June 8, 2009, Justice Ginsburg issued a stay regarding the sale, which was vacated by the full Supreme Court on June 9, 2009. The sale to New Chrysler closed on June 10, 2009.

Some of New Chrysler's owners include the following: 12.31% to the governmental entities (including the U.S. Treasury and Export Development Canada); 20% ownership to Fiat (with the ability to ultimately achieve 51% ownership); and 55% to the trust established to pay health care obligations to Chrysler's retirees.

As a result of the sale, Old Chrysler's prepetition senior secured lenders were paid $2 billion on their $6.9 billion facility. New Chrysler also assumed approximately $4.5 billion of Old Chrysler's obligations. All other creditors whose debts were not assumed by New Chrysler will not receive a distribution.

Speculation still surrounds the Chrysler sale and many criticize the size of the payout to the UAW VEBA. Those that defend the sale claim that it was necessary to preserve Chrysler as a going concern, while others criticize the speed of the sale and the size of the equity granted to New Chrysler arguing that liquidation of Chrysler would have ultimately been better for the estate's creditors. Others argue that the sale was a de facto plan of reorganization, and the beneficial treatment of the retiree's claims was favored over the secured debt claims. Whatever the criticism, the bankruptcy court, Second Circuit Court of Appeals and the United States Supreme Court all found that the sale to the Fiat group was Chrysler's only hope of moving forward as a going concern.

B. <u>General Motors</u>

General Motors filed for chapter 11 bankruptcy on June 1, 2009 in the Southern District of New York. The beleaguered car company listed assets of $82 billion and liabilities of $172 billion. The numbers, however, do not begin to tell the story of this case. GM was an American icon and an employer of 235,000 people, and as such, spawned a case that was unique both in the public interest it generated and the degree to which the United States government was involved.

At about the same time as the filing, GM ran a commercial aimed at inspiring customer confidence. The commercial focused on the idea of GM "reinventing" itself through bankruptcy, but it also gave a good overview of the reasons for the bankruptcy and the goals that GM was working toward. The process, it explained, was meant to address the issues of a cost structure that could not compete globally and a company that simply had too many brands. The goal of the reorganization was to create a "New GM." The New GM would be: "fewer stronger brands, fewer stronger models, greater efficiencies, better fuel economy, and new technologies; leaner, greener, faster, smarter." The commercial even made a rare reference to Chapter 11 of the Bankruptcy Code noting that "the only chapter we are focused on is Chapter 1."

The fact that the United States government would be partnering with GM to pursue these goals was obvious long before the case was filed. In 2008, the Presidential Task Force on the Auto Industry began overseeing the restructuring of the auto industry in America. GM presented business plans to the Task Force, and as a result, GM was able to eventually obtain approximately $20 billion in prepetition loans from the United States Treasury. And the government certainly did not give up on GM when bankruptcy was filed. As the government emphasized in its statement filed on the first day of the case, "[n]ot only is the fate of GM at stake, but so are the livelihoods of innumerable American workers, suppliers, and dealers – and indeed the American economy as a whole."[1] To respond to this potential threat, the Treasury volunteered to partner with the governments of Canada and Ontario to provide a $33 billion DIP loan to GM, but the government also had a plan for this case. Its first-day statement concluded by noting that "Treasury, as senior secured prepetition lender and proposed DIP lender, has made clear that its financial support for GM is predicated entirely upon the prompt approval of the 363 Transaction."[2]

The government ultimately got its wish, and on July 5, the motion to sell substantially all of the assets of the company was approved. The motion was hotly contested though, with roughly 850 objections filed. The two main objections to the motion were that it constituted a *sub rosa* plan of reorganization and that it limited successor liability claims against the purchaser. In its decision, the court quickly dismissed the contention that the 363 sale constituted a *sub rosa* plan since the proceeds would be distributed to stakeholders consistent with their statutory priorities.[3]

[1] "Statement of the United States of America Upon the Commencement of General Motors Corporation's Chapter 11 Case," Case No. 09-50026, (Bankr. S.D.N.Y.), Docket #37.
[2] *Id.* at 13
[3] *In re* General Motors Corp., 407 B.R. 463, 474 (Bankr. S.D.N.Y. 2009).

The court felt that the issue of successor liability, which was very important to tort litigants and asbestos litigants, was a closer call.[4] Recognizing that both textual analysis and national case law did not resolve the issue, the court chose to follow the law from its own Circuit in holding that "to the extent the Purchaser has not voluntarily agreed to accept successor liability, GM's property—like that of Chrysler, just a few weeks ago—may be sold free and clear of claims."[5]

As a result of the sale of assets, New GM was formed. The company continues to reinvent itself, but it has already taken some steps. Certain brands, such as Saturn and Pontiac have been closed down. Others, such as Hummer, have been sold. The greater test still stands before the company though, to see if it can successfully adapt to truly become "leaner, greener, faster, smarter."

General Motors remains in chapter 11 and is expected to file its plan of reorganization before exclusivity terminates on July 27, 2010.

[4] *Id.*
[5] *Id.* at 475.

C. <u>Lehman</u>

While the Lehman Brothers Holdings Inc. bankruptcy case presses on and continues to make bankruptcy headlines almost daily, this article will only focus on two aspects – the initial sale of certain assets and the effect on the derivatives market.

Bay Harbour Management, L.C. v. Lehman Brothers Holdings Inc. (In re Lehman Brothers Holdings Inc.), Case nos. 08-8869 & 08-8914 (DLC) (S.D.N.Y. March 13, 2009) (Opinion and Order).

<u>Initial Sale to Barclays</u>

In late 2007, Lehman Brothers Holdings Inc. ("Lehman"), the fourth largest independent investment banking and financial services group was struggling financially. Prior to seeking chapter 11 bankruptcy protection, Lehman attempted to sell certain of its assets and divisions, and ultimately sought a bailout from the U.S. Government. When Lehman's was not able to sell its assets out-of-court and the U.S. Government denied a bailout, Lehman was forced for file chapter 11 on September 15, 2008. Two days after the petition date, on September 17, 2008, Lehman filed an expedited motion to sell the assets of Lehman Brothers International ("LBI"), a non-debtor subsidiary, to Barclays Capital, Inc. ("Barclays") "free and clear of liens and other interest."

A group of investment funds (the "Appellants") that maintained prime brokerage accounts with LBI and another, non-debtor subsidiary, Lehman Brothers Inc. (Europe) ("LBIE"), objected to the sale on the basis that Barclays was not a bona fide purchaser of the assets.

On the petition date, Lehman resumed negotiations with Barclays to purchase LBI. The parties executed an asset purchase agreement on September 16 and then sought an expedited sale hearing and process by motion on September 17. On the same day as filing the motion, the bankruptcy court considered the sale procedures, which were supported by the Securities and Exchange Commission, the Federal Reserve Bank of New York, and the Securities Investor Protection Corporation. At the bid procedures hearing, Lehman testified that if LBI was not sold by September 19, Lehman would likely not be a viable going concern. The court approved the expedited schedule and ordered specialized notice by email, fax and overnight mail. The sale hearing commenced on September 19 and carried into the next day. Lehman had several people testify that if Barclays was not allowed to purchase LBI that the failure to consummate the "sale might 'ignite a panic in the financial condition' of the country." *Id.* at 7.

The Appellants objected to the sale and participated in the expedited sale hearing arguing that Barclays was not a good faith purchaser of the assets because certain missing funds referred to as the "Defalcated Funds," which had been transferred from LBIE to LBI, which in turn meant that LBIE was owed $8 billion. The Appellants argued that some of the assets being sold to Barclays derived from the Defalcated Funds. The allegations against Barclays questioned whether Barclays could be a good faith purchase under section 363(m). The Appellants did not have sufficient information to prove that Barclays was not a good faith purchaser, they merely had suspicions and a lack of knowledge regarding Barclay's status.

The court rejected the Appellant's objections, and the objections filed by several others, and approved the sale of LBI to Barclays. The sale order deemed Barclays a good faith purchaser, and further ordered that anyone seeking an appeal must also pursue a stay of the sale. Appellants did appeal, but did not seek a stay of the sale, and thus on September 22, the sale transaction was closed with Barclays. The Appellants' appeal requested a revision of the terms of the sale to vacate the portion of the sale order finding that Barclays was a good faith purchaser and the finding that Barclays took all of LBI's assets free and clear of all interests, liens and encumbrances. The District Court affirmed the sale order finding that the evidence presented at the sale hearing was sufficient to support all findings, including that of Barclays being a good faith purchaser.

After the fact, Lehman started investigating whether Barclays was a good faith purchaser and subsequently brought an action against Barclays for receiving an alleged $5 billion windfall in the sale transaction. The court-appointed trustee in the Lehman's bankruptcy case has determined that about $6.7 billion of cash and securities were wrongfully transferred to Barclays. Lehman is seeking a renegotiation of the sale transaction or damages against Barclays as a result of the purchase. Barclays opposes renegotiation of the deal and also objects the claims alleged in the lawsuit. The parties are currently in the discovery process.

In re Lehman Brothers Holdings Inc., et al., Case No. 08-13555 (Bankr. S.D.N.Y.) (currently pending).

Effect on the Derivatives Market

The Lehman Brothers Chapter 11 involved a massive number of derivative contracts. On September 17, 2009 the United States Bankruptcy Court for the Southern District of New York issued two separate orders that could significantly affect the derivatives markets.

(a) Metavante Order[6]

The Metavante Order relates to a non-defaulting counterparty's right to suspend its performance under and/or terminate a derivative contract. Metavante Corporation, a financial-technology company, entered into pre-petition swap agreements, as evidenced by an ISDA Master Agreement, in which Metavante traded its variable rate debt to Lehman for a fixed rate. Interest rates subsequently fell below the fixed rate putting Metavante "out of the money," however Metavante refused to make its quarterly payments to Lehman as they became due post-petition. Metavante argued that Lehman's bankruptcy filing constituted an event of default thereby excusing Metavante's performance under section 2(a)(iii) of the Master Agreement, which states that a party's obligations to perform only become due if the other party has not committed an event of default at that time. Metavante elected not to terminate the swap at the time of the default, taking the position that it reserved the right to terminate the contract in the future, presumably when market conditions swung back in its favor.

[6] Docket No. 5209.

Lehman filed a motion to compel Metavante's performance. The Court held that the Bankruptcy Code obligates a non-defaulting counterparty to either terminate the underlying contract within a reasonable period of time of the other party's default or to continue performance. Metavante elected not to terminate the contract, therefore, the Court ordered Metavante to pay Lehman approximately $6.6 million in past and current quarterly payments, including default interest, and to continue performing under the contract pending assumption or rejection by Lehman.

The Metavante Order clearly limits a non-defaulting counterparty's ability to withhold performance under section 2(a)(iii) of the Master Agreement on account of a counterparty's bankruptcy. The Court did, however, recognize a non-defaulting counterparty's right to terminate a derivatives contract under the safe harbor provisions of the Bankruptcy Code, as long as the contract is terminated within a "reasonable time" of the bankruptcy filing or other default. What constitutes a "reasonable time" remains to be determined.

(b) ADR Order[7]

In a separate order, the Court may have altered the method in which counterparties settle derivative contracts in future bankruptcy proceedings. Upon motion of the debtors, the Court ordered the debtors and approximately two hundred fifty (250) counterparties to existing or terminated derivative contracts to resolve disputes through alternative dispute resolution. The purposes of the approved procedures is basically to facilitate settlement procedures and to centralize dispute resolution in the event the parties are unable to consensually resolve the matter.

The approved procedures consist of two stages – the Notice/Response Stage and the Mediation Stage. The Notice/Response Stage provides the parties with an opportunity to exchange settlement offers. The debtor must provide notice to the counterparty containing certain information regarding the dispute and including a settlement demand. The counterparty is then given either thirty (30) or forty-five (45) days to agree to the debtor's settlement demand or deny such demand and/or provide a counteroffer. The debtor will then have fifteen (15) days to reply to the counterparty's response. Either party at any point may request an initial telephonic settlement conference, subject to certain notice requirements.

Derivative disputes that are not resolved during the Notice/Response Stage will proceed to mediation before one of three court-appointed mediators, subject to the mediation procedures set forth in General Order #M-143. Participation in these proceedings by affected parties is mandatory and failure to participate could result in sanctions by the Court. Each party will be responsible for its own attorneys' fees and related expenses, except that the debtors will pay the fees of the mediator. The Court noted in the ADR Order that mandatory alternative dispute resolution has been ordered in other complex chapter 11 cases and has contributed to the effective administration of those proceedings and reduced costs for all parties. It will be interesting to see if mandatory alternative dispute resolution becomes the standard method of resolving derivative disputes in bankruptcy proceedings.

[7] Docket No. 5207.

D. Charter Communication

Many companies secured their financing several years ago when the credit market featured advantageous pricing and loose loan covenants. Because these favorable terms would be impossible for borrowers to obtain in today's lending environment, many viable companies with highly leveraged capital structures are looking for strategies to remove debt and, at the same time, to preserve, or "reinstate," the favorable financing deals they secured before the markets crashed.

In order to undo the acceleration of pre-petition debt and to reinstate such debt through a chapter 11 bankruptcy, a debtor's plan must reinstate the original maturity applicable to the debt, and cure any defaults that may have occurred. 11 U.S.C. §1124(2). The bankruptcy court must determine whether defaults have occurred or will occur under the applicable credit agreement by carefully analyzing the credit agreement itself and the evidence regarding the debtor's value and sources of liquidity. On November 17, 2009, New York Bankruptcy Judge James Peck issued an unprecedented opinion reinstating $11 billion dollars of debt over the vociferous objections of Charter's senior lenders. Key to the Bankruptcy Court's ruling are the holdings that (i) the credit agreement did not create defaults for a prospective inability to pay debts as they become due, and (ii) there was no prohibited "change of control" as a result of the Plan.

Charter Communications ("Charter"), the country's fourth largest cable television company, took a gamble during, arguably, the most challenging period in the modern era of global corporate finance. After entering into calculated pre-bankruptcy agreements with its junior lenders without any negotiation with its senior lenders, Charter filed bankruptcy seeking confirmation of a plan of reorganization ("Plan") that proposed to (i) eliminate $8 billion of debt from its highly leveraged capital structure; (ii) raise $1.6 billion in new equity through a rights offering back-stopped by certain bondholders; and (iii) reinstate $11.8 billion in senior secured debt to preserve favorable existing credit terms and save hundreds of millions of dollars in interest payments that would otherwise be payable if such debt had to be replaced at current market pricing.

JPMorgan Chase Bank, N.A., as agent for a syndicate of senior lenders (the "Senior Lenders") objected to the Plan on the grounds that Charter had defaulted under many covenants in its credit agreement with the Senior Lenders. The Court rejected the Senior Lenders' argument that certain holding companies of Charter could not prospectively pay their debts as they came due on the grounds that (i) the credit agreement covenants did not address the holding companies' prospective inability to pay debts, and (ii) the Senior Lenders' evidence failed to conclusively demonstrate an event of default under the credit agreement.

The Senior Lenders also challenged reinstatement on the grounds that a change of control would occur on the effective date of the Plan, and that such change of control was a default under the credit agreement. While the Bankruptcy Court noted that the change of control issue was the "most challenging problem" for the Debtors in seeking reinstatement, it ultimately found no change of control. The change of control inquiry required an examination of relevant covenants of the credit agreement related to the percentage of voting power that must be held by Paul Allen ("Allen"), who had invested eight billon dollars in Charter. Pursuant to the credit agreement no "change of control" would trigger if Allen's economic interests were eliminated as long as Allen held a minimum voting percentage of 35%. In order to make this work, the Debtor's Plan (i) provided that Allen would receive nothing on account of his equity investment; but (ii) proposed a settlement with Allen in order to retain his voting participation so as to not trigger a change of control. Pursuant to the settlement, the Debtors paid Allen $375 million in consideration for his continued voting participation. In return, the Court found the Debtors received $3.5 billion in benefits including the hundreds of millions saved by reinstating the Senior Lenders' debt at a below-market interest rate, and $1.14 billion in cash tax savings associated with preservation of net operating losses.

The Court further held that although the three large bondholders supporting the Plan and the conversion of their debt to equity "worked collectively and in a coordinated fashion" in securing control of the debtors, they were not a "group," as defined by Section 13(d) of the Securities Exchange Act, because they never entered an agreement to act jointly. Accordingly, the Court held that their efforts did not violate the change of control provisions of the credit agreement.

Finally, the Senior Lenders argued that the bankruptcy petitions of the holding companies accelerated certain indentures outstanding against them and triggered an event of default; specifically, a "cross-default" under the credit agreement. Section 1124 of the Bankruptcy Code provides that any default relating to the insolvency or financial condition of a debtor, or "ipso facto" defaults, need not be cured for reinstatement. Although the Senior Lenders argued that the cross-default was not an "ipso facto" default because the borrowing entity under the relevant credit agreement was technically solvent, the Bankruptcy Court was not persuaded on this point. Observing Charter to be an "integrated enterprise," where "the financial condition of one affiliate affects the others," Judge Peck held Charter's cross default under the credit agreement to be ipso facto and therefore not a bar to reinstatement.

The "gamble" paid off for the debtors (and the junior lenders) in Charter. Pending appeals are likely being mooted as the Debtors begin to implement their Plan. It remains to be seen whether other courts will follow the Charter precedent and allow other overleveraged companies to convert debt to equity, alter the ownership structure of the company, and at the same time reinstate favorable financing.

E. General Growth

In re General Growth Properties, Inc., 09-11977 (ALG) (Bankr. S.D.N.Y. Aug. 11, 2009).

On April 16 and 22, 2009, General Growth Properties, Inc. ("GGP") – a publicly-traded real estate investment trust operating a nationwide network of approximately 200 shopping malls in 44 states - and 337 of its approximately 750 subsidiaries, affiliates and joint ventures filed for Chapter 11. GGP had financed its acquisitions and operations, in part, through conventional property-specific mortgages and CMBS financing. At the time of the Chapter 11 filings, GGP and its affiliates were obligated on approximately $18.27 billion of debt secured at the project level. After the implosion of the national and global real estate financing markets since the fall of 2008, many of the GGP properties faced covenant defaults, with lenders exercising cash control and other remedies over the properties, even though they generated sufficient cash flow to cover their own operating expenses. Certain other properties faced loan maturity or "hyper-amortization"[8] in a time-frame ranging from the next few months to years. In addition, GGP and certain of its affiliates had approximately $6.58 billion of unsecured debt. Ultimately, GGP believed that the Chapter 11 filings for it and almost half of its affiliates were necessary to address an overall capital structure GGP believed had become unmanageable due to the collapse of the credit markets.

To put the motions to dismiss in context, on April 16, 2009, at the first day hearing for the GGP cases, the Court granted the debtors' cash collateral motion and permitted the debtors to have immediate access to the cash collateral generated by the SPEs, wherever located, in order to continue the debtors' overall operations and to preserve the value of the group's assets for a successful reorganization. Virtually all of project-level lenders objected to the use of cash collateral and proposed debtor in possession (DIP) financing on numerous grounds, including that the debtors' requested relief would vitiate the SPE and bankruptcy-remote protections embedded in the mortgage and CMBS financings. The Court authorized the use of cash collateral on an interim basis while granting the lenders various forms of adequate protection, and noted many of the other structural issues raised in the objections would come into better focus once the debtors finalized their DIP financing negotiations. In the following weeks, the debtors engaged in an auction process among three prospective DIP lenders, in which project-lender representatives provided input, while certain lenders filed motions to dismiss the Chapter 11 cases of their specific borrowers. On May 14, 2009, the Court entered a final DIP order approving a $400 million DIP financing embodying negotiated terms, including adequate protection, which, from the perspective of the property lenders, substantially improved on the terms initially proposed by the debtors. The DIP financing order was viewed generally by commentators and the real estate financing community as maintaining the integrity of the pre-petition SPE structures, while addressing in a satisfactory manner the practical considerations resulting from the debtors' immediate financing needs. However, several commentators noted that the SPE structures would be tested next through the motions to dismiss.

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[8] Hyper-amortization refers to the situation where the borrower's failure to repay or refinance the loan at a negotiated anticipated repayment date would result in a dramatic increase in interest rates and in the restrictions on GGP's access to the property owners' cash.

The motions to dismiss framed the argument on the parties' intention to structure the SPEs in question as "bankruptcy remote" entities to make them more attractive to potential investors, as well as to insulate property-specific borrowers from the obligations of their parents and affiliates. As a result, the movants argued that they were now being forced to assume the credit risk of the entire GGP group – a risk that they had not bargained for when investing in specific SPEs – and that their borrowers had no present or impending need for Chapter 11 protection, since they still produced sufficient cash flow to service their individual debts. One lender argued that its borrower SPE has been organized as an Illinois land trust which was ineligible to file for Chapter 11.

SPEs were deemed to be "bankruptcy remote" if, among other things, they were organized to require the vote of an independent director (or manager, with respect to SPE limited liability companies) for significant corporate actions such as a bankruptcy filing, if their corporate purpose was limited to owning and operating only the specific real estate constituting the collateral, and if their organizational documents required them to maintain themselves as entities separate and distinct from their corporate parents and affiliates. The SPEs had their own cash management systems with respect to property-specific expenses. The loans to the SPEs did not include parent company repayment guaranties. Indeed, the closing document checklists for these financings included "non consolidation" legal opinions – premised on the adherence to the bankruptcy-remote requirements by all parties involved with the borrower and the lender's reliance on its' borrower's separateness - that the SPEs were validly organized in a manner that would not likely result in the substantive consolidation[9] of the borrower with the United States bankruptcy cases of its parent and sibling entities.

On August 11, 2009, the Bankruptcy Court for the Southern District of New York overseeing the GGP Chapter 11 cases of denied motions by several property lenders and special servicers to dismiss the Chapter 11 cases of certain SPE subsidiaries of GGP as bad faith filings, or, in one instance, on the ground that the SPE was ineligible to be a Chapter 11 debtor. The Court ruled that the interests of the entire GGP group must be taken into account in determining whether an individual SPE's Chapter 11 filing should be dismissed as a bad faith filing. The Court determined that the Chapter 11 filings of SPEs which generated sufficient cash to cover their own operating expenses were not premature even though those specific borrowers were not yet in default or facing loan maturity, finding that the disarray in the real estate financing market created sufficient uncertainty as to whether these borrowers would be able to refinance debt maturing years in the future. The Court explained that its consideration of the group's interests in determining not to dismiss the SPE bankruptcy cases did not sacrifice the fundamental rights of the lenders who had sought to be isolated with a particular SPE, although the Court noted that bankruptcy inherently altered some of the rights these lenders had negotiated. The Court also

[9] Under the doctrine of substantive consolidation, a bankruptcy court may, if appropriate circumstances are determined to exist, consolidate the assets and liabilities of different affiliated entities by merging their assets and liabilities and treating the related entities as a consolidated entity for purposes of the bankruptcy. Through substantive consolidation, the intercompany claims of the consolidated companies are eliminated, the assets of all of the entities are treated as common assets, and claims of creditors against any of the debtors are treated as against the common fund. Among other things substantive consolidation has been used with similar effect by courts to extend a debtor's bankruptcy proceeding to include in its bankruptcy estate the assets of a related entity which is not a debtor in a bankruptcy case.

ruled that an SPE organized as a trust under Illinois law was a business trust eligible for Chapter 11.

<u>What's a SPE lender to do now?</u>

The *General Growth* August 11 decision did not reach surprising conclusions, especially in the context of the Bankruptcy Court's initial orders on DIP financing, use of cash collateral and consolidated cash management. The Court stressed that its decision focused narrowly on whether or not to dismiss the Chapter 11 cases of the GGP SPEs in question as bad faith filings, and did not foreshadow how the Court would rule on other important issues that might yet be raised in the GGP cases, including substantive consolidation and the classification and treatment of the secured, mezzanine and unsecured debt asserted against GGP debtors. Still, lenders to companies structured similarly to GGP – holding companies with intermediate holding companies for property-level SPE subsidiaries – must now consider whether or not the GGP decisions represent a developing body of law which may be used as precedent in other cases. Moreover, as the real estate financing markets bottom out and lenders consider re-introducing liquidity, prospective lenders, borrowers and rating agencies will have to consider whether the results of the GGP case raise implications for the future of securitizations premised on the bankruptcy-remote SPE structure.

Perhaps the most significant finding by the *General Growth Properties* court is its analysis of the fiduciary duties owed by the independent directors, officers and managers of solvent SPEs to the SPE lenders, special servicers and equity holders. The Court noted that, in 2007, the Delaware Supreme Court had rejected the notion that directors of a nearly insolvency company, operating in the "zone of insolvency," owed fiduciary duties to creditors,[10] and mandated that directors of a solvent corporation consider only the interests of the shareholders in exercising their fiduciary duties. Noting that the movants did not argue that the SPE debtors in question were insolvent at any time, the Court determined that the fiduciaries of the SPE borrowers properly exercised their duty in considering the interests of the SPEs' equity holders over the property-level creditors. This result flew in the face of lender expectations that the "independent" fiduciaries of the SPE would, in fact, focus on the lenders' interests in determining whether to approve the SPE's bankruptcy filing. As a result, the consideration of the interests of the GGP entities as a whole by the SPE fiduciaries was deemed proper, and their bankruptcy filings were found to be not premature even where the loan maturities for a SPE's debt was years away.

The court also noted that the securitization master servicer / special servicer structure militated against a finding that the SPEs' Chapter 11 filings had been made in bad faith. Master servicers of real estate mortgage conduits (REMICs) manage the day-to-day loan administration functions and serviced the loans when not in default, while a special servicer would assume management authority for a loan in default. Only special servicers have the ability to agree to modify a loan (in some cases, with the consent of the holders of the CMBS securities issued by the REMIC), but loans would not be transferred to special servicers until the loan was in default or loan maturity was impending. As a result, before the GGP bankruptcy filings, GGP sought permission to communicate with special servicers, but was told by master servicers that the loans

[10] *North American Catholic Educational Programming Foundation, Inc. v. Gheewalla*, 930 A.2d 92 (Del. 2007).

had to be much closer to maturity before they would be transferred to special servicers. Only one servicer was willing to meet with GGP, bolstering GGP's contention that it had no ability to pursue a restructuring of the property-level debt outside of a bankruptcy.

In addition, lenders must now consider whether the *General Growth Properties* decision is evidence of a broader predilection by bankruptcy courts against dismissing as bad faith filings the Chapter 11 case of an SPE in circumstances similar to the GGP cases. The perception that bankruptcy courts will be loathe to dismiss SPE bankruptcy cases filed for the benefit of an entire corporate group may invite companies structured similarly to GGP to pursue their financial restructuring in Chapter 11, regardless of whether their SPE subsidiaries are insolvent.

Accordingly, property-level and CMBS lenders, REMIC securities holders and their master and special servicers must now be alert to the prospects that their borrowers and collateral can be the subject of bankruptcy cases regardless of their individual financial condition. Moreover, the historic and accepted use of SPEs and securitizations for property-specific and CMBS financing has not always succeeded in isolating and protecting the collateral, cash and debt of GGP property-level lenders from the claims of creditors of affiliated entities controlled under the larger GGP corporate umbrella. Lenders should expect that their financing structures will be viewed by courts in the context of a dormant 2009 financing market, rather than the lenders' expectations borne out of the boom years of real estate financing.

F. <u>SemCrude</u>

In re Semcrude, L.P., 399 B.R. 388 (Bankr. D. Del. 2009).

Companies that engage in multiple transactions with different entities of related groups often enter into contractual netting agreements that allow the setoff of obligations between entities within the groups. The effectiveness of these agreements has been called into question by the *Semcrude* bankruptcy court. In *In re SemCrude, L.P.*, Chevron had contracts for the sale or purchase of petroleum products with SemCrude, SemFuel and SemStream, all subsidiaries of SemGroup. Each of the contracts referred to certain Chevron standard terms and conditions, including netting provisions that authorized setoff between the parties and their affiliates. When SemCrude, SemFuel and SemStream filed their Chapter 11 petitions, Chevron owed SemCrude \$1.4 million, but SemFuel and SemStream owed Chevron a total of \$13.5 million.

Since exercising a setoff right is ordinarily prohibited by the automatic stay of section 362 of the Bankruptcy Code, Chevron filed a motion to lift the automatic stay to allow it to set off its \$13.5 million SemFuel/SemStream claims against Chevron's \$1.4 million obligation to SemCrude pursuant to section 553 of the Bankruptcy Code. The court denied Chevron's motion, finding that the proposed "triangular setoff" was impermissible because of a lack of mutuality. Section 553 recognizes any right of a creditor to offset a mutual debt owing by the creditor to a debtor against a claim of such creditor against the debtor. The court noted that debts are considered "mutual" only when they are due to and from the same persons, in the same capacity. Chevron argued that an exception existed to the mutuality requirement if a contract provides for triangular setoff and cited several cases that seemed to recognize such an exception. The court concluded that none of those cases actually allowed such a triangular setoff and that such an exception would be inconsistent with the express language of § 553, which only allows for the setoff of "mutual debts." The court distinguished the situation where one party guaranties another party's debts, thus creating a contractual obligation by the guarantor to pay another party's debt.

By contrast, according to the court, a simple agreement to allow a setoff among affiliates does not create indebtedness from one party to another; instead such an agreement simply recognizes the parties' rights to offset obligations that already exist apart from the tripartite netting agreement. Consequently, because SemCrude did not guarantee the obligations of SemFuel and SemStream, SemCrude did not owe a debt to Chevron against which Chevron could offset its obligation to SemCrude. The Court concluded that Chevron did not have a "right to collect" against SemCrude under the tripartite setoff agreement and that mutuality did not exist.

The court went on to say that the agreement did not call for SemCrude to make a payment to Chevron and that section 553 only permits a right of a creditor to offset a mutual debt owing by such creditor to the debtor. Consequently, since no debt was owed by Chevron to SemFuel or SemStream, Chevron's claims against SemFuel and SemStream could not be set off against the debt of Chevron to SemCrude. Non mutual debts cannot be transformed into mutual debts by a multi party agreement that allows for triangular setoff of non mutual debts. The court also determined that there was no exception to the mutual debt requirement and that parties could not contract around the provisions of the Bankruptcy Code.

The *SemCrude* decision caused great consternation in the oil and gas industry since multi-party netting agreements are commonly used and honored. Chevron was persuaded to file a motion to reconsider since it had failed to argue that the contracts in question were either forward contracts or swap agreements as defined in the Bankruptcy Code and subject to the "safe harbor" provisions of the Bankruptcy Code, which Chevron then argued permitted the offset and netting of forward contracts and swap agreements without regard to the setoff provisions of section 553. The court denied the motion for rehearing holding that Chevron had not argued the safe harbor provisions at the prior hearing and that the court should not consider those arguments on a motion for rehearing. Thus, the issue of whether the contracts were protected by the safe harbor provisions was not addressed.

Although the court in *SemCrude* recognized that a guaranty may create a contractual obligation, the court failed to realize that the triangular netting agreements constituted limited recourse guaranties among the parties. By entering into the agreements, SemCrude was effectively guaranteeing the obligations of SemFuel and SemStream to Chevron to the extent that Chevron owed anything to SemCrude. These agreements created the mutual obligations and debt that the court found lacking. The "right to payment" that the *SemCrude* court failed to recognize is the right to be paid from a particular asset of SemCrude, its receivable from Chevron.

<u>Adversary proceedings</u>

Despite the clear intention of producers' lien statues to protect sellers of hydrocarbons from financially distressed buyers, recent decisions in three adversary proceedings in the bankruptcy case of *SemCrude*, have undercut the priority of producers' liens in relation to other security interests.

The three opinions issued by Judge Shannon of the United States Bankruptcy Court for the District of Delaware on June 19, 2009 address three adversary proceedings filed by holders of producers' liens under Texas, Kansas and Oklahoma law.[11] Each opinion addressed substantially the same issue: whether prior perfected Article 9 security interests asserted by Semcrude's lenders are superior to the security interests of holders of producers liens.

In the Texas adversary proceeding, the holders of producers' liens argued that § 9.343 automatically perfected their security interests and gave them priority over the prior-perfected security interests of the banks in production sold to first purchasers and the proceeds of that production. Applying the laws of Delaware and Oklahoma (because SemCrude and certain of its subsidiaries were organized in these states), the Bankruptcy Court found that the Delaware UCC did not contain a provision analogous to section 9.343, therefore the Texas producers could not rely on that provision for automatic perfection of their security interests. Under Delaware and Oklahoma perfection rules, because the Texas producers had not taken any action to perfect their security interests in Oklahoma or Delaware, pursuant to the applicable UCC provisions, their security interests were unperfected and therefore subordinate to the lenders' prior-perfected security interests. Thus, Texas producers' lienholders who sold and delivered oil and gas, in

[11] The cases are numbered and styled: *Arrow Oil & Gas, Inc., et al., v. Semcrude, L.P. et al.*, Adversary No. 08-11525 (Texas); *Samson Res.Company, et al., v. Semcrude, L.P., et al.*, Adversary No. 08-51445 (Oklahoma); and *Mull Drilling Company, Inc., et al., Semcrude, L.P., et al.*, Adversary No. 08-51446 (Kansas).

Texas, to SemCrude or its Oklahoma subsidiary could not rely on Texas § 9.343 governing liens on production and proceeds.[12] The Bankruptcy Court arrived at substantially the same conclusions in the Kansas and Oklahoma adversary proceedings although the discussion of Oklahoma law involved determining whether the Oklahoma statute created an implied or resulting trust.[13] Notwithstanding an opinion of the Oklahoma Attorney General opining that the Oklahoma Legislature intended an implied trust (whether resulting or constructive) under the operative Oklahoma statute (§ 510.10(A) of Title 52), the *SemCrude* court concluded that the operative language was part of a reporting and remittance statute and did not create a trust.

While the Bankruptcy Court did certify all three decisions for direct appeal to the Third Circuit Court of Appeals, all three disputes have been settled. Thus, the perfection and priority of producers' liens securing the obligations of out-of-state first purchasers under non-uniform provisions of the UCC remains in doubt.

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[12] *Arrow Oil & Gas, Inc., et al., v. Semcrude, L.P. et al.*, Adversary No. 08-11525 (Bankr. D. Del. June 19, 2009) (order subordinating producers' liens under Texas law).

[13] *Samson Res. Company, et al., v. Semcrude, L.P., et al.*, Adversary No. 08-51445 (Bankr. D. Del. June 19, 2009) (order subordinating producers' liens under Oklahoma law); *Mull Drilling Co., Inc., et al., Semcrude, L.P., et al.*, Adversary No. 08-51446 (Bankr. D. Del. June 19, 2009) (order subordinating producers' liens under Kansas law).

G. TOUSA

On October 13, 2009, a Florida bankruptcy judge in the TOUSA, Inc. bankruptcy cases ordered, among other things, (i) the avoidance of obligations, including liens, incurred by certain of the TOUSA subsidiaries (the "Conveying Subsidiaries") under a $200 million first lien facility (the "First Lien Facility") and a $300 million second lien facility (the "Second Lien Facility"); (ii) the disgorgement by certain lenders of $403 million received in connection with the transaction and (iii) the disgorgement of principal, interest and fees paid to the lenders under the First Lien Facility and the Second Lien Facility. The judge's ruling raises a number of troubling issues for commercial lenders, including but not limited to, the judge calling into question the enforceability of fraudulent conveyance "savings clauses," common in commercial loan agreements.

TOUSA, Inc. and its subsidiaries are homebuilders marketing homes under a variety of brand names. In June 2005, TOUSA entered into a joint venture to acquire certain properties owned by Transeastern Properties, Inc. in Florida. To fund the purchase of the Transeastern Properties, TOUSA and its joint venture subsidiary entered into a credit agreement (the "Transeastern Loan") for third party funding with certain lenders (the "Transeastern Lenders"). The Conveying Subsidiaries were not parties to the Transeastern Loan nor did they execute guarantees for the benefit of or pledge collateral to the Transeastern Lenders. With the turn in the housing market, the joint venture ran into hard times, and litigation ensued between TOUSA and the Transeastern Lenders.

On July 31, 2007, TOUSA entered into a settlement agreement with, among others, the Transeastern Lenders by which TOUSA agreed to pay approximately $420 million to the Transeastern Lenders (the "Transeastern Settlement"). In connection with the Transeastern Settlement, TOUSA and the Conveying Subsidiaries, as borrowers, entered into the First Lien Facility and the Second Lien Facility (collectively, the "July 31 Transaction"). Using the proceeds of the new financing, TOUSA and the Conveying Subsidiaries (although not obligated under the Transeastern Loan) paid approximately $420 million to the Transeastern Lenders. The Conveying Subsidiaries pledged substantially all of their, previously unencumbered, assets to secure repayment of the loans advanced pursuant to the July 31 Transaction. The Conveying Subsidiaries did not retain any of the proceeds advanced under the July 31 Transaction.

On January 28, 2008, TOUSA and the Conveying Subsidiaries filed for bankruptcy protection, and the creditors committee commenced an adversary proceeding seeking to unwind the Conveying Subsidiaries' obligations under the July 31 Transaction to recover the $420 million paid to the Transeastern Lenders. In a 182-page opinion, the judge found, among other things, that the Conveying Subsidiaries were insolvent at the time of or rendered insolvent by the July 31 Transaction, that the Conveying Subsidiaries were left with unreasonably small capital as a result of the July 31 Transaction and that the July 31 Transaction could be avoided as a fraudulent transfer because the Conveying Subsidiaries did not receive reasonably equivalent value in exchange for the obligations incurred and liens granted by the Conveying Subsidiaries under the July 31 Transaction.

The judge dismissed each of the defenses raised by the defendants including the argument that the fraudulent conveyance "savings clauses" in the First Lien Facility and the Second Lien Facility prohibited the avoidance of the July 31 Transaction. Like most commercial loan agreements involving multiple borrowers or guarantors, the First Lien Facility and Second Lien Facility contained a fraudulent conveyance "savings clause" that provided:

> Each Borrower agrees if such Borrower's joint and several liability hereunder, or if any Liens securing such joint and several liability, would, but for the application of this sentence, be unenforceable under applicable law, such joint and several liability and each such Lien shall be valid and enforceable to the maximum extent that would not cause such joint and several liability or such Lien to be unenforceable under applicable law, and such joint and several liability and such Lien shall be deemed to have been automatically amended accordingly at all relevant times.

The defendants argued that TOUSA and the Conveying Subsidiaries, as sophisticated parties, had agreed to limit the ability of TOUSA and the Conveying Subsidiaries to later avoid the July 31 Transaction as a fraudulent transfer under the Bankruptcy Code. The Court disagreed and found that the fraudulent conveyance savings clauses were unenforceable for the following reasons:

1. The Conveying Subsidiaries received no benefit under the Transeastern Settlement and the corresponding July 31 Transaction since the proceeds were used to repay the Transeastern Lenders under a debt they had no obligation to repay;

2. The savings clauses contained inherently indefinite contract terms since the enforceability of each facility was circularly dependent upon the enforceability of the other facility (i.e., the judge could not make heads or tails of the fraudulent conveyance savings clauses);

3. The fraudulent conveyance savings clauses would effectuate amendments to the credit facilities, and the defendants had failed to take the necessary steps under the loan agreements to affect the required amendments;

4. The right to avoid a fraudulent transfer is property of the debtor and contract provisions conditioned on the insolvency or financial condition of the debtor that affect a forfeiture of a debtor's interest in property violate the Bankruptcy Code; and

5. Enforcement of the fraudulent conveyance savings clauses would violate public policy as an attempt to contract around core provisions of the Bankruptcy Code.

The judge's reasoning under #1 and #2 above is fact-specific and will vary in each case. More problematic is his reasoning under #3 through #5 because they are applicable to most fraudulent conveyance savings clauses. The judge seems to be implying that savings clauses are per se unenforceable and that reliance by lenders on fraudulent conveyance savings clauses may be misplaced.

Also worth noting, the judge concluded that the lenders knew, or should have known, that their borrowers, the Conveying Subsidiaries, were insolvent, or would be rendered insolvent, by the Transeastern Settlement and the July 31 Transaction. The judge noted that "some problems cannot be drafted around" even by overreaching "really clever lawyers."

The Yellowstone Mountain Decision

In another harmful opinion to commercial lenders is the decision by a Bankruptcy Court in Montana, which recently equitably subordinated a secured lender's first lien claims to the claims of the debtor-in-possession ("DIP") lender and the unsecured creditors even though the lender did not owe any fiduciary duties to the debtor or any of the debtor's potential creditors. *Credit Suisse v. Official Comm. of Unsecured Creditors (In re Yellowstone Mountain Club, LLC)*, Ch. 11 Case No. 08-61570, Adv. No. 09-00014 (Bankr. D. Mont., May 12, 2009). The Court found that the agent for the syndicated lenders, Credit Suisse, was motivated to earn large fees and encouraged the controlling equity owners of the borrower to cash out of their investments by taking a majority of the proceeds of the loan to the borrower, thus saddling the borrower with so much debt that the borrower was doomed to fail.

Although section 510(c) of the United States Bankruptcy Code permits a court to subordinate a lender's claim based upon inequitable conduct that injured other creditors or conferred an unfair advantage on the lender, it is rare, and difficult, to subordinate claims of creditors that are not fiduciaries or insiders of a debtor. To equitably subordinate a non fiduciary or insider claimant, courts must find gross or egregious misconduct or conduct amounting to fraud.

The Court noted that the loan product marketed to the debtor was marketed to five other residential developers — all of whom filed petitions for bankruptcy — as a product that was "akin to a 'home equity loan[.]'" The loan expressly permitted the controlling equity holders to take large portions of loan proceeds — in this case, $209 million of the $375 million loan — for their own personal use even though Credit Suisse knew that there was a minority shareholder class. The Court also noted that Credit Suisse would have known that if the controlling equity holder took $209 million of the loan as a distribution, it would have caused the debtor to record negative owners' equity on its books, resulting in a qualification on the debtor's audited financials and non-compliance under the terms of the credit agreement. In order to avoid this result, Yellowstone "loaned" $209 million to the controlling shareholder. The Court focused on the new debt load, which increased "at least six times" as a result of the financing even though the debtor had consistently failed to meet its profitability projections. Additional facts which the Court found to weigh in favor of equitable subordination were Credit Suisse's: (i) lack of due diligence; (ii) failure to request audited financials from the debtor; (iii) exclusive reliance on the projections provided by the debtor; (iv) invention and use of a new form of appraisal methodology, "Total Net Value," to justify the loan while ignoring a recent prior valuation that suggested a 90% loan to value ratio; and (v) desire to increase fees by loaning more money.

Based on these facts the Court determined that it was appropriate to equitably subordinate Credit Suisse's claim. The court permitted Credit Suisse to credit bid the amount of its secured claim at a sale of the debtor's assets, but only on the condition that it pay off the DIP loan, the administrative fees and costs of the Debtors' bankruptcy estate and unsecured creditors' claims.

While the facts of the *Yellowstone Mountain* decision are unique, the syndicated loan in *Yellowstone Mountain* is similar to other loans which are currently outstanding. Indeed, many loans have been made to companies where the bulk of the loan proceeds have been distributed to the equity owners. In effect, the court in *Yellowstone Mountain* concluded that an arms length lender which made a loan to a borrower, knowing that the loan proceeds would be distributed to the equity owners, under all the circumstances described in the decision, has committed egregious conduct warranting equitable subordination. The court apparently felt that a desire to maximize fees and lax underwriting practices are evidence of evil intent. Debtors and junior creditors might refer to the *Yellowstone Mountain* decision in negotiations with senior lenders and lenders to distressed borrowers would be wise to analyze the specific factors that the Bankruptcy Court considered in equitably subordinating Credit Suisse's claim.

Ultimately, Credit Suisse settled the underlying dispute and voted in favor of a third amended plan of reorganization (the "Plan"). The Plan was confirmed on June 2, 2009. A precondition to the Plan's Effective Date was entry of an order vacating or amending the underlying decision. The *Yellowstone Mountain* decision is an instructive example of conduct that can lead to equitable subordination.

H. ASARCO

American Smelting and Refining Company ("Asarco"), the leading copper producer in the United States, filed for bankruptcy in 2005 in the Southern District of Texas with about $10 billion in liabilities. Low copper prices, labor strikes, environmental liability, asbestos claims, and $440 million in bond debt all contributed to Asarco's decision to seek the protection of Chapter 11. Despite the dire circumstances that Asarco found itself in, four and a half years after the petition was filed, the confirmation order was signed in what Judge Schmidt described as "perhaps the most successful major bankruptcy in reorganization history."

In this case, the road to success was a bumpy one. After 100 years of mining, smelting, and refining copper and other metals, it was alleged that Asarco or one of its subsidiaries was responsible for environmental clean-up costs at more than 100 sites spread throughout 16 states. Asarco also had five non-operating subsidiaries included in the bankruptcy because the asbestos that they manufactured over ten years ago resulted in thousands of lawsuits with future claimants yet to come. And labor relations were not helping either. Roughly 70% of Asarco's workers were represented by the United Steelworkers union and had already gone on strike before the filing to express discontent over negotiations regarding their collective bargaining agreements.

In looking for assets to satisfy the numerous claims, parties closely scrutinized many of the transactions that took place in the years preceding the filing. By late 2001, Asarco was already in trouble and began selling assets to generate cash. The most significant sale came in 2003 when Americas Mining Corporation, Asarco's corporate parent, purchased what has been described as Asarco's "crown jewel." AMC paid Asarco $500 million in cash, a note for $123 million, and forgave intercompany debt of $42 million, but even this did not save Asarco, which continued to struggle despite rising copper prices at the time. In the bankruptcy, this transaction was attacked as a fraudulent transfer, and the matter was tried before District Court Judge Hanen. In a complex 190 page decision, Judge Hanen found, among other things, that AMC paid reasonably equivalent value in the 2003 transfer and that the sale was a legitimate means by which to restructure Asarco.[14] However, Judge Hanen also found that AMC was liable for a fraudulent transfer because it entered into the transaction with full knowledge that Asarco's creditors would be hindered or delayed as a result. The court ordered that the stock purchased in the transaction had to be returned and that AMC had to pay damages to Asarco.[15]

The bright side to this case was that the Debtor still held very valuable assets, and these fueled a bidding war that would eventually satisfy all creditors' claims in full. The two primary bidders were Sterlite (USA) Inc., and AMC. The bids changed over time as each tried to top the other while keeping an eye on the price of copper. Sterlite won initially, becoming the plan sponsor and contracting to purchase the assets of Asarco for $2.6 billion, but later defaulted. Ultimately, the revised Sterlite bid was incorporated into the Debtors' proposed plan of reorganization, but the court lifted exclusivity so that AMC was able to also propose a plan offering to purchase the assets of Asarco for roughly $2.2 billion.

[14] Asarco LLC, Southern Peru Holdings, LLC v. Americas Mining Corp., 396 B.R. 278, 363, 378 (S.D. Tex. 2008).
[15] Asarco LLC, Southern Peru Holdings, LLC v. Americas Mining Corp., 404 B.R. 150, 181-82 (S.D. Tex. 2009).

After a lengthy and contentious confirmation proceeding, Judge Schmidt recommended approval of the plan sponsored by AMC.[16] The District Court agreed and confirmed the Parent's plan, which promised full payment, in cash, of principal and interest to all creditors. A trust was set up to provide for present and future asbestos claimants, and the Parent paid $1.79 billion to address environmental contamination at sites across the United States.

[16] Because the plan sought a permanent channeling injunction under section 524(g), by Order dated August 6, 2009, the District Court withdrew the reference regarding proceedings related to confirmation of a plan of reorganization and requests for a channeling injunction.