

Bankruptcy and Other Tools For Extracting Value in the Great Recession

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ARCO Outboard

MIX GAS
DOUBLE
ABOVE
COST



Doing Business in Great Recession

- Fast Bankruptcy Asset Sales
- Distress Asset and Loan Sales
- Seller Financing To Await fresh equity
- Return of Mezz Lenders
- Stalled Construction Project Financing
- Some CMBS
- Strategic Stock Acquisitions

BANKRUPTCY 101

- Chapter 7 Liquidation
- Chapter 11 Reorganization

CHAPTER 11 PROCESS

- Filing of Petition
 - Form 7, Item 17
 - PRP Notice, violations, list of releases, imminent threats, judicial/adm proceedings
- automatic stay (section 362)
- bar date
 - EPA and state proof of claims
 - contingent and unknown creditors only require constructive notice
 - no notice or excusable neglect

Chapter 11 Cont'd.

- Order of Relief
 - Debtor Exclusivity Period
 - Appointment of Creditors' Committees
- Disclosure Statement
- Confirmation Hearing
- Order of Plan Confirmation
 - Discharge
 - Confirmation Injunction

Bankruptcy Claim

- Legal or Equitable Right to Payment
 - When Arise?
 - Effect of Injunctions?
 - Apex Oil v. LTV decisions
 - owned vs non-owned properties
 - owned/operating vs owned/discontinued

Administrative Expense Priority for Environmental Claims

- DIP/trustee compliance with laws [28 U.S.C. 959(b)]
- Imminent and Identifiable Harm (Midlantic)
- Owned but Discontinued?
- Pre-petition vs post-petition
-

Super-Priority (506)(c)

- government may recoup costs from proceeds of sale before distribution to creditors
 - reasonable, necessary costs and expenses of preserving or disposing of such property
 - to the extent of any benefit to the holder of such claim.”

363 Surcharging Cash Collateral

- extraordinary remedy
 - lender consent
 - “adequate protection”
- Court may allow to prevent imminent harm

Claim Estimation

- contingent or unliquidated claim “*the fixing or liquidation of which.....would unduly delay administration of the case*”
- mini-trial
 - robust discovery with hard/tight deadlines
 - experts
 - lenient admissibility standards
 - status conferences/mediation

Claim Disallowance

- Contingent
- co-liable with debtor
- Impact of Burlington Northern?

Asset Sales and Property Disposition

- Section 1141 (reorganization)
- Section 363 Free and Clear Sales
- Abandonment
- Lease Rejection

363 Sales

- Exigent Circumstances
 - “melting ice cube”
 - Lack of DIP Financing
- Conditions
 - applicable state law authorizes sale
 - sales price exceeds value of liens
 - creditors consent or compelled by court to accept proceeds to satisfy interest in debtor assets

363 Sales Cont'd.

- Stalking Horse
 - performs diligence
 - negotiates contract
 - breakup fee
- Auction
 - credit bid by creditors?

363 Sales Cont'd

- Court Order Free and Clear of Liens and Interests
 - successor liability?
 - *“all claims or rights based on successor, environmental and products liability, with all such claims to attach to the proceeds of the sale”* (In Re Chrysler LLC)
 - *“Nothing in this Order or the Asset Purchase Agreement releases or nullifies any liability to a government entity under police and regulatory statutes or regulations that any entity would be subject to as the owner or operator of property after the date of entry of this Order.”* (In Re General Motors)

Opportunities

- Foreclosure Diligence
- New Equity
- REITs
- Greater Diligence on Old and New Loans
 - Stricter Underwriting
 - Poorly Maintained Properties
 - Loss of Entitlements

Opportunities Cont'd

- Agency Loans
- Pick Right Projects
 - Affordable Housing
 - medical offices
- Buy Note Instead of Land
- Reposition
- Value Added Properties