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Bankruptcy Alert

Supreme Court Upholds Right of Secured Creditors to Credit Bid in Chapter 11 Plan Sale

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Today, in *RadLAX Gateway Hotel, LLC, et al. v. Amalgamated Bank*, 566 U. S. ____ (2012), the U.S. Supreme Court issued a unanimous opinion upholding the right of secured creditors to credit bid at any sale of the secured creditors' collateral pursuant to a chapter 11 plan. Specifically, the Court, upholding a Seventh Circuit decision, held that a debtor may not obtain confirmation of a chapter 11 cramdown plan that provides for the sale of collateral free and clear of the secured creditors' liens, if it does not permit the secured creditors to credit bid at the sale.

In a client alert issued last summer (Seventh Circuit Holds That Secured Lenders Must Have the Opportunity to Credit Bid), we discussed the decision of the Seventh Circuit in the RadLAX bankruptcy case, in which it held that a proposed plan of reorganization that contemplated the sale of a debtor's assets free and clear of a dissenting secured lender's liens could not be confirmed under Bankruptcy Code section 1129(b)(2)(A) unless the proposed plan offered the secured lender the opportunity to credit bid in connection with the sale of the debtor's assets.[1] The *RadLAX* decision conflicted with the Third Circuit's 2010 ruling in *In re Philadelphia Newspapers*,[2] in which the Third Circuit held that a debtor could sell assets free and clear of liens under a proposed plan of reorganization without affording dissenting secured lenders the opportunity to credit bid, and with the Fifth Circuit's earlier ruling in *Pacific Lumber*.[3]

Following the Seventh Circuit's ruling in *RadLAX*, the *RadLAX* debtors petitioned the Supreme Court to hear an appeal of the decision. Such is the importance of this issue to the distressed investing community that the Loan Syndications and Trading Association, despite supporting the winning side of the credit bidding argument at the Seventh Circuit, filed a brief in support of the debtors' effort to have the Supreme Court hear the case. With a clear split between the circuits now in existence, the Supreme Court agreed that the time was ripe for the law to be clarified.[4]

In a unanimous ruling for the Court, Justice Scalia wrote that a debtor may not sell its property free of liens under §1129(b)(2)(A) "without allowing lienholders to credit-bid, as required by clause (ii)." In dispensing with the debtor's argument that §1129(b)(2)(A)(iii), which provides secured creditors with a right to receive the "indubitable equivalent" of their claims, allows the debtor to avoid the language in clause (ii), which expressly forecloses the possibility of a sale without credit bidding, Justice Scalia wrote that the argument was "hyperliteral and contrary to common sense."

[1] *River Road Hotel Partners, LLC v. Amalgamated Bank*, Nos. 09-30029, 09-30047 (7th Cir. June 28, 2011).
[2] 599 F.3d 298 (3d Cir. 2010).
[3] 584 F.3d 229 (5th Cir. 2009).
[4] *River Road Hotel Partners, LLC, et al. v. Amalgamated Bank*, 565 U. S. ___ (2011).

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In referring to this as an "easy case," Justice Scalia wrote that it is the Supreme Court's "obligation to interpret the Code clearly and predictably using well established principles of statutory construction." In resolving the split among circuit court authorities in favor of the rights of secured creditors, the Supreme Court has done just that: made it abundantly clear that secured creditors always have the right to credit bid at any sale of their collateral free and clear of the secured creditors' liens.

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