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Supreme Court Confirms that Credit Bidding is Alive and Well

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Today, the Supreme Court of the United States issued its much awaited decision in *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. _____ (2012). The noteworthy decision resolves any uncertainty surrounding a secured creditor's right to credit bid in a sale under a Chapter 11 plan which arose after cases like *Philadelphia Newspapers* 599 F.3d 298 (3d Cir. 2010) curtailed the right. In a unanimous decision (Kennedy recused), the Court held that debtors may not sell their property free and clear of liens under a plan of reorganization without allowing lienholders to credit bid. In so concluding, the Court settled a circuit split on the issue between the Third Circuit (*see In re Philadelphia Newspapers, LLC*, 599 F.3d 298 (3d Cir. 2010) (holding that secured lenders do not have an absolute right to credit bid in an auction process carried out under a Chapter 11 plan)) and the Seventh Circuit (*see River Road Hotel Partners, LLC v. Amalgamated Bank*, 651 F.3d 642 (7th Cir. 2011) (declining to follow *Philadelphia Newspapers* and upholding secured lender's right to credit bid in a sale under a Chapter 11 plan)). We previously wrote on both the *Philadelphia Newspapers* decision ***here*** and on the *River Road* decision ***here***.

Secured creditors are now guaranteed the same rights to credit bid, whether the sale of a debtor's assets is through a plan of reorganization or under section 363 of the Bankruptcy Code.

Background

In 2007, RadLAX Gateway Hotel, LLC and RadLAX Gateway Deck, LLC (together, the "**Debtors**"), purchased the Radisson Hotel at the Los Angeles International Airport, along with an adjacent lot on which they planned to build a parking structure. To finance the project, the Debtors obtained a $142 million loan, secured by a lien on all of the Debtors' assets, from Longview Ultra Construction Loan Investment Fund, for which Amalgamated Bank (the "**Bank**") served as trustee. Within two years, the Debtors ran out of funds and were forced to stop construction of the parking structure. With $120 million owing on the loan, plus interest accruing monthly, and no prospect for obtaining additional funds, the Debtors filed for relief under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Northern District of Illinois in August of 2009.

During their Chapter 11 cases, the Debtors proposed a Chapter 11 plan of reorganization that called for a sale of all their assets, free and clear of liens, without the consent of the Bank and without affording the Bank the right to bid for the property by crediting the debt owed to it. The Bank objected to the Debtors' bid procedures and argued that "free and clear" assets sales, such as the one proposed by the Debtors, must allow for credit bidding.

To determine whether the Debtors' bid procedures could be approved, the parties both cited section 1129 of the Bankruptcy Code which sets forth the requirements for confirmation of a Chapter 11 plan. Under section 1129(b), the Bankruptcy Code permits confirmation of non-consensual plans (colloquially, "cramdown plans") where such plans do not unfairly discriminate against dissenting classes and treat dissenting classes fairly and equitably. With respect to a class of secured claims, a plan is only fair and equitable if it satisfies one of the following three requirements:

(i) it provides secured creditors the right to retain their liens on collateral and get deferred cash payments with a net present value of at least the allowed amount of the holders' secured claims;

(ii) in connection with a "free and clear" sale, subject to section 363(k) of the Bankruptcy Code, it provides that liens attach to the proceeds of the sale; or

(iii) it provides secured creditors with the "indubitable equivalent" of their claims.

See 11 U.S.C. § 1129(b)(2)(A).

The Bankruptcy Court denied the Debtors' bidding procedures motion on the grounds that it ran afoul of the requirements set forth in 1129(b)(2)(A)(ii), the specific provision concerning "free and clear" asset sales. The Bankruptcy Court declined to find, as the Third Circuit did, that the Debtor could, at least in theory, confirm a Chapter 11 plan that provided for a sale of assets over the objection of a secured lender by paying the secured lender the proceeds of the sale and otherwise satisfying the indubitable equivalent standard set forth in 1129(b)(2)(A)(iii). *In re River Road Hotel Partners, LLC*, 2010 Bankr. LEXIS 5933 (Bankr. N.D. Ill., Oct. 5, 2010). The United States Court of Appeals for the Seventh Circuit affirmed the Bankruptcy Court's holding. *See River Road Hotel Partners, LLC v. Amalgamated Bank*, 651 F.3d 642 (7th Cir. 2011).

Supreme Court Decision

The Supreme Court affirmed the Seventh Circuit. The Court found the Debtors' reading of section 1129(b)(2)(A)(iii) as obviating a secured lender's 363(k) credit bidding rights "hyperliteral and contrary to common sense." Rather, applying the statutory interpretation cannon that "the specific governs the general," the Court noted that "clause (ii) is a detailed provision that spells out the requirements for selling collateral free of liens, while clause (iii) is a broadly worded provision that says nothing about such a sale." Therefore, the Court concluded that although clause (iii) may be broad enough to permit a sale of assets, it should not be applied to "free and clear" asset sales to read out a secured lender's right to credit bid when its collateral is being sold without its consent, absent a showing of cause.

Notably, the Court found it was obligated to interpret the Bankruptcy Code "clearly and predictably using well established principles of statutory construction." By resolving the lingering uncertainties related to credit bidding under a Chapter 11 plan and upholding secured creditors' rights, the Court has risen to its own challenge.