SALIENT SALE-RELATED CASES OF 2007 AND 2008

The following is a summary of noteworthy reported decisions in 2007 and 2008 addressing issues relating to the sale of assets pursuant to Section 363 of the Bankruptcy Code.

The summary updates the attached materials which were prepared in connection with the American Bankruptcy Institute's Annual Spring Meeting in April 2008.[1]

1. *Florida Department of Revenue v. Piccadilly Cafeterias, Inc.*, No. 07-312 (U.S. Sup. Ct. filed June 16, 2008)

The U.S. Supreme Court considered whether a tax-stamp exemption under § 1146(a) in the Bankruptcy Code applies to a debtor whose Chapter 11 plan has not yet been approved by a bankruptcy court. Piccadilly declared Chapter 11 bankruptcy and was awaiting confirmation of its bankruptcy plan. In the interim, the court granted the debtor a tax-stamp exemption for asset transfers under 11 U.S.C. §1146(a), which provides an exemption for transfers "under a plan confirmed under section 1129." The Eleventh Circuit affirmed the application of the exemption. The Supreme Court reversed, holding that preconfirmation transfers do not qualify for a stamp-tax exemption under §1146(a).

2. *In re PW, LLC (Clear Channel Outdoor, Inc. v. Nancy Knupfer)*, No. 07-1176, (9th Cir. B.A.P. filed May 30, 2008)

The Bankruptcy Court entered an order approving a sale of assets free and clear of all liens, claims and interests pursuant to § 363(f)(5), and found that the buyer was a good faith purchaser under section § 363(m). On appeal, non-consenting junior secured lien holder, Clear Channel Outdoor, argued that the sale should be overturned or in the alternative, that the purchaser take the assets subject to its lien. The Ninth Circuit Bankruptcy Appellate Panel upheld the sale, but reversed the Bankruptcy's Order allowing the sale free and clear of Clear Channel's lien. The BAP held that § 363(f)(5) can only be used when evidence reflects that the lienholder can be compelled

[1] These materials were prepared by Robbin Itkin and Sharon Kopman of Steptoe & Johnson and Jeffrey Pomerantz of Pachulski Stang Ziehl & Jones LLP.

through a legal or equitable proceeding to accept money in satisfaction of its interest and the cramdown provisions under § 1129(b)(2) do not constitute such a proceeding. The BAP also affirmed the lower court's ruling that § 363(f)(3) does not authorize the sale of interests free and clear of a lienholder's interest if the price of the estate property is equal to or less than the aggregate amount of all claims held by creditors with a lien or security interest on the property being sold.

3. ***In re Straightline Investments, Inc***., 525 F.3d 870 (9th Cir. 2008)

The Ninth Circuit confirmed that the vertical and horizontal tests should be used to determine if a transaction is within the ordinary course of business pursuant to § 363(c)(1). Post petition the Debtor obtained receivables financing from a third party without court approval. After a chapter 11 trustee was appointed, the bankruptcy court granted the trustee's motion to recover the receivables transferred without court authority as an unauthorized post petition transfer under Section 549, which order was affirmed by the Bankruptcy Appellate Panel. The transferee argued that the Debtor sold the receivables to it and that since such sales were made in the ordinary course of the Debtor's business no Court approval was required for the transaction. In order to constitute an "ordinary course transaction" the transaction must satisfy the "vertical test" and the "horizontal test". The "vertical test" compare's the debtor's prepetition and postpetition business practices to determine whether, from the creditor's perspective, the transaction was ordinary in the context of such relationships. Under the "horizontal test" the question is whether the transaction is the type of transaction that a similar business would engage in as ordinary business. Because the transactions in question did not satisfy either test, they were not in the ordinary course of business.

4. ***In re Telluride Income Growth, L.P.*, 364 B.R. 390 (10th Cir. B.A.P. 2007)**

The Tenth Circuit held that while some courts have narrowly construed an interest in property to mean *in rem* interests only, such as liens, it agrees with the majority of courts that have a more expansive reading of interest in property as encompassing other obligations that may flow from ownership of the property when determining the extent of 363(f) sales free and clear of liens.

5. *Al Perry Enters. v. Appalachian Fuels LLC*, 503 F.3d 538 (6th Cir. 2007)

The Sixth Circuit broadly interpreted §363(f) and specifically addressed what types of claims could possibly survive a §363 sale. The Sixth Circuit held that if a party has a claim in a bankruptcy case, whether actual or contingent on future events, unless the claim is expressly assumed as part of the asset purchase agreement, the assets can be sold free and clear of any interest the claimant might hold. The Circuit further held that after the order is entered, such interest is then extinguished.

6. *In re Reading Broadcasting, Inc.*, 2008 WL 1828821 (Bankr. E.D. Pa. 2008)

This bankruptcy case involved competing plans of reorganization filed by the Trustee and the Philadelphia Television Network ("PTN"). The Court confirmed the Trustee's plan which contemplated a sale of certain assets free and clear of liens. Thereafter, PTN objected to certain findings of fact contained in the confirmation order and attempted to introduce new evidence that the Trustee had not marketed the assets sufficiently. In declining to vacate the confirmation order, the Court focused on the strong public policy of finality and regularity in bankruptcy sales and reasoned that reopening a closed bidding process would undermine such policies. The Court further reasoned that evidence justifying vacating a sale order will involve collusion between bidders or some type of fraudulent behavior, none of which was alleged by PTN.

8. *In re MMH Automotive Group, LLC*, 385 B.R. 347 (Bankr. S.D. Fla. 2008)

The Bankruptcy Court analyzed the interplay between §§ 363 (f) and (h) and held that any sale pursuant to § 363 necessarily takes into account any rights of a non-debtor party to an unexpired lease pursuant to §363(h), when those rights are applicable. Property can be sold free and clear of a leasehold interest, if the non-debtor can be compelled to accept money in lieu of its interest under § 363(f)(5).

9. *In re Pan American Hosp. Corp.*, 364 B.R. 832 (Bankr. S.D. Fla. 2007)

The Bankruptcy Court held that successor liability for back pay and reinstatement claims filed by the NLRB would not be imputed to the buyer. Debtor sought to sell substantially all of its assets pursuant to court approved bidding procedures. In advance of the auction, the NLRB filed and served on interested parties a notice informing potential bidders that the successful bidder for the Debtor's assets would be liable for unfair labor practices committed by the Debtor prior to the closing of the sale under 29 U.S.C. Section 151. The Committee moved to strike the NLRB's pleading and sought sanctions. Prior to the hearing, the NLRB withdrew the notice. Nevertheless, the court entered an order to show cause why the NLRB should not be sanctioned and why its conduct was not in violation of the automatic stay. Subsequently, the Court ruled that the NLRB had violated the stay because its notice, which implied that a buyer would have successor liability for labor relations claims, chilled bidding for the Debtor's property. The Court then ruled that the Debtor's assets can be sold free and clear of back pay and reinstatement claims under 363(f).

10. *In* ***re Global Home Products LLC,*** **369 B.R. 770 (D. Del. 2007).**

The debtor sold and assumed and assigned to buyer a Trademark Sublicense Agreement and the Bankruptcy Court found the buyer to be a good faith purchaser pursuant to 363(m). A third party argued that § 363(m) was inapplicable to assumption and assignment of an executory contract pursuant to § 365, but the Court disagreed because there was also a sale of such contract under § 363. The Court dismissed the appeal as moot because the sale concluded and there was no stay in effect and noted that it is in the best interests of public policy to provide protection to buyers under 363(m).

11. *In re USA Commercial Mortg. Co.*, 2007 WL 2571947 (Bankr. D.Nev. 2007)

This case involved the appeal of two orders relating to the confirmation of the Debtors' plan of reorganization which authorized the sale of certain of the Debtors' assets. The Debtors sought dismissal of the appeals on the grounds that they were moot under Section 363(m) because the creditors did not obtain a stay pending appeal. The Debtors also sought dismissal on the grounds that the appeal was equitably moot.

The District Court of Nevada first analyzed mootness under Section 363(m) and held that the appeals were moot because the creditors failed to obtain a stay pending appeal and there were no allegations that the buyers acted other than in good faith. While the creditors acknowleged the failure to obtain a stay pending appeal, they urged the District Court to adopt the "validity of sale exception" under Section 363(m) which has been adopted by the Third, Eighth and Tenth Circuits. Under that exception, there is no per se mootness of an appeal under Section 363(m) unless two conditions are satisfied: (a) the sale order was not stayed pending appeal; and (b) reversing or modifying the sale order would affect the validity of the sale. The District Court rejected the creditors argument reasoning that the Ninth Circuit has never acknowledged an exception to Section 363(m) mootness and has demonstrated a consistent rejection of the weakening of the Section 363(m) mootness standard. Moreover, while certain Ninth Circuit cases have recognized an exception to Section 363(m) mootness when the sale transaction would violate state law, the sale at issue did not violate state law.

Lastly, the Court reasoned that the appeals were equitably moot

12. *In re Slifco*, 2007 WL 1732782 (Bankr. D. Co. 2007)

The Bankruptcy Court, after noting that there is a split among courts regarding whether a bankruptcy filing automatically severs a joint tenancy, held that joint tenancy is destroyed when one joint tenant files for bankruptcy and fails to schedule the jointly held property as "exempt," because such an action is inconsistent with the right of survivorship.