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The Supreme Court Upholds a Secured Creditor's Right to Credit-Bid Under a Bankruptcy Plan of Reorganization

In an eagerly anticipated decision, the United States Supreme Court resolved a split of authority among the courts of appeal on the issue of whether a secured creditor is ensured the right to credit-bid in an asset sale conducted as part of the debtor's Chapter 11 plan of reorganization. Credit-bidding refers to the ability of a secured creditor to bid its debt up to the amount of its claim, rather than pay cash, at an auction sale of its collateral, allowing the secured creditor to purchase the property without an infusion of fresh capital. While the right to credit-bid is expressly codified for asset sales conducted under section 363 of the Bankruptcy Code, courts disagreed as to whether this right extends to sales under a Chapter 11 plan. In *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, --- S. Ct. ----, No. 11-166, 2012 WL 1912197 (U.S. May 29, 2012), the Supreme Court unanimously affirmed the right of a secured creditor to credit-bid its claim in a sale that is part of a plan of reorganization.

In *RadLAX*, RadLAX Gateway Hotel, LLC and RadLAX Gateway Deck, LLC (together, "RadLAX") purchased the Radisson Hotel at Los Angeles International Airport along with an adjacent lot. RadLAX planned to renovate the hotel and build a parking structure on the lot. RadLAX financed the plan with a $142 million loan from a fund for which Amalgamated Bank (the "Bank") served as trustee, secured by all of RadLAX's assets. After the project ran into financial problems, RadLAX filed for bankruptcy. The RadLAX debtors subsequently filed a bankruptcy plan that proposed to sell substantially all of their assets. The bidding procedures for the sale proposed by the debtors did not permit the Bank to credit-bid its claim and instead required all interested purchasers to submit a cash bid. Given that the Bank was likely to object to the plan as a result of this limitation in the bidding procedures, the debtors sought to confirm the plan of reorganization under section 1129(b) of the Bankruptcy Code, the so-called "cramdown" provision.

The bankruptcy court denied the debtors' motion to approve the bidding procedures, finding that they did not comply with the requirements of section 1129(b)(2)(A) for confirming a plan over a secured creditor's objection. In *River Road Hotel Partners, LLC v. Amalgamated Bank*, 651 F.3d 642 (7th Cir. 2011), the Seventh Circuit agreed with the bankruptcy court.

The Supreme Court now has affirmed the right to credit-bid under a plan, resolving a split of authority between the *River Road* decision and the Fifth and Third Circuits' decisions in *In re Pacific Lumber Co.*, 584 F.3d 229 (5th Cir. 2009) and *In re Philadelphia*

Newspapers, LLC, 599 F.3d 298 (3d Cir. 2010), respectively, where those courts of appeal held that property may be sold under a plan without granting the secured creditor the right to credit-bid. In doing so, the Supreme Court summarily dismissed the debtors' argument that they could avoid giving a secured lender the right to credit-bid as long as they otherwise provided the lender with the "indubitable equivalent" of its claim, finding the debtors' statutory argument to be "hyperliteral and contrary to common sense."

Under section 1129(b)(2)(A) of the Bankruptcy Code, a bankruptcy plan may be confirmed over the objection of a secured creditor if it meets one of three requirements, including (i) the retention of the creditor's lien on the property pledged as collateral and the receipt of deferred cash payments, (ii) the sale of the property free and clear of the lien, subject to section 363(k) (which provides the right to credit-bid secured claims), where the liens attach to the proceeds of the sale, or (iii) the secured creditor's realization of the "indubitable equivalent" of its claim. The issue in *RadLAX* was whether in a proposed sale under a plan of assets that served as the collateral for the secured creditor, it was necessary to comply with the second requirement. The RadLAX debtors argued that because their plan would provide the Bank the "indubitable equivalent" of its claim, they did not need to provide the Bank a right to credit-bid in the plan-related sale of the lenders' collateral.

The Supreme Court disagreed, finding that under the plain rules of statutory interpretation, any plan that proposes a sale of collateral free and clear of liens over a secured creditor's objection, which was the case with the RadLAX debtors' plan, needs to fulfill the second requirement. Thus, the Court held that any plan proposing a sale of collateral free and clear needed to comply with the provisions of section 1129(b)(2)(A)(ii) that address asset sales and permit credit-bidding by the secured creditor, and that the general right to provide secured creditors the "indubitable equivalent" of their claims would not override the specific sale-related requirements. In reaching its ruling, the Court specifically declined to address policy arguments for or against credit-bidding that were raised by the litigants although it did note that the federal government, often a secured creditor, does not have easy access to cash funds that it could use to bid for its own collateral.

The Supreme Court's ruling resolves a split of authority that was a source of concern to many secured creditors. In resolving this ambiguity, the Court reaffirmed an important right of secured creditors and averted what could have other otherwise been increased risk of providing secured lending to distressed companies.

If you have any questions, please feel free to contact any of your regular contacts at the firm or any of our partners and counsel listed under "Bankruptcy and Restructuring" in the "Practices" section of our website (www.clearygottlieb.com).

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