Corporate Restructuring (Click on a title below to read the article.)

Out-of-Court Prepackaged and Prearranged Restructuring Strategies Continue to Prevail Over Traditional Chapter 11 Cases

CONTRIBUTING PARTNERS

Mark S. Chehi / Wilmington

Jay M. Goffman / New York

We predict that out-of-court, prepackaged and prearranged restructuring strategies will continue to be favored in 2012. Sophisticated stakeholders and financially distressed companies prefer to avoid in-court proceedings and the uncertainties and expense typically associated with traditional Chapter 11 cases.

Out-of-court financial restructurings can be accomplished with a broad variety of transactions, including tender offers, exchange offers, recapitalizations, refinancings, debt-to-equity conversions, consent solicitations that modify terms of existing debt instruments, amendments and extensions to existing credit facilities, new equity investments, and traditional merger and acquisition transactions. However, the hallmark of an out-of-court strategy is the need to obtain all consents and agreements required by applicable nonbankruptcy law.

Standing alone, an out-of-court restructuring strategy will fail if all needed consents and agreements are not forthcoming within the time frames required in a particular situation. Indeed, dissenting stakeholders may intentionally withhold agreement in order to maximize their perceived negotiating leverage in the face of looming legal deadlines or liquidity crisis events.

Out-of-court restructuring strategies may be assisted by "backup" prepackaged Chapter 11 plans that are never actually implemented. Backup prepacks encourage all stakeholders to reach agreement on out-of-court terms because prepackaged plan terms will bind dissenting stakeholders. When a holdout knows it will be bound by a prepackaged plan, the dissenter has greater incentive to agree on an out-of-court basis.

The 2011 Travelport and Jackson Hewitt financial restructurings illustrate the continuing trend of nontraditional Chapter 11 strategies.[1]

Travelport Out-of-Court Restructuring. Travelport is one of the world's largest providers of online travel services. In September 2011, it accomplished a complex out-of-court, cross-border financial restructuring involving $3.8 billion of debt issued by U.S., Bermuda, Cayman Islands, UK and other European entities, without any judicial proceedings.

Before its restructuring, Travelport confronted significant financial obstacles resulting from the current global economic downturn, as well as market and industry-wide pressures. Travelport Holding Limited (Travelport Holdings), the parent company of Travelport Limited, was obligated on approximately $715 million in unsecured payment-in-kind (PIK) term loans approaching maturity. Travelport Limited's existing credit agreement and bond indebtedness contained covenants limiting its ability to make cash payments to Travelport Holdings and other restrictions that required a creative restructuring approach.

The company needed a strategy that would extend the maturity dates of its debt and avoid bankruptcy. Persuading the PIK lenders unanimously to accept an out-of-court restructuring plan was the greatest challenge. Without their approval, Travelport Holdings faced a Chapter 11 outcome.

[1] Skadden represented Travelport and Jackson Hewitt in their successful restructurings.

Travelport's successful out-of-court restructuring was achieved with a dual-track restructuring plan: a strategy and negotiation that contemplated both consensual out-of-court transaction terms and, alternatively, prepackaged Chapter 11 terms if PIK lender consents to the out-of-court transaction were not obtained.

A "back-up" prepackaged Chapter 11 plan was formulated and proposed to lenders, in addition to proposed out-of-court restructuring terms. The existence of the backup prepackaged bankruptcy alternative encouraged all of the PIK term loan lenders ultimately to accept the out-of-court package of consideration offered to them. Additionally, 99.3 percent of the outstanding debt under Travelport Limited's senior secured credit agreement consented to the out-of-court restructuring terms.

The successful restructuring of the PIK term loans consisted of: (i) an $85 million *pro rata* cash repayment, (ii) an exchange of $207.5 million of existing PIK term loans for $207.5 million of second lien term loans due December 1, 2016, to be issued by a subsidiary of Travelport Limited, (iii) an extension of the remaining PIK term loans in two tranches: (a) $287.5 million aggregate principal amount of PIK term loans extended to December 1, 2016, and (b) $135 million aggregate principal amount extended until September 30, 2012, and (iv) equity of the parent of Travelport Holdings, subject to increase upon certain events. If not repaid by September 30, 2012, the obligations due under the $135 million tranche of PIK term loans will be satisfied with an additional $135 million of second lien term loans due December 1, 2016.

> "The existence of the backup prepackaged bankruptcy alternative encouraged all of the PIK term loan lenders to ultimately accept the out-of-court package of consideration offered to them."

Travelport's dual-track restructuring strategy allowed it to extend the maturity of the PIK term loans and pay off a portion of that indebtedness without commencing any bankruptcy proceedings that would have been detrimental to the company's business operations.

Jackson Hewitt Prepackaged Restructuring. Jackson Hewitt Tax Service Inc. and its affiliates' (Jackson Hewitt) Chapter 11 case illustrates what can be achieved with a prepackaged restructuring. Because of declining revenues and EBITDA, the tax return preparer business no longer was able to refinance its secured bank debt, which totaled approximately $357 million. Jackson Hewitt therefore worked with its lenders to restructure its debt and capital structure with a partially prepackaged plan of reorganization.

Following successful negotiations with its secured lenders and obtaining their unanimous support, Jackson Hewitt filed Chapter 11 petitions and a prepackaged plan of reorganization on May 24, 2011. Under the plan, $357 million in secured debt was forgiven in exchange for each lender receiving its *pro rata* share of 100 percent of the stock in the reorganized company, a new $100 million secured note and the opportunity to participate in a new $115 million lending facility. The company's public shares were cancelled, and the plan provided that unsecured creditors were to receive no recovery. Importantly, the confirmed plan discharged and thereby resolved numerous pending, disputed putative statewide class action litigations alleging Jackson Hewitt violated consumer protection laws.

Jackson Hewitt and its lenders ultimately agreed to a slightly modified plan that established a litigation trust with funding of approximately $1 million for the benefit

of unsecured creditors. The bankruptcy court entered an order confirming the plan approximately 75 days after the petition date.

The prepackaged restructuring strategy provided Jackson Hewitt with certainty of outcome and speed that the company needed for its business. The company timed its Chapter 11 filing to coincide with the conclusion of its 2011 tax season so that it would emerge from Chapter 11 quickly, in time for the company and its 700 franchisees to begin ramping up for the 2012 tax season. The certainty of outcome permitted Jackson Hewitt to maintain its franchisees and finalize a new agreement with Wal-Mart covering tax preparation kiosks in over 2,000 Wal-Mart stores nationwide. After a minimum of Chapter 11 time and expense, Jackson Hewitt restructured its entire balance sheet and capital structure, obtained a new revolving line of credit and quickly resolved prepetition consumer litigation claims.

European Companies to Expand Their Use of Chapter 11

CONTRIBUTING PARTNERS

Van C. Durrer II / Los Angeles

Chris Mallon / London

European companies in need of restructuring are expected to make greater use of Chapter 11 in the future, especially to complete reorganizations that are largely financial as opposed to operational.

Marked differences between bankruptcy and insolvency laws in the United States and Europe make the U.S. bankruptcy system attractive to foreign companies seeking a financial restructuring. Bankruptcy and insolvency laws throughout the European Union focus primarily on liquidation and the protection of secured creditors' rights. However, the U.S. Bankruptcy Code emphasizes reorganization and rehabilitation of financially distressed companies, allowing management of an insolvent company to maintain control over the restructuring process and permitting modification of secured creditor rights.

Recently, in the *In re Marco Polo Seatrade B.V.* Chapter 11 case(s), Case No. 11-113634 (JMP) (Bankr. S.D.N.Y. Nov. 3, 2011), the Bankruptcy Court for the Southern District of New York confirmed that foreign companies encounter few, if any, legal barriers to restructuring in the U.S. under the U.S. Bankruptcy Code. A foreign company is eligible to seek relief in the U.S. under Chapter 11 if it has a "place of business, or property in the United States." Notwithstanding *Marco Polo*, however, the key consideration for a foreign company in need of restructuring is not simply whether it may commence a Chapter 11 proceeding in the U.S., but whether it successfully can enforce U.S. bankruptcy court orders against foreign creditors abroad. As the *Marco Polo* decision confirmed, that the bulk of a foreign company's operations may be located outside the U.S. is not dispositive.

Rather, the real risk is that foreign courts, located where the foreign company primarily operates, may not recognize or enforce U.S. bankruptcy court orders either because the foreign jurisdiction has not enacted UNCITRAL's Model Law on Cross-Border Insolvency or the U.S. does not contain the company's "center of main interest" or at least an "establishment" within the meaning of Article 17 of the Model Law. If the company's home courts will not enforce the restructuring accomplished in the U.S., the U.S. restructuring becomes largely meaningless.

> "While a foreign court may be unwilling to enforce the orders of a U.S. bankruptcy court, a foreign company debtor may be able to seek contempt orders or other judicial enforcement powers against the U.S. operations of its foreign creditors."

Nevertheless, a foreign company debtor may be able to enforce U.S. court orders against foreign creditors within the U.S. — because many large creditors of foreign companies, such as banks, have substantial operations in the United States. While a foreign court may be unwilling to enforce the orders of a U.S. bankruptcy court, a foreign company debtor may be able to seek contempt orders or other judicial enforcement powers against the U.S. operations of its foreign creditors. In this way, a foreign company debtor may achieve the same practical result as enforcement of U.S. court orders abroad to accomplish its restructuring goals. A foreign company debtor should evaluate carefully whether such an approach will be sufficient to accomplish its needs and objectives.

Another risk arising from the use of Chapter 11 by a foreign company debtor is the potential for a plenary restructuring process in the company's home court. If there is an insolvency proceeding pending or commenced overseas by or against a foreign company debtor, its foreign representative can seek dismissal of Chapter 11 proceedings in the U.S. if the foreign proceeding is recognized and the purposes of Chapter 15 of the U.S. Bankruptcy Code would be "better served" by such dismissal. 11 U.S.C. § 305(a)(2). The Bankruptcy Code expressly lists the purposes of Chapter 15: comity, legal certainty for trade and investment, fair and efficient administration of interest, maximization of debtor assets and rescue of financially troubled businesses. 11 U.S.C. § 1501(a).

To date, only one court has addressed what "better serves" the purposes of Chapter 15 in any depth since the Model Law was enacted in the U.S. as part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, P.L. No. 109-8, 119 Stat. 23 (2005). In *In re RHTC Liquidating Co.*, 424 B.R. 714 (Bankr. W.D. Pa. 2010), the bankruptcy court refused to dismiss an involuntary petition against a U.S. subsidiary of a Canadian company that was the subject of an insolvency proceeding in Canada. In the *RTHC* case, where the foreign company debtor sought to avoid involuntary bankruptcy proceedings against it in the U.S. in favor of the company's voluntary proceeding overseas, the U.S. bankruptcy court concluded that dismissal of the involuntary U.S. bankruptcy case would not advance any of the purposes of Chapter 15. However, there has been no published decision in the context of a foreign company debtor that prefers a voluntary Chapter 11 case in the U.S. when its creditors prefer an involuntary foreign insolvency proceeding overseas.

Foreign companies exploring a restructuring strategy involving Chapter 11 will need to understand the implications of an insolvency proceeding in their home jurisdiction on a restructuring in the United States before moving ahead with this approach.

Supreme Court Decision in *Stern v. Marshall* Calls Into Question Extent of Bankruptcy Judges' Authority

CONTRIBUTING PARTNER

Mark A. McDermott / New York

Last fall, Skadden prepared a detailed overview of the United States Supreme Court's highly controversial decision in *Stern v. Marshall,* 564 U.S. ____, 131 S. Ct. 2594 (2011),[2] which ruled that a bankruptcy judge could not constitutionally enter a final ruling in a class of matters that bankruptcy judges and practitioners had long understood to be the proper domain of the bankruptcy courts.

While the Court's ruling focused on only one narrow aspect of bankruptcy judges' authority, both the bench and practitioners have struggled with the decision's implications on numerous aspects of bankruptcy practice, including fraudulent transfer and fiduciary duty litigation, two of the most common types of litigation commenced in bankruptcy courts. Indeed, dozens of courts around the country collectively have issued more than 100 rulings attempting to interpret it.

As a result of this confusion, litigants are using the decision to call into question bankruptcy judges' authority to hear and determine numerous matters that they historically have handled without any previous legitimate question about whether they could do so. The ruling therefore affects the litigation strategies of lenders, hedge funds, equity sponsors, directors and officers, and others who become involved in a bankruptcy case and related litigation.

Fiduciary Duties in the LLC Context: Creditors Have No Standing to Assert Derivative Claims

CONTRIBUTING PARTNERS

Mark S. Chehi / Wilmington

Van C. Durrer II / Los Angeles

Glenn S. Walter / Los Angeles

A recent *en banc* decision of the Delaware Supreme Court confirms that creditors of an insolvent Delaware limited liability company (LLC) do not have rights equal to creditors of an insolvent Delaware corporation. Whereas creditors of an insolvent corporation have standing to assert derivative fiduciary claims against corporate directors, creditors of an insolvent LLC may not assert derivative claims.

In *CML V, LLC v. Bax*, 28 A.3d 1037 (Del. 2011), the Delaware Supreme Court held that creditors of a Delaware limited liability company have no standing to assert derivative claims on behalf of an LLC, even if the LLC is insolvent. The decision applies Section 18-1002 of the Delaware Limited Liability Company Act (the LLC Act), which provides that only members and assignees of an interest in an LLC have standing to bring derivative claims in the right of the LLC.

The *Bax* decision has significant implications for Delaware LLCs and their stakeholders, counterparties, creditors, managers and affiliates. Although *Bax* does not change or diminish the fiduciary duties owed by the managers of a Delaware LLC, *Bax* does limit the universe of potential plaintiffs with standing to enforce such duties.

The implications of *Bax* for creditor rights will play out as creditors of LLCs (as well as creditors of corporations seeking to convert to an LLC for tax or other reasons) seek contracts to address the court's holding. The Delaware Supreme Court itself suggested in *Bax* that a creditor could protect itself by bargaining for contractual provisions that automatically make a creditor an assignee of an LLC member upon

[2] *See* "Chapter 11 Litigation Strategies After The Supreme Court's Decision in *Stern v. Marshall*" (Oct. 11, 2011), *available at* http://www.skadden.com/newsletters/Chapter_11_Litigation_Strategies_After_The_Supreme_Courts_Decision.pdf.

LLC insolvency or that give the creditor control of the LLC's governing body upon a default. It is unclear whether such provisions will be enforceable in bankruptcy.

In the wake of *Bax*, we expect lenders and other contractual counterparties to Delaware LLCs to demand terms that enhance creditor rights. Creditors may seek protective terms in LLC organizational documents and other contractual rights and protections such as information rights, rights to recover from specific LLC assets, rights to approve of certain LLC transactions and contractual limitations on distributions to LLC members. Creditors of LLCs also may bargain for direct contractual rights against LLC members and managers, including guarantees by them.

The *Bax* decision may be important in bankruptcy cases. For instance, Chapter 11 plan terms addressing derivative LLC claims should take into account whether assignees of such claims under a plan will have standing to pursue such claims.

Bax is likely to be followed in Delaware limited partnership matters because the Delaware Revised Uniform Limited Partnership Act includes provisions equivalent to Section 18-1002 of the LLC Act.

'Living Will' Contingency Planning Required for Certain Systemically Important Financial Institutions

CONTRIBUTING PARTNER

Mark A. McDermott / New York

On September 13, 2011, the Federal Deposit Insurance Corporation (FDIC) approved a rule that requires large bank holding companies and other systemically important financial companies to develop comprehensive contingency plans for the orderly resolution of their affairs under the United States Bankruptcy Code. The Federal Reserve Board (Board) approved the rule on October 17, 2011. The rule was promulgated under the authority of the Dodd-Frank Act as part of the act's larger aim to impose controls on risk-taking and related activities of financial institutions in the wake of the near-collapse of the global financial system in the fall of 2008.

The impetus for the contingency planning rule in particular was the unprecedented bankruptcy filing of Lehman Brothers. Lehman had virtually no contingency planning, which in turn resulted in a highly chaotic filing that disrupted markets as regulators and market participants struggled to understand the complexity of Lehman's operations and the ramifications of its collapse. Regulators therefore are requiring covered financial companies to engage in a thorough risk-management exercise under the rule so that they can be better prepared in the event of either an idiosyncratic or systemic crisis.

Last fall, Skadden prepared a comprehensive summary of terms of the rule and similar rules anticipated to be adopted by United Kingdom's Financial Services Authority (FSA).[3] The FDIC, the Board and the FSA collectively are farther along than any of the world's other financial regulators in pursuing contingency planning requirements.

[3] *See* "Dodd-Frank, FDIC and FSA Rules Require Financial Companies to Develop Global Insolvency Contingency Plans" (Sept. 23, 2011), *available at* http://www.skadden.com/newsletters/Dodd-Frank_FDIC_and_FSA_Rules_Require_Financial_Companies_to_Develop_Global_Insolvency_Contingency_Plans.pdf.

Washington Mutual Decision Granting Standing to Equity Committee Raises New Concerns for Restructuring Negotiations

CONTRIBUTING PARTNERS

Van C. Durrer II / Los Angeles

Casey T. Fleck / Los Angeles

Glenn S. Walter / Los Angeles

A recent bankruptcy court decision is impacting restructuring negotiations and has the potential to significantly upset negotiation practices. On September 13, 2011, the United States Bankruptcy Court for the District of Delaware granted standing to the equity committee in the *In re Washington Mutual, Inc.* Chapter 11 cases, Case No. 08-12229 (MFW), to pursue claims for equitable disallowance of certain noteholder claims. The committee was authorized to do so based upon alleged insider trading by noteholders who had traded debt securities of the debtor following expiration of confidentiality agreements previously entered into regarding plan-related settlement negotiations. Although the *WaMu* decision is on appeal, debtors, creditors and other parties in interest should consider its implications prior to entering into any restructuring negotiations.

In rendering its decision that denied confirmation of a proposed plan of reorganization, the *WaMu* court noted that knowledge of settlement negotiations and information in term sheets exchanged in such negotiations can constitute material information under federal securities laws. This was the basis for the *WaMu* court's decision authorizing the equity committee to pursue equitable disallowance of noteholder claims. Although credit agreement obligations generally are not deemed securities, the *WaMu* decision may be expanded to justify equitable disallowance of claims in connection with negotiations regarding the restructuring of credit agreement obligations as well.

The potential consequences of the *WaMu* decision are significant. Although surprising, the possibility that failed negotiations and term sheets exchanged during these negotiations may constitute material nonpublic information in similar circumstances (plan settlement negotiations) is an important factor to consider in restructuring negotiations.

In the wake of *WaMu*, debtors and creditors entering into negotiations should expect significant disclosures about attempted restructuring negotiations, including disclosure of proposed terms, in the event negotiations are unsuccessful. In the *WaMu* negotiations, confidentiality agreements required the debtor to make disclosures of material nonpublic information upon the expiration of the confidentiality agreements, but such disclosures ultimately did not include the existence of these negotiations or the content of the settlement term sheets. Notably, the *WaMu* court rejected the argument that noteholders should not have any further duty to ensure that the debtor properly releases all material nonpublic information to the public and found that noteholders could not rely solely on the debtor's contractual cleansing disclosure requirements in a confidentiality agreement. As a result, parties may now require more extensive disclosures in the event that negotiations are unsuccessful, including disclosure of proposed settlement terms.

Some predict that the *WaMu* decision and its implications may chill settlement discussions in bankruptcy cases to the extent that creditors engaging in such discussions may be exposed to insider trading allegations and risks if nonpublic negotiations fail. However, these risks may be managed if creditors restrict their trading in debtor securities or implement appropriate ethical walls that insulate use of nonpublic information about settlement negotiations.

On the other hand, the *WaMu* decision actually may encourage settlements by incentivizing creditors that enter into negotiations prior to the expiration of pertinent confidentiality agreements out of concern about possible future public disclosure of their private negotiation terms.

Confirming Joint Plans for Multiple Debtors in the Wake of the *Tribune* Decision

CONTRIBUTING PARTNERS

John ("Jack") Wm. Butler, Jr. / Chicago

John K. Lyons / Chicago

George N. Panagakis / Chicago

Multiple affiliated debtor entities comprising a single company often simultaneously commence Chapter 11 cases, and their respective bankruptcy cases are administered jointly by a bankruptcy court. A single, "joint" Chapter 11 plan may be proposed by numerous affiliated debtors (or by another party in interest) for the joint resolution of the affiliated debtors' respective classes of claims and liabilities.

For a plan to be confirmed, it must satisfy numerous requirements of Section 1129(a) of the Bankruptcy Code. One important confirmation requirement is imposed by Section 1129(a)(10): a Chapter 11 plan must be accepted by at least one class of claims that is "impaired" by the plan. A class of claims is impaired if the legal, equitable or contractual rights of class claimants are altered by the terms of the plan.

On October 31, 2011, the Bankruptcy Court for the District of Delaware held in the jointly administered *In re Tribune Company* Chapter 11 cases (Bankr. D. Del., No. 08-13141 (KJC)) that Bankruptcy Code Section 1129(a)(10) must be satisfied on a debtor-by-debtor basis, *i.e.*, Section 1129(a)(10) imposes a "per-debtor" statutory confirmation requirement.[4] The *Tribune* decision may have far-reaching consequences when a joint plan of reorganization is proposed by or for multiple affiliated debtors.

In the *Tribune* bankruptcy cases, competing reorganization plans were proposed for the joint resolution of the claims and liabilities of all of the 111 affiliated *Tribune* debtors: One joint plan was proposed by the debtors, the official committee of unsecured creditors and certain senior lenders, and another was proposed by the holders of certain bonds. However, neither of the proposed joint plans was accepted by an impaired accepting class at each of the numerous debtor entities.

The Bankruptcy Court held that, absent substantive consolidation of multiple debtors or the "consent" of the nonvoting impaired class by way of "deemed acceptance," Section 1129(a)(10)'s confirmation requirement that there be one accepting impaired class must be satisfied with respect to each debtor subject to a joint plan. In reaching this conclusion, the Bankruptcy Court noted the "nonsubstantive consolidation" provisions in each of the competing *Tribune* plans and that "[t]he practical effect of these … provisions … is that each joint plan actually consists of a separate plan for each Debtor."

In the wake of the *Tribune* decision — which may be followed by other bankruptcy judges and in other jurisdictions — parties in interest in complex multidebtor Chapter 11 cases should not assume that "joint" administration of affiliated

[4] Skadden continues to represent the special committee of the board of directors of the Tribune Company, which was formed in the fall of 2006 to oversee Tribune's consideration of a possible strategic transaction.

debtor cases means that a single joint plan for all debtors will succeed. Statutory confirmation requirements, including Section 1129(a)(10)'s impaired accepting class requirement, may or will be tested on a per-debtor basis. Such requirements may necessitate technical plan terms and strategies that should be anticipated by bankruptcy professionals before a particular plan is proposed.

Supreme Court to Consider Secured Lender Credit-Bidding Rights

CONTRIBUTING PARTNERS

Ron E. Meisler / Chicago

David M. Turetsky / New York

There is ongoing debate about the rights of secured creditors to credit bid their claims when their collateral is proposed to be sold free and clear of liens pursuant to a Chapter 11 plan. The U.S. Courts of Appeals for the Third and Fifth Circuits have held that the Bankruptcy Code does not require that secured creditors be afforded the right to credit bid in a Chapter 11 plan-based sale if secured creditors are to receive under the plan deferred cash payments or the "indubitable equivalent" of their claims, as provided in Section 1129(b)(2)(A) of the Bankruptcy Code.

A recent decision by the U.S. Court of Appeals for the Seventh Circuit in *In re River Road Hotel Partners, LLC*, 651 F.3d 642 (7th Cir. 2011) creates a circuit split because the Seventh Circuit concluded that, absent consent, secured creditors must be afforded the right to credit bid when their collateral is sold pursuant to a Chapter 11 plan. We commented on the developing circuit split in the *New York Law Journal*.[5]

On December 12, 2011, the U.S. Supreme Court granted a petition for certiorari seeking review of the *River Road* decision. *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, No. 11-166, 2011 WL 3499633, (U.S. Dec 12, 2011) (No. 11-166). The Supreme Court's review is expected to resolve the split between the Seventh Circuit and the Third and Fifth Circuits.

In contrast to earlier decisions by the Third and Fifth Circuits in *In re Philadelphia Newspapers, LLC*, 599 F.3d 298 (3rd Cir. 2010) and *In re Pacific Lumber Co.*, 584 F.3d 229 (5th Cir. 2009), the Seventh Circuit in *River Road* rejected the notion that the plain language of Bankruptcy Code Section 1129(b)(2)(A) permits a Chapter 11 plan-based sale of collateral free and clear of liens without opportunity for secured creditors to credit bid for their collateral. Reading Section 1129(b)(2)(A) differently than the Third and Fifth Circuits, the Seventh Circuit in *River Road* decided that the rights of secured creditors to credit bid are applicable to all plans that provide for the sale of secured creditor collateral free and clear of creditor liens. The *River Road* court rejected the argument that Section 1129(b)(2)(A) provides a basis to deprive secured creditors of the right to credit bid so long as they are given the "indubitable equivalent" of their claim. It reasoned that depriving secured creditors of the right to credit bid would be inconsistent with statutory protections for secured creditors elsewhere in the Bankruptcy Code, including secured creditor rights to credit bid pursuant to Section 363(k) when their collateral is sold outside a plan.

[5] *See* "The 'River Road' Less Traveled" (Sept. 26, 2011), *available at* http://www.skadden.com/content/Publications/Publications2539_0.pdf.

The upcoming Supreme Court review will have important implications for debtors, secured creditors and other interested parties. The right to credit bid constitutes not only a significant protection for secured creditors but also is a potent tool for parties seeking to acquire distressed assets through "loan-to-own" strategies.

The Seventh Circuit's decision in *River Road* (assuring secured creditors' right to credit bid in free-and-clear, Chapter 11 plan-based sales) vindicates the interests of secured creditors, including those that have purchased secured debt for bankruptcy credit-bidding purposes. The position taken by the Third and Fifth Circuits (permitting free-and-clear, plan-based collateral sales without affording secured creditors the right to credit bid) may give debtors greater flexibility to structure plan-based transactions and outcomes, but at the cost of limiting secured creditor protections.