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IT'S ABOUT TIME – VALUE AS A TEMPORAL CONSTRUCT IN BANKRUPTCY CASES

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IT'S ABOUT TIME – HOW VALUE FLUCTUATIONS
AFFECT YOUR CLIENT'S RIGHTS IN CHAPTER 11

I. Value Makes the Bankruptcy World Go Round – An Overview of the Role of Value and Valuation in Bankruptcy.

In the world of bankruptcy, however, value and valuation can dwarf the role played by traditional notions of money. In bankruptcy, a five dollar unsecured claim could lead to the receipt of five cents, a five million dollar oversecured claim could lead to the receipt of five million dollars plus interest, fees, and expenses, and a "low" valuation of a debtor company can lead to the complete elimination of shareholders' interests. *See, e.g.*, Transcript of Continued Confirmation Hearing on September 2, 2016 at 16, *In re Horsehead Corp.*, Case No. 16-10287 (CSS), ECF. No. 1640 (ruling that "in order for the equity committee to be in the money and for the plan to violate the absolute priority rule, I believe the value must exceed at least 735 million dollars, which it does not."). The value ascribed to a creditor's claim depends on a game of musical chairs (with an especially great shortage of chairs) and the point at which the music stops. One cannot overstate the importance of value and valuation in this alternate reality of bankruptcy. This paper explores the temporal nature of value and valuation – when does the music stop?

A. The Bankruptcy Code and Valuation.

While the Bankruptcy Code is replete with express and indirect references to "value," "[t]he failure of Congress to establish any guidelines [in the Bankruptcy Code] in the area of valuation was by no means inadvertent." Louis W. Levit, *Use and Disposition of Property under Chapter 11 of the Bankruptcy Code: Some Practical Concerns*, 53 AM. BANKR. L.J. 275, 288 (1979). The legislative history shows that Congress intended to provide the courts with the maximum possible latitude to balance the equities based on the facts and circumstances of each situation. *Id.* Moreover, Congress (at least the House of Representatives) believed that parties would negotiate value issues and reach a consensual resolution without court intervention; only infrequently would the courts become involved:

> In any particular case, especially a reorganization case, the determination of which entity should be entitled to the difference between the going concern value and the liquidation value must be based on equitable considerations based on the facts of the case. It will frequently be based on negotiation between the parties. Only if they cannot agree will the court become involved.

Id. at 289 (citing to the House Report 95, 95th Congress, First Session at 339); *see also In re Cason*, 190 B.R. 917, 927 (Bankr. N.D. Ala. 1995) (finding that the argument that having multiple valuation is time consuming and inefficient is a red herring because separate valuations are only required when specifically requested by a creditor). Although intentional, Congress' decision not

to provide any instruction on valuation nonetheless leaves a void in the Bankruptcy Code for parties and courts.

This paper focuses primarily on the timing of value determinations with respect to secured claims under three specific Bankruptcy Code provisions: 11 U.S.C. §§ 361(1), 506(b), and 507(b). Section 361(1) concerns adequate protection, which is mandated by the Bankruptcy Code when requested by an entity with an interest in property in which the estate has an interest. *See* 3 COLLIER ON BANKRUPTCY ¶ 361.02[3] (Alan N. Resnick & Henry J. Sommers eds., 16th ed.).

> When adequate protection is required under section 362, 363, or 364 of this title of an interest of an entity in property, such adequate protection may be provided by—(1) requiring the trustee to make a cash payment or periodic cash payments to such entity, *to the extent that* the stay under section 362 of this title, use, sale, or lease under section 363 of this title, or any grant of a lien under section 364 of this title *results in a decrease in the value of such entity's interest in such property* . . . .

11 U.S.C. § 361(1) (emphasis added).

"The most important message of the Code with respect to treatment of an entity with an interest in property of the estate or in the possession of the estate is that its remedies may be suspended, even abrogated, and its right of recourse to collateral may be terminated as it is consumed in the business, so long as the *value* of its secured portion is adequately protected, when required." 3 COLLIER ON BANKRUPTCY ¶ 361.02[3] (Alan N. Resnick & Henry J. Sommers eds., 16th ed.); *see also In re Cason*, 190 B.R. at 927 (citation omitted) (explaining that "[t]o read the statutes as mandating a single valuation would make the statutes dealing with adequate protection superfluous.").

Section 506(b) provides for the holder of an oversecured claim to obtain interest on such claim and other costs:

> To the extent that an allowed secured claim is secured by property the value of which, after any recovery under subsection (c) of this section, is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement or State statute under which such claim arose.

11 U.S.C. § 506(b). Pursuant to this section, a creditor's receipt of post-petition interest is capped by the extent to which the creditor's claim is oversecured. 4 COLLIER ON BANKRUPTCY ¶ 506.04[2] (Alan N. Resnick & Henry J. Sommers eds., 16th ed.); *see also United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd. (In re Timbers of Inwood Forest Assocs., Ltd.)*, 484 U.S. 365, 108 S. Ct. 630, 631, 98 L. Ed. 2d 740 (1988).

Title search: It’s About Time: Value as a Temporal Construct

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