Current Developments and Hot Tips

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This paper is a collection of developments, cases and events which we think are relevant to lawyers who practice in the area of commercial real estate finance, transactions and development. Some are reports of new developments and some are reminders of law and practice that we think might be useful to you. We are certain that we have overlooked many developments that you would like to see covered, but we have picked those things to report which we think would be helpful to most of you and maybe even entertaining in some ways. We have tried not to step on the toes of the contributors to this seminar who so skillfully inform us of developments in Texas cases, but where we see a trend that might not have been fully dealt with, we do include some Texas cases.

A. Regulatory Definition of “Waters of the United States” Withdrawn. But Confusion still Exists in Permitting and Enforcement Jurisdiction

B. *Markel Interests, LLC v. US Fish and Wildlife Service* – Designation of “Critical Habitat” – A case destined for SCOTUS

C. Other Proposed ESA Regulatory Changes Proposed

VIII. An Opinion Issue – not new law but a reminder of issues we need to understand

IX. How you settle your case matters – Credits against the debt in multi-party litigation over real estate debt

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I. YOU NEED TO KEEP UP WITH DEVELOPMENTS IN BANKRUPTCY LAW EVEN THOUGH YOU DO NOT WANT TO

We all need to remember that the bankruptcy power is a specifically named power of the federal government in the US Constitution. Its benefits cannot for the most part be waived by a debtor. Even in economic "good times" lawyers for both borrowers and lenders need to be aware of changes in bankruptcy law so they can use the possible application of bankruptcy law in planning and documenting their transactions. This year we have new cases which demonstrate, again, that statement is true.

A. <u>An Overly Basic Overview Of What Lenders Want In Bankruptcy Cases.</u>

Typically, a lender in a commercial real estate financing wants to either get paid as agreed or to get the collateral property quickly and cheaply so as to minimize its loss on the transaction. The potential for a debtor to use a bankruptcy case to either slow down the lender in getting control of the collateral property or to "cram down" the debt so as to create a loss for the lender is to be avoided at all costs. Lenders' counsel have developed several techniques to try to avoid either the delay or the cram down, but some of these lender techniques are under challenge, and debtors counsel are developing techniques by which debtors may delay collection or cram down debt.

B. <u>Cram Downs in Multiple Debtor Cases.</u>

When times get bad, real estate borrowers may try to restructure their loans through the "cram down" provisions of Chapter 11. In order to successfully effect a cram down, one class of impaired non-borrower affiliated creditors is required to vote in favor of the plan. For that reason, it has become the norm for real estate commercial loans to be structured so that an asset would have only one secured loan and any additional financing would have to be done via a mezzanine structure, thereby eliminating the need for a vote for the plan from the second lien lender.

But what happens in a Chapter 11 in which there is a joint plan of reorganization for multiple non-substantively consolidated debtors? A Bankruptcy Court has recently held that the approval of the plan by one impaired class of one debtor is sufficient to enable cram down for the debts of the multiple debtors. <u>In re Transwest Resort Properties Inc</u>., 2016 WL 4087111 (D. Ariz. June 22, 2016). The Ninth Circuit Court of Appeals recently affirmed the decision (881 F3d 724 (9th Cir. 2018)). The Bankruptcy Court for the District of Delaware, on the other hand, has held that satisfaction of the conditions for a cram down requires acceptance of the plan by an impaired class for <u>each</u> debtor in a multiple debtor case. <u>In re Tribune</u>, 464 B. R. 126

(Bankr. D. Del. 2011). The Transwest and the Tribune cases are examples of the contrasting "per plan" or "per debtor" approaches to the matter.

Lenders have taken care to structure loans so that the borrower entity is isolated from its affiliates. But this case indicates that a joint filing and a joint plan (over which the the lender may have no control) can determine the fate of the debt, even when the bankruptcy cases are not substantively consolidated.

C. The "Golden Share" Technique Loses its Luster

Another tactic by which lenders have tried to preserve the ability to enforce their loan documents and remedies in the face of possible Chapter 11 filings has been to take an interest in the borrower, a characteristic of which interest is that an affirmative vote of this particular interest is required to authorize the filing of a Chapter 11 proceeding. The ownership interest typically has no economic aspect – that is the interest does not share in profits of the enterprise. This structure has been called the creation of a "Golden Share". A recent case from the Bankruptcy Court in Delaware calls into question the effectiveness of this technique.

The debtors in this case were oil and gas companies, organized under Delaware law and the operations of the borrower were mostly in North Dakota. This Golden Share had been issued after the loan went into default as part of a forbearance agreement during workout negotiations.

In a case named In Re Intervention Energy Holdings, LLC., No. 16-11247 (Bankr. D. Del. June 3, 2016) the Bankruptcy Court refused to invalidate a bankruptcy filing made without the consent of the owner of the "Golden Share", holding that the Golden Share was void as a matter of federal public policy in the circumstances of this case. After default, the debtor had filed for Chapter 11 relief and the creditor moved to dismiss the petition on the grounds that the debtor lacked the proper authorization to file the petition.

The Court determined that the Golden Share structure in this situation was an "absolute waiver" of the right of the debtor to seek bankruptcy relief and that was contrary to federal bankruptcy law and policy. The Court focused on the fact that the Golden share had been issued in workout circumstances (so it was a "pre-petition contract") rather than the validity or invalidity of the Golden Share itself. It determined that the issuance of the Golden Share was directly intended to block a bankruptcy filing and that violated federal policy. It distinguished this case from the holding by a Bankruptcy Court in Georgia which had allowed a creditor holding something like a Golden Share to block a bankruptcy filing when that creditor also had a significant investment in and so an economic interest in the debtor (In re Global Ship Sys., 391 B. R. 193 (S. D. Ga. 2007)).

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