Current Developments and Hot Tips

Mortgage Lending Institute of
The University of Texas School of Law

September, 2022

Robert DuBois,
DuBois, Bryant & Campbell
and Adjunct Professor of Law, University of Texas School of Law

Brian Rider
Adjunct Professor of Law, University of Texas School of Law
(who Robert wants you to know is solely responsible for the "crazy talk" about the Metaverse)

This edition of this Hot Tips paper is again 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.

Subchapter V of Chapter 11 Debt Limit Extended

The Bankruptcy Threshold Adjustment and Technical Corrections Act was signed into law on June 21, 2022. P. Law No. 117-151. It reinstates the limit on the amount of debt of a debtor may have and still qualify under Subchapter V of Chapter 11 to $7.5 Million. The amount had automatically reduced to $3 Million upon expiration of the 2020 CARES Act in March. The reinstated limit will now run until June 21, 2024. Remember that the Subchapter V was a pandemic era benefit for small businesses seeking relief under Chapter 11. Under Subchapter V, the small business was not subject to the "absolute priority rule" so that the owners of the business could continue to own and operate it even though not all of the debts were paid (so long as payments were made for at least three years after plan confirmation), no competing plan of reorganization is allowed (but a creditor can object to the debtors' plan), no disclosure statement is required as part of consideration of the plan, and no class of impaired creditor has to vote for the plan but the plan can be confirmed by the Bankruptcy Judge if it is found to be "fair and equitable". These are very favorable provisions for cases which fit under the maximum debt cap and so it is a significant development for debtor counsel that the higher qualification debt amount under this beneficial statute has been extended.

Bankruptcy Again – Third Party Releases in Chapter 11 Confirmations of Plans

An issue in Bankruptcy Court – the ability of a confirmation of a Chapter 11 Plan to release third parties from various liabilities – is bubbling back to the surface and there may be some new limitations developing on the use of the third-party releases, which is good!

For those who have not watched this subject over the years, there have been cases in which Bankruptcy Courts have confirmed plans of Chapter 11 debtors which released the liabilities of persons or organization which did not file Chapter 11 from contractual or tort liabilities. While the recent cases have mostly been mass tort cases, real estate cases have been and are involved and parties released may be debtors or guarantors under financing arrangements. See, e.g. In re Master Mortgage Inv. Fund, Inc., 168 B. R. 930 (Bankr. W. D. Mo. 1994). To focus sharply on

the problem, these cases have given third parties (usually officers or guarantors) the benefits of Chapter 11 protections even without the benefited party filing Bankruptcy.

The cases which are currently in the news and in the courts deal mostly with mass torts. The primary corporate defendant either files its subsidiary in Chapter 11, or in some cases creates a new subsidiary to which it assigns some assets and all of the mass tort liabilities and then files the subsidiary in Chapter 11 and seeks to confirm a plan which releases the parent entity from liabilities. This is the situation in pending or recent cases such as the Purdue Pharmaceuticals and USA Gymnastics cases. But real estate and finance related cases are also involved in this discussion. Confirmation of a Plan of Reorganization is on appeal, and another is pending in which the debtor is PWM Property Management LLC in Manhattan over 245 Park Avenue and a Chicago tower also owned by that entity. The debt totals about $2.2 billion and the issues involve the scope of releases of liabilities of insiders who are accused of misconduct in fiduciary duties.

There is a Circuit split on the propriety of giving such releases in Chapter 11 confirmations, with the Fifth, Ninth and Tenth Circuits declining to grant such third party releases; the Fourth, Sixth, Seventh and Eleventh Circuits approving the releases; and the Second and Third Circuits not being clearly for or against, (which is a problem because those Circuits include Delaware and the Southern District of New York, which are very popular places for Chapter 11 filings). Citations available on request to the authors. The US Supreme Court has not taken on the issue. See Ronald J. Mann, BANKRUPTCY AND THE US SUPREME COURT (2017).

The negative commentary from legal publications and from the popular press about the possibility that institutions which have lots of money escaping liability without having to file Chapter 11 seems to be having the impact of at least focusing the Courts on the issues of releases given to third parties and there ae some reports of Bankruptcy Courts narrowing releases if not turning down the provisions of Plans which would give such releases. But these have been no definitive cases to approve or disapprove the practice in its entirety, so watch for future events.

The Issue of "Waters of the United States" Floats to the Top Again.

The U. S. Supreme Court will, again, hear argument in the Sackett case in October of 2022. The case is both interesting from a procedural standpoint and important to the development of real property across the land. Sackett v. EPA, No. 21-454 in the US. S. Supreme Court.

From a procedural standpoint, the case is about what lower courts do when the SCOTUS has decided a case on a 4-1-4 split. Do the lower courts honor the reasoning of the plurality which decided the prior case, in this situation the opinion of Justice Scalia in Rapanos v. U.S., 547 U. S. 715 (2006) joined by three other justices, or the opinion of Justice Kennedy, who concurred in the outcome but announced a different way to analyze the issue involved. The issue is the definition of "Waters of the United States" or "WOTUS" which has been the subject of heated dispute for at least a decade now.

Title search: Hot Topics and Quick Tips

Also available as part of the eCourse
Hot Topics and Recent Developments in Mortgage Lending (2022)

First appeared as part of the conference materials for the
56th Annual William W. Gibson, Jr. Mortgage Lending and Servicing Institute session
"Hot Topics and Quick Tips"