



Case Alert: In re Givens

DELAWARE JUDGE DISTINGUISHES PHILADELPHIA NEWSPAPERS IN INDIVIDUAL CHAPTER 11 CASE

In a memorandum order issued on December 7, 2010, United States Bankruptcy Judge Brendan Linehan Shannon sustained a mortgagee's objection to an individual chapter 11 debtor's plan where the debtor proposed to sell his residence free and clear of the mortgage without permitting the mortgagee to credit bid. In re Givens, Case No. 09-14401 (BLS) (Bankr. D. Del.). The debtor argued that the sale was permitted under the "indubitable equivalent" cramdown provision of Bankruptcy Code § 1129(b)(2)(A)(iii), as interpreted by In re Philadelphia Newspapers, LLC, 599 F.3d 298 (3d Cir. 2010) (finding it was possible to provide secured creditors the "indubitable equivalent" of their security interest without permitting them to credit bid at a sale of its collateral). The mortgagee argued that Bankruptcy Code § 1123(b)(5) supersedes Philadelphia Newspapers because it specifically forbids a plan from modifying the rights of a holder of a mortgage in the debtor's principal residence.

The Court agreed with the mortgagee that the specific language of § 1123(b)(5) governed over the general language of § 1129(b)(2)(A)(iii) as interpreted by Philadelphia Newspapers. While noting that neither party had cited any law regarding whether there was a "right to credit bid" under Delaware state law, the Court concluded such a right existed based upon a general provision in the mortgage permitting the mortgagee, in the event of default by the borrower, to take any "reasonable or appropriate act" to protect its interest in the residence, and the general policy of Delaware law favoring freedom of contract. Specifically, the Court found that, "where Debtor proposes to open bidding on the Residence securing the Note at an amount substantially less than what is owed on the Note, the secured creditor's ability to credit bid is the quintessential 'reasonable or appropriate act to protect [its] interest'".

Since the analysis in Philadelphia Newspapers dealt with the federal statutory right to credit bid under Bankruptcy Code §§ 363(k) and 1111(b), rather than a state-law right, it is unclear whether the assertion of such a right under state law would have impacted the decision of the Third Circuit in that case. However, the decision in Givens should provide guidance to lenders regarding the importance of preserving bargained-for state law rights and preserving (or not abrogating) those rights in chapter 11 cases.

If you have any questions or would like to discuss the decision further, please contact any of the Bankruptcy and Corporate Restructuring partners at Young Conaway. The Firm is also available for complimentary Delaware Update CLE programs to address any aspects of Delaware law that are of interest to our friends and colleagues around the country.

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Opinion

[In re Givens](#), Case No. 09-14401 (BLS) (Bankr. D. Del.)

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