Case Alert: In re Capmark Financial Group, Inc.

The Official Committee of Unsecured Creditors (the "Committee") filed a motion for standing to pursue claims against the senior secured lender, in which the Committee sought to avoid $1.5 billion of liens as being either fraudulent or preferential. The debtors countered with a motion to approve a settlement with their senior secured lender, pursuant to which the debtors would (1) engage in a "collateral swap" with their lenders that would result in the lenders foregoing their collateral for an upfront cash payment, (2) release causes of action against the lenders, and (3) save the estates in excess of $300 million in interest, fees, and litigation costs.

The Committee argued that the Court could not approve the settlement because there is no basis in the law to allow for the settlement and payment of a secured lenders pre-petition claim outside a chapter 11 plan. The Committee argued next that the Court should not approve the settlement because, among other things, the debtors were settling valid claims against the lenders "too cheaply," the value of the collateral being left with the estate was substantially less than the Debtors estimated and the settlement was achieved through "an unfair process in which the unsecured creditors were not allowed to participate."

The Court rejected these arguments and approved the settlement. In so ruling, the Court applied the oft-cited "Martin factors" and found that (i) the litigation over the alleged claims "would be complicated, time consuming and expensive," (ii) the claims had "a low probability of being successful," (iii) the value of collateral being 'swapped' (or left behind) was "well in excess of the unencumbered cash for which it is being swapped," and (iv) "the settlement was a result of arm's length bargaining and the process was fair and equitable."

The Court further found that, while there is no *per se* rule, there is "ample authority under the Bankruptcy Code" to allow for the payment through a settlement and outside of a plan of reorganization of a secured creditor's pre-petition claim. In so ruling, the Court cited at least four (4) examples where secured creditors are paid on account of their claims outside of a chapter 11 plan (refinancings, "roll-ups," stay relief to proceed against collateral, and payments following a 363 sale). And while the Court acknowledged that its authority to approve a payment of a secured creditor's pre-petition claim is not limitless, the facts adduced and arguments made by the Committee did not justify denial of the proposed settlement.

Lastly, while the Court acknowledged that "it is usually desirable to involve an official committee [of unsecured creditors] in these types of negotiations," it noted that such inclusion is "certainly not required" and that "[t]here is no *per se* rule that views of a committee or other creditors are dispositive on the reasonableness of a settlement."

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Opinion

In re Capmark Financial Group, Inc., et al., Case No., 09-13684 (CSS) (November 1, 2010)

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