YOUNG CONAWAY STARGATT & TAYLOR, LLP

SDNY BANKRUPTCY TREND WATCH

Young Conaway is pleased to provide you with the current edition of SDNY Bankruptcy Trend Watch, a service from Young Conaway that is designed to identify emerging trends in restructuring and bankruptcy law that will impact your practice and the business of your clients. This edition will focus on recent Southern District of New York bankruptcy court decisions pertaining to chapter 11 plan confirmation issues. We hope that you will find the SDNY Bankruptcy Trend Watch helpful and, as always, we are happy to field any comments or questions that you may have regarding the issues addressed in this SDNY Bankruptcy Trend Watch or the restructuring practice generally.

1. *In re Innkeepers USA Trust*, 442 B.R. 227 (Bankr. S.D.N.Y. Dec. 20, 2010) (Chapman, J.) – Bankruptcy court denied the debtors' motion to assume plan support agreement because the agreement was dominated by one of the creditors, was not in the debtors' best interests, and was not the result of good faith.

2. *In re Indu Craft, Inc.*, Ca. No. 97-44958 (RDD), 2011 Bankr. LEXIS 2545 (Bankr. S.D.N.Y. July 1, 2011) (Drain, J.) – Bankruptcy court denied motion to reconsider confirmation order because the plan had been substantially consummated, the order was final, and, as a result, not subject to modification.

3. *In re Mesa Air Group, Inc.*, Ca. No. 10-10018 (MG), 2011 Bankr. LEXIS 3855 (Bankr. S.D.N.Y. Jan. 20, 2011) (Glenn, J.) – Bankruptcy court denied standing to claim transferee due to the failure of the holder to file proof of claim transfer. On the merits, the bankruptcy court denied the objections of the claim holder, finding that the plan complied with the provisions of title 11 and was proposed in good faith.

4. *In re Borders Group, Inc.*, Ca. No. 11-10614 (MG), 2011 Bankr. LEXIS 2150 (Bankr. S.D.N.Y. June 2, 2011) (Glenn, J.) – Bankruptcy court granted the debtors' motion to extend the period of exclusivity pursuant to § 1121(d) of the Bankruptcy Code after weighing the *Adelphia* factors and other practical considerations.

5. *In re Jennifer Convertibles, Inc.*, 447 B.R. 713 (Bankr. S.D.N.Y. Feb. 4, 2011) (Gropper, J.) – Bankruptcy court found that the plan could not be confirmed as to one of the debtors because substantive consolidation was not in the best interests of a group of trade creditors.

6. *In re Gen. Growth Props.*, 451 B.R. 323 (Bankr. S.D.N.Y. June 16, 2011) (Gropper, J.) – Bankruptcy court concluded that in order to cure and reinstate a loan pursuant to § 1124 of the Bankruptcy Code, the debtors were required to pay post-petition interest at the contract default rate because the default rate was reasonable, the lender did not engage in misconduct, the unsecured creditors would not be harmed, and the debtors' "fresh start" would not be hindered given that the debtors emerged from bankruptcy "highly solvent."

7. *In re Gen. Growth Props.*, Ca. No. 09-11977 (ALG), 2011 Bankr. LEXIS 2857 (Bankr. S.D.N.Y. July 20, 2011) (Gropper, J.) – Bankruptcy court concluded that the lenders were entitled to post-petition interest at the contract default rate given that the default rate was reasonable and the debtors emerged from bankruptcy solvent.

8. *In re Lyondell Chem. Co.*, 442 B.R. 236 (Bankr. S.D.N.Y. Jan. 4, 2011) (Gerber, J.) and *In re Chemtura Corp.*, 443 B.R. 601 (Bankr. S.D.N.Y. Jan. 13, 2011) (Gerber, J.) – Bankruptcy court sustained debtors' objections to the claims of the EPA and certain state governments for contribution under CERCLA, finding that § 502(e)(1)(B) mandated disallowance of the claims as contingent claims from co-liable parties for reimbursement or contribution.

9. *In re Motors Liquidation Co.*, 447 B.R. 198 (Bankr. S.D.N.Y. Mar. 7, 2011) (Gerber, J.) – The debtors sought confirmation of their plan, which was "very popular" with creditors overall but which had five objections pending relating to good faith, unfair discrimination, failure to establish a specifically segregated reserve (as opposed to a large, aggregate reserve as proposed), lack of sufficient oversight of the creditor trust, and the alleged conflict of interest of a member of the creditors' committee. The bankruptcy court overruled the objections and confirmed the plan. However, with respect to the plan's provision for exculpation of participants in the case, the court modified the plan to create for itself a "gate-keeping" role whereby any third party must demonstrate to the court that its claim against a non-debtor participant in fact belongs to the third party and is not properly a claim of the estate (which released its claims under the plan).

10. *In re Lyondell Chem. Co.*, 445 B.R. 277 (Bankr. S.D.N.Y. Mar. 28, 2011) (Gerber, J.) – In deciding whether claims asserted in state court against the debtor and the agent under the exit facility were barred, the bankruptcy court held that (i) the bankruptcy court had not released its jurisdiction over such claims, (ii) the claims against the debtor were barred by the administrative claims bar date, (iii) the claims against the exit-facility agent were not barred by the exculpatory provisions of the plan, (iv) the exit-facility agent was not protected by the "good faith" findings in the plan, and (v) any claims against the exit-facility agent should proceed in bankruptcy court.

11. *In re Bearingpoint, Inc.*, 453 B.R. 486 (Bankr. S.D.N.Y. July 11, 2011) (Gerber, J.) – Bankruptcy court agreed that plan should be modified to permit plan trustee to bring D&O claims in state court, finding that the bankruptcy court may not be able to render a final judgment in light of *Stern v. Marshall*.

12. *In re Chemtura Corp.*, 448 B.R. 635 (Bankr. S.D.N.Y. Apr. 19, 2011) (Gerber, J.) – Creditor sought estimation of claim for purposes of establishing a reserve, and debtor argued that claim should be disallowed. Bankruptcy court concluded that creditor's claim was released in connection with a settlement and was barred by the statute of limitations; nevertheless, in an abundance of caution, the court established a 30% claim reserve.

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.

The Bankruptcy and Corporate Restructuring Partners

Joseph M. Barry
Sean M. Beach
Robert S. Brady
M. Blake Cleary
John T. Dorsey
Daniel F.X. Geoghan
Edwin J. Harron
David R. Hurst
Matthew B. Lunn
Pauline K. Morgan
Edmon L. Morton
Michael R. Nestor
James L. Patton, Jr.
Joel A. Waite
Sharon M. Zieg

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