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Alert

Bankruptcy Court Allows Collateral Agent to Credit Bid Without 100% Approval of Senior Lenders in Same Facility

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In a recent decision, the Bankruptcy Court for the District of Delaware allowed the collateral agent for senior lenders to credit bid for the debtors' assets even though all of the senior lenders had not authorized the bid. One of the senior lenders had objected to the group's acquisition of the debtors' assets by the credit bid. *In re GWLS Holdings, Inc.*, 2009 WL 453110 (Bankr. D. Del. Feb. 23, 2009) (Walsh, J.). Relying exclusively on the underlying loan documents, the bankruptcy court held that collateral agent "had the authority to enter the credit bid in accordance with § 363(k) of the Bankruptcy Code on behalf of all the First Lien Lenders as contemplated by the clear and unambiguous language of . . . the Collateral Agreement." *Id.* at *6.

Credit Bidding Generally

The Bankruptcy Code (the "Code") generally grants secured creditors the right to credit bid at a sale of the debtor's assets. A "credit bid" allows a secured creditor to offset the purchase price by the amount of its allowed secured claim.[1] Although the concept is simple, credit bidding can become complicated in practice when there are many secured lenders in a single facility, but not all lenders consent to the credit bid purchase. Few courts have addressed the issue.

Facts

In *GWLS*, the debtors' capital structure included a $337 million credit facility secured by a first lien on substantially all of the debtors' assets. The debtors granted the lien to a collateral agent (the "Collateral Agent") under an agreement for the benefit of the first lien lenders (collectively, the "Lenders"). *Id.* at *1. The debtors sought approval of a credit bid sale of their assets under Code § 363 to the Lenders. One of the first lien Lenders opposed the credit bid sale (the "Objecting Lender").[2] *Id.* at *1. The Objecting Lender argued that the sale could not be approved over its objection because the loan agreement required the unanimous consent of all Lenders to proceed with a sale by credit bid. *Id.* at 2. The Objecting Lender relied on the waiver and amendment provision in the loan agreement, which provided that, "no . . . waiver and no . . . amendment, supplement or modification [of the terms of any of the credit documents] shall . . . release all or substantially all of the Collateral or alter the relative priorities of the secured obligations entitled to the Liens of the Security Documents, in each case without the written consent of *all* Lenders . . . ." *Id.* (emphasis in original). The Objecting Lender argued that credit bidding was an amendment or waiver, for it effectively released the lien on the collateral.

[1] Code § 363(k) provides that "[a]t a sale . . . of property that is subject to a lien that secures an allowed credit claim, unless the court orders otherwise, the holder of such claim may bid at such sale, and if the holder of such claim purchases such property, such holder may offset such claim against the purchase price of such property."

[2] The Objecting Lender owned $1 million (.03%) of the first lien debt prior to debtors' bankruptcy filing and subsequently acquired an additional $31.3 million (8.5%) of the first lien debt. *Objection of Grace Bay Holdings, LLC and Grace Bay Holdings II, LLC to Motion of Debtors* . . . [D.E. 595], at 11. The additional $31.3 million was the subject of dispute. *See First Lien Agent's Omnibus Reply* . . . [D.E. 701], at 10 (referring to this amount, "[t]he First Lien Agent has not received a request to process or settle the acquisition of any additional claims asserted by [objecting Lender] . . . ."). The decision refers only to the $1 million claim.

The Collateral Agent and the Debtors countered that another section of the loan agreement controlled, allowing for a non-unanimous credit bid. The loan agreement empowered the Collateral Agent to "take such actions on its behalf and to exercise such powers as are delegated to the Collateral Agent by the terms hereof and thereof, together with such actions and powers as are reasonably incidental thereto." *Id.* at *3. One of the powers delegated to the Collateral Agent in the collateral agreement was the power to dispose of the collateral. That agreement provided that in an event of default, including the filing of a bankruptcy petition, the "Collateral Agent, on behalf of other Secured Parties, may exercise all rights and remedies of a secured party under the New York UCC or other applicable law. Without limiting the generality of the foregoing, the Collateral Agent. . . may sell, lease, license, sublicense, assign, give option or options to purchase, or otherwise dispose of and deliver the Collateral or any part thereof." *Id.* The Collateral Agent thus could dispose of and deliver the collateral by any means, including a credit bid. *Id.*

Court Ruling
According to the court, the parties had agreed "that the sole issue was the contract interpretation issue of whether the applicable agreements required unanimous written consent of the First Lien Lenders in order for the credit bid to proceed." *Id.* at *3. Interpreting New York law, the court explained, "a contract must be interpreted and enforced according to the plain meaning of its unambiguous terms . . . ." *Id.* at *4.

The court then held that the section empowering the Collateral Agent to sell or otherwise dispose of the collateral "allows the Collateral Agent to enter into the proposed credit bid on behalf of the First Lien Lenders." *Id.* at *5. Rejecting the Objecting Lender's argument, the bankruptcy court found that this contractual language "clear[ly] and unambiguous[ly] contemplated that the Collateral Agent could credit bid without unanimous consent of the . . . Lenders." *Id.* at 6. "Accordingly, the Collateral Agent may credit bid [the Objecting Lender's] claim and Debtors' assets may be sold free and clear of the . . . lien." *Id.*

The Objecting Lender has appealed the decision.

Comments
1. This case was decided solely on the bankruptcy court's interpretation of the contractual provisions. Although this court held that the contract terms were clear, another court presented with the same facts could disagree.

2. Regarding credit bidding or what percentage of lenders have the right to direct a collateral agent to credit bid on their behalf, absent a clear contractual provision, secured lenders attempting to credit bid over an objection of a lender in the same facility are likely to face similar litigation. Lenders should follow the *GWLS* case on appeal.

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