

OBSERVATIONS REGARDING
CHAPTER 11 PRACTICE IN
UNITED STATES

First International G.R.O. Annual
Conference

Modena, Italy -- October 11, 2013

Reorganization vs. Liquidation

- ▣ Chapter 7 liquidation is the benchmark for comparison.
- ▣ “Is this outcome better than the result that would be achieved if business were liquidated?”
- ▣ Does the enterprise have “reorganization value?”

Discovery of the Truth

- ▣ Not in hands of trustee or government but in the hands of the real parties-in-interest who, with professionals, investigate, gather, and evaluate facts, and negotiate suitable business outcomes.
- ▣ 9019 Settlements – parties investigate, negotiate and settle controversies subject to bankruptcy court approval
 - Standard for approval: Given the costs and uncertainties of litigation, is the settlement within the “zone of reasonableness.”

Automatic Stay

- ▣ Happens automatically upon filing
- ▣ No need for judicial intervention
- ▣ Provided directed in Bankruptcy Code
- ▣ Powerful injunction
- ▣ May be modified, terminated, conditioned or annulled by the Court upon application by the enjoined party

Priorities

- ▣ “Race to the Courthouse” ceases
- ▣ Order of who gets paid and when is defined by the Code
- ▣ Saves time, effort, money by determining how assets should be divided up front

Gathering Assets for equitable distribution

- ▣ Empowers Debtor-in-possession/ trustee to bring “avoidance actions”
 - Preferences
 - Fraudulent Conveyances
- ▣ Collection and turnover of assets

Adequate Protection

- ▣ Gives protection to certain creditors
- ▣ Preserves status quo

Sales and Use of Property other than in ordinary course

- ▣ “363” sales have become popular in recent years
- ▣ Used to be a major issue about whether could sell all assets
- ▣ Have become a regular feature in chapter 11 cases

First Day Orders

- ▣ “DIP Lending”
 - Providing super priority status for lenders who give capital to a debtor post-petition.
 - Necessary in most cases
 - Procedure and timing
 - Typical conditions and terms
- ▣ Cash collateral
- ▣ Payment of “critical vendors”
- ▣ Payment of employees
- ▣ Approval of key contracts

Assumption and rejection of executory contracts and leases

- ▣ Ability to change contracts during bankruptcy
- ▣ Gives Debtor-in-possession flexibility and power that it did not have pre-petition
- ▣ Rejection creates unsecured claim
- ▣ Assumption may be over the objection of the counterparty
- ▣ Favorable contracts may be “assigned”, i.e. sold

Plan Process

- ▣ Classification of Claims
- ▣ Voting
- ▣ Disclosure
- ▣ Exclusivity
- ▣ Confirmation
- ▣ Roles of parties
- ▣ Model of consensus

Future of U.S. Insolvency

- ▣ Dodd Frank Orderly Resolution for systemically significant debtors
- ▣ Electronic service and remote access to court hearings
 - Electronic court filing
 - Service by email and other electronic means
 - Video conferences
 - Access to audio recordings of court hearings

Adversarial Legal System

- ▣ Need to work with “opposition,” such as creditors, United States Trustee, committees, in order to reach a confirmable plan
- ▣ Debtor and certain other appointed officials are fiduciaries – including attorney to debtor-in-possession
- ▣ Lawyers are all officers of the court

Beneficial Outcomes

- ▣ Company comes out of bankruptcy by way of 363 sale or reorganization in a manner that preserved jobs, value, maintains contributing enterprise
- ▣ Quick process at an acceptable societal cost