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The Price is Right

Confirmation/Plan Issues
Unique Asset Valuations

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In re Thru, Inc., No. 17-31034, 2017 WL 3394506 (Bankr. N.D. Tex. July 10, 2017) (Jernigan, J.)
In re Trendsetter HR, LLC, et al., 16-34457 (Bankr. N.D. Tex. Aug. 24, 2018) (Jernigan, J.)

- Issue
  - What is the appropriate rate of post-confirmation interest on cramdown to non-consenting unsecured class
- Holding
  - Federal post-judgment interest rate is appropriate
    - The federal rate was 1.22% at the time
    - The federal rate is currently 2.31%
    - http://www.txnd.uscourts.gov/post-judgment-rates

In re Thru, Inc., No. 17-31034, 2017 WL 3394506 (Bankr. N.D. Tex. July 10, 2017) (Jernigan, J.) *In re Trendsetter HR, LLC, et al.*, 16-34457 (Bankr. N.D. Tex. Aug. 24, 2018) (Jernigan, J.)

- Analysis
  - Prior precedent—*In re Texas Star Refreshments, LLC*, 494 B.R. 684 (Bankr. N.D. Tex. 2013), Judge Robert L. Jones applied the state postjudgment interest rate of 5%:
  - "At first blush, it appears that an unsecured creditor should receive a higher interest rate than a secured creditor, given the risk of non-payment. This analysis fails, however, when the relative risks of liquidation and confirmation are considered. A secured creditor's risk may increase given a debtor's continued use of the creditor's collateral. An unsecured creditor's prospects of repayment may indeed be enhanced if the debtor survives and the only other real alternative is liquidation," *id*. at 701-02;
  - *Till* is instructive, and asks courts to find an objective standard to set the interest rate to compensate the creditor for delay and risk
  - The federal postjudgment interest rate's purpose is to "compensate the successful plaintiff for being deprived of compensation for the loss from the time between the ascertainment of the damages and the payment by the defendant,"
  - Therefore, the federal postjudgment interest rate is an objective standard which federal law already provides as compensation
  - Because the claim liquidated and allowed in *Trendsetter* was liquidated by the bankruptcy court—a federal court—the federal rate and not the state rate was appropriate. This is "fair and equitable" under the facts.

In re Thru, Inc., No. 17-31034, 2017 WL 3394506 (Bankr. N.D. Tex. July 10, 2017) (Jernigan, J.)
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- Result
  - Unsecured class being crammed down receives potentially substantially lower interest rate than secured class
  - Not in every case, and depends on potential state law if state law judgment or claim is involved;
  - Federal postjudgment rate varies, and has been as high as 16.25% in 1978;
  - Secured creditor should receive more than unsecured creditor because, even though secured creditor has less risk, the plan prevents the secured creditor from exercising its rights against the collateral, unlike for an unsecured creditor, who is frequently out of the money in a liquidation scenario.

In re Thru, Inc., No. 17-31034, 2017 WL 3394506 (Bankr. N.D. Tex. July 10, 2017) (Jernigan, J.)

- Background
  - Feasibility is a question of fact;
  - The debtor, having lost in federal copyright litigation against Dropbox, proposed plan that crammed down Dropbox;
  - The debtor had operation losses every year prepetition, and depended on additional investments 31 times in its 15 year history;
  - The debtor's investors were very wealthy and their history of past investments was evidence that they would likely continue making investments: "the investors' long track record of sustaining the Debtor's business over the past fifteen years cannot be ignored";
  - The debtor's testimony was credible, the debtor did not have significant trade debt, and the debtor would not be in bankruptcy but for the judgment as a whole;
  - Therefore, as a question of fact, the court found the plan feasible even though nothing obligated the investors to continue funding the debtor; *i.e.* there was no rule of law such that investors would be required to invest in order to find plan feasible.

In re Thru, Inc., No. 17-31034, 2017 WL 3394506 (Bankr. N.D. Tex. July 10, 2017) (Jernigan, J.)

- Issue
  - Is plan feasible if it depends on future equity contributions that are not guaranteed?
- Holding
  - Under the facts of this case, plan was feasible in light of repeated past equity contributions.
- Other Considerations
  - Unusual holding, to conclude that a plan is feasible when it depends on future investments that are not secured, and the case is on appeal. On the other hand, does a debtor who sells goods, or rents out rooms, depend any less in the future on third parties providing it with funds?

In the Matter of Transwest Resort Properties Inc., 881 F.3d 724 (9th Cir. 2018)

- Issue
  - Under a cramdown consolidated plan for multiple debtors, must there be an impaired, consenting class for each debtor, or is it enough to have one impaired consenting class between the debtors?
- Background
  - Chapter 11 case with 5 debtors;
  - The cases were jointly administered but not substantively consolidated
  - The plan was a consolidated plan for all 5 debtors;
  - The lender was the sole class with respect to 2 debtors, and rejected plan;
  - Applying the plain language of the statute, 1129(a)(10) requires "at least one class of claims that is impaired under the plan" to accept the plan;
  - Therefore, the plain language requires just one class under the plan as a whole, as opposed to per debtor, and Congress could have required each debtor to file its own plan or it could have required that 1129(a)(10) be satisfied per debtor;
  - Furthermore, "the plan" must refer to the plan as a whole, or other 1129(a) subsections make less sense, such as the plan being proposed in good faith, the plan complying with all laws, and the plan being feasible

In the Matter of Transwest Resort Properties Inc., 881 F.3d 724 (9th Cir. 2018)

- Holding
  - the requirement for an impaired consenting class applies on a per plan basis and not a per debtor basis, meaning that one impaired consenting class under the plan is sufficient
- Other Considerations
  - Fifth Circuit *dicta*: "substantive consolidation . . . results in . . . combining creditors of the two companies for purposes of voting on reorganization plans." *In the Matter of Pacific Lumber*, 584 F.3d 229, 249 (5th Cir. 2009) (*quoting In re The Babcock and Wilcox Co.*, 250 F.3d 955, 958-59 n. 5 (5th Cir. 2001)).
  - Secondary holding—where lender makes an 1111(b) election, cramdown does not require a "due on sale clause" and cramdown is satisfied even where the property is transferred post-confirmation without a payment at the transfer, so long as the lender retains its liens against the property.

In re Duer Wagner III Oil & Gas, L.P., No. 15-41961 (Bankr. N.D. Tex.) (Nelms, J.)

- Background
  - Just before Plan Confirmation, the bankruptcy estate owned approximately 40 separate, small, non-operating working interests spread throughout the U.S.
  - The working interests were subject to operator claims and corresponding liens.
  - The Debtors did not wish to and could not afford to retain the working interests.
  - Marketing and selling the working interests was not economically feasible.
  - On the Petition Date, Debtors owned over 1,000 non-operating working interests ("WI") spread throughout the United States.
  - Approximately 97% of the WI were pledged to the Debtors' Senior Secured Lender ("Lender").
    - The remaining 3% were deemed too inconsequential for the Lender to perfect its security interest
  - Lender's secured claim against the WI was junior to claims of the corresponding operators ("Operator Claims")
  - As of the Petition Date the Debtors owed substantial Operator Claims

In re Duer Wagner III Oil & Gas, L.P., No. 15-41961 (Bankr. N.D. Tex.) (Nelms, J.)

- Background (continued)
  - The Operator Claims continued to accrue post-Petition-Date.
  - Debtors and Lender reached a settlement.
    - Debtors would transfer the Lender's WI collateral to Lender.
    - Lender could select WI that it did not want transferred to it. Those WI would remain in the Debtors' estates unencumbered by Lender's lien.
    - For the WI that Lender would take, the Lender funded settlements of the Operator Claims negotiated by the Debtors.
  - The good 'ol dirt for debt (or working interest for debt) allowed by *Sandy Ridge.* But modified…
  - The Amended Plan ("Plan") contained a single class of Operator Claims.
  - The Plan called for the Operator Claims to be satisfied in full via the assignment of the corresponding WI owned by the Debtors to the Operator that operated the WI.
  - The Operators left holding Operator Claims have been inactive in the bankruptcy case.

In re Duer Wagner III Oil & Gas, L.P., No. 15-41961 (Bankr. N.D. Tex.) (Nelms, J.)

- Result
  - The good 'ol dirt for debt (or working interest for debt) allowed by *Sandy Ridge.* But modified…
  - The Amended Plan ("Plan") contained a single class of Operator Claims.
  - The Plan called for the Operator Claims to be satisfied in full via the assignment of the corresponding WI owned by the Debtors to the Operator that operated the WI.
  - The Operators left holding Operator Claims have been inactive in the bankruptcy case.
  - Notice to the Operator Class was very important.
  - It was *highly* unlikely that sufficient members of the Operator Class would submit ballots for (or against) the Plan.
  - In fact, the Debtors received very few ballots from the Operator Class – preventing the Debtors from carrying the Operator Class.
  - Leaving the Debtors to satisfy the Court that the Operators' receipt of the WI constitutes the indubitable equivalent of their claims.

In re Duer Wagner III Oil & Gas, L.P., No. 15-41961 (Bankr. N.D. Tex.) (Nelms, J.)

- Result (continued)
  - Slightly different than traditional dirt for debt:
    - The Operators should be more familiar with the asset (WI) than a traditional secured creditor.
    - Unlike a traditional secured creditor, the Operator is likely to retain the asset (WI), not immediately market and sell the asset transferred.
    - The Operators likely did not pay attention to the Plan, disclosure statement, and terms therein and may be unwilling to accept an assignment of the WI post Plan confirmation.
    - Approximately 40 small assets spread over multiple states.
  - Valuation
    - Indubitable equivalent generally calls for a “conservative” fair market value.
    - Valuing approximately 40 small WI spread across the United States would be a highly inefficient use of estate funds, it would likely cost more than the total value of the subject WI.
    - The Debtors’ officers provided testimony of the value of the WI, based on recent and historical performance of the WI.
    - No Operator Class member objected.

In re Duer Wagner III Oil & Gas, L.P., No. 15-41961 (Bankr. N.D. Tex.) (Nelms, J.)

- Implementation
  - Low likelihood the Operators would acknowledge and actively accept an assignment.
  - Plan and Confirmation Order called for assignment of the WI to the Operators to be effective upon the Debtors executing and providing an assignment to the Operator.
  - Plan injunction, release, and satisfaction of pre-confirmation Operator Claims occurred at confirmation/assignment.
- Implications for Debtors
  - Many of the WI were in properties that may be subject to substantial future liabilities and expenses, including Workover; New exploration and production; Indemnities; or Future plugging and abandonment.
  - Bankruptcy Plan and Confirmation Order was prepared to prevent future liabilities to the reorganized Debtors under Texas Supreme Court's opinion in *Seagal Energy E&P, Inc. v. Eland;* and *GOM Shelf, LLC v. Sun Operating Limited Partnership* out of the Southern District of Texas.

Houston SportsNet Finance LLC v. Houston Astros LLC (In re Houston Regional Sports Network LP), 886 F.3d 523 (5th Cir. 2018)

- Background
  - Debtor was formed by Astros and Rockets to broadcast their games, and Debtor entered into media-rights agreements with the teams
  - Under media-rights agreements, Debtor had exclusive right to broadcast games in exchange for fees
  - Under separate Affiliation Agreement, Comcast subsidiary agreed to pay Debtor fees to carry Debtor's network
  - Comcast loaned Debtor $100M secured by all tangible and intangible assets
  - When Debtor defaulted on media-rights fees to Astros, Comcast affiliates filed involuntary chapter 11
  - Under the Plan, all equity in Debtor was sold to AT&T, and teams agreed to waive $107 million in media-rights fees
  - Comcast filed 1111(b) election
  - Court valued collateral as of the petition date
  - After subtracting waived media-rights fees in its valuation, Court found value to be zero
  - Court found that creditor cannot make 1111(b) election with respect to collateral of inconsequential value, so election was not allowed

Houston SportsNet Finance LLC v. Houston Astros LLC (In re Houston Regional Sports Network LP), 886 F.3d 523 (5th Cir. 2018)

- Issues
  - Was the petition date the correct date of valuation?
  - Was it appropriate to subtract the media-rights fees in the valuation?
- Holdings
  - "Courts have flexibility to select the valuation date so long as the bankruptcy court takes into account the purpose of the valuation and the proposed use or disposition of the collateral at issue."
  - It was not appropriate to subtract media-rights fees because the proposed use of the property was a reorganization, and buyer would not be responsible for fees going forward. The deduction might have been appropriate if the proposed use was a liquidation.

US Bank NA v. Village at Lakeridge LLC, 138 S. Ct. 960 (2018)

- Background
  - Debtor files bankruptcy with two creditors, parent company and US Bank
  - Debtor classifies creditors separately
  - US Bank votes against confirmation, and parent's insider vote does not count
  - Parent board member sells parent's $2.4M claim to her boyfriend for $5K
  - US Bank seeks to designate the claim based on alleged, non-statutory insider status
  - Bankruptcy Court finds that transaction was arm's length, so boyfriend is not non-statutory insider
  - 9th Circuit affirms, holding that decision should be reviewed for clear error
- Issue
  - What is the appropriate standard of review for decision that boyfriend was not and insider?

US Bank NA v. Village at Lakeridge LLC, 138 S. Ct. 960 (2018)

- Holding
  - Mixed question of law and fact reviewed for clear error
  - Affirmed
- Analysis
  - When reviewing a mixed question of law or fact, the real issue is whether answering it entails primarily legal or factual work
  - Based on two-part test that bankruptcy court applied, it was more factual than legal
  - Majority opinion did not address whether 9th Circuit's test was correct, as cert. was denied on that issue
- Concurrence
  - Majority opinion assumes the test is right. If the test were different, then the standard of review could be different
  - Questions whether bankruptcy court applied the right test

In re Ultra Petroleum Corp., 575 B.R. 361 (Bankr. S.D. Tex. 2017) (Isgur, J.)

- Background
  - Debtor issues unsecured notes pursuant to Master Note Purchase Agreement totaling $1.46 billion
  - Note Agreement had provision for make-whole payment if notes were prepaid
  - Bankruptcy constituted event of default that triggered acceleration and make-whole payment
  - Debtor became solvent during chapter 11 case due to increase in commodity prices and therefore proposed 100 cent plan with return to equity
  - Plan proposed to treat noteholders as unimpaired, which means deemed acceptance
  - Noteholders objected, claiming they were impaired unless Debtor paid make-whole amounts plus interest at default rate
- Issue
  - Must the Debtor pay the make-whole amounts and default interest in order for the noteholders to be unimpaired?

In re Ultra Petroleum Corp., 575 B.R. 361 (Bankr. S.D. Tex. 2017) (Isgur, J.)

- Rejection of *In re PPI Enterprises (U.S.), Inc.*, 324 F.3d 197 (3d Cir. 2003)
  - *PPI* held that landlord was not impaired by cap under § 502(b)(6) because it was the Code, not the plan, that caused altered landlord's rights
  - Judge Isgur rejected this reasoning because "the *PPI* court failed to analyze the fact that the issue is one of discharge rather than allowance"
- Holdings
  - Debtor must pay make-whole amounts in order for noteholders to be unimpaired
  - Debtor must pay default interest at the contract rate in order for noteholders to be unimpaired
- Status
  - Case is presently on certified direct appeal to the 5th Circuit

In re Midway Gold US, Inc., 575 B.R. 475 (Bankr. D. Colo. 2017)

- Comprehensive review of nationwide precedent on third-party releases and exculpation provisions
- Minority position: 5th and 9th Circuits
  - Bankruptcy court does not have authority to issue and enforce third-party non-debtor releases in a chapter 11 plan
- Majority Position: 1st, 2nd, 3rd, 4th, 6th, 7th, 8th, and 11th Circuits
  - Bankruptcy court may permit non-debtor third-party releases in a chapter 11 plan under certain circumstances when certain standards are met

In re Midway Gold US, Inc., 575 B.R. 475 (Bankr. D. Colo. 2017)

- Example: 1st and 8th Circuits adopt factors from *Master Mortgage Inv. Fund, Inc.*, 168 B.R. 930 (Bankr. W.D. Mo. 1994)
  - (1) There is an identity of interest between the debtor and the third party, usually an indemnity relationship, such that a suit against the non-debtor is, in essence, a suit against the debtor or will deplete assets of the estate.
  - (2) The non-debtor has contributed substantial assets to the reorganization.
  - (3) The injunction is essential to reorganization. Without the it, there is little likelihood of success.
  - (4) A substantial majority of the creditors agree to such injunction, specifically, the impacted class, or classes, has "overwhelmingly" voted to accept the proposed plan treatment.
  - (5) The plan provides a mechanism for the payment of all, or substantially all, of the claims of the class or classes affected by the injunction.

In re GenOn Energy Inc. et al., 4:17-bk-33695 (December 12, 2017) (Jones, J.)

- Background
  - The plan contained non-consensual third party releases, including of officers and directors, and the plan deemed those who did not otherwise mark their ballots to opt out of the releases, or those who did not object to the plan, as having consented to the releases;
  - The third party releases were instrument and integral to the plan which was overwhelmingly supported by the creditors, and the directors and officers shared an identity of interests with the debtors, and would be entitled to indemnification, etc., and they provided substantial value to the debtors;
  - The ballots expressly contained an opt-out box, and non-voting creditors were informed of the need to object, otherwise they would be deemed to have consented to the releases;
  - Adequate notice was provided, including bold font, and those creditors who did not opt-out or object were deemed to have consented, and more than 12 creditors opted out, demonstrating that the plan's treatment of the release issue was fair;
  - Thus, there were no non-consensual third party releases.

In re GenOn Energy Inc. et al., 4:17-bk-33695 (December 12, 2017) (Jones, J.)

- Issue
  - May Chapter 11 plan contain non-consensual third party releases?
- Holding
  - Yes and no; here, because the plan contained an opt-out provision, the releases were approved.
- Other Considerations
  - It is troubling that one needs to affirmatively opt out in order not to be forced into releases, although if a creditor knows of causes of action or is even asserting them, then checking a box or filing a simple objection is not a difficult task.
  - Also, as we know from *Executive Benefits Ins. Agency v. Arkinson*, 134 S. Ct. 2165 (2014) ("*Bellingham*"), implied consent to a bankruptcy court entering final judgment is possible. The same principles can apply to a plan, especially where case law prohibits collateral attacks even if the plan effectuates impermissible things.

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