



Key Bankruptcy Issues Affecting Equipment Lessors

**Tuesday, December 1, 2009
12:00-1:30 p.m.**



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Introductions and Agenda

- Understanding the bankruptcy process for equipment leases/assets.
- Legal remedies and the sale process.
- Current trends and developments in equipment leasing.



Understanding the Bankruptcy Process

- What should you expect 90 days prior to filing?
- What to look for in the sale process?
- What happens after the filing?
- What's involved in a typical case?
- What can you expect during the first day hearings?



Chapter 11 Process

- Filing of the Petition – Automatic Stay
- Typical First Day Motions:
 - Payment of Pre-petition Wages
 - DIP Financing Loan:
 - Unsecured Credit in the Ordinary Course of Business
 - Unsecured Credit Outside the Ordinary Course of Business
 - Super-priority and Secured Credit
 - Priming Liens and Equal Liens
 - Cash Collateral
 - Interim Order vs. Final Order
 - Tension Between Obtaining Funds to Keep Debtor Alive vs. Overreaching of Secured Lender



Liquidating Chapter 11's – Section 363 Sales

- Current Trend (For example, the recent Chrysler and General Motors cases, where valuable assets of debtors sold quickly under 363 and debtors left to liquidate businesses.)
- Options?
 - Bidding Procedures Motion
 - Stalking Horse
 - Auction
 - Sale Hearing
 - Successor Liability
 - Sales Free and Clear



Preference Claims

- Section 547(b) of Bankruptcy Code: Trustee may “avoid” any transfer of an interest of the debtor in property under certain conditions.
- Secured Creditor generally is immune to preference liability (even in Chapter 7).
- Lessors may be susceptible to preference claims, but there are defenses!



Creditors' Committee

- Selecting the Committee
- Committee's Obligations
- Committee's Activities
 - A non-exclusive list of powers and duties are described in section 1103(c) of Bankruptcy Code.



Plan and Disclosure Statement Issues

- The Plan
 - Contents
 - Treatment of Claims
 - Plan Confirmation
 - The Disclosure Statement



Lessor Issues in Chapter 11 Cases

- The Automatic Stay
- Lease Assumption and Rejection
 - What's in the Bankruptcy Code? (see section 365(d)(2))
 - Assumption, Assignment, or Rejection?



Lessor Remedies in Chapter 11

- Motion for Relief from the Automatic Stay
 - Applicable if debtor/lessor fails to meet its obligations under lease
 - Court required to provide at least preliminary hearing on motion within 30 days
- Motion to Compel Assumption or Rejection
 - Debtor's discretion
 - May create uncertainties/challenges for lessor – may request motion that court require debtor to assume/reject lease



Bankruptcy Code Section 1110 – Limited Stay Relief for Lessors of Aircraft Equipment and Certain Vessels

- Debtor must agree to perform the relevant agreement and cure any default within 60 days after the petition date, or risk equipment repossession by lessor under applicable agreement.
- Debtor’s agreement to perform must be approved by the court (60 day period may be extended by court with consent of both parties).
- A different concept of “adequate protection” – The only adequate protection that a lessor or secured lender is required to accept is actual performance under the operative agreement.



Current Trends in Equipment Leasing

- Syndication Issues – Time to Re-Think Age Old Assignor Representations and Fiscal Agency Provisions
- Jury Trial Waiver and Forum Selection Clauses – A Mixed Bag of Results Following Norvergence
- Vehicle Titling and Its Impact on Deal Structure – The Good News
- Documentation – Bundling Equipment and Services



Conclusion – Like the Boy Scouts, Always “Be Prepared” and Avoid Surprises

- At the outset of the transaction do the appropriate Due Diligence
 - Conduct Lien Searches
 - Determine whether obtaining releases of prior Financing Statements are practical
 - Make sure your lease documents contain an appropriate grant (contingent grant) of security interest
 - Even if only precautionary – File your own UCC-1 Financing Statement that tracks the grant if security interest contained in the Lease; Never assume that the Lease will not be recharacterized in BK
- Operations – Be ready to act quickly if things go sideways
 - Establish a protocol to follow when a deal starts to turn
 - Check Docket and Monitor Case – deadlines in bankruptcy are short
 - Get Counsel (whether internal or external) involved as soon as possible
 - Must be nimble as no two sets of facts and circumstances are exactly alike



Questions?



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