



Client Alert

April 22, 2011

Commerce Department Drops Challenge to Section 363 Asset Sale

The federal government has stopped fighting court rulings that allowed an import company, which was facing steep penalty tariffs, to file bankruptcy and transfer its assets to a new business formed by the debtor's principals. The move is important to small to mid-size companies that want to rid themselves of substantial liabilities by selling assets to a new entity with identical ownership, "free and clear" under section 363 of the Bankruptcy Code.

The case concerned Hazelwood, Missouri-based Whitney Design Inc., which was a distributor of household goods imported primarily from vendors in China. Faced with millions of dollars in anti-dumping duties, Whitney filed for Chapter 11 protection in the U.S. Bankruptcy Court for the Eastern District of Missouri in November 2009. Shortly afterwards it filed a motion to sell substantially all of its assets to Household Essentials, which was formed by Whitney's principals.

Sales of assets "free and clear" under section 363 of the Bankruptcy Code within days of a bankruptcy filing and without any plan of reorganization had previously been approved in "mega" cases involving Chrysler Group and General Motors Co.

The U.S. Department of Commerce (DOC) tried to block the Whitney transaction, but the Bankruptcy Court approved the sale in January, 2010 (*In re: Whitney Design, Inc.*, Case No. 09-51928-705). The government then appealed to the U.S. District Court of the Eastern District of Missouri, which dismissed the government's petition (*In re: Whitney Design, Inc.* Case No. 4:10-CV-441). The DOC, represented by the Department of Justice, has failed to pursue the challenge with the Eighth Circuit Court of Appeals.

Some of the salient facts that lead to the Bankruptcy Court's decision in *Whitney* include:

- The anti-dumping liability had caused Whitney's bank lenders and trade creditors to restrict credit because potential reduction of the anti-dumping liability would not have occurred for several years through the appeal process.
- The credit restrictions impaired Whitney's ability to purchase goods to meet existing orders, thereby threatening to cause the company to go out of business.
- Whitney hired an investment banker to serve as an independent "Chief Sales Officer" to negotiate the sale of Whitney's assets to Household Essentials and shop the deal for a higher and better offer.
- The sale price greatly exceeded valuation of the assets under a multiple of EBITDA approach, included payment of post-petition professional and trade claims, as well as contract cure amounts, and was found to be fair and reasonable.
- Whitney's "deposits" with the government (though substantially less than the amount of the asserted anti-dumping liability) remained available to be applied upon resolution of the appeal.

Owners and/or officials of a company facing substantial liability unresolvable in time to save the business but who are willing to pay a fair price for its assets and expose the transaction to competing bidders through an acceptable marketing process should consider use of section 363 of the Bankruptcy Code.

Talbot Sant, a partner in Armstrong Teasdale's Financial Restructuring, Reorganization and Bankruptcy practice group, represented Household Essentials and its principals in the Whitney transaction. For further information about this case, Section 363 asset sales or other bankruptcy matters, please contact:

Tal Sant / 314.342.4106
jsant@armstrongteasdale.com

This alert is offered as a service to clients and friends of Armstrong Teasdale LLP and is intended as an informal summary of certain recent legislation, cases, rulings and other developments. This alert does not constitute legal advice or a legal opinion and is not an adequate substitute for the advice of counsel.

ADVERTISING MATERIAL: COMMERCIAL SOLICITATIONS ARE PERMITTED BY THE MISSOURI RULES OF PROFESSIONAL CONDUCT BUT ARE NEITHER SUBMITTED TO NOR APPROVED BY THE MISSOURI BAR OR THE SUPREME COURT OF MISSOURI.

Unsubscribe from our mailing list

Don't miss Armstrong Teasdale's news and updates — please add armstrongteasdale@armstrongteasdale.com to your contact list or address book.