CLIENT UPDATE

BANKRUPTCY COURT UPHOLDS POST-PETITION PLAN SUPPORT AGREEMENT

NEW YORK
Richard F. Hahn
rfhahn@debevoise.com

Jae-Sun Chung
jchung@debevoise.com

Kevin Bensley
kbensley@debevoise.com

On January 31, 2013, the Bankruptcy Court for the District of Delaware confirmed the debtors' proposed plan of reorganization in *In re Indianapolis Downs, LLC*,[1] declining to "designate" or disallow the votes of several substantial creditors that had entered into a plan support or "lockup" agreement with the debtors after the bankruptcy filing. In a written decision,[2] the Bankruptcy Court provided important guidance concerning the permissibility of post-petition plan support agreements entered into before the court approves a disclosure statement. In the past, some judges, including at least one judge sitting on the Delaware Bankruptcy Court, have held that such agreements constitute an impermissible solicitation of votes to approve a plan of reorganization in violation of section 1125(b) of the Bankruptcy Code which provides that an acceptance or rejection of a plan may not be solicited from a holder of a claim or interest after the commencement of a case unless the holder is provided with a court-approved disclosure statement.

---

1 *In re Indianapolis Downs, LLC., et al.*, No. 11-11046 (BLS), 2013 WL 395137 (Bankr. D. Del 2013).

2 http://www.debevoise.com/publications/pdf/IndyDownsOpinionreConfirmationandMotiontoDesignateVotes.pdf

BACKGROUND

A plan support agreement is an agreement among a debtor and significant creditors reflecting the results of their negotiations over the terms of a plan of reorganization. Such agreements generally provide for (i) the material terms of the plan of reorganization, (ii) a timetable for the documentation, approval and consummation of the plan and (iii) a requirement that the creditors party to the agreement vote in favor of the plan. These agreements are often an essential step in the negotiation and implementation of a plan of reorganization.

Section 1125(b) of the Bankruptcy Code, however, prohibits solicitation of an acceptance or rejection of a plan of reorganization after the commencement of a Chapter 11 proceeding unless, at the time of or before such solicitation, the creditor or interest holder receives a written disclosure statement approved by the court as containing "adequate information." The Bankruptcy Code does not define the term "solicitation," and courts have differed on whether a post-petition plan support agreement constitutes an impermissible solicitation. If a plan support agreement is found to be a solicitation in violation of section 1125(b), any vote on the plan cast by a creditor or interest holder that is a party to such agreement can be designated by the court under section 1126(e) of the Bankruptcy Code.

In 2002, in two unreported decisions,[3] Judge Walrath of the Bankruptcy Court for the District of Delaware suggested that post-petition plan support agreements are *per se* impermissible. Although other courts have subsequently held that post-petition plan support agreements do not constitute an improper solicitation,[4] there has been substantial uncertainty in Delaware concerning the permissibility of such arrangements and debtors have been reluctant to enter into plan support agreements after filing for bankruptcy.

INDIANAPOLIS DOWNS DECISION

In *Indianapolis Downs*, the debtors, operators of a combination horse racing track and casino, filed for Chapter 11 protection in early 2011 after unsuccessfully attempting to resolve their financial distress outside of bankruptcy. Following months of negotiations, the debtors and their two major creditor groups agreed on the terms of a plan of reorganization and this agreement was memorialized in a Restructuring Support Agreement. Under the Restructuring Support Agreement, the creditors agreed to vote in

---

3 *In re Stations Holding Co.,* Case No. 02-10882 (Bankr. D. Del 2002); *In re NII Holdings, Inc.*, Case No. 02-11505 (Bankr. D. Del 2002).

4 *In re Heritage Organization, LLC*, 376 B.R. 783 (Bankr. N.D. Tex. 2007).

favor of a plan that complied with the Restructuring Support Agreement. Under the terms of the Restructuring Support Agreement, this obligation was enforceable by specific performance.

Certain members of the debtors' senior management and holders of equity and debt moved to have the Bankruptcy Court designate the votes of the parties to the Restructuring Support Agreement on the grounds that the Restructuring Support Agreement was an improper post-petition solicitation of votes prior to dissemination of a court-approved disclosure statement.

The Bankruptcy Court held that the Restructuring Support Agreement was not an improper solicitation of votes and declined to designate the votes of the parties to the Restructuring Support Agreement, adopting the narrow view of "solicitation" first announced by the Third Circuit in *Century Glove, Inc. v. First American Bank of New York*.[5] Citing *Century Glove*, the court held that the term "solicitation" in section 1125(b) must be interpreted narrowly in order to encourage free negotiation among creditors in a Chapter 11 proceeding. The Bankruptcy Court found that "Congress intended that creditors have the opportunity to negotiate with debtors and amongst each other; to the extent that those negotiations bear fruit, a narrow construction of 'solicitation' affords those parties the opportunity to memorialize their agreements in a way that allows a Chapter 11 case to move forward."[6]

In addition, citing *In re Heritage Organization, LLC*,[7] the court noted that in that case, the court emphasized the fact that the creditors who signed the agreement were ultimately co-proponents of the plan and it would be absurd to think that the signing of the agreement would be an improper solicitation of votes from creditors who believed that they had sufficient information about the case and the available alternatives to jointly propose the Chapter 11 plan. Although the parties to the Restructuring Support Agreement were not co-proponents of the plan, the court found that the same considerations would apply to those parties given their significant stakes in the debtors and involvement in the proceedings. The court held that the parties to the Restructuring Support Agreement were not the type of creditors the robust disclosure under section 1125 is designed to protect, highlighting the fact that these parties were "all sophisticated financial players…represented by able and experienced professionals" and that designating the votes of these parties "would grossly elevate form over substance."

---

5 *Century Glove, Inc. v. First Am. Bank of New York*, 860 F.2d 94 (3d Cir. 1988).

6 *In re Indianapolis Downs, LLC., et al.*, No. 11-11046 (BLS), 2013 WL 395137 (Bankr. D. Del 2013), p. 9.

7 376 B.R. 783 (Bankr. N.D. Tex. 2007).

Notably, the court specifically addressed the specific performance provision of the Restructuring Support Agreement which was a principal basis of Judge Walrath's bench decisions. The court held that the parties "were entitled to demand and rely upon assurances that accepting votes would be cast" for a plan that conforms to the Restructuring Support Agreement. The court went on to decline to follow Judge Walrath's bench decisions by holding that they presented a markedly different factual and procedural context than the case at bar and contained no legal analysis and, consistent with the court's practice, were "of only the most limited (if any) precedential value."

IMPLICATIONS

The *Indianapolis Downs* decision follows courts in other jurisdictions which have adopted the narrow interpretation of "solicitation" that the Third Circuit set forth in *Century Glove* and provides comfort that the Delaware Bankruptcy Court will enforce post-petition plan support agreements, eliminating the uncertainty created by Judge Walrath's bench decisions.

* * *

Please do not hesitate to contact us with any questions.

February 25, 2013