

VIEWPOINT

Outside-The-Box Solutions To Maximize Post-Confirmation Creditor Recoveries

By Anthony Schnelling,
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Post-confirmation trusts or plan administrations are unusual animals.

After the " Sturm und drang" of the main bankruptcy case settles and the plan of reorganization has been negotiated, confirmed and consummated, the creditors are in charge of their own destiny for the first time since the debtor filed its petition. All of the main actors in the case generally exit stage left on the confirmation date and the creditors are left to fend for themselves.

In many cases, nothing need be done except to resolve claims and then divide up and distribute the cash or securities left behind and close the case. However, in a large number of cases the recovery promised in the plan depends on selling assets left behind after confirmation or prosecuting litigation that has been turned over to beneficiaries of the estate. Frequently, the plan doesn't provide much liquidity to use to support these efforts. Actual creditor recoveries can vary immensely.

On Dec. 15, 2005, the U.S. Bankruptcy Court for the Southern District of Georgia, following a spirited Section 363 auction, approved the sale of the former Durango Paper Mill in St. Marys, Ga., to a leading real estate developer for approximately \$42.08 million. This result provided the bankruptcy estate with a recovery far in excess of the \$7 million in net present value offered to the creditors for the abandoned paper mill and its equipment by the debtor during plan negotiations.

This case is interesting because, since the initial filing for bankruptcy, all parties in interest assumed that only another paper company would be interested in the property for its potential as a re-starter operation, or for the salvage value of the plant and equipment. Because of environmental concerns associated with the manufacture of paper it was widely assumed that the mill site couldn't be developed for any other purpose. Indeed, research we undertook when our firm was named as the creditor trustee indicated that no shuttered paper mills had previously been converted for alternative uses.

However, as the saying goes, assumptions are made to be questioned and, before we settled for liquidating the assets as distressed and environmentally challenged, we asked ourselves: (i) was it possible that the environmental concerns weren't as severe as advertised, (ii) what alternative uses could one postulate for a property consisting of 750+ acres, located on a bluff on the Atlantic Ocean, with a deep river harbor and situated adjacent to a gentrifying southern sea coast town?

Fortunately, one of our principals is trained as an environmental engineer and he, working with retained experts, concluded that the environmental concerns, while real, weren't insurmountable because paper manufacture doesn't generate the kinds of toxins and by-products that create long-term, serious contamination. Armed with this information, we were able to convince the creditors' committee that it was in the estate's best interest to consider marketing the bankruptcy estate to real estate developers, along with paper mill companies.

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After a yearlong marketing process, pointing toward a Section 363 auction, we received several bids from real-estate developers willing to take on the environmental issues in order to acquire an unusual piece of property lending itself to a multi-use residential and resort development. The net result: a return to creditors orders of magnitude greater than anticipated during the bankruptcy proceeding.

In another instance we were named as creditor trustee for the Agribiotech Creditors' Trust, successor to Agribiotech, Inc., a roll up of seed companies that filed for bankruptcy protection in Las Vegas on Jan. 25, 2000. We were charged with administering assets and potential litigations left behind for the creditors of this estate.

At confirmation the estate had liquid assets in excess of \$10 million, \$8 million of which was earmarked to be paid out to holders of secured seed claims and in settlement of allowed administrative expenses related to the bankruptcy. The major assets of the estate were a series of claims against the debtors' senior lenders, challenging perfection of their collateral, and against directors and officers of the debtor for a variety of alleged self-dealing and failure to properly exercise fiduciary duty. The debtors' bankruptcy professionals were uncertain as to the real value of these claims and uncertain about our ability to successfully prosecute them because of the disparity between the estate's resources and the coffers of the senior lenders. Indeed, creditors reading the disclosure statement were advised that unsecured claims weren't likely to yield in excess of 3 cents per dollar of claims, at best.

The litigation against the senior lenders came first, as there was insufficient free cash in the estate to begin the D&O lawsuits, even on a contingent basis, until the collateral issues were resolved. A year into the senior lender litigation and on the eve of trial, the estate was out of cash to pursue the litigation, but still had cash on hand due to holders of secured seed claims. No other sources of funding were available and so we canvassed several thousand seed growers in the northwestern U.S. for permission to use a portion of their secured recovery in support of their claims as unsecured creditors against the senior lenders.

Their willingness to allow this use of their cash, albeit supported by a court-approved commitment to repay them first out of proceeds with interest, allowed the estate to maintain its litigation stance and force the defendants to mediation. The resulting settlement provided sufficient cash to allow the D&O litigation to be properly prosecuted and secured creditors were ultimately paid in full, unsecured creditors received in excess of 30 cents per dollar and the senior lenders received approximately 2 cents per dollar on their deficiency claim related to the amounts disgorged in mediation.

As both of these cases demonstrate, by thinking and acting "out of the box," the trustee or plan administrator charged with administering the estate, working alongside the creditors, can significantly increase the ultimate recovery to the estate.

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