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The Debate Continues: The Seventh Circuit Upholds Credit Bidding in a "Free and Clear" Plan Sale

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Adam A. Lewis, Norman S. Rosenbaum, Stefan W. Engelhardt, John Pintarelli, and Erica J. Richards of Morrison & Foerster LLP's Bankruptcy & Restructuring and Litigation groups successfully represented Amalgamated Bank, as Administrative Agent for the secured lenders, in an appeal before the Seventh Circuit Court of Appeals brought by the debtors. Through extensive briefing, a trial, and oral argument by Mr. Lewis, the Morrison & Foerster team blocked the debtors from proceeding with a "free and clear" sale of the secured lenders' collateral under a proposed chapter 11 bankruptcy plan sale that sought to prohibit the secured creditors' statutory right to credit bid their claims.

In a decision that is expected to have wide-ranging implications for secured lenders and reorganization plan sales nationwide, the Seventh Circuit's June 28, 2011 opinion in In re River Road[1] marks a jurisdictional split on the contours of credit bidding in bankruptcy. While this decision is squarely at odds with decisions of the Courts of Appeals for the Third and Fifth Circuits, its holding is in many respects a validation of Judge Ambro's robust dissent in Philadelphia News,[2] and is arguably more aligned with mainstream bankruptcy thinking on credit bidding issues.

The Seventh Circuit held that under a free and clear plan sale, the plan proponent must afford the objecting secured creditors the opportunity to credit bid. The plan proponent cannot "cram down" such a plan over the objection of the secured creditors by purporting to furnish the creditors with the indubitable equivalent of their claims.[3]

STATUTORY FRAMEWORK

Section 1129(b) of the Bankruptcy Code provides that a plan of reorganization can be confirmed over the objection of a class of secured creditors—a process referred to as a "cramdown" because the objecting class is forced to accept the treatment afforded under the objectionable plan. To succeed with a cramdown, the plan proponent (typically the debtor in possession) must prove that its treatment of the objecting secured class is "fair and equitable."

Section 1129(b)(2)(A) of the Bankruptcy Code provides three circumstances, enumerated in three separate subsections, under which a plan will be deemed "fair and equitable" to a dissenting class of secured creditors:

- under subsection (i), retention by the secured creditors of their liens and the receipt of deferred cash payments totaling at least the allowed amount of their claims with a value at least equal to the present value of the secured creditors' interest in their collateral;
- under subsection (ii), a sale of the assets free and clear of the secured creditors' liens, provided that the secured creditors are furnished the right to credit bid their claims in accordance with section 363(k) of the Bankruptcy Code and with such liens to attach to the proceeds of sale; or
- under subsection (iii), the realization by the secured creditors of the "indubitable equivalent" of their claims.

Under section 363(k) of the Bankruptcy Code, a secured creditor is afforded the right to credit bid its claims in connection with any sale of its collateral under section 363(b) of the Bankruptcy Code. However, under section 363(k), the bankruptcy court can condition the right to credit bid if "cause" is shown. Through reference to section 363(k), section 1129(b)(2)(A)(ii) of the Bankruptcy Code incorporates the right to credit bid as part of the cramdown requirements.

THE CREDIT BIDDING LANDSCAPE BEFORE *RIVER ROAD*

In March 2010, the Court of Appeals for the Third Circuit, by a 2-to-1 majority, issued its much-publicized *In re Philadelphia Newspapers* decision. There, the Third Circuit ruled that, under a plan of reorganization that provides for a sale of assets free and clear of liens through an auction process, a group of secured creditors who opposed the plan did not have the statutory right to credit bid their claims in the auction.[4] Instead, in a departure from the long-held conventional view of the statute and well-established practice, the Third Circuit, following a decision of the Fifth Circuit in *Pacific Lumber*,[5] held that a plan proponent could preclude credit bidding at an auction yet nonetheless confirm a plan over the objection of its secured lenders. The Third Circuit held that such a result could be achieved under section 1129(b)(2)(A)(iii) of the Bankruptcy Code so long as such creditors are provided with the "indubitable equivalent" of their claims.

In a lengthy and vigorous dissent, Judge Thomas L. Ambro disagreed with the majority's interpretation of the statute, laying the foundation for the Seventh Circuit's ruling in *River Road.*

THE ROAD TO *RIVER ROAD*: THE BANKRUPTCY COURT DECISION

The *River Road* debtors and certain of their affiliates (the "*River Road* Debtors") are the owners and operators of the InterContinental Chicago O'Hare Hotel and related assets located near Chicago O'Hare Airport. The *RadLAX* debtors and certain of their affiliates (the "*RadLAX* Debtors" and, together with the *River Road* Debtors, the "Debtors") are the owners and operators of the Radisson Hotel and related assets located near the Los Angeles International Airport. The Debtors financed the acquisition and construction of these assets with loans from Amalgamated Bank and U.S. Bank National Association (as successor-in-interest to San Diego National Bank) (the "Lenders"). Amalgamated Bank, acting as administrative agent for the Lenders (the "Administrative Agent"), holds a blanket lien on substantially all of the Debtors' assets, including their respective hotel properties. As of the commencement of the bankruptcy cases, the Lenders' claims in *River Road* totaled approximately $161 million, and their claims in *RadLAX* totaled approximately $130 million.

On June 4, 2010, following the template outlined by the debtors in *Philadelphia Newspapers*, the Debtors filed separate chapter 11 plans in each of the bankruptcy cases (the "Plans"), which provided for the sale of substantially all of the Debtors' assets to newly formed stalking horse bidders free and clear of liens, including the Administrative Agent's liens. Generally, the Plans provided for the proceeds of the sales (net of certain expenses and claims) to be distributed to the Lenders. Each of the stalking horse bids for the hotel properties was for a sum well below the applicable Lenders' claims. The Debtors' Plans provided for the sales of the hotel properties to be subject to higher or better bids through an auction process.[6]

On the same date, as required by the Plans, the Debtors filed bid procedures motions to approve procedures for the contemplated auction sales of their assets by which they sought to preclude the Lenders from credit bidding their claims. The proposed auction procedures mandated that only cash bids would qualify, and proscribed credit bidding. The Debtors claimed that section 1129(b)(2)(A)(iii) permitted them to deny the secured creditors the right to credit bid, arguing

that they did not have to proceed under section 1129(b)(2)(A)(ii), which preserves and imports secured creditors' rights to credit bid under section 363(k) except when there is "cause" to deny that right. In the alternative, and assuming that the Bankruptcy Court would not accept the Debtors' interpretation of section 1129(b)(2)(A)(iii), the Debtors proposed to cram down the Lenders under section 1129(b)(2)(A)(ii). However, the Debtors sought to prohibit the Lenders from credit bidding under the "for cause" standard incorporated into subsection (ii) of section 1129(b)(2)(A) through reference to section 363(k) of the Bankruptcy Code.

The Administrative Agent filed objections to the bid procedures motions asserting that the Debtors' Plans could not be confirmed over the objections of the secured Lenders because the Plans, in direct contravention of the Bankruptcy Code, contained an outright prohibition on the ability of the Lenders to credit bid their claims against the Debtors at the contemplated auctions. The Administrative Agent urged the Bankruptcy Court to follow Judge Ambro's interpretation of the underlying statute which, it argued, gave effect to the entirety of the protections afforded secured creditors under the Bankruptcy Code. The Administrative Agent further asserted that there was no basis to preclude credit bidding under a "for cause" standard.

- ***"Cause" Did Not Exist to Deny Credit Bidding***

On July 22, 2010, the Bankruptcy Court orally ruled that the Debtors could not preclude the Lenders from credit bidding as a matter of law—i.e., section 1129(b)(2)(A)(iii) does not trump section 1129(b)(2)(A)(ii) because of its reliance on section 363(k). Separately, the Bankruptcy Court scheduled and conducted an expedited trial on the issue of whether the Debtors could preclude the Lenders from credit bidding "for cause" under section 363(k) of the Bankruptcy Code. On August 30, 2010, after completing discovery and a full evidentiary trial, now Chief Bankruptcy Judge Black ruled that "cause" did not exist to deny credit bidding. The Bankruptcy Court entered orders denying the bid procedures motions on October 5, 2010, expressly adopting the reasoning set forth in Judge Ambro's dissent.[7]

The Debtors fast-tracked their appeal of the Bankruptcy Court's orders[8] directly to the Seventh Circuit pursuant to 28 U.S.C. § 158(d) (introduced as part of the 2005 BAPCPA Amendments), which authorizes a direct appeal under certain circumstances.[9] The Bankruptcy Court certified the cases for appeal on November 4, 2010 and the Seventh Circuit accepted the appeal on November 30, 2010. Oral arguments were held on April 7, 2011.[10]

RIVER ROAD ARGUMENTS IN FOCUS

In *River Road*, the Debtors, relying primarily on *Philadelphia Newspapers*, argued that because section 1129(b)(2)(A) is phrased in the disjunctive "or," a plain reading of that section indicates that a plan can be confirmed as long as it meets the requirements of any one of the three subsections, regardless of whether the plan's structure more closely resembled another subsection. Under the interpretation advocated by the Debtors, a plan proponent has the flexibility to propose a plan that provides for a free and clear sale of assets without credit bidding so long as the plan provides the "indubitable equivalent" of the secured claims. The Debtors contended that the proceeds of sale could provide the Lenders with the indubitable equivalent of their claims, although they acknowledged that the Lenders were free to contest this issue at confirmation.

In support of these arguments, the Debtors asserted that the plain language of the statute is clear and unambiguous, and, therefore, relying on legislative history or other extrinsic sources to reach a contrary interpretation is inappropriate.

- ***Giving Effect to Each Provision***

The Administrative Agent argued that section 1129(b)(2)(A) must be read to give effect to each specific provision and that the interpretation adopted by the Third Circuit and advocated by the Debtors would render section 1129(b)(2)(A)(ii) virtually meaningless. Thus, rather than providing an equal alternative path for plan confirmation, clause (iii) should be viewed as a "catch-all" provision that applies only in those circumstances in which neither of the more specific subsections (i) and (ii) of section 1129(b)(2)(A) is applicable (for example, where the collateral is abandoned or where the secured creditor is provided with replacement collateral of equal value).

- ***Adopting a Holistic Approach***

The Administrative Agent further contended that the Debtors' interpretation of the statute would deprive secured lenders of essential rights afforded to them elsewhere under the Bankruptcy Code. Advocating a holistic approach to statutory construction, the Administrative Agent asserted that the Bankruptcy Code guarantees secured lenders one of two important rights to preserve their bargained for interest in their collateral: the right to elect treatment of their deficiency claims as fully secured under section 1111(b) of the Bankruptcy Code, or the right to credit bid their claims under section 363(k) in the context of any sale of their collateral.

Both provisions, the Administrative Agent argued, serve to protect the secured creditor from the risk of the undervaluation of the collateral. A secured creditor is statutorily precluded from making a section 1111(b) election where the underlying assets are to be sold under section 363(b) of the Bankruptcy Code or under a plan. However, in this context, the secured creditor is protected by its right to credit bid—a position supported by the relevant statutory history, but negated by the interpretation of section 1129(b)(2)(A) adopted by the Third Circuit and advocated by the Debtors.

- ***Key Policy Considerations***

Finally, the Administrative Agent stressed that the majority's position in Philadelphia News provided a dangerous roadmap for third party bidders and insiders to follow in an effort to acquire assets at below market value—the very same road map pursued by the Debtors in River Road. A secured creditor's right to credit bid serves as a critical market check against undervaluation where assets are sold through a bankruptcy auction process. In that connection, the Administrative Agent observed that the Debtors' interpretation of the statute served no bankruptcy policy because every penny of a cash bid up to the amount of the secured creditor's claim would go right to the secured creditor; only when the cash bid exceeded the secured creditor's claim could there be any benefit to any other constituency in the case, the exact situation when credit bidding is permitted. Thus, the only potential beneficiaries of the Debtors' view are bidders—often insiders—who might get the property at a reduced value because the secured creditor lacks the liquidity or resources to

A SECURED CREDITOR'S RIGHT TO CREDIT BID SERVES AS A CRITICAL MARKET CHECK AGAINST UNDERVALUATION WHERE ASSETS ARE SOLD THROUGH A BANKRUPTCY AUCTION PROCESS. IN THAT CONNECTION, THE ADMINISTRATIVE AGENT OBSERVED THAT THE DEBTORS' INTERPRETATION OF THE STATUTE SERVED NO BANKRUPTCY POLICY BECAUSE EVERY PENNY OF A CASH BID UP TO THE AMOUNT OF THE SECURED CREDITOR'S CLAIM WOULD GO RIGHT TO THE SECURED CREDITOR; ONLY WHEN THE CASH BID EXCEEDED THE SECURED CREDITOR'S CLAIM COULD THERE BE ANY BENEFIT TO ANY OTHER CONSTITUENCY IN THE CASE, THE EXACT SITUATION WHEN CREDIT BIDDING IS PERMITTED.

cash bid. (Note, again, that any such cash bid by an able secured creditor would eventually go back into the secured creditor's pocket until his claim is paid in full.)

THE *RIVER ROAD* RULING

The Seventh Circuit agreed with the Administrative Agent's interpretation of section 1129(b)(2)(A), noting that, like the Bankruptcy Court, it found the statutory analysis articulated by Judge Ambro in his *Philadelphia Newspapers* dissent to be compelling. The Seventh Circuit observed that "[n]othing in the text of Section 1129(b)(2)(A) directly indicates whether Subsection (iii) can be used to confirm any type of plan or if it can only be used to confirm plans that propose disposing of assets in ways that can be distinguished from those covered by Subsections (i) and (ii). Hence, there are two plausible interpretations of the statute: one that reads Subsection (iii) as having global applicability [as proposed by the Debtors] and one that reads it as having a much more limited scope [as argued by the Administrative Agent]."[11]

- ***Looking Beyond the Statute***

Contrary to the Debtors' position and the majority's view in *Philadelphia News*, the Seventh Circuit found that the "statute does not have a single plain meaning," thereby necessitating a "look beyond the text of Section 1129(b)(2)(A) to determine which of its possible interpretations is the correct one."[12]

Here, the Seventh Circuit concluded that, even if it were to analyze subsection (iii) in isolation, the text of the provision does not unambiguously indicate that plans such as those proposed by the Debtors (i.e., plans that deny secured lenders the right to credit bid) qualify for "fair and equitable" status. Expressing considerable skepticism about the capacity of bankruptcy auctions to generate market value, the court rejected the Debtors' argument that the proceeds of an auction sale where credit bidding is precluded could provide a secured creditor with the indubitable equivalent of its claims:

> In essence, by granting secured creditors the right to credit bid, the Code promises lenders that their liens will not be extinguished for less than face value without their consent. This protection is important since there are number of factors that create a substantial risk that assets sold in bankruptcy auctions will be undervalued.
>
> Because the Debtors' proposed auctions would deny secured lenders the ability to credit bid, they lack a crucial check against undervaluation. Consequently, there is an increased risk that the winning bids in these auctions would not provide the Lenders with the current market value of the encumbered assets. Nothing in the text of Section 1129(b)(2)(A) indicates that plans that *might* provide secured lenders with the indubitable equivalent of their claims can be confirmed under Subsection (iii).[13]

- ***Statutory Interplay***

The court next turned to well-established principles of statutory interpretation in determining which of the two plausible arguments was superior. The Seventh Circuit found that the Debtors' proposed interpretation of section 1129(b)(2)(A)(iii) was unacceptable because it would render the other subsections of the statute superfluous. "We cannot conceive of a reason why Congress would state that a plan must meet certain requirements if it provides for the sale of assets in particular ways and then immediately abandon these requirements in a subsequent subsection."[14] Adopting a holistic view of the Bankruptcy Code, the court also held:

> Because the Debtors' interpretation of Section 1129(b)(2)(A) would not provide secured creditors with the

types of protections that they are generally accorded elsewhere in the Code, their interpretation is less plausible than a construction of the statute that reads Subsection (ii), which offers the standard protections to creditors, as providing the only way for plans seeking to sell encumbered assets free and clear of liens to obtain 'fair and equitable' status.[15]

THE SECURED LENDING COMMUNITY HAS TAKEN STEPS TO COUNTERACT THE REPERCUSSIONS OF *PHILADELPHIA NEWS* BY CONDITIONING DEBTOR-IN-POSSESSION FINANCING AND THE USE OF CASH COLLATERAL ON THE COMMITMENT OF THE DEBTOR TO WAIVE THE ABILITY TO PURSUE A PLAN SALE WITHOUT CREDIT BIDDING.

Finally, the court considered the unambiguous protections furnished to secured creditors in the context of free and clear sales by sections 363(k) and 1129(b)(2)(A)(ii) of the Bankruptcy Code, and the rights afforded undersecured creditors under section 1111(b) of the Bankruptcy Code. "In contrast, the Code does not appear to contain any provisions that recognize an auction sale where credit bidding is unavailable as a legitimate way to dispose of encumbered assets."[16]

RIVER ROAD'S IMPLICATIONS/BEST PRACTICES

Both the Bankruptcy Court and Seventh Circuit perceived some urgency in addressing the credit bidding issue in *River Road*. Their sense of urgency is understandable in light of the repercussions that the *Philadelphia Newspapers* decision has had in the lending community. For example, the secured lending community has taken steps to counteract the repercussions of *Philadelphia News* by conditioning debtor-in-possession financing and the use of cash collateral on the commitment of the debtor to waive the ability to pursue a plan sale without credit bidding. It remains to be seen to what extent such waivers will be uniformly approved by bankruptcy courts, and whether they will accomplish their intended effects. In any case, secured lenders should continue to insist on such waivers.

RIVER ROAD IS A CRITICAL VICTORY FOR THE SECURED LENDING COMMUNITY

As *River Road* indicates, *Philadelphia Newspapers* provides the template for a credit bid override in the context of a free and clear plan sale. From the perspective of third parties, this presents the potential for acquiring assets at attractive valuations where the secured creditor elects not to, or simply cannot, cash bid. From the secured creditor's perspective, the decisions in *Philadelphia News* and *Pacific Lumber* pose a very real threat to their bargained for state law rights and long held expectations concerning their ability to realize the value of their collateral in a cramdown scenario.

RIVER ROAD MAY PROVE TO BE A TURNING POINT IN THIS DEBATE AND, COUPLED WITH JUDGE AMBRO'S DISSENT, BE VIEWED AS PERSUASIVE AUTHORITY FOR THOSE COURTS THAT HAVE YET TO ADDRESS THIS ISSUE.

In this regard, *River Road* is a critical victory for the secured lending community. However, the Third and Fifth Circuit will remain safe havens where debtors and plan proponents, in tandem with third party bidders, can attempt this cramdown strategy. For courts outside of the Third, Fifth, and Seventh Circuits, including the Second and Ninth Circuits, there is no certainty. *River Road* may prove to be a turning point in this debate and, coupled with Judge Ambro's dissent, be viewed as persuasive authority for those courts that have yet to address this issue. At the same time, the Circuit split may give debtors pause before expending the time and resources to engage in this cramdown tactic. However, unless and until the United States Supreme Court takes up this critical issue, the uncertainty will remain.

- ***The Role of "Cause" Under 363(k)***

Somewhat overlooked in the extensive coverage of the ongoing credit bidding debate engendered by these Circuit Court decisions, was the Debtors' unsuccessful attempt before the Bankruptcy Court to preclude credit bidding for "cause" under section 363(k). After a trial on the merits, the Bankruptcy Court ruled against the Debtors and no appeal of this ruling was taken.

The Debtors alleged that sufficient cause was present for two reasons. First, they alleged that the Lenders had engaged in certain objectionable conduct prior to the commencement of the chapter 11 cases, a charge the Bankruptcy Court rejected after considering the evidence.[17] Second, they argued that cause existed to deny credit bidding because in the context of the Debtors' contemplated auctions, credit bidding would chill bidding activity. In support, the Debtors offered expert testimony which the Bankruptcy Court characterized as standing for the assertion that credit bidding, in and of itself, serves to chill bidding in an auction context. While the Bankruptcy Court acknowledged that the "potential to chill the bidding process has been recognized as a reason to deny credit bidding,"[18] the court ruled that the Debtors had not demonstrated "cause." In particular, the court found that the Debtors failed to provide any specific evidence that credit bidding would chill bidding in the context of the contemplated auctions.[19]

The argument that credit bidding, irrespective of the particular facts of a case, will necessarily have a chilling effect on the auction process raises a perplexing question under section 363(k). If the potential to chill bidding in an auction is inherent in credit bidding, and such impact arguably establishes "cause" under section 363(k), then the "for cause" exception to credit bidding would indeed be "swallowing" the rule that credit bidding is otherwise mandated. The opportunity remains open for secured creditors to argue that the reason that credit bidding might chill bidding is inherent to the auction process, and not a matter of the particular facts of any case, and that had Congress intended that to be a ground for denying credit bidding, it would not have bothered to include a right to credit bid in section 363(k) in the first place.

THE BANKRUPTCY COURT'S DETERMINATION IS A SOBERING REMINDER THAT DEBTORS IN POSSESSION AND THIRD PARTY BIDDERS MAY SEEK TO PRECLUDE CREDIT BIDDING BY ADVANCING THESE "FOR CAUSE" ARGUMENTS. IRRESPECTIVE OF THE OUTCOME OF THE JURISDICTIONAL SPLIT ON CREDIT BIDDING IN CRAMDOWN SCENARIOS, THE SECURED LENDER COMMUNITY MUST REMAIN COGNIZANT OF THIS EXCEPTION TO CREDIT BIDDING AND THE NEED TO VIGOROUSLY OPPOSE ANY EFFORT TO ADVANCE THIS ARGUMENT WITH APPROPRIATE LEGAL ANALYSIS.

There appears to be limited legal authority and empirical studies on whether credit bidding acts to chill the auction process. However, the Bankruptcy Court's determination is a sobering reminder that debtors in possession and third party bidders may seek to preclude credit bidding by advancing these "for cause" arguments. Irrespective of the outcome of the jurisdictional split on credit bidding in cramdown scenarios, the secured lender community must remain cognizant of this exception to credit bidding and the need to vigorously oppose any effort to advance this argument with appropriate legal analysis and evidence. For bargain hunters, *River Road* charts another potential course for acquiring assets through a cramdown plan.

We will continue to provide updates regarding credit bidding developments, including potential implications for lenders and other players in future bankruptcy cases.

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Because of the generality of this update, the information provided herein may not be applicable in all situations and should not be acted upon without specific legal advice based on particular situations.

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[1] *River Road Hotel Partners, LLC v. Amalgamated Bank*, Case Nos. 10-3597 & 10-3598, 2011 U.S. App. LEXIS 13131 (7th Cir. June 28, 2011) ("*River Road*"). *River Road* addressed two related bankruptcy cases pending in the Bankruptcy Court for the Northern District of Illinois: *In re River Road Hotel Partners, LLC*, Case No. 09-30029 and *In re RadLAX Gateway Hotel, LLC*, Case No. 09-30047. The two bankruptcy proceedings are separately administered; however, because the hotels (and their related properties) that are the primary assets in each case share common management and ownership, the cases have been generally conducted in parallel and each raised the identical issue on appeal.

[2] *In re Philadelphia Newspapers, LLC*, 599 F.3d 298 (3d Cir. 2010) ("*Philadelphia Newspapers*").

[3] *River Road*, 2011 U.S. App. LEXIS, at *32.

[4] *Philadelphia Newspapers*, 599 F.3d at 318.

[5] In *Scotia Pacific Co. v. Official Unsecured Creditors Comm. (In re The Pacific Lumber Co.)*, 584 F.3d 229 (5th Cir. 2009) ("*Pacific Lumber*"), the Fifth Circuit ruled that a secured creditor does not have an absolute right to credit bid its claim when its collateral is being sold free and clear of liens pursuant to a plan of reorganization, although the Seventh Circuit found this case to be less relevant than *Philadelphia Newspapers* because the collateral at issue in *Pacific Lumber* was not being auctioned and the value of such collateral had already been judicially determined.

[6] Following the filing of the Appeal with the Seventh Circuit, the Debtors filed amended plans and asset purchase agreements (with new stalking horse entities) which had substantially the same terms. The purchase prices were slightly higher but were still well below the amount of the Lenders' claims.

[7] Following the Bankruptcy Court's denial of the Debtors' bid procedures motions in *River Road* and *RadLAX*, the court, on motion of the Administrative Agent, terminated each Debtor's exclusive plan filing period. Thereafter, the Administrative Agent, on behalf of the Lenders as plan proponents, filed a plan in the chapter 11 case of the *River Road* Debtors. The Lenders' plan was confirmed by an order of the Bankruptcy Court dated July 7, 2011.

[8] The Appeal was limited to the issue of whether the Bankruptcy Court erred in holding that the Debtors must proceed under 11 U.S.C. § 1129(b)(2)(A)(ii) and provide their secured creditors with an opportunity to credit bid, where the Debtors proposed, under a plan of reorganization, to sell free and clear of liens the collateral securing such secured creditors' claims. The Debtors did not appeal the Bankruptcy Court's determinations that "cause" to deny the Lenders the right to credit bid pursuant to 11 U.S.C. § 363(k) did not exist.

[9] 28 U.S.C. § 158(d)(2)(A) provides in relevant part:

> The appropriate court of appeals shall have jurisdiction of appeals . . . if the bankruptcy court, the district court, or the bankruptcy appellate panel involved, acting on its own motion or on the request of a party to the judgment, order, or decree described in such first sentence, or all the appellants and appellees (if any) acting jointly, certify that—

> (i) the judgment, order, or decree involves a question of law as to which there is no controlling decision of the court of appeals for the circuit or of the Supreme Court of the United States, or involves a matter of public importance;
>
> (ii) the judgment, order, or decree involves a question of law requiring resolution of conflicting decisions; or
>
> (iii) an immediate appeal from the judgment, order, or decree may materially advance the progress of the case or proceeding in which the appeal is taken.

[10] The Seventh Circuit granted the Loan Syndications and Trading Association ("LSTA") leave to file an *amicus* brief, although the LSTA did not participate in oral arguments. The LSTA also participated as *amicus curiae* in *Philadelphia Newspapers*.

[11] *River Road*, 2011 U.S. App. LEXIS, at *19-20.

[12] *Id.* at *20 (citation omitted).

[13] *Id.* at *23-25 (emphasis in original).

[14] *Id.* at *28.

[15] *Id.* at *31.

[16] *Id.*

[17] Order Denying Bid Procedures Motion at 4, *In re River Road Hotel Partners, LLC*, Case No. 09-30029, (Bankr. N.D. Ill., Oct. 5, 2010), ECF No. 462.

[18] *Id.*

[19] *Id.*