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6 Questions for Buchalter Nemer's Bo Bollinger

By *Natalie Dolce*

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Bollinger

LOS ANGELES—"Investors must be willing to get involved in the early stages of a case that includes potential target assets and must be nimble in its due diligence capabilities." So advises **Bernard Bollinger**, a shareholder and chair of the insolvency and financial solutions practice group at law firm **Buchalter Nemer** in Los Angeles. Bollinger focuses his practice on bankruptcy matters and regularly represents secured and unsecured creditors and debtors in various corporate reorganizations and recently spoke with [GlobeSt.com's](#) Natalie Dolce about some specific provisions and structures in the bankruptcy code.

GlobeSt.com: Are you seeing an increase in bankruptcy sales as real estate investment opportunities?

Bollinger: In the last two years I have seen more real estate sales in bankruptcy cases than at any time in my nearly 25 years as an insolvency attorney. Whether those sales present an investment opportunity, however, depends upon the potential investor's knowledge of the particular market niche involved. The most successful investors in this arena realize that the bankruptcy sales process is based upon an inherent contradiction, as the interests of creditors in obtaining the highest sales price often conflict with the desire of a debtor's insiders to sell the property through a process that restricts bidders. As a result, investors must be willing to get involved in the early stages of a case that includes potential target assets and must be nimble in its due diligence capabilities.

GlobeSt.com: How does a bankruptcy filing by a tenant impact a commercial lease and how does a bankruptcy filing by a commercial lessor impact a commercial lease?

Bollinger: These issues have been the subject of many treatises and much litigation over the years but let me try to reduce these issues to their essence. A debtor tenant can assume a lease; assume and assign a lease to a third party (even if a lease specifically prevents assignment); or reject a lease, while a debtor lessor (a pretty rare circumstance until recently) has little or no ability to modify an existing lease without the consent of the tenant. These rights are dictated by very complicated

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bankruptcy code provisions that have been amended numerous times to address issues raised by various lobbying groups, so these circumstances warrant the involvement of a knowledgeable insolvency attorney.

GlobeSt.com: *I have heard the term "automatic stay" recently when talking about bankruptcy. Can you explain what is it exactly and how it impacts the rights of creditors in a bankruptcy case? In addition, why would a creditor want to serve on a creditor committee in a real estate bankruptcy case?*

Bollinger: The automatic stay prevents creditors from proceeding with collection remedies. It goes into effect from the moment a bankruptcy case is filed and remains in place throughout a debtor's case unless the creditor obtains an order lifting the automatic stay. As a result, creditors seeking to foreclose upon real property must first obtain relief from stay... Stay relief it is very difficult to obtain if a debtor can demonstrate that the property is necessary to an effective reorganization that is in progress. Since one of the elements of a debtor making that showing is the ability to demonstrate support of its creditor's committee, members of creditor committees in real estate cases can use that leverage to help maximize the return to creditors.

GlobeSt.com: *What happens if a bankruptcy case is started after a state court receiver has been appointed to manage a distressed real property?*

Bollinger: The bankruptcy code contains provisions that require a receiver to turn over all property in its possession to the debtor absent an order of the bankruptcy court excusing compliance with these requirements. As a result, it is incumbent upon a secured creditor to bring a motion to excuse the receiver from the obligation to turn over the property in its possession. At one time that remedy was almost never granted, but I have recently seen several instances where a receiver has been permitted to remain in place during the course of a bankruptcy proceeding.

GlobeSt.com: *What is a "cramdown" and how often do you see that tactic successfully employed in a real estate case?*

Bollinger: In bankruptcy parlance a "cram down" is the process by which the holder of a claim or a class of claims is forced to accept a plan of reorganization's treatment of those claims. Most often the term is applied to a secured creditor that has its loan terms modified through a plan despite its lack of consent to that treatment. While the cramdown requirements are quite complicated and not commonly employed successfully, it is the mere potential for cramdown that often results in the secured lender's willingness to compromise its claim in a bankruptcy proceeding.

GlobeSt.com: *Why is it that bankruptcy cases can be pending in a jurisdiction that is vastly different than the location of the real property that is the subject of the case?*

Bollinger: The bankruptcy code permits a debtor to file its bankruptcy case in the jurisdiction where it owns real property or has a principal place of business or in the state of its incorporation. Since many corporations and LLCs are formed in jurisdictions like Delaware or New York that are far from the location of the property or business operations that are the subject of a bankruptcy case, creditors can find themselves at a distinct disadvantage. While there have been many unsuccessful attempts over the years to amend the code to prevent filings in the state of incorporation, it remains to be seen whether the recent "Bankruptcy Venue Reform Act of 2011" that was introduced as recently as July, 2011 will fare any better.

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Natalie Dolce *Natalie Dolce, editor of the West Coast region for GlobeSt.com and Real Estate Forum, is responsible for coverage of news and information pertaining to that vital real estate region. Prior to moving out to the Southern California office, Natalie was Northeast bureau chief, covering New York City for GlobeSt.com. Dolce's background includes a stint at InStyle Magazine, and as managing editor with New York Press, an alternative weekly New York City paper. In her career, she has also covered a variety of beats Arthur Frommer's Budget Travel magazine, FashionLedge.com, Co-Ed magazine, and has also freelanced for a number of publications including MSNBC.com and Museums New York magazine. Contact Natalie Dolce.*



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