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BANKRUPTCY

ASK AND YE SHALL (USUALLY) RECEIVE

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There are 216 specific procedural rules used in the bankruptcy courts across the country; my copy of the bankruptcy code is 407 pages. Yet, perhaps the most valuable and strategic play is found nowhere in either. Rather, as any child seems to know, if you want something, just ask. And as my 7-year old can attest, keep asking over and over again until weariness finally results in a "yes." Many have heard the cliché, which is spot on: bankruptcy is a court of negotiation and not litigation. Because of the flexibility granted to debtors and judges to craft an effective reorganization, there are magical opportunities to achieve things that would normally not be possible in the litigation or commercial contexts.

There are many bankruptcies where a debtor is looking to reorganize and needs continued surety support during the pendency of the bankruptcy. This leads to an opportunity early on to receive accommodations and make deals. There are three areas where we typically see the most favorable agreements: (1) continued survival of collateral pledged pre-petition; (2) ratification of indemnity obligations; and (3) reimbursement of fees, expenses, and premiums.

In terms of the collateral, early negotiations with a debtor can allow a surety to secure not only survival of any pre-petition collateral, but also cross-collateralization for any new bonds that are issued after the bankruptcy is filed. We have also seen circumstances where premium rates can be adjusted or more collateral can be pledged – all of which can occur in the normal course of the bankruptcy if the parties are successful at crafting the appropriate surety bond order during the first days of the bankruptcy.

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Indemnity is the same. In addition to ensuring that all indemnity agreements are assumed as part of the bankruptcy reorganization, negotiations can net an agreement up front by the debtor to reimburse the Surety in real time for its fees, expenses, and premiums. This dovetails with the proof of claim process. In most cases, we recommend filing a proof of claim for the full amount of the bonded exposure. This can be a significant number. As part of the negotiation on reimbursement, language can be used in a proposed Confirmation Order noting that the proof will be automatically withdrawn as of the effective date of the plan, but only if the surety has been fully reimbursed; the debtor also agrees to continuing indemnity. All of this requires the debtor to make sure these payments occur if it wants to emerge out of bankruptcy and tie up all loose ends.

While we usually have success at obtaining these concessions, that is not to say that the ideas are readily accepted by debtors. Indeed, in many cases, these notions are novel to debtor attorneys. With diligence, however, and the flexibility provided by the bankruptcy process, this learning curve can usually be overcome. And, by providing a debtor a comprehensive package that solves all surety issues up front, it lets them focus on other issues in the bankruptcy. We have found that closure up front goes a long way in complex bankruptcies where attorneys are scrambling on the debtor side to cross items off their list.

Langley LLP actively provides creditor representation on bankruptcies throughout the country, including Delaware, Florida, and Texas.

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