General Growth Properties Project-Level Lenders Fare Well in GGP Bankruptcy Plan

When General Growth Properties, Inc. and its affiliates (collectively, "GGP") filed bankruptcy petitions for a large number of their special purpose entities ("SPEs"), the capital markets understandably reacted with concern over the attack on the sanctity of the bankruptcy remote structure that is essential to securitizations and structured financings.

Although red flags were raised about the prospect of substantive consolidation of these SPEs into the broader GGP bankruptcy, the plan of reorganization that GGP filed for a number of its subsidiaries on December 1, 2009 suggests that the structure withstood the attack in a way that enabled the lenders to the SPEs to obtain favorable restructuring terms.

The December 1, 2009 plan — for which confirmation is on a fast track and is expected by December 15, 2009 — covers 182 debtors, 92 properties, and roughly $9.7 billion in debt.

While portions of the plan were filed under seal to preserve GGP's flexibility in its negotiations with lenders with whom it has not yet reached settlements, the broad outlines of the agreements between GGP and the settling lenders include reinstatement of the debt (with default interest and late fees waived, and with a new amortization schedule), payment of a 100-basis-point forbearance fee and a portion of any incremental special servicer fee, standard waivers, acknowledgments of the validity and perfection of the lenders' liens, and other standard loan restructuring provisions.

The agreements are subject to confirmation from the rating agencies that the modifications and waivers set forth in the plan will not result in the qualification, downgrade, or withdrawal of the ratings currently assigned to the applicable certificates, if the applicable pooling & servicing agreements require such confirmation. Lenders will be entitled (at their expense) to satisfactory REMIC opinions. GGP will continue to utilize its centralized cash management system.

While it is hard to characterize anything in the GGP bankruptcy as ordinary, in many ways, the restructured terms are similar to most real estate restructurings taking place in today's environment.

The settling lenders bargained for, and GGP agreed to, certain additional protections regarding the bankruptcy remoteness of the SPEs and the implications of a "chapter 22," or later bankruptcy filing by the SPE.

As between GGP and the settling lenders, the fact that these concessions are embodied in a plan that will be confirmed by a court order suggests that these provisions will be enforced in any subsequent bankruptcy filing by the settling GGP entity.

It remains to be seen whether these provisions become "market standard" in other deals and whether courts will enforce comparable provisions not initially approved by a court. In our view, it would be a mistake simply to import these provisions into other transactions and to assume without careful analysis that they will withstand later scrutiny.

Independent Directors

The August 2009 denial of the motions to dismiss the GGP SPE cases[1] was based in large part on the grounds that the organizational documents of the SPEs did not prevent the firing and replacement of the independent directors (even though it was done surreptitiously, without notice to the fired directors and without lender consent or notice), and did not limit the fiduciary duty of those directors to the SPE and its creditors, thereby requiring the directors to consider the interests of the equity owners of the SPEs (including the members of the GGP "corporate family") in determining whether to file bankruptcy. The plan settlements address these issues in two ways.

Each settling SPE will be required to have two independent directors, each of whom must be a natural person approved by the lender (which consent shall not be unreasonably withheld, conditioned or delayed) and unaffiliated with the debtor, or provided by a corporate services provider. The plan notes that while this provision remains under discussion, the approved list of nationally-recognized companies providing independent managers, directors and/or trustees will include Corporation Services Company, CT Corporation, National Registered Agents, Inc., and Independent Director Services, Inc.

The lenders will have the right to consent to any new or replacement independent director (which shall be deemed given if the independent director is provided by a corporate services provider and otherwise shall not be unreasonably withheld, conditioned or delayed) and the lenders are entitled to at least 15 business days' prior notice of the replacement of an independent director. These approval rights represent a movement away from traditional practice, where lenders have been reluctant to exercise control over the independent director out of concern that such control might be alleged to support "lender liability" type claims. This concern is arguably mitigated by the fact that the lenders have not been given an absolute and unconditional approval right: the lenders have no approval right if the independent director is employed by a corporate service provider and they cannot unreasonably withhold or delay their consent to any other proposed independent director.

The plan notes that a requirement that the debtors become Delaware limited liability companies (and thus able to limit their directors' fiduciary duties pursuant to section 18-1101 of the Delaware Limited Liability Company Act to a greater extent than is possible with corporate directors) remains under discussion.

Assuming that provision remains in the plan, in making a determination whether to file a subsequent bankruptcy for the SPE, the directors' duties would require them, "to the extent permitted by applicable law," to consider only the interests of the SPE as a stand-alone business entity, would not allow them to consider the interest of the member of the SPE or any direct or indirect beneficial owner of the member, and would require them to consider the interest of the lender, who shall be a third-party beneficiary to this provision.

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[1] Discussed in detail in our Client Alert dated August 26, 2009, which can be found here: http://www.kayescholer.com/news/client_alerts/20090826/_res/id=sa_File1/BRCR_RE_SFAlert.08.26.09.pdf

Subsequent Bankruptcy Event

Each settling SPE is agreeing that if it files a later bankruptcy petition, or if an involuntary petition filed against it is not dismissed in 180 days, relief from the automatic stay shall automatically be granted in favor of the lender, its successors and/or assigns, and the debtor shall not challenge a motion seeking such relief or seek to reinstate the automatic stay pursuant to section 105 or any other provision of the Bankruptcy Code.

The plan also provides that, upon such filing, the extension of the maturity date for the renegotiated loan will become void and of no further force and effect.

The law is unsettled on whether automatic stay waivers are enforceable. Many courts choose not to enforce such provisions on public policy grounds. As noted, the fact that this provision is included in a plan and will be confirmed by court order (thus likely eliminating the public policy argument) suggests that a court with jurisdiction over a subsequent SPE filing should enforce these provisions as between the settling GGP SPE and its lenders or their assigns. We are less sanguine — and certainly doubt that any law firm would opine — that waivers of this sort not blessed by prior court order would be enforced.

Parent Guarantees

All GGP entities will not yet emerge from bankruptcy. Upon emergence, the ultimate parent of each settling SPE will deliver non-recourse carve-out guarantees that, in addition to containing customary "bad acts" recourse provisions (fraud, misappropriation or misapplication of monies, *etc.*), will provide full recourse to such entity if the settling SPE either files a subsequent voluntary petition, fails to have an involuntary filing dismissed within 180 days, makes an assignment for the benefit of creditors, admits its inability to pay its debts, or intentionally interferes with lender's exercise of remedies following an event of default.

Although the negotiations between the lenders and the filed GGP SPEs played out against the uncertainty that any bankruptcy filing brings, the bargains struck suggest that while the maturity extensions may disappoint some investors, the settling lenders were able to filter out the noise of the bankruptcy, and to exercise the powers they bargained for at the outset of their deals to obtain favorable results. While GGP no doubt will be cited as precedent for other SPE filings in this and other jurisdictions, the commercial outcome speaks well to the integrity of the SPE structure.