801.1(c)

Verne, B. Michael

From: [redacted]
Sent: Thursday, May 29, 2008 4:25 PM
To: Verne, B. Michael
Cc: [redacted]
Subject: An HSR question
Attachments: nyc4-730768-1.doc

Mike,
I have attached a memo detailing a transaction between a debtor-in-possession ("D") and a purchaser ("P"). There may or may not be a filing on that transaction depending on the value of the assets being acquired directly from D by P. The wrinkle is this. There are several ordinary course lenders who we think can rely on 802.63 to acquire assets from D in exchange for the debts owed them. These creditors have assigned the rights to these assets to P who will acquire them, but not from D, as legally, they will have been foreclosed upon by creditors. It is the creditors who will assign the rights to the assets to P, so we believe it is correct to say that those assets will be acquired by P from Creditors and not from D and so should not be considered as part of the consideration in the transaction between D and P.
We would like to discuss this with you to determine if you agree with that analysis or not. Please let us know when a good time will be to discuss and I can set up a conference call.
Thanks very much.
Joe

[redacted]

Facts

Seller is Debtor-in-possession ("D").

Ultimate parent entity of Buyer is "J".

J will form a Newco of which it will own in excess of 50%.

There are several pre-petition ordinary course secured creditors ("Creditors").

There is one purchase agreement to which all are parties, with Creditors acting thru an Agent.

D is selling or otherwise disposing of assets valued in excess of $63.1 million.

Newco is paying about $17 million to D for control of a business ("TQ") that is already 49% owned by J. As a result of this acquisition, J will own TQ interests valued at approximately $27.951 million.

Newco is paying $30-40 million to D for inventory, based on an estimated GAAP value. There are virtually no assumed liabilities.

*Creditors are realizing on their collateral and acquiring assets from D valued at approximately $150 million, although no one creditor will acquire more than $63.1 million in assets. The Creditors have made a Credit bid whereby they are probably not taking possession of the assets but will be the legal owners at least with respect to their right to subsequently assign their rights to the property to Newco.

J will contribute to Newco several facilities which J owns and approximately $135 million in cash.

Creditors have agreed to assign their rights to D's assets to Newco in exchange for minority positions in the Newco and $135 million.

Analysis

We do not think there are any HSR filings required under a scenario in which the inventory is valued at less than $35 million and the assumed liabilities are virtually zero.

Newco is paying approximately $17 million to D for the 51% interest in TQ that J does not presently own. The value of the business that will be held as a result of the acquisition is approximately $27.951 million.

Newco is paying approximately $30-$40 million to D for the assets it is acquiring from D and when added to the value of the TQ interests will not exceed$63.1 million if the inventory is valued at approximately $35 million or less. The value of assumed liabilities is zero.

[redacted]

The creditors' acquisition of D's assets are exempt because no one creditor will be receiving more than $63.1 million in assets but also because Rule 802.63 would apply, as the Creditors, who are ordinary course creditors, are acquiring the right to those assets pursuant to a restructuring.

*The collective transfer or assignment of the creditors' assets to Newco should be viewed as separate transactions from the different persons (the Creditors) who have the rights to those assets pursuant to the restructuring and not as a acquisition of the assets by J through Newco from D.

Thus, the consideration with respect to the TQ/Newco transaction and the D/Newco inventory purchase is less than $63.1 million [so long as inventory is valued at less than $35 million and there are no significant assumed liabilities]. The consideration with respect to each Creditor's assignment to Newco is less than $63.1 million for each of the transactions between Newco and the Creditors, but these transactions do not count as part of consideration for D/J transactions (TQ and inventory).

Creditors will not have to file to acquire Newco interests since Newco is an LLC, and no creditor will acquire a 50% or more interest in Newco.

Accordingly there are no HSR filings required so long as inventory is valued at less than $35 million and there are virtually no assumed liabilities.

[redacted]

Advised that beneficial ownership of the D assets does not pass to the creditors prior to being acquired by Newco. The creditors will not have dispositive rights because there is a definitive agreement that commits their sale to Newco. Since there is a fixed price for the assets, the creditors bear no risk of loss or benefit of gain in value of the assets. So, what other than legal title is passing to the creditors for an instant?

K. Walsh agrees

BM
5/30/08