

802.63

Dear Mike,

In connection with the application of 802.63 and what used to be known as the "vulture fund exception to 802.63," we have a few questions, which we would like to discuss in the context of a somewhat stylized hypothetical:

1. Suppose that A buys outstanding debt from B's creditors. A knows that B is in bad shape and pays a significant discount on B's debt. While B has not announced bankruptcy, both A and B know that B will not be able to survive much longer. After A's purchase of B's debt, B files for bankruptcy protection. In the process, A's debt in B is converted into equity and A winds up controlling B -- which is exactly what A had in mind when it purchased the debt.

Assuming that the converted equity is valued such that it triggers the HSR thresholds and no other exemptions are available, it seems to us that this conversion would not be notifiable, because A acquired B's debt prior to B announcing that it would file for bankruptcy. This is because "the test applicable to so-called 'Vulture Funds' is based on whether debt is acquired pre-or post announcement of an intention to file for bankruptcy and not on the intent of the creditor at the time debt is acquired."

<http://www.ftc.gov/bc/hsr/informal/opinions/0805004.htm>

- [1] Is our understanding correct? If so:
- [2] The new bright line test seems to focus on the announcement. Pre-announcement purchases of

debt come under 802.63, post-announcement purchases don't. But what qualifies as an "announcement?" Clearly, a public announcement that bankruptcy has been filed does and, we suppose, an announcement that "on Friday, we will file for bankruptcy," would as well, but how about these?

(a) "We may be forced to file bankruptcy in a week unless we get relief."

(b) "We have retained [well-known bankruptcy debtor's counsel] and are exploring our options."

(c) "We are exploring our options, including a restructuring."

It seems that none of the above should constitute an "announcement," as all are contingent on future events and leave room for the debtor to not file for bankruptcy. So, in our hypothetical, if B communicates (a)-(c) and then A buys B's debt, A would still come under 802.63.

[3] In our hypothetical, does it matter for the application of 802.63 to pre-announcement purchases of debt if A is:

(a) a financial institution (bank, hedge fund, private equity fund, etc.)

(b) a manufacturer that in the past has occasionally purchased debt, some distressed, some not

(c) a manufacturer that has never before purchased any debt

(d) a competitor of B?

Thank you for your help,


[1] Yes

[2] I don't think (a), (b) or (c) would qualify as a public announcement of filing bankruptcy.

[3] (a) OK

(b) Unless the manufacturer has a financial arm that lends money and/or buys debt in the ordinary course of its business (e.g. GMAC or GE Finance), the exemption would not be available.

(c) and (d) - Neither of these would qualify because it is not in the ordinary course of business for them.


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