Managing the risk of involuntary bankruptcy

David Conaway writes a cautionary tale for creditors contemplating the filing of an involuntary petition under Section 303 of the US Bankruptcy Code

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Many lawyers have written articles about a February 27, 2015 US Court of Appeals (11th Circuit) ruling (In re Maury Rosenberg) against petitioning creditors of an involuntary Chapter 7 proceeding.

Introduction

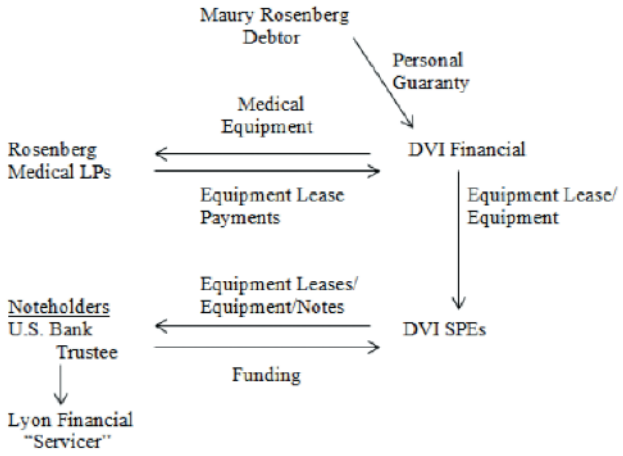
Creditors owed over $5 million filed an involuntary bankruptcy petition against Maury Rosenberg, a Philadelphia businessman who ran a group of radiology screening centers. As reported by Law360 (an online publication), not only did Rosenberg get the petition dismissed, he obtained a judgment of over $1 million against the petitioning creditors for costs and attorneys' fees as well as compensatory and punitive damages of $360,000, based on a complaint he filed against US Bank and others for $50 million over the "bad faith" involuntary filing.

Not surprisingly, the articles written cite the *Rosenberg* case as a cautionary tale for creditors contemplating the filing of an involuntary petition under Section 303 of the US Bankruptcy Code. Yet, a deeper dive into the facts of the case indicates it was a flawed filing from the get-go.

Background

The Rosenberg case was based on asset-backed securitisation transactions in 2000 gone wrong. Maury Rosenberg's affiliated limited partnerships (the **"Rosenberg LPs"**) entered into equipment leases with DVI Financial Services, Inc. (itself a Chapter 11 debtor), for a $27 million financing of the acquisition of medical equipment. DVI Financial bought the equipment, leased it to the Rosenberg LPs, which made lease payments to DVI. As a security, Rosenberg signed a personal guaranty to DVI.

Diagram 1



As part of various asset securitisation transactions, DVI Financial transferred the leases and equipment to various DVI SPE's (special purpose entities), who obtained loans from and issued notes to various lenders, for whom the agent was US Bank. Lyon Financial Services, Inc. became the "loan servicer" for US Bank and the noteholders (*see diagram 1 above*).

In 2003, the Rosenberg LPs defaulted on the equipment leases, Lyon filed suit in state court, and in 2005 the parties restructured the debts. Lyon signed the settlement agreement, not any of the DVI entities. As part of the settlement, Maury Rosenberg issued a superseding $7.7 million guaranty to "the Agent", defined as "Lyon Financial Services, Inc. d/b/a US Bank Portfolio Services as successor servicer for the DVI Entities …."

In 2008, the Rosenberg LPs defaulted on the restructured obligations, and Lyon obtained a judgment against the Rosenberg LPs and on the Guaranty in the amount of $4.7 million.

Later in 2008, Lyon's Director of Operations, *on behalf of the DVI Entities*, signed and filed an involuntary Chapter 7 petition against Maury Rosenberg in Pennsylvania. The petitioning creditors were listed as the DVI entities, whose claims totalled about $5.4 million. The involuntary Chapter 7 petition was transferred to the Southern District of Florida, where Rosenberg was a resident.

Lyon's Director of Operations signed and filed the involuntary petition in name of the DVI entities, without the DVI Entities' knowledge and without obtaining their authorisation for the filing.

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In 2009, the Bankruptcy Court granted Maury Rosenberg's motion to dismiss the involuntary petition because, among other reasons:

- The DVI Entities were not creditors of Rosenberg… the guaranty was in favour of Lyon.
- The DVI Entities were not "real parties in interest", rather they were "pass through" entities to facilitate the asset securitisation transactions.
- A demand for payment was not made on Rosenberg.

Initially, Rosenberg won trial verdicts of $1.1 million for costs and attorneys' fees, and for compensatory and punitive damages in the amount of $6.1 million. The trial judge later reduced the $6.1 million award to $360,000. As for the $1.1 million of costs and attorneys' fees, the 11th Circuit generally upheld the award of attorneys' fees but remanded the case to District Court (still pending) with the implication being the amount of the reward could be reduced.

Takeaways and remaining questions

This case is not about the inherent risk of three creditors filing an involuntary petition.

Rather, it illustrates how asset-based securitisation transactions can obscure who owns the claims against a debtor and thus who has the right and authority to file an involuntary petition.

Consider a "normal" vendor-customer transaction (*diagram 2, below*).

When creditors are suppliers to a customer, there is normally little risk of a dismissal of an involuntary filing on the basis that such creditors do not have authority to file the petition, which was the case in the Rosenberg dismissal. In any Section 303 involuntary petition, creditors must establish that (1) 3 or more creditors have claims against the debtor in the aggregate over $15,325 (in 2015), (2) the claims are not contingent as to liability, (3) the claims are not subject to a bona fide dispute, and (4) the target debtor is not paying its debts generally as they come due.

What will Rosenberg ultimately recover on the attorneys' fee claim? How much has he spent in legal fees since 2003?

How much has US Bank, *et al* recovered on the original $27 million financing?

How much has US Bank spent on legal fees?

Despite the Rosenberg ruling, an involuntary petition remains a viable remedy for creditors in appropriate circumstances. With all legal action, an involuntary petition should be pursued carefully, in compliance with the clear requirements of Section 303, and with a sound strategy for recovery for unsecured creditors. ■

> **THIS CASE ILLUSTRATES HOW ASSET-BASED SECURITISATION TRANSACTIONS CAN OBSCURE WHO OWNS THE CLAIMS AGAINST A DEBTOR**

Diagram 2