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"As Soon As Practicable" Under the LSTA Standard Terms: Goldman Sachs Lending Partners v. High River Limited Partnership

Parties trading distressed debt typically agree "to transfer the purchase amount of the Debt as soon as practicable on or after the Trade Date." Although that phrase is a part of almost every LSTA distressed trade confirmation, the phrase is not defined under the LSTA Standard Terms and Conditions for Distressed Trade Confirmations (the "Standard Terms"), and until now the phrase has never been tested in court in this context. On December 22nd, the New York Supreme Court (the "Court") awarded Goldman Sachs Lending Partners ("Goldman") $25,225,000 in damages and granted summary judgment[1] holding that "as soon as practicable" must be viewed in fact-specific context. Even though, in practice, distressed trades often take weeks or months to close, such trade practices do not alter the requirement that parties act speedily and in good faith under the circumstances. Specifically: (i) if a seller is selling loans short and the buyer communicates a need to settle quickly because of an impending rights-affecting event, such as a restructuring, the seller needs to make a good faith effort to buy the loans and complete the transaction in time to meet the deadline; (ii) if a buyer needs to settle quickly because of such an impending event and communicates that need to the seller, the deadline becomes an implied term of the contract; and (iii) good faith considerations trump trade practice when it comes to determining what "as soon as practicable" means.

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Facts

Goldman Sachs Lending Partners and High River Limited Partnership ("High River") entered into nine trades between July 15 and July 30, 2009 pursuant to which High River agreed to sell and Goldman agreed to purchase approximately $140 million principal amount of Tranche C loans under the prepetition Amended and Restated Revolving Credit, Term Loan and Guaranty Agreement, dated as of May 9, 2008, among Delphi Corporation, certain of its subsidiaries, and lenders, including JPMorgan Chase Bank, N.A., as administrative agent, and Citicorp USA, Inc., as syndication agent (the "Credit Agreement"). High River did not own the loans at the time of these trades; it was selling the loans short expecting the market price to drop below the price at which it sold the loans to Goldman. Rather than dropping in price, the loan price went up due in large part to the Bankruptcy Court's approval of Delphi's plan of reorganization on July 30, 2009, which among other things confirmed the sale of Delphi's assets to a holding company ("DIP Holdco") and provided lenders under the Credit Agreement with the opportunity to exchange a percentage of their plan distributions for new term loans, notes and equity (the "Rights Offering").

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[1] *Goldman Sachs Lending Partners v. High River Limited Partnership*, No. 603118/2009 (Sup. Ct. N.Y. Filed Oct. 9, 2010).

On August 25, 2009, DIP Holdco infomed the market that September 10, 2009 would be the record date for eligibility to participate in the Rights Offering and thus it would be the deadline for transferring loans under the Credit Agreement. Specfically, after September 10th, parties would only be able to purchase the equity rights, notes and cash offered under the Rights Offering (the "Rights"). While parties were closing trades prior to the deadline,[2] High River indicated it would be unable to settle the trades. Because of: (i) High River's admitted inability to close and (ii) Goldman's obligations to its downstream buyers, Goldman purchased the Rights in the market to cover its trades with High River.

Goldman filed suit on October 9, 2009, arguing that High River, among other things, should have been able to close all of the trades by September 10, 2009—at that point the trades had been outstanding for only 29 to 40 business days. Goldman alleged that by failing to settle all of the trades by September 10th, High River breached the "as soon as practicable" requirement under the Standard Terms and was therefore liable for the difference between the purchase price in the trade confirmations and the price Goldman paid when it covered—roughly $25 million in damages.

"As Soon as Practicable" Under the LSTA Guidelines

Pursuant to the Standard Terms, distressed trade parties agree "to transfer the purchase amount of the Debt as soon as practicable on or after the Trade Date." The Standard Terms do not define "as soon as practicable." Although the LSTA uses T+20 (i.e., 20 business days from the trade date) as a target date for settlement, most distressed trades take longer to settle. According to the LSTA's Secondary Trading & Settlement Study, the average settlement time for distressed trades was T+67 in 1Q11. The median settlement time was T+37. Moreover, the LSTA's new distressed Buy-In-Sell-Out Provisions generally require that a party wait at least 50 business days prior to sending a counterparty a "BISO notice," a letter intended to compel the delaying counterparty to settle.

"As Soon as Practicable" Under New York Law

As discussed above, the Court found that "as soon as practicable" does not have any special meaning in the distressed debt industry, and therefore, under New York law, the words should be given their plain meaning. The Court looked to the dictionary and a century old Second Department case to find that when used in a contract, "as soon as practicable" is practically synonymous with speedily. See *Wallbridge v. Brooklyn Trust Co.*, 143 App Div 502, 508 (2d ed 1911). Recognizing that definitions need flexibility, the Court next turned to an evaluation of the circumstances and found that because the loans could no longer be traded by assignment beyond the Record Date, High River's failure to take any action towards buying the loans, coupled with the fact that there was evidence that Goldman as well as other market participants closed assignments within this time frame, High River did not comply with the "as soon as practicable" requirement.

The Court also dismissed High River's contention that because Section 2 of the Standard Terms and Conditions provides "unless otherwise specified in the Confirmation, Buyer is assuming the obligation to purchase the Debt as may be reorganized, restructured, converted or otherwise modified," Goldman was required to accept the Rights and was not entitled to the loans. Section 2, the Court reasoned, would apply only where the parties could not possibly settle by assignment, and here the evidence demonstrated that if High River had purchased the loans when it entered into the trade—or even upon learning of the record date—there would have been no problem settling prior to record date and Section 2 would not have been triggered.

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[2] *Goldman pointed out that it closed a number of other trades of the same credit during this period in a matter of days or weeks.*

In addition to ruling on the definition of "as soon as practicable," the Court found that Goldman did not breach its contract with High River when it entered into the cover transactions[3] because High River breached the contract first by failing to deliver the loans. The Court stated that "where one party materially breaches a contract, the non-breaching party is discharged from performing any further obligations thereunder." *See Duke Media Sales, Inc. v. Jakel Corp.,* 215 A.D.2d 237 (1st Dept. 1995).

Analysis

It is important to note that the Court was not necessarily bothered by High River's short selling but rather was concerned about High River's failure to buy in once Goldman informed High River of Goldman's need to settle ahead of the record date for the Rights Offering. The Court was most troubled by High River's failure to take any action in the face of Goldman's repeated requests to settle, the impending Record Date and the plain terms of the confirmations. This opinion coupled with the new Distressed BISO provisions provides distressed debt buyers with ammunition against sellers who drag their feet.

[3] *Under the Standard Terms, it is generally considered a breach for the buyer to enter into a cover transaction instead of settling the trade with the seller.*