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Debtor-In-Possession Financing (Pre-Petition & Lock-Up Agreements)

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Debtor-In-Possession Financing (Pre-Petition & Lock-Up Agreements)*

Professor Douglas Baird & Mr. Martin Bienenstock

MR. BAIRD: A general theme that we've seen is that bankruptcy law is changing rapidly. Even though the text of the Bankruptcy Code has not substantially changed for 20 years, we're nevertheless in a universe in which the day-to-day practice has changed.

And as we saw this morning, we don't even know the status of critical vendor orders. We don't know the status at least in front of one district judge in the Northern District. But the evolving practice of critical vendor orders is quite different from what we understood it to be twenty years ago.

When we look at any of these issues in Chapter 11, that's going to be our experience. But this is especially true with respect to debtor-in-possession financing.

And what I'd like to do is just to start off with a typical transaction. I'm thinking in particular of the *Warnaco* Chapter 11 of several years ago. But *Warnaco* is not substantially different in this respect from a large number of other large Chapter 11 cases.

It is the 1990s. Warnaco is doing fantastically well. There was a leverage buyout in the late '80s. It has very good, very aggressive management. It sells different kinds of clothing, acquires very valuable licenses to sell things like Calvin Klein jeans, and it has a hard-charging, hard-driving C.E.O., and a board that has lots of famous people on it, but they're standing several steps back. But things are going great.

They continue to make aggressive acquisitions. It's now the late 1990s. Warnaco continues its aggressive ways. They buy back some stock. They reacquire, for example, Speedo swimwear. All the sudden they wake up, and they can't refinance the bridge loans. Their debt has grown from 500 million to 1.5 billion in a year. They can't make the payments on these bridge loans. People are not quite as

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enamored of this hard-charging C.E.O. as they were. At this point the firm has twenty different banks providing unsecured financing.

And they say, "Discretion's a better part of value. Let's consolidate these loans." And what emerges is a secured, revolving credit facility where a few banks team together and provide the bulk of the financing. They are providing the cash flow. They're now controlling the cash at the firm. Everything is again, they hope, on track. But by virtue of the fact this secured credit facility is in place, the dynamics have changed. A different person is calling the shots.

Flash forward another six months, and the firm still isn't making it. They need additional cash, and at this point they file for Chapter 11.

What do we know about what happens at this point? Well, because the firm requires additional cash in order to operate, and because bankruptcy judges are not going to allow debtor-in-possession financing that primes the revolver, Warnaco is essentially in a situation where they have to get their debtor-in-possession financing from the revolving credit facility, from the lenders who secured up their loans six months before. You'll very rarely see one of these cases filed 88 or 89 days after the revolving credit facility is put in place. Very rarely do we actually see 90 days or 91 days. 92 days, though, is more possible. This gets them outside the preference period, and also since lawyers are people who aren't that good in math, it gives you a little bit of cushion.

In the case of Warnaco, there wasn't gaming of the preference issue. But the reality is that when Warnaco needed additional cash, it could only get the cash from the revolving credit facility. Warnaco filed for bankruptcy only when that was what the people running the revolver wanted.

Why did they want bankruptcy and debtor-in-possession financing? What was debtor-in-possession financing doing for them?

A couple of obvious things. The first thing is for banks that make debtor-in-possession loans, the fees are very attractive. You can get a 7 percent fee in cash right off the bat, and that's before interest or anything else. That's obvious and that's a good business for them. And this is America and business is great. That's fine. They also get priority. They ensure that they're going to retain a first claim against all the assets of the estate, and that's great as well.

But what else is happening? I would suggest there are two other things going on. If you look at the structure of these DIP financings, these two things matter.

First, by morphing from the secured lender to the DIP lender, they insulate themselves from some of the possible vagaries of bankruptcy.

Among other things, as we said this morning, these loans will typically have a roll-up. I've got a security in an account. As that account constantly changes, I am going to be making a new loan as the old loan is paid off and taking new security. Once that loan has turned over completely, what I will have is a post-petition loan that's entitled to administrative priority. Because it's entitled to administrative priority, I'm entitled to be paid in cash upon confirmation of the plan. I can't be crammed down anymore.

You can look at this transaction and say what's happened is not that I've gotten different priority. I was entitled to be paid first anyway. What I've gotten now is a situation where I am "cram down remote," not bankruptcy remote. I've basically restructured the process to give myself an extra edge in negotiations.

Now, the first thing you're going to say is, and you've already said, it's not that big an edge. Post-petition financing can be done only by this person anyway. This person is in the driver's seat already. You're never going to cram someone like this down, so roll-ups are not that big a deal. But you have to understand that the things pre-petition lenders can bargain for in the DIP financing allow them to be insulated from things that usually happen in bankruptcy.

For example, in *Warnaco* one of the things the DIP financer did was acquire the debtor's power of attorney and also acquire a waiver of the automatic stay that entitled it to take whatever steps were necessary in order to protect its collateral. Now, some of the stuff may be very simple like just making an Article 9 filing, but other stuff could be repossessing the collateral. If you have the debtor's power of attorney, you're not, strictly speaking, even acting as a creditor anymore.

Let's focus on one more important feature of DIP lending: the control it gives. In many cases like *Warnaco* the DIP lender, the former secured financer, is for all practical purposes the only creditor in the case or at least the only creditor in the case who's in the money. So we're not really even talking about priorities since this person is going to get everything anyway.

What we really see a lot of is control. If you go through the provisions of these DIP financial arrangements, what you will see is a huge amount of control that is now in the power of the secured financer. This is a world where the secured creditor is now not simply someone who has priority but otherwise participates in the bankruptcy process, but someone who is insulated from many features of the bankruptcy process and who controls much of the process.

For example, debtor may have to hire a chief restructuring officer as a condition of the DIP loan. The debtor, of course, can pick any chief restructuring officer in the world it wants, as long as it's taken from a list of three provided by the DIP financer. That was a condition in *WorldCom*.

I've seen covenants where it was a default under the DIP to file a motion in the case without the DIP lender's permission. It was default to file a plan without the DIP lender's permission that did something other than pay the DIP lender in cash at the time the plan was filed.

DIP loans commonly contain financial covenants that are very powerful. The financial covenants are the engine now that's driving the *United* bankruptcy. United was allowed to get a cumulative operational loss in the first part of its bankruptcy, but the cumulative losses have to start to fall. The cumulative loss is measured by something called EBITDAR, which is Earnings Before Interest, Taxes, Depreciation, Amortization and Restructuring Costs. *United* as of next October is supposed to have been a break-even operation between the filing of the bankruptcy petition and October 1st. If you do the math, that shows that right about now, *United* is supposed to be a cash flow positive operation.

Now, they have a certain amount of overhead, and that overhead hasn't been completely gone through, and *United* has shaved rather significantly its operating expenses. It has restructured its collective bargaining agreements, at least temporarily. It has tentative agreements with everyone except the machinists. It has reduced its overall operating expenses. But it is still in a universe where it's going to start tripping up these covenants come June, and the question to ask is what actually is going to happen then?

Now, simply because it's a breach of the covenant, and simply because it means that the DIP lender has the power to declare a default, it doesn't mean they're going to do it. Indeed, in most of these cases, remember, essentially the DIP lender is the prior secured creditor. Remember, if you lend a little bit of money to someone, you're a creditor. If you lend a lot of money to someone, you're a partner.

In many of these cases, the senior bank that did the secured loan before bankruptcy is doing the revolver in bankruptcy and is invested in the business plan. It doesn't want the business to fail. The last thing it wants to do is see the business liquidated. It has already committed itself to the viability of the enterprise. It already believes in the basic business plan.

If a covenant is violated, the DIP lender may have the power to shut the firm down, but that's not really what they are interested in doing. What they are much more likely interested in doing is having a full and frank conversation with the directors about what strategic changes may be necessary, always with an eye, of course, to ensuring they don't expose themselves to a lender liability action.

Now, interestingly enough, in *United* we don't have that dynamic because the DIP lenders are not in fact prepetition secured lenders or at least not the dominant prepetition secured lenders. And they're doing DIP financing, but they are not investing in the business plan. Indeed, they actually have a claim over unsecured assets that at least before the war with Iraq had a certain liquidation value.

The old way we used to look at debtor-in-possession financing focused on fees and priority. We really have to see that control may be a large part of the game here.

One of the things I'd like to do now is just stop there and talk about lock-ups a bit. But first, I want to ask you what's your own sense of DIP financing and how it works and how the world is changing.

MR. BIENENSTOCK: I think this morning I explained the dynamics of rolling over to avoid the write-down of the lender, to avoid the default interest. There are a number of hot button issues that are really hot buttons more for the United States Trustee's office and the courts than for the parties, but they have to be dealt with.

For instance, there's a section in the Bankruptcy Code § 506(c) that says if the debtor uses unencumbered assets to preserve or improve the creditor's collateral, the debtor is allowed to be compensated by taxing the collateral.

Lenders frequently require that you waive § 506(c) rights as a quid pro quo of getting the debtor-in-possession loan. Usually courts will not let you do that at the interim financing hearing, but will let you do it at the final hearing. Recently as many of you probably know, the Supreme Court decided a case about §506(c) saying that only the trustee can assert a § 506(c) claim. Unpaid vendors who held the secured creditor's collateral cannot.

Another provision that's a hot button are avoidance actions. Lenders typically want a lien against all assets of the estate. It makes it very simple when you say "all." You don't need schedules. You're not going to leave anything out. "All" means "all" means "all" even though that's not good under the Revised Article 9. But one of the standard provisions in debtor-in-possession financing orders is you don't have to perfect under revised Article 9. The order usually has a provision that says you're perfected by virtue of the order, at least for as long as the case goes.

So lenders like to have liens against everything, and that would include avoidance actions that the estate has, preference actions, fraudulent transfer actions and the like.

The Third Circuit rendered its first *Cybergenics* decision several years ago, and basically said the action itself is not property of the estate. And if you go to Section 541, which defines property of the estate, you will find, sure enough, avoidance actions are not included. But proceeds of avoidance actions are property of the estate.

So, at the end of the day most U.S. Trustees and courts, if pressed, will agree that the lender can have liens against proceeds of avoidance actions, although they don't really want it and frequently will act towards the lender to back down before they'll grant it.

MR. FISCHER: Isn't it typically more for the old money, as opposed to the new money, where they get very violent about giving the avoidance actions as collateral?

MR. BAIRD: I think generically the courts aren't going to waive avoidance actions that can be brought against the DIP lender.

MR. FISCHER: My experience has been that the United States Trustee takes a much different view of the new money, as opposed to the old money, and to the extent that you try to shore up the old money with avoidance actions, proceeds in recoveries but not against the lender, the Trustee tries very hard not to permit it. But if it's new money, it's new money.

MR. BIENENSTOCK: I haven't seen that distinction, but I can readily see where several U.S. Trustees would make that point.

Another hot button is how much of the new loan and the fees should be approved at the interim hearing? The way the lender always wants to work it is that before it advances dollar one, it gets all the fees, which means at the final hearing if someone doesn't like the deal, they're really hard pressed to provide a new one because you've already paid the fees for the entire new loan even though only a portion of the new loan has been advanced. So where you can, you try to make it so that the fees don't all get paid at the interim hearing.

And there also needs to be a showing at the first day hearing why you need to do the interim financing hearing that day. Frequently you have to because you have to assure the public, the people that you do business with, that you have financing, otherwise you can't do business the next day. But that's not in every case, so you need to make that showing.

I think the last point I would make is simply this: that these situations, these debtor-in-possession financings are all unique. Every case is unique. We should never talk about any of them as cookie cutters, and I try not to because they're not. And the reason I raise that is a lot of U.S. Trustees, courts, and some practitioners, they have rules of thumb, and some of them rise to the level of religious mantras. We don't do this. We don't do that. I've always found that's a recipe for disaster, because if they actually absolutely need new financing that day or it fails, there shouldn't be any arbitrary prohibitions of "we don't do that here."

And I've been in situations where after a hearing the court has said we don't do that here, and I've had to go back for reconsideration, luckily successfully so far, where I explained to the court we're at a standstill. The business is stopping. Do you want us to liquidate? And then the necessary gets done so that the business goes on.

It's very hard to have rigid rules in advance. You have to make a full disclosure. You have to come prepared with your case, but the rigidity is really an enemy of reorganization.

MR. BAIRD: And I think you can see that a lot of these clauses aren't so much new as much as perhaps the aggressive ways in which some people repackage them. We have definitely seen an increase in sophistication by judges.

For example, Judge Walsh several years ago wrote a letter to the bar setting out the kind of stuff he wanted to see with financing orders and other kinds of first day matters. The Southern District of New York has released guidelines for DIP financing. The way to characterize what they've done is they've avoided exactly the concern that you've mentioned, which is they haven't said you can't do this, you can't do that. Instead what they've done is say, "There are a variety of transactions, a variety of things, including roll-ups, that you have to flag, and you have to be honest in disclosing them and then also explaining why they're necessary."

They'll also flag anything that doesn't have to be done right away. If it doesn't need to be made part of the interim order, the creditors' committee gets a chance to look at it and approve it or make their objections.

Even if the debtor has waived bringing any avoidance actions against the DIP lender, a creditors' committee or somebody else has to have a chance to look at it. Courts and the creditors alike are much more sophisticated about what's appropriate and what's not appropriate with respect to old money.

MR. FISCHER: Isn't it really that the courts have figured out that the debtor is totally powerless when it's dealing with a lender at that level of extremis? Often with an interim order, there isn't necessarily a committee and committee council. Basically, it's the court saying to the lending community don't try to put in the kitchen sink, because the debtor is going to have to say you can have it.

MR. BAIRD: Judge Walsh's letter is fairly clear about saying "Look, don't expect me to say this, that, or the other thing."

When you have experienced judges on that end, investment bankers respect it. In other words, if they know that Judge Walsh is not going to sign a particular order ahead of time, they don't ask him to do it.

MR. BIENENSTOCK: Well, Judge Walsh also has another habit, which you have to respect. He says don't ask me to write in the debtor-in-possession financing order that I approved the documents if you haven't given me long enough to read the 200 pages of documents that you gave me as the hearing started. He'll say, "I'll do that at the final hearing."

MR. BAIRD: Right. And, again, this is the kind of distinction that's become—

MR. FISCHER: And the only thing I was trying to suggest is it's really about somebody trying to — on that day the debtors got what the lender has given him.

MR. BAIRD: Right. And, again, in cases if the debtor waits too long to file, one of the things the debtor discovers is they don't have access to the financing. This, for example, is the problem American Airlines is facing. United actually had unencumbered collateral. But even so, United got completely creamed in its debtor-in-possession financing just in terms of the amount of control it had to turn over to the banks.

MR. FISCHER: Marc doesn't agree.

MR. KIESELSTEIN: That's okay.

MR. BAIRD: But it's an interesting development. What you have is a world where you don't have the debtor in full control anymore. You really have a bankruptcy where the shots are being called by the DIP lender who is frequently the prepetition secured creditor. It gives the bankruptcy a dramatically different feel.

Remember this morning people talked about—alluded to the *Cybergenics* case and how it was problematic. It was problematic precisely for the reason that it limits the ability of, let's say, the creditors' committee to bring avoidance actions.

Do you have any generic comments about debtor-in-possession financing?

MR. KIESELSTEIN: Well, just on the *United* points because I have a feeling I know where you were headed. I would say one thing a debtor might need to accomplish within its Chapter 11 case is that capital market benchmarks can actually be quite useful in validating what the debtor says it needs in court.

So, for instance, if you say, well, I need X amount of labor savings. Well, why? Because I say so. That's one answer. Why? Because if I don't, here's where the lines of my covenants cross with what the forecast looks like, and at that point I will be living at the sufferance of the DIP lenders.

So it's not just me talking. This is capital market discipline being imposed on the process. Is that ceding control? Well, maybe it is, but is it an effective tool for trying to get what you need inside the case? I think it might be.

MR. BAIRD: Yes, it's empowering. Burning your bridges is an empowering strategy even though there are obviously downsides associated with that.

If you look at bankruptcy law generally, courts are becoming much more willing to look to market benchmarks. We see that in *203 North LaSalle*. We see that in a large number of other issues where people say, "We've got a market out there. Why can't we use the market to value this or to understand this." And that's becoming more of a mantra in bankruptcy than I ever thought it would be.

Lock-ups. Lock-ups have the following characteristics: Let's say that we're outside of bankruptcy. The firm isn't really doing so terrifically. But what I'd really like to be able to do is to sell the firm, and it's really sort of necessary.

If someone comes to me and says, "Douglas, I'm willing to buy your firm," and let's say I own 51 percent of the stock. A bunch of other people own the rest, and I'm on the board, and my friends are on the board and so forth. And the person says, "Look, we'll negotiate with you." They negotiate with us. They look at the firm. They spend a lot of money looking at the firm and figures, and they make an offer.

And they say, "Look, what we don't want to have happen outside of bankruptcy or inside of bankruptcy is to live in a world where we wake up after having spent $10 million looking at the firm and you agree to sell it to someone for $5 million more than we're paying. You would be using us as a stalking horse. What we want you to do is promise now that when the matter comes to the shareholders, you will bind yourself to vote in favor of the sale. "

"We're only willing to make this offer to you now if we can lock up the deal. We don't want to be a stalking horse. We're not in this game to spend a lot of money only for someone else to come in and outbid us."

And the question is can you do that outside of bankruptcy? Can you do that inside of bankruptcy?

MR. BIENENSTOCK: Professor, I'm always amused when the question becomes can you basically have a private sale, because the only times you can have a private sale are when you run an auction before you do the private sale so that you can prove, whether it's to the Delaware Chancery Court or to the bankruptcy judge, you've already had the auction.

And even if you go right to court with someone who you think has made a great offer and say, "I want to approve this as a private sale," and let's say you've had an auction, nothing prevents anyone from running into court on the day of that hearing to say I have a better bid.

So when any client comes to me and says can I do this by a private sale, I always tell them don't kid yourself. We may rig up what will technically be a private sale, but there is going to be umpteen opportunities for people to bid against you before it gets done.

MR. FISCHER: One technique people use is to have the sale negotiated then filed, and then try to have the sale done under § 365. And the real danger with that is you lose all the protection under § 363(f).

MR. BIENENSTOCK: Well, there's some authority that applies to § 365 assignments. Another more dynamic way of doing it is to let the buyer be hired as the operator of the company so it's already inside when everyone else is trying to bid. That's a big advantage.

MR. BAIRD: Well, in the case of American Airlines, it becomes the DIP lender, and the DIP's going to terminate in 90 days if the sale isn't consummated. And, of course, as the DIP lender, not only do you get control, but you also get information that—

MR. KIESELSTEIN: TWA.

MR. BAIRD: And American wants—

MR. KIESELSTEIN: TWA-3.

MR. BAIRD: And American wants to buy TWA-3. It's the DIP lender for TWA's third Chapter 11. And the court considered other bids, but other people weren't bidding as much as American was. Not only did American have control, but it also had information other people didn't have access to.

If you've already filed for bankruptcy, to what extent can you go around and ask people to commit now to voting for your plan? The answer there is pretty clear. If you're not actually submitting a plan, and you're not soliciting votes in favor of the plan that you can present to the court, you run into—

MR. FISCHER: With a disclosure statement.

MR. BAIRD: With a disclosure statement, you're going to be in trouble.

What if you sort of negotiate everything right outside of bankruptcy a couple of days before the bankruptcy, and everybody is signed on, but one person doesn't sign on until after the formal petition is filed because it was Memorial Day weekend, and they didn't get around to it.

Judge Walrath had such a case and her reaction was to say, "I'm sorry. If you signed it before the petition, that would be fine, but after the petition, you can't do it." She disqualified those votes. The plan was confirmed anyway, but it's very hard to do these lock-up agreements as a formal matter inside of bankruptcy.

MR. BIENENSTOCK: Well, we charted part of the course in *Texaco Pennzoil*, and the courts accepted the notion that before a disclosure statement is approved, someone can agree not to support any other plan, to object to any other plan, not to object to your plan, to support your plan. They just can't check off the ballot that they accept your plan, and that's pretty effective.

And when you think about it, you don't want the law to be anything else because you're supposed to go around to creditors and find out who will accept what because you want to file a plan that has some likelihood of success.

MR. FISCHER: You can't negotiate your plan with your creditors if you can't say, if I do this, will you vote for it. You can't get to the plan of disclosure statement stage unless you can do exactly that.

MR. BAIRD: Yes. But we need to understand the line you can't cross. At what point will the judge come in and disqualify your votes?

Another thing you need to worry about is prebankruptcy lock-ups are now much more difficult after Friday's decision in Delaware in the *Genesis Health* case. The court said a director just can't approve a merger if that merger has been structured in such a way so that votes have been locked up. That just violates your fiduciary duties as a director.

MR. KIESELSTEIN: You don't see that affecting the typical prepack pattern, do you? I mean, you're going to your creditors and you're saying, here's our arrangement. We're going to convert your debt to equity. Management will get this much coming out if it gets done within X number of days.

MR. FISCHER: Wasn't there some sort of play with the lack of bail out for fiduciary duties?

MR. BAIRD: Lock-ups are not permitted, at least if there's not a fiduciary out. It's a clause that allows you to get consistent with your fiduciary duties, not withstanding any thing in the lock-up agreement.

MR. FISCHER: So the answer to his question would be as long as there was a fiduciary out.

MR. BAIRD: We should also remember that this new opinion doesn't just affect cases filed in Delaware. A lot of the issues we've been talking about are forum shopping issues because this is what Judge Walrath says or Judge Walsh says. This is the decision of the Delaware Supreme Court interpreting Delaware corporate law. So any corporation chartered in Delaware will face this problem even if it's filing a petition in the Northern District of Illinois or anyplace else.

MR. BIENENSTOCK: The dissent by the chief judge in the *NCS* decisions starts by saying, as a good dissent should, that the facts here are so unique, it's hard to imagine how this decision could apply to any other case.

MR. BAIRD: Right. On the other hand, I've read press reports about how this is the most important decision in corporate law in the last 20 years. That's probably an exaggeration.

But getting back to your question, the court did not actually address the question that would arise if there were a fiduciary-out clause, if a director said, "We're happy to agree to this. But you have to understand, we have a fiduciary duty as directors. We have a fiduciary duty to consider other bids. So you have to understand that we have a fiduciary out. To the extent that anything in any agreement we have with you requires us to violate our fiduciary duties, then it's inapplicable."

MR. BIENENSTOCK: I think it's more important outside of bankruptcy than in because in bankruptcy you have to accept the fact that every Chapter 11 debtor is in play. And whether the board of directors has locked it up or not, nothing prevents a creditor, or, frankly, even without a creditor, someone just walking into the bankruptcy court—this is America—and saying I have a better idea. And if it really is, the creditor is going to listen, and there will be objections to confirmation with a prepackaged plan. So in bankruptcy, people are going to bid if they want to bid.

MR. KIESELSTEIN: That's what happened with *U.S. Air.* The (inaudible) system of Alabama shows up out of the blue, and it's a new deal.

MR. BAIRD: Everybody understands that when American says we're going to buy TWA or in *Conseco* where you have another sale, the bankruptcy judge will not just sign off on the deal. Other people are going to have a chance to bid.

The question here really is what about the directors of the corporation and what are their obligations going to be? The effect of this Delaware opinion seems to say they can no longer enter into transactions where they stay on the sidelines, and see what happens with the bankruptcy judge.

The case stands at least for the proposition that the directors outside of bankruptcy can't waive their fiduciary duties to make sure that a particular sale goes through.

MR. KIESELSTEIN: That raises an interesting issue from the creditor perspective. Those who sign lock-ups in the prepackaged context will often say I need a fiduciary out because if there's a committee formed—and why there would be a committee on a prepack I don't really know—but if there is a committee that's going to be formed, you want me on that committee. You don't want the three guys that dissented from the deal, the holdouts, to be populating your committee. I can't be on the committee unless I have a fiduciary out. But don't worry, I'm solid with the deal. I'm not going to go south on you.

And it raises the whole issue of enforceability of lock-up agreements. I don't think there is a lot of case law on a creditor that did a prepetition lock-up and then said, you know what, I changed my mind. I think there's peer pressure that if you walk away from the deal, and you're one of the players, you'll be thrown out of the club. So it kind of sticks together by sort of adhesive force without having to get opinions on it.

I don't know, Marty, if you've run into situations of people walking away from their lock-ups.

MR. BIENENSTOCK: I haven't seen it.

MR. BAIRD: How are you going to do things differently now that this Delaware case is out? Presumably these directors are going to be violating their fiduciary duties if they agree to lock up and don't have fiduciary outs.

MR. BIENENSTOCK: I think my first reaction if I'm heading into Chapter 11 is that the whole Chapter 11 process is going to be fair, so I'm not worried about the lock-up. Whatever kind of outs or anything else there ought to be will have to be before the plan's approved.

MR. FISCHER: Even if you had an absolute lock-up, Marty's right. The whole process puts the company in play—

MR. KIESELSTEIN: Is a fiduciary out.

MR. FISCHER: — and it just won't happen that way. And maybe that acquirer has a claim against somebody. But even then, I'm not sure.

MR. BIENENSTOCK: I think going to the logical next step, if given what we've all said, the way things get locked up is that prebankruptcy a key business unit is sold to the acquirer. Done, it's a done deal, which makes the rest of the business worthless unless it goes to the same acquirer.

What the Delaware court is saying, we're undoing that sale because that was effectively a lock-up that no court could get around. And I think the answer based on that decision is, yes, that sale would be undone.

MR. BAIRD: And the other thing you have to remember that if you're a director and if you don't cut square corners as far as lock-up agreements are concerned, you're now exposing yourself to potential liability from creditors. Under *Credit Lyonnais,* in the zone of insolvency, your fiduciary duties are owed to creditors.

But, what we're doing is we're speculating about a case that was handed down on Friday.

I think the most important lesson to take away is that if you're at a cocktail party and some bankruptcy lawyer says "Lock-ups aren't any good anymore." You want to be able to come back and say, "It's a little more complicated than that." But again, like any new opinion, it hasn't been completely and fully absorbed.