

Chapman Client Alert

December 29, 2016

Current Issues Relevant to Our Clients

Distressed Investing: New York's Highest Court Holds — a Trade is a Trade

The New York Court of Appeals issued a decision holding that when two parties agree to the material terms of a sale of a syndicated loan, the parties have entered into a binding agreement, even though the sale remains subject to the execution of a written sales agreement. In *Stonehill Capital Management, LLC v. Bank of the West*,¹ the Court ruled that so long as the material terms of a sale are established (e.g. through a trade confirmation or email listing the price, identity of what is being sold, timing of closing and manner of payment), parties have entered into an enforceable sale.

The dispute in the case arose from an auction sale of various non-performing loans by Bank of the West ("Seller"). The Seller accepted a bid by Stonehill Capital Management LLC ("Buyer") for one of the loans, and the parties subsequently exchanged drafts of sale documents. But upon learning that the Buyer was refinancing the loan to be sold, which would apparently increase the value of the loan, the Seller informed the Buyer that it would not proceed with the sale and terminated the trade.

An email from the Seller accepting the Buyer's bid for the loan had stated that the bid was "[s]ubject to mutual execution of an acceptable" loan sale agreement and the submission of a 10% deposit. Based on this provision, the Seller argued that the sale was conditioned on the execution of a written agreement and the payment of a 10% deposit by the Buyer, neither of which was satisfied prior to the Seller's withdrawal from the transaction.

The Court began its analysis by noting that with respect to auctions, the general rule is that a seller's acceptance of an auction bid forms a binding contract, unless the bid is contingent on future conduct. The Court then reviewed the actions and communications between the Seller and Buyer and concluded that there was an "objective manifestation" of intent to move forward with the sale, as evidenced by, among other things, the Seller's acceptance of the Buyer's bid in correspondence that stated the terms of the purchase and the date and instructions for the closing, the exchange of emails between counsel regarding the documents necessary for the consummation of the sale, and the absence of an objection by the Seller to the form of the proposed sale agreement prior to its notice canceling the transaction.

Based on these factors, the Court found that the "subject to" language did not clearly express an intent by the Seller not to be bound to the sale of the loan. Importantly, the Court noted that there is a difference between "conditions precedent to performance" of an agreement and those conditions "prefatory to the formation of a binding agreement." In *Stonehill*, a signed document and a 10% deposit constituted post-agreement requirements necessary for the consummation of the transfer (i.e. they were future events necessary to close the sale); based on the totality of the parties' conduct, the Court concluded that these prerequisites were not the legal equivalent of an intent to delay the formation of a binding contract itself.

The *Stonehill* decision affirms the principle in the secondary loan market that "a trade is a trade" and an enforceable contract is created when the parties agree to the material terms of a sale. If parties to a potential sale wish to condition their assent to the transaction on the execution of definitive documents at a later time, they must clearly

¹ 2016 WL 7348990, 2016 N.Y. LEXIS 3808 (N.Y. Ct. of Appeals Dec. 20, 2016)

express such intent to delay the formation of a binding contract by including unequivocal language that they intend not to be bound until definitive documentation is signed and delivered by both parties.

A copy of the Court's decision is available [here](#).

For More Information

If you would like further information concerning the matters discussed in this article, please contact any of the following attorneys or the Chapman attorney with whom you regularly work:

Joon P. Hong

New York
212.655.2537
joonhong@chapman.com

Larry G. Halperin

New York
212.655.2517
halperin@chapman.com

Michael Friedman

New York
212.655.2508
friedman@chapman.com

Chapman and Cutler LLP

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