



THE REMNANT SALE – MAXIMIZING CASH FOR CREDITORS

By David Linn, Oak Point Partners

The “Remnant Sale” is fast-becoming a popular method to maximize asset recovery for creditors in commercial cases. Specifically, more and more Bankruptcy Trustees are generating an additional recovery for creditors by selling off the remaining “cats and dogs” in a bankruptcy estate for cash, even in situations without any remaining known assets. *Beyond just generating excess cash, the parties involved are also finding that a catch-all Remnant Sale accommodates the expanding notion that bankruptcy cases need to get to Final Decree instead of continuing to linger.*

This article explores the growing trend further, taking into consideration sever-

al key constituencies – the trustee/estate, the creditors, the Office of the U.S. Trustee (OUST) and the Bankruptcy Court.

Moldy Cases Just Hanging Around

The large number of commercial bankruptcy filings in the 1999-2003 period created opportunities for a wide array of providers within the industry, including law firms, restructuring firms, wind-down specialists, claims agents, and others. Yet, with the reduction in sizable corporate filings in 2004 and beyond, there was little incentive to get old cases wrapped up and to Final Decree. As such, a large number of "moldy" cases remain open today.

However, with the recent increase in corporate filings and the expected rise over the next 18-24 months, it has now become a hot topic to get old cases wrapped up. For a number of reasons, Trustees are aiming to close up the old cases to make room for the new ones. "Remnant Sales helped me get closure on some of my older cases and allowed me to focus more attention on newer cases," indicates Yann Geron, Chapter 7 Trustee (NY-Southern District) and Partner, Fox Rothschild LLP.

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This makes good sense for all involved, since the majority of recoveries for creditors typically have already been generated in these cases. Similarly, the majority of fees for most professionals are generated early in cases and engagements. As the matters linger, the billings usually drop significantly, making it more effective to wrap up and move on as soon as possible.

Just as importantly, in many regions, the Courts and the Office of the U.S. Trustee are pushing involved parties to get cases to Final Decree. Panel trustees

can be required to provide justification for cases that go beyond a three-year target timeframe. And as new filings increase, this push to clear out the old cases should continue to escalate.

Certainly, there are reasons for cases to stay open for long periods of time. Occasionally, a single piece of litigation may be pending that can have a dramatic impact on the payout to creditors. However, it appears that this tends to be the exception, not the norm. Many cases that stay open for long stretches do so from lack of attention. These older cases have increasingly sparse dockets, with recent entries that are few and far between. Often "case-fatigue" has set in, and there is very little impetus to wrap it up. Professionals are busy with other unrelated matters; or, even worse, they are *not* busy with other matters, causing a somewhat misguided desire to hold on to older cases.

Like it or not, however, the additional returns generated to creditors at these late junctures are typically nominal at best, and are even often outweighed by the costs associated with keeping the case open, continuing to pay quarterly OUST fees, claims agent fees, and other professional fees. Practically speaking, it

makes sense for professionals to do some housekeeping now and get old cases off their desks. Doing so will position them well to pursue new opportunities, without being bogged down in old work.

Selling Remnant Assets

By the time a case is nearing a Final Decree (and/or has been open for many years), the assets believed to have meaningful value have all been monetized. The company has reorganized or been sold via Section 363, and the residual trust/estate has pursued all key causes of

action. Or, in a liquidation scenario, any valuable real estate, equipment, and other hard assets have been sold off to the highest bidder. Despite this, experience shows that there is almost always something left for a catch-all Remnant Sale that can provide additional funds for the estate.

Often, a highly effective method for selling Remnant Assets begins with identifying one or more remaining intangible assets of limited value. This may include old default judgments, collections accounts, class action claims, unpaid trade claims in other bankruptcies, restitution payments, and rights to utility deposit refunds. "Near the end of each case, I look for any odds and ends to put into a Remnant Sale," says Gregg Szilagyi, Panel Trustee in the Northern District of Illinois and President of Tailwind Services LLC. "It provides an efficient way to monetize any remaining assets, increase overall recovery, and get cases wrapped up."

Even if no specific assets can be identified, a Remnant Sale can still be completed. The buyer in a Remnant Sale is typically buying the rights to all "known and unknown" assets. If there aren't any known assets, certain buyers will still pay a small amount of cash to buy the rights to unknown assets. These types of purchases are made by a buyer on the premise that there might be some small dollar items that appear down the road. Often such deals are highly risky for the buyer, and require an experienced buyer comfortable with this risk of loss of capital.

Sometimes, a restructuring professional is reluctant to move forward with a Remnant Sale because there's a long-shot potential for a large recovery in the future on a particular item. Such a possibility shouldn't preclude the ability to do a Remnant Sale. Instead, in such instances a Remnant Sale should be structured for an up-front cash payment at closing, together with a percentage share for the estate above a certain recovery level on any individual item. This provides the estate with an "insur-

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ance" plan, and yet it also allows the estate to only have to deal with additional cash after the Final Decree if a truly meaningful amount of money comes in.

Advantages of the Remnant Sale

Professionals are increasingly pursuing Remnant Sales for a range of key reasons.

- **Maximize cash for creditors.** The aim of the estate is to maximize recovery and therefore cash distributable to creditors. The Remnant Sale helps to further achieve this aim by selling the last parts of the already picked-over carcass. Any additional cash generated from such leftover assets is accretive to the creditors. For a concerned seller, any issue regarding the pricing of a Remnant Sale can be addressed by filing notice with the Court of the intent to sell the Remnants subject to acceptance, overbid and Court approval.

Historically, the rights to Remnant Assets were often abandoned or donated to a reputable charity. While the charitable donation is certainly noble, unfortunately it doesn't generate any additional cash for creditors, and therefore seemingly should only be a last resort if a Remnant Sale cannot be achieved.

- **Deliver certainty.** The Remnant Sale allows the estate to monetize with certainty items that may or may not ultimately pay out in the future. For example, there may be a claim in a class action case that could yield a modest payout to the estate a couple years down the road. Generally, it's in the creditors' best interest to see this sold for cash today, rather than continue to retain a "hope certificate" for several years.

- **Provide a complete and final close.** Perhaps the most functional aspect of the Remnant Sale is that it provides the professionals involved with a complete and final closing of the case. This prevents the issues that arise when a modest-sized check, say \$1,000 for a utility deposit refund, arrives for the estate a year or two after the Final Decree.

Trustees indicate a strong preference to avoid the dilemma that comes with such a check. On the one hand, it's too small to reopen the case and make another distribution; on the other hand there arguably lies a fiduciary responsibility not to simply let the check expire uncashed. As a solution, the buyer in a Remnant Sale has already paid cash to purchase the rights to these types of items from the estate, thereby eliminating the issue entirely for the professionals down the road.

- **Address the OUST's aim to wrap up cases.** The Remnant Sale also provides a path to address the desire of both the Office of the U.S. Trustee and many of the Bankruptcy Courts to get older cases wrapped up. This trend appears to be gaining momentum, and will no doubt continue to do so as new filings increase.

- **Freeing up professionals to focus on new business.** Finally, the Remnant Sale can do a lot to clear away the clutter from the professional's workload and to allow him or her to better identify and pursue more lucrative new business opportunities. Though any time is good for such efforts, now might be a particularly good time in an effort to wrap up loose ends prior to the expected rise in restructurings.

Examples of Recent Remnant Sales

Professionals are now realizing the value of a Remnant Sale in commercial bankruptcy cases of all shapes and sizes. In recent months, successful Remnant Sales occurred in a mega case of a technology provider (Delaware), a large supermarket case (Illinois, Northern District), a mid-sized financial services case (Massachusetts), a small internet retailer case (New York, Southern District), and in many other cases as well.

Specifically, in a recent Delaware case, the liquidating trustee wanted to find a way to bring in extra cash and prepare for a complete and final close. The trustee explored the options and ultimately determined that a Remnant Sale was in the best interest of the estate. He subsequently completed the non-

recourse Remnant Sale, including the rights to remaining default judgments, an unsecured claim in another case, and any other known or unknown assets.

In another recent Remnant Sale, the Chief Wind Down Officer of Eagle Food Centers Inc (Illinois – Northern District) capitalized on the opportunity to sell Remnant Assets to get cash today for remaining claims that likely would not have any payouts until well after the Final Decree. In the InsurAmericorp Inc. case (Michigan – Western District), the trustee was receiving small commission checks each month that would continue well into the future, but were immaterial to the overall value of the estate. Rather than continue to drag the case out, he completed a Remnant Sale which included the uncertain commission stream and any other unknown assets.

Out With the Old, In With the New

In growing numbers, key decision-makers are heeding the call from the Office of the U.S. Trustee and the Bankruptcy Courts to get cases wrapped up, and are advancing a new trend in asset recovery in the process.

More and more often, these practitioners are recognizing that a Remnant Sale of all remaining known and unknown assets is the most effective way to maximize recovery for creditors, minimize the potential for disruptions after the Final Decree, and free up their focus to pursue lucrative new business assignments. 🏠

About the Author

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