

Is the 'Golden Share' Losing its Luster' Delaware Bankruptcy Court Denies Dismissal of Chapter 11 Petitions Not Authorized By Lender Holding 'Golden Share'

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In our earlier [client alert](#), dated September 13, 2016, we described how during the period of the collapse of the real estate market from 1989 – 1993, countless real estate borrowers attempted to block their mortgage lenders from foreclosing by filing petitions for relief under chapter 11 of the Bankruptcy Code, and then sought to involuntarily restructure their mortgage loans by availing themselves of the cram-down provisions of Section 1129 of the Bankruptcy Code. In the aftermath of this downturn, when real estate mortgage lenders began to contemplate making new mortgage loans, they sought to create new legal structures to prevent their prospective borrowers from filing for chapter 11, and to ameliorate the adverse consequences, if such a filing were to occur. One such structure, has as its centerpiece, a device commonly referred to as the “Golden Share.” As more fully described below, the essence of this device is to provide the lender, at the time the loan is made, with a non-economic equity interest, whose affirmative vote would be necessary, and presumably not forthcoming, for its borrower to file chapter 11 in order to stymie the lender’s mortgage enforcement remedies following a loan default or maturity. The lender thereby could proceed to freely foreclose – without facing a chapter 11 filing. A recent decision of the important U.S. Bankruptcy Court of Delaware calls into question the effectiveness of the “Golden Share” device, creating yet another crack in the legal armor of real estate mortgage lenders.

In *In re Intervention Energy Holdings, LLC*, no. 16-11247 (Bankr. D. Del. June 3, 2016) (“*Intervention*”), the United States Bankruptcy Court for the District of Delaware (the “Court”) refused to invalidate a bankruptcy filing made without the consent of its lender, which held a “Golden Share” of a Delaware limited liability company (“LLC”) issued as part of a pre-bankruptcy forbearance agreement. In so doing, the Court held that the Golden Share issued in this case (discussed below) was void as a matter of federal public policy. However, the Court did not rule that Golden Shares per se violate federal bankruptcy policy.

In the bankruptcy context, the term “Golden Share” generally describes a membership interest provided to a lender for the purpose of voting on any resolution to approve a voluntary bankruptcy filing, coupled with a provision in the LLC’s operating agreement that requires the unanimous consent of all members of the LLC to such a bankruptcy filing.

Intervention highlights an overall fact pattern which the Court determined to be an “absolute waiver” of the right of the LLC to seek federal bankruptcy relief which is contrary to federal bankruptcy policy. While the debtors in *Intervention* were private, non-operated oil and natural gas exploration and production companies, the Court’s decision has implications in real estate transactions (and their subsequent restructurings) which utilize Golden Shares.

To read the full alert, click on the PDF linked below.

[Deleware-Bankruptcy-Court-Denies-Dismissal-of-Chapter11.PDF](#)