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"Predictable" Claims under Judicial Reorganizations?

In late 2016, the majority of the 3rd Panel of the Brazilian Superior Court of Justice ("*Superior Tribunal de Justiça*" or the STJ) decided upon ruling on appeal No. 1,443,750-RS that a claim for attorney's fees awarded against debtor after it has petitioned for judicial reorganization, stemming from a pre-petition lawsuit, must also be deemed a pre-petition claim.

This precedent may be much more significant than the background of the case would warrant at first sight.

Pursuant to the first part of article 49 of Law No. 11,101 dated as of 2.9.2005 (the Brazilian Bankruptcy Act), claims "*subject to judicial reorganization*" are those "*existing as of the filing*" even if they have not matured yet. Therefore, claims that come into existence after debtor has filed for reorganization are (or should be) deemed post-petition claims and are (or should be) immune to its effects.

In this recent precedent, the STJ established that certain claims that did not exist prior to filing must also be deemed pre-petition. This is a pro-debtor stance, since pre-petition claims may not be pursued for 180 days or more (stay period) and will be affected by whatever haircut, rescheduling and grace period is contemplated in the restructuring plan.

Upon interpreting article 49 of the Bankruptcy Act, the STJ majority opinions extended the concept of what claims "*existing as of the filing*" are, so as to also encompass claims that admittedly do not exist yet but are "*predictable*", regarding "*situations essentially occurred before the initial filing has been accepted in court*."

The rationale of the STJ was as follows: (a) the Bankruptcy Act's only purpose upon creating a more favorable regime for post-petition claims is to facilitate debtor's access to the market and thus enable its survival over the course of the proceedings, as suppliers would have no incentive to provide new services and goods to a party that has acknowledged its own insolvency if they could not pursue their claims promptly and in full; and (b) as the attorney's fees bore no relationship to purpose of survival of the business, they should not benefit from the more favorable regime of post-petition claims.

The STJ legislated from the bench. It introduced an additional, non-statutory, condition for a post-petition claim to be excluded from the reorganization proceedings: on top of the claim coming into existence after the filing, the very situation from which such claim originates must also have occurred after the filing and must relate to the purpose of preserving the continuity of the business.

The effects of this finding could be very far-reaching depending on how courts assimilate it. Ultimately, one could contend that all claims stemming from situations occurred prior to the filing for reorganization – whether based on torts or contracts, and even if the claims only come into existence way later –are "*predictable*" or do not serve the purpose of saving the business, and as a result must be deemed pre-petition claims.

Hopefully the courts will not accept the STJ reasoning.

The original relation between creditor and debtor and a hypothetical claim arising out of it are two different animals. Usually both will come into existence at the same time – say, when writing out a cheque or entering into a loan or a purchase and sale agreement with deferred payment. That is not always the case, though: in claims for contribution under contract or for torts, for example, the defendant will only be entitled to any contribution from the third-party defendant (i.e., it will only have a claim against debtor) if and when it pays damages to plaintiff.

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Under article 49 of the Bankruptcy Act, all that matters is solely the moment the claim becomes existent, as opposed to (a) the moment the fact, act or contract from which it stems has occurred, been practiced or been entered into and to (b) the cause or purpose of either the claim or the relation between creditor and debtor. If the claim existed as of the filing for reorganization, it is a pre-petition claim; if it only came into existence thereafter, then it is a post-petition claim.

The legislator could have made a different choice; for instance, it could have set forth that all claims arising out of facts prior to the filing are pre-petition claims, or that only claims based on contracts entered into by debtor after the filing (debtor-in-possession financing) may be deemed post-petition claims. It did not make such choice, however.

It is not hard to anticipate the controversies that could ensue as a result of the application of the STJ's opinion. Are all "*predictable*" claims to be included in the proceedings regardless of how unlikely it is that they come into existence? It will probably be necessary to define an abstract criterion of "predictability" or "likelihood" of the future existence of any given claim.

Debtor must comb through the instances with respect to which a future disbursement may be required, and upon filing for reorganization it must catalogue the relevant claims that fit that abstract criterion (pursuant to article 51, III, of the Bankruptcy Act the filing must be accompanied by the "*complete nominal list of creditors*"). And these "creditors" will then be entitled to vote the restructuring plan pursuant to article 39 of the Bankruptcy Act, even if the claim does not exist yet as of the general creditors' meeting and even if the claim never comes into existence at all.

Order No. 467 issued by the Ministry of Finance on 12.16.2016 created a workgroup for discussion and proposal of amendments to the Bankruptcy Act. If the workgroup proposes changes to the regime of post-petition claims stemming from pre-petition acts, facts and contracts and its suggestions are passed by Congress and enacted by the President, the concept of "*predictable claims*" will become statutory and only then will it be admissible that some post-petition claims be affected by the reorganization. For the time being, though, this is simply not the case under the Bankruptcy Act.

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