

Ferkingstad, James H.

802.63

From: [Redacted]

Sent: Tuesday, March 10, 2009 3:25 PM

To: Ferkingstad, James H.

Cc: [Redacted]

Subject: RE: 802.63 exemption question

3/10/09

Exempt MW Conclurs

JF

Hi James,

More snow today in Minneapolis! It is supposed to get much warmer by the weekend, so it may not be here for long.

Thank you for speaking to me last week regarding the 802.63 exemption question.

Would you please confirm my conclusion that the following facts will not affect the conclusion that the 802.63 exemption applies? The facts and analysis is below.

- 1) Bank A will form a special purpose entity/LLC to purchase and own the plant from Company B.
- 2) The members of the special purpose entity will be the participants in the original loan from Bank A to Company B.
- 3) Bank A participates all of its loans.
- 4) Bank A will be a non-member manager of the special purpose entity/acquiror.

Thank you James,

[Redacted]

From: [Redacted]

Sent: Thursday, March 05, 2009 7:27 AM

To: 'jferkingstad@ftc.gov'

Subject: 802.63 exemption question

Hi James,

I would like your confirmation of our conclusion and analysis that an acquisition is exempt from filing under 802.63, which allows a creditor to foreclose on collateral or negotiate the acquisition of receivables or other assets of a debtor in connection with a bona fide debt work-out without a filing. I would greatly appreciate hearing from you today due to the time sensitivity of the bankruptcy court's bid process. I will follow up with a call later this morning if I have not heard back from you by email.

Our client, Bank A, made a loan to debtor, Company B, to construct a plant. Company B gave Bank A a security interest in the plant. Bank A then participated the loan and now other banks hold participations in the loan and the lien. Company B subsequently filed bankruptcy and now the debtor in possession is selling the plant in a transaction covered by 11 U.S.C. 363(b) of the bankruptcy code. Bank A is going to make a credit bid to purchase the plant based upon its debt. The purchase price that Bank A would pay for the plant (approximately \$88 million) is the amount necessary to satisfy or discharge the debt owed by Company B to Bank A (and its participants), which is secured by the plant. Following the purchase of the plant, the debt owed by Company B to Bank A (and its participants) will be satisfied (up to the amount of the credit bid) and discharged and the plant will be transferred to Bank A (or its assignee).

Based on these facts, Bank A would be allowed to rely on the 802.63 exemption to acquire the plant without a filing because:

- 1. Bank A and Company B previously entered into a "bona fide credit transaction": Bank A made the original loan to the debtor and received a lien on the asset (the plant) that it hopes to acquire. (And did NOT acquire the

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obligations of the debtor or other creditor claims after an intention to initiate bankruptcy proceedings by or against the debtor was publicly announced).

2. Bank A entered into this transaction in the ordinary course of its business.

3. It does not effect our analysis that Bank A participated this loan and now various other creditor/banks hold an interest in the loan and the lien on the asset.

4. The acquisition of the plant is being done in lieu of foreclosure and will satisfy or discharge the debt obligation in whole or in part (i.e., the debtor will take any potential proceeds and pay off the creditors.)

We understand that only the acquisition by Bank A of the plant from Company B, and not any subsequent disposition by Bank A of the plant, would be exempt by Rule 802.63.

Thank you James,

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