



What Constitutes a Sale of Substantially All Assets?

Posted by David A. Katz, Wachtell, Lipton, Rosen & Katz, on Wednesday October 19, 2011

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The Delaware Supreme Court has affirmed the Court of Chancery's decision not to aggregate a series of dispositions in determining whether they constitute a transfer of "substantially all" of a company's assets under a bond indenture. See [Bank of New York Mellon Trust Co. v. Liberty Media Corp., No. 284, 2011 \(Del. Sept. 21, 2011\) \(en banc\)](#).

The case arose out of a June 2011 proposal by Liberty Media Corporation to split off its Capital and Starz businesses. Certain of Liberty's bondholders objected to the split-off as a transfer of "substantially all" of the company's assets in violation of Liberty's bond indentures. Although the Capital and Starz businesses alone would not amount to "substantially all" of Liberty's assets, the bondholders argued that the proposed split-off should be considered together with three prior dispositions undertaken by Liberty since March 2004.

The Court of Chancery declined to aggregate the different dispositions. Applying New York law, which governed Liberty's indentures, Vice Chancellor Laster noted that the various dispositions occurred over a seven-year period, that each arose from different facts and circumstances, and that each was the product of an independent decision by Liberty and not part of "a plan to engage in *seriatim* distributions that would remove assets from Liberty's corporate form and evade the bondholders' claims." The Court of Chancery also determined not to aggregate the dispositions based on the "step-transaction doctrine," which calls for aggregation if (1) successive dispositions are undertaken as part of a prearranged, binding commitment, (2) the dispositions are interdependent, or (3) the dispositions are preplanned parts of a single transaction designed to achieve a particular end result. See [Liberty Media Corp. v. Bank of New York Mellon Trust Co., C.A. No. 5702-VCL \(Del. Ch. Apr. 29, 2011\)](#).

The Delaware Supreme Court (in an *en banc* decision) affirmed the decision, but did so solely on the basis of the Court of Chancery's application of the Second Circuit Court of Appeals' 1982 decision in *Sharon Steel Corp. v. Chase Manhattan Bank, N.A.*, and declined to adopt the step-transaction doctrine. The Supreme Court held that the dispositions should not be aggregated because "each transaction was the result of a discrete, context-based decision and not as part of an overall plan to deplete Liberty's asset base over time." The Supreme Court stressed "the importance of uniform interpretation" of provisions respecting the transfer of assets drafted in the shadow of this well-established law, and noted that bondholders wishing for broader protection against unrelated, but temporally close, asset dispositions must negotiate for "a covenant separate and apart from the boilerplate successor obligor provision."

Indentures are generally governed by New York law, and, therefore, the Delaware Supreme Court's decision in *Liberty Media* is not binding. However, in the absence of a more definitive decision by a New York court, it provides helpful guidance in analyzing bond indentures in the context of M&A transactions. The decision is important in reaffirming that different dispositions should not be aggregated merely because they happen relatively close in time. A court's decision whether to aggregate dispositions will depend in large part on the factual record and whether there is any evidence to suggest that the dispositions were undertaken as part of a single plan or scheme.