

Seward & Kissel LLP Achieves Injunction Against Bank Asset Sale

On February 27, 2012, the Delaware Court of Chancery enjoined the sale of BankAtlantic, the sole banking subsidiary of BankAtlantic Bancorp (BBX), to Branch Bank & Trust (BB&T). BBX had planned to sell \$3.4 billion in deposits and \$3.1 billion in performing loans and other assets to BB&T, keeping BankAtlantic's criticized assets for itself in a "good bank/bad bank" transaction. Plaintiffs, including Wells Fargo Bank, National Association as Institutional Trustee of two Delaware statutory trusts (represented by Seward & Kissel LLP), brought suit to enjoin the sale, claiming that the sale violated the contractual rights of holders of some \$333 million of trust preferred securities (TruPS) issued by BBX.

The agreements governing the TruPS provided that any acquirer of all or substantially all of the assets of BBX would have to assume BBX's TruPS obligations. The proposed transaction between BBX and BB&T, however, contemplated no such assumption by BB&T. Had the transaction been consummated, the only assets retained by BBX to pay the TruPS would have been criticized assets such as nonperforming loans and real-estate owned property. After the transaction, BBX would leave the banking business and no longer be a bank holding company.

BBX contended that the sale of BankAtlantic did not constitute a sale of substantially all of its property because the assets to be retained by BBX had a book value of more than \$600 million. The court found BBX's argument to be "illogical and counter-factual." BBX further argued that the sale should not be enjoined in any event, because there would have been sufficient assets to pay the TruPS obligations.

After highly accelerated discovery, the Chancery Court conducted a three day trial of the issues raised by Plaintiffs. In its opinion, the court found that “by the most conservative measure [BBX] will convey 85-90% of its assets, and the transaction will change fundamentally the nature of [BBX]’s business.” The court concluded that the proposed sale would therefore breach BBX’s obligations to the TruPS holders.

The court further found that the TruPS holders would be irreparably harmed by the sale. Because the proposed sale would breach the agreements governing the TruPS, the TruPS obligations would be accelerated, and BBX would not be able to pay off the accelerated debt. Further, the personal consideration for BBX’s senior executives would receive in the proposed sale -- more than \$10 million -- would also breach the agreements governing the TruPS. In addition, the radical change in BBX’s business brought about by the sale would fundamentally alter the risk shouldered by the TruPS holders. The court held that BBX’s “officers and directors cannot extract value over time to benefit themselves and the equity through a transaction that violates clear contractual rights in the Indentures.” Affirming that “[p]arties who enter into contracts are entitled to enforce their rights,” the Chancery Court permanently enjoined the proposed transaction.

Before regulatory changes significantly limited the favorable capital treatment afforded to TruPS, banks had issued some \$60 billion of these securities, and over 1,800 banks placed TruPS into TruPS collateralized debt obligations (CDOs). Indeed, banks themselves have purchased some \$12 billion in TruPS CDOs, making them a significant investor in bank industry debt. By protecting the rights of TruPS investors,

the Chancery Court's decision may have a significant impact on how troubled TruPS issuers seek to resolve their difficulties.

The case is *In re BankAtlantic Bankcorp, Inc. Litigation*, Consol. C.A. No. 7068-VCL (Del. Ch.). Seward & Kissel's team members were Mark Hyland, Greg Cioffi, Jeffrey Berman, Jeffrey Dine, David Sagalyn, Benay Josselson, Celinda Metro and Ryan Suser.