

allocating restructuring costs amongst creditors: don't get stuck holding the bag

An increasing number of restructuring cases involve several creditors with security over varied assets or asset classes. In such cases there is often a dispute over allocation of the costs of the reorganization. This is particularly true in failed restructurings where costs are high and realizations are low.

Historically, many creditors have argued that their liability for costs should relate to the realizations they have received, but in a recent decision the Alberta Court<sup>1</sup> held that a creditor can be held liable for costs on the basis of what it could have realized, rather than on what it did realize, if the lower realization was caused by the creditor's own bad decision making.

In that decision, the debtor was placed in to receivership at the end of a failed CCAA reorganization. An auctioneer was hired and provided a minimum net guarantee. One of the equipment lenders elected to remove its equipment rather than take part in the auction. The minimum net guarantee for the equipment was \$1.4 million. The Monitor applied to the Court for approval to apportion the expenses of the proceeding, the costs of conducting the auction and debtor-in-possession financing costs amongst the secured creditors on a *pro rata* basis based on each party's actual recovery, and attributed the value of \$1.4 million to the equipment that had been removed. The equipment lender produced a valuation which placed the value of the equipment at \$990,000 and sought to have its share of costs allocated based at that value.

The Court held, however, that "[i]n furtherance of the principle that costs should be allocated in a fair and equitable manner, it is fair and equitable that one creditor not be permitted to avoid the consequences of a poor business decision by foisting them in part on other creditors." As a result, costs were allocated based on the \$1.4 million value which the lender could have received if it had not seized the equipment.

by Brett Harrision and Tobias Whitfiel

<sup>1</sup> *Re Respec Oilfield Services Ltd*, 2010 ABOB 277.

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**a cautionary note**

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