GETTING EXACTLY WHAT YOU BARGAINED FOR: THE ULTIMATE DOWN SIDE OF CREATIVE CREDIT ENHANCEMENT STRUCTURES IN THE FACE OF *IN RE SENIOR LIVING PROPERTIES*

Presented By:

Joe E. Marshall
E. Lee Morris
MUNSCH HARDT KOPF & HARR, P.C.
1445 Ross Avenue, Suite 4000
Dallas, Texas 75202-2790
Telephone: (214) 855-7500
Facsimile: (214) 855-7584
Email: jmarshall@munsch.com
Email: lmorris@munsch.com

Lynnette R. Warman
JENKENS & GILCHRIST, P.C.
1445 Ross Avenue, Suite 3200
Dallas, Texas 75202-2799
Telephone: (214) 855-4500
Facsimile: (214) 855-4300
Email: lwarman@jenkens.com

DALLAS BAR ASSOCIATION
Commercial Law and Bankruptcy Section
June 2, 2004

GETTING EXACTLY WHAT YOU BARGAINED FOR: THE ULTIMATE DOWN SIDE OF CREATIVE CREDIT ENHANCEMENT STRUCTURES IN THE FACE OF *IN RE SENIOR LIVING PROPERTIES*

Joe E. Marshall
E. Lee Morris[1]

I. Introduction

On April 22, 2004, the U.S. Bankruptcy Court for the Northern District of Texas (The Honorable Steven A. Felsenthal presiding) issued its Memorandum Opinion and Order in the case of *Dan B. Lain, Trustee of Senior Living Properties, L.L.C. Trust v. ZC Specialty Insurance Company*, Adversary No. 03-3262 (the "SLP case"). The SLP case involved the question of whether a pre-petition agreement entered into by Senior Living Properties, L.L.C. ("SLP"), the Chapter 11 debtor, and ZC Specialty Insurance Company ("Zurich"), the issuer of a surety bond as a credit enhancement to facilitate SLP's financed acquisition of 87 nursing homes in Illinois and Texas, established a *de facto* partnership between SLP and Zurich as to the ownership and operation of the nursing homes. Applying Illinois law,[2] the Court found that the agreement established a *de facto* partnership.[3]

This paper is designed to outline the background of the SLP case and the key factors considered by the Court in reaching its conclusion. Because of the significance of the outcome in the case – namely, the re-characterization of what ostensibly was documented as a debtor-

---

[1] Joe Marshall and Lee Morris are shareholders in the Reorganization and Corporate Finance section of Munsch Hardt Kopf & Harr, P.C.

[2] The parties took different positions on whether Illinois or Texas law applied. While the Court found that Illinois law applied by virtue of a choice of law provision within the agreement, the Court found that the same result would exist under Texas law as well.

[3] Because the Court found the agreement to be unambiguous, the Court looked solely to the agreement's terms and conditions in determining whether a *de facto* partnership was established, explaining that parole evidence of the parties' intentions in relation to the agreement was inadmissible. Nevertheless, because the issue of ambiguity was contested by the parties, the Court also (without objection) took evidence on the parties' conduct leading up to and following execution of the agreement to determine the intent of the parties, and found that the parties' conduct likewise supported the determination.

creditor relationship as a partnership relationship and the implications of same[4] – it is important for professionals on both sides of the bankruptcy aisle (creditor and estate) to understand the nature of a partnership under Texas law and the factors subject to consideration by the fact-finder in determining whether a partnership has been formed.

II. Background of the SLP Case

A. Primary Parties to the Transaction

SLP: Senior Living Properties LLC, an Indiana limited liability company established as the special purpose entity (SPE) to purchase 87 nursing homes in Texas and Illinois (the "Facilities").

CCS: Complete Care Services, L.P. CCS was instrumental in bringing Zurich to the table after its plan to independently acquire the Facilities fell through. CCS was a key player in the structural negotiations of the overall transaction, obtaining a 20-year agreement for the management of the Facilities. As part of the transaction, CCS financed $10 million of the Facilities' acquisition by SLP under a subordinated note (the "CCS Note").

Zurich: ZC Specialty Insurance Company, the issuer of a surety bond to GMAC to secure payment of $146 million of the GMAC Note (described below). Zurich's issuance of the surety bond enabled GMAC to increase its loan commitment to SLP from $80 million to $226 million.[5]

GMAC: GMAC Commercial Mortgage Corporation. GMAC financed $226 million of the Facilities' acquisition by SLP under a 10-year note (having a 25-year amortization and final balloon payment upon maturity) (the "GMAC Note"), secured by a first lien on the Facilities and supported, in part, by the Zurich surety bond (described above).

Heller: HCFP Funding, Inc. Heller provided a working line of credit to SLP, secured by SLP's accounts receivable.

---

[4] In Texas, subject to certain limitation, each of the partners is jointly and severally liable for all the debts and obligations of the partnership unless otherwise agreed by the holder of a claim against the partnership or otherwise provided by law. *See* Tex. Rev. Civ. Stat. art. 6132b-3.04; *see also id*. art. 6132b-3.02(a) (partners as agents of the partnership).

[5] Because the transaction provided for the acquisition of the Facilities by SLP, a special purpose entity created for the sole purpose of owning and operating the Facilities, and GMAC required an investment grade rating on the loan so as to enable its sale on the secondary market as part of a REMIC, GMAC was unwilling to advance more than $80 million in the absence of additional credit enhancements. The Zurich surety bond provided the requisite credit enhancement to the loan.

Members: Jim Eden (50.00%), Allison Eden (24.99%), Larry Bonds (24.99%) and SLP Management, Inc. (0.01%), the owners of SLP as determined by the Court.[6]

B. The Various "Premiums" Charged by Zurich Under the Reimbursement Agreement

Base Surety Premium: An annual payment of $2,692,041.00.

Additional Surety Premium: An annual payment of $1,383,128.00.

Performance Surety Premium: An annual fee equal to the "free cash flow"[7] occurring during any year, but not to exceed $4.0 million per year.

Supplemental Performance Surety Premium: An amount equal to 70% of the remaining "free cash flow" on a distribution date.

Termination Premium: An amount equal to the present value of the unpaid Base Surety Premiums and the Additional Surety Premiums payable as of the date of determination to the Maturity Date.[8]

Final Supplemental Performance Surety Premium: 70% of SLP's net fair market value as of the date on which such premium becomes payable, but if CCS is no longer the manager of the Facilities as of such date, then 90% of SLP's net fair market value.

C. The Various "Management Fees" Referenced in the Reimbursement Agreement

Actual Management Fees: Actual management fees paid or incurred in connection with operation of the Facilities.

Base Management Fee: The amount payable to CCS under its Management Agreement with SLP.

Partial Base Management Fee: 40% of the Base Management Fee paid to the manager of the Facilities during the immediately preceding year.

Performance Management Fee: An amount equal to 20% of the remaining "free cash flow" on a distribution date.

---

[6] It is unclear from the opinion who owned the remaining 0.01% of SLP.

[7] The term "free cash flow" is described in Section II.D below.

[8] "Maturity Date" is defined as February 1, 2008 in the Reimbursement Agreement, which corresponds to the maturity date of the GMAC Note.

Final Base Management Fee: The present value of the Partial Base Management Fee as if it was payable from the date of determination to the Maturity Date.

Final Performance Management Fee: 20% of SLP's net fair market value as of the date on which such fee becomes payable.

D. Other Unique Terms Used in the Reimbursement Agreement

Free Cash Flow: An amount, at any given determination date, equal to:

Net Operating Income[9]
- interest expense on all indebtedness
- Base Surety Premiums and Additional Surety Premiums
- Tax Distribution
+ depreciation and amortization
- increases in working capital
- capital expenditures (net of withdrawals from capital expenditures fund)
+ proceeds from the disposition of assets
- repayments of principal on indebtedness (and other defeasance pmts)
+ any additional cash held by SLP

Members' Distribution: An amount equal to 10% of the remaining "free cash flow" on a distribution date.

XYZ Payment: In the event of a sale of the Facilities prior to the expiration of the Zurich surety bond, which sale yields net proceeds which are insufficient to satisfy all of the amounts owing to CCS under the CCS Note, then an amount payable by Zurich to CCS which is equal to ½ of the difference between the unpaid principal of the CCS Note and the amount secured by Zurich's surety bond (*i.e.* the unpaid amount of the GMAC Note guaranteed by Zurich).[10]

E. The "Waterfall" and "Free Cash Flow" Distribution Provisions of the Reimbursement Agreement

1. The Waterfall Provision

Pursuant to the Reimbursement Agreement, Operating Revenue of SLP was to be determined on each distribution date (the first business day of each month) and applied in the following order of priority:

(1) Operating Expenses

---

[9] "Net Operating Income" is a defined term within the Reimbursement Agreement. In general terms, it is the difference between income generated from operations during a specified period, less operating expenses for such period (which includes (a) the base management fee payable to the manager of the Facilities [unless the manager is terminated for cause, in which case it is 50% of such fee], and (b) depreciation and amortization, but excludes surety premiums and all interest expenses).

[10] For example, if after such sale GMAC will be able to recover $8 million of its indebtedness from the Zurich surety bond and CCS is still owed $10 million in principal under the CCS Note, then Zurich is obligated to pay CCS $1 million (50% x ($10MM-$8MM)).

(2) P&I due on the Zurich surety bond (*i.e*. amounts reimbursable on account of draws made on the bond by GMAC)

(3) P&I and other amounts owing to GMAC

(4) Amounts reimbursable to Zurich (other than as set out in waterfall)

(5) Permitted Indebtedness (*e.g*., P&I under Heller note)

(6) Base Surety Premiums

(7) Capital Improvement Fund (in an amount provided by the budget)

(8) Subordinated balance of Base Management Fee (if applicable)[11]

(9) P&I due on CCS Note and Additional Surety Premiums, pari passu

(10) Interest due on Seller Note

(11) Principal due on Seller Note (subject to limitations)

2. Distribution of Free Cash Flow

Pursuant to the Reimbursement Agreement, "free cash flow" was to be determined on each distribution date and then distributed quarterly in the following order of priority:

(1) Performance Surety Premiums;

(2) Termination Premium and Final Base Management Fee, pari passu (applicable only upon the termination of the arrangement)[12]

(3) Supplemental Performance Surety Premiums (70%), Performance Management Fee (20%)[13] and Members' Distribution (10%)

3. The Liquidity Fund

Pursuant to the Reimbursement Agreement, amounts distributable as "free cash flow" were to be deposited into the Liquidity Fund (segregated into two accounts – the Performance Surety Premium Subaccount and the 70/20/10 Subaccount). The funds in the Liquidity Fund were to remain available to satisfy any shortfalls that may result under the "waterfall" provisions. Upon the Liquidity Fund reaching a level which would trigger SLP's obligation to make a Tax Distribution (the Liquidity Fund Cap), the excess over the Liquidity Fund Cap was subject to distribution to Zurich, the Manager of the Facilities and the Members in accordance with the priorities set in (2) above.

---

[11] While the Base Management Fee is included within Operating Expenses (item 1 above), in the event of the termination of the manager of the Facilities for substantial cause, 50% of such fee is subject to subordination.

[12] The earliest of (a) the initial maturity date of the GMAC Note, (b) the date of disposition of substantially all of the capital assets of SLP (with certain exceptions) whereby the proceeds are insufficient to pay the CCS Note, and (c) the date of payment or defeasance of the Zurich bond.

[13] However, if Manager is terminated, then after payment of amounts owing to the Manager, the Performance Management Fee is eliminated and the Supplemental Performance Surety Premiums are increased to 90%.

III. Key Provisions of the Texas Revised Partnership Act (TRPA)[14]

Article 6132b-2.02. Partnership Defined

(a) *Association to Carry on Business for Profit*. Except as provided by Subsections (b) and (c), an association of two or more persons[15] to carry on a business[16] for profit as owners creates a partnership, whether the persons intend to create a partnership, and whether the association is called a "partnership," "joint venture," or other name. A partnership may be created under:

(1) [the TRPA];

(2) the Texas Uniform Partnership Act (Article 6132b, Vernon's Texas Civil Statutes) and its subsequent amendments;[17]

(3) the Texas Revised Limited Partnership Act (Article 6132a-1, Vernon's Texas Civil Statutes) and its subsequent amendments; or

(4) a statute of another jurisdiction comparable to [the TRPA] or the Texas Revised Limited Partnership Act (Article 6132a-1, Vernon's Texas Civil Statutes) and its subsequent amendments.

(b) *Entity Not a Partnership*. An association or entity created under a law other than the laws described in Subsection (a) is not a partnership.[18]

(c) *Person with Capacity as Partner*. A person may be a partner unless the person lacks capacity apart from [the TRPA].

Article 6132b-2.03. Rules for Determining if Partnership is Created

(a) *Factors Indicating Creation of Partnership*. Factors indicating that persons have created a partnership include their:

---

[14] Tex. Rev. Civ. Stat. art. 6132b-1.01, *et seq*.

[15] "Person" is defined as including "an individual, corporation, business trust, estate, trust, custodian, trustee, executor, administrator, nominee, partnership (including a registered limited liability partnership and a limited partnership), association, limited liability company, government, governmental subdivision, governmental agency, governmental instrumentality, and any other legal or commercial entity, in its own or representative capacity." Tex. Rev. Civ. Stat. art. 6132b-1.01(14).

[16] "Business" is defined as "a trade, occupation, profession, or other commercial activity." Tex. Rev. Civ. Stat. art. 6132b-1.01(1).

[17] The Texas Uniform Partnership Act expired January 1, 1999. *See* Tex. Rev. Civ. Stat. Ann. art. 6132b hist. & stat. notes (Vernon Supp. 2004). As of January 1, 1999, the TRPA applies to all partnerships. *See* Tex. Rev. Civ. Stat. art. 6132b-11.03(c).

[18] For example, a corporation organized and incorporated pursuant to the provisions of the Texas Business Corporation Act, Tex. Bus. Corp. Act art. 1.01, *et seq*.

(1) receipt or right to receive a share of profits of the business;

(2) expression of an intent to be partners in the business;

(3) participation or right to participate in control of the business;

(4) sharing or agreeing to share:

(A) losses of the business; or

(B) liability for claims by third parties against the business; and

(5) contributing or agreeing to contribute money or property to the business.

(b) *Factors Not Indicating Creation of Partnership*. One of the following circumstances, by itself, does not indicate that a person is a partner in the business:

(1) the receipt or right to receive a share of profits:

(A) as repayment of a debt, by installments or otherwise;

(B) as payment of wages or other compensation to an employee or independent contractor;

(C) as payment of rent;

(D) as payment to a former partner, surviving spouse or representative of a deceased or disabled partner, or transferee of a partnership interest;

(E) as payment of interest or other charge on a loan, regardless of whether the amount of payment varies with the profits of the business, and including a direct or indirect present or future ownership interest in collateral or rights to income, proceeds, or increase in value derived from collateral; or

(F) as payment of consideration for the sale of a business or other property by installments or otherwise;

(2) co-ownership of property, whether in the form of joint tenancy, tenancy in common, tenancy by the entireties, joint property, community property, or part ownership, whether combined with sharing of profits from the property;

(3) sharing or having a right to share gross returns or revenues, regardless of whether the persons sharing the gross returns or revenues have a common or joint interest in the property from which the returns or revenues are derived; or

(4) ownership of mineral property under a joint operating agreement.

(c) *Additional Rules*. An agreement to share losses by the owners of a business is not necessary to create a partnership. Except as provided by Sections 3.06 and 7.03, a person

who is not a partner in a partnership under Section 2.02 is not a partner as to a third person and is not liable to a third person under [the TRPA].

IV. Select Cases Under Texas Law

A. Burden of Proof

Visage v. Marshall, 632 S.W.2d 667 (Tex. App. – Tyler 1982, writ ref'd n.r.e.)

Party asserting existence of partnership must establish same by a preponderance of the evidence.[19]

B. Required Elements of Partnership

Sysco Food Servs. of Austin, Inc. v. Miller, 2003 WL 21940009 (Tex. App. – Austin 2003, no writ)

A partnership consists of an express or implied agreement containing four required elements: (i) a community of interest in the venture, (ii) an agreement to share profits, (iii) an agreement to share losses, and (iv) a mutual right of control or management of the enterprise (citing *Schlumberger Tech. Corp. v. Swanson*, 959 S.W.2d 171 (Tex. 1997) and Tex. Rev. Civ. Stat. art. 6132b-2.03).[20]

McDowell v. McDowell, 2004 WL 892107 (Tex. App. – San Antonio 2004, no writ)

Under the TRPA, no one factor is dispositive as to whether a partnership has been formed. Additionally, an agreement to share losses by the owners of a business is not necessary to create a partnership (citing Tex. Rev. Civ. Stat. art. 6132b-2.03(c)).

Opus South Corp. v. Limestone Constr., Inc., 2003 WL 22329033 (N.D. Tex. 2003)

The most important factors to consider in determining whether a partnership exists are (i) the parties' receipt or right to receive a share of profits of the business, and (ii) the parties' participation or right to participate in control of the business. An agreement to share losses is explicitly not necessary to create a partnership (citing Tex. Rev. Civ. Stat. art. 6132b-2.03(c)).

---

[19] Under Illinois law, the standard of proof is clear and convincing evidence, which was the standard applied by the Court in SLP.

[20] The court's reliance on *Schlumberger* and article 6132b-2.03 in reciting these four "required" elements (in particular, the requirement of an agreement to share losses) is odd. *Schlumberger* was decided under the prior Texas Uniform Partnership Act, which neither expressly required nor expressly did not require an agreement to share losses. *See Schlumberger*, 959 S.W.2d at 176 ("At the outset we note that the Legislature revised the Texas Uniform Partnership Act in 1993, effective January 1994…As the Swansons and SEDCO originally formed their enterprise in 1978, the pre-1993 statute and case law decided under that statute control our determination"); *see also* Tex. Rev. Civ. Stat. Ann. art. 6132b, § 7 (Vernon 1970) (setting out the rules for determining the existence of a partnership under the TUPA). Article 6132b-2.03 of the TRPA, on the other hand, specifically provides that "[a]n agreement to share losses by the owners of a business is not necessary to create a partnership." Tex. Rev. Civ. Stat. Ann. art. 6132b-2.03(c) (Vernon Supp. 2004) (emphasis added); *see also id.* Comment of Bar Committee – 1993 ("Subsection (c) states specifically that an agreement to share losses is not necessary to create a partnership. This has been the subject of some confusion in certain court decisions under TUPA, which held that a partnership did not exist if there was no agreement to share losses").

DeNucci v. Moretti, 1999 WL 250141 (Tex. App. – Austin 1999, appeal dism'd by agmt)

In analyzing the factors set forth in Tex. Rev. Civ. Stat. art. 6132b-2.03, "[g]iven the variety of arrangements that people make, … it is not feasible to say exactly which factors must be present, or what the relative weights of the factors should be" (quoting the comment of the Partnership Law Committee following such provision).

C. Intent of the Parties

Elhamad v. Quality Oil Trucking Serv., Inc., 2003 WL 22211543 (Tex. App. – Ft. Worth 2003, no writ)

It is not essential that the parties agree to become partners by name, or that their agreement is an express one. If, by implied agreement, they assume a relationship that the law considers a partnership, they become partners in fact. A written or oral agreement is not necessary to create a partnership.

Nesmith v. Berger, 64 S.W.3d 110 (Tex. App. – Austin 2001, writ denied)

A label used by lay people does not define a partnership (finding that co-ownership of property, alone, is not sufficient to create a partnership).

DeNucci v. Moretti, 1999 WL 250141 (Tex. App. – Austin 1999, appeal dism'd by agmt)

For a partnership to exist in the absence of an express agreement for same, the agreement must be implied from the relationship of the parties. Mere legal conclusions by a lay witness do not prove the existence of a partnership.

Wright v. Stone (In re Wright), 1999 WL 33734469 (Bankr. W.D. Tex. 1999)

Affirmative intent to form a partnership is not the test; all that is necessary is an intent to undertake the actions which would constitute a partnership.

Federal Sav. & Loan Ins. Corp. v. Griffin, 935 F.2d 691 (5th Cir. 1991), cert. denied, 502 U.S. 1092 (1992)

Intent of the parties controls. Statement in a document that relationship between parties is not a partnership is evidence of intent, but not conclusive. Lack of an agreement to share losses is indicative that partnership not intended, but is not conclusive.

D. Meaning of "Profits"

Texaco, Inc. v. Phan, 2004 WL 966322 (Tex. App. – Houston [1st Dist.] 2004, no writ)

"Net profits" is defined as the difference between a business' total receipts and all of the expenses incurred in carrying on the business.

Atlas Copco Tools, Inc. v. Air Power Tool & Hoist, Inc., 131 S.W.3d 203 (Tex. App. – Ft. Worth 2004, pet. filed)

"Net profits" is defined as what remains in the conduct of business after deducting from its total receipts all of the expenses incurred in carrying on the business.

Helena Chem. Co. v. Wilkins, 18 S.W.3d 744 (Tex. App. – San Antonio 2000), *aff'd*, 47 S.W.3d 486 (Tex. 2001)

"Net profits" is defined as what remains in the conduct of a business after deducting from its total receipts all of the expenses incurred in carrying on the business.

E. Exceptions to Finding of Partnership

Robbins v. Payne, 55 S.W.3d 740 (Tex. App. – Amarillo 2001, writ denied)

Parties' agreement to form a corporation for the purpose of conducting business and the formation of such corporation thereafter eliminated the possibility of the relationship being characterized as a partnership (citing Tex. Rev. Civ. Stat. art. 6132b-2.02(b)).

V. The Court's Analysis of the Reimbursement Agreement

A. Zurich's Argument Against Partnership

- No partnership agreement executed
- No certificate of partnership filed as required by Illinois law
- No use of a partnership name in connection with SLP business
- No advertising as a partnership
- No partnership tax returns filed
- No agreement to share losses
- Purely debtor-creditor relationship – premiums were compensation for the surety bond posted and the exposure faced by Zurich on account of same

B. Provisions Found by the Court to be Typical to Debtor-Creditor Relationship

(Not Indicative of Partnership Relationship)

- Default provisions
- Representations and warranties
- Negative covenants
- Requirement that SLP remain in good standing as LLC
- Maintenance of insurance
- Provision of regular financial reporting
- Access to books and records
- Payment of debt service
- Debt service coverage ratios
- Capital expenditure reserves

C. Provisions Found by the Court to be Atypical to Debtor-Creditor Relationship

(Indicative of Ownership Interest/Partnership)

- Payment of operating costs before payment of GMAC Note
- Requirement of written consent (in sole discretion) to terminate CCS
- Requirement of written consent (in sole discretion) to hire new Manager
- Assumption of ½ CCS' loss on CCS Note (via XYZ Payment obligation)
- Increase in distributable free cash flow to 90% if CCS terminated

- Right (in sole discretion) to extend the maturity of GMAC Note if unsatisfied with amount of Final Supplemental Performance Surety Premium
- Requirement of written consent (in sole discretion) to prepay GMAC Note
- Requirement of written consent (in sole discretion) to approve transaction involving disposition of substantially all of SLP's capital assets
- Control over membership interests and distributions to members[21]

D. Court's Determinations

Profit Sharing

- Base Surety Premiums and Additional Surety Premiums designed to compensate for issuance of surety bond; therefore, not profit sharing in nature
- Performance Surety Premiums and Supplemental Performance Surety Premiums are payable from "free cash flow" and are not fixed in amount; "free cash flow" is the equivalent of profits; no market justification for premiums in excess of Base Surety Premiums and Additional Surety Premiums (*e.g.*, as part of debt service or interest); therefore, profit sharing in nature
- Final Supplemental Performance Surety Premium designed to capture a significant percentage of the net fair market value of SLP at a date within the control of Zurich; therefore, profit sharing in nature

Participation in Control of Business

- Control over management of the Facilities
- Control over prepayment of GMAC Note and extension of maturity of GMAC Note
- Control over disposition of substantially all assets of SLP
- Control over dividends to members
- Involvement in prioritization of payments to vendors once SLP in trouble
- Retention of professionals in the name of SLP once SLP in trouble
- Negotiation of additional financing for SLP once SLP in trouble

Loss Sharing

- Provision of surety bond to GMAC in the face of virtually no capital contributions by the initial equity holders of SLP
- Waterfall provision effectively ensures that all claims are paid ahead of distributions to Zurich on "performance"-based premiums
- Liquidity Fund to be available to fund shortfalls before distributions to Zurich on "performance"-based premiums
- Sharing in loss on CCS Note through XYZ Payment

---

[21] The Reimbursement Agreement includes the following provision: "Without limiting Section 7.10 hereof [the requirement that Operating Revenue be applied in accordance with the waterfall provisions], and except as hereinafter provided or as otherwise consented to by [Zurich] in writing, [SLP will not] declare or pay any distributions to its Members, or purchase, redeem, retire, or otherwise acquire for value, any ownership interest in [SLP] now or hereafter outstanding, return any capital to its Members as such, or make any distribution of assets to its Members."

- Issuance of surety bonds to subsequent manager of Facilities, financial advisor and Heller for extension of additional credit
- Provision of indemnity to subsequent manager of Facilities
- Provision of financing by Zurich affiliate
- Loss sharing not required under TRPA

RULING: **Based upon factors discussed above, Court concluded that Zurich was a partner in SLP's business and is, therefore, liable for SLP's debts.** Court recognized that subsequent proceeding would seek to establish the amount of Zurich's liability and the setoff available to Zurich on account of its claim.

STATUS: Appeal filed on May 27, 2004.