

Chapter 11 As A Viable Way To Redevelop Golf Courses

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The golf course industry is experiencing a slump nationwide, caused in part by declining interest in the sport, increased costs of operating and overdevelopment of courses. As golf courses are often a feature that enables developers to market and sell adjacent residential real property, developers may create golf course/residential development hybrid projects with an eye toward selling real property, as opposed to creating a viable long-term business model for the nearby golf course. Once the residential units are sold, the golf course is then transferred to a new owner who may have inherited a project which is marginally profitable, or even previously subsidized by the prior sale of nearby homes which the original developer has now completed. The result can be a golf course with a difficult-to-sustain business model. If the debt structure becomes onerous for the golf course owner, a Chapter 11 reorganization may provide the necessary breathing room to develop a workable business plan.



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Upon commencing a bankruptcy case, the "automatic stay" arises and prevents creditors or any other party from taking action outside the bankruptcy case itself, to obtain or otherwise affect the debtor's assets. In the case of a golf course, that would typically occur when a lender is poised to either foreclose on the property itself, or has initiated an action to appoint a state court receiver to oversee the operations of the course. Bankruptcy stops that process, at least temporarily, and provides the "honest but unfortunate" debtor with a potential new ally: the bankruptcy court itself.

The United States Bankruptcy Code is designed to give the honest but unfortunate debtor an opportunity to obtain a fresh start in its business, and at the moment there are few industries as unfortunate right now as the golf industry. The problems facing this industry include (1) inability to attract sufficient rounds of golf from outside members if the course is open to the public, (2) difficulty in collecting membership fees, or declining membership rolls, if the course is private and thus dependent on either adjacent homeowners or club members for its profits, (3) the increasing cost of water, (4) the decline in interest in 18-hole courses and (5) increasing demand by younger players for alternative potential uses of golf course space, such as its use

as an archery range.

The benefit of being a business owner in an industry facing systemic challenges is that in bankruptcy, it is likely that the bankruptcy judge is aware that these problems exist. It will become increasingly difficult for creditors to base their pleadings on purported evidence of, say, mismanagement, when a reasonable explanation exists that explains the businesses' drop in revenue. A bankruptcy judge is much more likely to grant the business the time it needs to develop a reorganization plan when the judge is aware that other businesses in the same industry, perhaps even in the same district or city, are experiencing the same problems.

Bankruptcy courts will be even more likely to give a golf course time to reorganize given that the underlying asset is real estate, and real estate can almost always be redeveloped to become more profitable — thus defeating a creditor's argument that the debtor's business is doomed to fail regardless of the outcome of the bankruptcy case, thus necessitating either immediate conversion to a Chapter 7 liquidation proceeding, dismissal of the case or appointment of a trustee. Even a vague assertion that the property can be redeveloped, without more, may be sufficient to buy a debtor time to retain experts, or an appraisal of the property, or at least to prepare and file a reorganization plan which contemplates that the debtor will continue to pursue redevelopment options.

The Bankruptcy Code is not a cure-all for a business's redevelopment problems, however. The same problems affecting or even preventing a golf course business from redeveloping outside of bankruptcy will not disappear just because the company is now in it. Zoning restrictions will still apply. Easements will still run with the land. Covenants, codes and restrictions that might require a business to operate as a golf course, or require adjacent homeowners to pay money to a nearby golf course for the privilege of golfing, will not be eliminated simply because a company commenced a Chapter 11 case. Nor can they be rejected as executory contracts under 11 U.S.C. §365, as they are not even contracts, but run with the land. The bankruptcy process will, however, put the debtor in a position of strength to renegotiate these covenants. The bankruptcy process may cast into a clear light the difficulties the golf course faces, and itself provide a mechanism for the debtor to meet with interested parties such as adjacent homeowners to attempt to craft a solution that is acceptable to all parties. Bankruptcy courts may order parties to mediate, or at least pressure parties to mediate, any dispute regarding the debtor's proposed reorganization plan and disclosure statement, which would include the details of its redevelopment proposal. Adjacent homeowners who become aware of the debtor's financial difficulties due to the public filings the business is now required to make (such as the

schedules, where a debtor identifies all of its assets and liabilities, and monthly operating reports, where a debtor identifies its monthly income and expenses), may be more inclined to entertain the possibility of developing a portion of the golf course property for alternative uses.

The bankruptcy process can provide the calming force to make such negotiations possible in the first place, as adjacent homeowners' concerns regarding the business acting without any supervision or concern for creditors is at least partially addressed by the fact that the bankruptcy court will oversee the bankruptcy process, as well as the fact that homeowners can appear in court and file their own pleadings if they feel their concerns are not being addressed. The bankruptcy process also steadies the business at least with regard to the immediate threat of foreclosure or outside litigation. In this way, the natural passions or "us vs. them" attitude that otherwise might prevent mediation from occurring can be addressed, allowing the parties time to reach an unbiased conclusion as to whether a deal is possible. Or a sale of the course, which may resolve the parties' issues as well.

A Chapter 11 reorganization process may not be specifically tailored to benefit golf courses, but given the issues facing golf courses today, that process benefits golf course businesses, and facilitates the reorganization of those businesses, to a degree not present in many other industries. The benefits and possible detriments of a Chapter 11 reorganization should be carefully considered with the help of experienced counsel and advisors by any golf course business facing serious financial distress.

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