

Attorneys: Reopening Alpha bankruptcy case unlikely to impact coal producer

Friday, January 11, 2019 12:56 PM ET

By Ellie Potter *Market Intelligence*

Bankruptcy attorneys said there is little precedent for a federal judge's decision to reopen Alpha Natural Resources Inc.'s bankruptcy case, but the move is ultimately unlikely to negatively affect the coal producer and could actually provide some benefit.

Judge Kevin Huennekens of the United States Bankruptcy Court for the Eastern District of Virginia ruled to reopen the case on Jan. 9 in a response to an appeal from Jay Alix, founder of AlixPartners, who claimed that consulting firm McKinsey & Co. had a conflict of interest in the case when acting as a management consultant.

McKinsey has denied knowing that the company's investment affiliate had invested employee retirement money in a hedge fund that bought shares of Contura Energy Inc., which was formed out of Alpha's bankruptcy. Alpha and Contura merged in November 2018.

Peter Morgan, a senior attorney with the Sierra Club who focuses on issues related to coal, said reopening the case is not expected to require counsel from Alpha or Contura to participate unless they are needed to help disburse money returned to the debtors if McKinsey is found to be an interested party.

Because Alix' claims are about the inadequacy of McKinsey's disclosures, he said, he will need to attain documents for the firm and take deposition, likely the first thing he is trying to accomplish with the case reopened.

"The case being reopened really just opens the door to this next round of procedural motions," Morgan said. "... All it does is it reinvests the court with the authority to even consider any of these motions or questions."

Courts reopen bankruptcy cases "with some regularity," said Kevin Barrett, a partner with Bailey & Glasser LLP, but it's usually done to manage unknown assets, handle unforeseen issues or for administrative purposes.

"Reopening for these purposes is pretty unusual," Barrett said. "I've never seen it happen."

Daniel Waxman, a partner with Wyatt Tarrant & Combs LLP who specializes in corporate bankruptcies with an emphasis in the natural resources sector, agreed, adding that "having a case reopened based on allegations of fraud on the court related to someone's employment is certainly not something that happens on a regular basis."

The judge will determine whether Alix has the "appropriate standing to raise this issue," he said.

Elizabeth Lee Thompson, a Kentucky-based member of the law practice Stites & Harbison PLLC who focuses on bankruptcy among other types of law, said reopening closed bankruptcy cases is not rare and can be done for general reasons such as addressing overlooked assets or according relief. Reopening a case does not afford any relief or substantiate any claims made and the court has not considered the merits of the accusations.

"It just provides an opportunity for the parties to then be able to file something in the case seeking relief," she said. "So it's not a judgment by the court on the merits whatsoever of this controversy with the consultant."

To be employed as a "professional for a debtor," the company must be disinterested, Thompson said. Should the court find that McKinsey was an interested party in Alpha's case, it could demand the payment received for the consultant's services in the proceedings, which would potentially be returned to the coal producer "and be distributed under the Chapter 11 plan," which may cover claims or be paid to unsecured creditors.

"The only way it could impact Alpha and its creditors is in a positive way," Thompson said.

Westmoreland Coal Co., which filed for Chapter 11 bankruptcy protection in October, is seeking to employ McKinsey through its own bankruptcy proceedings, something Alix also challenged through another company he owns, Mar-Bow Value Partners LLC. A U.S. trustee opposed the motion in a December filing with the Texas bankruptcy court, writing that the firm "patently lacks disinterestedness."

Morgan said the evaluation of disclosures is done on a case-by-case basis, and the two courts could come to different conclusions as to "what the law requires in terms of the adequacy of disclosures." The Texas court may not be able to cite the Virginia court's actions in making its decision, but "it's hard to quantify the effect that might have on a judge."

"I would expect it to lead the judge to take the allegations more seriously and dig into them maybe more deeply," Morgan said, "but I don't think substantively it's something ... that the Texas judge would point to support his decision there."

The court ordered the counsel for McKinsey, its investment affiliate, Mar-Bow and the trustee to attend a status conference on the case at 11 a.m. on Jan. 15 in Richmond.

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