

Banking - Norway

Bondholders' trustee is not trusted all the way

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Norway is a civil law country and has no specific trust legislation. However, the need for a trustee in the Norwegian bond market resulted in the establishment of Norsk Tillitsmann ASA in 1993.

Norsk Tillitsmann's legal position in a bond loan issue is based on authority conferred on it from bondholders pursuant to subscription agreements, and on provisions in bond loan agreements made between Norsk Tillitsmann as trustee and the issuer as borrower.

Under Norwegian civil disputes legislation, it is a general rule that a party, even if it is represented by counsel, may not grant power of attorney to another party to represent it. The main rule is that the party wishing to obtain a judgment must appear as a party.

However, in the aftermath of the 2008 financial crisis, Norsk Tillitsmann has tested this general rule by suing bond issuers as a party acting on behalf of bondholders. In two 2010 decisions Norsk Tillitsmann succeeded in having the Supreme Court agree (and overturn lower courts' rejections) that it could:

- file lawsuits as a party on behalf of bondholders against an issuer claiming payment under a bond loan agreement; and
- file a petition for bankruptcy proceedings against an issuer/borrower.

The 2010 decisions were largely based on an assessment of the arrangements agreed in bond loan documentation, and on the view that there is a strong commercial need in the market for the trustee to appear as a party on behalf of bondholders, claiming payment from the issuer.

Norsk Tillitsmann recently took its representation a step further by filing a lawsuit on behalf of bondholders against directors of a bankrupt issuer/borrower and against other third parties, alleging that the defendants had conspired to withhold assets from serving as repayment of the bonds or as security for such repayment. Norsk Tillitsmann maintains that there is a strong need in the market for it to be able to file such lawsuits as a party on behalf of bondholders, even if the claim is not strictly based on the bond loan documentation, but on general principles of tort.

The Oslo City Court dismissed the lawsuit, arguing that a claim in tort is different from the contractual claims for repayment under a bond loan agreement that were allowed by the Supreme Court in 2010. The court also found that the alleged commercial needs were not sufficiently strong to form a basis of a suit in tort, contrary to the commercial needs to claim contractual repayment under a bond loan agreement.

Norsk Tillitsmann is expected to appeal the decision.

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