JONES DAY

RECENT DEVELOPMENTS IN BANKRUPTCY AND RESTRUCTURING

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## IN THIS ISSUE



# GLOBAL FOCUS: EUROPEAN DISTRESSED DEBT MARKET

*Adam Plainer*

The distressed debt market is a rapidly growing market with increasing importance in large-scale restructurings in Europe. With non-performing loans ("NPLs") playing a large role in an overall bank restructuring initiative, distressed debt has become the latest hot topic with financiers.

In 2003 alone, the high yield debt sold by European issuers topped £18.6 billion. It is not just distressed debt that is on the increase either; the secondary market overall is also growing rapidly and experienced a 29 percent increase between 2003 and 2004. This growth is attributable to multiple factors including increased liquidity in the market (with more investors being attracted daily to this relatively new area of investment with such large potential returns), a significant reduction in equity contributions, and the resulting increase of leveraged multiples.

## RECENT KEY DEALS

Even though this is a relatively new market in Europe, there are already several cases that demonstrate the potential numbers involved in the trade of distressed debt, which in turn begin to explain the reason for the market's steady growth in recent times.

The collapse of Parmalat in December 2003, for example, has already made some investors (who bought much of Parmalat's debt at discounts of up to 90 percent) lose three times their money after the price benchmark of the bonds rose significantly over the last two years, and the company is currently in negotiations with its bondholders and creditors regarding a debt-equity swap (the vote closed on August 25, 2005).

At the beginning of 2005, British Energy's lenders were reported to have made almost £1 billion when the company was re-listed on the London Stock Exchange and its debt was exchanged for new shares and bonds. When British Energy had initially suffered its collapse, the creditors agreed to swap £1.2 billion in debt for £425 million in bonds and 97.5 percent of new shares. When the company was re-listed, it was thought that this debt package would be worth somewhere in the region of £2.03 billion.

In Germany, however, the distressed debt market is really booming as a result of an unprecedented push by the banks to sell off large proportions of their NPLs. In the NPL market, returns come not only from restructuring but also from realizing collateral that often makes insolvency a strategic decision to realize value. In Germany last April, Frankfurt and London Goldman Sachs entered into exclusive talks to acquire a €2 billion portfolio of bad loans with Delmore, a specialist bank. Earlier in the year they also bought €350 million of NPLs from Commerzbank. The biggest loan sale to date in Germany was the €3.6 billion sale by mortgage bank Hypo-Real Estate in 2003 to the U.S. fund Lone Star. This sale confirmed analysts' views that Germany is the biggest potential market for distressed debt in Europe. With Eurotunnel, Euro Disney, and Parmalat all in play, the market is forecast to grow throughout Europe in the coming years.

That said, the expansion of the distressed debt market is still taking time to entice some investors. Eurotunnel's approximate debt of £6.4 billion is spread among 200 creditors, a small proportion of which are secondary holders. The talks of a debt-equity swap, however, have got off to a slow start as the management is proposing a write-down of £4 billion that is currently being met by indignation and frustration from the creditors. Further, the European market would be wise to take stock of the U.S. market's experiences over recent months. As a result of $200 billion of General Motors' debt being unleashed on the market in May, the U.S. junk bond market found itself in chaos and dealing came to a standstill, unable to cope with the sheer volume of deals. The European market must be mindful of potential volatility and would do well to try to alleviate, or at least minimize, the chances of such chaos occurring in Europe.

## EFFECT OF INSOLVENCY RULES ON THE DISTRESSED DEBT MARKET

Analysis of a country's insolvency regime is key when evaluating a prospective credit. Currently, insolvency law differs widely in each of the 40-plus jurisdictions across Europe and, in general, such laws favor the creditors, which does not lend itself to the growth of the distressed debt investment market. There is a general desire, however, to change this approach and countries are slowly attempting to simplify their insolvency laws and make them more flexible and pragmatic, with a knock-on effect to the market.

In France, a draft law has proposed a significant change to the insolvency procedure, whereby debtors, even before entering into an insolvency situation, may be granted an automatic stay of creditors' claims. In such circumstances, the commercial court, which has a supervisory role over the proceedings, appoints an administrator, but the significant development is that the debtor retains management control over the company. This proposal is a move in the direction of the chapter 11 procedure, as used in the U.S., and rehabilitation plans are then negotiated with the creditors. A large degree of control still remains with the court, however, and the court may still reject any rehabilitation plans suggested, even if agreed between the parties.

Germany is moving in a similar direction to France. The first question the court asks is whether the company can be rehabilitated. If so, a process similar to that of chapter 11 is then implemented and the debtor is able to achieve restructuring on a going-concern basis by means of an insolvency plan approved by the majority of creditors.

Spain, it could be argued, is not perhaps progressing as quickly in this area as some of the other European states. In this jurisdiction, a commercial judge decides if the administrator, who is court-appointed, should take over the management of the company or leave it in the debtor's control. Spain does not, therefore, go as far as the French reforms in that respect, which allow the debtor to maintain control. The Spanish administrator, however, can then attempt to reach an agreement between the creditors and the debtor on the restructuring, if it feels such an agreement is a viable option.

In the U.K., the Enterprise Act of 2002 is aimed at streamlining insolvency rules and, in the main, brought about the end of administrative receivership. Ring-fencing for unsecured creditors was introduced along with the abolition of the preferential status of the Crown in respect of pay-as-you-earn tax, national insurance contributions, and value-added tax. It is also possible to use a new out-of-court procedure to initiate administration, but this process is only open to holders of qualifying floating charges, the debtor, and its directors. Further, in 2000, the government reformed Company Voluntary Arrangements, imitating chapter 11, and providing a procedure whereby creditors could be "crammed down," effectively paving the way for bondholders to reap the rewards.

Investors appear to be focusing on pan-European industries with weak fundamentals rather than tracking single-deal opportunities, the net effect being that the European distressed debt market will continue to grow over the coming years.

This general move towards a chapter 11 approach is beneficial to the distressed debt market in that the emphasis is shifted from bankruptcy proceedings to actually attempting to save the company. As a result, bondholders are an essential part of the restructuring process that will subsequently lead to a growth in the market.

## BASEL II

The introduction of the Basel II Rules will also influence the future growth of the distressed debt market. In July 2004, the European Commission adopted a directive proposal, the Capital Requirements Directive, for a new capital requirements framework for institutional investors. The Basel Committee on Banking Supervision wished to introduce new capital requirements for banks and investment firms to ensure coherent applications throughout the European Union. The Committee aimed to ensure that the financial institutions' capital in the future would be more closely aligned with the risks that they face. Lending will become a far more risk-sensitive area as a result. Such an approach will mean the introduction of new standards for establishing minimum capital requirements for banks, which will in turn mean that banks will be forced to start getting rid of NPLs in order to ensure they have adequate capital to support their risk. This move will have the knock-on effect of increasing the level of distressed debt available to the market. These new capital requirements may be brought in towards the end of 2006, but the more advanced changes will not be implemented until the end of 2007.

## THE FUTURE FOR THE DISTRESSED DEBT MARKET

It is predicted that, as a result of these reforms, on a national level in the UK as well as on the pan-European level, the rights of senior lenders will continue to be eroded and more rights will be given to bondholders. The emphasis will be on saving the debtor by way of restructuring, with the aim being to create a pan-European restructuring process in the future. There has already been a suggestion of this pan-European approach in the U.K., with administration orders being made against the entire Crisscross Group despite eight companies of the group having assets and creditors registered in other jurisdictions. Latterly, the same approach has been adopted in Collins & Aikman. This approach is likely to be increasingly taken up across Europe.

Investors appear to be focusing on pan-European industries with weak fundamentals rather than tracking single-deal opportunities, the net effect being that the European distressed debt market will continue to grow over the coming years. Some sectors, particularly automotive, retail, and the airlines, are predicted to experience dramatically increased opportunities. Bank debt is also likely to become the most attractive product in terms of investment opportunity in light of the shift in market supply, with opportunities in public debt and bonds now insufficient to deal with the available capital of investors in the market. Traditional clearing banks are beginning to embrace the concept of selling their debt and seem to have overcome concerns about protecting their brand. Distressed debt investors, particularly hedge funds, may be a source of new financing when it is needed as part of the reorganization plan, again replacing traditional clearing banks but this time in the provision of new money as well as in buying their existing exposure during the restructuring process.

In addition, the move towards a chapter 11 procedure, whereby the debtors remain in possession and the creditors merely have a voice when negotiating the methods of rehabilitation, will further assist the growth in the distressed debt market by further encouraging the rehabilitation and restructuring of debtors as opposed to promoting their bankruptcy. As excess market liquidity chases the (fewer) available opportunities in the European distressed debt arena, however, each asset class becomes more widely held across different types of creditors. Having diverse creditors (*e.g.*, par and sub-par investors) within an asset class as well as across the capital structure will make reaching a consensus outside a formal reorganization process more challenging and may force more companies into an insolvency process as a means of dealing with diverse creditor constituencies. Companies and creditors will be assessing insolvency as a tactical move in the absence of established precedent in many European jurisdictions.

## SECOND CIRCUIT RULES THAT CREDITORS LACKED STANDING TO SETTLE ESTATE CLAIMS

*Mark G. Douglas*

As more and more companies file for bankruptcy protection, creditors and other stakeholders have increasingly assumed a more active role in the proceedings as a means of both maximizing their recoveries and influencing the outcome. Vehicles for stakeholder participation include the right to participate generally in the main bankruptcy proceeding, intervention in litigation filed during the case, representation and prosecution of stakeholder interests as a member of an officially sanctioned committee and, in a chapter 11 case, the right to vote for or against a chapter 11 plan proposed for the debtor.

Another means of pro-active participation — the ability of creditors or committees in a bankruptcy case to act on behalf of the estate by assuming certain powers traditionally reserved for a bankruptcy trustee or chapter 11 debtor-in-possession ("DIP") — has recently attracted a considerable amount of scrutiny. Because unequivocal authority for anyone other than a trustee or DIP to, for example, prosecute avoidance actions belonging to the estate is found nowhere in the Bankruptcy Code, the legitimacy of such "derivative standing" to sue continues to be an unsettled and controversial question. A related issue — whether creditors can settle estate causes of action — was addressed for the first time in a ruling recently handed down by the Second Circuit Court of Appeals. In *Smart World Technologies, LLC v. Juno Online Services, Inc.*, the Second Circuit held that creditors lacked standing to settle claims belonging to the estate.

### RIGHT TO BE HEARD IN BANKRUPTCY

Unlike most ordinary litigation commenced in federal courts, a bankruptcy case generally impacts the substantive rights of a large group of creditors, shareholders, and other parties with a stake in the outcome of the case. As a consequence, parties whose rights or remedies are affected by the case are allowed to participate generally in the proceedings by, for example, receiving notification of significant events during the course of the bankruptcy. Where a stakeholder's rights are

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# WHAT'S NEW AT JONES DAY?

A team of Jones Day attorneys led by ***David G. Heiman (Cleveland)*** and ***Richard Engman (New York)*** is representing Levitz Home Furnishings, Inc. and its subsidiaries in connection with chapter 11 cases filed by the companies on October 11, 2005 in New York. Other members of the restructuring team include ***Nicholas M. Miller (Cleveland), Scott Welkis (New York), Gus Kallergis (Cleveland), David A. Beck (Columbus), Thomas A. Wilson (Cleveland),*** and ***Joshua P. Weisser (New York)***.

An article written by ***Corinne Ball (New York)*** entitled "Ad Hoc Committees Offer Scope for Creditor Influence" appeared in the October 28, 2005 edition of the *New York Law Journal*.

***Paul D. Leake (New York), Erica M. Ryland (New York), Brad B. Erens (Chicago), Joseph M. Witalec (Columbus), Scott J. Friedman (New York), Helena Huang (New York), Robbin Rahman (Atlanta),*** and ***Ross S. Barr (New York)*** are part of a team of Jones Day lawyers representing FLYi, Inc., its operating entity, Independence Air, and their respective subsidiaries in connection with voluntary chapter 11 petitions filed by the companies on November 7, 2005 in Delaware.

***Corinne Ball (New York), Paul E. Harner (Chicago), Mark A. Cody (Chicago),*** and ***Robert E. Krebs (Chicago)*** are part of a team of Jones Day lawyers representing the official committee of retirees appointed in the chapter 11 cases filed by Tower Automotive, Inc. and its debtor affiliates in New York.

***Michelle M. Harner (Chicago)*** and ***Carl E. Black (Cleveland)*** co-authored an article entitled "A Chapter 11 Debtor's Life after October 17: Not So Bad if You Plan Effectively" that appeared in the November 2005 issue of the *American Bankruptcy Institute Law Journal*.

***Heather Lennox (Cleveland)*** participated in a panel discussion on September 21, 2005 concerning "Objectives and Goals of the Borrower" at a program sponsored by the Cleveland Bar Association on Loan Workouts for Troubled Companies. She also gave a presentation on October 18, 2005 at a Cleveland Bar Association program entitled "Women in Law: A Life Plan for Leadership."

On November 4, 2005, ***Carl Jenks (Cleveland*** and ***New York)*** spoke at the National Conference of Bankruptcy Judges in San Antonio, Texas on the tax provisions contained in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. His article entitled "The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005—Summary of Tax Provisions" will appear in the December 2005 issue of the *American Bankruptcy Law Journal*.

An article co-written by ***Scott J. Friedman (New York)*** and ***Mark G. Douglas (New York)*** entitled "You Just Can't Give it Away: Senior Class Give-up to Equity Violates Absolute Priority Rule" appeared in the December 2005 edition of *Pratt's Journal of Bankruptcy Law*.

An article written by ***Mark G. Douglas (New York),*** entitled "Second Circuit Invalidates Chapter 11 Plan Releases of Non-Debtors," was published in the December 2005 edition of *Pratt's Journal of Bankruptcy Law*.

Effective with the October 2005 revisions to *Collier on Bankruptcy* that reflect the changes made by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, ***Carl Jenks (Cleveland*** and ***New York)*** has been named Reviewing Editor of volume 15 of *Collier on Bankruptcy* and those portions of volumes 1 through 14 that involve tax matters. In November, he appeared on panels of the Cleveland Tax Institute and the Practicing Law Institute (Beverly Hills) that addressed new tax developments of relevance to troubled businesses, including the recently proposed "no net value" regulations.

An article written by ***Mark G. Douglas (New York)*** entitled "Third Circuit Raises the Bar for Substantive Consolidation" appeared in the November 2005 edition of *The Banking Law Journal*.

An article written by ***Ross S. Barr (New York)*** entitled "Charter Exculpatory Provisions Preclude Bankruptcy Trustee from Suing on Breach of Duty of Care" appeared in the December 2005 edition of *Pratt's Journal of Bankruptcy Law*.

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directly impacted (*e.g.*, if the value of a creditor's collateral is eroding or the debtor continues to use the property during the bankruptcy case), various provisions of the Bankruptcy Code give the stakeholder a right to seek appropriate relief from the court, such as modification of the automatic stay or other measures designed to protect a secured creditor's interest in collateral.

The right to participate in a chapter 11 case is more explicit. Section 1109(b) of the Bankruptcy Code provides that "[a] party in interest, including the debtor, the trustee, a creditors' committee, an equity security holders' committee, a creditor, an equity security holder, or any indenture trustee, may raise and may appear and be heard on any issue in a case under this chapter." Exactly what "appear and be heard on any issue in a case" means is unclear. Although it is universally understood to encompass the right to inform the bankruptcy court of a stakeholder's position on issues arising in the main bankruptcy case, courts disagree as to whether section 1109 also creates the right to intervene formally in litigation commenced during the case, which in bankruptcy nomenclature is referred to as an "adversary proceeding."

"Case" and "proceeding" have distinct meanings in bankruptcy. The former refers to the main bankruptcy case that began when the debtor filed its bankruptcy petition. Certain kinds of litigation commenced thereafter, including suits to determine the validity, priority, or extent of a lien, to subordinate a claim, to recover assets that were preferentially or fraudulently transferred, to obtain injunctive relief beyond the scope of the automatic stay, or to object to the discharge of a debt, are classified as adversary "proceedings." These proceedings are governed by substantially the same procedural rules that apply to other federal litigation, including the rules determining when a non-party to the action can intervene because it has a stake in the outcome. Other types of disputed issues that arise in a bankruptcy case that do not qualify as adversary proceedings (*e.g.*, claims objections or stay relief motions) are referred to as "contested matters."

Section 1109(b)'s express reference to a "case" has led some courts to conclude that the right of a party in interest to participate is limited to the main chapter 11 case. The First, Fourth, Fifth, and Tenth Circuits favor this approach. The Second and Third Circuits take the opposite view. For instance, the Second Circuit held in *In re Caldor Corporation* that any party in interest in a chapter 11 case has an unconditional right to intervene in any adversary proceeding. According to the Court of Appeals, the phrase "any issue in a case" is all-encompassing and plainly grants a right to raise, appear, and be heard on an issue regardless of whether it arises in a contested matter or an adversary proceeding.

## STANDING

Closely related to the right to be heard and the right to intervene is the concept of "standing." Standing is the ability to commence litigation in a court of law. It is a threshold issue — a court must determine whether a litigant has the legal capacity to pursue claims before the court can adjudicate the dispute. In the bankruptcy context, the Bankruptcy Code determines who has the legal capacity to commence litigation concerning claims and causes of action that belonged to the debtor prior to filing for bankruptcy.

These claims become part of a debtor's bankruptcy estate on the petition date. Standing to prosecute estate claims is expressly given by statute to a bankruptcy trustee or DIP. Thus, for example, the trustee may sue to recover estate property preferentially or fraudulently transferred immediately prior to a bankruptcy filing, or can commence litigation seeking to hold officers and directors liable for pre-bankruptcy fiduciary improprieties.

Although the Bankruptcy Code does not expressly authorize anyone other than a trustee or DIP to prosecute claims belonging to the estate, many courts will allow committees or individual creditors to commence litigation on behalf of the estate under certain narrowly defined circumstances. In one of the seminal cases addressing this issue, the Second Circuit Court of Appeals held in *In re STN Enterprises* that, in considering a committee's request for leave to sue a director for misconduct, a court is required to consider whether the debtor unjustifiably failed to initiate suit against the director and whether the action is likely to benefit the debtor's estate. The Second Circuit broadened this doctrine in *In re Commodore International Ltd.*, which involved litigation brought by a creditors' committee against various officers and directors for fraud, waste, and mismanagement. Unlike in *STN Enterprises*, the debtor in *Commodore* had not unreasonably refused to bring suit, but agreed to permit the committee to litigate the claims on behalf of the estate. The Court of Appeals ruled that a committee may bring suit even if the debtor does not unjustifiably refuse to do so as long as: (i) the trustee or debtor consents; and (ii) the court finds that the litigation is (A) in the best interests of the estate and (B) necessary and beneficial to the fair and efficient resolution of the bankruptcy proceedings.

The Second Circuit's approach represents the majority view. Other courts have employed the same or similar standards to permit not only committees to bring suit on behalf of the estate, but individual creditors as well. Still, some courts reject derivative standing as illegitimate based upon the Bankruptcy Code's express reference to a "trustee" (and by inclusion, a DIP) in specifying who has the right to sue on behalf of the estate. The most notorious adherent to this view (albeit temporarily) was the Third Circuit Court of Appeals, which ruled in 2002 in *In re Cybergenics* that, based upon the express language of section 544(b) of the Bankruptcy Code, only a bankruptcy trustee has the authority to commence avoidance litigation that could have been brought by a creditor under applicable state law outside of bankruptcy.

The Court of Appeals did an about-face on the issue the following year, vacating its original ruling and concluding that the scope of a bankruptcy court's equitable powers is sufficiently broad to encompass the discretion to delegate standing to a creditor or committee under appropriate circumstances. Despite the Third Circuit's imprimatur of approval, a handful of courts continue to reject derivative standing.

## COMPROMISE AND SETTLEMENT IN BANKRUPTCY

Part and parcel of prosecuting claims is the ability to settle them. Procedural rules implementing the Bankruptcy Code provide a framework for the settlement of claims or causes of action in a bankruptcy case. Rule 9019 provides that "[o]n motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement." The purpose of the rule is to allow the trustee and the creditors to avoid the expenses and burdens associated with litigating sharply contested and dubious claims. Rule 9019 is silent, however, on what standard the court should apply in determining whether to grant its approval. This was left to the courts, which devised a number of different tests designed to gauge the reasonableness and fairness of settlements proffered by a bankruptcy trustee or DIP.

Although most courts agree that someone other than a bankruptcy trustee or DIP can be authorized to commence litigation on behalf of the estate, no court had been called upon to consider whether the concept of derivative standing or the broad right of intervention encompasses the related right to compromise or settle estate claims, as opposed to litigating them. The Second Circuit became the first court to address the question in *Smart World Technologies*.

## THE SECOND CIRCUIT'S RULING IN SMART WORLD TECHNOLOGIES

Internet service provider Smart World Technologies, LLC filed for chapter 11 protection in 2000 for the purpose of effecting the sale of its most valuable asset — its subscriber list — to a profitable competitor, Juno Online Services, Inc. The bankruptcy court approved the sale three weeks after the case was filed. Prior to the closing, however, relations between Juno and Smart World soured because of a dispute concerning the number of qualified internet subscribers and the purchase price for the assets.

Juno ultimately commenced an adversary proceeding contending that Smart World had concocted false claims in an effort to extract additional consideration for the sale transaction. The litigation languished for three years, during which the court imposed a standstill based upon Juno's assurances that a settlement was imminent. Smart World, however, did not participate in settlement negotiations, which Juno conducted almost exclusively with Smart World's creditors based upon its assessment that Smart World had no economic stake in the outcome in light of the estate's insolvency. The bankruptcy judge repeatedly denied Smart World's requests to proceed with the litigation, expressing the view that a settlement was in the best interests of all parties concerned.

In 2003, Juno and Smart World's creditors filed a motion pursuant to Bankruptcy Rule 9019 to settle the adversary proceeding. Under the terms of the settlement, Juno was to pay Smart World's largest creditor, WorldCom Technologies, Inc., $5.5 million in exchange for a release of all claims. Smart World objected to the settlement, challenging, among other things, the standing of its creditors to pursue a settlement over its objections and claiming that it could not evaluate the reasonableness of the settlement because it had never had an opportunity to conduct discovery. The bankruptcy court approved the settlement, finding that it was in the best interests of all concerned and that Smart World's refusal to endorse it was unreasonable in light of the risks, expense, and delay that would be posed by further litigation and the insolvency of the estate. The court also found that various provisions of the Bankruptcy Code giving creditors the right to intervene and endowing the bankruptcy court with broad equitable powers provided an adequate legal basis for conferring standing upon Smart World's creditors to pursue the settlement. The district court upheld this ruling on appeal.

Smart World appealed to the Second Circuit. Examining the language of Rule 9019, the Court of Appeals concluded that the rule explicitly "vests authority to settle or compromise solely in the debtor-in-possession." This principle, the Court of Appeals explained, is consistent with lawmakers' desire to leave administration of a chapter 11 estate solely in the hands of the DIP and the DIP's statutory duty to manage the estate's legal claims wisely. According to the Second Circuit, "it is the debtor-in-possession who has the legal obligation to pursue claims or settle them, based upon the best interests of the estate."

The Court proceeded to consider whether the doctrine of derivative standing, the broad right of intervention found in section 1109(b), and the bankruptcy court's broad equitable powers can justify construing Rule 9019 broadly to permit settlement of estate claims by creditors. Though refusing to rule out the possibility categorically, the Second Circuit held that such authority was not warranted under the circumstances of the case before it.

First, the Court discussed the doctrine of derivative standing. Observing that "[i]n our view, there is an important difference between pursuing an otherwise neglected claim and settling a claim that the estate is trying to pursue," the Court distinguished the case before it from typical situations where committees are authorized to bring suit against the debtor's principals because the DIP refuses to do so. A DIP pursuing litigation in other contexts, the Second Circuit emphasized, is much less likely to be acting for reasons antithetical to the interests of the estate, such that "a party who seeks to displace the debtor faces a heavier burden."

The Second Circuit did not rule out the possibility that "in rare circumstances derivative standing might be appropriate in the Rule 9019 context." Such circumstances were not present in Smart World's chapter 11 case.

The Second Circuit did not explain the extent of that burden. Instead, it concluded that Smart World's creditors were not entitled to derivative standing even under the standard applied under ordinary circumstances because the bankruptcy court summarily dismissed Smart World's claims in the underlying litigation rather than determining the "'likelihood of success' of settlement versus litigation." In fact, the Second Circuit concluded that the bankruptcy court actively prevented Smart World from conducting discovery necessary to establish the merits of its claims, all the while expressing a strong preference for settlement over litigation. It also seemingly "ignored several signs that the interests of the settling parties were in conflict with those of the estate, thereby rendering creditor derivative standing inappropriate."

The Second Circuit did not rule out the possibility that "in rare circumstances derivative standing might be appropriate in the Rule 9019 context." Such circumstances, however, were not present in Smart World's chapter 11 case.

Consistent with U.S. Supreme Court precedent narrowly interpreting the substantive rights created by section 1109(b), the Second Circuit held that the statute does not entitle parties-in-interest to usurp a debtor-in-possession's role as legal representative of the estate. Moreover, the Court of Appeals emphasized, "a distinction can be drawn between the right to intervene in an adversary proceeding, to which [Smart World's creditors] are plainly entitled, and the right to take ownership of the debtor's claims in that adversary proceeding." The Second Circuit explained that intervenors' claims are separate from those of the original parties to a proceeding. According to the Court of Appeals, in drafting section 1109(b), lawmakers could not have intended to override other provisions carving out an exclusive role for the debtor-in-possession as legal representative and fiduciary of the estate.

The Second Circuit also rejected section 105 of the Bankruptcy Code as a basis for authorizing creditors to settle claims belonging to the estate. Even though section 105 gives a bankruptcy court broad equitable powers to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions" of the Bankruptcy Code, the Court of Appeals emphasized, it cannot be used to create substantive rights that do not already exist elsewhere in the statute.

Concluding that sections 1109(b) and 105(a) and, under the circumstances, the doctrine of derivative standing could not serve as a basis for authorizing Smart World's creditors to settle the adversary proceeding, the Second Circuit vacated the orders below and remanded the matter to the bankruptcy court.

**OUTLOOK**

*Smart World* reinforces one of the fundamental principles underlying chapter 11 — the DIP, at least in the first instance, is entrusted with directing the course of a case, managing its assets and maximizing the value of the bankruptcy estate for the benefit of all stakeholders. This remains the rule even when the estate is insolvent and creditors may be the only economic parties with a stake in the outcome of the case. Only if the DIP fails to fulfill its statutory mandate are creditors or other stakeholders permitted to seek relief from the bankruptcy court designed to remedy the problem, which may include assuming the mantle of responsibility for prosecuting claims belonging to the estate on behalf of all stakeholders in the case, or proposing a chapter 11 plan.

The Second Circuit's ruling does not erode the validity of the doctrine of derivative standing. The decision merely clarifies the standards governing its use and the purpose for which it is intended, concluding that, under the circumstances of this case, the doctrine cannot be a license for creditors to usurp a DIP's right to prosecute (or not) potentially colorable causes of action. Still, we are left to speculate about the circumstances that would justify deployment of the doctrine as authority for creditors to settle estate claims. Presumably, it would entail some kind of negligence or misconduct by the DIP in pressing claims that are too insubstantial to justify expending estate assets to litigate. Although such conduct by a DIP might not rise to the level of "cause" for the appointment of a chapter 11 trustee, it may be an appropriate case for use of the doctrine of derivative standing in the Rule 9019 context.

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*Smart World Technologies, LLC v. Juno Online Services, Inc. (In re Smart World Technologies, LLC)*, 423 F.3d 166 (2d Cir. 2005).

*Unsecured Creditors Committee of Debtor STN Enterprises, Inc. v. Noyes (In re STN Enterprises)*, 779 F.2d 901 (2d Cir. 1985).

*Commodore Int'l Ltd. v. Gould (In re Commodore Int'l Ltd.)*, 262 F.3d 96 (2d Cir. 2001).

*Official Comm. of Unsecured Creditors of Cybergenics Corp. v. Chinery*, 330 F.3d 548, 579 (3d Cir. 2003).

*Canadian Pac. Forest Prods. Ltd. v. J.D. Irving, Ltd. (In re The Gibson Group, Inc.)*, 66 F.3d 1436 (6th Cir. 1995).

*In re Xonics Photochemical, Inc.*, 841 F.2d 198 (7th Cir. 1988).

*Louisiana World Exposition v. Fed. Ins. Co.*, 858 F.2d 233 (5th Cir. 1988).

*In re Fox*, 305 B.R. 912 (Bankr. 10th Cir. 2004).

*Official Unsecured Creditors' Committee v. Michaels (In re Marin Motor Oil)*, 689 F.2d 445 (3rd Cir. 1982), *cert. denied*, 459 U.S. 1206 (1983).

*Term Loan Holder Committee v. Ozer Group, L.L.C. (In re The Caldor Corporation)*, 303 F.3d 161 (2d Cir. 2002).

# CATEGORICAL SUBORDINATION OF ESOP CLAIMS IMPROPER

*David A. Beck and Mark G. Douglas*

Whether a bankruptcy court can subordinate a claim in a bankruptcy case in the absence of creditor misconduct continues to be an unsettled issue despite the U.S. Supreme Court's pronouncement nearly a decade ago invalidating the subordination of tax claims without any showing that the claimants acted unfairly. A ruling recently handed down by the First Circuit Court of Appeals clarifies the distinction between two forms of non-voluntary subordination sanctioned by the Bankruptcy Code — the automatic, or "categorical," subordination of certain shareholder claims, and equitable subordination of creditor claims. In *In re Merrimac Paper Co.*, the Fifth Circuit held that a bankruptcy court erred by categorically subordinating claims based upon promissory notes issued to redeem stock under an employee stock ownership plan without any finding of misconduct on the part of the individual claimants.

## SUBORDINATION IN BANKRUPTCY

The concept of claim or debt subordination is well recognized under federal bankruptcy law. A bankruptcy court's ability to reorder the relative priority of claims or debts under appropriate circumstances is part and parcel of its broad powers as a court of equity. The statutory vehicle for applying these powers in a bankruptcy case is section 510 of the Bankruptcy Code.

Section 510(a) makes a valid contractual subordination agreement enforceable in a bankruptcy case to the same extent that it would be enforceable outside of bankruptcy. Subordination, however, can also be effectuated in a bankruptcy case under circumstances not involving the voluntary undertakings of two or more parties to a contract.

Section 510(b) addresses mandatory or statutory subordination of shareholder claims (also sometimes referred to as categorical subordination). It automatically subordinates any claim for damages arising from the rescission of a purchase or sale of a debtor-company's securities to the claims of ordinary creditors. Its purpose is to prevent the bootstrapping of equity interests into claims that are on a par with other creditor claims, consistent with the Bankruptcy Code's "absolute priority" rule. According to this rule, unless creditors are paid in full or agree otherwise, shareholders cannot receive any distribution from a bankruptcy estate. Most claims based upon injuries sustained by a shareholder of an insolvent estate will be categorically subordinated under section 510(b).

Misconduct that results in injury to creditors can warrant the "equitable" subordination of a claim under section 510(c). The statute does not specify what kind or degree of misconduct justifies application of the remedy, providing merely that the bankruptcy court may "under principles of equitable subordination, subordinate for purposes of distribution all or part of an allowed claim to all or part of another allowed claim." It has been left to the courts to develop criteria for determining whether equitable subordination is appropriate.

In 1977, the Fifth Circuit Court of Appeals articulated what has become the most commonly accepted standard for equitably subordinating a claim. Under the *Mobile Steel* test, a claim can be subordinated if the claimant engaged in some type of inequitable conduct that resulted in injury to creditors (or conferred an unfair advantage on the claimant), and if equitable subordination of the claim is consistent with the provisions of the Bankruptcy Code. Courts have since refined the test to account for special circumstances. For example, many make a distinction between insiders (*e.g.*, corporate fiduciaries) and non-insiders in assessing the level of misconduct necessary to warrant subordination. Regardless of the standard applied, two principles are clear under the *Mobile Steel* test: equitable subordination requires some kind of misconduct and a claim or interest will be subordinated only to the extent necessary to redress it.

Although the majority of courts follow the *Mobile Steel* approach, some courts have taken issue with the principle that subordination of non-shareholder claims requires a showing of misconduct that injures other creditors. In many cases, their reasoning derives from decisions and policies that pre-date enactment of the Bankruptcy Code in 1978. They also rely on statements in the legislative history of section 510(c) indicating that pre-Code decisions can assist in determining the priority of claims under the Bankruptcy Code. For example, a long line of cases in the First Circuit stands for the proposition that stock redemption claims should be categorically subordinated even though such claims may not fall within the scope of present-day section 510(b).

The ruling will do little to resolve the ongoing debate concerning whether, in the wake of *CF & I* and *Noland*, equitable subordination requires a finding of inequitable conduct by the claimant.

In 1996, the U.S. Supreme Court strove to dispel any lingering uncertainty concerning the scope of section 510(c) in a pair of rulings. In *United States v. Noland*, the Court found that section 510(c) does not permit a court to subordinate a non-compensatory tax penalty claim of the IRS that would otherwise have been entitled to administrative expense priority. In part, the ruling was predicated on the idea that section 510(c) codifies the equitable power of the bankruptcy court to consider claims on a case-by-case basis. The subordination of tax penalty claims based on a general policy, rather than the claim's merits, the Court reasoned, represents an inappropriate exercise of section 510(c) in a legislative, rather than equitable, manner. The Supreme Court employed similar reasoning to invalidate subordination of an unsecured tax penalty claim in *United States v. Reorganized CF & I Fabricators of Utah, Inc.*

### THE FIRST CIRCUIT'S RULING IN MERRIMAC PAPER

Ralph Harrison worked at Merrimac Paper Company, Inc. ("Merrimac") from 1963 to 1999. In 1985, Merrimac established an employee stock option plan ("ESOP") qualified under the Employee Retirement Income Security Act ("ERISA"). The ESOP provided that retiring workers would be vested with shares of Merrimac's non-publicly traded stock. At any time within 15 months of retirement, an employee could exercise a put option and force Merrimac to purchase the stock for fair market value, as determined by a third-party appraisal. Merrimac could elect to pay any exercised put option over a period not to exceed five years, in which case it had to pay interest on the deferred principle balance and provide "adequate security" for the deferred payments.

Harrison exercised the put option in 2000. Rather than purchase the stock, Merrimac gave him an interest-bearing promissory note in the amount of $916,300 to be amortized in three equal annual installments. Merrimac failed to make the second annual payment on the note. Harrison sued in both state court on a breach of contract and in federal district court on several causes of action arising under ERISA. Merrimac filed for bankruptcy while both actions were pending.

Harrison asserted both a claim under the note (the "Note Claim") and a claim based on the ERISA lawsuit (the "ERISA Claim"). Merrimac sought to subordinate both claims and filed a chapter 11 plan that subordinated all claims related to stock redemption notes. The bankruptcy court ruled that the ERISA Claim could be subordinated under section 510(b), but that the Note Claim fell outside the scope of that provision because it was properly based upon a debt. Even so, the court held that it did have the ability to subordinate categorically all stock redemption claims, including the Note Claim, under section 510(c). Harrison appealed to the First Circuit after the district upheld that determination on appeal.

The Court of Appeals reversed. After examining the language and history of section 510, as well as relevant Supreme Court precedent, the First Circuit concluded that categorical subordination was inappropriate under section 510(c). It held that *Noland* and *CF & I* overrule pre-Code decisions authorizing categorical subordination of stock redemption claims. Subordination under section 510(c), the Court of Appeals observed, requires an analysis of the equities of a particular case rather than the "taxonomic status" of a claim.

The First Circuit proceeded to examine the equities of the Note Claim. Noting that the ESOP was a highly regulated ERISA qualified plan, the Court explained that ERISA rules require that ESOPs include put options to force employers to repurchase stock owned by retiring employees in cases where the stock is not readily tradable, although employers may elect to pay the purchase price over time, provided it posts adequate security. Based upon these requirements, the First Circuit concluded that retirees in ESOPs are not supposed to be subject to the risks of a typical equity investor once they retire. By exercising his put option, the Court of Appeals reasoned, Harrison legitimately chose to transform his legal relationship with Merrimac from that of equity investor to creditor, as ERISA expressly gave him the right to do. Under the circumstances, including the absence of any allegation of misconduct on Harrison's part, the First Circuit found that it would be inequitable to subordinate his claims under section 510(c).

### ANALYSIS

The outcome of *Merrimac* is logical and defensible based upon the circumstances of the case. Unfortunately, the ruling will do little to resolve the ongoing debate concerning whether, in the wake of *CF & I* and *Noland*, equitable subordination requires a finding of inequitable conduct by the claimant. The First Circuit was also careful to leave itself room to find that stock redemption notes issued in non-ERISA cases could be equitably subordinated under section 510(c) of the Bankruptcy Code, even if subordination is not appropriate under section 510(b).

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*Merrimac Paper Company, Inc. v. Harrison (In re Merrimac Paper Co., Inc.)*, 420 F.3d 53 (1st Cir. 2005).

*In re Mobile Steel Co.*, 563 F.2d 692 (5th Cir. 1977).

*United States v. Noland*, 517 U.S. 535 (1996).

*United States v. Reorganized CF & I Fabricators of Utah, Inc.*, 518 U.S. 213 (1996).

## EXCEPTIONS TO PUBLIC DOCUMENT ACCESS IN BANKRUPTCY NARROWLY CONSTRUED

*Mark G. Douglas*

One of the hallmarks of the U.S. bankruptcy system is ready access to information concerning any debtor that files for bankruptcy protection. The integrity of that system is premised upon the presumption that not only creditors and other interested parties in a bankruptcy case, but the public at large should have the unfettered ability to examine any document filed by a debtor with the bankruptcy court. Rooted in the common law right of access to public documents, full disclosure promotes the legitimacy of the bankruptcy court as an institution entrusted with impartially applying the nation's bankruptcy laws and administering debtors' estates for the benefit of all interested parties. Unrestricted access to judicial records also fosters confidence among creditors regarding the fairness of the bankruptcy system.

As with every general rule, the principle of full public access has exceptions. Thus, where disclosure of information would result in the revelation of trade secrets or where the matters involved are scandalous or defamatory, a bankruptcy court has the power to implement protective measures that are appropriate to the circumstances. The manner in which such relief should be fashioned was the subject of a ruling recently handed down by the First Circuit Court of Appeals. In *In re Gitto Global Corp.*, the Court of Appeals held that potentially untrue statements must either be irrelevant or included for an improper purpose to qualify as "scandalous or defamatory" information and, therefore, be protected from public disclosure.

### PUBLIC ACCESS TO COURT DOCUMENTS

The public's general right to inspect and copy public documents, including judicial records, has long been a part of the common law. The existence of such rights, which are based upon the public's interest in monitoring the workings of the judicial system, are universally regarded as being "fundamental to a democratic state." They are closely allied to the First Amendment presumption that court proceedings should ordinarily be open to the press and the public.

Section 107(a) of the Bankruptcy Code recognizes the right of public access in a bankruptcy case. It provides that "[e]xcept as provided in subsection (b) of this section, a paper filed in a case under this title and the dockets of a bankruptcy court are public records and open to examination by an entity at reasonable times without charge." The scope of the provision extends to nearly all documents filed with the court, but there are certain exceptions. For example, other rules shield from public disclosure an individual debtor's Social Security number (or the fact that none exists) to prevent this information from becoming part of the public record.

The common law right of access to public documents is not absolute — confidentiality may be justified if access to information is sought for an improper purpose. This caveat is reflected in section 107(b)(2) of the Bankruptcy Code. It provides that if an interested party so requests, "the bankruptcy court shall . . . (1) protect an entity with respect to a trade secret or confidential research, development, or commercial information; or (2) protect a person with respect to scandalous or defamatory matter contained in a paper filed in a case under this title." The statute also authorizes the bankruptcy court to undertake such protective measures on its own initiative. The second prong of the exception applies to any "person," which includes individuals, partnerships, and corporations but excludes most governmental entities. No such restriction applies to the first prong, whose scope encompasses not only any "person," but governmental entities, estates, and trusts as well.

Rules of bankruptcy procedure create a mechanism for the application of section 107(b). Rule 1007(j) requires any party seeking to prevent disclosure of a list of creditors or stockholders to file a motion seeking such relief with the court, which will impound the list, or permit only limited inspection, upon a showing of "cause." Also, Rule 9018 permits the court, upon request or its own initiative, to issue any order:

(1) to protect the estate or any entity in respect of a trade secret or other confidential research, development, or commercial information;

(2) to protect any entity against scandalous or defamatory matter contained in any paper filed in a case under the Code; or

(3) to protect governmental matters that are made confidential by statute or regulation.

Any of the relief contemplated by section 107 and the procedural rules implementing it are subject to the caveat that exceptions to the broad right of public access should be made sparingly. The statute's application was recently addressed by the First Circuit for the first time in *Gitto Global*.

## GITTO GLOBAL

Plastics manufacturer Gitto Global Corp. filed for chapter 11 protection in 2004. Shortly thereafter, the bankruptcy court appointed an examiner to investigate allegations of fraud, mismanagement, accounting irregularities, and other misconduct committed by Gitto's pre-bankruptcy management. The examiner compiled his report by the end of 2004, but sought court authority to file the document under seal and to have it impounded pending further order of the court. The court granted the motion, subject to a requirement that any party-in-interest be allowed to seek court permission to unseal the report. It later issued orders modifying the terms of access to permit partial disclosure of the report in redacted form.

Gitto's chairman, its chief executive officer, and 24 other individuals (collectively, the "officers") requested that the entire report remain sealed, arguing that there is no right of public access to the report under either common law or the First Amendment. They also claimed that because the document contained scandalous and defamatory material within the meaning of section 107(b)(2), the usual presumption of public access under section 107(a) does not apply. Two news organizations opposed the request. The media contended that common law, the First Amendment, and section 107(a) created a right of public access to the report, and that the officers failed to prove that any portions of the report were defamatory or scandalous such that section 107(b)(2) applied to overcome the presumption of access.

The bankruptcy court concluded that there was nothing scandalous or defamatory in the report. It ruled that the entire report (with minor exceptions) should be made publicly available consistent with section 107(a) and the common law presumption of access. It declined to address whether the First Amendment also creates such a right. The district court affirmed that ruling on appeal, although it adopted a broader definition of "defamatory" than the bankruptcy court. The officers appealed to the First Circuit.

## THE FIRST CIRCUIT'S RULING

The officers fared no better with the Court of Appeals. After exploring the presumption of access to documents filed in court under common law, the First Circuit explained that, in the bankruptcy context, this right is codified in section 107, which "establishes a broad right of public access, subject only to limited exceptions set forth in the statute, to all papers filed in a bankruptcy case." Because it directly addresses the question of access, the Court of Appeals concluded, section 107 supplants the common law for purposes of determining public access to papers filed in a bankruptcy case.

The First Circuit then directed its inquiry to the issue at hand — namely, whether material in the report falls within the section 107(b)(2) exception for "defamatory matter." According to the officers, they were only required to "identify material that would cause a reasonable person to alter his opinion of them" to qualify for the exception. The First Circuit rejected such a low threshold for non-disclosure, agreeing with the district court that "it would sweep all manner of documents into its embrace" in contravention of the section 107(a) presumption favoring public access in the bankruptcy context.

It found similarly unpersuasive the officers' contention that section 107(b), like the common law, obligates a bankruptcy court to engage in a balancing of competing interests to determine what protective measures justice requires, whether it be sealing or a more modest form of protection. Once an interested party identifies material that is scandalous or defamatory, the Court of Appeals emphasized, "the court must protect the party. . . . [a]lthough the protection may stop short of sealing the entire document containing the defamatory material." According to the First Circuit, section 107 "speaks directly to the issues regarding disclosure that are addressed by the common law analysis; its framework is not merely a prelude to the common law analysis."

Observing that "[p]apers filed in the bankruptcy court do not fall within the § 107(b)(2) exception merely because they would have a detrimental impact on an interested party's reputation," the First Circuit concluded that "something more" is required to render statements as defamatory within the meaning of the statute. It faulted as "largely unworkable" the lower courts' test equating defamatory with "untruthful." According to the Court of Appeals, it would be unrealistic to require a bankruptcy court to resolve factual disputes at a preliminary stage in the case, and "[t]he untruthfulness requirement would add an enormous burden to the bankruptcy courts' already heavy docket by turning motions for protection under § 107(b)(2) into an occasion for mini-trials."

Observing that "[p]apers filed in the bankruptcy court do not fall within the § 107(b)(2) exception merely because they would have a detrimental impact on an interested party's reputation," the First Circuit concluded that "something more" is required to render statements as defamatory within the meaning of the statute.

The Court of Appeals opted instead for a two-part test: (i) where untruthfulness is readily apparent, the court may prevent disclosure of the information; and (ii) where, as is more likely in the great majority of cases, information that would alter a party's reputation in the eyes of a reasonable person can only be shown to be "potentially untrue," an "additional showing" is required before the court can limit access to the information. Looking to analogous federal procedural rules for guidance, the First Circuit concluded that the precise nature of this additional showing is context-sensitive. In other words, "the purpose of including material in a paper filed with the court should inform the inquiry into whether that material falls within the § 107(b)(2) exception." The Court of Appeals, after examining other cases interpreting the exclusion, agreed with the district court below that, in order to fall within the scope of section 107(b)(2), potentially untrue statements must also be "irrelevant or included within a bankruptcy filing for an improper end."

Having established the ground rules for application of section 107(b)(2), the First Circuit examined whether the information that the officers wanted to remain under seal (namely, allegations of mismanagement or other fiduciary improprieties) satisfied either prong of the test. The Court of Appeals easily concluded that it did not. First, the officers had not proven that the material in the report was inaccurate — at best, they demonstrated that certain statements were potentially untrue, a contingency that would be resolved only after the examiner's continuing investigation produced supporting or contradictory evidence. Next, the First Circuit determined that the statements were neither irrelevant, as pertaining directly to the examiner's investigation of alleged managerial misconduct and accounting irregularities, nor included for an improper end, given the absence of any indication that the examiner was other than disinterested or filed his report in bad faith or with an ulterior motive. It accordingly affirmed the rulings below.

## OUTLOOK

The right of access to documents filed in court is rooted strongly in the U.S. system of justice. Exceptions to the rule are drawn narrowly, and courts generally cast a critical eye on any attempt to abridge it. The First Circuit's ruling in *Gitto Global* demonstrates that the right of access is as important in bankruptcy as in any other context.

Even so, bankruptcy courts can, and frequently do, implement appropriate measures to shield information from disclosure that legitimately falls within the categories described in section 107(b)(2). It remains to be seen whether bankruptcy courts will embrace the First Circuit's formulation of the standard to be applied in cases of allegedly defamatory statements.

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*Gitto v. Worcester Telegram & Gazette Corp. (In re Gitto Global Corp.)*, 422 F.3d 1 (1st Cir. 2005).

## LARGEST PUBLIC COMPANY CHAPTER 11 FILINGS IN 2005

| Company | Filing Date | Assets |
|---|---|---|
| Refco Inc. | October 17, 2005 | $33,333,172,000 |
| Delta Air Lines, Inc. | September 14, 2005 | $21,801,000,000 |
| Delphi Corporation | October 8, 2005 | $16,593,000,000 |
| Northwest Airlines Corp. | September 14, 2005 | $14,042,000,000 |
| Collins & Aikman Corp. | May 17, 2005 | $3,196,700,000 |
| Tower Automotive, Inc. | February 2, 2005 | $2,846,406,000 |
| Winn-Dixie Stores, Inc. | February 21, 2005 | $2,618,891,000 |
| ASARCO LLC | August 9, 2005 | $1,108,447,000 |
| Amer. Bus. Finan. Serv., Inc. | January 21, 2005 | $1,042,870,000 |
| McLeodUSA Inc. (2005) | October 28, 2005 | $1,025,800,000 |
| Satélites Mexicanos, S.A. de C.V. | August 4, 2005 | $950,978,000 |
| Entergy New Orleans, Inc. | September 23, 2005 | $662,774,000 |
| Anchor Glass Cont. Corp. (2005) | August 8, 2005 | $657,195,000 |
| Foamex International Inc. | September 19, 2005 | $645,710,000 |

## BILLION-DOLLAR BANKRUPTCIES

The chart below illustrates the number of publicly traded companies that have filed for chapter 11, and the ratio between those reporting $1 billion or more in assets in the most recent annual report prior to filing for chapter 11.

| | Number of Public Bankruptcies | | Assets | | Billion $ Bankruptcies as % of Total | |
|---|---|---|---|---|---|---|
| Year | Billion $ | All | Billion $ | All | Number | Assets |
| 1987 | 1 | 112 | 32,892 | 41,503 | 0.9% | 86.5% |
| 1988 | 3 | 122 | 38,347 | 43,488 | 2.5% | 88.2% |
| 1989 | 12 | 135 | 65,435 | 71,371 | 8.9% | 91.7% |
| 1990 | 15 | 115 | 73,401 | 82,781 | 13.0% | 88.7% |
| 1991 | 18 | 123 | 64,310 | 93,624 | 14.6% | 68.7% |
| 1992 | 14 | 91 | 44,011 | 64,226 | 15.4% | 68.5% |
| 1993 | 3 | 86 | 5,026 | 18,745 | 3.5% | 26.8% |
| 1994 | 1 | 70 | 1,139 | 8,337 | 1.4% | 13.7% |
| 1995 | 7 | 85 | 14,592 | 23,107 | 8.3% | 63.1% |
| 1996 | 3 | 86 | 4,012 | 14,201 | 3.5% | 28.3% |
| 1997 | 4 | 83 | 9,003 | 17,247 | 4.8% | 52.2% |
| 1998 | 4 | 122 | 12,532 | 29,195 | 3.3% | 42.9% |
| 1999 | 20 | 145 | 40,018 | 58,760 | 13.8% | 68.1% |
| 2000 | 23 | 176 | 66,824 | 94,786 | 13.1% | 70.5% |
| 2001 | 44 | 257 | 225,086 | 258,490 | 16.7% | 87.1% |
| 2002 | 34 | 195 | 348,679 | 382,683 | 17.4% | 91.1% |
| 2003 | 21 | 143 | 74,391 | 97,404 | 14.7% | 76.4% |
| 2004 | 8 | 84 | 32,334 | 46,374 | 9.5% | 69.7% |
| 2005 | 10 | 76 | 97,600 | 107,499 | 7.6% | 90.7% |


## BUSINESS RESTRUCTURING REVIEW

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