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IN THIS ISSUE

EIGHTH CIRCUIT REAFFIRMS LEGITIMACY OF DERIVATIVE STANDING

Mark G. Douglas

A bankruptcy trustee or chapter 11 debtor-in-possession ("DIP") is entrusted in the first instance with prosecuting avoidance claims and other causes of action that are part of a debtor's estate when it files for bankruptcy protection. However, in some cases, a trustee or DIP is either unwilling or unable (due, for example, to a lack of funds) to pursue such actions. Although the Bankruptcy Code does not unambiguously create a mechanism for conferring "standing" to prosecute estate claims on someone other than a trustee or DIP, the majority of courts recognize the concept of "derivative standing." The Eighth Circuit Court of Appeals recently had an opportunity to reconsider the legitimacy of derivative standing, but under circumstances that it had never previously encountered. In *In re Racing Services, Inc.*, the court of appeals ruled that derivative standing may be appropriate if a trustee or DIP consents to, or does not oppose, the prosecution of estate claims by a creditor or committee, and the doctrine is not limited to situations involving a trustee's inability or unwillingness to prosecute such claims.

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, various provisions of the Bankruptcy Code confer standing on various entities (*e.g.*, the debtor, a bankruptcy trustee, creditors, equity interest holders, committees, or indenture trustees) to, among other things, participate generally in a bankruptcy case or commence litigation involving causes of action or claims that either belonged to the debtor prior to filing for bankruptcy or are created by the Bankruptcy Code.

The right to participate in a chapter 11 case is more explicit. Section 1109 of the Bankruptcy Code provides that any "party in interest," including the debtor, the trustee, a committee of creditors or equity interest holders, a creditor, or an indenture trustee, "may appear and may be heard on any issue" in a chapter 11 "case." This general right to participate, however, does not confer standing upon every party in interest to engage in litigation expressly contemplated by other provisions of the statute, such as lien and transfer avoidance. Many of these provisions deal with claims or causes of action belonging to the debtor prior to filing for bankruptcy, which become part of its bankruptcy estate on the petition date. Standing to prosecute estate claims is expressly given by statute to a bankruptcy trustee (or DIP, by operation of section 1107(a) of the Bankruptcy Code).

Racing Services is consistent with the approach adopted by the majority of courts on the issue of derivative standing. Under this approach, a stakeholder other than a DIP or trustee is permitted under certain circumstances to prosecute claims on behalf of the bankruptcy estate, particularly where the estate lacks sufficient unencumbered cash to fund litigation of colorable claims.

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 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 later refined the doctrine of "derivative standing" 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. In 2007, the Second Circuit reaffirmed the vitality of the doctrine of derivative standing in *Official Comm. of Unsecured Creditors v. Halifax Fund, L.P. (In re Applied Theory Corp.)*, where it ruled that, without bankruptcy court approval under the doctrine, a creditors' committee does not have standing to commence litigation seeking the equitable subordination of a claim. The Second Circuit's approach represents the majority view. The Eighth Circuit had an opportunity to reexamine derivative standing under circumstances that presented a matter of first impression in *Racing Services*.

RACING SERVICES

Racing Services, Inc. ("RS"), operated a horse-race wagering service business before filing for chapter 11 protection on February 3, 2004, in Delaware. The chapter 11 case was converted to a chapter 7 liquidation shortly after venue of the case was transferred to North Dakota. PW Enterprises, Inc. ("PW"), was the company's largest nongovernmental unsecured creditor, asserting a claim of more than $2 million. The State of North Dakota and affiliated state entities (collectively, "North Dakota") held a $6 million priority tax claim against RS.

Shortly before the statute of limitations on estate avoidance actions expired, PW asked the chapter 7 trustee to commence litigation against North Dakota seeking to avoid as preferential and/or fraudulent certain transfers made to North Dakota by RS prior to filing for bankruptcy that were allegedly improperly classified as "taxes." The trustee declined to bring suit, whereupon PW filed a complaint seeking avoidance of the transfers without having obtained bankruptcy court authority to do so. Two months afterward, PW petitioned the bankruptcy court for an order authorizing it to prosecute the claims. Only North Dakota opposed the motion. The trustee filed a statement indicating that he did not oppose conferring derivative standing upon PW, provided any order granting standing made it clear that the claims and any proceeds of the litigation belonged to the estate.

The bankruptcy court denied PW's motion, concluding that PW failed to show that the trustee abused his discretion or acted unjustifiably in failing to pursue the avoidance claims. The court did not address PW's argument that a creditor may proceed derivatively if the trustee either consents or offers no opposition. A bankruptcy appellate panel affirmed the bankruptcy court on appeal, ruling that the court properly denied PW's request for derivative standing because PW did not seek court authority prior to filing the avoidance complaint. It too declined to address PW's consent/nonopposition argument. PW appealed to the Eighth Circuit.

THE EIGHTH CIRCUIT'S RULING

The court of appeals reversed. It acknowledged that its 1996 ruling in *In re Lauer* had created uncertainty and conflicting views among lower courts in the circuit on the availability of derivative standing. In *Lauer*, the Eighth Circuit affirmed denial of standing to creditors seeking to prosecute avoidance actions because they failed to allege that the trustee was "unable or unwilling" to pursue the claims on behalf of the estate, stating that "[a]bsent evidence that the trustee cannot be relied upon to assert [avoidance claims], claims to avoid preferential transfers may not be brought by creditors." Courts applying *Lauer*, however, have disagreed as to what constitutes inability or unwillingness on the part of a bankruptcy trustee or chapter 11 debtor-in-possession because *Lauer* did not detail what showing is required to establish these pre-conditions to derivative standing.

Emphasizing that, if conferred routinely, derivative standing "could usurp the central role" played by a trustee or debtor-in-possession as a representative of the estate, the Eighth Circuit ruled that any creditor seeking such standing must establish that: (i) it petitioned the trustee to prosecute the claims and the trustee refused; (ii) the claims are colorable; (iii) it sought court permission to prosecute the claims; and (iv) the trustee's refusal to prosecute the claims was unjustifiable. A claim is colorable, the court explained, if it would survive a motion to dismiss. At a minimum, the Eighth Circuit noted, the creditor must provide the court with specific reasons why it believes the trustee's refusal to prosecute is unreasonable. According to the court, although the particular circumstances of the case will dictate whether any refusal is unreasonable, the "universe of circumstances" is "somewhat limited," and the bankruptcy court must weigh the costs that would be incurred in prosecuting claims against any anticipated benefit:

> At one end of the spectrum, a trustee almost certainly abuses his discretion by refusing to bring a creditor's claim that, if successful, would clearly benefit the estate. At the other end, a trustee certainly does not abuse his discretion by refusing to bring a claim that would yield insignificant benefits to the estate. A more difficult situation, however, is when the creditor establishes that its claims, if successful, would offer more than marginal benefits to the estate but not necessarily a windfall. . . . In short, we trust that bankruptcy judges will, in the first instance, refine the contours of when derivative standing is appropriate.
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> At bottom, the determination of whether the trustee unjustifiably refuses to bring a creditor's proposed claims will require bankruptcy courts to perform a cost-benefit analysis. . . . While by no means exhaustive, among the factors the court should consider in conducting this analysis are: (1) "[the] probabilities of legal success and financial recovery in event of success"; (2) the creditor's proposed fee arrangement; and (3) "the anticipated delay and expense to the bankruptcy estate that the initiation and continuation of litigation will likely produce." . . . We do not suggest, however, that the bankruptcy court "undertake a mini-trial" in evaluating a creditor's request for derivative standing. . . . But the bankruptcy court must support its decision to grant or deny standing with a written or oral explanation that reflects it conducted the appropriate cost-benefit analysis.

Having articulated the general rule on derivative standing, the Eighth Circuit proceeded to address a matter of first impression before it — namely, the propriety of derivative standing in cases where a bankruptcy trustee or DIP consents to, or does not oppose, the prosecution of estate claims by a creditor or committee. The court adopted the approach articulated by the Second Circuit on this issue in *Commodore*. It ruled that derivative standing may be conferred upon a creditor in cases where the trustee consents and the bankruptcy court finds that prosecuting the claims is: (i) in the best interest of the estate, and (ii) "necessary and beneficial to the fair and efficient resolution of the bankruptcy proceedings." The court emphasized, however, that bankruptcy courts should not "passively view the trustee's consent as a proxy that a proposed derivative action is 'necessary and beneficial.'" A bankruptcy court, the Eighth Circuit cautioned, has an obligation to scrutinize carefully the predicates for derivative standing in cases involving both a trustee's consent or unreasonable refusal.

Finally, the Eighth Circuit faulted the bankruptcy appellate panel for its apparent imposition of a per se rule barring a creditor or committee from commencing litigation on behalf of the estate unless it first obtains court permission. Such a blanket rule against retroactive approval, the court of appeals emphasized, could result in "needless dismissals and refilings" or forfeiture of meritorious derivative claims. Provided the standard for derivative standing has been met, the court of appeals remarked, "bankruptcy courts may retroactively grant a creditor derivative standing."

OUTLOOK

Racing Services is consistent with the approach adopted by the majority of courts on the issue of derivative standing. Under this approach, a stakeholder other than a DIP or trustee is permitted under certain circumstances to prosecute claims on behalf of the bankruptcy estate, particularly where the estate lacks sufficient unencumbered cash to fund litigation of colorable claims. As part of its broad equitable powers, the bankruptcy court acts as the gatekeeper for derivative standing, and its discretion in exercising those powers is considerable.

Still, some courts reject derivative standing as illegitimate, based upon the Bankruptcy Code's express reference to a "trustee" (and by inclusion, a debtor-in-possession) in specifying who may prosecute avoidance actions belonging to the estate. The most notable adherent to this view (albeit temporarily) was the Third Circuit Court of Appeals, which ruled in 2002 in *Official Committee of Unsecured Creditors of Cybergenics Corp. v. Chinery* (*In re Cybergenics Corp.*) that, based upon the express language of section 544(b) of the Bankruptcy Code and the Supreme Court's 2000 ruling in *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 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, a handful of courts continue to reject derivative standing. In addition, the Fourth Circuit, although it has never decided the issue directly, observed in its 2005 ruling in *Scott v. National Century Fin. Enters., Inc. (In re Baltimore Emergency Servs. II Corp.)* that "[i]t is far from self-evident that the Bankruptcy Code permits creditor derivative standing."

The Second Circuit recently added yet another chapter to the evolution of the doctrine of derivative standing. In *Official Committee of Equity Security Holders of Adelphia Comm. Corp. v. Official Committee of Unsecured Creditors of Adelphia Comm. Corp. (In re Adelphia Comm. Corp.)*, the court of appeals affirmed a district court ruling dismissing an official equity committee's challenge of an order confirming Adelphia's chapter 11 plan. The equity committee challenged the plan confirmation order on the grounds that the bankruptcy court lacked the power to transfer derivative claims that the committee had been authorized to prosecute to a litigation trust established under the plan, the proceeds of which would benefit unsecured creditors. According to the Second Circuit, a court "may withdraw a committee's derivative standing and transfer the management of its claims, even in the absence of that committee's consent, if the court concludes that such a transfer is in the best interests of the bankruptcy estate."

PW Enterprises, Inc. v. North Dakota Racing Commission (In re Racing Services, Inc.), 540 F.3d 892 (8th Cir. 2008).

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

NEWSWORTHY

Corinne Ball (New York) and ***David G. Heiman (Cleveland)*** have been recognized as "Leaders in their Field" in *Chambers Global 2009*.

Jones Day's Business Restructuring & Reorganization Practice was recognized by *Chambers Global 2009* as one of the best in the Restructuring/Insolvency practice area.

Paul D. Leake (New York) moderated a panel discussing "A Year in Review from the Perspective of Judges and Attorneys" at the 7th Annual Advanced Restructuring and Plan of Reorganization Conference in New York on October 21.

Simon Powell (Hong Kong) was recognized by *Chambers Asia* as one of the finest attorneys in the Restructuring/Insolvency practice area for 2009.

Adam Plainer (London), ***Sion Richards (London)***, and ***Michael Rutstein (London)*** were recognized by *Chambers UK* as three of the finest attorneys in the Restructuring/Insolvency practice area for 2009.

An article written by ***Volker Kammel (Frankfurt)*** and ***Alexander Strigin (Frankfurt)*** entitled "Suppliers' Rights in the Insolvency of a German Company" appeared in the November 2008 issue of *The In-House Lawyer*.

Tobias S. Keller (San Francisco) and ***Daniel R. Mitz (Silicon Valley)*** gave a presentation on December 4 entitled "Bankruptcy Issues in Licensing Transactions" at the 20th Annual All Hands Meeting sponsored by Ivy Associates and the Silicon Valley Association of General Counsel in Santa Clara, California.

An article written by ***Daniel P. Winikka (Dallas)*** and ***Debra K. Simpson (Dallas)*** entitled "Will Bankruptcy Courts Limit the Right to Credit Bid?" appeared in the December 2008 volume of the *Norton Journal of Bankruptcy Law and Practice*.

Carl E. Black (Cleveland) participated in a panel discussion entitled "Third Circuit Update" on November 3 at Delaware Views from the Bench and Bar.

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

Official Comm. of Unsecured Creditors v. Halifax Fund, L.P. (In re Applied Theory Corp.), 493 F.3d 82 (2d Cir. 2007).

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

Fogel v. Zell, 221 F.3d 955 (7th Cir. 2000).

Avalanche Mar., Ltd. v. Parekh (In re Parmetex, Inc.), 199 F.3d 1029 (9th Cir. 1999).

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

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

Nagle v. Lauer (In re Lauer), 98 F.3d 378 (8th Cir. 1996).

Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A., 530 U.S. 1 (2000).

Scott v. National Century Fin. Enters., Inc. (In re Baltimore Emergency Servs. II Corp.), 432 F.3d 557 (4th Cir. 2005).

Official Committee of Equity Security Holders of Adelphia Comm. Corp. v. Official Committee of Unsecured Creditors of Adelphia Comm. Corp. (In re Adelphia Comm. Corp.), 544 F.3d 420 (2d Cir. 2008).

AUSTRALIA ADOPTS THE MODEL LAW ON CROSS-BORDER INSOLVENCY

Steven Fleming

Australia's Federal Parliament recently enacted the Cross-Border Insolvency Act (the "Act"), which elevates to domestic law the United Nations Commission on International Trade Law's Model Law on Cross-Border Insolvency (the "Model Law"), a framework of principles designed to coordinate cross-border bankruptcy and insolvency cases that has now been adopted in one form or another by 15 nations or territories. As explained in this article, the Act will have a major impact on the management and administration of international insolvencies with elements in Australia.

According to the Act's explanatory memorandum, the aim of the Model Law is to address the complexities surrounding cross-border insolvencies, facilitate international trade in goods and services, and integrate national financial systems with international financial systems. Practically speaking, the Act will streamline the role played by Australian courts when a company with assets or debts in Australia and abroad becomes insolvent. It is procedural in nature and is not intended to alter Australia's substantive insolvency laws.

Unlike many other international treaties, such as the New York Convention on International Commercial Arbitration, the Model Law does not depend upon reciprocity to operate — so creditors and representatives of those creditors (for example, liquidators) who reside in a country that has not enacted the Model Law are not prevented by that fact from utilizing the benefit of the Act, even though creditors resident in Australia cannot expect the same treatment in the other country. The Model Law has not been widely embraced in the Asia-Pacific region; only the United States (which enacted chapter 15 of the Bankruptcy Code in 2005), South Korea, Japan, and New Zealand have adopted it.

Crucial to the objective of streamlining the way international insolvencies are conducted will be the determination by the court of the location (and, therefore, the jurisdiction) most relevant to the insolvency. This determination requires the court to decide whether foreign proceedings are "foreign main proceedings" or "foreign non-main proceedings," which in turn entails a determination as to the "centre of main interest" ("COMI") of the insolvency.

The Act provides little guidance as to how the court should determine COMI, other than to create a rebuttable presumption that the location of the registered office of the company will be its COMI. The Honourable J.J. Spigelman, New South Wales Chief Justice, recently confirmed that Australian courts will seek guidance from the way overseas courts have interpreted this concept, including the reasoning articulated by U.S. bankruptcy judge Burton R. Lifland in *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd. (In Provisional Liquidation)*, 374 B.R. 122 (Bankr. S.D.N.Y. 2007). In that case, the court held that determining COMI was a matter for the court rather than the parties. (The interested parties had consented to a COMI in the Cayman Islands, which was also where the registered office was located, even though the debtor hedge funds had no meaningful contacts with the Caymans.) The court found that the U.S., not the Cayman Islands, was the COMI of the insolvent company for reasons largely to do with the management of Bear Stearns. Based on that determination, the U.S. bankruptcy court denied recognition of the Cayman Islands liquidation proceedings under chapter 15 of the U.S. Bankruptcy Code as either main or nonmain foreign proceedings. A federal district court upheld that ruling on appeal in May 2008.

IMPACT OF THE ACT IN AUSTRALIA

Subject to certain exemptions (pertaining principally to insurance companies and "deposit-taking" institutions (*i.e..,* banks)), if a foreign proceeding is recognized as being the foreign main proceeding upon the application of the foreign creditor (or its representative), it will be mandatory for the Australian courts to:

- Stay any actions in Australia against the debtor;
- Stay the execution against any assets of the debtor located in Australia;

- Suspend the right of the debtor to transfer, encumber, or otherwise dispose of its assets; and

- Permit proceedings to be commenced (or to continue) in Australia only if the debtor has assets in Australia and the proceedings are restricted to those assets.

If the COMI of the debtor is Australia, the Act has several important implications for foreign creditors of the debtor, including:

- Foreign creditors will be entitled to commence and participate in Australian proceedings;

- Unsecured foreign creditors have the same rights as unsecured domestic creditors and can therefore expect the same entitlements from the distribution of the proceeds from a liquidation of the debtor; and

- The court has broad powers to stay proceedings or the enforcement of proceedings if to do so is necessary to protect the assets of the debtor or the interests of creditors.

Regardless of the COMI, the Act requires Australian courts to cooperate to "the maximum extent possible" with foreign courts and foreign representatives (*i.e.,* insolvency practitioners and agents of those practitioners). The type of cooperation that foreign creditors can expect to receive includes:

- From the time that an application is made to recognize foreign proceedings, the court may grant urgent provisional relief to protect assets of the debtor located in Australia, including orders freezing the assets or staying execution against the assets;

- Australian courts will be able to entrust a foreign representative of the creditor with the administration or realization of all or part of the debtor's assets located in Australia and will assist in the coordination of the administration and supervision of the debtor's assets and affairs;

- The court may order the examination of witnesses, the taking of evidence, or the delivery of information concerning the debtor's affairs. Specifically, the court is permitted to communicate directly with the foreign court or representative and communicate information to that foreign court or representative; and

- The coordination of concurrent domestic and foreign proceedings, if those proceedings involve the same debtor.

The enactment of the Model Law in Australia will provide real assistance to foreign creditors with exposure to debtors in Australia. This assistance will probably be most useful to foreign creditors where the COMI of the debtor is in a foreign jurisdiction, but it will also help streamline recovery actions by foreign creditors against debtors whose COMI is Australia.

RECENT DELAWARE RULING A CAUTIONARY TALE FOR FIDUCIARIES STEWARDING BRINK-OF-INSOLVENCY CORPORATIONS

Jennifer J. O'Neil and Mark G. Douglas

The enduring credit and housing crises, extreme market volatility, and the tightening of U.S. purse strings are pushing more and more corporations to the brink of insolvency and beyond. Corporate fiduciaries stewarding any company that is either insolvent or anywhere near the zone of insolvency must be aware that their actions and inactions will be subjected to heightened scrutiny to ensure that they do not run afoul of established fiduciary duties of loyalty and care. The strictures of those duties in a distressed scenario were the subject of a ruling recently handed down by a Delaware bankruptcy court in *In re Bridgeport Holdings, Inc.*, where the court considered a motion to dismiss litigation commenced by a liquidating trust against a chapter 11 debtor's former directors, officers, and restructuring professional asserting claims for breach of fiduciary duty and lack of good faith. The bankruptcy court ruled that the complaint alleged sufficient facts to support a claim of breach of duty of loyalty by detailing the directors' conscious disregard of their duties to the corporation by abdicating all responsibility to the hired restructuring professional and then failing to adequately monitor the restructuring professional's execution of his own sell strategy, which resulted in an abbreviated and uninformed sale process and ultimate sale of assets for grossly inadequate consideration.

FIDUCIARY DUTIES OF CARE, LOYALTY, AND GOOD FAITH

The officers and directors of a corporation owe fiduciary duties of care and loyalty to the corporation. The "duty of care" is defined as the fiduciary duty to exercise the care of ordinarily prudent and diligent persons in like positions under similar circumstances, requiring that a board's decisions be informed and carefully considered. The duty of loyalty requires a board to act to promote the interests of the corporation without regard for personal gain. In the context of a solvent corporation, these duties of care and loyalty are owed to the corporation's shareholders and are enforceable by the corporation, either directly or derivatively through the shareholders. When a corporation is insolvent, or is nearing the zone of insolvency, the duties of care and loyalty are owed to the entire corporate enterprise, including creditors, albeit derivatively.

Directors and officers can avail themselves of the "business judgment rule" in defending against such claims. The business judgment rule is a legal presumption that a board's actions are made on an informed basis, in good faith, and in the best interests of the corporation. This presumption, however, is an imperfect shield. It can be overcome by a showing that a board failed to act with due care, in good faith, or in the best interests of the corporation, after which a challenged transaction is closely scrutinized and the board bears the burden of demonstrating its "entire fairness."

Adding to the Third Circuit's robust jurisprudence on a board's fiduciary duties of care and loyalty, Judge Walsh's ruling in *Bridgeport* is a cautionary tale regarding the heightened scrutiny leveled at corporate fiduciaries of companies skirting the zone of insolvency.

In discharging their duty of care, directors and officers are entitled to rely in good faith on reports and advice provided by officers of the corporation or outside experts. Many courts have also imputed a good-faith component to the duty of loyalty. While rulings have been murky in defining the contours of the interaction between the duty of loyalty and the attendant requirement of good faith, the Delaware Supreme Court in *Stone v. Ritter* clarified the issue in 2006 by holding that "the fiduciary duty of loyalty is not limited to cases involving a financial or other cognizable fiduciary conflict of interest." The duty of loyalty may also be breached in cases where the fiduciary fails to act in good faith. According to the court, "[w]here directors fail to act in the face of a known duty to act, thereby demonstrating a conscious disregard for their responsibilities, they breach their duty of loyalty by failing to discharge that fiduciary obligation in good faith." The good-faith component of the duty of loyalty figured prominently in the bankruptcy court's ruling in *Bridgeport Holdings*.

BRIDGEPORT HOLDINGS

Bridgeport Holdings, Inc. ("Bridgeport"), a Norwalk, Connecticut-based PC and Apple Computer-product catalog company that traded under the name "Micro Warehouse," filed for chapter 11 protection on September 10, 2003, in Delaware.

One day prior to filing for bankruptcy, Bridgeport consummated a sale of substantially all of its U.S. assets, including the bulk of its inventory and nearly all of its intellectual property, to CDW Corporation ("CDW") for $28 million. CDW's own discounted cash flow valuation of the assets, however, concluded that the present value of Bridgeport's U.S. operations was $126 million — more than four times the purchase price.

Falling victim to the bursting of the dot-com bubble and the decrease in consumer demand after the September 11, 2001, terrorist attacks, Bridgeport was forced to renegotiate its credit facility in December 2000 and then again after defaulting on various loan covenants in January 2002. In early June 2003, the company's secured lenders advised Bridgeport to hire a restructuring advisor. Bridgeport retained a restructuring advisor in August 2003. It also appointed a restructuring professional as chief operating officer (the "CRO"). Within 72 hours of his appointment, the CRO decided to sell Bridgeport's assets to CDW. The CRO did not commence a competitive bidding process for the assets, nor did he hire investment bankers to explore other opportunities. Neither the CRO nor Bridgeport's other directors made any substantial effort during the abbreviated due diligence and negotiation period to identify or contact any other potential buyers. In fact, Bridgeport entered into an agreement to negotiate exclusively with CDW and rebuffed any requests for due diligence materials from other potential acquirers thereafter.

The bankruptcy court confirmed Bridgeport's liquidating chapter 11 plan in 2004. Under the plan, a liquidating trustee succeeded to all estate causes of action. The liquidating trustee sued CDW in 2005, seeking to avoid the pre-bankruptcy sale transaction as a fraudulent conveyance. The litigation was ultimately settled after CDW agreed to pay $25 million to the liquidating trust. The trustee then sued Bridgeport's officers and directors, alleging that they breached their fiduciary duties in connection with the sale transaction by wholly abdicating their decision-making authority to the CRO, failing to supervise him adequately in his restructuring efforts, and passively acquiescing in the CRO's decision to sell Bridgeport's assets on the eve of bankruptcy for a grossly inadequate price. The defendants moved to dismiss, claiming, among other things, that the complaint failed to state a claim for breach of the duty of loyalty.

Bankruptcy judge Peter J. Walsh denied the motion. He clarified that the fiduciary duty of loyalty encapsulates the important component of good faith and that a fiduciary acts in bad faith, breaching the duty of loyalty, when he takes or fails to take any action that demonstrates a faithlessness or lack of true devotion to the interests of the corporation and its shareholders. Applying this standard, he concluded that the complaint adequately stated a claim for breach of the duty of loyalty.

OUTLOOK

Adding to the Third Circuit's robust jurisprudence on a board's fiduciary duties of care and loyalty, Judge Walsh's ruling in *Bridgeport* is a cautionary tale regarding the heightened scrutiny leveled at corporate fiduciaries of companies skirting the zone of insolvency. The decision, which is fairly detailed in parsing the various forms of fiduciary misconduct, provides a kind of road map for corporate fiduciaries intent upon limiting their potential exposure in distressed situations. Among other things, fiduciaries should: (i) recognize that all actions are likely to be examined and second-guessed; (ii) ensure that all actions are taken with the goal of maximizing the value of the corporation; (iii) avoid interested transactions, preferential treatment of some stakeholders at the expense of others, uninformed approval of transactions, or other actions that could result in forfeiture of the protection of the business judgment rule; (iv) ensure that the board of directors meets regularly and is provided with timely and adequate information concerning any proposed transactions; (v) maintain a constant dialogue with the company's advisors in connection with any proposed transaction; (vi) implement and adhere to a deliberate (and meticulously documented) decision-making process; (vii) fully disclose all facts material to the decision-making process; (viii) in connection with potential transactions, retain investment bankers and/or other financial professionals, obtain fairness opinions, and solicit competing offers; and (ix) remain well informed and proactive in any restructuring process, recognizing that any abdication of duties without adequate oversight can lead to claims of an absence of good faith.

In re Bridgeport Holdings, Inc., 388 B.R. 548 (Bankr. D. Del. 2008).

Stone v. Ritter, 911 A.2d 362 (Del. 2006).

LENDER ENTITLED TO GRID AS WELL AS DEFAULT INTEREST AS PART OF ALLOWED SECURED CLAIM WHERE DEBTOR PROVIDED INACCURATE FINANCIAL INFORMATION

Mark G. Douglas

During the six years since the Sarbanes-Oxley reforms were implemented in 2002, the heightened accountability of corporate fiduciaries has made restatements of public-company SEC filings and indictments of corporate fiduciaries routine fodder for business and financial headlines. The financially devastating and sometimes criminal consequences of such revisionism for the companies and their fiduciaries have been highly visible. Less attention, however, has been devoted to the impact that forensic accounting may have on the company's obligations to its creditors. A New York district court recently had an opportunity to examine this issue. In *Bank of Nova Scotia v. Adelphia Communications Corp. (In re Adelphia Communications Corp.)*, the district court reversed a bankruptcy court order excluding from the allowed amount of a secured claim "grid" interest to which the lenders would have been entitled under their loan agreement had the debtors provided them with accurate financial information.

DETERMINING THE ALLOWED AMOUNT OF SECURED CLAIMS IN BANKRUPTCY

Debts and other obligations, secured or otherwise, are generally classified as "claims" in the Bankruptcy Code. This means that a secured obligation may give rise to both a secured claim, to the extent of the value of the property securing it, and an unsecured claim, to the extent of any deficiency in the collateral value. In accordance with section 506(a) of the Bankruptcy Code, the value of the debtor's interest in assets securing a debt determines whether the debt gives rise to an allowed secured claim, an allowed unsecured claim, or both.

If a creditor turns out to be "oversecured" because its collateral value exceeds the face amount of the underlying debt (including interest, fees, and other charges), section 506(b) provides that it may recover interest and related costs as part of its allowed secured claim:

> To the extent that an allowed secured claim is secured by property the value of which, after any recovery under subsection (c) of this section, is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement or State statute under which such claim arose.

Although this provision expressly refers to "interest on such claim . . . provided for under the [underlying] agreement or State statute," it does not specify whether any distinction should be made between ordinary and default-rate interest. Most courts, consistent with the Supreme Court's 1989 ruling in *United States v. Ron Pair Enterprises, Inc.*, have allowed (or at least recognized a presumption of allowability for) default interest provided in a contract as part of a secured creditor's claim, provided the rate is not unenforceable under applicable nonbankruptcy law. Whether an allowed secured claim should include both default interest and pre-default interest that would have been payable to a secured lender had the debtor accurately reported its financial condition was the subject of the district court's ruling in *Adelphia*.

ADELPHIA

Before filing for chapter 11 protection in New York in June 2002, Adelphia Communications Corporation and its affiliates (collectively, "Adelphia"), once the nation's fifth-largest cable services company with 5.7 million subscribers in more than 31 states, entered into credit agreements with certain lenders. Under the credit agreements, Adelphia was obligated to pay nondefault, or "grid," interest that varied according to the company's financial performance (as specified in a grid included within agreements). The grid interest, which increased with Adelphia's leverage ratio, was determined in accordance with financial statements delivered periodically by Adelphia to the lenders' administrative agents. Delivery of inaccurate financial information would constitute a breach of Adelphia's covenant under the credit agreements to provide an accurate assessment of its financial health and would thus trigger an event of default. In the event of a default, the agreements provided that interest would accrue on Adelphia's outstanding obligations at the specified default rate.

In their proofs of claim against Adelphia, the agent banks asserted fully secured claims based upon the credit agreements. After two of Adelphia's officers were later convicted of various crimes, including bank fraud, the agent banks amended their claims to include retroactive payment of the additional grid interest to which the lenders would have been entitled (approximately $187 million) had they been provided with accurate financial-performance information. Adelphia objected to the amended claims, contending that the sole remedy under the credit agreements in the event of a covenant violation was payment of default interest.

Adelphia is undoubtedly a positive development for any lender whose loan agreement incorporates interest calculated according to a grid determined by leverage or other financial-performance indicia, but the fact that it came only after reversal on appeal should be a clear warning to lenders.

The bankruptcy court agreed with Adelphia, ruling that the credit agreements did not provide for the payment of retroactive grid interest as a consequence of the company's delivery of false financial statements to the lenders. According to bankruptcy judge Robert E. Gerber, the lenders' exclusive remedy under the credit agreements was default interest. He also ruled that Adelphia was not required to establish a reserve for the payment of grid interest claims in its chapter 11 plan.

The ruling was important because the lenders, in connection with debtor-in-possession financing provided to Adelphia, had agreed to waive any claim for default interest arising from pre-petition defaults. Without such a waiver, the amount of default interest would have significantly exceeded the amount of the lenders' claims for additional grid interest. Judge Gerber also rejected the lenders' claims for additional grid interest based on tort theories of fraud or misrepresentation. According to Judge Gerber, although tort claims could have given rise to an unsecured liability, they could not be a component of the lenders' allowed secured claims under section 506(b). He also held that the tort claims at issue did not give rise to damages for the lenders' expectancy for additional grid interest, but only compensatory damages for the lenders' actual out-of-pocket loss, which Judge Gerber equated to the outstanding principal amount. Because the lenders' claims were to be paid in full under Adelphia's chapter 11 plan, the judge reasoned, they would not suffer any compensable damages. Some of the agent banks appealed the ruling to the district court.

THE DISTRICT COURT'S RULING

The United States District Court for the Southern District of New York reversed. District judge John G. Koeltl embarked upon his analysis by noting that there was no dispute that Adelphia was obligated under the credit agreements to provide accurate financial information and that grid interest was calculated on the basis of the information. Addressing the lenders' remedies for Adelphia's failure to comply, Judge Koeltl concluded that although the credit agreements provided for payment of default interest upon the occurrence of a default, the agreements did not specifically express an intention for default interest to be the exclusive remedy. Instead, Judge Koeltl determined, the lenders were entitled to recover standard expectancy damages arising from Adelphia's breach of the credit agreements. The credit agreements, he explained, actually indicated that the lenders had remedies other than default interest. For example, the lenders expressly retained the right to pursue "damages, other monetary relief, injunctive relief or any other remedy at law or equity against the [b]orrower . . . by reason of fraud, [or] knowing or willful breach of representations and warranties." The credit agreements also included "no-waiver" clauses, which precluded any waiver of the lenders' right to collect nondefault interest at the appropriate rate, even though they exercised their right to collect default interest.

Based upon his analysis, district judge Koeltl reversed the bankruptcy court's determination that retroactive grid interest was not a component of the lenders' allowed secured claim under section 506(b). However, the judge remanded the case to the bankruptcy court to consider whether the lenders had waived any claim to grid interest in connection with the court's approval of debtor-in-possession financing for Adelphia.

OUTLOOK

Adelphia is undoubtedly a positive development for any lender whose loan agreement incorporates interest calculated according to a grid determined by leverage or other financial-performance indicia, but the fact that it came only after reversal on appeal should be a clear warning to lenders. According to Judge Koeltl's approach, an oversecured creditor's allowed secured claim should include any interest shortfall resulting from financial-reporting mistakes or misrepresentations that are later discovered, provided the loan agreement does not limit the lender's remedy to default interest payable upon default. The real lesson of *Adelphia* lurks in this proviso. A lender intent upon preserving the integrity of its loan must ensure that loan documentation expressly and unambiguously spells out the lender's entire panoply of remedies.

Bank of Nova Scotia v. Adelphia Communications Corp. (In re Adelphia Communications Corp.), 2008 WL 3919198 (S.D.N.Y. Aug. 22, 2008).

United States v. Ron Pair Enterprises, Inc., 489 U.S. 235 (1989).

AMENDMENTS PROPOSED TO RULES OF BANKRUPTCY PROCEDURE

The Judicial Conference of the United States Committee on Rules of Practice and Procedure recently released for public comment a preliminary draft of the latest proposed amendments to the Federal Rules of Bankruptcy Procedure. Many of the proposed amendments would implement Chapter 15, which was added to the Bankruptcy Code in 2005 as part of the Bankruptcy Abuse Prevention and Consumer Protection Act. Chapter 15 establishes a framework of rules governing cross-border bankruptcy and insolvency cases patterned on the Model Law on Cross-Border Insolvency formulated by the United Nations Commission on International Trade Law in 1997.

At this juncture, the rule changes have been proposed by the various advisory committees to the Judicial Conference's Rules Committee. The Rules Committee has not yet approved the proposed amendments, other than authorizing their publication for comment. After considering the public comments, the Advisory Committee on Bankruptcy Rules will determine whether to submit the proposed amendments to the Rules Committee for approval. Any proposals approved by the Rules Committee will then go to the Judicial Conference, and afterward to the U.S. Supreme Court, for approval. Comments on the draft proposed amendments are due no later than February 17, 2009. Approved amendments would become effective at the earliest on December 1, 2010.

SOME OF THE PROPOSED RULE AMENDMENTS

Proposed new Rule 1004.2 would require an entity filing a chapter 15 petition to disclose the country of the foreign debtor's main interests ("COMI") and to list each country in which a case involving the debtor is pending. The new rule would also establish a deadline for challenging the COMI asserted in the petition.

Rule 1014 would be amended to apply the rule's venue provisions to chapter 15 cases. The venue provisions authorize the court to determine where cases should proceed when multiple petitions involving the same debtor are pending.

Rule 1015 would be amended to include chapter 15 cases among those subject to the rule that authorizes the court to order the consolidation or joint administration of cases.

Rule 1018, which governs intervention and the right to be heard, would be amended to reflect the enactment of chapter 15 in 2005. The amendments would also clarify that the rule applies to contests over involuntary petitions but does not apply to matters that are merely related to a contested involuntary petition.

Rule 5009, which governs the closing of chapter 7, 12, 13, and 15 cases, would be amended to require, among other things, that a foreign representative in a chapter 15 case must file and give notice of the filing of a final report in the case.

Proposed new Rule 5012 would establish a procedure in chapter 15 cases for obtaining court approval of an agreement regarding communications in, and the coordination of proceedings with, cases involving the debtor pending in other nations.

The proposed rules, reports from the advisory committees, and a link to submit comments electronically are posted at http://www.uscourts.gov/rules/newrules1.htm on the federal judiciary web site.

RECLAMATION RIGHTS NOT EXTINGUISHED WHEN GOODS ARE SOLD TO SATISFY DIP LENDER'S CLAIMS

Michelle M. Beck and Mark G. Douglas

The Bankruptcy Code generally preserves the rights of vendors under applicable nonbankruptcy law to reclaim goods sold to an insolvent buyer, providing in most cases that a reclaiming seller that makes a timely demand is entitled either to the goods or equivalent compensation such as an administrative claim. Even though the statute was amended in 2005 to clarify that reclamation rights are subordinate to the rights of any creditor asserting a security interest in the goods, a number of unsettled issues endure concerning the impact of a bankruptcy filing on reclamation rights. One such issue — whether sale of the goods during a chapter 11 case to satisfy a DIP lender's claims effectively extinguishes the seller's reclamation right — was the subject of a ruling recently handed down by the Sixth Circuit Court of Appeals in *Phar-Mor, Inc. v. McKesson Corp*.

RECLAMATION RIGHTS

Under section 2-702 of the Uniform Commercial Code ("UCC") and common law, a seller of goods generally has the right to reclaim goods sold to an insolvent buyer by making a reclamation demand within a prescribed period of time. The goods must be in the buyer's possession at the time reclamation is sought, and they must be identifiable. In addition, a seller's reclamation rights are subject to the rights of any ordinary-course buyer or good-faith purchaser of the goods.

Section 546(c) of the Bankruptcy Code preserves and even expands a seller's reclamation rights under nonbankruptcy law to a limited extent. It provides that a bankruptcy trustee's avoidance powers are subject to any right the seller has to reclaim goods sold to an insolvent debtor in the ordinary course of the seller's business if the debtor received such goods within 45 days of filing for bankruptcy. To activate its reclamation right, the seller must make written demand for reclamation of the goods not later than 20 days after the date of commencement of the bankruptcy case.

If a seller fails to provide notice within the 20-day period prescribed in section 546(c), it may nevertheless assert a right to an administrative claim for the value of the goods under section 503(b)(9) of the Bankruptcy Code. Enacted in 2005 as part of the Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA"), section 503(b)(9) confers administrative-expense priority on the claims of vendors for the value of the goods sold to the debtor in the ordinary course of business during the 20 days prior to the commencement of a bankruptcy case. Section 546(c) does not preclude a seller's right to pursue other nonbankruptcy remedies, such as the right to stop goods in transit, although such rights may be abrogated by operation of the automatic stay or superseded by the trustee's avoidance powers.

For many years, a dispute has existed in the courts concerning the enforceability of reclamation rights with respect to goods subject to a blanket security interest. At the heart of the dispute is whether a creditor asserting a blanket lien qualifies as a "good-faith purchaser" under applicable bankruptcy law, even though the UCC incorporates within the definition of "good-faith purchaser" a creditor holding a security interest or lien. Some courts have taken the position that reclamation rights are effectively extinguished by the superior interest of a secured creditor in the goods. According to this view, if a seller's reclamation right is superseded under applicable nonbankruptcy law by the superior rights of a secured creditor, the seller has no rights under section 546(c) and holds merely an unsecured claim for the value of the goods. This approach is sometimes referred to as the "prior lien defense." Other courts, representing the minority view, have concluded that such rights survive regardless of a secured creditor's superior right, and the seller should be compensated in the form of an administrative claim in the amount of the value of the goods or a lien on other assets of the bankruptcy estate.

In an attempt to resolve this dispute, section 546(c) was amended in 2005 as part of BAPCPA to provide that a seller's right of reclamation is "subject to the prior rights of a holder of a security interest in such goods or the proceeds thereof." Post-2005 court rulings, however, indicate that the meaning of "subject to" is unclear.

Amended section 546(c) also: (i) expanded the reclamation look-back period before a bankruptcy filing, during which goods may be subject to reclamation, from 10 days to 45 days; and (ii) expanded the grace period, which gives a seller additional time after a bankruptcy filing during which to file its notice of reclamation, from 10 days to 20 days. The seller is also given up to 20 days after the bankruptcy filing to transmit its reclamation demand if the 45-day reclamation-demand period expires after the bankruptcy filing.

Section 546(c) was also amended in 2005 to remove the reference to the "statutory or common law right" of the seller. Lawmakers did not explain the reason for the deletion in BAPCPA's legislative history. Some commentators have suggested that deletion of the reference to state law in amended section 546(c) means that the provision no longer incorporates the state-law right of reclamation and instead creates an entirely new reclamation right under federal bankruptcy law. Bankruptcy judge Burton R. Lifland rejected this interpretation in *In re Dana Corp.*, observing that "[i]f amended §546(c) created an independent federal reclamation right that replaced state law, then in bankruptcy a reclaiming seller would conceivably have broad rights superior to those of buyers in the ordinary course of business, lien creditors or good-faith purchasers other than a holder of a prior security interest." Congress, Judge Lifland remarked, "could not have intended to permit reclamation of goods that have been sold to consumers or other good-faith purchasers."

Finally, section 546(c) was altered in 2005 to remove language providing that, if the bankruptcy court denied reclamation, it was obligated to compensate the seller by means of an administrative-priority claim or lien. Instead, section 546(c) now states that any seller failing to provide timely notice of its reclamation claim "still may assert the rights contained in section 503(b)(9)," which, as noted, confers administrative status on claims for the value of goods provided to the debtor within 20 days of a bankruptcy filing.

Amendment of section 546(c) in 2005 did not end the debate on reclamation rights. Another issue that continues to cause problems, for example, concerns the impact on a seller's reclamation right if the goods in question are sold to satisfy a secured creditor's claims, so that such goods are no longer in the buyer's possession or identifiable. The Sixth Circuit recently had an opportunity to address this question in *Phar-Mor*, a pre-BAPCPA case.

PHAR-MOR

Phar-Mor, Inc. ("Phar-Mor"), a chain of discount drugstores based in Youngstown, Ohio, filed for chapter 11 bankruptcy protection in September 2001. Several vendors, including McKesson Corporation ("McKesson"), filed reclamation claims for goods shipped to Phar-Mor immediately before its bankruptcy filing. The bankruptcy court approved Phar-Mor's proposal that each such vendor be granted a priority administrative claim in lieu of returning the goods.

The court subsequently authorized Phar-Mor to incur up to $135 million in DIP financing with super-priority secured and super-priority administrative status. Phar-Mor, however, continued to lose money and eventually conducted a going-out-of-business sale. It was able to repay the $135 million loan from the proceeds but was left with only $30 million toward satisfaction of more than $185 million in general unsecured claims.

Phar-Mor moved to reclassify McKesson's reclamation claim as a general unsecured claim, arguing that the vendor's priority was extinguished when the goods subject to reclamation were sold and the proceeds used to satisfy the claims of the DIP lenders. Phar-Mor contended that the DIP lenders, by virtue of the after-acquired property clause in their security agreement, were good-faith purchasers and, because McKesson's reclamation claims were "subject to" the lenders' security interests, McKesson had no right to reclaim the goods. The bankruptcy court denied the motion, holding that even though the reclamation right was rendered "subject to" the DIP lender's super-priority liens, McKesson's properly filed reclamation claim still had administrative-expense priority. Phar-Mor appealed to the Sixth Circuit after the district court upheld that determination on appeal.

THE SIXTH CIRCUIT'S RULING

Phar-Mor fared no better with the court of appeals. Because Phar-Mor filed for bankruptcy prior to 2005, the pre-amendment version of section 546(c), which, as noted, did not make reclamation rights expressly "subject to the prior rights of a holder of a security interest in such goods or the proceeds thereof," governed McKesson's reclamation right. According to the Sixth Circuit, if McKesson had a right under applicable nonbankruptcy law (here, Ohio law) to reclaim the goods and properly asserted that claim, the bankruptcy court was obligated under section 546(c) to grant the request or to grant McKesson either an administrative-expense priority claim or a lien on the proceeds resulting from the use of the goods by the debtor. The court of appeals concluded that the "subject to" caveat in the UCC as enacted in Ohio "does not allow a secured creditor's claim to defeat" a seller's reclamation right.

Disposition of the goods to satisfy the DIP lender's claims, the court emphasized, did not extinguish McKesson's valid reclamation right. Citing to its prior decisions, the Sixth Circuit court noted that "[a] priority in bankruptcy should not depend for its existence upon the contingency of whether specific assets are within the bankrupt's estate" and that "[i]t would certainly be unjust to subject to the payment of the debts of their fraudulent vendee, goods [the vendee] had improperly obtained from [the aggrieved vendors], and which in equity, [the vendors] were entitled to reclaim." The court of appeals was critical of other court rulings (including *Dana*) finding that reclamation rights are extinguished pursuant to the "prior lien defense" upon disposition of the goods to satisfy the secured lender's claims, observing that "[t]hese holdings are not practical and their reasoning is not compelling."

ANALYSIS

Even though the Sixth Circuit was applying the pre-amendment version of section 546(c) in *Phar-Mor*, the ruling indicates that there are enduring disputes concerning reclamation rights in bankruptcy. Given the Sixth Circuit's determination that the rights of a secured creditor with a blanket lien do not extinguish a seller's reclamation right, it is difficult to predict whether the outcome would have been different if the court of appeals were applying the amended version of the statute, which expressly makes reclamation rights subject to the rights of a creditor asserting a pre-existing security interest in the goods and, apparently, limits the availability of administrative claims to claims qualifying for priority under section 503(b)(9).

Reclamation claims under amended section 546(c) have decreased significance because, by virtue of new section 503(b)(9), goods delivered to a debtor in the 20 days prior to a bankruptcy filing will have automatic administrative priority. As such, the utility of reclamation claims relates primarily to goods delivered in the 21 to 45 days prior to the bankruptcy filing. By expanding the reclamation period and adding section 503(b)(9), the 2005 amendments to the Bankruptcy Code may increase the potential for administrative claims, and to the extent that is the case, debtors will require greater financial resources to reorganize successfully.

Phar-Mor, Inc. v. McKesson Corp., 534 F.3d 502 (6th Cir. 2008).

In re Dana Corp., 367 B.R. 409 (Bankr. S.D.N.Y. 2007).

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