THE YEAR IN BANKRUPTCY: 2010

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What should have been the best economic news of 2010 was largely obscured by the deluge of bad news dominating world headlines. The latter included tidings of chronically high unemployment; a continuing malaise in the U.S. housing market; wars in Iraq and Afghanistan; debt crises precipitating the implementation of austerity measures in Britain, Portugal, Italy, Greece, Spain, and Ireland (to name but a few), as well as countless state and local governments in the U.S.; a sharp escalation of food prices worldwide; a deepening U.S. mortgage foreclosure crisis; natural disasters; and the worst environmental disaster in U.S. history.

End of the Great Recession?

Now for the good news. According to the National Bureau of Economic Research, the organization responsible for marking turning points in the U.S. business cycle, the U.S. recession that started in December 2007 ended in June 2009. On January 7, 2010, the Euler Hermes Economic Outlook for Winter 2009/10 similarly reported that the world economy has “staged a technical exit from recession” by piggybacking on the positive performance of the Asian markets.

Pronouncements of the demise of the Great Recession—to the extent that anyone other than economists was paying attention—were greeted with a healthy dose of (well-deserved) skepticism. Abroad, Eurozone countries struggled in 2010 to rein in spending, resulting in the adoption of highly unpopular austerity budgets and yet another round of sovereign bailouts. The

United States' balance sheet fared no better. Year-end official debt figures published by the U.S. Treasury show that the federal government accumulated more new debt—$3.22 trillion—during the tenure of the 111th Congress (which expired at the end of 2010) than it did during the first 100 Congresses combined. That equals $10,429.64 in new debt for each of the 308,745,538 people counted in the U.S. by the 2010 Census. At the end of 2010, the total national debt of $13.86 trillion stood at $44,886.57 for every man, woman, and child in America.

In 2010, more U.S. banks failed than in any other year since 1992, the height of the savings-and-loan crisis. Amid near double-digit unemployment, a struggling economy, and a still-devastated real estate market, the U.S. closed the year with 157 bank failures, up from 140 in 2009. Moreover, the Federal Deposit Insurance Corporation's list of "problem" banks—banks whose weaknesses "threaten their continued financial viability"—stood at 860 as of September 30, the highest since 1993.

Average Americans are not only more debt-ridden, but poorer. U.S. Census Bureau data released in September 2010 showed that poverty among the working-age population of the U.S. had risen to the highest level in almost 50 years at the beginning of 2010. Poverty among those aged 18 to 64 rose by 1.3 percentage points to 12.9 percent—the highest level since the early 1960s, prior to then-president Lyndon Johnson's "War on Poverty." The overall poverty rate rose by 1.1 percentage points to 14.3 percent, the highest since 1994.

More than 14.5 million U.S. workers were out of work at the end of 2010, including 6.4 million who have been jobless for six months or longer, according to data reported by the U.S.

Department of Labor in January 2011. This equates to an unemployment rate of 9.4 percent. Some estimates put the “underemployment” rate, which counts those looking for jobs as well as those who have given up looking, in addition to people who want full-time employment but settle for part-time, at nearly 17 percent.

The number of Americans filing for personal bankruptcy topped 1.5 million in 2010, as high long-term jobless rates, depressed home prices, and soaring medical bills drove more households to seek court protection. This represents a 9 percent increase from 2009 and is the highest level since the Bankruptcy Code was overhauled in 2005, according to the American Bankruptcy Institute, an association of bankruptcy professionals, and the National Bankruptcy Research Center.

Banks took steps to repossess a record 2.87 million U.S. homes in 2010, as the two-year-old mortgage crisis continued to weigh heavily on the economy. According to RealtyTrac, an online marketplace for foreclosure properties, foreclosures hit 2.23 percent of all housing units in the country, or one out of 45, an increase from 2.21 percent in 2009. More than 1 million homes were actually repossessed in 2010.

According to the National Association of Realtors, fewer people bought previously owned U.S. homes in 2010 than in any year since 1997. Sales fell 4.8 percent to 4.91 million units in 2010, the weakest performance in 13 years. Home prices were depressed by a record number of foreclosures and high unemployment, and many potential buyers held off on purchases in 2010, fearful that prices had not yet bottomed out.

Municipal Distress

The financial plight of towns, cities, counties, and other municipalities in the U.S. remained in sharp focus in 2010. On December 10, the U.S. Congressional Budget Office ("CBO") released an economic and budget issue brief on the fiscal stress that local governments are facing and the options they have, including defaulting on their debt or filing for chapter 9 bankruptcy protection. According to the report, weak economic conditions can lead to fiscal stress—the "gap between projected revenues and expenditures"—for local governments "by reducing their tax revenues, lessening the state aid they receive, increasing the demand for some services and triggering investment losses."

Unlike state governments, the report states, local governments facing "significant fiscal stress may default on their debt or file for bankruptcy," but these options are rarely used. Only 54 out of 18,400 municipal bond issuers defaulted during the period from 1970 to 2009, and only six of the defaulting entities were counties, cities, or towns—the remaining defaulting entities were special districts or government entities. Although investors generally recover most or all of the debt owed, defaults have been rising, with more than $4 billion in defaults in 2010. Furthermore, defaults "may lead a municipality to file for bankruptcy, in part to protect itself from lawsuits." Roughly 600 governmental entities filed for bankruptcy protection over the past 70 years, 203 of which filed between 1988 and the end of 2010.

According to the CBO, filing a chapter 9 bankruptcy may not solve a municipality's problems. The obligation to pay debt service limits a municipality's ability to cut taxes, cover increased costs of existing services, and pay for new services. Additionally, any fiscal advantages of chapter 9 may be reduced due to legal costs incurred during the bankruptcy case. Finally, the CBO noted that “bankruptcy does not necessarily eliminate the political dynamics and state laws that may make recovery difficult” and may “continue to limit the ability of municipalities to address their fiscal problems.” Moreover, cutting spending will not affect the heaviest burden that these political subdivisions face. States and cities have nearly $3 trillion in outstanding bonds and more than $3.5 trillion in shortfalls in projected pension obligations. Promised future health benefits alone amount to more than $500 billion.

On a potentially ominous note, for the first time in two years, Switzerland’s UBS AG began making markets again in 2010 in derivatives tied to municipal bonds and other securities. These credit-default swaps obligate swap sellers to compensate buyers if a municipal debt issuer misses an interest payment or restructures its debt. In addition, five large derivatives dealers—Bank of America Merrill Lynch; Citigroup, Inc.; Goldman Sachs Group Inc.; JPMorgan Chase & Co.; and Morgan Stanley—met in November 2010 to discuss standardizing agreements for “muni CDSs” in an effort to attract more participants.

Accountability for Transgressions

2010 was the year that recriminations for the financial crisis began in a serious way. The Financial Crisis Inquiry Commission created in 2009 formally convened in January 2010 to begin investigating the root causes of the crisis, and both civil and criminal investigations were opened by state and federal agencies into the conduct of some of the major players involved, including the credit-rating agencies. 2010 was also the year that the most sweeping reforms to the U.S. financial system in decades were enacted, in an effort to prevent any recurrence of the events that led to the crisis.

Silver Linings

All things considered, the financial sound bites and catchwords of 2010, such as “QE2,” “ObamaCare,” “PIIGS,” “flash crash,” “robo signers,” and “Repo 105 loophole,” were relatively innocuous compared to those of the previous two years.

2010 saw some notable and encouraging developments belying predictions that recovery might be thwarted by the specter of a “double-dip” recession. The Troubled Asset Relief Program, implemented in 2008 at the end of the George W. Bush administration to rescue the U.S. financial industry, formally expired in October 2010. Of the $700 billion in bailout funds authorized under the program by Congress, $475 billion in TARP money was actually disbursed. All but the smallest banks repaid their TARP loans in full during or prior to 2010. On October 5, 2010, the TARP bailout, originally expected to cost U.S. taxpayers $356 billion, was estimated to be between $25 billion and $30 billion, significantly less than the burden shouldered by taxpayers in connection with the savings-and-loan crisis of the late 1980s. Even the once written-off American International Group is considered “on track” to repay a significant portion of its $182 billion in bailout money.

At the very end of 2010, the U.S. unemployment rate fell from 9.8 percent to 9.4 percent, its lowest rate since July 2009.

2010 saw the largest overhaul of the overpriced U.S. health-care industry since Medicare was passed in 1965. Cost estimates by the Congressional Budget Office, although disputed, indicate that the bill will reduce federal budget deficits by $143 billion over the next decade. It remains to be seen whether the reforms, if not repealed or defunded, will have any meaningful impact on an industry whose costs have spiraled out of control.

On November 23, 2010, the U.S. Commerce Department reported that American businesses earned profits at an annual rate of $1.659 trillion in the third quarter. This is the highest figure recorded since the government began keeping track more than 60 years ago, at least in nominal or noninflation-adjusted terms.

Domestic automakers ended 2010 with an 11 percent increase in December sales in the U.S. over December 2009, much of which was achieved without the help of big incentives like “cash for clunkers” and despite increased fuel prices, a fact that suggests consumers are becoming better able to afford new cars and trucks. Each of Detroit’s Big 3 posted substantial gains in 2010. By contrast, plagued by the fallout from vehicle recalls, Toyota (which became the world’s largest automaker in 2009) was the only full-line automaker to report lower sales in 2010.

The high point in 2010 of this unexpected reversal of fortune for Detroit’s Big 3 came on November 23, when General Motors Corp. (“GM”) raised $23.1 billion in the nation’s largest initial public stock offering ever, returning billions of dollars in bailout money to the federal government. Although the automaker will have to build on its revival for the government to recoup its entire $50 billion investment, the development is unquestionably positive and a far cry from the questionable prognosis given GM’s prospects for recovery when it emerged from a government-brokered bankruptcy sale 17 months earlier.

Another positive event in 2010 was the reopening of the world of financing to businesses, at least large businesses, thanks to a wave of high-yield financing that rescued a significant number of companies from bankruptcy. Meanwhile, according to Moody's Investors Service, the U.S. speculative-grade default rate plummeted in 2010 from its December 2009 high of 14.7 percent and is expected to dip even further in 2011. The low default rates and open credit markets paint an optimistic picture for big businesses in 2011. With interest rates likely to stay low, many experts foresee ample opportunities for companies to refinance, thereby skirting the "wall of maturities" that once loomed large on the horizon.

The most significant development in mergers and acquisitions in 2010 may be the renewed confidence of dealmakers. 2010 saw the first annual gain in dealmaking worldwide since the financial crisis began. Global dollar volume in announced mergers and acquisitions rose 23.1 percent in 2010 to $2.4 trillion, according to data reported by Thomson Reuters. In the U.S., merger volume rose 14.2 percent to $822 billion—far from the peak of 2007, but an improvement nevertheless.

Private equity deals rebounded in spades in 2010. According to Preqin, an independent research firm that focuses on alternative assets, buyout transactions globally reached more than $200 billion for the first time since 2007. Among the largest deals consummated or announced in 2010 were private equity firm Cerberus Capital Management's agreement to sell Chrysler Financial, the former financing arm of the automaker, for $6.3 billion; the $1.6 billion buyout offer for fabric and craft retail industry leader Jo-Ann Stores; the announced buyout of Del Monte Foods for $5.3 billion; the $4 billion acquisition of supplement and vitamin producer NBTY; and the $4.6 billion acquisition of Tomkins, a British engineering and manufacturing company.

Most U.S. securities markets ended the year on a positive note. The Dow Jones Industrial Average ended 2010 having surged 11 percent, helped by strong corporate earnings, a spike in M&A activity, and boosts to dividend payouts. The S&P 500 jumped 13 percent, while the NASDAQ Composite soared 17 percent. Stocks, commodities, bonds, and the dollar all finished out the year higher. Investor sentiment in 2010 swung from extreme pessimism in the first half of the year, following the debt crisis in Greece and the May “flash crash,” to soaring confidence in the second half as the U.S. Federal Reserve initiated another round of quantitative easing (“QE2”) and economic data and earnings improved.

Business Bankruptcy Filings

Business bankruptcy filings dropped off in 2010, especially public-company bankruptcy filings. According to data released by Epiq Systems Inc., the number of U.S. businesses declaring bankruptcy last year fell for the first time since 2005. 85,011 companies sought bankruptcy protection in 2010, a 5.2 percent decrease from the number of business bankruptcy filings during 2009. The number of chapter 11 filings also fell in 2010. According to the Epiq data, 13,619 businesses filed for chapter 11 last year, a 10 percent decline from 2009.

The number of public bankruptcy filings (defined as companies with publicly traded stock or debt) for 2010 was 106, according to data provided by New Generation Research, Inc.’s Bankruptcydata.com, roughly half the 211 public-company filings in 2009. Moreover, 2010 added only 19 names to the billion-dollar bankruptcy club, compared to 56 in 2009 and 25 in 2008. The largest bankruptcy filing of 2010—Ambac Financial Group, Inc., with $19 billion in assets—was only the 28th-largest filing of all time, based upon asset value. However, no fewer than 30 public companies with assets greater than $1 billion emerged from bankruptcy, were liquidated, or obtained confirmation of chapter 11 plans in 2010.

According to some commentators, the declining number of U.S. businesses seeking bankruptcy protection is an indication that credit markets have opened and that more companies are able to restructure their debts outside of court. Others have characterized the drop as either a return to or a new era of "normalcy." By most accounts, the bankruptcy boom of 2008–2009 is over. Many bankruptcy professionals predict that the U.S. bankruptcy landscape, at least in the near term, will be populated with cases filed by middle-market companies locked out of the credit thaw rather than their mega-case brethren.

Many of the companies that remain standing shored up their balance sheets during the recession by cutting costs, paring down workforces, and deleveraging, and some have benefited from decreased competition as rivals were driven out of business. Bigger companies have also regained access to the credit markets.

Where Do We Go From Here?

Wading into the sometimes treacherous waters of prognostication, most industry experts predict that the volume of big-business bankruptcy filings will not increase in 2011. Also expected is a continuation of the business bankruptcy paradigm exemplified by the proliferation of prepackaged or prenegotiated chapter 11 cases and quick-fix section 363(b) sales.

Companies that do enter bankruptcy waters in 2011 are more likely to wade in rather than free-fall, as was often the case in 2008 and 2009. More frequently, struggling businesses are identifying trouble sooner and negotiating prepacks before taking the plunge, in an effort to minimize restructuring costs and satisfy lender demands to short-circuit the restructuring process. Prominent examples of this in 2010 were video-rental chain Blockbuster Inc.; Hollywood studio Metro-Goldwyn-Mayer, Inc.; and newspaper publisher Affiliated Media Inc.

Industries pegged as including companies “most likely to fail” (or continue foundering) in 2011 include health care, publishing, restaurants, entertainment and hospitality, home building and construction, and related sectors that rely heavily on consumers. Finally, judging by trends established in 2010, companies that do find themselves in bankruptcy are more likely to rely on rights offerings than new financing as part of their exit strategies.

Highlights of 2010

January 7	The Euler Hermes Economic Outlook for Winter 2009/10 states that the world economy has “staged a technical exit from recession” by piggybacking on the positive performance of the Asian markets. A similar report issued in January 2009 by Euler Hermes, the world’s largest credit insurer, predicted that a worldwide wave of bankruptcies was imminent.
January 8	China overtakes the U.S. to become the biggest car market in the world. The Chinese purchased more than 13.5 million vehicles in 2009, compared with 10.4 million cars and light trucks sold in the U.S., the fewest in 27 years. The U.S. Labor Department reports that 85,000 jobs were lost in December 2009, leaving the unemployment rate at 10 percent. The European Union statistics office in Luxembourg reports that unemployment in the Eurozone rose to 10 percent from a revised 9.9 percent in October, the highest since August 1998.

	Standard & Poor's reports that global corporate bond defaults totaled 265 in 2009, with junk-rated companies comprising almost 90 percent of those that defaulted. The number of defaults for the year was the highest since S&P began tracking them in 1981, breaking the previous record of 229 in 2001. The U.S. led the world with 193, roughly twice the number of defaults recorded for 2008.
January 13	The Financial Crisis Inquiry Commission created in 2009 convenes in Washington, where principals of Goldman Sachs, JPMorgan Chase & Co., Morgan Stanley, and Bank of America testify about their roles in the financial crisis.
January 19	Japan Airlines, the once mighty flagship carrier and Asia's biggest airline, files for bankruptcy protection in Japan, crippled by years of mismanagement and more than $25 billion in debt. It is Japan's largest-ever corporate failure outside the financial sector. Democrats lose their 60-seat supermajority in the U.S. Senate as a Republican, Scott Brown of Massachusetts, is elected to fill the seat left vacant upon the death of Senator Edward Kennedy.
January 20	The Air Transport Association of America reports that the airline industry suffered its largest drop ever in passenger revenue in 2009, as a weak economy grounded many would-be travelers. Total passenger revenue for the major U.S. carriers fell 18 percent in 2009 versus 2008, the largest drop on record, exceeding even the 14 percent decline in 2001.
January 21	Declaring that big U.S. banks nearly wrecked the economy by taking "huge, reckless risks in pursuit of quick profits and massive bonuses," the Obama administration proposes the "Volcker Rule" (in recognition of the former Federal Reserve chairman, Paul A. Volcker), which would ban bank holding companies from owning, investing in, or sponsoring hedge funds or private equity funds and from engaging in proprietary trading, or trading on their own accounts, as opposed to the money of their customers. The rule, eroding the 1999 law that repealed the Depression-era Glass-Steagall Act, which once banned banks from selling securities or insurance, would also cap any one financial firm's share of overall market liabilities. In the largest automobile recall in history, Toyota, after recalling 5.2 million vehicles on November 2, 2009, to correct an accelerator-pedal entrapment/floor-mat problem, recalls an additional 2.3 million vehicles in the U.S. to correct possible mechanical sticking of the accelerator pedal causing unintended acceleration. Toyota will later widen the recall to include 1.8 million vehicles in Europe and 75,000 in China and will issue a separate recall in February 2010 to correct a problem in anti-lock brake software

	installed in its hybrid models, including the bestselling Toyota Prius. The total number of recalled vehicles will eventually grow to 9 million.
January 25	Shortly after defaulting on $3 billion in debt, the owners of Stuyvesant Town and Peter Cooper Village, the iconic middle-class housing complexes overlooking the East River in Manhattan, decide to turn over the properties to creditors, four years after the $5.4 billion purchase of the complexes' 110 buildings and 11,227 apartments in what was the most expensive real estate deal of its kind in American history. The National Association of Realtors reports that sales of previously occupied homes took the largest monthly drop in more than 40 years in December 2009, sinking more dramatically than expected even after lawmakers extended the deadline for taking advantage of the first-time homebuyer's tax credit from November 30, 2009, to April 30, 2010, and created a $6,500 credit for existing homeowners who purchase new homes between November 6, 2009, and April 30, 2010.
January 26	The U.K. Office for National Statistics reports that Britain finally experienced positive growth in the final quarter of 2009, after six straight quarters of contraction, possibly signaling an end to the recession in Britain. The country is the last of the G-7 industrialized nations to emerge from recession, behind France and Germany. Among the major European economies, only Spain has not commenced recovery.
January 28	Ben S. Bernanke is confirmed by the Senate as the chairman of the U.S. Federal Reserve for an additional four-year term. The 70-30 vote is the lowest margin of approval ever in the Fed's history. It is reported that the U.S. economy grew at its fastest pace in more than six years at the end of 2009. Gross domestic product expanded at an annual rate of 5.7 percent in the fourth quarter, after growing at an annualized rate of 2.2 percent in the previous quarter. Analysts had forecast annualized growth of 4.8 percent in the fourth quarter. The strong growth in the fourth quarter capped a year that saw the biggest contraction since 1946.
January 30	In his report to Congress, Neil Barofsky, the special inspector general for TARP, admonishes U.S. lawmakers for failing to tackle the problems that rocked the nation's financial system in the first place. According to the report, the government's efforts to fix the financial system have created a "heads I win, tails the government bails me out" mentality on Wall Street. Barofsky also warns that while many Wall Street recipients repaid their rescue funds last year, the financial system is no safer than it was at the height of the credit crisis.
February 1	President Obama proposes a $3.8 trillion budget for the coming fiscal year

	that raises taxes on businesses and upper-income households by $2 trillion over 10 years and cuts spending on programs but will still leave the nation with $8.5 trillion in added debt over the next decade. The budget plan for fiscal 2011 calls for nearly $1 trillion in tax increases on families with income above $250,000—largely by allowing tax cuts from the administration of George W. Bush to expire. Banks and multinational corporations would face new fees and levies, and oil companies would lose $36.5 billion in tax breaks over the next decade.
February 2	The research firm First American CoreLogic projects that the number of Americans who owe more than their homes are worth (virtually none when the real estate collapse began in mid-2006) will climb to 5.1 million by June 2010—approximately 10 percent of all Americans with mortgages.
February 9	Official data is released confirming that China overtook Germany in 2009 to become the world’s largest exporter, with total 2009 exports of $1.2 trillion, ahead of the €816 billion ($1.17 trillion) forecast for Germany.
February 18	President Obama officially establishes a bipartisan commission to propose ways to rein in the national debt, which is projected to approach $1.6 trillion in 2010, nearly 11 percent of the overall economy, the highest level since the end of World War II. By 2020, Obama projects that the national debt will have grown to more than 77 percent of the overall economy.
February 24	The World Trade Organization reports that world trade fell by 12 percent in 2009—the biggest drop since World War II. The level of trade between nations had been expected to decline by 10 percent in 2009.
February 26	Greece’s prime minister calls on the EU for more solidarity over the country’s debt crisis. Moody’s and S&P consider downgrading Greece’s debt to junk status. Fannie Mae, the nation’s largest provider of residential mortgage funds, reports a loss of $16.3 billion for the fourth quarter of 2009 and requests $15.3 billion from the U.S. Treasury to maintain a positive net worth. To date, Fannie has asked for $76.2 billion from the Treasury’s unlimited credit line and expects that losses are likely to continue.
March 2	It is reported that Ford outsold GM in February, gaining customers from recall-plagued Toyota. It is the first time in 40 years that Ford’s sales surpassed GM’s—except for a blip in 1998, when GM was on strike. All of Detroit’s Big 3 automakers posted sales gains in February over the previous year. Toyota’s sales slid 8.7 percent from a year ago. The Administrative Office of the U.S. Courts reports that bankruptcy filings in the federal courts rose 31.9 percent in calendar year 2009. The number of

	bankruptcies filed in the 12-month period ending December 31, 2009, totaled 1,473,675, up from 1,117,641 bankruptcies filed in CY 2008. Business filings totaled 60,837 in CY 2009, up 40 percent from the 43,533 business filings in CY 2008. Chapter 11 filings rose 50 percent to 15,189, up from the 10,147 filings in CY 2008.
March 3	EU officials indicate that €4.8 billion in new taxes and cutbacks adopted by the Greek government to deal with its staggering debt load and impending bankruptcy clears the way for the first bailout in the history of the euro.
March 11	In the Wall Street equivalent of a coroner's report, the bankruptcy court-appointed examiner for Lehman Brothers issues a 2,200-page report laying out in new and startling detail how the defunct company used accounting sleight of hand, including the "Repo 105 loophole," to conceal the bad investments that led to its undoing. The 158-year-old company, it concludes, died from multiple causes, including bad mortgage holdings and, less directly, demands by rivals like JPMorgan Chase and Citigroup that the foundering bank post collateral against loans it desperately needed. Examiner Anton R. Valukas also details "materially misleading" accounting gimmicks that Lehman used to mask the perilous state of its finances, including financial engineering to temporarily shuffle $50 billion of troubled assets off its books in the months before its collapse in September 2008 to conceal its dependence on leverage.
March 15	Moody's Investors Service warns that the U.S., Germany, and other major economies have moved "substantially" closer to losing their top-notch credit ratings and cannot depend solely on economic growth to save themselves. The ratings of the AAA governments—which also include Britain, France, Spain, and the Nordic countries—are currently "stable," Moody's writes in the report, but it adds that "their 'distance-to-downgrade' has in all cases substantially diminished." After filing the largest bankruptcy case ever in September 2008 with $691 billion in assets, Lehman Brothers Holdings Inc., once the world's fourth-biggest investment bank, files a liquidating chapter 11 plan with the bankruptcy court. The plan details how Lehman's remaining assets will be divided up to pay more than $830 billion in claims filed against the company by more than 130 classes of creditors.
March 21	By a vote of 219 to 212, the U.S. House of Representatives approves the Patient Protection and Affordable Care Act ("PPACA"), a far-reaching overhaul of the nation's health-care system, over unanimous Republican opposition, giving final approval to legislation passed by the Senate on Christmas Eve 2009. The health-care bill will require most Americans to have health insurance, will add 16 million people to the Medicaid rolls, and

	will subsidize private coverage for low- and middle-income people, at a cost to the government of $938 billion over 10 years, according to the Congressional Budget Office. The budget office estimates that the bill will provide coverage to 32 million uninsured people but still leave 23 million uninsured in 2019, one-third of whom will be illegal immigrants. The new costs will be offset by savings in Medicare and by new taxes and fees, including a tax on high-cost employer-sponsored health plans and a tax on the investment income of the most affluent Americans. Cost estimates by the budget office also show that the bill will reduce federal budget deficits by $143 billion in the next 10 years.
March 23	President Obama gives his imprimatur to the PPACA—the most expansive social legislation enacted in decades and the most sweeping piece of federal legislation since Medicare was passed in 1965. Along with the Health Care and Education Affordability Reconciliation Act of 2010, the PPACA is a product of the health-care reform agenda of the Democrat-controlled Congress and the Obama administration. Fourteen states immediately file legal challenges to the constitutionality of the health-care overhaul.
March 24	The U.S. Congressional Budget Office announces that the Social Security Administration will pay out more in benefits in 2010 than it receives in payroll taxes, an important threshold it was not expected to cross until at least 2016. Partly because of steps taken during the early 1980s to avert a crisis and partly because of many years of robust economic growth, the latest projections show the program will not exhaust its funds until about 2037.
March 30	President Obama signs legislation to expand college access for millions of young Americans by revamping the federal student loan program in what he calls "one of the most significant investments in higher education since the G.I. Bill."
March 31	The U.S. Federal Reserve terminates its $1.25 trillion program to buy mortgage-backed bonds guaranteed by Fannie Mae and Freddie Mac. The Commodity Futures Trading Commission approves the creation of a sixth and separate "account class"—this one for over-the-counter derivatives—that would be used in the event of a futures commission merchant's bankruptcy under either the Securities Investor Protection Act or chapter 7 of the Bankruptcy Code.
April 6	The U.S. Government Accountability Office reports that the pension plans at GM and Chrysler are underfunded by a total of $17 billion and could fail if the automakers do not return to profitability.

	Moody's Investors Service downgrades nearly $39 billion of subprime residential mortgage-backed securities on the eve of the commencement of a series of hearings on the origins of the subprime mortgage market crisis at the Financial Crisis Inquiry Commission.
April 7	A study released by the Mortgage Bankers Association entitled "What Happens to Household Formation in a Recession?" reports that approximately 1.2 million U.S. households were lost from 2005 to 2008, a loss that contributed significantly to the surplus of apartments and single-family homes on the market.
April 11	European leaders provide a long-awaited financial rescue package to Greece, offering the country up to $40 billion in aid to meet its giant debt obligations.
April 12	The Dow Jones Industrial Average closes at 11,005.97, finishing above the 11,000 mark for the first time since the end of September 2008. The Dow has soared 68 percent since March 2009 but remains some 3,100 points below the highs reached in 2007, before the economy sank into recession.
April 16	The SEC charges Goldman, Sachs & Co. and one of its vice presidents with defrauding investors by misstating and omitting key facts about a financial product tied to subprime mortgages as the U.S. housing market was beginning to falter. The SEC alleges that Goldman Sachs structured and marketed a synthetic collateralized debt obligation ("CDO") that hinged on the performance of subprime residential mortgage-backed securities ("RMBS") and that Goldman failed to disclose to investors vital information about the CDO, particularly the role a major hedge fund played in the portfolio selection process and the fact that the hedge fund had taken a short position against the CDO.
April 20	An explosion on BP America oil rig *Deepwater Horizon* in the Gulf of Mexico kills 11 workers, leading to the collapse and sinking of the rig and causing the largest oil spill in U.S. history. The spill dwarfs the cataclysmic *Exxon Valdez* disaster, which spilled about 250,000 barrels of oil into Prince William Sound in Alaska in 1989. U.S. warships are later deployed to assist with the cleanup, which threatens Gulf fisheries as the spill invades the Louisiana and surrounding coastlines. The gushing 5,000-foot-deep well is not capped even temporarily until July 15, and the well is not declared "dead" until September 19. An estimated 4.9 million barrels, or about 205 million gallons, of oil will enter the water before the well is sealed.
April 21	G-20 advocates of a global banking levy gain support as the IMF backs new banking taxes, including a radical fee on lenders' future profits. The IMF proposes an initially flat-rate "financial stability contribution," or FSC, to ensure that banks pay the costs of rescuing or winding down any failing financial institutions. The IMF also advocates a "financial activities tax," or

	FAT, on banks' profits and remuneration, going well beyond temporary taxes on bankers' bonuses that had been introduced in the U.K. and France. The FSC is similar in structure to the Financial Crisis Responsibility levy proposed in January by President Obama, although that proposal was designed specifically to recoup the $700 billion TARP funding. The IMF expects these countries to raise between 2 and 4 percent of gross domestic product from the FSC. The U.S. Senate Agriculture Committee votes in favor of a bill imposing tougher rules for derivatives. The bill would require most derivative contracts to be traded on a public exchange and to be processed, or cleared, through a third party to guarantee payment if one of the parties to a trade goes out of business. The derivatives bill also would require most big banks and Wall Street firms to spin off their derivatives trading into separate subsidiaries. GM announces that it repaid the U.S. and Canadian governments $5.8 billion, paying in full the loans the governments extended in connection with the automaker's bankruptcy restructuring. GM's loan repayments—$4.7 billion to the U.S. Treasury and C$1.1 billion to Export Development Canada—come five years ahead of the scheduled maturity dates and two months earlier than previously predicted.
April 22	Assistant U.S. Treasury Secretary for Financial Stability Herbert Allison testifies before the House Appropriations Subcommittee on Financial Services and General Government that TARP will end up costing no more than $120 billion, instead of the $700 billion amount appropriated by Congress in 2008.
April 27	Hearings commence before the Senate Permanent Subcommittee on Investigations concerning the role that Goldman, Sachs & Co. played in the subprime mortgage crisis, building on a case initiated by the SEC, which has accused Goldman of defrauding investors in a transaction known as "ABACUS 2007-AC1." The subcommittee takes the SEC case one step further by claiming that the bank had devised not just one of the deals, but a series meant to profit from the collapse of the home mortgage markets. Stock markets stumble worldwide as Standard & Poor's downgrades Greece's national debt to junk status, warning that bondholders could face losses of up to 50 percent of their holdings in a restructuring. The agency also downgrades Portugal's debt by two notches. The U.S. Government Accountability Office reports that American International Group ("AIG") is "stable," primarily as a result of the U.S. Treasury's infusion of $182 billion into AIG beginning in March 2008. As of

	December 31, 2009, the outstanding balance of the bailout assistance provided to AIG was $129.1 billion.
April 29	U.S. federal prosecutors open an investigation into trading at Goldman Sachs, raising the possibility of criminal charges against the Wall Street giant.
May 3	United Airlines and Continental Airlines announce a $3 billion merger to supplant Delta Air Lines as the world's largest airline.
May 6	World stock markets plummet amid continued fears that Greece's debt crisis may be going global and what appears to have been a technology glitch in computerized mass-trading systems. In the U.S., the Dow takes a brief, 1,000-point plunge before recovering, the biggest intra-day loss since the market crash of 1987, ending down 347.80, or 3.2 percent, at 10,520.32. Regulators later conclude in a report issued at the beginning of October that the automated sale of a large block of futures by a single mutual fund touched off a chain of events that caused the plunge.
May 11	It is reported that U.S. prosecutors are investigating whether Morgan Stanley misled investors about mortgage-derivatives deals it helped design and sometimes bet against, in a step that intensifies Washington's scrutiny of Wall Street in the wake of the financial crisis.
May 12	New York attorney general Andrew M. Cuomo starts an investigation of eight banks—Goldman Sachs, Morgan Stanley, UBS, Citigroup, Credit Suisse, Deutsche Bank, Crédit Agricole, and Merrill Lynch, which is now owned by Bank of America—to determine whether they provided misleading information to rating agencies Standard & Poor's, Fitch Ratings, and Moody's Investors Service in order to inflate the grades of certain mortgage securities. The investigation parallels federal inquiries into the business practices of a broad range of financial companies in the years before the collapse of the housing market.
May 13	The Federal Reserve Bank of New York reports that approximately one-third of U.S. subprime mortgages are either in foreclosure or delinquent by at least 90 days.
May 14	The Administrative Office of the U.S. Courts reports that bankruptcy filings for the 12-month period ending March 31, 2010, increased 27 percent over filings for the 12-month period ending March 31, 2009. Bankruptcy filings totaled 1,531,997—the highest number of total bankruptcy filings since the 12-month period ending March 31, 2006—compared to the 1,202,395 cases filed in the 12-month period ending March 31, 2009. Business filings totaled 61,148, up 25 percent from the 49,077 filed in the 12-month period ending March 31, 2009.

May 18	The SEC announces new rules designed to halt trading of some stocks that have big price swings to avoid market plunges. Under the new rules, trading of any Standard & Poor's 500 stock that rises or falls 10 percent or more would be halted for five minutes. These rules, known as "circuit breakers," would be applied if the price swing occurs between 9:45 a.m. and 3:35 p.m., Eastern Time. The rules are intended to prevent a repeat of the May 6 market plunge.
May 20	Dubai World, the debt-plagued conglomerate and proxy for the free-spending emirate of Dubai, reports that it has reached an agreement with a group of banks to restructure $23.5 billion in debt. The deal comes after months of discussions involving Dubai World and a committee representing more than 90 lenders.
May 26	Apple, the maker of iPods, iPhones, and iPads, shoots past computer software giant Microsoft to become the world's most valuable technology company. Wall Street values Apple at $222.12 billion and Microsoft at $219.18 billion. The only American company valued higher is Exxon Mobil, with a market capitalization of $278.64 billion. This changing of the guard caps one of the most stunning turnarounds in business history, Apple having been given up for dead only a decade earlier. More than a year after bailing out Citigroup, the U.S. Treasury Department announces that it began selling its stake in the financial giant—and that the government is turning a profit on its investment. The Treasury sold 1.5 billion shares of Citigroup, or about a fifth of its holdings, at a profit of $1.3 billion. At that rate, the government stands to make about $6.6 billion on its entire investment in Citigroup, of which the Treasury still owns 22 percent.
June 9	U.S. Federal Reserve chairman Ben S. Bernanke warns that "the federal budget appears to be on an unsustainable path," but also acknowledges that an "exceptional increase" in the deficit has been necessary to ease the pain of recession.
June 17	Hoping to repair shattered confidence in the health of its financial sector, the EU agrees to publish the results of stress tests imposed on 25 major banks operating across the borders in the 27-nation bloc. European leaders also renew their pledge to press for a banking levy and a possible transaction tax at the global level.
June 22	Germany, the U.K., and France announce bank levies in hopes of convincing other G-20 nations to follow suit at a meeting scheduled for the weekend of June 26 in Toronto. The U.K.'s levy, which will include a charge on assets including Tier 1 capital and insured retail deposits, will raise £2 billion ($2.97 billion) after going into effect in January, while Germany hopes to

	collect €1 billion ($1.23 billion) annually. The U.K.'s new levy will target domestic banks and the local operations of overseas lenders, exempting small institutions. In the U.S., any bank tax awaits final passage of financial reform legislation, which remains tied up in Congress.
June 25	Nearly two years after the U.S. financial system teetered on the verge of collapse, congressional negotiators reach agreement to reconcile competing versions of the biggest overhaul of financial regulations since the Great Depression. The final bill vastly expands the regulatory powers of the Federal Reserve and establishes a systemic risk council of high-ranking officials, led by the Treasury secretary, to detect potential threats to the overall financial system. It creates a new consumer financial protection bureau and widens the purview of the SEC to broaden regulation of hedge funds and credit-rating agencies.
June 27	Leaders of the world's biggest economies agree on a timetable for cutting deficits and halting the growth of their debt, but also acknowledge the need to move carefully so that reductions in spending do not set back the fragile global recovery. The action at the G-20 summit meeting in Toronto signals the determination of many of the wealthiest countries, after enacting spending programs to counter the worldwide financial crisis, to now emphasize debt reduction. It also underscores the conviction of European nations in particular that deficits represent the biggest threat to their economic stability. The U.S. joins other countries at the summit by endorsing a goal of cutting government deficits in half by 2013 and stabilizing the ratio of public debt to gross domestic product by 2016. G-20 leaders also discuss banking regulations but cannot agree on a proposal for a global bank tax, supported by the U.S., Britain, and the EU, but opposed by Canada and Australia.
June 28	Average rates on 30-year fixed-rate mortgages reach their lowest levels in more than 50 years at 4.69 percent. However, demand for new mortgages remains low, since many well-qualified borrowers already refinanced their mortgages in 2009, when rates were also low, and other borrowers with an incentive to refinance cannot qualify under today's tougher lending standards.
July 6	Real estate research firm Reis, Inc., reports that demand for U.S. office space hit a 17-year low in the second quarter and could dip further this year. The U.S. office vacancy rate reached 17.4 percent in the second quarter, a level unseen since 1993 during the last U.S. commercial real estate implosion.

July 7	The European Parliament approves one of the world's strictest crackdowns on exorbitant bank pay, going beyond some of the limits that many banks were pressed to adopt in the wake of the financial crisis. Bankers in the 27-nation bloc will be barred from taking home more than 30 percent of their bonus in cash starting next year and will risk losing some of the remainder if the bank's performance erodes over the next three years. Banks that refuse to curb the salaries of their biggest earners will have to set aside more capital to make up for the risk.
July 12	Portugal's credit rating is cut two notches by Moody's Investors Service, a move that lent urgency to the discussions of EU finance ministers about how banks would be affected if a government were to default on its debts.
July 16	Standard & Poor's Ratings Services reports that annual corporate defaults in the U.S. hit their highest rate since 1981, as 191 companies defaulted in 2009. The dollar amount of U.S. corporate defaults in 2009 totaled $516 billion, which accounted for 82 percent of the global total. Globally, the total number of corporate defaulters rose to 264 in 2009 from 125 in 2008. The default rate for U.S. corporations rated as speculative-grade was 11 percent at the end of 2009, which was almost two percentage points higher than the global rate of 9.35 percent.
July 19	Ireland's efforts to pull out of a deep economic slump suffer a setback when Moody's Investors Service, citing a weak banking system and rising debt, downgrades the country's debt to Aa2 from Aa1, although it remains above junk level. Moody's also changes the outlook on the ratings to stable from negative.
July 21	President Barack Obama signs into law the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010. Among other things, the sweeping financial reforms include a ban on proprietary trading by banks and: (i) the creation of the Financial Stability Oversight Council headed by the Treasury secretary to watch for major risks in the overall economy and to step in and dismantle failing firms that pose "systemic risk"; (ii) the creation of a new consumer financial protection agency to combat lending abuse by monitoring mortgage lenders and credit card companies and capping the fees debit card companies can charge retailers; (iii) the implementation of stricter oversight of hedge funds, private equity firms, and the derivatives market; (iv) increased capital requirements (beginning in five years) for large banks to ameliorate losses in the event loans go bad; and (v) a watered-down version of the "Volcker Rule," which limits to 3 percent of its capital a bank's ability to make speculative investments (*e.g.*, investments in hedge funds and private equity funds) that do not benefit its customers.
July 22	The Committee of European Banking Supervisors reports that seven

	European lenders failed a stress test performed on 91 banks in 20 countries to check the health of the Continent's financial sector while restoring confidence in banks. Five Spanish banks, one state-run bank in Germany, and another in Greece dipped below the Tier 1 capital ratio requirements during the stress test.
August 5	The U.S. Senate confirms Elena Kagan as an associate justice on the U.S. Supreme Court by a vote of 63-37. Kagan is only the fourth woman to serve on the High Court. After being formally sworn in as the 112th Supreme Court justice on October 1, she joins Justices Ruth Bader Ginsburg and Sonia Sotomayor, marking the first time three women have served together on the Court. Justice Sandra Day O'Connor, the first woman justice, retired from the Court in 2006.
August 10	The U.S. Federal Reserve announces that it will begin buying U.S. Treasury debt in a second round of "quantitative easing" ("QE2") deemed necessary because it can no longer lower interest rates. The first round of quantitative easing, which began in 2008 and ended earlier in 2010, was the Federal Reserve's unprecedented purchase of agency debt to prop up the housing market, along with credit facilities for big banks.
August 16	After three decades of spectacular growth, China passes Japan in the second quarter to become the world's second-largest economy behind the U.S., according to government figures. Experts say unseating Japan—and in recent years passing Germany, France, and Great Britain—underscores China's growing clout and bolsters forecasts that China will pass the U.S. as the world's biggest economy as early as 2030. America's gross domestic product was about $14 trillion in 2009.
August 17	The Administrative Office of the U.S. Courts reports that bankruptcy filings rose 20 percent in the 12-month period ending June 30. A total of 1,572,597 bankruptcy cases were filed in federal courts in that period, compared to 1,306,315 bankruptcy cases filed in the 12-month period ending June 30, 2009. This represents the highest number of bankruptcy filings for any period since many of the provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 took effect. Business filings totaled 59,608, up 8 percent from the 55,021 filings reported for the year ended June 30, 2009. Chapter 11 filings totaled 14,272, up 2 percent from the 13,951 filings during the 12-month period ended June 30, 2009.
August 18	Just over 14 months after seeking chapter 11 protection in the third-largest bankruptcy filing in U.S. history, GM, 70 percent of which is owned by the U.S. and Canadian governments, files for a landmark public stock offering that will allow government shareholders to begin selling off their stakes in

	the automaker as well as raise money for GM's turnaround.
August 20	In its Pension Insurance Data Book 2009, the Pension Benefit Guaranty Corporation ("PBGC") reports that claims by insolvent multi-employer plans most likely will increase significantly in the years ahead. Since fiscal year 1981, the PBGC has provided more than $500 million in financial assistance to 62 insolvent multi-employer plans covering more than 93,000 participants. The PBGC estimates that in the future it will incur liability for financial assistance of about $2.3 billion for approximately 104 plans with about 136,000 participants.
August 27	U.S. Federal Reserve chairman Ben S. Bernanke states that the central bank is determined to prevent the economy from slipping into a cycle of falling prices, even as he emphasizes that he believes growth will continue in the second half of the year, "albeit at a relatively modest pace." Mr. Bernanke gives his strongest indication yet that the Fed is ready to resume its large purchases of longer-term debt if the economy worsens, a move that would add to the Fed's already substantial holdings. The U.S. Justice Department clears the planned $3 billion merger between United Airlines and Continental, lifting the biggest regulatory hurdle to the creation of the world's top airline. Together, the airlines will have 21 percent of domestic capacity, in terms of available seat miles (one seat flown one mile), exceeding the 20 percent held by Delta, the current market leader.
August 31	The SEC declines to charge Moody's Investors Service for violating securities laws by failing to comply with its own procedures for rating complex derivative securities in 2007, because of jurisdictional issues, as the securities in question originated in and were rated and sold in Europe. However, the SEC warns all of the national credit-rating agencies that it will use new powers under the Dodd-Frank banking law to take action against similar conduct, even if it occurs outside the U.S. Although the credit-rating agencies have come under criticism over their role in the financial crisis, they have not been the subject of major enforcement actions by securities regulators.
September 6	President Obama, looking to stimulate a sluggish economy and create jobs, calls for Congress to approve major upgrades to the nation's roads, rail lines, and runways—part of a six-year plan that would cost tens of billions of dollars and create a government-run bank to finance innovative transportation projects.
September 12	At a meeting of financial officials from 27 countries in Basel, the world's top bank regulators agree on far-reaching new rules intended to make the global banking industry safer and protect international economies from future financial disasters.

	The new requirements will more than triple the amount of capital that banks must hold in reserve, an effort to move banks toward more conservative positions and force them to maintain a larger cushion against potential losses.
September 16	U.S. Census Bureau data show that poverty among the working-age population of the U.S. rose to the highest level in almost 50 years in 2009. Poverty among those aged 18 to 64 rose by 1.3 percentage points to 12.9 percent—the highest level since the early 1960s, prior to then-president Lyndon Johnson's "War on Poverty." The overall poverty rate rose by 1.1 percentage points to 14.3 percent, the highest since 1994.
September 17	After it becomes clear that key senators intend to block the confirmation of Harvard law professor Elizabeth Warren as the first director of the newly created Consumer Financial Protection Bureau, the White House announces that she will become an assistant to the president and a special advisor to the Treasury secretary, responsible for overseeing creation of the bureau.
September 20	In a new report, the National Bureau of Economic Research ("NBER"), the organization responsible for identifying turning points in the U.S. business cycle, states that the U.S. recession which started in December 2007 ended in June 2009, but it also highlights the weaknesses still facing the U.S. economy. As worries persist about the struggling economy and its future path, the NBER warns that "any future downturn of the economy would be a new recession and not a continuation of the recession that began in December 2007."
September 21	24/7 Wall St., an internet-based financial news and opinion operation, issues a report on how American business has changed, showing that corporate America today is dominated by service companies, tech firms, and huge retailers that have thousands of locations and hundreds of thousands of workers. This contrasts with the corporate landscape 55 years ago, when most of the largest corporations in the U.S. built cars, supplied car parts, or provided fuel for America's vehicles. Among the 10 largest employers in 1955 were GM, Chrysler, U.S. Steel, Standard Oil of New Jersey, Amoco, Goodyear, and Firestone, none of which could have existed or been nearly as large as they were without the huge appetite for American-made cars. Today, four of the 10 largest companies by total employees are Walmart, Target, Sears, and Kroger. Two other companies on the list—IBM and Hewlett-Packard—represent the tip of an iceberg comprising dozens of large tech companies with high margins, rapidly growing sales, and well-paid workforces, such as Dell, Google, Cisco, and Oracle.
September 24	The U.S. government swoops in to stabilize a crucial part of the credit-union

	sector battered by losses on subprime mortgages. Regulators announce a rescue and revamping of the nation's wholesale credit-union system, underpinned by a federal guarantee valued at $30 billion or more. The move includes the seizure of three wholesale credit unions, plus an unusual plan by government officials to manage $50 billion of troubled assets inherited from failed institutions. To help fund the rescue, the National Credit Union Administration plans to issue $30 billion to $35 billion in government-guaranteed bonds, backed by the shaky mortgage-related assets.
September 28	President Obama signs into law the Small Business Jobs Act. Among other things, the new law significantly expands the ability of the Small Business Administration ("SBA") to provide loans to small businesses, doubles the maximum loan size for the largest SBA programs, creates a new $30 billion small business lending fund, and implements new tax cuts for small businesses. U.S. Census Bureau statistics show that the income gap between the richest and poorest Americans grew in 2009 to its widest amount on record as young adults and children in particular struggled to stay afloat in the recession. The top-earning 20 percent of Americans—those making more than $100,000 each year—received 49.4 percent of all income generated in the U.S., compared with the 3.4 percent earned by those below the poverty line. A different measure, the international Gini index, finds U.S. income inequality at its highest level since the Census Bureau began tracking household income in 1967. The U.S. also has the greatest disparity among Western industrialized nations.
October 1	Bank of America, the country's largest mortgage lender by assets, announces that it is reviewing documents in all foreclosure cases now in court to evaluate if there are errors. It is the third major lender in the last two weeks to freeze foreclosures in the 23 states where the process is controlled by courts due to errors in mortgage and court foreclosure documentation. According to LPS Applied Analytics, a mortgage data firm, 2 million households are in foreclosure and another 2.37 million households are seriously delinquent. AIG, the beneficiary of a $182 billion bailout, outlines an ambitious plan to repay the $130 billion actually disbursed in loans by the U.S. Treasury and the Federal Reserve by spinning off profitable divisions and exchanging its preferred stock for common stock in a public offering.
October 3	TARP formally expires. Of the $700 billion in bailout funds authorized under the program by Congress, $475 billion in TARP money was actually disbursed. Although the nation's largest banks have repaid their TARP loans in full, the smallest banks have been unable to do so, and it is estimated that

	up to $50 billion will never be recovered.
October 5	The Japanese central bank lowers its benchmark interest rate to a range of 0 to 0.1 percent, a tiny change but a symbolic shift back into an age of zero interest rates. The Bank of Japan also announces that it will set up a fund of ¥5 trillion, or $60 billion, to buy Japanese government bonds, commercial paper, and other asset-backed securities amid concerns about weakening growth in the economy, the world's third-largest, after those of the U.S. and China. The U.S. Treasury Department reports that it expects to lose $29 billion on the federal bailouts stemming from the financial crisis, with most of the losses in its housing finance program and the auto rescue. Treasury officials declare the bailout (which includes TARP) a success, emphasizing that much of the program's money has been returned and that losses are now likely to be less than expected. The cost, the report says, is far below the $350 billion the Congressional Budget Office once estimated. In total, the Treasury has received back about $204 billion of the bailout funds, or just over half the money it doled out. The report segregated the money given out under the Bush administration—$294 billion—from the $94 billion awarded under the current administration. All of the large bank bailouts were made under the prior administration, and since then, the money was invested in small banks, automakers, housing programs, and AIG.
October 8	Bank of America Corp. imposes a moratorium on all foreclosure sales across the U.S., amid political pressure on U.S. banks to examine foreclosure-documentation problems. The nation's largest bank by assets is the first financial institution to stop all foreclosure sales amid revelations that the banking industry had used "robo signers," people who sign hundreds of documents a day without reviewing their contents, when foreclosing on homes. Bank of America, JPMorgan Chase & Co., and Ally Financial Inc. (parent of GMAC Mortgage) last week postponed foreclosures in 23 states where a court's approval is required to foreclose on a home.
October 10	It is reported that China's foreign-exchange reserves, the world's largest, may have climbed to a record $2.5 trillion, adding fuel to complaints that its currency intervention is undermining the global economic recovery.
October 12	According to a *Wall Street Journal* survey, financial firms, including banks, investment banks, hedge funds, money management firms, and securities exchanges, are projected to pay $144 billion in compensation and benefits in 2010, a 4 percent increase over the $139 billion paid out in 2009.
October 13	The attorneys general of all 50 states announce that they will open a joint investigation into flawed paperwork filed to support home mortgage

	foreclosures.
October 21	The Federal Housing Finance Agency reports that, based upon “stress tests” performed on Fannie Mae and Freddie Mac, the companies could cost taxpayers another $19 billion over the next three years, but the total tab could nearly double if the U.S. economy slides back into a recession. Fannie and Freddie have already cost taxpayers a combined $135 billion. The bulk of the losses have stemmed from soured mortgages bought or guaranteed between 2005 and 2008. Fannie and Freddie, which own or guarantee around half of the nation’s $10.6 trillion in mortgages, are well on their way to becoming the most expensive legacy of the financial crisis.
November 3	Formally launching its long-anticipated QE2 program, the U.S. Federal Reserve announces that it will purchase up to $600 billion in long-term treasury bonds by the end of June 2011, somewhat more than the $300 billion to $500 billion that many in the markets had expected.
November 5	The total number of U.S. banks seized by regulators reaches 141, topping the 140 shuttered last year. By year-end, a total of 157 U.S. banks will fail, the highest number of closings in a single year since the savings-and-loan crisis two decades ago.
November 8	The Administrative Office of the U.S. Courts reports that bankruptcy filings for fiscal year 2010, the 12-month period ending September 30, 2010, increased 13.8 percent over bankruptcy filings for fiscal year 2009. The number of bankruptcies filed during FY 2010 totaled 1,596,355 versus 1,402,816 filings reported for FY 2009. Business filings totaled 58,322, a 0.7 percent decrease from FY 2009. Chapter 11 filings in FY 2010 fell 3.8 percent to 14,191.
November 12	The municipal bond market experiences its biggest decline since the financial collapse of 2008, amid concern over the increasingly strained finances of states and cities and a growing backlog of new bonds for sale.
November 17	American taxpayers’ ownership of GM is halved, and billions of dollars in bailout money is returned to the federal government, as a result of the nation’s largest initial public stock offering ever. The offering raises $23.1 billion, and the new shares will begin trading November 18 at $33 each. To break even on its investment in GM, the Treasury Department will need to sell its remaining 500 million shares at an average price of $53 each in the months and years to come.
November 21	Ireland agrees to accept a rescue package worth more than $100 billion, a move that prompts a call for early elections and a warning from a major

	ratings agency that the bailout could prove to be a “credit negative” for the country.
November 23	The U.S. Commerce Department reports that American businesses earned profits at an annual rate of $1.659 trillion in the third quarter, the highest figure recorded since the government began keeping track more than 60 years ago, at least in nominal or noninflation-adjusted terms.
November 30	Having arranged to repay its $130 billion taxpayer-financed bailout, AIG announces that it will sell about $2 billion worth of bonds in its first debt offering since the financial crisis.
December 4	Complying with the new Dodd-Frank law, the U.S. Federal Reserve discloses the recipients of $3.3 trillion from emergency lending programs put in place during the crisis days of 2008. The data show that the biggest recipient of taxpayer assistance was Citigroup, followed closely by Morgan Stanley, Merrill Lynch, and Bank of America. Goldman Sachs was also a large beneficiary.
December 9	The Federal Reserve’s Flow of Funds report states that household wealth in the U.S. rose by $1.2 trillion in the third quarter as share prices jumped in response to an improving economy. Net worth for households and nonprofit groups increased at a 9.1 percent annual pace to $54.9 trillion after dropping at a 9.9 percent rate in the previous three months. American families also cut debt for a 10th consecutive quarter. Web-based real estate service Zillow reports that $9 trillion in U.S. home value has been destroyed since June 2006, of which $1.7 trillion in losses occurred during 2010.
December 10	The Congressional Budget Office releases an economic and budget issue brief on the fiscal stress local governments are facing and the options they have, including defaulting on their debt or filing for chapter 9 bankruptcy protection. According to the report, weak economic conditions can lead to fiscal stress—the “gap between projected revenues and expenditures”—for local governments “by reducing their tax revenues, lessening the state aid they receive, increasing the demand for some services and triggering investment losses.”
December 17	President Obama signs the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, giving his imprimatur to an extension of the Bush-era tax cuts and other tax breaks in a stimulus package valued at $858 million, the biggest slice of the $2.8 trillion in stimulus poured into the U.S. economy since the recession began three years ago. The other components of the stimulus packages included the $700 billion TARP, the $787 billion stimulus bill passed in the early days of the Obama

	administration, $151 billion spent to shore up Freddie Mac and Fannie Mae, the $168 billion stimulus package approved in early 2008 and signed by President George W. Bush, and various smaller stimulus programs aggregating $162 billion.
December 21	The Financial Report of the United States Government, which applies corporate-style accrual accounting methods to Washington, shows that the U.S. government's liabilities exceeded assets by $13.473 trillion, compared to a gap of $11.456 trillion a year earlier.
December 27	Official debt figures published by the U.S. Treasury show that the federal government has accumulated more new debt—$3.22 trillion—during the tenure of the 111th Congress than it did during the first 100 Congresses combined. That equals $10,429.64 in new debt for each of the 308,745,538 people counted in the U.S. by the 2010 Census. The total national debt of $13.86 trillion now equals $44,886.57 for every man, woman, and child in the U.S.
December 30	Freddie Mac reports that the average rate for a traditional 30-year, fixed-rate mortgage loan for 2010 was 4.7 percent, which represented the lowest annual average since 1955, when the average price of a U.S. home was $22,000.
December 31	The Dow Jones Industrial Average ends the year having surged 11 percent during 2010, helped by strong corporate earnings, a spike in M&A activity, and boosts to dividend payouts. The S&P 500 jumped 13 percent, while the NASDAQ Composite soared 17 percent. Commodities outpaced returns from stocks and bonds in 2010 as demand from China, tight supply, and loose monetary policy boosted the prices of everything from cotton and silver to copper and corn. However, stocks, commodities, bonds, and the dollar all finished the year higher.

Top 10 Bankruptcies of 2010

Bank or financial services holding companies that filed for bankruptcy protection as mere shell corporations for the purpose of liquidating their (comparatively) negligible remaining assets dominated the Top 10 List for 2010, according to the calculation customarily performed in assessing the asset values of public chapter 11 filings, which looks to the most recent public financial statements filed by the companies before filing for bankruptcy. This designation applied to no fewer than eight of the 10 companies gracing the Top 10 List for 2010.

The top spot in 2010 belonged to yet another company whose destruction was heralded by the meltdown of American International Group ("AIG") in 2008 amid the onslaught of the Great Recession. Ambac Financial Group, Inc. ("Ambac Financial"), is the holding company for Ambac Assurance Corp. ("Ambac"). Founded in 1971 and headquartered in New York City, Ambac was once one of the largest insurers of municipal bonds. However, the company was doomed after it pioneered the practice of selling guarantees on mortgage-backed securities and more complex collateralized debt obligations ("CDOs").

Ambac's demise highlights the decline of bond insurance, a previously booming business that was among the hardest hit during the financial crisis. When home prices started slumping in 2007 and mortgage defaults accelerated, Ambac was saddled with huge liabilities that it could not pay. The most toxic part of the company's business, which was seized by regulators in March 2010, has gradually been shut down in a controversial process that leaves many policyholder claims unpaid.

When Ambac and its main bond insurance rival, MBIA Inc., first encountered problems in 2007, investors worried that the demise of the companies might rock the foundations of the financial system. Together, the companies guaranteed hundreds of billions of dollars of municipal bonds, while also serving as a valuable source of hedging for big investment banks playing in the market for mortgage-backed securities and CDOs. When counterparty banks realized that the bond insurers were unable to pay their guarantee claims in full, they agreed to accept pennies on the dollar.

The troubles of Ambac and MBIA, however, paled in comparison to those of AIG, which had written similar guarantees on CDOs partly backed by mortgage-related securities. When AIG could not afford to pay its guarantee obligations, the company was saved from bankruptcy by the U.S. government, which committed more than $100 billion of taxpayer money. Ambac was not so fortunate. Even though Ambac Financial reported nearly $19 billion in total assets in its most recent filings with the SEC, the company listed only $394.5 million in assets and $1.68 billion in liabilities as of June 30, 2010, in its chapter 11 filing.

Positions 2 through 4 on the Top 10 List for 2010 belong to bank holding companies that filed for bankruptcy to liquidate their remaining assets after their banking operations were seized and sold by regulators. These companies included Corus Bankshares, Inc. (No. 2), a Chicago-based company with 521 employees that acted as the holding company for Corus Bank, N.A., which was placed into receivership in September 2009. In its most recent 10-K filed with the SEC, Corus Bankshares reported total assets of $8.35 billion, but its chapter 11 petition listed assets of only $314 million. Nos. 3 and 4 on the Top 10 List went to FirstFed Financial Corp. and R&G Financial Corp., bank holding companies that reported $7.45 billion and $7.25 billion in assets, respectively, before filing for bankruptcy to liquidate the negligible vestiges of their once substantial banking empires.

The first non-shell corporation on the Top 10 List for 2010 is real estate investment trust ("REIT") Anthracite Capital, Inc. A privately owned specialty finance REIT with public debt founded in 1998 and based in New York City, Anthracite targeted investments in high-yield commercial real estate loans by acquiring commercial mortgage-backed securities ("CMBS"), issuing debt backed by CMBS, or providing mezzanine financing. The company disclosed in SEC filings that the economic downturn in late 2008 reduced the value of its assets and resulted in rising delinquencies on its CMBS and commercial real estate loans. Liquidity used to finance Anthracite's investments also began to decline in the second half of 2007 before evaporating completely in 2009. Anthracite filed a chapter 7 petition in New York on March 15, 2010, with $3.8 billion in assets.

Bank holding companies with vestigial assets also grabbed Positions 6 through 8 on the Top 10 List for 2010. Position No. 6 belongs to AMCORE Financial, Inc. ("AMCORE Financial"), a Rockford, Illinois-based company with 962 employees that operated as the bank holding company for AMCORE Bank, N.A. ("AMCORE Bank"). Before being seized by regulators on April 23, 2010, AMCORE Bank operated 66 branches in northern Illinois and southern Wisconsin. AMCORE Financial reported total assets of $3.8 billion in its most recent SEC filings but listed only $7.2 million in assets in its chapter 11 filing. Melrose Park, Illinois-based Midwest Banc Holdings, Inc. (assets previously reported at $3.4 billion, listed in the chapter 11 filing at $9.7 million), and Lincoln, Nebraska-based TierOne Corporation (assets previously reported at $3.1 billion, listed in the chapter 7 filing at less than $1 million) grabbed rungs No. 7 and 8 on 2010's Top 10 List.

The penultimate position on the Top 10 List for 2010 belongs to The Great Atlantic & Pacific Tea Company, Inc. ("A&P"), the venerable 110-year-old supermarket chain. A&P was incorporated in New Jersey in 1900, 41 years after having opened its first store on Vesey Street in New York City under the name The Great American Tea Company. The company changed its name to The Great Atlantic & Pacific Tea Company in 1869, in honor of the completion of the coast-to-coast transcontinental railroad and its intention to operate stores across the country. A&P expanded to California, Washington, and Canada in the 1930s, with 15,357 stores across the continent at its height.

As of December 12, 2010, the day it filed for chapter 11 protection in White Plains, New York, A&P operated nearly 400 supermarkets under the names Waldbaum's, The Food Emporium, Pathmark, Super Fresh, and Food Basics; employed 45,000 people nationwide; and had $8.8 billion in annual sales. The Montvale, New Jersey-based company sought bankruptcy protection after failing to compete successfully amid a significant shift in consumer spending to wholesale clubs, supercenters, and drugstores. A&P had $2.8 billion in assets and $3.2 billion in debt when it filed for chapter 11.

The final entry on the Top 10 List for 2010 was yet another bank holding company, Community Bancorp, which filed a chapter 7 petition on May 28, 2010, in Nevada after regulators seized its banking subsidiary Community Bank of Nevada in August 2009. Community Bancorp reported assets of nearly $1.7 billion in 2009 but listed only $43.7 million in assets in its chapter 7 filings.

Among the most notable bankruptcies failing to grace 2010's Top 10 List were the following:

- Los Angeles-based Metro-Goldwyn-Mayer Studios, Inc. (“MGM”), a privately held company that develops, produces, and distributes feature films, television programming, interactive media, and music and also licenses merchandise. MGM and 160 affiliates filed a prepackaged chapter 11 case in New York on November 3, 2010, with the intention of exchanging nearly $5 billion in secured debt for 99.5 percent of the equity in the reorganized companies. The company listed its assets at more than $2.67 billion and its liabilities at more than $5.76 billion. The bankruptcy court confirmed MGM’s prepackaged chapter 11 plan on December 2, 2010, effectively ending the studio’s month-long stay in bankruptcy.

- AmericanWest Bancorporation, the Spokane, Washington-based bank holding company that filed for chapter 11 protection on October 28, 2010, with $1.65 billion in assets for the purpose of selling and recapitalizing its banking subsidiary, AmericanWest Bank (which was not included in the filing), in an accelerated transaction pursuant to section 363(b) of the Bankruptcy Code. On December 9, 2010, the bankruptcy court approved the sale of the bank to an investor group supported by $750 million from private equity groups, mutual funds, and pension plans. This represents the first time that the section 363(b) sale process has been used to orchestrate the sale of a substantial financial institution in lieu of seizure and sale by government regulators.

- Blockbuster Inc. (“Blockbuster”), which joined its smaller rival Movie Gallery, Inc., in bankruptcy when it filed for chapter 11 protection on September 23, 2010, in New York. The filing was precipitated by Blockbuster’s largely ineffective efforts to grapple with competition from mail-delivery video rental services offered by Netflix, Inc.; Redbox Automated Retail, LLC’s DVD-dispensing kiosk machines; Apple Inc.’s iTunes platform; Google Inc.’s YouTube; and an array of cable providers that offer on-demand and streaming videos. Blockbuster filed for bankruptcy with more than $1.5 billion in assets.

- Vertis, Inc. (“Vertis”), a Baltimore-based privately owned provider of integrated marketing communications services, and one of the largest offset printers in North America. Vertis filed for chapter 11 protection on November 17, 2010, in New York with $1.5 billion in assets. The bankruptcy court confirmed its prepackaged chapter 11 plan on December 16, 2010, allowing the company to emerge from bankruptcy having successfully reduced its debt by approximately 60 percent, or more than $700 million.

- Privately owned Palm Beach, Florida-based REIT Innkeepers USA Trust, which owns upscale and extended-stay hotel properties throughout the

U.S., including interests in 72 hotels with approximately 10,000 rooms in 19 states and the District of Columbia. The company filed for chapter 11 protection on July 19, 2010, in New York with approximately $1.5 billion in assets.

- Reston, Virginia-based telecommunications provider TerreStar Networks Inc., which filed for chapter 11 protection on October 19, 2010, in New York with $1.4 billion in assets, after emerging from a previous stay in bankruptcy in 2002.

- Truvo USA LLC ("Truvo"), a Wilmington, Delaware-based holding company that, through its non-U.S. subsidiaries, is a multinational provider of local search and advertising services, with a primary focus on publishing printed and online directories. Truvo filed for chapter 11 protection in New York on July 1, 2010, due to problems caused by the continuing shift from print media toward online products. It exited from bankruptcy on November 30, 2010, after the bankruptcy court confirmed a chapter 11 plan implementing a secured debt-for-equity swap.

- Privately owned Penton Media Inc. ("Penton"), the third-largest business-to-business media company in the U.S. as publisher of 113 trade magazines, including *Ward's AutoWorld*, *Restaurant Hospitality*, and *National Hog Farmer*. Penton filed for chapter 11 protection on February 10, 2010, in New York, listing assets of $841 million against debt totaling $1.13 billion. The company obtained confirmation of a prepackaged chapter 11 plan eliminating $271 million of debt on March 5—only 23 days after filing for bankruptcy.

- Movie Gallery, Inc. ("Movie Gallery"), which reprised its role as a chapter 11 debtor when it filed for bankruptcy protection on February 2, 2010, in Virginia. A Wilsonville, Oregon-based company with more than 19,000 employees that was founded in 1985, Movie Gallery operated as a home entertainment specialty retailer in North America, with approximately 3,290 retail stores under the names Movie Gallery, Hollywood Video, and GameCrazy. The chapter 11 filing came less than eight months after the company emerged from its first bankruptcy (filed in 2007), with more than $800 million in secured debt still on its balance sheet arising from the company's ill-fated $1.25 billion acquisition of rival Hollywood Entertainment Corp. The movie-rental chain filed for bankruptcy with only $660 million in assets. The bankruptcy court confirmed a liquidating chapter 11 plan for Movie Gallery on November 18, 2010.

- Mesa Air Group, Inc. ("Mesa"), a Phoenix-based air carrier with 4,113 employees and 130 aircraft serving 127 cities in 41 states, Canada, and Mexico. Mesa filed for chapter 11 protection in New York on January 5, 2010, with $959 million in assets and the stated intention of using chapter

11 to resolve an "untenable financial situation" with its aircraft leases as well as its ongoing dispute with Delta Air Lines over regional carrier service.

Notable Exits From Bankruptcy in 2010

Company	**Filing Date Court**	**Conf. Date Effective Date**	**Assets When Filed**	**Industry**
Chrysler LLC	04/30/2009 (S.D.N.Y.)	04/20/2010 CD 05/01/2010 ED	$39 billion	Automobiles
General Growth Properties, Inc.	04/16/2009 (S.D.N.Y.)	10/21/2010 CD 11/09/2010 ED	$29.5 billion	Real Estate
Lyondell Chemical Co.	01/06/2009 (S.D.N.Y.)	04/24/2010 CD 04/30/2010 ED	$27 billion	Chemicals
Fremont General Corp.	06/18/2010 (C.D. Cal.)	05/25/2010 CD 06/11/2010 ED	$12.9 billion	Banking
R.H. Donnelley Corp.	05/28/2009 (D. Del.)	01/12/2010 CD 01/29/2010 ED	$11.9 billion	Media
AbitibiBowater Inc.	04/16/2009 (D. Del.)	11/22/2010 CD 12/09/2010 ED	$8 billion	Paper Products
Smurfit Stone Containers Corp.	01/26/2009 (D. Del.)	06/21/2010 CD 06/30/2010 ED	$7.4 billion	Packaging
Extended Stay, Inc.	06/15/2009 (S.D.N.Y.)	07/20/2010 CD 10/08/2010 ED	$7.1 billion	Hospitality
Station Casinos, Inc.	07/28/2009 (D. Nev.)	08/27/2010 CD 09/10/2010 ED	$5.8 billion	Entertainment and Hospitality
Visteon Corp.	05/27/2009 (D. Del.)	08/31/2010 CD 10/01/2010 ED	$5.2 billion	Auto Parts
Aleris International Inc.	02/12/2009 (D. Del.)	05/13/2010 CD 06/01/2010 ED	$5.1 billion	Aluminum Products
The Reader's Digest Assoc. Inc.	08/24/2009 (S.D.N.Y.)	01/15/2010 CD 02/22/2010 ED	$4 billion	Media
Spansion, Inc.	03/01/2009 (D. Del)	04/16/2010 CD 05/10/2010 ED	$3.8 billion	Computer Manufacturing
AMCORE Financial, Inc.	08/19/2010 (N.D. Ill.)	12/15/2010 CD	$3.8 billion	Banking
Circuit City Stores, Inc.	11/10/2008 (E.D. Va.)	09/08/2010 CD 11/01/2010 ED	$3.7 billion	Retail
Chemtura Corp.	03/18/2009 (S.D.N.Y.)	10/21/2010 CD 11/09/2010 ED	$3 billion	Chemicals
Six Flags, Inc.	06/13/2009 (D. Del.)	04/28/2010 CD 05/03/2010 ED	$3 billion	Entertainment
Metro-Goldwyn-Mayer Studios, Inc.	11/03/2010 (S.D.N.Y.)	12/02/2010 CD 12/20/2010 ED	$2.7 billion	Media
The Citadel Broadcasting Corp.	12/20/2009 (S.D.N.Y.)	05/19/2010 CD 06/03/2010 ED	$2.4 billion	Media
Trump Entertainment Resorts, Inc.	02/17/2009 (D.N.J.)	05/07/2010 CD 07/16/2010 ED	$2.2 billion	Entertainment and Hospitality
Capital Corp. of the West	05/11/2009 (E.D. Cal.)	01/21/2010 CD 02/04/2010 ED	$2.1 billion	Banking
Cooper Standard Holdings, Inc.	08/03/2009 (D. Del.)	05/12/2010 CD 05/27/2010 ED	$1.8 billion	Auto Parts

Tropicana Entertainment, LLC	05/05/2008 (D. Del.)	07/06/2009 CD 03/08/2010 ED	$1.7 billion	Entertainment and Hospitality
Metaldyne Corp.	05/27/2009 (S.D.N.Y.)	02/23/2010 CD 03/30/2010 ED	$1.6 billion	Auto Parts
Vertis, Inc.	11/17/2010 (S.D.N.Y.)	12/16/2010 CD 12/20/2010 ED	$1.5 billion	Print Advertising
Truvo USA LLC	07/01/2010 (S.D.N.Y.)	10/26/2010 CD 11/30/2010 ED	$1.3 billion	Print Advertising
Tarragon Corporation	01/12/2009 (D.N.J.)	06/18/2010 CD 07/06/2010 ED	$1.1 billion	Real Estate
Herbst Gaming, Inc.	03/22/2009 (D. Nev.)	01/22/2010 CD 02/05/2010 ED	$1.08 billion	Entertainment
Affiliated Media Inc.	01/22/2010 (D. Del.)	03/19/2010 CD 05/31/2010 ED	$1.01 billion	Media

Legislative Developments

Bankruptcy Studies to Be Conducted Under New Financial Reform Law

President Barack Obama gave his imprimatur to the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 on July 21. Relatively few of the provisions in the new law implicate the Bankruptcy Code. However, among other things, the law does call on the Board of Governors of the Federal Reserve System, in consultation with the Administrative Office of the U.S. Courts, to conduct two bankruptcy-related studies.

One study deals with the bankruptcy process for financial institutions under chapters 7 and 11 of the Bankruptcy Code. The other concerns international coordination of the bankruptcy process for nonbank financial institutions under the Bankruptcy Code and applicable foreign law. Reports of each of the studies must be submitted no later than one year after the date of enactment of the new law to the Senate Committee on Banking, Housing, and Urban Affairs; the House Committee on Financial Services; and the House and Senate Judiciary Committees.

Technical Corrections to the Bankruptcy Code Enacted

On December 23, 2010, President Obama signed into law the Bankruptcy Technical Corrections Act of 2010, which makes technical corrections to the Bankruptcy Code relating to amendments made by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. The legislation does not make changes to substantive law, but is instead intended to make the Bankruptcy Code easier to understand by bankruptcy professionals and judges. The technical corrections pertain to: (1) the power of the court; (2) waiver of sovereign immunity; (3) public access to papers; (4) who may be a debtor; (5) penalties for fraudulent or negligent preparation of bankruptcy petitions; (6) debtor reporting requirements; (7) the automatic stay; (8) case administration; (9) determination of tax liability; (10) priorities of creditors and claims; (11) debtors' duties; (12) exceptions to discharge; (13) restrictions on debt-relief agencies; (14) property of the estate; (15) abandonment of property of the estate; (16) treatment of certain liens; and (17) conversion or dismissal of bankruptcy cases.

Bankruptcy Rule Amendments Effective

Several changes to the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules") took effect on December 1, 2010. Many of the changes implement chapter 15, which was added to the Bankruptcy Code in 2005 to govern cross-border bankruptcy and insolvency cases. The amendments were approved by the U.S. Supreme Court on April 28 and transmitted to Congress in May.

Among other changes, the amendments include the following:

- Amendment of Rule 1014 to apply the rule's venue provisions to chapter 15 cases.

- Amendment of Rule 1015 to include chapter 15 cases among those subject to the rule, which authorizes the court to order the consolidation or joint administration of cases.

- Amendments to Rule 1018 to reflect the enactment of chapter 15 in 2005. The amendments 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.

- Amendments to Rule 5009, which governs the closing of chapter 7, 12, 13, and 15 cases, to require a foreign representative in a chapter 15 case to file and give notice of the filing of a final report in the case.

- Addition of new Rule 5012, which establishes a procedure in chapter 15 cases for obtaining the approval of an agreement regarding communications in, and the coordination of the proceedings with, cases involving the debtor pending in other countries.

- Amendment of Rule 9001 to apply to the rules the definitions of words and phrases listed in section 1502 of the Bankruptcy Code governing cross-border insolvencies.

Proposed Bankruptcy Code Amendments to Benefit Employees and Retirees

On September 15, 2010, the House Subcommittee on Commercial and Administrative Law voted to report H.R. 4677 to the full House Judiciary Committee. Entitled the "Protecting Employees and Retirees in Business Bankruptcies Act of 2010," H.R. 4677 contains substantial changes to federal law aimed at protecting employee wages and benefits during a chapter 11 case. The bill's Senate companion, S. 3033, was introduced on February 24, 2010. Among the provisions in H.R. 4677 are the following:

- Enhanced priority for employee wage and benefit claims in bankruptcy and doubling of the cap on priority employee wage claims to $20,000.

- Expanded scope of priority wage claims to include claims for severance pay owed to employees other than executives and consultants, as well as claims under the Worker Adjustment and Retraining Notification Act.

- A provision allowing claims for stock value losses in defined-contribution pension plans if the losses were caused by fraud or the breach of a duty owed to the employee.

- Added requirements under section 1113 of the Bankruptcy Code for rejecting collective bargaining agreements in chapter 11, including a requirement that any proposed reduction in employee compensation be "not more than the minimum savings essential to permit the debtor to exit bankruptcy" and be part of a plan that includes savings in management personnel costs. Also, the court could allow rejection of a bargaining agreement only if proposed modifications would not, among other things, "cause a material diminution of the purchasing power of the employees covered by the agreement." The implementation of executive bonus plans during the chapter 11 case or the 180-day period preceding the filing would be presumed to be overly burdensome to employees and would preclude rejection of the bargaining agreement. Similar restrictions are included in H.R. 4677 for proposed modifications to retiree benefits under section 1114.

- Significant restrictions on payment of executive bonuses before, during, and after a bankruptcy case and a prohibition against any deferred compensation plan for executives and insiders if a defined-benefit pension plan for employees is terminated during the bankruptcy case or the 180-day period preceding the filing.

- A provision exempting from the scope of the automatic stay arbitration proceedings commenced prepetition under a collective bargaining agreement as well as acts to enforce a prepetition arbitration award or settlement.

Enactment of the Austrian "Chapter 11"

Austria implemented radical changes to its insolvency law and introduced a new restructuring proceeding with self-administration (*Sanierungsverfahren mit Eigenverwaltung*) on July 1, 2010, in its newly adopted Insolvency Code (*Insolvenzordnung*). One of the main features of the new form of insolvency proceeding is that the insolvent company largely remains in control of its business, but under the supervision of a restructuring administrator, much in the same way that a chapter 11 debtor in possession in the U.S. continues to manage its property and affairs under the supervision of the bankruptcy court. For a more detailed analysis of the new legislation, refer to http://www.jonesday.com/austrian_chapter_11/.

Amendments to Russia's Insolvency Law

On December 28, 2010, Russian president Dmitry Medvedev signed into law Federal Law No. 429-FZ, which amends Federal Law No. 127-FZ on insolvency (bankruptcy) dated October 26, 2002. Among the amendments are changes to regulations concerning Russia's Bankruptcy Registry requiring that bankruptcy records, including the names, addresses, tax identification information and other registration numbers of insolvent entities, filing dates, and information regarding creditor claims and bankruptcy sales, be made publicly available both in print and online in a readily searchable format. The amendments were adopted on December 21, 2010, by the State Duma, the lower house of parliament, and on December 24 by the Federation Council, the upper house of parliament. They become effective on April 1, 2011, with certain exceptions.

Notable Business Bankruptcy Decisions of 2010

Allowance/Disallowance/Priority of Claims

As part of the overhaul of bankruptcy laws in 1978, Congress for the first time included the definition of "claim" as part of the Bankruptcy Code. A few years later, in *Avellino & Bienes v. M. Frenville Co. (In re M. Frenville Co.)*, 744 F.2d 332 (3d Cir. 1984), the Third Circuit became the first court of appeals to examine the scope of this new definition in the context of the automatic stay. In interpreting the definition of "claim," the Third Circuit focused on the "right to payment" language in that definition and ultimately held that a claim arises when a claimant's right to payment accrues under applicable nonbankruptcy law. Subsequent to the decision in *Frenville*, courts in other jurisdictions almost unanimously criticized the Third Circuit's adoption of the “accrual” test because it appeared to contradict the broad definition of “claim” enunciated by Congress in the Bankruptcy Code.

On June 2, 2010, the Third Circuit issued an en banc decision in *Jeld-Wen, Inc. v. Van Brunt (In re Grossman’s Inc.)*, 607 F.3d 114 (3d Cir. 2010), specifically overruling *Frenville* and 26 intervening years of precedent. In *Grossman’s*, the court rejected the widely criticized accrual test initially adopted in *Frenville* and instead opted for a version of the “conduct” test used by other courts to determine when a claim arises for purposes of the Bankruptcy Code. With this ruling, the Third Circuit fundamentally altered how courts in the Third Circuit will determine whether an entity has a claim in bankruptcy.

A new administrative-expense priority was added to the Bankruptcy Code as part of the 2005 bankruptcy reforms for claims based upon the value of goods received by a debtor from vendors in the ordinary course of business within 20 days of filing for bankruptcy. A dispute has arisen in the courts as to whether such “20-day claims” under section 503(b)(9) of the Bankruptcy Code are subject to disallowance (temporary or otherwise) under section 502(d) if the vendor is alleged to have been the recipient of a preference or other avoidable transfer. In *In re Circuit City Stores, Inc.*, 426 B.R. 560 (Bankr. E.D. Va. 2010), a Virginia bankruptcy court disagreed with a number of other courts in holding that 20-day claims held by avoidable-transfer recipients must be disallowed under section 502(d), pending the return of prepetition payments that are the subject of avoidance litigation.

In *In re Oldco M Corp.*, 438 B.R. 775 (Bankr. S.D.N.Y. 2010), the bankruptcy court ruled that an allowed-administrative-expense priority under sections 503(b)(1)(A) and 507(a)(2) of the Bankruptcy Code does not depend on the definition of the term "claim." An "allowed administrative expense," the court explained, includes the "actual, necessary costs and expenses of preserving the estate," without regard to whether those expenses might also satisfy the definition of a "claim" under section 101(5). The court nonetheless denied a request by the Michigan Department of Natural Resources and Environment for an order conferring administrative priority on its claim for future remediation costs at a facility sold during the debtor's bankruptcy case, because the Department failed to demonstrate that it had expended any money for response costs or that it would be required to do so in the future.

The Bankruptcy Code treats insiders with increased scrutiny, from longer preference periods to rigorous equitable subordination principles, denial of chapter 7 trustee voting rights, disqualification in some cases of votes on a cramdown chapter 11 plan, and restrictions on postpetition key-employee compensation packages. The treatment of claims by insiders for prebankruptcy services is no exception to this general policy: section 502(b)(4) disallows any insider claim for services to the extent the claim exceeds the "reasonable value" of such services.

In *In re Delta Air Lines, Inc.*, 2010 WL 423279 (Bankr. S.D.N.Y. Feb. 3, 2010), a New York bankruptcy court ruled that the debtor's chief financial officer remained an insider despite submitting a resignation letter while she was negotiating her subsequent consulting agreement and that claims arising from the debtor's rejection of her prepetition consulting agreement were limited by section 502(b)(4) and should be capped at zero due to compensation already received.

Changes made to section 548(a) of the Bankruptcy Code in 2005 made it easier for a bankruptcy trustee or chapter 11 debtor in possession ("DIP") to avoid and recover severance payments made (or promised) to an executive terminated prior to a bankruptcy filing if the amount of the payment is later deemed to be excessive. The Fifth Circuit Court of Appeals applied section 548(a) in this context in 2010. In *In re TransTexas Gas Corp.*, 597 F.3d 298 (5th Cir. 2010), the court affirmed a ruling below authorizing a DIP to avoid prepetition severance payments made to an executive as fraudulent transfers. Although it would appear that the court of appeals mistakenly applied the post-2005 amendment version of section 548(a), the ruling highlights the importance of proving reasonably equivalent value if an insider is to retain payments under or enforce a severance agreement.

Restrictions on a borrower's ability to prepay secured debt are a common feature of bond indentures and credit agreements. Lenders often incorporate "no-call" provisions to prevent borrowers from refinancing or retiring debt prior to maturity. Alternatively, a loan agreement may allow prepayment at the borrower's option, but only upon payment of a "make-whole premium" (commonly referred to as a "prepayment penalty"). The purpose of these prepayment penalties is to compensate the lender for the loss of the remaining stream-of-interest payments it would otherwise have received had the borrower paid the debt through maturity.

Bankruptcy courts almost uniformly refuse to enforce no-call provisions against debtors and routinely allow the debtor to repay outstanding debt. Also, courts sometimes disallow lender claims for payment of make-whole premiums for breach of a no-call provision because those premiums are generally not due under the applicable loan documents during the no-call period. Some courts are similarly loath to buy into a lender's alternative argument that it should be entitled to contract damages claims (apart from a make-whole premium) for "dashed expectations" when its outstanding debt has been paid prior to its original maturity.

These issues were the subject of several important rulings handed down in 2010. For example, in *HSBC Bank USA, Nat'l Ass'n v. Calpine Corp.*, 2010 WL 3835200 (S.D.N.Y. Sept. 15, 2010), the debtor sought to refinance its DIP financing to repay approximately $2.5 billion of prepetition secured project-level debt. Two tranches of the debt contained no-call provisions barring repayment during certain time payments but allowed prepayment afterward upon the payment of a make-whole premium, while the third tranche barred prepayment until maturity. The debtor sought to repay all three tranches during the no-call periods. The lenders objected, claiming that their loan documents prohibited the repayment, and if repayment were allowed, they should be entitled to dashed-expectation claims.

The bankruptcy court ruled that no-call provisions "are unenforceable in chapter 11 cases." In addition, the court held that, because the loan agreements never specifically required the payment of any "charges" for make-whole damages resulting from repayment of the debt upon maturity in the event of acceleration, the lenders were not entitled to make-whole damages as part of their allowed secured claims under section 506(b). However, the court ruled that the lenders were entitled to unsecured claims for dashed expectations. On September 15, 2010, the district court reversed this last determination on appeal. It held that any claim for damages for breach of a no-call provision is precluded by the disallowance under section 502(b)(2) of a claim for unmatured interest, because the automatic acceleration of the debt upon bankruptcy made any future interest obligations that would otherwise have accrued "unearned" as of the petition date.

A Mississippi bankruptcy court confronted the same issue in *In re Premier Entertainment Biloxi LLC*, 2010 WL 3504105 (Bankr. S.D. Miss. Sept. 3, 2010). Like the district court in *Calpine*, the court in *Premier Entertainment Biloxi* ruled that the lenders were not entitled to a secured claim for make-whole damages because the indenture required prepayment penalties only if the debtor repaid the loan prior to maturity, and maturity was automatically accelerated as a consequence of the debtor's bankruptcy filing. However, the court sided with the bankruptcy court in *Calpine*, awarding the lenders an unsecured claim for dashed expectations, emphasizing that "the non-breaching party is not deprived of a monetary remedy just because no-call provisions are not subject to the remedy of specific performance in bankruptcy cases." Moreover, the court noted, "absent compelling equitable considerations," when a debtor is solvent, as was the (unusual) case in *Premier Entertainment Biloxi*, "it is the role of the bankruptcy court to enforce the creditors' contractual rights."

The next contribution to this debate was offered by the bankruptcy court in *In re Chemtura Corp.*, 2010 WL 4272727 (Bankr. S.D.N.Y. Oct. 21, 2010), but in a slightly different context. In *Chemtura*, the debtors sought bankruptcy-court approval of a global settlement among the debtors, the unsecured creditors' committee, and an ad hoc bondholder group in connection with confirmation of a chapter 11 plan. Among other things, the settlement contemplated prepayment by the debtors of certain notes, a make-whole settlement payment, and a damages settlement payment for the debtors' breach of a no-call provision. The bankruptcy court approved the settlement. The court carefully analyzed several factors, including the parties' relative litigation positions and likelihood of prevailing on each of the issues involved and the impact that the debtors' insolvency should have on damages claims arising from breach of the no-call provision. On the basis of that analysis, the court ruled that the settlement was reasonable, even "[t]aking into account the new thinking in the area, as articulated in [the district court's ruling in *Calpine*] and *Premier Entertainment Biloxi*."

Liquidated damages (albeit not in the context of a no-call provision) were also the subject of the court's ruling in *In re Saint Vincent's Catholic Medical Centers of New York*, 2010 WL 4553542 (Bankr. S.D.N.Y. Nov. 12, 2010). In *Saint Vincent's*, an oversecured creditor's loan documents included an "*ipso facto*" clause accelerating the maturity of a mortgage loan upon the borrower's bankruptcy filing, as well as an "acceleration indemnification," or liquidated damages clause, triggered by the *ipso facto* clause. The court ruled that the creditor's allowed secured claim under section 506(b) of the Bankruptcy Code included the outstanding principal amount of the mortgage loan, the acceleration indemnification, attorneys' fees, and interest at the regular, nondefault contract rate up to the date of the sale of the property.

In *In re Adelphia Communications Corp.*, 2010 WL 4791795 (Bankr. S.D.N.Y. Nov. 18, 2010), the court held that section 503(b) does not provide the exclusive standard for determining whether fees incurred by individual creditors may be paid by the estate. Instead, the court explained, the inquiry should concern whether a provision in a chapter 11 plan providing for the payment of creditors' legal fees is "appropriate," and a bankruptcy court should not adjudge a plan provision to be otherwise on the basis of anything short of a conflict with bankruptcy case law, nonbankruptcy statutory or case law, or clear public-policy concerns. The court ruled that, where a debtor agreed as part of a settlement with litigious unsecured creditors (distressed-debt investors) to pay the individual creditors' reasonable attorneys' fees, the creditors were entitled to payment of reasonable attorneys' fees without establishing that they had made a "substantial contribution" or that the underlying services benefited the estate.

Avoidance Actions/Trustee's Avoidance and Strong-Arm Powers

Reliance of leveraged-buyout participants on the "safe harbor" protections of the Bankruptcy Code as a means of skirting avoidance liability was the subject of an important ruling handed down by a bankruptcy court in *In re Mervyn's Holdings, LLC*, 426 B.R. 488 (Bankr. D. Del. 2010). The court ruled that allegations in a complaint filed by a chapter 11 debtor, challenging transactions by which a parent company first converted the corporation into a limited liability company and then transferred its 100 percent interest in the LLC in a manner that left the acquiring entity with little working capital and $800 million in additional debt, adequately stated a claim for collapsing the transactions surrounding the sale, for the purpose of avoiding the sale on a fraudulent-transfer theory.

The court also held that the parent company could not assert the "settlement payment" defense to avoidance claims set forth in section 546(e) of the Bankruptcy Code, concluding that the series of transactions taken as a whole did not qualify as a "settlement payment" and that the parent could not focus on one isolated part of the integrated series of transactions for purposes of invoking the defense. The case is significant for its treatment of the LBO vis-à-vis the safe-harbor protections of the Bankruptcy Code and because it cuts against the general trend protecting sellers from fraudulent-conveyance actions with regard to LBOs.

In *Paloian v. LaSalle Bank, N.A.*, 619 F.3d 688 (7th Cir. 2010), the Seventh Circuit ruled, as a matter of first impression, that the trustee of a securitized investment pool can be a "transferee" as that term is used under section 550(a)(1) of the Bankruptcy Code for the purpose of avoiding transfers. However, the court of appeals rejected the bankruptcy court's finding that the debtor was insolvent by valuing its contingent liabilities at 100 percent, while valuing contingent assets at zero, and remanded the case below for further findings on the issue of solvency.

When a company files for chapter 11 protection, it typically obtains either DIP financing or permission to use cash collateral, or a combination of both, to keep the business operational. A ruling handed down in 2010 by the U.S. Court of Appeals for the Eleventh Circuit highlights the principle that a debtor's use of cash collateral is subject to strict scrutiny. In *In re Delco Oil, Inc.*, 599 F.3d 1255 (11th Cir. 2010), a three-judge panel of the court of appeals put vendors who trade with a debtor postpetition on notice that unauthorized payments by a DIP using cash collateral can be avoided and recovered by the estate under sections 549 and 550 of the Bankruptcy Code.

In *In re Jim L. Shetakis Distributing Co.*, 2010 WL 4269532 (9th Cir. Oct. 27, 2010), the Ninth Circuit ruled that an improper transfer by a DIP under section 549 is voidable rather than void. The court explained that, although the automatic stay voids transfers of the debtor's property by creditors and other third parties in order to protect the debtor from all collection efforts, such protection is not necessary for transfers initiated by the debtor itself.

In *Cadle Co. v. Mims (In re Moore)*, 608 F.3d 253 (5th Cir. 2010), the Fifth Circuit Court of Appeals addressed two issues that have created a split of authority among the federal circuits: (i) whether a trustee in bankruptcy may sell causes of action that arise from the trustee's avoidance powers under section 544(b) of the Bankruptcy Code; and (ii) whether the proposed settlement of an avoidance action should be scrutinized under section 363(b) as well as Bankruptcy Rule 9019 because a creditor offered to purchase the claim for more than the proposed settlement amount.

The court ruled that both the reverse veil-piercing and fraudulent-conveyance claims originally asserted prepetition by a creditor under state law were property of the debtor's estate that could be sold. In remanding the case below, the Fifth Circuit also ordered the bankruptcy court to consider the propriety of an auction and section 363 sale procedures in light of the creditor's offer to purchase the claims, as well as the propriety of settlement of the claims under Bankruptcy Rule 9019.

When a bankruptcy trustee successfully avoids a preferential transfer under section 547 of the Bankruptcy Code, section 550(a) gives the trustee the option of recovering either the property transferred or its value from the transferee (with certain exceptions). Under section 551, any transfer or lien avoided is preserved for the benefit of the estate. In *In re Taylor*, 599 F.3d 880 (9th Cir. 2010), the Ninth Circuit ruled that, when a lien is avoided as a preferential transfer, the effect of avoidance should be that the lien is transferred to the estate and the transferee is granted an unsecured claim in the amount of the avoided transfer. The court reversed a bankruptcy-court ruling directing the creditor/defendant to pay the estate the "value" of the lien, which the bankruptcy court found to be the initial amount of the underlying loan. Because the lien had no readily ascertainable value, the Ninth Circuit concluded, the court should have ordered the lien itself to be transferred to the estate.

Bankruptcy Asset Sales

In *In re Boston Generating, LLC*, 2010 WL 4922578 (Bankr. S.D.N.Y. Dec. 3, 2010), the bankruptcy court approved a sale of substantially all of the chapter 11 debtors' assets under sections 363(b) and (f) of the Bankruptcy Code over the objections of the debtors' second-lien lenders and the unsecured creditors' committee. Among other things, the court determined that an intercreditor agreement providing that, until the first-lien obligations were discharged, first-lien lenders would have the exclusive authority to enforce rights, exercise remedies, and make determinations regarding any release, sale, or disposition of the collateral did not clearly provide that second-lien lenders waived the right to object to the sale, especially where the proposed sale would effectively deprive the second-lien lenders of the opportunity to vote, in any economically meaningful way, on a chapter 11 plan.

The court concluded that the debtors properly exercised their fiduciary duties in pursuing the sale transaction and that approval of the sale was appropriate under standards articulated by the Second Circuit Court of Appeals in *Comm. of Equity Sec. Holders v. Lionel Corp. (In re Lionel Corp.)*, 722 F.2d 1063 (2d Cir. 1983), and the bankruptcy court in *In re General Motors Corp.*, 407 B.R. 463 (Bankr. S.D.N.Y. 2009), *aff'd sub nom. In re Motors Liquidation Co.*, 430 B.R. 65 (Bankr. S.D.N.Y. 2010). It also found that the sale did not constitute a *sub rosa* chapter 11 plan, and it declined to follow the ruling in *Clear Channel Outdoor, Inc. v. Knupfer (In re PW, LLC)*, 391 B.R. 25 (Bankr. 9th Cir. 2008). The *Boston Generating* court held that the term "value," as used in section 363(f)(3), refers not to the face amount of liens encumbering assets to be sold free and clear, but to the value of the secured claims, as determined by section 506(a).

The court determined that the "business judgment," rather than the "entire fairness," standard should apply to the proposed sale transaction, given the absence of any evidence that the sale process was "tainted" because the debtors' directors had "personal and economic allegiances to entities other than the Debtors," along with the court's finding that the sale process was fair. Finally, the court declined to rule on a dispute between first- and second-lien creditors under the intercreditor agreement regarding allocation of the sale proceeds, remarking that "[s]uch decisions are more appropriately rendered during the plan process, or via adversary proceeding between the Secured Parties."

Contrarian Funds, LLC v. Aretex LLC (In re WestPoint Stevens, Inc.), 600 F.3d 231 (2d Cir. 2010), involved a dispute between first- and second-lien lenders in the context of a section 363(b) sale. The second-lien lenders submitted the successful bid at an auction sale of the company's assets. However, the bid did not provide that the first-lien debt would be paid in cash; instead, it provided that the first-lien claims would be satisfied with equity securities and subscription rights to the stock of the acquirer's parent corporation valued at an amount equal to the first-lien lenders' allowed claims.

The first-lien lenders objected to the proposal. Among other things, they argued that, pursuant to the terms of an intercreditor agreement, second-lien lenders could not receive any payments in respect of their claims and were not entitled to exercise any rights or remedies with respect to their claims, until the first-lien claims had been paid in full in cash. However, the bankruptcy court concluded that the agreement contemplated that first-lien claims might be paid other than with cash, and it approved the sale transaction. The district court reversed on appeal, holding that neither the intercreditor agreement nor the adequate-protection provisions of the Bankruptcy Code authorized payment to the first-lien lenders with securities (*i.e.*, other than in cash).

The Second Circuit agreed with the district court, but to no avail for the first-lien lenders. Even though the court concluded that the terms of the sale violated the intercreditor agreement, the court ruled that appellate review was barred by the rule of “statutory mootness” pursuant to section 363(m) of the Bankruptcy Code because the sale transaction had already been consummated and the challenged provisions were an integral part of the sale transaction.

The Third Circuit Court of Appeals had an opportunity in 2010 to revisit application of the section 503(b) administrative-expense standard to breakup fees sometimes approved in connection with bankruptcy-asset-sale transactions. In *In re Reliant Energy Channelview LP*, 594 F.3d 200 (3d Cir. 2010), the court of appeals, reaffirming its previous rulings, held that such fees may be allowed only if they are necessary to induce a stalking-horse bidder either to enter into a transaction or to adhere to its bid after the court orders a public auction.

Whether successor liability claims survive a bankruptcy asset sale was one of the issues addressed by the Second Circuit Court of Appeals in *Douglas v. Stamco*, 2010 WL 337043 (2d Cir. Feb. 1, 2010). The court of appeals affirmed a district court’s denial of a tort claimant’s motion to amend a complaint to add a successor liability claim against a company that had acquired a debtor company against which the tort claim was asserted. According to the court, the complaint did not state a successor liability claim under New York law and the debtor's assets had been sold free and clear under section 363(f) of the Bankruptcy Code, such that "it is evident that the potential chilling effect of allowing a tort claim subsequent to the sale would run counter to a core aim of the Bankruptcy Code, which is to maximize the value of the assets and thereby maximize potential recovery to the creditors."

Section 363(m) of the Bankruptcy Code provides that the reversal or modification on appeal of an order approving a bankruptcy asset sale does not affect the validity of the sale to a "good faith" purchaser, unless the order approving the sale is stayed pending appeal. Courts disagree as to what is necessary to establish the purchaser's "good faith" incident to a determination that a challenge to a sale is mooted by section 363(m). In *In re Fitzgerald*, 428 B.R. 872 (Bankr. 9th Cir. 2010), a bankruptcy appellate panel for the Ninth Circuit ruled that section 363(m) does not moot an appeal of a sale order without specific findings concerning good faith, as opposed to a boilerplate recitation of good faith in the sale order.

Bankruptcy-Court Powers/Jurisdiction

A bankruptcy court's power to sanction parties for contempt was among the issues addressed by the Second Circuit in *In re Kalikow*, 602 F.3d 82 (2d Cir. 2010). Even though the parties in the *Kalikow* bankruptcy case were guilty of "reprehensible conduct" after a chapter 11 plan was confirmed, the court of appeals vacated an award of $335,000 in sanctions for violating the discharge injunction contained in the plan confirmation order and section 524(a)(2) of the Bankruptcy Code. Violating the discharge injunction, the court held, could not be the basis for imposing sanctions for bad conduct because the guilty parties were not attempting to collect a prebankruptcy judgment. The Second Circuit also ruled that the bankruptcy court did not have "inherent power" to impose a contempt sanction under section 105(a) of the Bankruptcy Code, because section 105(a) cannot serve as an "independent basis for awarding sanctions without violation of § 524(a)(2) or another provision of the Bankruptcy Code."

In *In re 15375 Memorial Corp.*, 430 B.R. 142 (Bankr. D. Del. 2010), the court considered whether chapter 11 debtors' attorneys and related corporate entities should be sanctioned in connection with appellate courts' determinations that the debtors' chapter 11 cases had been filed in bad faith as a litigation tactic to shield the debtors as well as their indirect parent company and affiliates from liability in ongoing litigation.

The bankruptcy court ruled that neither counsel for the debtors and the related entities nor the debtors' representative violated Bankruptcy Rule 9011 in connection with filing the debtors' chapter 11 petitions. Therefore, the court held, neither sanctions nor an order requiring the debtors' attorneys to disgorge their fees was warranted, notwithstanding a determination on appeal that the cases were filed in bad faith and had to be dismissed, because counsel and the representative did not mislead, make misrepresentations, or dissemble.

The court also ruled that misuse of the bankruptcy process by the debtors' indirect parent company and related entities, in filing and controlling the debtors' bankruptcy cases, warranted the imposition of sanctions in the amount of $2 million, representing the litigation creditor's attorneys' fees and expenses for proceedings before the bankruptcy court, pursuant to the court's inherent authority to sanction abuses in bankruptcy cases and 28 U.S.C. § 1927—the statute allowing for sanctions for multiplying proceedings “unreasonably and vexatiously.” However, the court concluded that it did not have the authority to impose sanctions, pursuant to either its inherent powers or section 1927, for matters that were pending before higher courts.

Addressing an issue of apparent first impression for the court, the Second Circuit Court of Appeals ruled in *Baker v. Simpson*, 613 F.3d 346 (2d Cir. 2010), that professional malpractice claims based on services rendered in connection with the filing of a bankruptcy petition are subject to the bankruptcy court’s “arising in” jurisdiction under 28 U.S.C. § 157(b)(1) and that the court of appeals lacked jurisdiction to review the propriety of the bankruptcy court’s discretionary decision not to abstain under 28 U.S.C. §§ 1334(c)(1) and (d).

In *In re SemCrude, L.P.*, 2010 WL 5140487 (Bankr. D. Del. Dec. 13, 2010), the court examined the outer limits of its jurisdiction under 28 U.S.C. §§ 157 and 1334 and held, as a matter of first impression, that a bankruptcy court cannot utilize supplemental jurisdiction under 28 U.S.C. § 1367 as a jurisdictional basis to adjudicate a proceeding. Section 1367 recognizes that, although certain state-law claims may not otherwise be adjudicated by federal district courts, under certain circumstances, such claims may be heard on the basis of considerations of judicial efficiency when a district court has original jurisdiction over other claims that share the same common nucleus of operative facts.

In *SemCrude*, the court acknowledged that, although the Ninth Circuit has held that a bankruptcy court may exercise supplemental jurisdiction, both the Fifth Circuit and a New York bankruptcy court have ruled that bankruptcy courts cannot exercise such jurisdiction. These courts reasoned that the language of section 1367 does not authorize bankruptcy courts to exercise supplemental jurisdiction and that the carefully crafted endowment of jurisdiction under sections 1334 and 157 does not contemplate consideration of a supplemental nonfederal claim that has no impact on a bankruptcy estate. The *SemCrude* bankruptcy court agreed with this analysis, ruling that section 1367 cannot serve as a jurisdictional basis for the court to consider noncore claims arising under state law.

Bankruptcy Professionals

The "common interest" doctrine allows attorneys representing different clients with aligned legal interests to share information and documents without waiving the work-product doctrine or attorney-client privilege. Issues involving the common-interest doctrine often arise during the course of a business restructuring, because restructurings tend to involve various constituencies whose legal interests may be aligned at any one time. In *In re Leslie Controls, Inc.*, 437 B.R. 493 (Bankr. D. Del. 2010), the court determined that the common-interest doctrine protected certain prepetition communications and documents relating to insurance coverage for potential asbestos liabilities that counsel to chapter 11 debtor Leslie Controls, Inc., shared with counsel to an ad hoc committee of asbestos plaintiffs and counsel to a proposed future-claims representative during the course of restructuring negotiations. The negotiations eventually culminated in a bankruptcy filing and the submission of a consensual plan of reorganization. The ruling provides parties participating in plan negotiations some reassurance that sharing documents during the course of such negotiations will not make the materials subject to discovery in later litigation.

In many bankruptcy cases, the employment of "conflicts counsel" to handle discrete issues when a debtor's general bankruptcy counsel has an adverse interest solves many conflict issues arising in connection with the retention of general bankruptcy counsel. Even so, as demonstrated by the bankruptcy court's ruling in *In re Project Orange Associates, LLC*, 431 B.R. 363 (Bankr. S.D.N.Y. 2010), the use of conflicts counsel may not justify retention of general bankruptcy counsel under section 327(a) of the Bankruptcy Code if the proposed general bankruptcy counsel has a conflict of interest with a creditor that is central to the debtor's chapter 11 case.

The court ruled that a conflicts waiver obtained from the creditor by attorneys that the debtor sought to retain as general bankruptcy counsel did not, by contractually permitting the firm to represent the debtor on some matters adverse to the creditor, trump the statutory requirements governing the estate's employment of professionals. According to the court, the waiver severely limited the firm's ability to act in the debtor's best interests with regard to the creditor by barring the law firm from suing or threatening to sue the creditor or its affiliates, even within the context of negotiations.

Chapter 11 Plans

The early 2000s witnessed a wave of chapter 11 filings by entities with liability for asbestos personal-injury claims. The chapter 11 case of Quigley Company, Inc. ("Quigley"), was one of the last large asbestos cases to file in the 2000s and represents one of the more interesting strategies for dealing with asbestos liabilities in chapter 11. A bankruptcy judge in the Southern District of New York, however, struck down this strategy in 2010 and denied confirmation of the debtor's proposed chapter 11 plan.

In *In re Quigley Co., Inc.*, 437 B.R. 102 (Bankr. S.D.N.Y. 2010), the court found that the chapter 11 case was a Quigley bankruptcy "only in name" and that Quigley's parent corporation had arranged the proceedings to protect itself from derivative liability for asbestos claims and only incidentally to reorganize its subsidiary. The court also found that the parent had procured the votes needed to confirm the Quigley plan in bad faith, because asbestos claimants voted for the plan to obtain their payments for settling the parent's asbestos liability, rather than as creditors of Quigley. Therefore, the court ruled both that the plan was not proposed in good faith, as required by section 1129(a)(3) of the Bankruptcy Code, and that the votes of the settling claimants should not be counted, as having been procured in bad faith under section 1126(e).

Over the past decade, rights offerings have become a valuable and frequently used source of exit financing for chapter 11 debtors. A Delaware bankruptcy court's ruling in *In re Accuride Corp.*, 439 B.R. 364 (Bankr. D. Del. 2010), demonstrated how important it is for parties subscribing to a rights offering under a chapter 11 plan to ensure that they understand the subscription provisions of the plan and to submit complete information to obtain the level of distribution desired. In *Accuride*, the party seeking to subscribe to the plan rights offering stated the incorrect amount of its claim on its subscription form, causing it to receive less than the full distribution to which it was otherwise entitled. On the basis of the express language of the chapter 11 plan, the court ruled in favor of the debtor's position that the submitted form should govern the amount of the distribution, thus squarely placing the burden on the subscribing party to submit an accurate subscription form.

The concept of "impairment" of a claim under a chapter 11 plan for the purpose of determining whether the claimant has the right to vote has evolved since the Bankruptcy Code was first enacted in 1978. A noteworthy step in that development was the subject of a ruling handed down in 2010 by the bankruptcy court overseeing the whirlwind chapter 11 case of Major League Baseball's Texas Rangers. In *In re Texas Rangers Baseball Partners*, 434 B.R. 393 (Bankr. N.D. Tex. 2010), the court held that, in order to render a secured creditor's claim "unimpaired," a chapter 11 plan need not honor the creditor's contractual right to veto a postdefault sale of the debtor's assets during the bankruptcy, so long as the creditor retains the right to sue the debtor for breach of this contractual right.

Preservation of favorable tax attributes, such as net operating losses, that might otherwise be forfeited under applicable nonbankruptcy law is an important component of a business debtor's chapter 11 strategy. However, if the principal purpose of a chapter 11 plan is to avoid paying taxes, rather than to effect a reorganization or the orderly liquidation of the debtor, the Bankruptcy Code contains a number of tools that can be wielded to thwart confirmation of the plan.

The Seventh Circuit Court of Appeals was called upon in 2010 to weigh in on this issue as an apparent matter of first impression in the circuit courts of appeal. In *In re South Beach Securities, Inc.*, 606 F.3d 366 (7th Cir. 2010), the court affirmed an order denying confirmation of a chapter 11 plan proposed by a company whose sole asset consisted of tax attributes and whose only creditor was a related company attempting to acquire the attributes to avoid taxes.

Section 1127(b) of the Bankruptcy Code governs the circumstances under which a confirmed chapter 11 plan may be modified prior to the plan's "substantial consummation." Early in 2010, the Fifth Circuit Court of Appeals examined whether section 1127(b) precludes certain appeals potentially affecting plan confirmation orders. In *In re Blast Energy Services, Inc.*, 593 F.3d 418 (5th Cir. 2010), the court of appeals ruled that, even though a chapter 11 plan had been substantially consummated and no stay pending appeal had been granted, the district court abused its discretion in determining that a creditor's appeal of the confirmation order was equitably moot. The success of appeal, the court explained, did not seriously threaten the success of the plan, nor would the appeal have disrupted the rights of third parties. It also held that the district court erred in ruling that section 1127(b) mooted a creditor's appeal both of an order denying its motions to compel rejection of an executory contract and of the confirmation order. According to the Fifth Circuit, neither the debtor nor a proponent of the confirmed plan was attempting to modify the plan, and a plain reading of section 1127(b) indicated that the provision was not relevant to either appeal, as both appeals arose preconfirmation, and the confirmation appeal was governed by the equitable mootness doctrine rather than section 1127(b).

Section 1129(b) of the Bankruptcy Code governs confirmation of a chapter 11 plan if a class of creditors or interest holders votes to reject the plan or is deemed to have rejected it. The introductory language of section 1129(b)(1) cross-references section 510(a) (*i.e.*, "Notwithstanding section 510(a) of this title . . . ."), which provides that a subordination agreement will be enforced in bankruptcy. Few cases or commentators have addressed how to reconcile sections 510(a) and 1129(b)(1), the latter of which seems to eliminate the former from a cramdown analysis. The bankruptcy court did so in *In re TCI 2 Holdings, LLC*, 428 B.R. 117 (Bankr. D.N.J. 2010). In a controversial ruling, the court held that intercreditor subordination agreements need not be enforced in order to decide whether a nonconsensual plan should be confirmed under section 1129(b).

Claims/Debt Trading

Participants in the multibillion-dollar bankruptcy claims-trading market breathed a collective sigh of relief on January 25, 2010, when the Sixth Circuit Court of Appeals handed down its highly anticipated ruling in *B-Line, LLC v. Wingerter (In re Wingerter)*, 594 F.3d 931 (6th Cir. 2010). The court reversed lower-court rulings sanctioning a company engaged in the business of buying and selling consumer bankruptcy claims for failing to make "a reasonable pre-filing inquiry" to ascertain whether an acquired claim was bona fide. Had the Sixth Circuit ruled otherwise, claims traders (principally in consumer cases) faced the unwelcome prospect of increased costs associated with ensuring that each proof of claim is supported by actual documentation, rather than information more easily accessible from electronic databases, and of an inability to rely on industry-standard warranties of a claim's validity by intermediate sellers.

In *In re UAL Corp.*, 2010 WL 375201 (N.D. Ill. Feb. 2, 2010), the district court considered the consequences of a creditor's sale of its claims arising under an executory contract that is rejected by a debtor. The court upheld a ruling that the transferee's claim did not include "cure" amounts that would otherwise have been due to the original creditor in the event that the debtor had assumed the contract, given the transferee's undisputed inability to perform even if the debtor had assumed the contract and the fact that the debtor had rejected it.

Committees

2010 saw significant developments in the realm of disclosure requirements for unofficial committees or groups of creditors in chapter 11 cases. In its present form, Bankruptcy Rule 2019 contains various disclosure requirements that must be complied with by "every entity or committee representing more than one creditor or equity security holder" in a chapter 9 or 11 case (except for official committees). Whether these disclosure requirements apply to ad hoc, or informal, creditor groups has been the subject of vigorous dispute in the bankruptcy courts during the last three years, with courts lining up on both sides of the divide in roughly equal numbers. That debate continued throughout 2010. *See, e.g.*, *In re Premier Int'l Holdings, Inc.*, 423 B.R. 58 (Bankr. D. Del. 2010); *In re Accuride Corp.*, Case No. 09-13449 (Bankr. D. Del. Jan. 20, 2010); *In re Philadelphia Newspapers, LLC*, 422 B.R. 553 (Bankr. E.D. Pa. 2010); *In re Milacron, Inc.*, 436 B.R. 515 (Bankr. S.D. Ohio 2010).

Amendments to Rule 2019 originally proposed early in the year by the Advisory Committee on Bankruptcy Rules (the "Rules Committee") would have increased the scope of required disclosures by ad hoc committees, including information regarding each committee member's "disclosable economic interest." Under the initial recommendation, the bankruptcy court would also have been given the authority to order the disclosure of amounts paid for claims or interests.

However, the Rules Committee's final recommendation for changes to Rule 2019 (issued May 27, 2010) retreated from the "precipice of full pricing disclosure." Instead, the recommendation adopted substantially all of the changes lobbied for by trading-industry watchdogs, such as the Loan Syndications and Trading Association and the Securities Industry and Financial Markets Association, which have been actively seeking to repeal or alter Rule 2019 since 2007. Among other things, the amended rule (as distinguished from the Rules Committee's initial recommendation) would remove any absolute requirement to disclose the price paid for a bankruptcy claim or reveal the claimant's disclosable economic interest and would eliminate the authority of the court to order disclosure of the purchase price paid for a disclosable economic interest.

The recommended revisions to Rule 2019 must be approved by the Standing Committee on Rules of Practice and Procedure, the Judicial Conference, and the U.S. Supreme Court before they become effective. At present, such approval is anticipated, and it is expected that revised Rule 2019 will become effective as of December 1, 2011.

In *In re Bayou Group, LLC*, 431 B.R. 549 (Bankr. S.D.N.Y. 2010), the court considered whether a committee of unsecured creditors formed prebankruptcy can receive an administrative-expense claim for legal fees incurred in making a substantial contribution to a chapter 11 case under sections 503(b)(3)(D) and (b)(4). The court ruled that it can under appropriate circumstances. In this case, the court explained, the unofficial committee was entitled to reimbursement for, among other things, fees incurred in obtaining the appointment of a prepetition operating receiver who later became the designated representative of the DIP. Although the remedy (*i.e.*, the receiver) was novel, the court noted, it provided what the debtor urgently needed—continuity of fiduciary management uninterrupted by a new chapter 11 trustee having to learn the ropes.

Creditor Rights

The ability of a creditor whose claim is “impaired” to vote on a chapter 11 plan is one of the most important rights conferred on creditors under the Bankruptcy Code. The voting process is an indispensable aspect of safeguards built into the statute to ensure that any plan ultimately confirmed by the bankruptcy court meets with the approval of requisite majorities of a debtor’s creditors and shareholders and satisfies certain minimum standards of fairness. Under certain circumstances, however, a creditor can be stripped of its right to vote on a plan as a consequence of its conduct during the course of a chapter 11 case.

In *In re DBSD North America, Inc.*, 2010 WL 4925878 (2d Cir. Dec. 6, 2010), a bankruptcy court had ruled in December 2009 that the votes of a creditor that purchased the debtors' senior secured debt at par, after the debtors had filed a chapter 11 plan proposing to satisfy the senior secured debt in full, should be "designated" (*i.e.*, disallowed) pursuant to section 1126(e) of the Bankruptcy Code. The creditor's acknowledged purpose in buying the debt and voting to reject the chapter 11 plan was to take control of the debtor. The bankruptcy court concluded that the creditor's conduct warranted designation of its votes, observing that:

> [w]hen an entity becomes a creditor late in the game paying . . . [100 cents] on the dollar, as here, the inference is compelling that it has done so not to maximize the return on its claim, acquired only a few weeks earlier, but to advance an "ulterior motive" condemned in the case law.

A district court affirmed the ruling on March 24, 2010. On December 6, 2010, the Second Circuit Court of Appeals, in a two-page order to be followed by a full decision, affirmed the ruling regarding vote designation under section 1126(e), but reversed the order confirming the chapter 11 plan on the basis that the plan violated the absolute-priority rule. The rulings serve as a cautionary tale to prospective strategic investors pursuing a "loan to own" strategy.

Secured lenders are not as protected in bankruptcy as they might have thought, at least in the Third Circuit after a ruling in 2010. In *In re Philadelphia Newspapers, LLC*, 599 F.3d 298 (3d Cir. 2010), the court of appeals sent shock waves through the commercial lending industry by ruling that a dissenting class of secured creditors can be stripped of any right to credit-bid its claims under a chapter 11 plan that proposes an auction sale of the creditors' collateral free and clear of liens.

According to the majority ruling, the "indubitable equivalent" prong of the "fair and equitable" requirement set forth in section 1129(b)(2)(A) of the Bankruptcy Code does not itself require that a secured creditor be permitted to credit-bid its claim. Instead, the court held, the "indubitable equivalent" alternative unambiguously requires a secured creditor to realize "the unquestionable value" of the creditor's secured interest in the collateral. The court also held that the amount of a secured creditor's successful credit bid is not the exclusive means of determining collateral value.

The ability to file for bankruptcy protection and receive a discharge of debts is sometimes perceived, rightly or wrongly, as a fundamental entitlement under U.S. law. For this reason, the general rule is that a debtor may not waive the right to file for bankruptcy protection, and a voluntary bankruptcy filing is prohibited only under the narrowly defined circumstances contained in the Bankruptcy Code.

A creditor's right to file an involuntary bankruptcy petition against a debtor, however, is less inviolable. A ruling handed down in 2010 by the Second Circuit Court of Appeals illustrates that under appropriate circumstances, creditors can be enjoined from filing an involuntary bankruptcy case against a debtor. In *Securities and Exchange Commission v. Byers*, 609 F.3d 87 (2d Cir. 2010), the court of appeals affirmed a district-court order denying a request to dissolve an anti-litigation injunction barring nonparties from filing involuntary bankruptcy petitions against entities whose property was subject to an SEC receivership. "Simply put," the Second Circuit ruled, "there is no unwaivable right to file an involuntary bankruptcy petition, and, even if there were, the receivership accomplishes what a bankruptcy would."

The Second Circuit subsequently reaffirmed the legitimacy of SEC receiverships to liquidate a company, as opposed to liquidation under chapter 7 or 11 of the Bankruptcy Code, in *Securities and Exchange Commission v. Malek*, 2010 WL 4188029 (2d Cir. Oct. 25, 2010). The court of appeals held that, although there is a preference against the liquidation of a corporation through the mechanism of a federal securities receivership, as opposed to through the bankruptcy courts, the district court did not err in approving a receivership plan that effected a liquidation, on the basis of findings that bankruptcy would be more expensive and more time-consuming.

In *In re DB Capital Holdings, LLC*, 2010 WL 4925811 (Bankr. 10th Cir. Dec. 6, 2010), a bankruptcy appellate panel for the Tenth Circuit ruled that a provision in a limited liability company ("LLC") operating agreement prohibiting the entity from filing for bankruptcy was enforceable. The court distinguished case law holding that provisions in lending documents prohibiting a bankruptcy filing are unenforceable, reasoning that this agreement was undertaken by the entity owners in the organizational documents and should be enforceable even though the provision was apparently requested by and bargained for by the LLC's lender. Given the absence of any claim by the debtor that the undertaking was coerced by a creditor, the court wrote, "the Court declines to opine whether, under the right set of facts, an LLC's operating agreement containing terms coerced by a creditor would be unenforceable."

The ability of the creditors of an insolvent corporation to sue on behalf of the corporation to redress breaches of fiduciary duties is an important right. In *CML V, LLC v. Bax*, 6 A.3d 238 (Del. Ch. 2010), the Delaware Chancery Court ruled that under Delaware law, the creditors of an LLC do not have such a right. According to the court, the statutory right to bring a derivative action on behalf of an LLC is restricted to members or assignees of an interest in the LLC and can never devolve to creditors, even if the LLC is insolvent.

Cross-Border Bankruptcy Cases

October 17, 2010, marked the five-year anniversary of the effective date of chapter 15 of the Bankruptcy Code. Governing cross-border bankruptcy and insolvency cases, chapter 15 is patterned after the Model Law on Cross-Border Insolvency (the “Model Law”), a framework of legal principles formulated by the United Nations Commission on International Trade Law in 1997 to deal with the rapidly expanding volume of international insolvency cases. The Model Law has now been adopted in one form or another by 19 nations or territories. The jurisprudence of chapter 15 has evolved consistently since 2005. Noteworthy steps in that evolution were documented in several court rulings handed down during 2010.

In *In re Metcalfe & Mansfield Alternative Investments*, 421 B.R. 685 (Bankr. S.D.N.Y. 2010), the bankruptcy court, by way of “additional assistance” in a chapter 15 case involving a Canadian debtor, enforced a Canadian court’s order confirming a restructuring plan that contained nondebtor releases and injunctions, even though it was uncertain whether a U.S. court would have approved the releases and injunctions in a case under chapter 7 or 11 of the Bankruptcy Code.

In *Lehman Brothers Special Financing, Inc. v. BNY Corporate Trustee Services, Ltd. (In re Lehman Brothers Holdings Inc.)*, 422 B.R. 407 (Bankr. S.D.N.Y. 2010), the court refused to recognize rulings by U.K. courts that validated a "flip clause" in a swap agreement that shifted the priority of claims between a noteholder and its swap counterparty, due to the U.S. bankruptcy filing of the parent company. Even though the priority shift was valid under U.K. law, the court declined to recognize the rulings notwithstanding principles of comity because it concluded that the flip clause, a common risk-mitigation technique in swap transactions, was an *ipso facto* clause that is unenforceable under U.S. law.

In *In re JSC BTA Bank*, 434 B.R. 334 (Bankr. S.D.N.Y. 2010), the court, addressing a matter of apparent first impression, ruled that the automatic stay, which is triggered when a U.S. court issues an order recognizing a foreign main proceeding under chapter 15, does not prevent non-U.S. creditors from continuing to prosecute a foreign arbitration proceeding that does not involve the foreign debtor's U.S. assets. A detailed analysis of this important ruling can be found elsewhere in this edition of the *Business Restructuring Review*.

Until 2010, cases involving the interpretation of chapter 15's provisions had risen no higher in the appellate hierarchy than the federal district courts. That changed in March 2010, when the Fifth Circuit handed down its highly anticipated ruling in *Fogerty v. Petroquest Resources, Inc. (In re Condor Insurance Limited)*, 601 F.3d 319 (5th Cir. 2010). In that case, the bankruptcy and district courts held that unless the representative of a foreign debtor seeking to avoid prebankruptcy asset transfers under either U.S. or foreign law first commences a case under chapter 7 or 11 of the Bankruptcy Code, a bankruptcy court lacks subject-matter jurisdiction to adjudicate the avoidance action. The Fifth Circuit reversed on appeal, ruling that "[a]s Chapter 15 was intended to facilitate cooperation between U.S. courts and foreign bankruptcy proceedings, we read section 1521(a)(7) in that light and hold that a court has authority to permit relief under foreign avoidance law under the section."

The Fifth Circuit reprised its groundbreaking role in connection with chapter 15 shortly afterward. In *In re Ran*, 607 F.3d 1017 (5th Cir. 2010), the court affirmed a district-court order denying recognition under chapter 15 of an ongoing, involuntary bankruptcy proceeding pending in Israel because the evidence showed that the debtor's habitual residence and place of employment (*i.e.*, "center of main interest") were in Texas rather than Israel.

In *In re Qimonda AG Bankruptcy Litigation*, 433 B.R. 547 (E.D. Va. 2010), the court ruled that section 365(n) of the Bankruptcy Code, which governs a debtor's treatment of executory contracts relating to intellectual property licenses, does not apply automatically in chapter 15 cases. Instead, the court concluded, the provision applies only in the discretion of a bankruptcy court where circumstances warrant its invocation.

Sections 305(a) and (b) of the Bankruptcy Code were enacted in 2005 specifically to deal with the concept of "abstention" in chapter 15 cases. They provide in part that the court

> may dismiss a case under this title or may suspend all proceedings in a case under this title, at any time, if . . . the interests of creditors and the debtor would be better served by such dismissal or suspension; or . . . a petition under section 1515 for recognition of a foreign proceeding has been granted; and . . . the purposes of chapter 15 of this title would be best served by such dismissal or suspension.

A Pennsylvania bankruptcy court became one of the first courts to apply the abstention standard to a chapter 15 case in 2010. In *In re RHTC Liquidating Co.*, 424 B.R. 714 (Bankr. W.D. Pa. 2010), the court denied a motion under section 305(a) to dismiss an involuntary chapter 7 petition filed in the U.S. against the wholly owned subsidiary of a company that was a debtor in a Canadian bankruptcy proceeding and had obtained recognition of the case in the U.S. under chapter 15. According to the court, the foreign debtor's representative failed to demonstrate that dismissal of the parallel chapter 7 case was in the best interests of both the subsidiary and its creditors, and it failed to prove that dismissal of the chapter 7 case, which was commenced by American creditors holding roughly 85 percent in number and amount of the subsidiary's noninsider, unsecured debt, would best serve the purposes of chapter 15.

Retiree Benefits

On July 13, 2010, the Court of Appeals for the Third Circuit issued an opinion in *IUE-CWA v. Visteon Corp. (In re Visteon Corp.)*, 612 F.3d 210 (3d Cir. 2010), holding that the procedures set forth in section 1114 of the Bankruptcy Code apply to all retiree benefit plans, even those plans that could have been terminated at will outside of bankruptcy. In so ruling, the Third Circuit reached the opposite conclusion on this issue from the majority of courts that have previously considered it. The court of appeals also made clear that a debtor remains free to terminate benefits as permitted by its retiree welfare plans after the debtor emerges from bankruptcy.

Executory Contracts and Unexpired Leases

Section 365(d)(3) of the Bankruptcy Code requires a trustee or DIP timely to perform all obligations of the debtor arising under any unexpired lease of nonresidential real property from and after entry of an order for relief until the lease is assumed or rejected. In *In re Goody's*

Family Clothing Inc., 610 F.3d 812 (3d Cir. 2010), the Third Circuit ruled that section 365(d)(3) does not supplant or preempt section 503(b), the Bankruptcy Code's administrative-expense provision. The court of appeals affirmed the ruling below, finding that the DIP's use of the leased premises postpetition to produce income provided an "actual and necessary" benefit to the estate and that commercial landlords were thus entitled to "stub rent" (*i.e.*, the amount due landlords for the period of occupancy and use between the petition date and the first postpetition rent payment) as an administrative expense. According to the Third Circuit, the appropriate amount of stub rent could vary, depending on the facts of the case.

A debtor's decision to assume or reject an executory contract is typically given deferential treatment by bankruptcy courts under a "business judgment" standard. Certain types of nondebtor parties to such contracts, however, have been afforded special protections. For example, in 1988, Congress added section 365(n) to the Bankruptcy Code, granting some intellectual property licensees the right to continued use of licensed property, notwithstanding a debtor's rejection of the underlying license agreement. However, section 365(n) does not apply to trademark licenses. Therefore, the rights of trademark licensees if the licensor files for bankruptcy remain in doubt.

In *In re Exide Techs.*, 607 F.3d 957 (3d Cir. 2010), the Third Circuit ruled that a trademark license agreement was not executory because the licensee had materially performed its obligations under the agreement at the time that the debtor filed for bankruptcy. Thus, the court never addressed whether rejection of the agreement (had it been found to be executory) would have terminated the licensee's right to use the debtor's trademark.

However, in a separate concurring opinion, circuit judge Thomas L. Ambro took issue with the bankruptcy court's conclusion that rejection of a trademark-licensing agreement necessarily terminates the licensee's right to use the debtor's trademark. According to Judge Ambro, Congress's decision to leave treatment of trademark licenses to the courts signals nothing more than Congress's inability, at the time it enacted section 365(n), to devote enough time to consideration of trademarks in the bankruptcy context; no negative inference should be drawn by the failure to include trademarks in the Bankruptcy Code's definition of "intellectual property." As Judge Ambro concluded, "[I]t is simply more freight than negative inference will bear to read rejection of a trademark license to effect the same result as termination of that license."

Bank holding company Colonial BancGroup Inc. ("Colonial") won a major victory over the Federal Deposit Insurance Corp. when an Alabama bankruptcy court ruled on August 31, 2010, that Colonial had not entered into an enforceable agreement to make up a $1 billion capital deficiency at Colonial's bank unit. It is one of the few rulings addressing section 365(o), which was added to the Bankruptcy Code in 1990 to compel a company in bankruptcy to cure deficits under "any commitment by the debtor to a federal depository institutions regulatory agency" related to the maintenance of capital.

The court ruled in *In re Colonial Bancgroup, Inc.*, 2010 WL 3488747 (Bankr. M.D. Ala. Aug. 31, 2010), *amended and superseded*, 436 B.R. 713 (Bankr. M.D. Ala. 2010), that the language in agreements entered into by the holding company and the Federal Reserve during the year before the bank failed and the holding company filed for chapter 11 protection in August 2009 obligating the company to increase its capital did not comply with the definitions in section 365(o). According to the court, the agreements did "not make the debtor either primarily or secondarily liable for the bank's obligations," but merely required the holding company to "assist" the bank. "Most importantly," the court wrote, the agreements did not "require the debtor to make a capital infusion, in any amount, in the Bank."

Financial Contracts

"Safe harbors" in the Bankruptcy Code designed to insulate nondebtor parties to financial contracts from the consequences of a bankruptcy filing by the contract counterparty have been the focus of a considerable amount of scrutiny. In *In re Lehman Bros. Holdings Inc.*, 433 B.R. 101 (Bankr. S.D.N.Y. 2010), the court ruled that, absent mutuality of obligations (*i.e.*, funds against which a bank sought to set off were deposited into the debtor's account postpetition), such funds were not protected by the Bankruptcy Code's safe-harbor provisions and could not be used to set off an obligation allegedly owed by the debtor under a master swap agreement. "A contractual right to setoff under derivative contracts," the court wrote, "does not change well established law that conditions such a right on the existence of mutual obligations."

Liabilities of Officers, Directors, and Advisors

Although they did not directly implicate issues of substantive bankruptcy law, a number of decisions handed down in 2010 addressed questions regarding the duties and liabilities of officers, directors, and advisors that commonly arise in bankruptcy cases. For example, in *In re TOUSA, Inc.*, 437 B.R. 447 (Bankr. S.D. Fla. 2010), the court ruled that "the insolvency of a wholly-owned subsidiary is a fiduciary game-changer" and that under Delaware law, the directors of a corporation owe fiduciary duties of loyalty, good faith, and due care to the creditors of an insolvent wholly owned subsidiary. According to the court, “It would be absurd to hold that the doctrine that directors owe special duties after insolvency is inapplicable when the insolvent company is a subsidiary of another corporation.” That eventuality, the court wrote, “is precisely when a director must be most acutely sensitive to the needs of a corporation’s separate community of interests, including both the parent shareholder and the corporation’s creditors.”

On October 21, 2010, New York’s highest state court, the New York Court of Appeals, rejected by a 4-3 vote pleas to allow broader liability for third-party financial professionals, pulling the plug on allegations that outside financial advisors and others assisted or furthered corporate fraud in connection with the collapse of Refco, Inc., into bankruptcy in 2005 and the meltdown of American International Group in 2008. In *Kirschner v. KPMG LLP*, 15 N.Y.3d 446 (N.Y. 2010), the court of appeals ruled that under the common-law rule of *in pari delicto*, which provides in substance that courts will not intercede in disputes between wrongdoers, and the related “adverse interest exception” to agency imputation, a company cannot shift responsibility for its own agents’ misconduct to third parties, such as financial advisors.

The ruling thwarted efforts to broaden liability under New York law for auditors, accountants, investment bankers, financial advisors, attorneys, and other professionals. However, such efforts may not have been defeated entirely—three judges dissented, including chief judge Jonathan Lippman, opining that the decision should have carved out an exception for fraud cases involving schemes between outside advisors and corporate insiders.

Ironically, the ruling in *Kirschner* was handed down only a few days after accounting firm Grant Thornton LLP agreed in a federal district court in New York to pay $25 million to settle claims of aiding and abetting fraud in Refco-related transactions. Basing its decision on the New York Court of Appeals' ruling on questions that had been certified to the court by the Second Circuit Court of Appeals with respect to New York law, the Second Circuit affirmed dismissal of the Refco bankruptcy trustee's adversary proceedings against the defendants in *Kirschner v. KPMG LLP*, 626 F.3d 673 (2d Cir. 2010).

Municipal Debtors

Increasingly prominent amid the carnage wrought by the Great Recession is the plight of cities, towns, and other municipalities in the U.S. One option available to municipalities teetering on the brink of financial ruin is chapter 9 of the Bankruptcy Code, a relatively obscure and seldom used legal framework that allows an eligible municipality to "adjust" its debts by means of a plan of adjustment that is in many respects similar to the plan of reorganization that a debtor devises in a chapter 11 case. However, due to constitutional concerns rooted in the Tenth Amendment's preservation of each state's individual sovereignty over its internal affairs, the resemblance between chapter 9 and chapter 11 is limited.

Two important distinctions between chapter 9 and chapter 11 were highlighted in decisions issued during 2010. In *In re City of Vallejo, California*, 432 B.R. 262 (E.D. Cal. 2010), the district court affirmed a bankruptcy-court ruling that section 1113 of the Bankruptcy Code, which delineates the circumstances under which a chapter 11 debtor can reject a collective bargaining agreement, does not apply in chapter 9. Under this ruling, it would appear to be easier for a municipal debtor to reject a labor agreement. In *In re New York City Off-Track Betting*

Corporation, 434 B.R. 131 (Bankr. S.D.N.Y. 2010), the bankruptcy court denied a creditor's motion to compel the immediate payment as an administrative expense of sums the debtor was obligated to pay under applicable New York law, ruling that because there is no bankruptcy estate in a chapter 9 case, there can be no expenses of administering the estate allowed under section 503(b) of the Bankruptcy Code.

In *In re Las Vegas Monorail Co.*, 429 B.R. 770 (Bankr. D. Nev. 2010), the bankruptcy court engaged in a comprehensive analysis of the type of entity that qualifies as a "municipality" eligible to file a chapter 9 case. The court denied a creditor's motion to dismiss a chapter 11 case filed by a nonprofit monorail company on the basis that, as an "instrumentality of the state," the debtor was required to file a chapter 9 case instead. According to the court, the corporation was not created pursuant to statute; did not have any traditional government powers, such as those of taxation, eminent domain, or sovereign immunity; and relied not on the public fisc to support its operations, but on fares collected from its customers. As such, the court ruled, the corporation did not qualify as an "instrumentality of the state" ineligible for chapter 11 relief.

From the Top

The U.S. Supreme Court handed down four decisions involving issues of bankruptcy law, and another potentially bearing on bankruptcy venue, in 2010. In the first, the court affirmed in part and reversed in part a decision of the Eighth Circuit Court of Appeals. On March 8, 2010, the court held in *Milavetz, Gallop & Milavetz, P.A. v. U.S.*, 130 S. Ct. 1324 (2010), that consumer bankruptcy lawyers must advertise themselves as "debt-relief agencies" and that section 526(a)(4) of the Bankruptcy Code, which provides that a debt-relief agency shall not advise an assisted person to incur more debt in contemplation of filing for bankruptcy, prohibits a debt-relief agency from advising a debtor to manipulate the protections of the bankruptcy system by "loading up" on debt with the expectation of obtaining its discharge. In doing so, the court upheld the constitutionality of provisions added to the Bankruptcy Code in 2005.

On March 23, 2010, a unanimous court ruled in *United Student Aid Funds, Inc. v. Espinosa*, 130 S. Ct. 1367 (2010), that under Federal Rule of Civil Procedure 60(b)(4), a student loan provider was not entitled to relief from a bankruptcy-court order confirming a chapter 13 plan that discharged the debtor's student loan debt even though the bankruptcy court made no finding of "undue hardship" in an adversary proceeding, as required by section 523(a)(8) of the Bankruptcy Code and Bankruptcy Rule 7001(6). In affirming a ruling by the Ninth Circuit Court of Appeals, the court concluded that although the bankruptcy court's failure to find undue hardship was a legal error, given the Bankruptcy Code's clear and self-executing requirement for an undue-hardship determination, the confirmation order was enforceable and binding on the lender because it had actual notice of the error and failed to object or timely appeal.

When a bankruptcy court calculates the "projected disposable income" in a repayment plan proposed by an above-median-income chapter 13 debtor, the court may "account for changes in the debtor's income or expenses that are known or virtually certain at the time of confirmation," the U.S. Supreme Court held on June 7, 2010, in *Hamilton v. Lanning*, 130 S. Ct. 2464 (2010). Writing for an 8-1 majority, Justice Samuel A. Alito, Jr., agreed with the Tenth Circuit Court of Appeals and concluded that a "forward-looking approach" is the proper way to calculate projected disposable income under section 1325(b)(1)(B) of the Bankruptcy Code, rather than the “mechanical approach” advocated by the chapter 13 trustee.

On June 17, 2010, the Supreme Court handed down its ruling in *Schwab v. Reilly*, 130 S. Ct. 2652 (2010), in which it considered whether a chapter 7 trustee who does not lodge a timely objection to a debtor’s claimed exemption of personal property may nevertheless sell the property if he later learns that the property value exceeds the amount of the claimed exemption. Writing for a 6-3 majority, Justice Clarence Thomas concluded that where a debtor gives “the value of claimed exemptions” on Schedule C dollar amounts within the range the Bankruptcy Code allows for what it defines as “property claimed as exempt,” a chapter 7 trustee is not required to object to the exemptions in order to preserve the estate’s right to retain any value in the equipment beyond the value of the exempt interest. The trustee, the majority ruled, is entitled to sell the property subject to the exemption claim and distribute to the debtor the amounts claimed as exempt, retaining for the estate any excess.

On February 23, 2010, the Supreme Court issued its opinion in *Hertz v. Friend*, 130 S. Ct. 1181 (2010). One of the issues in the case was the location of the principal place of business of a corporation for purposes of diversity jurisdiction. Writing for a unanimous court, Justice Stephen G. Breyer, after examining the federal circuit courts of appeals’ “divergent and increasingly complex interpretations” regarding the issue, ruled as follows:

> We conclude that “principal place of business” is best read as referring to the place where a corporation’s officers direct, control, and coordinate the corporation’s activities. It is the place that Courts of Appeals have called the corporation’s “nerve center.” And in practice it should normally be the place where the corporation maintains its headquarters—provided that the headquarters is the actual center of direction, control, and coordination, *i.e.*, the “nerve center,”

> and not simply an office where the corporation holds its board meetings (for example, attended by directors and officers who have traveled there for the occasion).

Hertz did not involve the bankruptcy venue requirements set forth in 28 U.S.C. § 1408. As such, the impact of the ruling on the chosen venue for large corporate bankruptcy cases remains to be seen.

Largest Public-Company Bankruptcy Filings Since 1980

Company	**Filing Date**	**Industry**	**Assets**
Lehman Brothers Holdings Inc.	09/15/2008	Investment Banking	$691 billion
Washington Mutual, Inc.	09/26/2008	Banking	$328 billion
WorldCom, Inc.	07/21/2002	Telecommunications	$104 billion
General Motors Corporation	06/01/2009	Automobiles	$91 billion
CIT Group Inc.	11/01/2009	Banking and Leasing	$80 billion
Enron Corp.	12/02/2001	Energy Trading	$66 billion
Conseco, Inc.	12/17/2002	Financial Services	$61 billion
Chrysler LLC	04/30/2009	Automobiles	$39 billion
Thornburg Mortgage, Inc.	05/01/2009	Mortgage Lending	$36.5 billion
Pacific Gas and Electric Company	04/06/2001	Utilities	$36 billion
Texaco, Inc.	04/12/1987	Oil and Gas	$35 billion
Financial Corp. of America	09/09/1988	Financial Services	$33.8 billion
Refco, Inc.	10/17/2005	Brokerage	$33.3 billion
IndyMac Bancorp, Inc.	07/31/2008	Banking	$32.7 billion
Global Crossing, Ltd.	01/28/2002	Telecommunications	$30.1 billion
Bank of New England Corp.	01/07/1991	Banking	$29.7 billion
General Growth Properties, Inc.	04/16/2009	Real Estate	$29.6 billion
Lyondell Chemical Company	01/06/2009	Chemicals	$27.4 billion
Calpine Corporation	12/20/2005	Utilities	$27.2 billion
New Century Financial Corp.	04/02/2007	Financial Services	$26.1 billion
Colonial BancGroup, Inc.	08/25/2009	Banking	$25.8 billion
UAL Corporation	12/09/2002	Aviation	$25.2 billion
Delta Air Lines, Inc.	09/14/2005	Aviation	$21.9 billion
Adelphia Communications Corp.	06/25/2002	Cable Television	$21.5 billion
Capmark Financial Group, Inc.	10/25/2009	Financial Services	$20.6 billion
MCorp	03/31/1989	Banking	$20.2 billion
Mirant Corporation	07/14/2003	Energy	$19.4 billion
Ambac Financial Group, Inc.	11/08/2010	Financial Insurance	$18.9 billion