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The Year in Bankruptcy 2010: Part II

CHARLES M. OELLERMANN AND MARK G. DOUGLAS

In the conclusion of their two part article, the authors continue to explore the key bankruptcy developments from the past year.

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	Automo-biles
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 Chemi-cal 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 bil-lion	Banking
R.H. Donnelley Corp.	05/28/2009 (D. Del.)	01/12/2010 CD 01/29/2010 ED	$11.9 bil-lion	Media
AbitibiBowater Inc.	04/16/2009 (D. Del.)	11/22/2010 CD 12/09/2010 ED	$8 billion	Paper Products

Charles M. Oellermann is a partner in the Business Restructuring and Reorganization Practice of Jones Day in Columbus. Mark G. Douglas is the firm's Restructuring Practice Communications Coordinator. The authors can be contacted, respectively at coellermann@jonesday.com and mgdouglas@jonesday.com.

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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.

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, ad-

dresses, 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 dam-

ages 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 matu-

rity, 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 trust-

ee 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, be-

cause 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 period from 2000 to 2010 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 this period and represents one of the more in-

teresting 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.

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 address-

ing 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 bank-

ruptcy 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 Bankrupt-

cy 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