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THE YEAR IN BANKRUPTCY: 2011

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A "roller-coaster ride of financial and economic uncertainty" would be one way to describe 2011. Limiting the script to financial and economic developments, however, would leave a big part of the story untold, as we chronicle the (not so certain) aftermath of the Great Recession. Impacting worldwide financial and economic affairs in 2011 was a seemingly endless series of groundbreaking, thought-provoking, and sometimes cataclysmic events, including:

- One of the worst nuclear disasters in history (Fukushima Daiichi, Japan);
- The Arab Spring and the removal of two autocrats (Hosni Mubarak and Colonel Muammar el-Qaddafi);
- The death of Apple founder Steve Jobs, shortly after Apple surpassed Exxon Mobil to become the world's most valuable company;
- The deaths of the most wanted terrorist in human history (Osama bin Laden) and a North Korean dictator (Kim Jong-il);
- The "Occupy Wall Street" movement;
- Phone Hackgate
- Breaching the 7 billion mark in global population;
- The end of a nine-year war in Iraq; and
- The beginning of the second decade of the (most recent) war in Afghanistan.

Among the most memorable business and financial sound bites and keywords of 2011 were the following:

- Austerity measures;
- 99 percenters and 1 percenters;
- Orderly Liquidation Authority;
- Living wills;
- SIFIs (systemically important financial institutions);
- Insider trading;
- Deficit-reduction supercommittee;
- Rehypothecation;
- The Volcker Rule;
- The Buffett Rule; and
- Debtmaggedon.

In the U.S., the hallmarks of 2011 could readily have belonged to 2009 or 2010: high unemployment; depressed home values; high home-foreclosure rates; a high poverty rate and a widening income disparity between rich and poor; a national deficit of historic proportions; and a (well deserved) crisis of confidence in a dysfunctional political leadership riven by vituperative partisan politics. Still, the U.S. fared better in 2011 than many other countries.

The eye of the global financial storm moved to Europe in 2011—Greece, Italy, France, Portugal, Spain, and Ireland, in particular—where the maelstrom now threatens to dismantle the 27-nation European Union, or at least the 17-member eurozone, which now confronts the very real prospect of a Great Recession II if austerity measures fail to provide enduring financial triage.

THE U.S.—MIXED MESSAGES

President Obama released a fiscal year 2012 budget on February 14, 2011, projecting that 2011 would see the biggest one-year debt jump in history, or nearly $2 trillion, to reach $15.476 trillion by September 30, 2011, the end of the fiscal year. That would have equated to 102.6 percent of gross domestic product ("GDP")—the first time since World War II that that figure has been reached. The budget projected that the U.S. government would run a deficit of $1.645 trillion in 2011.

The U.S. Government Accountability Office issued its report on the 2011 fiscal year on December 23, 2011. It states that the U.S. officially closed its books on fiscal year 2011 with approximately $15.3 trillion in debt—still an all-time record—equating to 100.3 percent of GDP. The deficit, however, was $1.299 trillion, slightly more than the $1.293 billion deficit in 2010 and less than the $1.413 trillion deficit in 2009. By contrast, 2007's deficit was just $160 billion.

On August 5, 2011, Standard & Poor's ("S&P") removed the U.S. from its list of risk-free borrowers for the first time, cutting its rating of long-term federal debt to AA+, one notch below the top grade of AAA. It described the decision as a judgment about the nation's leaders, writing that "the gulf between the political parties" had reduced its confidence in the government's ability to manage its finances. The U.S. had maintained the highest credit rating since S&P first designated it AAA in 1941. The downgrade ignited one of the most harrowing stretches in Wall Street history, with wild swings in the financial markets captivating the nation and the world. Even so, the U.S. Treasury had no trouble attracting investors in subsequent auctions of government securities, perhaps reflecting the deep cynicism towards ratings agencies harbored by investors in the wake of the financial crisis.

The downgrade came shortly on the heels of a last-minute agreement in Washington to raise the U.S. debt limit and ward off "Debtmaggedon," a possible default by the U.S. government on its obligations. The deal reached by lawmakers provided for cuts of approximately $2.5 trillion from the deficit over a decade. $1.5 trillion of the cuts were to be determined by a deficit-reduction "supercommittee" comprising 12 lawmakers evenly split between Democrats and Republicans. However, on November 21, 2011, the (not so) supercommittee conceded that panel members failed to come up with a plan, setting up what is likely to be a yearlong political fight over the automatic cuts to a broad range of military and domestic programs that would go into effect starting in 2013 as a result of the committee's inability to reach a deal.

Ninety-two federally insured banks closed their doors in 2011, compared to 157 in 2010 and 140 in 2009. The Federal Deposit Insurance Corporation's list of "problem" banks—banks whose weaknesses "threaten their continued financial viability"—as of November 22, 2011, stood at 844, compared to 860 as of the end of fiscal year 2010.

After starting the year at 9 percent and rising as high as 9.2 percent in June 2011, the U.S. unemployment rate finished the year at 8.5 percent, the lowest since February 2009, according to a U.S. Bureau of Labor Statistics report released on January 6, 2012. The total number of unemployed Americans seeking work stood at 13.1 million at the end of 2011, compared to 14.5 million at the end of 2010. The number of long-term unemployed (those jobless for 27 weeks or more) was little changed at 5.6 million and accounted for 42.5 percent of the unemployed. Approximately 7.2 million Americans were receiving unemployment benefits at the end of 2011. Congress agreed in December to extend the emergency benefits that half of these unemployed workers depend on for another two months, instead of letting them lapse at the end of 2011.

Fewer Americans filed for personal bankruptcy in 2011. 1.35 million Americans filed for chapter 7 or chapter 13 relief in 2011, 12 percent fewer than in 2010, according to the National Bankruptcy Research Center. Chapter 7 filings were down 17 percent from the previous year, and chapter 13 filings dropped off 25 percent. This represents the first decrease in personal bankruptcies since 2006.

Income disparity was a big part of U.S. headlines in 2011. On October 30, 2011, the U.S. Congressional Budget Office released a report showing that the richest 1 percent of Americans have increased their income 275 percent since 1979, while other Americans have increased their income only 18 to 40 percent. This development and the widespread perception that Wall Street bankers responsible for the recent financial crisis are not being punished for their transgressions sparked "Occupy Wall Street" and hundreds of similar demonstrations throughout the U.S.

According to U.S. Census Bureau data released September 13, 2011, the nation's poverty rate rose to 15.1 percent (approximately 46.2 million in poverty) in 2010, up from 14.3 percent (approximately 43.6 million) in 2009, the highest level since 1993. Nearly 50 million Americans were without health insurance at the end of 2011. On August 2, 2011, the U.S. Department of Agriculture reported that the number of Americans receiving food stamps rose to a record 45.75 million in May 2011.

According to RealtyTrac, Inc., 1.9 million U.S. homes entered the foreclosure process in 2011, the lowest level since 2007, when the recession began.

State and Municipal Distress

Headlines in 2011 continued to herald the dire financial straits of U.S. states and municipalities. A study released on February 3, 2011, by Robert Novy-Marx of the University of Rochester and Joshua Rauh at Northwestern University showed that U.S. cities, counties, and states face a $3.6 trillion gap between their pension assets and their pension obligations to retirees. It was also reported on January 21, 2011, by the Center on Budget and Policy Priorities, a Washington research group, that states must contend with $140 billion in budget deficits for the 2012 fiscal year. A total of 44 states and the District of Columbia forecast budget shortfalls for the 2012 fiscal year, with the most cash-strapped states including California, with a projected shortfall of $25.4 billion; New Jersey at $10.5 billion; and Illinois at $15 billion.

Most U.S. municipalities have recourse to chapter 9 of the Bankruptcy Code to sort out their financial problems, but they rarely file for bankruptcy. Fewer than 40 chapter 9 cases have been filed during the last four years—four in 2008, 12 in 2009, seven in 2010, and 13 in 2011. Noteworthy chapter 9 debtors in 2011 included Jefferson County, Alabama (the largest chapter 9 filing in history); Harrisburg, Pennsylvania (whose bankruptcy case was subsequently dismissed); and Central Falls, Rhode Island. Confronted with an increasing volume of actual or prospective municipal failures, state legislatures and executives have been anything but idle, in many cases scrambling to implement an array of tools designed to offer viable alternatives to a chapter 9 filing or, in some cases, to preclude a filing altogether.

Unlike municipalities, states cannot seek bankruptcy protection. Some U.S. lawmakers briefly considered establishing a state bankruptcy option in 2011 to address the risk of underfunded state pension plans, but backed off after legal and financial experts warned that such an option would wreak havoc with municipal bond markets and could amount to an unconstitutional intrusion upon state sovereignty.

Business Bankruptcy Filings

Business bankruptcy filings dropped off (again) in calendar year 2011, especially public-company bankruptcy filings. According to court data compiled by Bloomberg News, there were 74,000 business filings in 2011, 19.5 percent fewer than in 2010. Chapter 11 filings in 2011 totaled 11,400, 16.6 percent fewer than the 13,619 chapter 11 cases filed in 2010.

The drop-off can be attributed to a number of factors. For example, defying expectations, the anticipated tsunami of debt maturities never arrived in 2011 to catapult a large number of borderline businesses into default and bankruptcy. Many companies (and their lenders) successfully pursued an "amend and extend" (or, as expressed in some circles, "extend and pretend") strategy.

The number of bankruptcy filings by public companies (defined as companies with publicly traded stock or debt) for 2011 was 86, according to data provided by New Generation Research, Inc.'s BankruptcyData.com, compared to 106 public-company filings in 2010 and 211 in 2009. The year 2011 added only 12 names to the billion-dollar bankruptcy club, compared to 19 in 2010 and 56 in 2009. The largest bankruptcy filing of 2011—MF Global Holdings Ltd., with $40.5 billion in assets—was the eighth-largest filing of all time, based upon asset value. Seventeen public companies with assets greater than $1 billion exited from bankruptcy in 2011, most, however, by means of liquidating chapter 11 plans. Two of the most prominent names on the list were Lehman Brothers Holdings Inc. (whose chapter 11 plan was confirmed but not yet effective in 2011), the largest bankruptcy filing ever, and Motors Liquidation Company, formerly known as General Motors Corporation, which filed the largest bankruptcy case in 2009.

Globally, according to Thomson Reuters, distressed debt and bankruptcy restructuring activity totaled $179.3 billion during 2011, a 43.7 percent decline from 2010. The number of completed deals decreased by 24.9 percent to 416 transactions. U.S. deal activity totaled $57.3 billion during 2011, a 60.1 percent decrease compared to last year. There were 233 restructuring transactions announced in 2011, a 24.6 percent increase compared to the previous year. The real estate and media and entertainment industries accounted for half of the U.S. debt restructuring market.

Where Do We Go From Here?

The outlook for 2012 in the U.S. business bankruptcy world looks like a reprise of 2011 in many respects. Most industry experts predict that the volume of big-business bankruptcy filings will remain steady in 2012 (although Fitch Ratings recently predicted that the number and size of corporate bankruptcies will double this year). 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, sometimes involving credit bidding by existing secured lenders. Much of what actually occurs will depend heavily on developments in Europe, which consistently defy accurate prognostication.

Middle-market restructurings—cases involving companies valued between $200 million and $1 billion—are likely to increase in 2012, judging by the uptick in such work near the end of 2011. A number of middle-market companies that were able to push off maturity dates in previous years are now overleveraged and have started seeking restructuring advice. Their inability to line up refinancing in a tight credit market may mean that bankruptcy is the most preferable strategy.

As in 2011, companies that do enter bankruptcy waters in 2012 are more likely to wade in rather than free-fall, as was often the case during the Great Recession. More frequently, struggling businesses are identifying trouble sooner and negotiating prepacks or section 363 sales before taking the plunge, in an effort to minimize restructuring costs and satisfy lender demands to short-circuit the restructuring process. Industries pegged as having companies "most likely to fail" (or continue foundering) in 2012 include shipping, health care, publishing, restaurants, entertainment and hospitality, home building and construction, and related sectors that rely heavily on consumers.

EUROPE—THE GREAT RECESSION II?

In Europe, the 27-member European Union is facing the defining crisis of its 19-year existence (in its current form). Most of the problems revolve around difficulties associated

with attempting to implement a unified fiscal policy for the 17 EU countries that use the euro. The crisis and popular backlash against draconian austerity measures toppled no fewer than two EU governments in 2011. Bowing to popular and EU-wide pressure, both Greek prime minister George Papandreou and Italian prime minister Silvio Berlusconi resigned in November 2011, forced out by a loss of confidence that they could successfully steward their nations through the financial crisis.

On November 28, 2011, the Organisation for Economic Co-operation and Development stated that the euro crisis remains "a key risk to the world economy." The Paris-based research group sharply cut its forecasts for wealthy Western countries and cautioned that growth in Europe could come to a standstill. The warning came just hours after Moody's Investors Service issued its own bleak report on Europe's rapidly escalating sovereign debt crisis. The credit agency warned that the problems may lead multiple countries to default on their debts or exit the euro, which would threaten the credit standing of all 17 countries in the currency union.

S&P warned on December 5, 2011, that it might strip the eurozone's two biggest economies, Germany and France, of their AAA long-term credit ratings because of the crisis. The agency also said that the ratings of 13 other eurozone countries are vulnerable. S&P followed through on the threat on January 13, 2012, downgrading the credit ratings of France, Italy, and seven other European countries.

European leaders agreed on December 9, 2011, to sign an intergovernmental treaty that would require them to enforce stricter fiscal and financial discipline in their future budgets. However, efforts to achieve unanimity among the 27 members of the EU failed, as Britain and Hungary refused to go along. All 17 members of the EU that use the euro agreed to the new treaty, but Britain's refusal casts doubt on whether the deal can be successful.

ASIA—A MIXED BAG

S&P lowered its sovereign credit rating for Japan to AA- from AA on January 27, 2011, warning that the Japanese government's already high debt burden is likely to continue to rise further than anticipated before the financial crisis. Japan's economic outlook was dealt another blow when a devastating earthquake and tsunami in March 2011 caused one of the worst nuclear disasters in history, forcing Japan's major automakers to cease production temporarily and causing a worldwide shortage of auto parts. Moody's Investors Service also lowered Japan's credit rating by one notch in August, warning that frequent changes in administration, weak prospects for economic growth, and its recent natural and nuclear disasters make it difficult for the government to pare down its huge debt.

On July 1, 2011, Russian regulators averted the collapse of one of the largest Russian banks by providing a bailout package of 395 billion rubles to Bank of Moscow, suggesting that the bank's problems with bad loans are more severe than previously acknowledged. The bailout, worth $14.15 billion, raised the specter of balance-sheet problems at other Russian banks, which had a tendency during the recession to roll over loans to struggling companies, rather than force them into bankruptcy courts.

China fared considerably better during 2011. On March 14, 2011, economics research firm IHS Global Insight reported that China, ending a 110-year run for the U.S. as the world's dominant producer, overtook the U.S. as the world's largest manufacturer. This marks the first time since 1850 that China has held that crown, the latest sign of the nation's economic resurgence. On April 25, 2011, the International Monetary Fund forecast that the size of China's economy will surpass the economy of the U.S. in 2016, more than a decade earlier than most forecasters have suggested.

MARKET VOLATILITY

U.S. stock markets had a relatively good, albeit volatile, year compared to their Asian and European counterparts. After opening 2011 at 11,577.51, reaching a high of 12,928.45 on May 2 and bottoming out at 10,362.26 on October 4, the Dow Jones Industrial Average finished the year at 12,217.56, a 5.53 percent increase over 2010. The S&P 500 and NASDAQ Composite Indices finished 2011 at about the same place they started, the former ending at almost break-even and the latter finishing 2011 slightly down.

Nearly all European and Asian markets finished 2011 down, some sharply down. In Asia, Japan's Nikkei 225 was down nearly 16 percent, the Hong Kong Hang Seng Index finished down 19.7 percent, China's benchmark was down 21 percent, and Australia's benchmark S&P ASX 200 ended the year down 14.5 percent. In Europe, the Deutsche Borse AG German Stock Index (DAX) was off 14.7 percent, the Euro Stoxx 50 Price Index finished down more than 13 percent, London's FTSE 100 Index was down 5.6 percent for the year, and France's CAC 40 was off about 18 percent.

According to Bloomberg News data, nearly $6.3 trillion was erased from global stock markets in 2011, as the eurozone financial crisis reverberated across the world in the latter half of the year, calling into question the future of the world's largest currency bloc. Global stock market capitalization dropped 12.1 percent to $45.7 trillion, while the euro ended the year as the worst-performing major currency.

HIGHLIGHTS OF 2011

January 4	The Roman Catholic Archdiocese of Milwaukee files for chapter 11 protection to manage sexual-abuse claims. Milwaukee is the eighth American diocese, out of 194, to file for bankruptcy protection.
January 7	U.S. Federal Reserve chairman Ben S. Bernanke tells senators that he expects the recovery to be "moderately stronger" in 2011. He also states that "[i]t could take four to five more years for the job market to normalize fully," noting that the sector has "improved only modestly at best." The highest court in Massachusetts rules against Wells Fargo & Co. and U.S. Bancorp in two foreclosure cases that cast doubt over whether some home loans were properly handled when securitized. The defeat provides ammunition to mortgage-bond investors who have accused servicers of systematically shoddy loan documentation.
January 10	U.S. Federal Reserve chairman Ben Bernanke rules out a central bank bailout of state and local governments strapped with big municipal debt burdens, saying the Fed has limited legal authority to help and little will to use that authority.
January 12	In a desperate ploy reflecting the severity of the state's financial crisis, the Illinois state legislature votes to increase the income tax rate to 5% from its current rate of 3%, a 67% increase and the first increase in two decades. The rate for corporate taxes would rise to 7% from its current rate of 4.8%. Illinois faces a budget deficit of as much as $15 billion. In its 2011 *Global Risks* report, the World Economic Forum reports that the risk that perilous government finances will trigger sovereign debt defaults remains one of the biggest threats facing the world in 2011.
January 18	The U.S. Financial Stability Oversight Council, the council of financial regulators created by the Dodd-Frank Act to oversee the stability of the U.S. financial system, takes its first big steps to set tentative guidelines to limit trading by banks for their own accounts and to restrict the growth of the biggest financial companies. It also proposes rules as to how large nonbank financial companies will be regulated by the Federal Reserve because they constitute a potential threat to the stability of the nation's financial system on the basis of their size. The recommendations include a report on the Volcker Rule, the ban on trading by banks for their own accounts, and proposed rules on regulating nonbank financial companies.
January 25	After 19 days of hearings and interviews with more than 700 witnesses, the Financial Crisis Inquiry Commission issues a 545-page report concluding that the 2008 financial crisis was an "avoidable" disaster caused by widespread failures in government regulation, corporate mismanagement, and heedless risk taking by Wall Street. According to the report, 12 of the 13 largest U.S. financial institutions "were at risk of failure" at the nadir of the 2008 financial crisis, while at least 50 hedge funds tried to capitalize on it. The Standard & Poor's ("S&P")/Case-Shiller Home Price Indices report that a new slide in U.S. housing prices has begun in earnest, with averages in major cities across the country falling to their lowest point in many years. Neil Barofsky, the Special Inspector General for TARP, reports that, after two years, many of the goals of the Home Affordable Modification Program, launched in March 2009 to provide mortgage servicers an incentive to modify mortgages on the verge of foreclosure, have been largely unmet.

January 26	The U.S. Congressional Budget Office projects that the government's budget deficit will soar to nearly $1.5 trillion in 2011, $414 billion higher than its previous estimate in August 2010. The deficit was $1.4 trillion in 2009 and $1.3 trillion in 2010.
February 1	The Dow Jones Industrial Average closes above 12,000 for the first time in 2.5 years, yet another sign that the U.S. economy is extending its recovery from the recession. The S&P 500 also reaches a milestone, closing above 1,300 for the first time since August 2008. The Dow fell to a low of 6,547 in March 2009.
February 2	The U.S. Treasury announces that it has collected nearly $243 billion of the $245 billion in TARP money it provided to financial firms in 2008 and 2009. The department expects eventually to receive a $20 billion profit on TARP funds it disbursed to banks through repayments, dividends on outstanding loans, and sales of warrants in banks.
February 3	A study released by Robert Novy-Marx of the University of Rochester and Joshua Rauh at Northwestern University shows that U.S. cities, counties, and states face a $3.6 trillion gap between their pension assets and pension obligations to retirees. It is also reported by the Center on Budget and Policy Priorities, a Washington research group, that states must contend with $140 billion of budget deficits next fiscal year. State pension plans cover 24 million active and retired workers, about 8% of the U.S. population of 309 million in 2010. The United Nations Food and Agriculture Organization reports that its monthly food price index moved to a record high in January 2011 due to higher global prices of cereal, sugar, and vegetable oils.
February 7	For the first time since the onset of the credit crisis, Moody's Investors Service records a month in which not a single company defaulted on its debt.
February 9	The U.S. Agriculture Department reports that reserves of corn in the U.S. have hit their lowest level in more than 15 years, reflecting tighter supplies that will lead to higher food prices in 2011. Increasing demand for corn from the ethanol industry is a major reason for the decline.
February 11	World stock markets end the day mostly higher, as 82-year-old President Hosni Mubarak of Egypt resigns his post and turns over all power to the military, ending his 30 years of autocratic rule and bowing to a historic 18-day popular uprising that has transformed politics in Egypt and around the Arab world, but at a cost, by some estimates, of more than $300 million per day to the Egyptian economy. The success of the popular protest in Egypt comes amid widespread and sometimes violent unrest throughout "MENA"—the Middle East and neighboring northern African countries, including Jordan, Syria, Iran, Bahrain, Saudi Arabia, Yemen, Algeria, Morocco, Libya, and Tunisia.
February 14	President Obama releases a fiscal year 2012 budget that projects an annual deficit of more than $1 trillion before government shortfalls decline to "sustainable" levels for the rest of the decade. The budget paints the bleakest picture yet of the current fiscal year, which is on track for a record federal deficit and will see the government's overall debt surpass the size of the total U.S. economy. Financial and legal experts tell U.S. legislators that establishing a state bankruptcy option to address the risk of underfunded state pension plans would wreak havoc with municipal bond markets and could amount to an unconstitutional violation of state sovereignty.

February 28	Bank of America Merrill Lynch's Global Broad Market Index, which tracks the performance of more than 19,000 securities valued at about $39 trillion, reports that bond market investors are showing the greatest confidence in global economic growth since credit markets crashed three years ago. The Institute for Supply Management reports that U.S. businesses unexpectedly grew in February at the fastest pace in two decades, indicating that manufacturing remains at the forefront of the recovery.
March 4	The U.S. Labor Department reports that the nation's employers added 192,000 jobs in February, pushing the unemployment rate down to 8.9%, the first time it has fallen below 9% in nearly two years.
March 7	As TARP winds down, the Congressional Oversight Panel ("COP"), the U.S. Treasury Department, and outside analysts agree that the government's unprecedented effort to prop up the financial system staved off major disaster and at far less cost than anticipated. The newest estimates put TARP's total cost between $25 billion and $50 billion.
March 8	In what prosecutors call the biggest insider-trading case in U.S. history, Raj Rajaratnam, cofounder of the N.Y.-based Galleon Group hedge fund, which at its peak managed nearly $7 billion in assets, goes on trial in federal district court for 14 counts of securities fraud and conspiracy. He is accused of making $45 million trading on illegal information scoured from a network of sources that spanned Wall Street and corporate America.
March 9	*Forbes* releases its list of world billionaires for 2011, the 25th year that it has been tracking global wealth. The 2011 Billionaires List breaks two records: total number of listees (1,210) and combined wealth ($4.5 trillion). BRICs led the way: Brazil, Russia, India, and China produced 108 of the 214 new names. These four nations are home to one in four members, up from one in 10 five years ago. Before this year, only the U.S. had ever produced more than 100 billionaires. China now has 115 and Russia 101. Atop the heap is Mexican telecom mogul Carlos Slim Helú; with an estimated net worth of $74 billion, he has pulled far ahead of his two closest rivals. Bill Gates, No. 2, and Warren Buffett, No. 3, are now worth $56 billion and $50 billion, respectively.
March 11	World markets are shaken as Japan is devastated by an earthquake measuring 9.0 on the Richter scale, the fifth-largest recorded since 1900, and an ensuing tsunami that kills nearly 20,000 and displaces hundreds of thousands more in the northern part of the country near Sendai. Six of Japan's Fukushima Daiichi nuclear reactors operated by Tokyo Electric Power Company are damaged by the quake, in what later becomes the worst nuclear accident since Chernobyl in 1986. The plant will not be declared "stable" until December 16.
March 14	Japan's $5 trillion economy, the third-largest in the world, is threatened with severe disruptions and partial paralysis, and the collective anxiety from the earthquake and tsunami causes a rout in the Japanese stock market. The main Nikkei index falls 6.2%, the worst drop in three years. The broader TOPIX, or Tokyo Stock Price Index, drops 7.4%. Worried about the severe strains on banking and financial systems, the Bank of Japan pumps about $180 billion into the economy, and the government considers an emergency tax increase to help finance relief and recovery work. Economics research firm IHS Global Insight reports that China, ending a 110-year run for the U.S. as the world's dominant producer, has overtaken the U.S. as the world's largest manufacturer. China manufactured 19.9% of the world's goods in 2010, while the U.S. accounted for 19.4%. This marks the first time since 1850 that China has held the crown as the world's largest manufacturer, the latest sign of the nation's economic resurgence.

March 16	The Federal Deposit Insurance Corporation ("FDIC") reports that it paid out nearly $9 billion to cover losses on loans and other assets at 165 failed institutions that were sold to stronger companies during the financial crisis. FDIC officials expect to make an additional $21.5 billion in payments from 2011 to 2014.
March 17	The G-7 join in a highly unusual effort to stabilize the value of the yen by intervening in currency markets. It is the first time since 2000 (to stabilize the euro) that the G-7 have made a coordinated intervention into the currency markets. During the 1990s, the yen and the dollar were also the targets of similar coordinated interventions.
March 29	The FDIC, as mandated by Dodd-Frank, votes unanimously to propose new rules that would prohibit Wall Street banks from selling packages of risky mortgages to investors without holding on to a stake in the loans. The proposed rule would require banks to retain at least 5% of the credit risk on securities backed by mortgages on all but the safest loans, leaving the banks with "skin in the game." So-called qualified residential mortgages, conservative loans that meet strict underwriting criteria, are eligible for an exemption. The proposal does not apply to securities carrying a government guarantee, which represent more than 90% of the market. The FDIC also spells out details on what information "systemically significant" banks and nonbank financial companies must include in resolution plans—so-called living wills—and credit exposure reports required under Dodd-Frank.
April 1	The U.S. Department of Labor reports that the unemployment rate dipped to 8.8%, the lowest since March 2009.
April 6	Portugal's caretaker government gives in to market pressures and joins Greece and Ireland in seeking an emergency bailout of as much as €100 billion as the government is forced to pay much higher rates to sell more debt.
April 8	With less than two hours to spare, U.S. congressional leaders and President Obama head off a shutdown of the government that would have shuttered federal facilities and furloughed thousands of workers under a tentative budget deal that would cut $38 billion from federal spending in 2011. The Organisation for Economic Co-operation and Development ("OECD") issues a report finding that the U.S. spends far more on health care than any of the other 29 OECD nations and gets less health for its money. Annual public and private health-care spending in the U.S. stands at $7,538 per person, 2.41 times the OECD average and 51% more than the second-biggest spender, Norway. Meanwhile, average U.S. life expectancy is 77.9 years, less than the OECD average of 79.4.
April 11	FinAid.org and Fastweb.com, which compile estimates of student debt, including federal and private loans, report that U.S. student-loan debt outpaced credit-card debt in 2010 for the first time and is likely to top $1 trillion in 2011, as more students go to college and a growing share borrow money to do so.
April 21	The U.S. Federal Reserve Board announces it is launching two studies examining whether the Bankruptcy Code needs revisions in order to better handle failures of big financial companies, as required by Dodd-Frank. One study will examine the adequacy of chapter 7 and chapter 11 for facilitating bankruptcies of systemically important financial companies. Questions the study will explore include whether a new chapter or subchapter of the Bankruptcy Code should be created to address unique issues raised by financial-firm failures.

April 25	The International Monetary Fund ("IMF") forecasts that China's economy will surpass the economy of the U.S. in 2016, more than a decade earlier than most forecasters suggest. The IMF predicts that China's economy will increase from $11.2 trillion in 2011 to $19 trillion in 2016, while the U.S. economy will expand at a slower pace—from $15.2 trillion to $18.8 trillion during that period. The Pew Center on the States releases a report showing that the gap between the promises U.S. states have made for public employees' retirement benefits and the money they have set aside grew to at least $1.26 trillion in fiscal year 2009, resulting in a 26% increase in one year. *The Widening Gap: The Great Recession's Impact on State Pension and Retiree Health Care Costs* finds that state pension plans represented slightly more than half of this shortfall, with $2.28 trillion stowed away to cover $2.94 trillion in long-term liabilities—leaving about a $660 billion gap. Retiree health care and other nonpension benefits accounted for the remaining $604 billion. States have amassed $635 billion in nonpension liabilities but saved just $31 billion to pay for them—slightly less than 5% of the total cost.
April 28	The Special Inspector General for TARP ("SIGTARP") reports that roughly $146 billion in bank bailout money has not yet been repaid to the U.S. Treasury Department as of the end of March 2011, and the return on those investments remains "unknowable." More than 550 banks have not repaid their bail-out funds. SIGTARP is the program's remaining watchdog after the COP closed in April. The Congressional Budget Office continues to drop its estimate of TARP's eventual cost, lowering it to $19 billion in March. The Public-Private Investment Program, which buys up toxic mortgage-backed securities, earned $1.2 billion for the Treasury in the first quarter and is scheduled to last at least seven more years.
April 29	The Financial Accounting Standards Board modifies its rules on repurchase agreements designed in part to prohibit the types of abuses in the Lehman Brothers' "Repo 105" repurchase agreements that helped hide the firm's quarterly obligations and contributed to its downfall in the 2008 financial crisis.
May 1	World markets open higher as news is released that U.S. troops and CIA operatives shot and killed Osama bin Laden in Abbottabad, Pakistan, a city of 500,000 people that houses a military base and a military academy.
May 2	Japan's Parliament passes a ¥4 trillion ($49 billion) disaster relief budget as ruling and opposition lawmakers put aside their differences and seek to quickly launch efforts to rebuild the country's quake-hit northeast. Chrysler Group LLC announces that rising vehicle sales led to a small net profit for the first quarter, the automaker's first since exiting bankruptcy almost two years ago.
May 6	Student-aid web sites Fastweb.com and FinAid.org report that the average student debt of newly minted U.S. college graduates in 2011 is $22,900, the most ever and 47% more than a decade ago.
May 10	The U.S. Postal Service announces that it lost $2.2 billion for the quarter that ended March 31, warning of defaults on payments to the government if a law forcing it to prepay into a massive employee health fund is not changed. As an agency under the executive branch, the post office cannot technically go bankrupt, but it has to fund its own operations and could become insolvent, which could create havoc inside the federal government and impact its obligations to pay other agencies, such as the U.S. Office of Personnel Management.

May 11	Billionaire investor Raj Rajaratnam, who once ran the Galleon Group, one of the world's largest hedge funds, is found guilty of fraud and conspiracy, becoming the most prominent figure convicted in the government's crackdown on insider trading on Wall Street. A federal jury in Manhattan convicted Mr. Rajaratnam of all 14 counts he faced. He could face as much as 19.5 years in prison under federal sentencing guidelines.
May 16	The U.S. government reaches its $14.3 trillion debt limit and begins taking what Treasury Secretary Timothy Geithner calls "extraordinary measures" to meet obligations while lawmakers and President Obama seek a budget deal to raise the limit.
May 17	The U.S. Securities & Exchange Commission ("SEC") proposes rules meant to improve the system by which such firms as Moody's Investors Service and S&P assign ratings to bonds and other securities. Some of the proposals advanced are intended to address conflicts of interest that can compromise the objectivity of the ratings. However, the proposals would not change what some say is the rating industry's fundamental conflict of interest. Rating firms would still be selected and paid by the very companies they are rating or whose investment products they grade.
May 24	Chrysler repays nearly $5.9 billion in U.S. government loans (with interest) extended in March 2009 as part of a $12.5 billion government bailout. It also repays Canadian taxpayers approximately $1.6 billion in loans (with interest). AIG, whose near-collapse in the fall of 2008 led to one of the biggest bailouts of the financial crisis, has its first new stock offering since then, pricing 300 million shares at $29 each to raise a total of $8.7 billion. The sale includes 200 million shares held by the federal government, which realized $5.8 billion—a small profit of about $60 million—and lowered U.S. taxpayers' stake in the company to 77% from 92%.
May 31	According to the S&P/Case-Shiller Home Price Indices, U.S. home prices fell 4.2% in the first quarter, hitting a new post-bubble low after falling 3.6% in the fourth quarter of 2010.
June 3	The U.S. Labor Department reports that the U.S. unemployment rate ticked up to 9.1% from 9.0% in April.
June 7	Real estate data firm CoreLogic Inc. reports that nearly 40% of U.S. homeowners who took out second mortgages are underwater on their loans, more than twice the rate of owners who did not take out such loans. Online real estate database Zillow reports that sales of U.S. homes foreclosed on in the previous 12 months made up 24% of the market in April, up from 16% one year ago. It is the 10th straight month of increases and yet another record high.
June 9	The U.S. Federal Reserve surpasses China as the single largest creditor of the U.S. government. As a result of its asset purchase program (QE2), the Federal Reserve at the end of the first quarter of 2011 held about 14% of total outstanding federal debt (debt held by the public). China is ranked second. In late March, it owned Treasuries worth $1.145 trillion, slightly less than 12% of the total amount outstanding.

June 21	JPMorgan Chase agrees to pay $153.6 million to settle federal civil accusations that it misled investors in a complex mortgage securities transaction in 2007, just as the housing market was beginning to plummet. In a case simultaneously brought and settled, the SEC asserts that JPMorgan's investment bank had structured and marketed a security known as a "synthetic collateralized debt obligation" without informing buyers that a hedge fund which helped select the assets in the portfolio stood to gain, in most cases, if the investment lost value. The settlement comes after a $550 million agreement the SEC reached with Goldman Sachs last year to resolve similar claims.
June 28	French Finance Minister Christine Lagarde becomes the first woman to be appointed to the helm of the IMF, taking on one of the most powerful positions in global finance as a worsening crisis in Greece threatens the euro currency union and rattles financial markets worldwide. Her appointment follows the resignation last month of Dominique Strauss-Kahn due to a sexual-assault charge.
June 29	Bank of America announces plans to set aside $14 billion to pay investors who bought securities it assembled from mortgages that later soured, generating an anticipated second-quarter loss of as much as $9.1 billion. The charge represents the banking industry's biggest single settlement tied to the subprime-mortgage boom and the subsequent financial crisis of 2008. The losses stem largely from mortgages underwritten by Countrywide Financial, the subprime-mortgage lender that Bank of America bought in 2008.
June 30	The U.S. Federal Reserve ends its $600 billion bond-buying program, known as QE2, without offering any hints of more monetary easing to come. A federal judge sentences Lee B. Farkas, a former mortgage-industry executive accused of masterminding one of the largest bank fraud schemes in history, to 30 years in prison. The case against Mr. Farkas, the former chairman of the mortgage firm Taylor, Bean & Whitaker, stands as the single biggest prosecution stemming from the financial crisis. As chairman of Taylor Bean, Mr. Farkas orchestrated a plot that caused the demise of Colonial Bank and cheated investors and the government out of billions of dollars. Colonial filed for bankruptcy in August 2009, making it the sixth-largest bank failure in history.
July 1	Russian regulators avert the collapse of one of the largest Russian banks by providing a bailout package of 395 billion rubles ($14.15 billion) to Bank of Moscow, suggesting the bank's problems with bad loans are more severe than previously acknowledged. The bailout raises the specter of balance-sheet problems at other Russian banks, which had a tendency during the recession to roll over loans to struggling companies, rather than force them into bankruptcy courts. Minnesota encounters its second government shutdown in six years as Democratic governor Mark Dayton and Republican lawmakers fail to reach a compromise on closing the state's $5 billion budget gap.

July 5	Thomson Reuters data reports that M&A deals totaling about $1.4 trillion were announced in the first half of 2011, a 35% increase over the same time last year. It is the strongest start to dealmaking since the financial crisis, as corporate boards, armed with cash and cheap financing, felt comfortable enough to seek out growth by acquisitions. Moody's Investors Service cuts Portugal's debt rating to junk status, ratcheting up the pressure on eurozone governments to work out a lasting solution to their financial woes. Media mogul Rupert Murdoch's News Corporation announces that 168-year-old tabloid *News of the World* will close after revelation of a widespread phone-hacking scandal involving prominent politicians, celebrities, police, and murder and terrorist victims, among others. The "Hackgate" scandal will shake media giant News Corporation to its core, leading to the abandonment of a $12 billion bid for the satellite company British Sky Broadcasting, the resignation of several top executives (including the publisher of *The Wall Street Journal*) as well as the commissioner and assistant commissioner of Scotland Yard, and a full-blown investigation by the English Parliament, with scathing criticism directed toward Prime Minister David Cameron for his close ties to the News Corporation executives involved.
July 6	The FDIC implements a rule allowing regulators to recover up to two years of Wall Street executives' pay if, through "negligence," they are found responsible for the collapse of a major financial firm. The provision is part of a broader FDIC rule detailing how creditors would be handled when the agency unwinds a failed nonbank financial institution under the orderly liquidation provisions of Dodd-Frank.
July 7	Federal regulators adopt the first in a series of new rules for the derivatives market, giving the government broad new authority over the $600 trillion industry that played a central role in the financial crisis. The rules, approved unanimously by the Commodity Futures Trading Commission (the "CFTC"), greatly expand the government's ability to police insider trading and other fraud. Another crucial rule requires hedge funds and other large firms to disclose details about their derivatives trading to the CFTC.
July 13	A bill that would punish Pennsylvania's financially troubled capital, Harrisburg, and dozens of other small- to medium-sized cities for seeking federal bankruptcy protection is signed by Governor Tom Corbett. Under the law, any of more than 50 cities within a certain population range—third-class cities that include Allentown, Erie, Reading, Bethlehem, Lancaster, and Wilkes-Barre—that is deemed by the state to be financially distressed would lose all state aid if it files for bankruptcy protection before July 1, 2012.
July 15	European regulators unveil the results of their banking "stress tests," but the small number of lenders that flunked the exams provokes skepticism. Eight banks failed the tests, with a combined shortfall of €2.5 billion ($3.54 billion) in capital under a simulated worst-case economic scenario, according to the European Banking Authority. The EU regulators say another 16 banks narrowly passed the tests, which examined the abilities of 90 top lenders across Europe to endure a deteriorating economy and strained financial system. The Italian Parliament gives the green light to a draconian austerity budget designed to cut the country's soaring deficit by 2014 and reassure nervous financial markets. The Parliament approved a €48 billion ($68 billion) austerity package aimed at averting a full-blown financial crisis. The plan is designed to signal to financial markets that the world's eighth-largest economy is serious about staying out of the debt crisis engulfing Europe.

July 19	The U.S. Government Accountability Office issues a report entitled *Bankruptcy: Complex Financial Institutions and International Coordination Pose Challenges*, explaining that the effectiveness of winding down failed complex financial institutions through the Bankruptcy Code, compared to winding down institutions through other processes such as FDIC receivership under the Orderly Liquidation Authority created by Dodd-Frank, is unclear. According to the report, measuring the effectiveness of the Bankruptcy Code for facilitating orderly liquidations or reorganizations of complex and internationally active financial institutions is difficult because there have been few large-scale bankruptcies, there is a lack of data, and many times there is government involvement. In addition, the complex activities and organizational structures of financial institutions make analysis more difficult.
July 21	Fiat SpA acquires the remaining Chrysler Group LLC shares held by the U.S. and Canadian governments, returning the Detroit automaker to private ownership. The U.S. Treasury says the closing of the transaction leaves the government with a $1.3 billion loss on its investment in Chrysler, an amount it is "unlikely to fully recover." European leaders agree to reduce Greece's debt burden in a last-ditch effort to preserve the euro and stem a broader financial panic. The pact, negotiated in Brussels, is part of a rescue package of €109 billion, or $157 billion, for Greece, the most troubled economy in the eurozone. It will force many investors in Greek debt to accept some losses on their bonds. The deal will also provide substantial debt relief for Ireland and Portugal.
August 1	European and Asian financial markets heave a sigh of relief over a last-minute agreement in Washington to raise the U.S. debt limit and ward off "Debtmaggedon," shrugging off for now the lingering concerns about longer-term global growth prospects and the debt crisis in the euro area. The deal cuts approximately $2.5 trillion from the deficit over a decade. The first $900 billion to $1 trillion will come directly from domestic discretionary programs (about a third of it from the Pentagon) and will include no new revenues. The next $1.5 trillion will be determined by a deficit-reduction "supercommittee" of 12 lawmakers that could recommend revenues or entitlement reforms but is unlikely to do so, since half its members come from each political party. If the committee is deadlocked or its recommendations are rejected by either house of Congress, then a dreaded guillotine of cuts would come down: $1.2 trillion in across-the-board spending reductions that would begin to go into effect by early 2013.
August 2	The U.S. Senate approves the debt-ceiling bill by a margin of 74 to 26. The bill is immediately signed by President Obama, averting a possible default on U.S. debt obligations and preserving the nation's AAA rating. The U.S. Department of Agriculture reports that the number of Americans receiving food stamps rose to a record 45.75 million in May 2011.
August 5	S&P removes the U.S. government from its list of risk-free borrowers for the first time, cutting its rating of long-term federal debt to AA+, one notch below the top grade of AAA. It describes the decision as a judgment about the nation's leaders, writing that "the gulf between the political parties" reduced its confidence in the government's ability to manage its finances. The downgrade ignites one of the most harrowing stretches in Wall Street history, with wild swings in the financial markets captivating the nation and the world. The U.S. Department of Justice closes its criminal investigation of the circumstances surrounding the September 2008 collapse of Washington Mutual Bank—the biggest bank failure in U.S. history—without filing charges against former executives.

August 7	Hugh Carey, the two-term New York governor who helped New York City avert bankruptcy in 1975 by imposing financial controls and made tough choices on the state level to cut taxes and balance the budget, dies at the age of 92.
August 9	Trepp, a leading provider of CMBS and commercial mortgage information, reports that in July the delinquency rate for U.S. commercial real estate loans in CMBS shot up 51 basis points to 9.88%, the highest delinquency rate in the history of the CMBS market.
August 10	Apple surpasses Exxon Mobil Inc. to become the world's most valuable company. Apple's market capitalization of $337 billion exceeds Exxon's market capitalization of $331 billion. The power shift, while largely symbolic, is a substantial milestone for Apple, which has enjoyed a triumphant comeback since the 1990s, when it struggled to stay afloat before Steve Jobs returned to take the helm.
August 16	Less than two weeks after S&P rocked financial markets by downgrading its ratings on U.S. long-term debt, rival ratings service Fitch Ratings affirms its AAA credit rating for the U.S. The affirmation "reflects the fact that the key pillars of the U.S.'s exceptional creditworthiness remains [*sic*] intact: its pivotal role in the global financial system and the flexible, diversified and wealthy economy that provides its revenue base."
August 23	The number of banks on the FDIC's list of institutions most at risk for failure falls to 865, the first decrease in the number of problem banks since the third quarter of 2006. There were 48 bank failures in the first half of 2011, far fewer than the 86 failures in the first six months of 2010. The year 2010's total of 157 collapsed banks was the highest since the last severe recession, in the early 1990s.
August 24	Moody's Investors Service lowers Japan's credit rating by one notch, warning that frequent changes in administration, weak prospects for economic growth, and its recent natural and nuclear disasters make it difficult for the government to pare down its huge debt.
September 2	The federal agency that oversees the mortgage giants Fannie Mae and Freddie Mac begins filing lawsuits against more than a dozen big banks, accusing them of misrepresenting the quality of mortgage securities they assembled and sold at the height of the housing bubble; it seeks billions of dollars in compensation. The litigation alleges that the banks, which assembled the mortgages and marketed them as securities to investors, failed to perform the due diligence required under securities law and missed evidence that borrowers' incomes were inflated or falsified. When many borrowers were unable to pay their mortgages, the securities backed by the mortgages quickly lost value. In part as a result of the deals, Fannie and Freddie lost more than $30 billion, losses that were borne mostly by taxpayers.
September 8	In a highly anticipated speech to the U.S. Congress, President Obama proposes a $447 billion jobs stimulus package, which would include $240 billion in cuts to Social Security payroll taxes (by extending employee payroll tax cuts due to expire in December and introducing new cuts for employer contributions), payments to unemployed workers, incentives for companies that hire workers, and increased federal spending on infrastructure. Taking a bleak view of Saab Automobile's prospects for recovery, a Swedish court rejects the troubled carmaker's application for protection from creditors. On September 21, 2011, Saab will on appeal obtain protection from its creditors as the automaker awaits investments from Chinese investors. However, the company will throw in the towel on December 19, 2011, filing for liquidation, after its hopes of receiving a lifesaving investment from Chinese investors collapse in the face of opposition from its former owner, General Motors.

September 12	S&P raises the 2011 global corporate default tally to 28, slightly fewer than half the 61 issuers that defaulted by this time last year. Regionally, 19 of the defaulters were based in the U.S.; three were based in New Zealand; two were in Canada; and one each was in the Czech Republic, France, Israel, and Russia. Of the total defaulters by this time in 2010, 44 were U.S.-based issuers; eight were in the region comprising Australia, Canada, Japan, and New Zealand; seven were from the emerging markets; and two were European issuers.
September 13	The FDIC gives the largest, most systemically important financial companies until July 2012 to provide "living wills" detailing how to divide up their assets if they fail. Nonbank financial institutions and bank holding companies with assets, including derivatives and other financial products, of $250 billion or more will have to provide living wills to regulators by July 1, 2012. Nonbank financial institutions and bank holding companies with assets between $100 billion and $250 billion will have until July 1, 2013. The remaining institutions covered by the rule will have until the end of 2013. The living-will rule, which applies to 124 firms, was a key part of Dodd-Frank. Approximately 90 of the affected institutions are foreign-owned. Foreign institutions with small U.S. operations will be allowed to provide "tailored" living wills with less detail than those of U.S. companies. New census data shows that the U.S. poverty rate rose to 15.1% in 2010, its highest level since 1993. In 2009, 14.3% of people in America were living in poverty. About 46.2 million people are now considered in poverty, 2.6 million more than last year. The U.S. government defines the poverty line as income of $22,314 a year for a family of four and $11,139 for an individual.
September 16	In an extensive report to U.S. lawmakers, Congressional Research Service estimates that the exposure of banks to Greece, Ireland, Italy, Portugal, and Spain—some of the most heavily indebted eurozone economies—amounts to $641 billion. It adds that "a collapse of a major European bank could produce similar problems in U.S. institutions." It further estimates American banks' exposure to German and French banks to be in "excess of" $1.2 trillion, equivalent to about 10% of total commercial banking assets in the U.S. Similarly, the Bank for International Settlements reports that at midyear, banks in the U.S. had $757 billion in derivatives contracts and $650 billion in credit commitments from European banks.
September 17	"Occupy Wall Street," an ongoing series of demonstrations in New York City based in Zuccotti Park, begins. The participants, including "99 Percenters" objecting to the fact that 1% of Americans control about a third of the country's wealth, are protesting mainly against social and economic inequality, corporate greed, and the influence of corporate money and lobbyists on government. Similar demonstrations are later held in hundreds of cities, on college campuses, at corporate headquarters, and in foreclosed homes.
September 19	President Obama calls for a new minimum tax rate for individuals making more than $1 million a year to ensure that they pay at least the same percentage of their earnings as middle-income taxpayers, according to administration officials. He calls his proposal the "Buffett Rule," in a reference to Warren E. Buffett, the billionaire investor who has complained repeatedly that the richest Americans generally pay a smaller share of their income in federal taxes than do middle-income workers, because investment gains are taxed at a lower rate than wages.

September 28	The European Commission proposes an EU-wide tax on financial transactions to be paid by banks, investment firms, insurers, stockbrokers, pension funds, and other financial institutions. The tax would be levied on all exchanges of shares, bonds, and derivatives between financial institutions, when at least one of them is located within the 27-nation EU. Although 10 EU countries already tax financial transactions to some extent, the Commission's proposal would impose an EU-wide minimum rate in a bid to reduce competitive distortions resulting from tax evasion and discourage risky trading activities.
October 5	Apple cofounder Steve Jobs, who stepped down from the helm of the company in August, dies of pancreatic cancer at the age of 56. During his tenure, Jobs transformed Apple from a visionary, but largely anachronistic, footnote to the Microsoft dynasty in the 1990s to the most valuable company worldwide, with a market capitalization in August 2011 of $337 billion.
October 6	Freddie Mac's weekly market survey shows that the average rate for a conventional, 30-year fixed-rate mortgage in the U.S. fell below 4% for the first time on record.
October 7	A new study by two former Census Bureau officials indicates that, in a grim sign of the enduring nature of the economic slump, U.S. household income declined more in the two years after the recession ended than it did during the recession itself. Between June 2009, when the recession officially ended, and June 2011, inflation-adjusted median household income fell 6.6% to $49,909. During the recession—from December 2007 to June 2009—household income fell 3.2%. The full 9.8% drop in income from the start of the recession appears to be the largest in several decades, according to other Census Bureau data. The report calls the decline "a significant reduction in the American standard of living."
October 11	The Financial Stability Oversight Council unveils a list of criteria and a three-stage process for selecting nonbanks to be designated "systemically important financial institutions" (SIFIs) and face Federal Reserve oversight, increased scrutiny, and maybe increased capital requirements.
October 13	Raj Rajaratnam, cofounder of the N.Y.-based Galleon Group hedge fund, which at its peak managed nearly $7 billion in assets, receives 11 years in prison, the longest sentence ever for insider trading, capping an aggressive government campaign that has ensnared dozens and may help deter the illegal use of confidential information on Wall Street.
October 18	Bank of America, with $2.22 trillion in assets, is supplanted as the "Biggest Bank in America" by JPMorgan Chase, which has $2.29 trillion in assets. Bank of America also ranks second to JPMorgan Chase in terms of branches and total deposits.
October 19	The Federal Reserve Bank of New York reports that new U.S. student loans originated in 2010 reached more than $100 billion, a new record. The total amount of outstanding student loans now stands at $550 billion (compared to $690 billion in total U.S. consumer credit-card debt). According to the College Board, the average amount of loans a full-time undergrad borrowed last year was $4,963; after adjusting for inflation, students are borrowing twice the amount they did 10 years ago.
October 20	The Arab Spring progresses, as 69-year-old Colonel Muammar el-Qaddafi, the erratic, provocative dictator who ruled Libya for 42 years, meets a violent death at the hands of the Libyan forces that drove him from power. The eight-month-long revolt leaves the country in shambles.

October 27	World financial markets are buoyed as European leaders, in a significant step toward resolving the eurozone financial crisis, win an agreement from banks to take a 50% loss on the face value of their Greek debt. The SEC adopts a rule requiring large hedge funds for the first time to report detailed information on their investments and borrowings. However, after intense lobbying, the funds win several important concessions from the commission's earlier proposal. The changes call for only the largest funds to report the most detailed information, and the data will not be public.
October 30	The U.S. Congressional Budget Office releases a report showing that the richest 1% of Americans have increased their income 275% since 1979, while other Americans have increased their income only 18% to 40%.
October 31	The United Nations reports that the world population has reached 7 billion. MF Global Holdings Ltd., the Wall Street firm run by former Goldman Sachs chairman and New Jersey governor Jon S. Corzine, files for bankruptcy, making it the first big American casualty of the European debt crisis and the eighth-largest U.S. bankruptcy filing ever, according to the value of pre-bankruptcy assets (just over $40 billion). The Securities Investor Protection Corporation later files for a protective order under the Securities Investor Protection Act for MF Global Inc., the brokerage arm of MF Global. MF Global later reveals that it cannot account for $1.2 billion in customer money, some of which may have been seized immediately prior to MF Global's bankruptcy filing by commodity trade counterparties to whom funds in supposedly segregated customer accounts were rehypothecated to secure MF Global's obligations.
November 1	Greece shocks world financial markets and enrages EU leaders when it announces that the latest proposed EU bailout will be submitted to a public referendum instead of implemented immediately. The announced plan for a referendum will be rescinded within days, in response to the international outcry prompted by the plan. The U.S. Federal Reserve and the FDIC adopt the final rule to implement the requirement in Dodd-Frank regarding living wills. The rule requires each nonbank financial company designated by the Financial Stability Oversight Council and each bank holding company with assets of $50 billion or more to periodically report its plan for rapid and orderly resolution in the event of material financial distress or failure. The rule becomes effective on November 30, 2011.
November 3	A Brookings Institution report based on Census Bureau income data from 2000 to 2009 states that the number of people living in neighborhoods of extreme poverty in the U.S. grew by a third over the past decade, erasing most of the gains from the 1990s, when concentrated poverty declined. Extreme poverty—defined as areas where at least 40% of the population lives below the federal poverty line, which in 2010 was $22,314 for a family of four—is still below its 1990 level, when 14% of poor people lived in such areas.

November 7	The focus of the eurozone crisis shifts to Italy, as interest rates on Italian bonds rise to euro-era records, close to the level that forced Greece, Ireland, and Portugal to seek financial rescues. Higher rates threaten to sap Italy's long-term ability to support its debt load, which, at nearly 120% of its annual economic output at the end of last year, is among the highest for countries that use the euro. Prime Minister Silvio Berlusconi of Italy pledges to resign after his party fails to maintain its majority in the aftermath of a vote of confidence in Parliament. He will remain at the helm until Italy implements austerity reforms. The Administrative Office of the U.S. Courts reports that bankruptcy cases filed in U.S. courts for fiscal year 2011 (the 12-month period ending September 30) totaled 1,467,221, down 8% from FY 2010 bankruptcy filings of 1,596,355. Business bankruptcy filings totaled 49,895, down 14% from the 58,322 business filings reported in FY 2010. Nonbusiness bankruptcy filings totaled 1,417,326, down 8% from the 1,538,033 nonbusiness bankruptcy filings in FY 2010. Chapter 11 filings fell to 11,979, down 16% from the 14,191 chapter 11 filings reported in FY 2010.
November 9	Jefferson County, Alabama, grappling with $3.14 billion in sewer debt, files the largest municipal bankruptcy in U.S. history after settlement talks with creditors break down. The county's chapter 9 case involves more than $4 billion in debt, dwarfing the $1.7 billion bankruptcy of Orange County, California, in 1994 that had been the largest municipal bankruptcy case on record. Greece's outgoing prime minister, George Papandreou, announces that the nation's political parties have agreed on an interim administration that will implement the recent EU bailout agreement.
November 10	Respected economist Lucas Papademos is named prime minister of Greece to lead a unity government that has pledged to quickly approve the tough terms of a European aid package and save the country from bankruptcy. The choice of Mr. Papademos, a former vice president of the European Central Bank, came after four days of tense negotiations that put Greece's feuding political parties on full display.
November 13	In the wake of the departure of Silvio Berlusconi, Mario Monti, a former member of the European Commission, conditionally accepts a mandate to form a new government in Italy whose main task will be to keep the country from being dragged under by Europe's debt crisis.
November 15	The U.S. Postal Service releases its annual financial results, reporting an annual loss of $5.1 billion, as declining mail volumes and mounting benefit costs take their toll. The Postal Service states that its losses would have been roughly $10.6 billion if not for the passage of legislation postponing a $5.5 billion payment required to fund retiree health benefits. The Pension Benefit Guaranty Corporation ("PBGC") reports that it ran a $26 billion deficit for the budget year which ended September 30, the largest in the agency's 37-year history. The agency has been battered by the weak economy, which has brought more bankruptcies and failed pension plans. The agency insures pensions for nearly 44 million U.S. workers.

November 21	Leaders of the congressional supercommittee charged with finding at least $1.2 trillion in deficit reductions concede that panel members have failed, setting up what is likely to be a yearlong political fight over the automatic cuts to a broad range of military and domestic programs that would go into effect starting in 2013 as a result of their inability to reach a deal.
November 29	After resisting for a decade, the parent company of American Airlines announces that it will follow a strategy the rest of the industry chose long ago by filing for bankruptcy protection to shed debt, cut labor costs, and find a way back to profitability. AMR Corporation's chapter 11 filing is the second-largest airline bankruptcy (behind UAL), the 11th-largest nonfinancial public bankruptcy filing ever, and the 25th-largest public bankruptcy filing in U.S. history.
November 30	The U.S. Federal Reserve, the Bank of England, the European Central Bank, the Bank of Japan, the Bank of Canada, and the Swiss National Bank take steps to buttress financial markets by increasing the availability of dollars outside the U.S., reflecting growing concern about the fallout of the European debt crisis. The central banks announce that they will slash by roughly half the cost of an existing program under which banks in foreign countries can borrow dollars from their own central banks, which in turn get those dollars from the Fed. The loans will be available until February 2013, extending a previous endpoint of August 2012.
December 2	The U.S. Labor Department reports that the U.S. unemployment rate dipped unexpectedly to 8.6% in November, the lowest level in 2.5 years.
December 5	S&P warns that it might strip the eurozone's two biggest economies, Germany and France, of their AAA long-term credit ratings because of the European economic crisis. The agency also says the ratings of 13 other eurozone countries are vulnerable.
December 6	Lehman Brothers Holdings Inc., which filed the largest bankruptcy case of all time when it filed for chapter 11 protection in 2008 at the inception of the Great Recession, obtains confirmation of a liquidating chapter 11 plan, paving the way for a distribution of $65 billion to creditors—who originally asserted 67,000 claims of about $1.2 trillion—in the final wind-down.
December 9	European leaders agree to sign an intergovernmental treaty that would require them to enforce stricter fiscal and financial discipline in their future budgets. But efforts to get unanimity among the 27 members of the EU, as desired by Germany, fail as Britain and Hungary refuse to go along. All 17 members of the EU that use the euro agree to the new treaty, along with six other countries that wish to join the currency union one day. Two countries, the Czech Republic and Sweden, say they want to talk to their parties and parliaments at home before deciding.
December 15	After nearly nine years, 4,500 American fatalities, an estimated 100,000 Iraqi civilian deaths, and more than $800 billion, the war in Iraq officially ends.

December 16	U.S. securities regulators accuse six former executives at mortgage firms Fannie Mae and Freddie Mac of playing down the risks to investors of the firms' foray into subprime loans. The civil lawsuits filed by the SEC rank among the highest-profile crisis-related cases the government has brought. They are also the first cases against the top executives at Fannie and Freddie before their 2008 government takeover, which has cost taxpayers $151 billion.
December 17	Kim Jong-il, the North Korean leader who turned his starving, isolated country into a nuclear-weapons power even as it sank further into despotism, dies of a heart attack. He is succeeded by his 27-year-old son, Kim Jong-un.
December 21	The European Central Bank announces that it will loan up to €489.2 billion ($640 billion) (more than virtually every forecast) to 523 banks. World markets rally on the news, and interest rates on subsequent sovereign debt offerings plunge. Fitch Ratings warns that it will likely cut the U.S.'s AAA rating by the end of 2013 unless lawmakers are able to formulate a plan to reduce the budget deficit after the 2012 congressional and presidential elections.
December 23	The U.S. Congress passes a two-month payroll-tax-cut extension eight days before its scheduled expiration after House Republicans drop their objections under growing political pressure. President Barack Obama signs the measure, and negotiators in both parties make plans to start work on a longer-term deal. The U.S. Government Accountability Office issues its report on the 2011 fiscal year. It states that the U.S. officially closed its books on fiscal year 2011 with approximately $15.3 trillion in debt—an all-time record—equating to 100.3% of GDP. The deficit, however, was $1.299 trillion, slightly more than the $1.293 billion deficit in 2010 and less than the $1.413 trillion deficit in 2009. By contrast, 2007's deficit was just $160 billion altogether.
December 26	Luis de Guindos, Spain's new economy minister, predicts that the country will slide back into recession early in 2012, with the current quarter and the first quarter of 2012 both contracting 0.2% to 0.3%. Spain, which has the fourth-largest economy among the 17 countries that use the euro, began to emerge from a nearly two-year recession in 2010.

NEWSWORTHY

Jones Day topped Boston-based BTI Consulting Group's 2012 "Client Service A-Team" ranking, which identifies the top law firms for client service through a national survey of corporate counsel. Jones Day's client-service score surpassed that of the second-ranked firm by a 196-point margin. For the 11th consecutive year, the Firm has won a place among BTI's "Client Service 30," the elite group within the "A-Team." The Firm has held the No. 1 spot in this survey for seven of those 11 years and has always ranked in the top four.

Corinne Ball (New York), ***Heather Lennox (New York and Cleveland)***, ***Lisa G. Laukitis (New York)***, ***Veerle Roovers (New York)***, ***Ryan T. Routh (Cleveland)***, and ***Robert W. Hamilton (Columbus)*** are advising privately held baked-goods giant Hostess Brands, Inc., and its affiliates in connection with chapter 11 cases filed by the companies on January 11, 2012, in the U.S. Bankruptcy Court for the Southern District of New York.

Paul D. Leake (New York), ***Pedro A. Jimenez (New York)***, and ***Robert W. Hamilton (Columbus)*** are leading a team of Jones Day professionals representing the official committee of unsecured creditors appointed in the chapter 11 cases of General Maritime Corporation, a leading crude and products tanker company serving principally within the Atlantic basin, which includes ports in the Caribbean, South and Central America, the U.S., western Africa, the Mediterranean, Europe, and the North Sea.

Pedro A. Jimenez (New York) and ***Ross Barr (New York)*** are advising Indonesian-based PT. Arpeni Pratama Ocean Line Tbk. in connection with its chapter 15 case currently pending in the U.S. Bankruptcy Court for the Southern District of New York, the first cross-border restructuring under Indonesian law recognized in the U.S.

David G. Heiman (Cleveland), ***Heather Lennox (New York and Cleveland)***, ***Brett Barragate (New York and Cleveland)***, ***Rachel Rawson (Cleveland)***, ***Todd Swatsler (Columbus)***, and ***Charles M. Oellermann (Columbus)*** were selected as "Ohio Super Lawyers" for 2012.

David G. Heiman (Cleveland) was named a "Top 50 Cleveland Area Super Lawyer" and a "Top 100 Ohio Super Lawyer" for 2012 by *Super Lawyers*.

Philip J. Hoser (Sydney) was named a "Leading Individual" in the field of Restructuring & Insolvency by *The Legal 500 Asia Pacific 2012*.

Heather Lennox (New York and Cleveland) was named one of the "Top 50 Women Ohio Super Lawyers" for 2012 by *Super Lawyers*.

Daniel B. Prieto (Dallas) was designated a "Rising Star" in *Texas Super Lawyers* for 2012.

Yuichiro Mori (Tokyo) was "Recommended" in the field of Dispute Resolution by *The Legal 500 Asia Pacific 2012*.

Corinne Ball (New York) was listed among the best lawyers of 2011 in the field of Bankruptcy in the *Lawdragon* 500.

Brad B. Erens (Chicago) and ***Mark A. Cody (Chicago)*** were included on the list of "Illinois Super Lawyers" for 2012.

An article written by ***Carl E. Black (Cleveland)*** and ***Jennifer L. Seidman (Cleveland)*** entitled "The Expansion of Bankruptcy Code Section 546(e)'s Application to Leveraged Buyouts Involving Privately Held Securities" was published in the January 2012 edition of *Pratt's Journal of Bankruptcy Law*.

Christopher M. Healey (Columbus) was designated a "Rising Star" in *Ohio Super Lawyers* for 2012.

Joseph M. Tiller (Chicago) was designated a "Rising Star" in *Illinois Super Lawyers* for 2012.

Daniel J. Merrett (Atlanta) gave a presentation concerning chapter 9 of the Bankruptcy Code on January 24 to the Urban Fellows of Georgia Institute of Technology at the Georgia State University College of Law.

Heather Lennox (New York and Cleveland) was elected to the National Bankruptcy Conference in January.

TOP 10 BANKRUPTCIES OF 2011

The Top 10 List in 2010 was dominated by bank or financial services companies that filed for bankruptcy protection as primarily shell corporations for the purpose of liquidating their negligible remaining assets. Not so in 2011. The Top 10 List for 2011 was populated principally with a wide variety of operating companies ranging from commodities brokers to airlines to booksellers to shipping companies, each of which checked into bankruptcy with more than $1 billion in assets (according to the calculation customarily performed in assessing the asset values of public-company bankruptcy cases, which looks to the most recent public financial statements filed by the companies before filing for bankruptcy).

Global financial derivatives and commodities broker ***MF Global Holdings Ltd.*** ("MF Global") rang the bell for 2011 when it filed for chapter 11 protection on October 31, 2011, in New York with $40.5 billion in assets. The first U.S. financial casualty of the European debt crisis, MF Global bought up approximately $6.3 billion in European debt during late 2010 and 2011, gambling that issuing countries such as Italy, Portugal, Spain, and Ireland would soon recover or be bailed out by the EU. MF Global's descent into bankruptcy at the end of October came after a week when investors fled the company and credit-ratings agencies cut ratings on the firm to junk status.

The bankruptcy filing came just as U.S. regulators were considering how stringently to implement the Dodd-Frank Act's Volcker Rule and as Congress considered whether to revise the law's procedures for seizing and winding down failed firms. Although relatively small in comparison to the largest U.S. firms, MF Global will be a test case for dealing with what the law deems to be "systemically important financial institutions," or SIFIs. The bankruptcy filing was a humbling blow for MF Global's chief executive, Jon S. Corzine, who took the reins of the firm early in 2010 after a decade as a U.S. senator and New Jersey governor and was summoned to testify before the U.S. Congress concerning the whereabouts of as much as $1.2 billion in customer funds that may have been improperly rehypothecated and seized by commodities-contract counterparties. MF Global's bankruptcy filing is the eighth-largest in U.S. history.

Cruising in at No. 2 on the Top 10 List for 2011 was ***AMR Corporation***, the parent company of ***American Airlines, Inc.*** ("American"). A Fort Worth, Texas-based company with 78,250 employees that was founded in 1934, American was the last major U.S. airline to resist filing for chapter 11 in an effort to shed a heavy debt load and reduce labor costs by renegotiating collective bargaining agreements.

American had been negotiating new contracts with its unions, but talks stalled early in November 2011, when American's pilots' union refused to send a proposal to its members for a vote. Long the biggest airline in the U.S., American began to lose ground in recent years as low-cost carriers such as Southwest Airlines grew in prominence.

As competition intensified, American responded by borrowing more and more, eventually pledging nearly all of its assets and leaving itself heavily indebted. American's principal competitors, including Delta Air Lines ("Delta") and UAL Corporation's United Airlines ("United"), filed for bankruptcy, shedding billions of dollars in costs and renegotiating labor contracts. Both also merged with competitors to gain scale, with Delta pairing off with Northwest and United with Continental. The deals allowed those airlines to regain profitability.

American filed for chapter 11 protection in New York on November 29, 2011, with just over $25 billion in assets and nearly $30 billion in debt. American's bankruptcy is the 24th-largest ever and the second-largest airline filing, behind that of United in 2002.

Dynegy Holdings, LLC ("Dynegy Holdings"), surged to the No. 3 position on the Top 10 List for 2011. Houston, Texas-based Dynegy Holdings engages in the production and wholesaling of electric energy, capacity, and ancillary services in the U.S. It also trades in natural-gas and coal positions. Dynegy Holdings' parent, Dynegy Inc. (which did not file for bankruptcy), is the third-largest independent U.S. power producer.

Dynegy Holdings reported a net loss of $234 million for 2010 after a continuing slump in the U.S. economy drove down electricity prices. The power company missed a $43.8 million interest payment on November 1, 2011, and later concluded a preliminary deal with bondholders to restructure

approximately $4 billion in debt to be consummated pursuant to a prenegotiated chapter 11 plan. Dynegy Holdings and four affiliates filed for chapter 11 protection in New York on November 7, 2011, with $9.9 billion in assets.

PMI Group, Inc. ("PMI"), a Walnut Creek, California-based company that, through its subsidiary, PMI Mortgage Insurance Co., provides residential mortgage insurance products to mortgage lenders and investors in the U.S., filed the fourth-largest public bankruptcy case in 2011. The company was forced into bankruptcy when a judge upheld a takeover by Arizona state regulators of PMI's primary mortgage insurance divisions. PMI filed for chapter 11 protection in Delaware on November 23, 2011, with $4.2 billion in assets (as reflected in its recent public securities filings), although the company listed no more than $100 million to $500 million in assets on its bankruptcy petition.

Spot No. 5 on the Top 10 List for 2011 belonged to Miamisburg, Ohio-based ***NewPage Corporation*** ("NewPage"), a leading producer of coated paper in North America, with 8,000 employees, 10 paper mills, and 20 paper machines in the U.S. and Canada. NewPage, its corporate parent NewPage Group, and 12 affiliates filed for chapter 11 protection in Delaware on September 7, 2011, with $3.5 billion in assets.

Albuquerque, New Mexico-based ***First State Bancorporation*** ("First State") was deposited in the No. 6 position on the Top 10 List for 2011 when it filed a chapter 7 petition on April 27, 2011, in New Mexico. Founded in 1922, First State operated as the holding company for ***First Community Bank***, which operated 40 branch offices in New Mexico and Arizona until it was seized by federal regulators on January 28, 2011, and was later sold to U.S. Bank N.A. First State last publicly reported approximately $3.2 billion in assets, although it listed no more than $1.1 million in assets in its chapter 7 filing.

Evansville, Indiana-based bank holding company ***Integra Bank Corporation*** ("IBC") cashed out in the No. 7 position for 2011 when it filed a chapter 7 petition on July 30, 2011, in Indiana. The chapter 7 filing followed the July 29, 2011, closure by the Office of the Comptroller of the Currency of IBC subsidiary Integra Bank N.A., which previously operated 67 banking centers and 116 ATMs at locations in Illinois, Indiana, Kentucky, and Ohio. IBC's assets were once pegged at $2.42 billion, although the chapter 7 petition listed no more than $8.2 million in assets at the time of the bankruptcy filing.

General Maritime Corporation ("General Maritime") navigated its way to the No. 8 berth on the Top 10 List for 2011 when it filed for chapter 11 protection in New York on November 17, 2011, with $1.78 billion in assets. A New York City-based company with 1,180 employees, General Maritime is a leading provider of international seaborne energy transportation services, owning and operating one of the largest crude-oil tanker fleets in the world, principally in the Caribbean, South and Central America, the U.S., western Africa, and the North Sea. The company sought bankruptcy protection from creditors amid low freight rates and a surplus of ships. General Maritime listed assets of $1.71 billion and debt of $1.41 billion in its chapter 11 petition. The company joins other troubled shipping companies in bankruptcy, including Korea Line Corp., Korea's second-largest operator of dry-bulk ships, and time-chartered operators Britannia Bulk Plc, Armada (Singapore) Pte Ltd., and Transfield ER Cape.

Borders Group, Inc. ("Borders"), closed the book on the No. 9 spot on the Top 10 List for 2011 when it filed for chapter 11 protection in New York on February 16, 2011, with $1.4 billion in assets after failing to secure agreements with publishers and other vendors to restructure its $1.3 billion in debt. At the time of the bankruptcy filing, Ann Arbor, Michigan-based Borders had 642 stores across the U.S. and approximately 19,500 full- and part-time employees, principally in its Borders and Waldenbooks stores.

Borders began liquidating 226 of its stores in the U.S. shortly after filing for bankruptcy. Despite an offer from the private-equity firm Najafi Companies (which was later withdrawn), Borders was unable to find a buyer before its July 17, 2011, bidding deadline and consequently began liquidating its remaining retail outlets, with the last remaining stores closing their doors in September 2011. On October 14, 2011, the Borders.com web site was automatically redirected to the Barnes & Noble web site, effectively shutting down Borders.com entirely. The bankruptcy court confirmed a liquidating chapter 11 plan for Borders on December 20, 2011. The pot plan will pay unsecured creditors from four to 10 cents on the dollar.

Satellite and terrestrial telecommunications company ***TerreStar Corporation*** ("TS Corp.") crash-landed into the final spot on the Top 10 List for 2011 when it filed for chapter 11 protection in New York on February 16, 2011, with $1.4 billion in assets. Through its subsidiaries TerreStar Networks, Inc. ("TS Networks"), and TerreStar Global Ltd., TS Corp. was created to operate a wireless communications system to provide mobile coverage in the U.S. and Canada using integrated satellite terrestrial smartphones and to construct and operate a Pan-European integrated mobile satellite and terrestrial communications network to address public safety and disaster relief, as well as to provide rural broadband connectivity. TS Corp.'s TerreStar-1 satellite was launched on July 1, 2009. With a mass of 6,910 kg, it has been deemed the largest commercial telecommunications satellite ever launched.

TS Networks filed a prepackaged chapter 11 case on October 19, 2010, and later obtained confirmation of a plan whereby the secured creditors exchanged $940 million of debt for approximately 97 percent of the company. TS Networks is now owned by Dish Network, which purchased the company from TS Corp. in August 2011 for $1.35 billion. A hearing to consider confirmation of TS Corp.'s chapter 11 plan is currently scheduled for February 13, 2012.

Among the most notable bankruptcies failing to grace 2011's Top 10 List were the following:

Jefferson County, Alabama, a county perched in the foothills of the Appalachian Mountains with 660,000 residents and home to the state's largest city (Birmingham). Jefferson County recently supplanted Orange County, California, as the largest municipal debtor in U.S. history when it filed for chapter 9 protection on November 9, 2011. The county had entered into a series of complex bond-swap transactions after incurring $3.2 billion in debt to finance a new sewer system.

Privately owned ***MSR Resort Golf Course LLC*** (also known as PGA West & Citrus Club), the owner of the Grand Wailea Resort Hotel & Spa in Maui, Hawaii, and 30 other units linked to luxury hotels and golf courses, which filed for chapter 11 protection on February 1, 2011, in New York with $2.2 billion in assets after lenders seized control of the resorts following a default.

Newspaper publisher ***Lee Enterprises, Inc.*** ("Lee Enterprises"), which filed for chapter 11 protection on December 12, 2011, in Delaware with $1.16 billion in assets. A Davenport, Iowa-based company with 6,200 employees, Lee Enterprises publishes 49 daily newspapers, including the *St. Louis Post-Dispatch*, and 300 weekly newspapers and specialty publications in 23 states. Founded in 1890 in Ottumwa, Iowa, by A.W. Lee, the company included on its staff Mark Twain, Willa Cather, and Thornton Wilder. Lee Enterprises is the third-largest newspaper publisher to file for bankruptcy, behind the MediaNews Group in 2010 and the Tribune Company in 2008, as readership and advertising revenue continue to dwindle across the industry.

Denver, Colorado-based ***Delta Petroleum Corp.***, an oil and natural-gas explorer and developer whose largest shareholder is billionaire investor Kirk Kerkorian. It filed for chapter 11 protection on December 15, 2011, in Delaware with $1.024 billion in assets after failing to restructure its debts or find a buyer.

Harry & David Holdings, Inc. ("Harry & David"), the Medford, Oregon-based multichannel specialty retailer and producer of branded premium gift-quality fruit, gourmet food products, and other gifts. Recession-weary shoppers, stiff competition from big-box retailers, and an overleveraged balance sheet prompted the company to reach out to creditors and investors for help. The upshot was a prenegotiated chapter 11 filing on March 28, 2011, in Delaware and confirmation on August 29, 2011, of a chapter 11 plan converting all of Harry & David's approximately $200 million of outstanding public notes into equity of the reorganized company.

Solyndra LLC ("Solyndra"), a privately held manufacturer of solar power systems that filed for chapter 11 protection on September 6, 2011, in Delaware after ceasing operations and firing its 1,100 full- and part-time employees. As the impetus for the bankruptcy filing, Solyndra cited competitive challenges exacerbated by "a global oversupply of solar panels

and a severe compression of prices that in part resulted from uncertainty in governmental incentive programs in Europe and the decline in credit markets that finance solar systems." An investigation was subsequently launched into the propriety of $535 million in loan guarantees given to Solyndra by the U.S. Department of Energy, allegedly at the behest of the Obama administration. Solyndra was one of four U.S. solar companies to file for bankruptcy in 2011 in response to increased global competition, massive oversupply in 2010 and 2011, and lower government subsidies in the U.S. and Europe. Among the other companies was ***Evergreen Solar, Inc.***, which filed for chapter 11 protection on August 15, 2011, in Delaware with nearly $490 million in debt to auction off its assets.

Privately held Major League Baseball franchise ***Los Angeles Dodgers LLC*** (the "Dodgers"), which filed for chapter 11 protection on June 27, 2011, in Delaware after baseball commissioner Bud Selig rejected a $3 billion television contract with News Corp.'s Fox Sports, purportedly due to concerns that the cash would be diverted to fund Dodgers owner Frank McCourt's "lavish" lifestyle. At the time of the filing, *Forbes* magazine valued the team at $800 million, the third-highest in baseball after the New York Yankees and the Boston Red Sox. The Dodgers were the 12th North American major-league team to file for chapter 11 bankruptcy protection.

The Dodgers were joined in bankruptcy three months later by the National Hockey League's ***Dallas Stars LP*** (the "Dallas Stars"), which filed for chapter 11 protection on September 15, 2011, in Delaware. The bankruptcy court confirmed a prepackaged chapter 11 plan for the hockey club on November 18, 2011, clearing the way for the sale of the Dallas Stars to Vancouver, British Columbia, businessman Tom Gaglardi for $265 million.

Sbarro, Inc. ("Sbarro"), the "world's leading Italian quick service restaurant concept" and the "largest shopping mall-focused restaurant concept in the world," with a global base of 1,056 restaurants in 41 countries. Sbarro filed for chapter 11 protection in New York on April 4, 2011, a victim of slashed mall traffic caused by the Great Recession and rising prices for its key ingredients, cheese and flour. On November 17, 2011, Sbarro obtained confirmation of a prenegotiated chapter 11 plan that converts all of the company's preexisting second-lien debt and senior notes to equity, leaving the company with about $175 million in outstanding debt with extended maturities.

Jackson Hewitt Tax Service Inc. ("Jackson Hewitt"), the second-largest U.S. tax-preparation firm (behind H&R Block), with a nationwide network of 5,800 offices. Jackson Hewitt filed for chapter 11 protection in Delaware on May 24, 2011, after getting into trouble with lenders as it failed to secure full funding for tax-refund ("refund anticipation") loans, a key covenant in its credit agreement.

Friendly's Ice Cream Corp. ("Friendly's"), an ice-cream-parlor chain founded in 1935 in Springfield, Massachusetts, which filed for chapter 11 protection on October 5, 2011, in Delaware, as the sluggish U.S. economy and slow consumer spending claimed another casual-dining operator. Friendly's blamed rising prices for cream and high rents for its problems. It has struggled to cut prices to lure back recession-weary families who prefer cheaper counter-service chains. Friendly's announced plans to close 63 of its weaker restaurants, while the remaining 424 are to remain open. It also revealed that it intends to sell the business to an affiliate of its current owner, Sun Capital Partners Inc. Other regional or national restaurant-chain bankruptcies in 2011 included chapter 11 filings by ***Perkins & Marie Callender's Inc.*** and ***Real Mex Restaurants, Inc.***

Secaucus, New Jersey-based retailer ***Syms Corp.*** ("Syms"), the parent company of ***Filene's Basement, LLC*** ("Filene's"), which made its final foray into bankruptcy when it filed for chapter 11 protection on November 2, 2011, in Delaware to liquidate its assets through going-out-of-business sales conducted at the 25 Syms and 21 Filene's locations during the remainder of 2011 and into 2012. Syms acquired Filene's at a bankruptcy auction in 2009 during Filene's second chapter 11 filing.

NOTABLE EXITS FROM BANKRUPTCY IN 2011

Company	Filing Date (Court)	Conf. Date Effective Date	Assets	Industry	Result
Lehman Brothers Holdings Inc.	09/15/2008 (S.D.N.Y.)	12/06/2011 CD	$691 billion	Financial Services	Liquidation
Motors Liquidation Company (former GM)	06/01/2009 (S.D.N.Y.)	03/29/2011 CD 03/31/2011 ED	$91 billion	Automobiles	Sale
Colonial BancGroup	08/25/2009 (M.D. Ala.)	06/02/2011 CD 06/03/2011 ED	$25.8 billion	Bank Holding Company	Liquidation
Capmark Financial Group Inc.	10/25/2009 (D. Del.)	08/23/2011 CD 09/30/2011 ED	$21 billion	Mortgage Banking	Reorganization
Guaranty Financial Group Inc.	08/27/2009 (N.D. Tex.)	05/11/2011 CD 05/13/2011 ED	$16.8 billion	Bank Holding Company	Liquidation
AmTrust Financial Corporation	11/30/2009 (N.D. Ohio)	11/03/2011 CD 11/30/2011 ED	$11.7 billion	Bank Holding Company	Liquidation
Corus Bankshares	06/15/2010 (N.D. Ill.)	09/27/2011 CD 10/27/2011 ED	$8 billion	Bank Holding Company	Reorganization
R&G Financial Corporation	05/14/2010 (D.P.R.)	12/21/2011 CD 01/03/2012 ED	$7.3 billion	Bank Holding Company	Liquidation
AMCORE Financial, Inc.	08/19/2010 (N.D. Ill.)	12/15/2010 CD 06/22/2011 ED	$3.8 billion	Bank Holding Company	Liquidation
Advanta Corp.	11/08/2009 (D. Del.)	02/11/2011 CD 02/28/2011 ED	$3.6 billion	Bank Holding Company	Liquidation
Midwest Banc Holdings, Inc.	08/20/2010 (N.D. Ill.)	05/31/2011 CD 06/03/2011 ED	$3.4 billion	Bank Holding Company	Liquidation
FairPoint Communications, Inc.	10/26/2009 (S.D.N.Y.)	01/13/2011 CD 01/24/2011 ED	$3.3 billion	Telecom	Reorganization
Tronox Incorporated	01/12/2009 (S.D.N.Y.)	11/30/2010 CD 02/14/2011 ED	$1.7 billion	Chemicals	Reorganization

Innkeepers USA Trust	07/19/2010 (S.D.N.Y.)	06/29/2011 CD 10/27/2011 ED	$1.5 billion	Hotels	Reorganization
Borders Group, Inc.	02/16/2011 (S.D.N.Y.)	12/20/2011 CD 01/12/2012 ED	$1.4 billion	Retail	Liquidation
Chesapeake Corporation	12/29/2008 (E.D. Va.)	03/29/2011 CD 04/18/2011 ED	$1.2 billion	Packaging Prods. Mfg.	Liquidation
Trico Marine Services, Inc. (2010)	08/25/2010 (D. Del.)	08/02/2011 CD 08/11/2011 ED	$1.1 billion	Shipping	Liquidation
Mesa Air Group, Inc.	01/05/2010 (S.D.N.Y.)	01/20/2011 CD 03/01/2011 ED	$959 million	Airline	Reorganization
Local Insight Media Holdings	11/17/2010 (D. Del.)	11/03/2011 CD 11/18/2011 ED	$812 million	Advertising	Reorganization
Sun-Times Media Group, Inc.	03/31/2009 (D. Del.)	08/18/2011 CD 10/01/2011 ED	$792 million	Media	Liquidation
Seahawk Drilling, Inc.	02/11/2011 (S.D. Tex.)	09/28/2011 CD 10/04/2011 ED	$625 million	Oil	Liquidation
RHI Entertainment, Inc.	12/10/2010 (S.D.N.Y.)	03/29/2011 CD 04/04/2011 ED	$587 million	Television	Reorganization
Sbarro, Inc.	04/04/2011 (S.D.N.Y.)	11/17/2011 CD 11/28/2011 ED	$490 million	Restaurant	Reorganization
Satélites Mexicanos, S.A. de C.V. (2010)	04/06/2011 (D. Del.)	05/11/2011 CD 05/26/2011 ED	$439 million	Satellite	Reorganization
Constar International, Inc. (2010)	01/11/2011 (D. Del.)	05/20/2011 CD 06/01/2011 ED	$418 million	Packaging	Reorganization
Perkins & Marie Callender's Inc.	06/13/2011 (D. Del.)	11/01/2011 CD 11/30/2011 ED	$292 million	Restaurant	Reorganization
Harry & David Holdings, Inc.	03/28/2011 (D. Del.)	08/29/2011 CD 09/14/2011 ED	$243 million	Retail	Reorganization

LEGISLATIVE/REGULATORY DEVELOPMENTS

REVISED BANKRUPTCY RULE 2019

Highly anticipated changes to Rule 2019 of the Federal Rules of Bankruptcy Procedure became effective on December 1, 2011. As amended, Rule 2019, which mandates certain disclosures concerning the economic interests of creditors and interest holders in bankruptcy cases, provides:

> In a chapter 9 or 11 case, a verified statement setting forth the information specified in subdivision (c) of this rule shall be filed by every group or committee that consists of or represents, and every entity that represents, multiple creditors or equity security holders that are (A) acting in concert to advance their common interests, and (B) not composed entirely of affiliates or insiders of one another.

Among other things, subdivision (c) of Rule 2019 requires that name and address information must be provided with respect to each "entity" and "each member of a group or committee," along with "the nature and amount of each disclosable economic interest held in relation to the debtor as of the date the entity was employed or the group or committee was formed." Amended Rule 2019 defines "disclosable economic interest" as "any claim, interest, pledge, lien, option, participation, derivative instrument, or any other right or derivative right granting the holder an economic interest that is affected by the value, acquisition, or disposition of a claim or interest."

PROPOSED CHAPTER 11 VENUE LEGISLATION INTRODUCED

On July 14, 2011, the Chapter 11 Bankruptcy Venue Reform Act of 2011 (H.R. 2533) was introduced to prevent what some lawmakers deem to be forum shopping in chapter 11 cases. The proposed legislation would limit venue to: (i) the location of the debtor's principal place of business or principal assets in the U.S. during the year immediately preceding the commencement of the chapter 11 case (or a portion of such one-year period exceeding that of any other district in which the debtor had such place of business or assets); or (ii) the district in which an affiliate of the debtor that owns, controls, or holds with power to vote more than 50 percent of the outstanding voting securities of such debtor has its chapter 11 case pending. If it were to become law, this proposed legislation would in many cases prevent a debtor from commencing a chapter 11 case in its state of incorporation or from "piggybacking" on the filing of a subsidiary. On August 25, 2011, H.R. 2533 was referred to the House Subcommittee on Courts, Commercial and Administrative Law. Initial hearings were conducted before the Subcommittee on September 8.

PBGC REGULATION ON TERMINATING PLANS IN BANKRUPTCY

On June 13, 2011, the Pension Benefit Guaranty Corporation ("PBGC") released a final rule that, in most cases, will reduce the amount of pension benefits guaranteed under the agency's single-employer insurance program when a pension plan is terminated in a bankruptcy case. The rule will also decrease the amount of pension benefits given priority in bankruptcy.

The rule (RIN: 1212-AA98) became effective on July 14, 2011. One consequence of the rule will be that a plan participant's guaranteed benefit can be no greater than the amount of the benefit on the sponsor's bankruptcy petition date. Previously, some employers continued to sponsor plans after filing for bankruptcy, and participants continued to accrue benefits after the petition date. Those postbankruptcy accruals will no longer be guaranteed by PBGC. Another consequence of the final rule is that PBGC will guarantee only benefits that were "nonforfeitable" on the bankruptcy petition date.

SPANISH PARLIAMENT APPROVES LAW AMENDING THE 2003 INSOLVENCY ACT

On October 10, 2011, the Spanish Parliament approved Law n. 38/2011, which amends the Spanish Insolvency Act of 2003 and applies, with certain exceptions, to insolvency cases commenced after January 1, 2012. The amendment is a comprehensive update of Spanish insolvency regulations applying the Insolvency Act and was implemented in the context of the current EU economic situation with a view toward, among other things, avoiding the liquidation of insolvent companies by exploring alternatives to insolvency and offering such companies a faster and less expensive solution to their financial crises by means of refinancing agreements.

NEW GERMAN INSOLVENCY ACT

The German Parliament enacted a new Insolvency Act on October 26, 2011 (the "Act"). The Act (*das Gesetz zur weiteren Erleichterung der Sanierung von Unternehmen*, broadly translated as "the law for the further facilitation of the rehabilitation of companies") will significantly strengthen the rights of creditors and, to some extent, the rights of debtors in insolvency proceedings. The Act is expected to come into force early in 2012. A more detailed discussion of the Act appears elsewhere in this edition of the *Business Restructuring Review*.

NOTABLE BUSINESS BANKRUPTCY DECISIONS OF 2011

ALLOWANCE/DISALLOWANCE/PRIORITY/DISCHARGE OF CLAIMS

When a company that has been designated a responsible party for environmental cleanup costs files for bankruptcy protection, the ramifications of the filing are not limited to a determination of whether the remediation costs are dischargeable claims. Another important issue is the circumstances under which contribution claims asserted by parties coliable with the debtor will be allowed or disallowed in the bankruptcy case. This question was the subject of rulings handed down in *In re Lyondell Chemical Co.*, 442 B.R. 236 (Bankr. S.D.N.Y. 2011), and *In re Chemtura Corp.*, 443 B.R. 601 (Bankr. S.D.N.Y. 2011). In separate bench rulings, the court held that environmental contribution claims remain contingent, and must be disallowed, until the coliable creditor actually pays for the cleanup or otherwise expends funds on account of the claim.

Until 2011, no federal circuit court of appeals had ever directly addressed whether a claim for multi-employer pension plan withdrawal liability incurred by a debtor-employer that continues to employ workers during a bankruptcy case is entitled (in whole or in part) to administrative-expense status. That changed when the Third Circuit handed down its ruling in *In re Marcal Paper Mills, Inc.*, 650 F.3d 311 (3d Cir. 2011). Addressing the issue as a matter of first impression, the court of appeals affirmed a district court's reversal of a bankruptcy court order denying administrative-expense status to a withdrawal-liability claim against a chapter 11 debtor in possession ("DIP") that continued to participate in a multi-employer defined-benefit pension plan until it sold substantially all of its assets to a successor entity. According to the Third Circuit, because part of the withdrawal liability was attributable to the post-petition time period and the debtor clearly benefited from postpetition labor provided by its unionized employees, the portion of the claim relating to postpetition services constituted a priority administrative expense.

Section 507(a)(4) gives priority to "allowed unsecured claims, but only to the extent of [$11,725] for each individual . . . earned within 180 days before the date of the filing of the petition . . . for . . . wages, salaries, or commissions, including vacation, severance, and sick leave pay earned by an individual." In the first circuit-level opinion on the issue, the Fourth Circuit in *Matson v. Alarcon*, 651 F.3d 404 (4th Cir. 2011), held that, for purposes of establishing priority under section 507(a)(4), an employee's severance pay was entirely "earned" upon termination of employment, even though the severance amounts were determined by the employee's length of service with the employer.

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 have received had the borrower paid the debt through maturity.

Courts sometimes disallow lender claims for payment of make-whole premiums in the event of prepayment because those premiums are generally not due under the applicable loan documents during the no-call period. In *In re Trico Marine Services, Inc.*, 450 B.R. 474 (Bankr. D. Del. 2011), the court ruled in an apparent matter of first impression before it that, following the "substantial majority of courts, a make-whole premium is in the nature of liquidated damages, not interest." This meant that the lenders ended up with an unsecured claim for the make-whole premium rather than a secured claim.

In most cases, when a "responsible" party under the Comprehensive Environmental Response, Compensation, and Liability Act or the Resource Conservation and Recovery Act files for bankruptcy, the cleanup costs incurred by the bankrupt responsible party are discharged. In *In re Mark IV Industries, Inc.*, 459 B.R. 173 (S.D.N.Y. 2011), the district court affirmed a bankruptcy court decision concluding that a state government's right to an injunction compelling a chapter 11 debtor to conduct an environmental cleanup is not a "claim" subject to discharge under the Bankruptcy Code. The decision continues a trend in court rulings limiting the circumstances under which an environmental cleanup obligation will be treated as a dischargeable bankruptcy claim.

AVOIDANCE ACTIONS/TRUSTEE'S AVOIDANCE AND STRONG-ARM POWERS

Lenders can breathe a little easier—for now—in the wake of a Florida district court decision in 2011 quashing the much-discussed *TOUSA* bankruptcy opinion. *See In re TOUSA, Inc.*, 422 B.R. 783 (Bankr. S.D. Fla. 2009), *quashed in part*, 444 B.R. 613 (S.D. Fla. 2011). In rejecting the bankruptcy court's analysis, the district court protected the lenders' right to accept payment of bona fide antecedent debt without undue concern that such payments would ultimately be disgorged as the spoils of a constructively fraudulent transfer. Among other things, the district court held that "the opportunity to avoid default, to facilitate the enterprise's rehabilitation, and to avoid bankruptcy, even if it proved to be short lived, may be considered in determining reasonable equivalent value." The venue for this continuing saga and its eagerly anticipated denouement has now shifted to the Eleventh Circuit.

In *In re Longview Aluminum, L.L.C.*, 657 F.3d 507 (7th Cir. 2011), the Seventh Circuit explained that, for purposes of avoidance litigation, there are two approaches to the determination of "insider" status: (i) the "similarity" approach; and (ii) the "closeness" approach. The similarity approach compares the position held by a nonstatutory insider with the list of statutory insiders delineated in section 101(31)(B) of the Bankruptcy Code and attempts to analogize the nonstatutory insider's position with statutory positions. If the court finds sufficient "similarity," the putative insider is viewed as a statutory insider. By contrast, according to the closeness approach, anyone with a sufficiently close relationship with the debtor such that his conduct is subject to closer scrutiny than those dealing at arm's length with the debtor will be deemed an insider.

The Seventh Circuit ruled that a bankruptcy court did not err in using the similarity approach to determine that a "member" of a limited liability company ("LLC") was similar to a

statutory "director" and thus was an insider. According to the Seventh Circuit, the court did not err in choosing not to analyze whether the LLC member was a nonstatutory insider via control factors.

When a debtor that has operated or been the instrument of a Ponzi scheme files for bankruptcy, the bankruptcy trustee or DIP may later seek to avoid and recover payments made in furtherance of the scheme as fraudulent transfers. Defendants in these avoidance actions commonly seek to thwart such attempted "clawbacks" by contending that they received their returns from the debtor in good faith and without any knowledge of the Ponzi scheme and that they gave "value" to the debtor in the form of initial and subsequent investments.

In *Picard v. Katz*, 2011 WL 4448638 (S.D.N.Y. Sept. 27, 2011), the district court examined the extent to which the trustee could avoid certain transfers made with the actual intent to defraud creditors in connection with the Bernard Madoff Ponzi scheme. The availability of a good-faith defense, the court explained, depends on whether the transfers sought to be recovered were the defendants' principal or profits. According to the court, the principal invested by the defendants conferred value upon the debtors, but the profits presumptively exceeded any value that might have been given. The court added the caveats that: (i) a trustee might be able to recover principal invested in a Ponzi scheme by demonstrating "willful blindness" by the investor; and (ii) a defendant could retain its profits if it could show that it gave value for the profits in excess of its principal.

In *Perkins v. Haines*, 661 F.3d 623 (11th Cir. 2011), the Eleventh Circuit reached a similar conclusion, albeit in a slightly different context—the initial investments in *Perkins* consisted of purchases of equity interests in limited partnerships, rather than direct investments of cash into a fund or other investment vehicle. Addressing the issue as a matter of apparent first impression, the court ruled that: (i) transfers made in furtherance of a Ponzi scheme are presumed to be actually fraudulent under section 548 of the Bankruptcy Code; (ii) the general rule is that an investor defrauded in a Ponzi scheme is recognized as having given "value" to the extent of the principal invested for purposes of the section 548(c) "good faith" affirmative defense; and (iii) amounts distributed to the investor in excess of the initial investment are deemed not to have been given for value and may be recovered. According to the Eleventh Circuit, the form of the investment—either as a payment giving rise to a debt claim or an equity investment—is irrelevant to application of the rule.

In *In re Dreier LLP*, 2011 WL 6327385 (Bankr. S.D.N.Y. Dec. 19, 2011), and *In re Dreier LLP*, 2011 WL 6337493 (Bankr. S.D.N.Y. Dec. 19, 2011), the bankruptcy court denied motions to dismiss counts in a complaint seeking to avoid as actual and constructive fraudulent transfers interest payments made to hedge funds that loaned money to a debtor operating a Ponzi scheme. In ruling that the section 548(c) safe harbor was not available to the lenders, the court reaffirmed the general rule that the good-faith defense in this context does not apply to payments other than principal and rejected the lenders' contention that a lender to a fraudulent business provides "value" in exchange for the interest it receives.

AUTOMATIC STAY

Section 362(a)(1) of the Bankruptcy Code automatically stays the commencement or continuation of a judicial proceeding against the debtor that was or could have been initiated before the filing of a bankruptcy petition. In *Chizzali v. Gindi (In re Gindi)*, 642 F.3d 865 (10th Cir. 2011), the Tenth Circuit interpreted section 362(a)(1) to mean that "the automatic stay does not prevent a Chapter 11 debtor in possession from pursuing an appeal even if it is an appeal from a creditor's judgment against the debtor."

At least nine other circuit courts of appeals have disagreed with the Tenth Circuit's interpretation of section 362(a)(1) in *Gindi*, holding that a bankruptcy filing automatically stays appellate proceedings if the debtor has filed an appeal from a judgment entered in a suit against the debtor. In *TW Telecom Holdings Inc. v. Carolina Internet Ltd.*, 661 F.3d 495 (10th Cir. 2011), the Tenth Circuit reversed its position on this issue. "From this date forward," the court wrote, "this Circuit will read 'section 362 . . . to stay all appeals in proceedings that were *originally brought* against the debtor, regardless of whether the debtor is the appellant or appellee.' "

In *Palmdale Hills Property, LLC v. Lehman Commercial Paper, Inc.*, 654 F.3d 868 (9th Cir. 2011), the Ninth Circuit held that the automatic stay bars actions which would diminish the estate of a debtor in bankruptcy ("debtor 1"), and therefore, if another debtor ("debtor 2") in a separate bankruptcy case wants to seek equitable subordination of claims asserted by debtor 1 against debtor 2, debtor 2 must first obtain relief from the stay in debtor 1's bankruptcy case.

In *In re Nortel Networks, Inc.*, 2011 WL 6826412 (3d Cir. Dec. 29, 2011), the Third Circuit affirmed lower-court rulings enforcing the automatic stay against the Trustee of Nortel Networks U.K. Pension Plan and the U.K. Board of the Pension Protection Fund ("PPF") with respect to their participation in U.K. pension proceedings initiated by the U.K. Pensions Regulator ("TPR") to determine the extent of the liability of Nortel Networks U.K. Limited and its affiliates, including two U.S. chapter 11 debtors (Nortel Networks, Inc., and NN Caribbean and Latin American), for an underfunded defined-benefit pension scheme established and governed by U.K. law.

The Third Circuit ruled that the Trustee and PPF failed to demonstrate that the proceedings fell within the "police power" exception to the automatic stay contained in section 362(b)(4) of the Bankruptcy Code. According to the court, neither the Trustee nor PPF was a "governmental unit" qualifying for the exception, and although TPR was a governmental unit, TPR was not a party to the bankruptcy proceedings and therefore could not assert the "police power" exception. In addition, the Third Circuit concluded that the U.K. proceedings were focused on the pecuniary interests of PPF and the members of the pension scheme, rather than the protection of public health or safety.

In *In re Stone Resources, Inc.*, 458 B.R. 823 (E.D. Pa. 2011), the district court held that a bankruptcy court abused its discretion in denying a franchisor's motion for relief from the automatic stay when the franchisee's bankruptcy petition was filed after the franchisor had previously filed litigation against the franchisee to enforce a covenant not to compete. The ruling is significant because it found that the relief the franchisor sought—the enforcement of the covenant not to compete—could not be considered a "claim" that could be remedied by a claim for money damages in bankruptcy and thus was immune from the effects of the automatic stay.

BANKRUPTCY ASSET SALES

The ability to sell an asset in bankruptcy free and clear of liens and any other competing "interest" is a well-recognized tool available to a trustee or DIP. Whether the category of "interests" encompassed by that power extends to potential successor-liability claims, however, has been the subject of considerable debate in the courts. A New York bankruptcy court addressed this controversial issue in *Olson v. Frederico (In re Grumman Olson Indus., Inc.)*, 445 B.R. 243 (Bankr. S.D.N.Y. 2011). The court ruled that a sale authorized under section 363 of the Bankruptcy Code cannot exonerate purchasers from successor-liability claims by claimants who, at the time of the sale, had not yet been injured and had no contact or relationship with the debtor or its products.

In *In re Skyline Woods Country Club*, 636 F.3d 467 (8th Cir. 2011), the debtor had sold its golf-course property "free and clear" of any interest under section 363 of the Bankruptcy Code. After the buyer ceased operating, adjoining homeowners sued in state court to enforce a covenant restricting use of the property as a golf course. The buyer argued that the restrictive covenant was wiped out by section 363(f). The state court ruled that the covenant was not an "interest" in property within the meaning of section 363(f).

The buyer went back to bankruptcy court to reopen the case for the purpose of challenging the state court's determination. The bankruptcy court denied the request, a ruling that was upheld by a bankruptcy appellate panel. On further appeal, the Eighth Circuit held that the state court ruling was entitled to full faith and credit and that the ruling did not represent a collateral attack on the bankruptcy court order approving the sale that would otherwise have been impermissible under section 363(m) of the Bankruptcy Code. According to the Eighth Circuit, the state court had merely interpreted the scope of the sale order's "free and clear" provision.

In *In re ASARCO, L.L.C.*, 650 F.3d 593 (5th Cir. 2011), the Fifth Circuit ruled that when a bidder seeks payment of sale-related expenses after a bankruptcy sale, with no mechanism for such reimbursement having been preapproved by the bankruptcy court, the standards governing the allowance and payment of administrative expenses in section 503(b) of the Bankruptcy Code apply. However, when the

bankruptcy court assesses the propriety of proposed bidder-reimbursement procedures before the sale, the court should apply the business-judgment standard that governs a proposed use, sale, or lease of estate property outside the ordinary course of business under section 363(b).

BANKRUPTCY COURT POWERS/JURISDICTION

In *Stern v. Marshall*, 131 S. Ct. 2594 (2011), the estate of Vickie Lynn Marshall, a.k.a. Anna Nicole Smith, lost by a 5-4 margin Round 2 of its U.S. Supreme Court bout with the estate of E. Pierce Marshall in a contest over Vickie's rights to a portion of the fortune of her late husband, billionaire J. Howard Marshall II. The dollar figures in dispute, amounting to more than $400 million, and the celebrity status of the original (and now deceased) litigants grabbed headlines. But the real story was the Supreme Court's declaration that a provision in the Federal Judicial Code addressing the bankruptcy court's "core" jurisdiction is unconstitutional. Refer to the "From the Top" section in this issue for a more detailed description of the ruling.

Although it has been described as an "extraordinary remedy," the ability of a bankruptcy court to order the substantive consolidation of related debtor entities in bankruptcy (if circumstances so dictate) is relatively uncontroversial, as an appropriate exercise of a bankruptcy court's broad (albeit nonstatutory) equitable powers. By contrast, considerable controversy surrounds the far less common practice of ordering consolidation of a debtor in bankruptcy with a nondebtor.

In *Kapila v. S & G Fin. Servs., LLC (In re S & G Fin. Servs. of S. Fla., Inc.)*, 451 B.R. 573 (Bankr. S.D. Fla. 2011), the court ruled that "it is well within this Court's equitable powers to allow substantive consolidation of entities under appropriate circumstances, whether or not all of those entities are debtors in bankruptcy." It also held that "this Court has jurisdiction over non-debtor entities to determine the propriety of an action for substantive consolidation insofar as the outcome of such proceeding could have an impact on the bankruptcy case."

The ability of a bankruptcy court to reorder the priority of claims or interests by means of equitable subordination or recharacterization of debt as equity is generally recognized. Even so, the Bankruptcy Code itself expressly authorizes only the former of these two remedies. This has led to uncertainty in some courts concerning the extent of their power to recharacterize claims and the circumstances warranting recharacterization. In *Grossman v. Lothian Oil Inc. (In re Lothian Oil Inc.)*, 650 F.3d 539 (5th Cir. 2011), the Fifth Circuit ruled in a matter of first impression that a bankruptcy court's ability to recharacterize debt as equity is part of the court's authority to allow and disallow claims (rather than the court's broad equitable powers under section 105 of the Bankruptcy Code), and the remedy is not limited to claims asserted by corporate insiders.

BANKRUPTCY PLANNING

The involuntary chapter 11 case that senior noteholders successfully filed against a "bankruptcy remote" collateralized debt obligation ("CDO") entity in *In re Zais Investment Grade Limited VII*, 455 B.R. 839 (Bankr. D.N.J. 2011), surprised some investors. A New Jersey bankruptcy court ruled that, even though the CDO entity was structured as a foreign-registered special-purpose vehicle with no employees or assets in the U.S. other than collateral held in trust for the benefit of noteholders, it was eligible to be a chapter 11 debtor under section 109(a) of the Bankruptcy Code because it had a place of business and property in the U.S. According to the court, chapter 11 provided an appropriate way to resolve the valuation dispute between senior and junior secured noteholders. The decision illustrates that "bankruptcy remote" is not equivalent to "bankruptcy proof."

BANKRUPTCY PROFESSIONALS/LITIGATION ISSUES

In *In re Tribune Co.*, 2011 WL 386827 (Bankr. D. Del. Feb. 3, 2011), the court ruled that, in the context of settlement negotiations that form the basis for a chapter 11 plan, the "common-interest doctrine," which allows attorneys representing different clients with aligned legal interests to share information and documents without waiving the work-product doctrine or attorney-client privilege, applies once the parties have "agreed upon material terms of a settlement." "Once the [plan proponents] agreed upon [the] material terms of the settlement," the court wrote, "it is reasonable to conclude that the parties might share privileged information in furtherance of their common interest of obtaining approval of the settlement through confirmation of the plan."

Section 107 of the Bankruptcy Code provides a public right to access to papers filed in a bankruptcy case. However, the provision protects, among other things, "scandalous or defamatory" information from disclosure. Because the Bankruptcy Code does not define these terms, bankruptcy courts look to other sources, including the ordinary, dictionary meaning of "scandalous," in determining whether information should be protected from disclosure. In *In re Roman Catholic Archbishop of Portland*, 661 F.3d 417 (9th Cir. 2011), the Ninth Circuit ruled that, in a tort action against a debtor diocese, no good cause justified continuing a protective order to bar disclosure of personnel records containing allegations that a nonretired, nonparty priest had sexually abused children because the priest's private interest in nondisclosure was outweighed by the significant public interests in protecting public safety and identifying abusers of children. It also held that the bankruptcy court erred in unsealing documents containing allegations that two nonparty priests had sexually abused children, as those documents met the statutory exception in section 107(b) to the general right of public access to bankruptcy filings for scandalous or defamatory matter.

CHAPTER 11 PLANS

Notwithstanding the "absolute priority rule" stated in section 1129(b)(2)(B) of the Bankruptcy Code, in order to foster plan confirmation or pursue other goals, a senior creditor, as part of a deal, may try to bypass an intermediate class of creditors by providing, from value that absent the deal would have gone to the senior creditor, a "gift" distribution to a junior class that would not otherwise be entitled to anything under a chapter 11 plan. Although the Third Circuit limited the use of gifting in that circuit in *In re Armstrong World Indus., Inc.*, 432 F.3d 507 (3d Cir. 2005), gifting retained viability as a tool to achieve certain goals in other circuits. However, in *Dish Network Corp. v. DBSD N. Am., Inc. (In re DBSD N. Am., Inc.)*, 634 F.3d 79 (2d Cir. 2011), the Second Circuit rejected gifting as inconsistent with the absolute-priority-rule requirements for "cramdown," or involuntary, confirmation of a chapter 11 plan.

Another requirement for involuntary plan confirmation is section 1129(b)(1)'s dictate that a plan be "fair and equitable" with respect to a dissenting class of creditors. For secured claims, section 1129(b)(2)(A) provides three alternative ways to satisfy this requirement: (i) the secured claimants' retention of their liens and receipt of deferred cash payments equal to at least the value, as of the plan effective date, of their secured claims; (ii) the sale, "subject to section 363(k)," of the collateral free and clear of all liens, with attachment of the liens to the proceeds and treatment of the liens on proceeds under option (i) or (iii); or (iii) the realization by the secured creditors of the "indubitable equivalent" of their claims.

Section 363(k) of the Bankruptcy Code establishes the right of secured creditors to "credit-bid" by providing that when a debtor sells any property secured by a valid lien, unless the court orders otherwise "for cause," and if the holder of the secured claim purchases the property, "such holder may offset such claim against the purchase price of the property."

In *River Road Hotel Partners, LLC v. Amalgamated Bank (In re River Road Hotel Partners, LLC)*, 651 F.3d 642 (7th Cir. 2011), the Seventh Circuit held that a dissenting class of secured lenders cannot be deprived of the right to credit-bid its claims under a chapter 11 plan that proposes an auction sale of the lenders' collateral free and clear of liens. The decision is a welcome development for secured creditors on the heels of contrary rulings handed down by the Third Circuit in *In re Philadelphia Newspapers*, 599 F.3d 298 (3d Cir. 2010), and the Fifth Circuit in *In re Pacific Lumber Co.*, 584 F.3d 229 (5th Cir. 2009). The resulting circuit split, however, was a compelling invitation for review by the U.S. Supreme Court, which agreed to review the *River Road* ruling when it issued a writ of certiorari on December 12, 2011.

Compared to the attention devoted to the legitimacy of senior-class "gifting" to junior classes under a chapter 11 plan, relatively little scrutiny has been directed toward significant developments in ongoing controversies in the courts during 2011 regarding the absolute priority rule in other contexts—namely, in connection with the "new value" exception to the rule developed under the former Bankruptcy Act of 1898 and whether the rule was written out of the Bankruptcy Code for individual chapter 11 debtors by the addition of section 1115 as part of the 2005 bankruptcy amendments.

Under the new value exception, a junior stakeholder (*e.g.*, a shareholder) may retain its junior claim or equity interest

under a chapter 11 plan over the objection of a senior impaired creditor class, provided the shareholder contributes new capital to the restructured enterprise. According to some courts, that capital must be new, substantial, necessary for the success of the plan, reasonably equivalent to the value retained, and in the form of money or money's worth. Other courts have concluded that the new value exception did not survive the enactment of the Bankruptcy Code in 1978 because, among other things, the concept is not explicitly referred to in section 1129(b)(2) or elsewhere in the statute. Several bankruptcy courts weighed in on this issue in 2011, most finding that the exception remains viable, but some concluding that its requirements were not satisfied. *See*, *e.g.*, *In re Multiut Corp.*, 449 B.R. 323 (Bankr. N.D. Ill. 2011); *In re Red Mountain Machinery Co.*, 448 B.R. 1 (Bankr. D. Ariz. 2011); *In re Greenwood Point, LP*, 445 B.R. 885 (Bankr. S.D. Ind. 2011).

"High-asset" individual debtors, such as business owners or owners of rental property or other significant business and personal assets, whose financial problems are too extensive to qualify for treatment under the wage-earner provisions in chapter 13, commonly seek protection under chapter 11 of the Bankruptcy Code. In 2005, Congress amended section 1129(b)(2)(B)(ii) with respect to individual chapter 11 debtors to provide that "in a case in which the debtor is an individual, the debtor may retain property included in the estate under section 1115," even if a dissenting class of unsecured creditors could otherwise argue that retention of such property violates the absolute priority rule. Lawmakers also added section 1115 to the Bankruptcy Code. Section 1115 provides that, in an individual chapter 11 case, "property of the estate includes, in addition to the property specified in section 541—(1) all property of the kind specified in section 541 that the debtor acquires after the commencement of the case . . . ; and (2) earnings from services performed by the debtor after the commencement of the case."

A dispute has arisen in the courts as to whether the carve-out added to section 1129(b)(2)(B)(ii) for property retained by individual debtors might extend to property other than post-petition earnings—in effect, abrogating the absolute priority rule in individual chapter 11 cases. Some courts, representing the minority view, have construed section 1115 broadly. These courts interpret section 1115 to mean that section 1129(b)(2)(B)(ii)'s exception from the reach of the absolute priority rule extends to all property of the estate, including, for example, prepetition ownership interests in nonexempt property and an individual debtor's ownership interests in a business. Other courts, representing a growing majority, subscribe to a narrower construction of section 1115 and confine the exemption from absolute priority to postpetition earnings. *See*, *e.g.*, *In re Kamell*, 451 B.R. 505 (Bankr. C.D. Cal. 2011); *In re Draiman*, 450 B.R. 777 (Bankr. N.D. Ill. 2011); *In re Maharaj*, 449 B.R. 484 (Bankr. E.D. Va. 2011); *In re Walsh*, 447 B.R. 445 (Bankr. D. Mass. 2011); *In re Stephens*, 445 B.R. 816 (Bankr. S.D. Tex. 2011).

In *Ala. Dep't of Econ. & Comm. Affairs v. Ball Healthcare-Dallas, LLC (In re Lett)*, 632 F.3d 1216 (11th Cir. 2011), the Eleventh Circuit was presented with an opportunity to weigh in on the absolute priority rule in individual debtor chapter 11 cases as well as the new value exception. However, section 1115 did not apply in that case because the chapter 11 filing preceded the October 17, 2005, effective date of the provision, and the court expressly declined "further discussion of this exception to the absolute priority rule, as it is not at issue in this case." On remand, however, the district court ruled in *In re Lett*, 2011 WL 2413484 (S.D. Ala. June 13, 2011), that the debtor's plan violated the absolute priority rule because certain property would revest in the debtor upon confirmation without paying senior creditor classes in full and that the plan failed to satisfy the new value exception because the debtor contributed no new value to the estate.

In *Lett*, the Eleventh Circuit also ruled that objections to a bankruptcy court's approval of a cramdown chapter 11 plan on the basis of noncompliance with the absolute priority rule may be raised for the first time on appeal. According to the court, "A bankruptcy court has an independent obligation to ensure that a proposed plan complies with [the] absolute priority rule before 'cramming' that plan down upon dissenting creditor classes," whether or not stakeholders "formally" object on that basis.

Section 1124 of the Bankruptcy Code delineates the requirements for rendering a class of claims or interests unimpaired in a chapter 11 plan. In *In re General Growth Properties, Inc.*, 451 B.R. 323 (Bankr. S.D.N.Y. 2011), the bankruptcy court ruled that, under section 1124(2), where a solvent debtor proposes

a plan that reinstates the creditor's claim, the creditor is entitled to postpetition interest on its claim at the contract default rate for the period from the bankruptcy petition date to the effective date of the plan.

In *In re Washington Mutual, Inc.*, 2011 WL 57111 (Bankr. D. Del. Jan. 7, 2011), the bankruptcy court greatly limited debtors' ability to release parties under a chapter 11 plan. The court approved a global settlement agreement resolving litigation stemming from the failure of Washington Mutual Bank in 2008 that was the basis for the debtors' sixth amended joint chapter 11 plan. Despite finding that the global settlement was fair and reasonable, the court denied confirmation of the plan because it found the releases granted by the debtors to certain parties under the plan to be excessively broad and impermissible under applicable law.

In *In re Washington Mutual, Inc.*, 2011 WL 4090757 (Bankr. D. Del. Sept. 13, 2011), the court once again denied confirmation of the debtors' chapter 11 plan and instead referred the litigants to mediation in order to move the case toward a confirmable resolution. Among other things, the court ruled that the equity committee in the cases had stated a colorable claim for equitable disallowance of noteholder claims on the ground that noteholders had traded on insider information obtained in settlement negotiations with the debtors and the buyer of the assets of an affiliate of the debtors. Such a ruling was required for the court to grant the committee standing to prosecute the claim on the basis of the debtors' alleged unjustifiable refusal to do so.

In *In re Tribune Co.*, 2011 WL 5142420 (Bankr. D. Del. Oct. 31, 2011), the bankruptcy court denied confirmation of competing joint chapter 11 plans for 111 affiliated debtors. Among other things, the court ruled that neither plan satisfied section 1129(a)(10) of the Bankruptcy Code, which provides that "[i]f a class of claims is impaired under the plan, at least one class of claims that is impaired under the plan has accepted the plan, determined without including any acceptance of the plan by any insider." According to the court, in the absence of substantive consolidation, the failure to have an accepting impaired class with respect to each of the 111 debtors precluded confirmation under section 1129(a)(10). In other words, the court held that section 1129(a)(10) must be satisfied on a "per debtor" basis, rather than a "per plan" basis.

Postconfirmation liquidation and litigation trusts have become an important mechanism in a chapter 11 bankruptcy estate's arsenal, allowing for the resolution of claims and interests without needlessly delaying confirmation in the interim. Section 1123(b)(3)(B) of the Bankruptcy Code states that a plan may provide for retention or enforcement by the reorganized debtor, the trustee, or a representative of the estate of any claim or interest belonging to the estate. The provision does not specify, however, the manner in which the retention of any such claim or interest must be drafted and disclosed to other parties—leaving to the courts the question of the level of specificity and detail required.

In *In re MPF Holdings US LLC*, 443 B.R. 736 (Bankr. S.D. Tex. 2011), the bankruptcy court suggested that, in the Southern District of Texas at least, the level of specificity and detail required is high. However, in *In re Matter of Texas Wyoming Drilling, Inc.*, 647 F.3d 547 (5th Cir. 2011), the Fifth Circuit issued an opinion clarifying that debtors in that circuit, which includes the Southern District of Texas, are not straitjacketed in this regard after all. According to the Fifth Circuit, to meet the "specific and unequivocal" burden necessary to preserve postconfirmation litigation claims, a plan must identify the types of claims—not simply reserve "any and all." Language identifying the types of claims (*e.g.*, avoidance actions), the possible amount of recovery, and the basis for the claims as well as the fact that the reorganized debtor or its representative intends to pursue those actions is sufficient. Individual defendants, however, need not be named.

Another Texas bankruptcy court addressed this issue in *In re Crescent Resources*, 2011 WL 3022567 (Bankr. W.D. Tex. July 22, 2011). Following *Texas Wyoming*, the court held that the requirement for a plan to contain "specific and unequivocal" language reserving claims to be pursued postconfirmation allows the use of the "categorical approach," in which claims are described by category rather than by the specific defendants to be sued.

CLAIMS/DEBT TRADING

In *Regan Capital I, Inc. v. UAL Corp. (In re UAL Corp.)*, 635 F.3d 312 (7th Cir. 2011), the Seventh Circuit affirmed a ruling below that the purchaser of a claim based upon an executory contract which was ultimately rejected by a DIP is not entitled to cure amounts as part of its allowed claim.

In re Mesa Air Group, Inc., 2011 WL 320466 (Bankr. S.D.N.Y. Jan. 20, 2011), highlighted the importance of complying with court-established procedures for acquiring claims and properly documenting claims transfers. The court had entered an order restricting the trading of large claims to protect the debtor's ability to use its net operating losses. It later ruled that a creditor which had acquired its claims in violation of the trading order lacked standing to object to confirmation of the debtors' chapter 11 plan.

CREDITOR STANDING AND RIGHTS

In a ruling that has been described as "very important" and the "first decision of its kind," the bankruptcy court held in *In re Innkeepers USA Trust*, 448 B.R. 131 (Bankr. S.D.N.Y. 2011), that a certificate holder with a beneficial interest in a securitized trust established by the chapter 11 debtors' prepetition lenders was not a "party in interest" and therefore lacked standing to object to bidding procedures proposed by the debtors for the sale of their assets outside the ordinary course of business. The court explained that this conclusion comports with the Second Circuit's holding in *In re Refco Inc.*, 505 F.3d 109 (2d Cir. 2007), that a "creditor of a creditor is not a 'party in interest' within the meaning of section 1109(b) of the Bankruptcy Code."

In *In re Global Industrial Technologies, Inc.*, 645 F.3d 201 (3d Cir. 2011), the Third Circuit ruled that, even if a chapter 11 debtor's liability insurers' ultimate liability was contingent, the insurers were "parties in interest" and thus had standing to challenge confirmation of a chapter 11 plan calling for them to fund a settlement trust created to satisfy the debtor's liability on silica-related claims.

In *In re Heating Oil Partners, LP*, 2011 WL 1838720 (2d Cir. May 16, 2011), the Second Circuit held that, although section 1109(b) of the Bankruptcy Code states that "[a] party in interest . . . may raise and may appear and be heard on any issue in a case under [chapter 11]," the provision does not abrogate constitutional standing requirements. A party in interest must still demonstrate that it meets the general requirements of the standing doctrine under the U.S. Constitution, including whether it has alleged a personal stake in the outcome of the proceedings and whether it is asserting its own legal rights and remedies.

In *Official Committee of Unsecured Creditors v. Baldwin (In re Lemington Home for the Aged)*, 659 F.3d 282 (3d Cir. 2011), the Third Circuit reversed a grant of summary judgment in favor of defendant directors and officers, holding, among other things, that the "deepening insolvency" cause of action, which the court previously recognized in *Official Committee of Unsecured Creditors v. R.F. Lafferty & Co.*, 267 F.3d 340 (3d Cir. 2001), remains an independent cause of action under Pennsylvania law. *Lemington* is discussed in greater detail elsewhere in this issue of the *Business Restructuring Review*.

Subordination agreements are generally enforceable in bankruptcy cases pursuant to section 510(a) of the Bankruptcy Code. In *In re SW Boston Hotel Venture, LLC*, 2011 WL 5520928 (Bankr. D. Mass. Nov. 14, 2011), a junior creditor that was a signatory to an intercreditor and subordination agreement which provided senior creditors with the sole right to vote on any chapter 11 plan for the debtor nevertheless submitted a ballot on its own behalf. The senior creditor moved to enforce the terms of the agreement. The bankruptcy court ruled that, to the extent a provision in a subordination agreement attempts to alter a substantive right under the Bankruptcy Code—here, section 1126(a), which provides that "[t]he holder of a claim or interest allowed under section 502 of this title may accept or reject a plan"—such a provision is invalid. Bankruptcy courts are evenly divided on this issue, which promises to remain controversial.

Mortgage loans have been increasingly packaged into mortgage-backed securities and securitization trusts known as "collateralized debt obligations." To avoid the need to rerecord a mortgage each time it is transferred, major mortgage lenders decided it would be more efficient for a single entity to be named as the "mortgagee of record" or "nominee" on a mortgage encompassed in such arrangements. A mortgage could then be transferred without having to be rerecorded because, assuming that the transferee agrees that the "mortgagee of record" or "nominee" will retain its status in that capacity notwithstanding future transfers, rerecording is not necessary because the mortgage remains recorded in the name of the mortgagee of record or nominee.

Mortgage Electronic Registration Systems Inc. ("MERS") was devised for this purpose. MERS is an electronic registry launched in 2004 for monitoring mortgage holders and

servicing rights for mortgage lenders and servicers who become MERS members. MERS, rather than an individual lender, is named as mortgagee of record or nominee on its members' mortgages. A mortgage is recorded in local real property records in MERS's name and can be transferred among MERS members without the need for rerecording the mortgage upon each transfer. By some recent estimates, MERS is mortgagee of record or nominee on approximately 50 percent of all residential U.S. mortgages.

The MERS system, however, has been the subject of heated controversy in the recent foreclosure-documentation saga. Foreclosure laws generally require, as a condition to foreclosure, both the note and the mortgage to be held by the same entity or an agent of such entity. It is unclear whether MERS, as the mortgagee of record or nominee, is an agent for the entity that would have been the mortgagee (the lender) under the traditional mortgage-recordation system. If MERS were not deemed to be an agent for the lender, MERS's recordation of the mortgage would split it from the note, and the resulting bifurcation would preclude the lender from foreclosing on the mortgage and leave the lender with an unsecured claim.

This dispute has played out prominently during 2011 not only in state courts but in U.S. bankruptcy and appellate courts as well, with courts lining up on both sides of the divide. Some courts have concluded that MERS is not an agent of the lender under applicable nonbankruptcy law. *See*, *e.g.*, *In re Gorman*, 2011 WL 5117846 (Bankr. E.D.N.Y. Oct. 27, 2011); *In re Salazar*, 448 B.R. 814 (Bankr. S.D. Cal. 2011); *In re Agard*, 444 B.R. 231 (Bankr. E.D.N.Y. 2011). Other courts have reached the opposite conclusion. *See*, *e.g.*, *Culhane v. Aurora Loan Services of Nebraska*, 2011 WL 5925525 (D. Mass. Nov. 28, 2011); *Nielsen v. Aegis Wholesale Corp.*, 2011 WL 1675178 (D. Utah May 4, 2011); *In re Martinez*, 455 B.R. 755 (Bankr. D. Kan. 2011).

In *In re J.H. Inv. Services, Inc.*, 2011 WL 5903523 (11th Cir. Nov. 22, 2011), the Eleventh Circuit ruled that an undersecured creditor must take an affirmative step to pursue an unsecured claim and that an undersecured creditor does not automatically assert a deficiency claim by operation of section 506(a)(1) of the Bankruptcy Code. According to the court, "No creditor—even an undersecured creditor—is required to pursue a claim in bankruptcy or file a proof-of-claim form," and an "undersecured creditor is not required to pursue a deficiency claim." If a creditor fills out a proof-of-claim form in a manner which indicates the creditor believes that it is fully secured, the court wrote, "it has waived any unsecured claim."

In *CompuCredit Holdings Corporation v. Akanthos Capital Management, LLC*, 661 F.3d 1312 (11th Cir. 2011), the Eleventh Circuit reaffirmed the extent to which holders of debt may engage in coordinated behavior with respect to a common issuer without running afoul of antitrust laws. The court affirmed a judgment on the pleadings for a group of hedge funds in an antitrust case challenging the funds' actions under the Sherman Act. The court rejected the issuer's assertion that the funds had violated section 1 of the Sherman Act by coordinating to force the issuer to pay above-market prices for the early redemption of its notes. In ruling for the funds, the court followed previous decisions by the Second and Seventh Circuits. *See United Airlines v. U.S. Bank, N.A.*, 406 F.3d 918 (7th Cir. 2005); *Sharon Steel Corp. v. Chase Manhattan Bank, N.A.*, 691 F.2d 1039 (2d Cir. 1982).

CROSS-BORDER BANKRUPTCY CASES

October 17, 2011, marked the six-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.

In *In re Fairfield Sentry Ltd.*, 452 B.R. 52 (Bankr. S.D.N.Y. 2011), and *In re Fairfield Sentry Ltd.*, 452 B.R. 64 (Bankr. S.D.N.Y. 2011) ("*Fairfield II*"), the bankruptcy court rendered two decisions involving offshore "feeder funds" that invested in the massive Ponzi scheme associated with Bernard L. Madoff Investment Securities LLC. In matters of apparent first impression, the court ruled that: (i) it would not remand or abstain from hearing actions commenced by the foreign representatives of a foreign debtor seeking recovery or avoidance of transfers made in connection with the Madoff Ponzi scheme; and (ii) the tolling provisions of the Bankruptcy Code apply

in chapter 15, such that the foreign representatives would receive an extension of deadlines in connection with both pending and potential lawsuits.

A New York district court later reversed *Fairfield II* on appeal in *In re Fairfield Sentry Ltd. Litigation*, 458 B.R. 665 (S.D.N.Y. 2011). According to the district court, because, among other things, the assets sought to be recovered were not located in the U.S. and the avoidance proceedings could be adjudicated by a foreign court, the proceedings were not "core" and thus could not be adjudicated by the bankruptcy court without the consent of the defendants under the U.S. Supreme Court's ruling in *Stern v. Marshall*, 131 S. Ct. 2594 (2011).

In *In re Daewoo Logistics Corp.*, 2011 WL 4706197 (Bankr. S.D.N.Y. Oct. 5, 2011), the bankruptcy court ruled that, in light of the ancillary nature of chapter 15, absent exigent circumstances, a stay imposed pursuant to chapter 15 is normally coterminous with the stay in the corresponding foreign proceeding and, accordingly, the stay terminates at the close of the foreign proceeding.

In a matter of apparent first impression, *In re Qimonda AG*, 2011 WL 5149831 (Bankr. E.D. Va. Oct. 28, 2011), the bankruptcy court held that the protections of section 365(n) of the Bankruptcy Code are available to licensees of U.S. patents in a chapter 15 case, even when those protections are not available under the foreign law applicable to the foreign debtor. The court found that a refusal to apply section 365(n) was "manifestly contrary to the public policy of the United States" within the meaning of section 1506 of the Bankruptcy Code and resulted in the licensees' not being "sufficiently protected."

EXECUTORY CONTRACTS AND UNEXPIRED LEASES

One of the primary fights underlying assumption of an executory contract or unexpired lease has long been over whether any prior debtor breaches under the agreement are "curable." Before the 2005 amendments to the Bankruptcy Code, courts were split over whether historic nonmonetary breaches (such as a failure to maintain cash reserves or prescribed hours of operation) undermined a debtor's ability to assume the contract or lease. By the 2005 amendments, however, Congress apparently took the position that—at least for contracts other than nonresidential real property leases—historic nonmonetary breaches do in fact generally preclude assumption of an executory contract or unexpired lease.

The Fifth Circuit's unpublished ruling in *In re Escarent Entities, L.P.*, 2011 WL 1659512 (5th Cir. Apr. 28, 2011), implicitly confirms that interpretation. The court held that a debtor's failure to consummate a sale under a prepetition executory land purchase agreement on the closing date was "not only a material default, but effectively an incurable one, as the parties are unable to return to January 12, 2009, when [the debtor's] performance was originally due."

Section 365(c)(1) of the Bankruptcy Code provides an exception to the general ability of a DIP or trustee to assume and assign executory contracts by providing that such a contract may not be assigned if "applicable law" excuses the nondebtor contracting party from accepting performance from an entity other than the debtor. In *In re XMH Corp.*, 647 F.3d 690 (7th Cir. 2011), the Seventh Circuit relied on this "applicable law" exception in laying down a "universal rule" that a trademark license may not be assigned to a third party without the licensor's consent.

The *XMH* decision is notable because it is the first published opinion on the circuit level regarding the issue, although the Ninth Circuit previously affirmed a similar ruling by a lower court without a written opinion in *N.C.P. Marketing Group, Inc. v. BG Star Prods., Inc. (In re N.C.P. Marketing Group, Inc.)*, 279 Fed. Appx. 561, 2008 WL 2192094 (9th Cir. 2008).

In *In re FPSDA I, LLC*, 450 B.R. 392 (Bankr. E.D.N.Y. 2011), the court held that where an unexpired lease is part of an integrated deal, a DIP cannot assume and cure the lease without assuming and curing defaults under other executory contracts that pertain to the integrated deal (here, a franchise). However, the court ruled, where there is an integrated deal involving both commercial real estate leases and other contracts not subject to the 120-day deadline in section 365(d)(4) of the Bankruptcy Code for assumption or rejection, the time limits of section 365(d)(4) do not apply, and the DIP has until confirmation to decide whether to assume or reject.

FINANCIAL CONTRACTS/SETOFFS

"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 during the last three years.

In 2009, a Delaware bankruptcy court ruled in *In re SemCrude, L.P.,* 399 B.R. 388 (Bankr. D. Del. 2009), that "triangular," or multiparty, setoff is not permitted in bankruptcy due to the absence of mutuality. A Delaware district court affirmed the bankruptcy court's ruling in *In re SemCrude, L.P.*, 428 B.R. 590 (D. Del. 2010). However, neither court's decision addressed whether the result would be different for derivatives and other financial contracts that fall under the safe-harbor provisions of the Bankruptcy Code.

The Bankruptcy Code's safe-harbor provisions could be construed to suggest that where a triangular setoff is being exercised under a contract that is protected by the safe harbor, the mutuality requirement of section 553(a) would not apply. This issue was raised before the bankruptcy court in *SemCrude*, but belatedly, such that it was never addressed by either the bankruptcy or the district court.

Notwithstanding this argument, in *In re Lehman Bros. Holdings Inc.*, 433 B.R. 101 (Bankr. S.D.N.Y. 2010) ("*Swedbank*"), the court held that the safe-harbor provisions of the Bankruptcy Code do not override the mutuality requirement for setoff, which, the court wrote, is "baked into the very definition of setoff." According to the court, although the safe harbors permit the exercise of a contractual right of offset in connection with swap agreements, notwithstanding the operation of any provision of the Bankruptcy Code which could operate to stay, avoid, or otherwise limit that right, "that right must exist in the first place."

Swedbank was upheld on appeal in *In re Lehman Bros. Holdings Inc.*, 445 B.R. 130 (S.D.N.Y. 2011). That case, however, involved not a multiparty setoff, but a setoff of prepetition claims against funds collected by the debtor postpetition. Even so, many commentators speculated that, taken together, *Swedbank* and the rulings in *SemCrude* suggest that multiparty setoffs likely would not withstand challenge in bankruptcy.

The bankruptcy court reprised its role as spoiler in this context, later ruling in *In re Lehman Bros. Inc.*, 458 B.R. 134 (Bankr. S.D.N.Y. 2011), that a "triangular setoff" does not satisfy the Bankruptcy Code's mutuality requirement and that the Bankruptcy Code's safe-harbor provisions do not eliminate that requirement in connection with setoffs under financial contracts. The ruling, which involved a broker-dealer liquidation proceeding under the Securities Investor Protection Act, confirmed speculation that multiparty setoffs under financial contracts would be deemed impermissible (at least in Delaware and New York) in the wake of the rulings in *SemCrude* and *Swedbank*.

Repurchase, or "repo," agreements have long been an important mechanism for investing in U.S. government and agency securities, mortgage-related instruments, commodities, and money market instruments. Section 562 of the Bankruptcy Code, which was enacted in 2005 to complement the Bankruptcy Code's broad array of protections for financial contracts, addresses the appropriate date or dates for measuring damages arising from the rejection by a DIP or trustee, or a counterparty's liquidation, termination, or acceleration of repo and derivatives instruments. In a case of first impression, the Third Circuit in *In re American Home Mortg. Holdings, Inc.*, 637 F.3d 246 (3d Cir. 2011), held that, for purposes of section 562, a discounted cash-flow analysis was a "commercially reasonable determinant" of value for the liquidation of mortgage loans in a repurchase transaction.

The scope of protection afforded by the safe harbor for financial contracts in section 546(e) has been the subject of considerable discussion and dispute in the courts. Some courts have attempted to reconcile a conflict between the apparently plain meaning of section 546(e) and Congress's clearly stated intent in enacting it, yielding divergent results. The Second Circuit weighed in on this issue in *In re Enron Creditors Recovery Corp. v. Alfa, S.A.B. de C.V.*, 651 F.3d 329 (2d Cir. 2011). The court held that more than $1.1 billion in prepetition "redemption payments" made by the debtor to retire certain of its commercial paper could not be avoided as being preferential or constructively fraudulent because the redemption payments qualified as "settlement payments" entitled to the protection of the safe-harbor provision.

The Second Circuit joined the Third, Sixth, and Eighth Circuits in ruling that section 546(e) and the Bankruptcy Code's definition of "settlement payment" should be broadly interpreted to cover a wide array of financial transactions. *See In re Plassein Int'l Corp.*, 590 F.3d 252 (3d Cir. 2009); *In re QSI Holdings, Inc.*, 571 F.3d 545 (6th Cir. 2009); *Contemporary Indus. Corp. v. Frost*, 564 F.3d 981 (8th Cir. 2009). Thus, the ruling does much to clarify the scope of section 546(e)'s protections by resolving the tension between the plain language of the provision and the related legislative history.

In a dissenting opinion, district judge John G. Koeltl, sitting by designation, argued that the majority's expansive reading of the term "settlement payment" and its accompanying legislative intent would bring virtually every transaction involving a debt instrument within the safe harbor of section 546(e). Indeed, his prognostication may have hit the mark. Shortly after *Enron* was decided, a New York bankruptcy court, in *In re Quebecor World (USA) Inc.*, 453 B.R. 201 (Bankr. S.D.N.Y. 2011), examined the application of section 546(e) in the context of a debtor's repurchase and subsequent cancellation of privately placed notes.

Relying heavily on *Enron*, the court concluded that courts no longer need: (i) to consider conflicting evidence about usage of the term "settlement payment" within the private-placement sector of the securities industry; or (ii) to decide whether prepetition transfers of value to the defendants should be characterized as a redemption of private-placement notes rather than a repurchase. Instead, the court ruled, any transaction involving a transfer of cash to complete a securities transaction is a "settlement payment" and thus cannot be avoided.

Enron effectively overruled a New York bankruptcy court's earlier ruling in *In re MacMenamin's Grill Ltd.*, 450 B.R. 414 (Bankr. S.D.N.Y. 2011), where the court held that the selling shareholders in a private leveraged buyout transaction were not entitled to the protections of section 546(e). Notwithstanding the plain meaning of the provision, the court read the legislative history of section 546(e) to mean that the safe harbor was intended to shield from avoidance as constructively fraudulent transfers only those transactions that, if avoided, would disrupt the financial markets.

MUNICIPAL DEBTORS

One option available to some 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 which 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.

An important distinction between chapter 9 and chapter 11 is chapter 9's requirement that a municipality be insolvent to qualify for relief. In *In re Boise County*, 2011 WL 3875639 (Bankr. D. Idaho Sept. 2, 2011), the bankruptcy court dismissed Boise County, Idaho's chapter 9 filing due to the county's failure to demonstrate that it was insolvent. According to the court, the county's budget deficit and failure to pay a single outstanding judgment debt were not adequate to support a showing of insolvency under section 101(32)(C) of the Bankruptcy Code. The ruling illustrates that chapter 9 of the Bankruptcy Code is not a panacea for the woes of towns, cities, and other municipalities across the country in the enduring aftermath of the Great Recession.

In *In re New York City Off-Track Betting Corp.*, 2011 WL 309594 (Bankr. S.D.N.Y. Jan. 25, 2011), the bankruptcy court dismissed the debtor's chapter 9 case, finding that the debtor had no prospect of reorganizing after the state legislature failed to act to amend the law governing the way the debtor's operations were funded, and the debtor ceased operating. Dismissal was also the remedy ordered by the bankruptcy courts in *In re Suffolk Regional Off-Track Betting Corp.*, 2011 WL 6010673 (Bankr. E.D.N.Y. Dec. 2, 2011), and *In re City of Harrisburg, Pennsylvania*, 2011 WL 6026287 (Bankr. M.D. Pa. Dec. 5, 2011). In *Suffolk*, the court ruled that the county resolution authorizing the debtor to file for chapter 9 relief exceeded the scope of the county legislature's authority, such that the debtor was not properly authorized to file a chapter 9 petition, as required by section 109(c)(2) of the Bankruptcy Code. Lack of due authorization under section 109(c)(2) similarly motivated the *Harrisburg* bankruptcy court, which held that the debtor was not "specifically authorized"

by state law to seek chapter 9 protection and was in fact prohibited from doing so under a law passed by the Pennsylvania legislature after the debtor was designated as a "distressed" municipality.

If a chapter 9 debtor is a health-care business, section 333(a)(1), which was added to the Bankruptcy Code in 2005, mandates the appointment of a "patient care ombudsman" not later than 30 days after commencement of the case to monitor the quality of patient care and to represent the interests of the debtor's patients, "unless the court finds that appointment of such ombudsman is not necessary for the protection of patients under the specific facts of the case."

In *In re Barnwell County Hosp.*, 2011 WL 5443025 (Bankr. D.S.C. Nov. 8, 2011), the bankruptcy court ruled that the appointment of an ombudsman was unnecessary because, among other things, the debtor sought relief under chapter 9 due to a shortfall of revenue, not due to any allegations of deficient patient care; the debtor was already subject to state and federal monitoring; and the debtor had adopted internal procedures to ensure a high level of patient care and to resolve complaints expeditiously. In *In re Barnwell County Hosp.*, 2011 WL 5117073 (Bankr. D.S.C. Oct. 27, 2011), the same court previously held that a citizens' group lacked standing to object to the debtor's chapter 9 filing on the basis of ineligibility, although the court ruled that it would rule on the issue *sua sponte*.

In *In re Connector 2000 Ass'n, Inc.*, 447 B.R. 752 (Bankr. D.S.C. 2011), the bankruptcy court confirmed a chapter 9 plan of adjustment that released third parties which were providing substantial consideration to the reorganization or substantially compromising their claims. According to the court, the release was appropriate and necessary because: (i) the debtor, a nonprofit corporation organized under South Carolina law to assist the South Carolina Department of Transportation ("SCDOT") in the financing, acquisition, construction, and operation of turnpikes, highway projects, and other transportation facilities, had an identity of interest with SCDOT, the beneficiary of the release; (ii) the releasee provided substantial consideration critical to effectuate the plan; and (iii) all of the impacted classes of creditors overwhelmingly supported the plan.

NONPROFIT DEBTORS

One of the many challenges confronted by nonprofits in chapter 11 cases concerns a workable exit strategy, especially if plan funding depends upon donor contributions. This obstacle was addressed in a ruling handed down by the Fifth Circuit in *In re Save Our Springs (S.O.S.) Alliance Inc.*, 632 F.3d 168 (5th Cir. 2011). The court affirmed a decision below denying confirmation of a chapter 11 plan, ruling that "voluntary pledges [from donors] alone are too speculative to provide evidence of [plan] feasibility."

In *Behrmann v. National Heritage Foundation*, 653 F.3d 704 (4th Cir. 2011), the Fourth Circuit considered whether a nonprofit charity could properly release nondebtor third parties under its chapter 11 plan. The court ruled that such releases were unwarranted in the absence of any specific findings by the bankruptcy court explaining its determinations that the release provisions: (i) were essential to the charity's reorganization and implementation of its plan; (ii) were appropriate in light of the charity's unique circumstances; (iii) were an integral element of transactions contemplated in the plan; (iv) conferred some material benefit on the charity, its bankruptcy estate, or its creditors; and (v) were consistent with the applicable provisions of the Bankruptcy Code.

The U.S. Supreme Court's October 2010 Term (which extended from October 2010 to October 2011) officially got underway on October 4, 2010, three days after Elena Kagan was formally sworn in as the Court's 112th justice and one of three female justices sitting on the Court.

Only two bankruptcy-related cases were handed down by the Supreme Court in 2011. On January 11, 2011, the Court ruled in *Ransom v. FIA Card Services, N.A.*, 131 S. Ct. 716 (2011), that a chapter 13 debtor, in calculating his or her projected "disposable income" during the chapter 13 plan period, cannot deduct automobile "ownership costs" specified in charts produced by the Internal Revenue Service, even though the debtor's vehicle is completely paid for. The circuits were split 3-1 on this issue, which arises from ambiguities introduced into the relevant provisions of the Bankruptcy Code in 2005.

On June 23, 2011, the Court handed down its bombshell ruling in *Stern v. Marshall*, 131 S. Ct. 2594 (2011). In *Stern*, the Court considered, among other things, whether a bankruptcy court created under Article I of the U.S. Constitution (rather than Article III, which governs the judiciary branch) can properly exercise "core" jurisdiction to adjudicate a state law tort claim asserted as a counterclaim to a claim for defamation filed in a bankruptcy case.

In its 5-4 ruling, the Court began by clarifying that: (i) "core proceedings are those that arise in a bankruptcy case or under Title 11 [*i.e.*, the Bankruptcy Code]"; (ii) there is no such thing as a "core" proceeding that does not arise under Title 11 or in a Title 11 case; and (iii) the list of core proceedings in 28 U.S.C. § 157(b)(2) is illustrative. Section 157(b)(2), among other examples, identifies "counterclaims by the estate against persons filing claims against the estate" as being within the bankruptcy court's core jurisdiction.

By its terms, the Court explained, 28 U.S.C. § 157(b)(2) entitled the bankruptcy court as a matter of statute to enter a final order on the counterclaim for tortious interference as a core proceeding because the creditor filed a proof of claim in the bankruptcy case. Notwithstanding the statute, however, the Court held that the bankruptcy court could not *constitutionally* enter a final order on such a counterclaim because that would trespass upon the judicial power granted to Article III courts.

This trespass, the Court emphasized, was not cured by the "public rights" exception, which recognizes a category of cases involving public rights that Congress may constitutionally assign to "legislative" courts for resolution. While the Court acknowledged that its treatment of the public rights exception has not been entirely consistent, it concluded that this case could not fit within any of the varied formulations of the doctrine.

The Court also rejected the argument that the bankruptcy court had authority to adjudicate the counterclaim because the creditor filed a proof of claim in the bankruptcy case. The Court distinguished the cases of *Katchen v. Landy*, 382 U.S. 323 (1966), and *Langenkamp v. Culp*, 498 U.S. 42 (1990), and held that, unlike in those cases, the counterclaim did not arise from the bankruptcy itself and that it was not necessary to resolve the counterclaim in the claims-allowance process.

Justice Breyer issued a dissenting opinion, joined by three other justices. In the minority's view, the Court's prior precedent mandated a more pragmatic approach to Article III questions. Applying this approach, the dissenters concluded that bankruptcy courts could adjudicate compulsory counterclaims without violating any constitutional separation-of-powers principle in light of several factors delineated in the dissenting opinion. The dissenting justices also contended that the practical problems associated with the majority's holding were more significant and, by contrast, that any intrusion on the judiciary could only be considered *de minimis*.

The reverberations of *Stern* have been earthshaking (at least in the bankruptcy world) and are likely to continue for some time. The volume of jurisdictional challenges (strategic or otherwise) has skyrocketed in *Stern*'s aftermath, with (by some counts) as many as 150 court rulings on the issue in 2011 alone. *See*, *e.g.*, *In re Ortiz*, 2011 WL 6880651 (7th Cir. Dec. 30, 2011) (based on *Stern*, bankruptcy court lacked jurisdiction to grant summary judgment on state law counterclaims absent consent of the litigants); *In re Schmidt*, 453 B.R. 346 (B.A.P. 8th Cir. 2011) (based on *Stern*, replevin actions that had been removed from the state court to the bankruptcy court were outside the bankruptcy court's core jurisdiction; the inability

of a bankruptcy judge after *Stern* to make final rulings on state law may take away power to enjoin suits against non-bankrupts); *In re McClelland*, 2011 WL 6117275 (Bankr. S.D.N.Y. Dec. 9, 2011) (adversary proceeding involving allegations that real estate appraiser retained and compensated in chapter 11 case with bankruptcy court approval committed gross negligence was core; state law counterclaim to fee application could not be finally adjudicated by court under *Stern*); *In re Refco Inc.*, 2011 WL 5974532 (Bankr. S.D.N.Y. Nov. 30, 2011) (*Stern* does not preclude court's issuance of final judgment on fraudulent transfer complaint where defendant has not filed a proof of claim); *In re Black Diamond Min. Co., LLC*, 2011 WL 4433624 (Bankr. E.D. Ky. Sept. 21, 2011) (based on *Stern*, court doubts that it would have supplemental jurisdiction over claims entirely unrelated to bankruptcy merely because those claims related to the same case or controversy as a cause of action pending before the court); *In re LLS America, LLC*, 2011 WL 4005447 (Bankr. E.D. Wash. Sept. 8, 2011) (substantive consolidation motion is core matter with respect to which bankruptcy court can issue final judgment under *Stern*); *In re AFY, Inc.*, 2011 WL 3800041 (Bankr. D. Neb. Aug. 18, 2011) (court lacked core jurisdiction under *Stern* over debt-collection suit mischaracterized as turnover proceeding under section 542).

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
MF Global Holdings Ltd.	10/31/2011	Commodities	$40.5 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
AMR Corporation	11/29/2011	Aviation	$25 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

THIRD CIRCUIT REAFFIRMS VIABILITY OF DEEPENING INSOLVENCY CLAIM

Nancy Chu

In *Official Committee of Unsecured Creditors v. Baldwin (In re Lemington Home for the Aged)*, 659 F.3d 282 (3d Cir. 2011), the Third Circuit Court of Appeals held, among other things, that the "deepening insolvency" cause of action, which the Third Circuit previously recognized in *Official Committee of Unsecured Creditors v. R.F. Lafferty & Co.*, 267 F.3d 340 (3d Cir. 2001), remains an independent cause of action under Pennsylvania law.

BACKGROUND

Lemington Home for the Aged, also known as Lemington Center ("Lemington Center" or the "Home"), was a nonprofit corporation founded in 1883 that provided care for elderly members of the African-American community in Pittsburgh. Lemington Center was affiliated with Lemington Elder Care Services ("Elder Care"), with which it had an interlocking board of directors.

Beginning in the 1980s, Lemington Center began to experience financial troubles. In 1998, the U.S. Department of Health and Human Services imposed a monthlong ban on the Home's admissions of new patients. Sometime afterward, Lemington Center's administrator began to work on a part-time basis despite a state law requirement that the center employ a full-time, licensed administrator. From November 2003 through January 2005, Lemington Center had no treasurer, nor was there any meaningful oversight of the Home's financial operations. The Home's chief financial officer also failed to maintain a general ledger for several years.

In 2004, two residents died at the Home, one under circumstances suggesting neglect. The Pennsylvania Department of Health conducted an investigation and noted that an administrator or a designee had not been on the premises as required by law and that the Home's administrator lacked the necessary qualifications. In March 2005, Lemington Center's board discussed plans to transfer the Home's principal charitable asset, the Lemington Home Fund, to Elder Care. On April 13, 2005, Lemington Center filed for chapter 11 protection in Pennsylvania.

The bankruptcy court approved the closure of the Home and the transfer of its residents to other facilities after Lemington Center failed to find either funding or a purchaser. In November 2005, the court authorized the official committee of unsecured creditors appointed in the case to prosecute claims against the Home's officers and directors for breach of fiduciary duty and for deepening insolvency. The adversary proceeding filed by the committee was withdrawn to the district court, which granted summary judgment to the defendants, ruling, among other things, that the committee failed to show the existence of fraud necessary to support a claim of deepening insolvency:

> Judging the facts in the light most favorable to plaintiff, as required, plaintiff has failed to create a material issue of fact regarding the claims of fraud. There are simply no facts by which a reasonable trier of fact could find that defendants committed or precipitated any type of fraud. At most, their actions amount to negligence, but in order to support a claim for deepening of insolvency, plaintiff must create a genuine issue of fact sufficient to establish the elements of fraud.

The committee appealed to the Third Circuit.

THE THIRD CIRCUIT'S RULING

A cause of action for "deepening insolvency" has not been formally recognized by the Pennsylvania state courts. However, relying on "decisions interpreting the law of other jurisdictions and on the policy underlying Pennsylvania tort law," the Third Circuit previously ruled in *Official Committee of Unsecured Creditors v. R.F. Lafferty & Co.*, 267 F.3d 340 (3d Cir. 2001), that "the Pennsylvania Supreme Court would determine that 'deepening insolvency' may give rise to a cognizable injury."

A Third Circuit panel further "clarified the mechanics" of the cause of action in *In re CitX Corp.*, 448 F.3d 672 (3d Cir. 2006), stating that "deepening insolvency" in Pennsylvania is

defined as "an injury to [a debtor's] corporate property from the fraudulent expansion of corporate debt and prolongation of corporate life." According to the *CitX* court, in order to prevail on such a claim, a plaintiff must demonstrate that the fiduciary's actions caused the deepening of insolvency and that the defendant's actions were fraudulent; negligence alone is insufficient.

In *Lemington*, the Third Circuit acknowledged that recent case law has called into question the viability of the deepening insolvency cause of action. Even so, the court noted that it was bound by its prior ruling in *Lafferty*, which could be overturned only by an en banc ruling. The Third Circuit accordingly vacated the district court's grant of summary judgment on this claim. It remanded the case for trial, finding that there was a genuine issue of material fact as to whether the directors and officers fraudulently contributed to the deepening insolvency of the Home by, among other things: (i) failing to disclose to creditors and to the bankruptcy court the board's decision to close the Home while delaying the bankruptcy filing for four months; (ii) commingling the Home's funds with funds of related entities; (iii) continuing to do business with vendors although they knew that the debtor was insolvent; and (iv) failing to collect business receivables.

OUTLOOK

Courts and commentators have increasingly questioned the viability of "deepening insolvency" as an independent cause of action. The Delaware state courts, for example, have expressly held that deepening insolvency is not available as an independent cause of action or a ground for damages under Delaware law. *Lemington* indicates that, at least for now, deepening insolvency remains a viable cause of action under Pennsylvania law.

EUROPEAN PERSPECTIVE

All Change in Germany–A New Era in German Insolvency Law

Olaf Benning and Michael Rutstein

Football is not the only arena where England and Germany have clashed in recent times. Insolvency and restructurings have been another battleground, and one in which England has had the upper hand. This has been evidenced by German debtors (usually individuals, but sometimes companies) migrating their centres of main interest ("COMIs") to Britain and also by German companies proposing English schemes of arrangement. The relative lack of German competitiveness compared to England's, at least in some important areas of corporate insolvencies, as well as the perceived need to make Germany a more creditor-friendly country, has prompted a German rethink of its insolvency laws. This has resulted in the enactment by the German Parliament of a new Insolvency Act on 26 October 2011 (the "Act"). The Act (*das Gesetz zur weiteren Erleichterung der Sanierung von Unternehmen*, broadly translated as "the law for the further facilitation of the rehabilitation of companies") will significantly strengthen the rights of creditors and, to some extent, the rights of debtors in insolvency proceedings. The new law has been adopted by the German Parliament and will come into force early in 2012. Described herein are some of the main features of the Act.

INSOLVENCY OFFICEHOLDER MAY BE PROPOSED BY CREDITORS

The Act introduces the right of creditors to request that the court appoint a specified individual as the insolvency officeholder. This is a fundamental change in German insolvency law. Although creditors in the past have occasionally put forward an individual to the court to act as the officeholder, certain insolvency courts have automatically disqualified the nominee on the basis of the view that anyone proposed by an interested party in the proceedings cannot be considered independent and therefore is not competent to hold office. Even where the insolvency courts in a particular region have not held this view, some judges in those courts have. In these instances, the court has appointed the officeholder under a rota (ladder) system, which does not always take into account the circumstances of the case (*e.g.*, a need for the officeholder to have cross-border expertise). That said, some German insolvency courts and judges have been more receptive to these sorts of requests.

The Act provides that a nominated individual does not lack the required independence if he or she has been proposed by the debtor or by a creditor, or has advised the debtor prior to the insolvency filing in a general capacity on the possible course of action in an insolvency proceeding or its consequences. The court must appoint the individual put forward by a unanimous resolution of the preliminary creditors' committee (the function and composition of which are described below), unless the nominated individual is not suitable to act as insolvency officeholder, taking into account any requirements set out in the committee's resolution. If the court intends to appoint as insolvency officeholder an individual other than the one proposed in the committee's resolution, the court must state its reasons in the order it makes for the opening of proceedings. This will make it difficult for the court to ignore the creditors' choice when making the appointment.

The fact that creditors can influence the appointment of the officeholder will make it easier to effect prepackaged asset sales in German insolvencies. Such asset sales can be implemented under German insolvency law only after the court opens insolvency proceedings, which is usually two or three months after the initial application is made to the court, and if the creditors' committee has approved the sale. However, if proper preparations have been made for the prepackaged sale and the sale clearly benefits all creditors, an earlier opening of insolvency proceedings is possible.

PRELIMINARY CREDITORS' COMMITTEE ESTABLISHED AT AN EARLY STAGE

As a general rule, in larger insolvencies, the court is required under the Act to establish a preliminary creditors' committee (*vorläufiger Gläubigerausschuss*) at an early stage of the proceedings. The composition of the committee, including the number of members, will be decided on a case-by-case basis by the court, but the committee will typically consist of an odd number of creditor representatives. In a large case, representatives can be expected to come from bank creditors, major suppliers, the local tax office,

the employment office, and the Pensions Protection Fund (*Pensions-Sicherungs-Verein*).

The committee will have an important function similar to that performed by creditors' committees in U.S. chapter 11 cases. For example, it can make decisions on the strategy the officeholder should pursue, such as whether a sale of assets should take place or whether the business should be continued. The insolvency officeholder will usually comply with resolutions of the committee, as he risks personal liability if he does not.

An important early function of the creditors' committee is to nominate to the court the person it wants to serve as the preliminary insolvency officeholder (*vorläufiger Insolvenzverwalter*). The nominee can be expected to be appointed by the court (as discussed above) both as preliminary officeholder and, once the court formally opens the proceedings several weeks later, as officeholder.

The court must establish a committee if the debtor satisfies two out of three thresholds: (i) a balance-sheet total (*Bilanzsumme*, equivalent to a company's total assets) of at least €4.84 million; (ii) revenues of at least €9.68 million in the 12 months immediately before the filing for insolvency; and (iii) an annual average of at least 50 employees. These thresholds were subject to some heated debate in legal and political circles and, as a consequence, were increased at a late stage of the legislative process. The thresholds now are identical with the criteria defining "small corporations" under section 267, paragraph 1, of the German Commercial Code. The thresholds were increased to address the concern that the volume of cases in which the court must establish a committee would soar to an unreasonable number.

However, a preliminary committee is not required if: (i) the establishment of such a committee would be inappropriate, giving regard to the value of the insolvency estate; (ii) a delay caused by the establishment of a committee would have an adverse effect on the debtor's net assets; or (iii) the debtor has already ceased its business operations. In these situations, the court is not obliged to establish a preliminary committee but nevertheless has the discretion to do so if the court considers it appropriate (*e.g.*, to preserve value or increase creditors' participation in the insolvency proceedings). This exception from the general rule is sensible—in the situations where it applies, the chances of achieving a higher recovery for general unsecured creditors will increase, since the estate will incur lower costs and, at least in an ideal world, the insolvency officeholder will be able to act more quickly because he will not be obliged to consult with a committee.

OBTAINING ORDER FOR SELF-ADMINISTRATION WILL BECOME MORE COMMON

One of the aims of the Act is to make it more likely that the court will order the debtor to be placed into self-administration (*Eigenverwaltung*) following an application to the court for the opening of insolvency proceedings. Self-administration is a "debtor in possession" procedure. This means that management remains in charge of the debtor's business, rather than a court-appointed insolvency officeholder, once the court formally opens the proceedings. The concept is similar to the debtor in possession in chapter 11 cases under the U.S. Bankruptcy Code.

The purpose of this change is to encourage the management of companies in financial difficulties to file for insolvency earlier than is currently the case (*i.e.*, before the situation becomes critical). Management can now expect that the court will make an order for self-administration, as opposed to making any other appointment, and so will remain in charge while the debtor attempts to restructure during the insolvency proceedings. The self-administration concept strengthened by the new law is a positive development for the debtor and, if the business or personal relationship with the shareholders is good, for the debtor's shareholders as well.

Where the court makes an order for self-administration, the debtor will act under the supervision of the court and of a preliminary insolvency trustee (*vorläufiger Sachwalter*) appointed by the court. Provided that certain requirements are met, the court will grant the debtor a period of up to three months to prepare a restructuring plan (*Insolvenzplan*), which in some respects is similar to an English company voluntary arrangement. These requirements include the following: first, that the debtor is not illiquid (*zahlungsunfähig*) (*i.e.*, it can pay its debts as and when they fall due for payment), and second, that the proposed restructuring is not considered to be "obviously without merit" (*offensichtlich aussichtslos*).

The debtor can request the court to make an order that prevents a creditor from taking enforcement steps against the debtor during this three-month period (a so-called protective shield, or *Schutzschirm*), except for enforcement over real property. The court also has discretion to make an order to establish a preliminary creditors' committee, to prevent third-party owned assets from being removed by the creditors concerned, and to order other protective measures it considers necessary. However, the three-month period for preparing a prepackaged restructuring plan will come to an end if, for example, it becomes obvious that the proposed restructuring is without merit or if the preliminary creditors' committee applies to the court to bring the protective shield to an end. When the period ends, the related protective measures come to an end as well. Automatic termination of the protective shield due to the illiquidity (*Zahlungsunfähigkeit*) of the debtor was removed from the draft Act at the last minute. These changes mean that the *Insolvenzplan* will become more popular with courts and insolvency officeholders as well as with debtors.

The fact that illiquidity will not automatically result in a lifting of the protective shield is expected to strengthen the shield's relevance in practice. However, in many cases, creditors can be expected to accelerate their payment claims once it is public knowledge that a protective shield has been ordered by the court and that acceleration of debt claims can easily cause the illiquidity of the debtor. When a debtor becomes illiquid after the protective shield has come into force, the preliminary creditors' committee (upon passing the necessary resolution) or a creditor may apply to the court for the protective shield to be brought to an end.

DEBT-FOR-EQUITY SWAPS

Under the Act, capital measures in connection with a debt-for-equity swap, the exclusion of existing shareholders' subscription rights, compensation payments to shareholders exiting the company, the transfer of shares in the company, and other corporate measures may be provided for in an *Insolvenzplan*. The plan must provide appropriate compensation payable by the estate if the existing shareholders forfeit their shares as a result of these measures. If the shares in the insolvent company become worthless, however, no compensation need be paid.

An *Insolvenzplan* becomes effective once it has been confirmed by the Insolvency Court (*Insolvenzgericht*), and it is no longer possible to appeal the confirmation. A court will not confirm the plan if any of the following are not complied with in all material respects: mandatory provisions regarding the content of the plan, the process followed in putting it together, or its adoption by creditors and existing shareholders. Voting on the *Insolvenzplan* takes place in groups. The plan itself allocates creditors and shareholders to different groups according to their specific legal positions vis-à-vis the debtor.

Examples of relevant groups are secured creditors, creditors holding large claims in relation to other creditors, creditors holding small claims, employees, and shareholders. There will usually be more than one creditor group. In general, an *Insolvenzplan* is adopted only if all the groups vote in favour of it. In order for a creditor group to approve the plan, the majority of the creditors in that group (based on head count and total value of claims) must vote in favour. In the case of a shareholder group, the Act provides that a majority of the shareholders in that group need to approve the plan; majority is determined by the usual company law principles relating to shareholder votes. Any group, particularly a shareholder group, that votes against the plan may nevertheless be "crammed down" (*i.e.*, their votes can be disregarded) if: (i) the members of the dissenting group are not worse off under the restructuring plan than they would be if there were no plan; (ii) they participate in an appropriate manner in the assets made available to the participants under the plan; and (iii) the requisite majorities of all other groups vote in favour of the plan.

An *Insolvenzplan* may provide for a cancellation of shares held by existing shareholders without any compensation if those shares have no value. This will usually be the case if the company is insolvent, whether on a balance-sheet basis or on a cash-flow basis. If a group of existing shareholders votes against this sort of plan, it can be crammed down, provided the members of the group would not have received anything if there had been no plan and the company had been liquidated. This is because the group members would not be worse off with the plan than they would be without it.

Members of a dissenting group need to benefit in an appropriate manner from the economic value that is made available under the plan. In exceptional cases, where the shares in the insolvent company still have some (residual) value, the *Insolvenzplan* must provide for: (i) the continuing participation of the existing shareholders in the company following the reorganisation in a way that reflects the residual value of their shares; or (ii) a cancellation of their shares in return for appropriate compensation.

The Act will prevent shareholders from blocking debt-to-equity swaps and other corporate measures with respect to debtors. It will also facilitate the restructuring of companies in insolvency proceedings and the participation of investors in such proceedings (*e.g.*, through loan-to-own strategies).

There you have it. The Act will encourage financial restructurings in Germany and represents a shift towards a more creditor-friendly stance. However, it remains to be seen whether the new law will decrease the appetite among German debtors for COMI migrations (which have been small in number anyway) and English schemes of arrangement. In Germany, the prevailing view seems to be that all this will be achieved. Englishmen might be more sceptical, but only time will tell who is right. What is certain is that the German insolvency law is about to be modernised and gives stakeholders in a financially distressed company more control over how the insolvency proceeding plays out.

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