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IN THIS ISSUE

RADLAX: CREDIT BIDDING IS CLEARED FOR TAKEOFF BY THE U.S. SUPREME COURT

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The U.S. Supreme Court in *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, _____ S. Ct. _____, 2012 WL 1912197 (May 29, 2012), held that a debtor may not confirm a chapter 11 "cramdown" plan that provides for the sale of collateral free and clear of existing liens but does not permit a secured creditor to credit-bid at the sale. The unanimous ruling written by Justice Scalia (with Justice Kennedy recused) resolved a split among the Third, Fifth, and Seventh Circuits. The *RadLAX* decision is important because it clarifies the application of section 1129(b)(2)(A) of the Bankruptcy Code and establishes that when collateral is sold free and clear of a creditor's liens under a plan, the creditor must be permitted, subject to the provisions of section 363(k) of the Bankruptcy Code, to bid on the assets using its outstanding secured debt.

As described in more detail below, the Supreme Court essentially concluded that section 1129(b)(2)(A)(i) is used for plans under which the creditor's lien remains on the property; section 1129(b)(2)(A)(ii) is the rule for plans under which the property is sold free and clear of the creditor's lien; and section 1129(b)(2)(A)(iii) is a residual provision covering asset dispositions under all other plans—for example, one under which the secured creditor receives the property itself (i.e., the "indubitable equivalent" of its secured claim).

WHAT IS A CRAMDOWN?

"Cramdown" is the procedure for approval of a nonconsensual chapter 11 plan where not all of the classes of creditors have agreed to the terms of the proposed plan. In particular, section 1129(b) of the Bankruptcy Code contains the applicable standards that must be met before the bankruptcy court can confirm a proposed plan despite the plan's rejection by a class of creditors whose rights will be impaired by the plan. These cramdown requirements for secured creditors are found in section 1129(b)(2)(A), which states:

> With respect to a class of secured claims, the plan provides—
>
> (i) (I) that the holders of such claims retain the liens securing such claims, whether the property subject to such liens is retained by the debtor or transferred to another entity, to the extent of the allowed amount of such claims; and
>
> (II) that each holder of a claim of such class receive on account of such claim deferred cash payments totaling at least the allowed amount of such claim, of a value, as of the effective date of the plan, of at least the value of such holder's interest in the estate's interest in such property;
>
> (ii) for the sale, subject to section 363(k) of this title, of any property that is subject to the liens securing such claims, free and clear of such liens, with such liens to attach to the proceeds of such sale, and the treatment of such liens on proceeds under clause (i) or (iii) of this subparagraph; or
>
> (iii) for the realization by such holders of the indubitable equivalent of such claims.

Under clause (i), the secured creditor retains its lien on the property and receives deferred cash payments. Under clause (ii), the property is sold free and clear of the lien, "subject to section 363(k)," and the creditor's lien attaches to the proceeds of the sale. Section 363(k) provides that "unless the court for cause orders otherwise the holder of such claim may bid at such sale, and, if the holder of such claim purchases such property, such holder may offset such claim against the purchase price of such property." Finally, under clause (iii), the secured creditor realizes the "indubitable equivalent" of its claim.

RADLAX

RadLAX Gateway Hotel, LLC, and RadLAX Gateway Deck, LLC (collectively, the "Debtors"), purchased the Radisson Hotel at Los Angeles International Airport in 2007. The Debtors also purchased lots adjacent to the hotel, on which the Debtors planned to build a parking structure. Within two years of obtaining financing for the refurbishment of the hotel and construction of the parking structure, the Debtors had run out of funds and were forced to halt construction. In August 2009, with over $120 million outstanding, over $1 million in interest accruing each month, and no additional funds available to complete the project, the Debtors filed for relief under chapter 11 in Illinois.

In 2012, the Debtors proposed a liquidating chapter 11 plan (the "Plan") in which they would dissolve and sell substantially all of their assets through an auction to the highest bidder. There was a "stalking-horse bidder"—a potential purchaser who was willing to start the bidding—and the proceeds of the auction were to be used to fund the Plan, primarily by repaying the Debtors' secured creditor, who loaned the Debtors money for the construction project (the "Secured Creditor"). The Debtors proposed to sell their property free and clear of the Secured Creditor's liens and repay the Secured Creditor with the sale proceeds. Rather than allowing the Secured Creditor to credit-bid under clause (ii) of section 1129(b)(2)(A), the Debtors argued that the approved auction procedures satisfied clause (iii) because providing cash generated by the auction represented the "indubitable equivalent" of the Secured Creditor's claim.

The Seventh Circuit disagreed and held in *River Road Hotel Partners, LLC, et al. v. Amalgamated Bank*, 651 F.3d 642 (7th Cir. 2011), that when a debtor proposes to sell assets subject to a security interest pursuant to a chapter 11 plan, the debtor must comply with subparagraph (i) or (ii) of section 1129(b)(2)(A). Specifically, the court of appeals ruled that the debtor must either: (i) sell the encumbered asset with the secured creditors retaining their liens; or (ii) sell the encumbered asset free and clear of liens, with the liens attaching to the sale proceeds, and permit the secured creditor to credit-bid as part of the sale. The Supreme Court agreed to hear the Debtors' appeal in December 2011 to resolve the circuit split on this issue.

THE SUPREME COURT'S DECISION

The Supreme Court affirmed the Seventh Circuit's ruling. It concluded that the Debtors' reading of section 1129(b)(2)(A)—under which clause (iii) would permit exactly what clause (ii) prohibits—was "hyperliteral and contrary to common sense."

In reaching this conclusion, the Supreme Court relied on a well-established canon of statutory interpretation: the specific governs the general. Writing for the unanimous court, Justice Scalia explained:

> [C]lause (ii) is a detailed provision that spells out the requirements for selling collateral free of liens, while clause (iii) is a broadly worded provision that says nothing about such a sale. The general/specific canon explains that the general language of clause (iii), although broad enough to include it, will not be held to apply to a matter specifically dealt with in clause (ii).

RadLAX, 2012 WL 1912197, at *7 (internal citations and quotations omitted). Thus, the Supreme Court determined that when the conduct at issue falls within the scope of both provisions, the specific provision presumptively governs, whether or not the specific provision also applies to some conduct that falls outside the general provision. In reaching this conclusion, the Supreme Court noted that clause (ii) addresses a subset of cramdown plans and that clause (iii) applies to *all* cramdown plans, including all of the plans within the narrower description in clause (ii).

IMPLICATIONS OF *RADLAX*

The Supreme Court's ruling in *RadLAX* clarifies the parameters under which credit bidding must be allowed in connection with a chapter 11 plan. The *RadLAX* ruling sets forth a clear framework for applying section 1129(b)(2)(A) and is consistent with the practice in bankruptcy cases that a secured creditor may use its secured debt as all or part of its bid to acquire the collateral subject to its lien.

30-YEAR TREASURY BONDS NOT "INDUBITABLE EQUIVALENT" OF ELECTING SECURED CREDITOR'S MORTGAGE LIEN

Paul M. Green and Mark G. Douglas

In *In re River East Plaza, LLC*, 669 F.3d 826 (7th Cir. 2012), the Seventh Circuit Court of Appeals affirmed a bankruptcy court's ruling that a debtor could not "cram down" a chapter 11 plan over the objection of an undersecured creditor which had made a section 1111(b) election by substituting a lien on 30-year U.S. Treasury bonds as the "indubitable equivalent" of the creditor's mortgage lien on the property. The ruling, which explores the interaction between sections 1129(b)(2)(A)(i) and 1129(b)(2)(A)(iii), was an interesting prelude (and a corollary) to the highly anticipated ruling handed down on May 29, 2012, by the U.S. Supreme Court in *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, ____ S. Ct. ____, 2012 WL 1912197 (May 29, 2012). In that case (which is discussed elsewhere in this issue of the *Business Restructuring Review*), the court resolved a split among the circuit courts of appeal concerning the ability of a debtor to confirm a chapter 11 plan that deprives a secured creditor of its right to credit-bid its claims in connection with a sale of its collateral under the plan.

THE BANKRUPTCY CODE'S CRAMDOWN REQUIREMENTS

Section 1129(b) of the Bankruptcy Code sets forth the requirements that must be met before a bankruptcy court can confirm a chapter 11 plan over the objections of a dissenting class of creditors whose rights are impaired by the plan. Among these "cramdown" requirements is the dictate in section 1129(b)(1) that a plan "not discriminate unfairly" and that it be "fair and equitable" with respect to a dissenting class of creditors.

Section 1129(b)(2) addresses the "fair and equitable" requirement for different types of claims. Section 1129(b)(2)(A) provides three alternative ways to achieve confirmation over the objection of a dissenting class of *secured* claims: (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."

THE SECTION 1111(b) ELECTION

Section 1111(b)(1) of the Bankruptcy Code provides that a nonrecourse secured claim shall be treated as a recourse claim (meaning that such a claim will be bifurcated into a secured claim to the extent of the value of the collateral and an unsecured claim for the deficiency), *unless* the class of secured creditors, including the claim, elects under section 1111(b) to have the entire claim treated as secured. However, the election is not available if the collateral is sold under section 363 of the Bankruptcy Code or under a chapter 11 plan. In the event of an election under section 1111(b), a claim in an electing class would be fully secured, but the present value of distributions under a chapter 11 plan provided to the holder of the claim need be no greater than the value of the collateral (e.g., a secured note bearing a rate of interest below the prevailing market rate).

Section 1111(b) is intended to protect a secured creditor against the possibility that the debtor can realize a windfall if collateral is assigned a low value (due to depressed market conditions or valuation error) and the creditor's secured claim is stripped down to the depressed value of its security interest. The exception for collateral that is sold is premised upon the idea that protection against low valuation is not necessary when the market determines the value of the collateral.

RIVER EAST PLAZA

"Indubitable equivalent" is not defined by the Bankruptcy Code, and the meaning of the term as it is used in section 1129(b)(2)(A)(iii) has been left to the courts to determine. In *River East Plaza*, the Seventh Circuit weighed in on this issue in connection with a chapter 11 plan proposing to substitute another form of collateral for the real-property collateral of a creditor that had made a section 1111(b) election.

River East Plaza, LLC ("River East"), owned a building in Chicago valued at $13.5 million. The property acted as security for a loan from LNV Corporation ("LNV") in the amount of $38.3 million. River East defaulted on the loan early in 2009. LNV commenced foreclosure proceedings, but River East filed for chapter 11 protection as a single-asset real-estate debtor in Illinois hours before the foreclosure sale was to occur.

The bankruptcy court denied confirmation of River East's initial chapter 11 plan after LNV elected to have its claims treated as fully secured under section 1111(b). In its second proposed chapter 11 plan, River East sought to satisfy the "fair and equitable" requirement for "cramdown" confirmation by substituting 30-year U.S. Treasury bonds with a face value of $13.5 million for LNV's existing collateral. According to River East, because (at the then prevailing rate of interest) the value of the bonds would grow in 30 years to equal $38.3 million—the full face value of LNV's claim—the bonds represented the "indubitable equivalent" of LNV's secured claim within the meaning of section 1129(b)(2)(A)(iii).

The bankruptcy court disagreed, stating "flatly" that an electing secured creditor cannot be forced to accept substitute collateral. It accordingly denied confirmation of River East's second plan. The court later refused to consider a third plan proposed by River East that would have allowed LNV to retain its lien on the building, ruling that the automatic stay should be vacated pursuant to section 362(d)(3)(A) (imposing a 90-day drop-dead date, albeit subject to extension, for the stay in single-asset real-estate cases) to allow foreclosure to proceed and dismissing the bankruptcy case. The bankruptcy court certified a direct appeal of its rulings to the Seventh Circuit, which stayed the sale pending resolution of the appeal.

THE SEVENTH CIRCUIT'S RULING

A three-judge panel of the Seventh Circuit affirmed. "Substituted collateral that is more valuable and no more volatile than a creditor's current collateral," the court wrote, "would be the indubitable equivalent of that current collateral even in the case of an undersecured debt." However, the court noted, such was not the case here, and moreover, "no rational debtor would propose such a substitution, because it would be making a gift to the secured creditor."

According to the Seventh Circuit, the 30-year U.S. Treasury bonds were not the indubitable equivalent of the building within the meaning of section 1129(b)(2)(A)(iii) because: (i) the bonds carried a different "risk profile"; and (ii) they impermissibly stretched out the time period over which LNV would be paid. The risk profile of the bonds was different, the court explained, because although Treasury bonds carry little default risk, long-term Treasury bonds carry "substantial inflation risk, which might or might not be fully impounded in the current interest rates on the bonds." In addition, the Seventh Circuit emphasized, River East might default under the plan in a relatively short time period, allowing LNV potentially to realize increased value by foreclosing upon and selling the building. However, the court explained, the value of the Treasury bonds could not be realized for quite some time, regardless of how soon River East defaulted, and would likely be lower at that time due to inflation and/or rising interest rates.

According to the Seventh Circuit, the substitution of the bond collateral was impermissible, but not only because it demonstrated that the bonds were something other than the indubitable equivalent of the building: such an approach would also improperly conflate cramdown under section 1129(b)(2)(A)(iii) with cramdown under section 1129(b)(2)(A)(i). Under the latter, the court explained, cramdown confirmation is possible if a secured creditor retains its lien on collateral, but the maturity of the debt is extended. River East could not both extend the maturity date (by substituting 30-year bonds) under subsection (i) and substitute collateral as an "indubitable equivalent" under subsection (iii). "By proposing to substitute collateral with a different risk profile, in addition to stretching out loan payments," the Seventh Circuit wrote, "River East was in effect proposing a defective subsection (i) cramdown by way of subsection (iii)."

OUTLOOK

River East is notable for several reasons. For example, the Seventh Circuit was clearly skeptical of what it perceived as machinations by the debtor to thwart an undersecured creditor's right to make a section 1111(b) election as a hedge against flawed valuation.

The ruling also acknowledged the circuit split (now resolved by the U.S. Supreme Court in *RadLAX*) over how the subsections of section 1129(b)(2)(A) can be utilized to confirm a chapter 11 plan over the objection of a secured creditor. The Third and Fifth Circuits had ruled that a plan contemplating the sale of collateral without honoring a secured creditor's right to credit-bid under section 363(k) can provide the creditor with the indubitable equivalent of its claim and therefore be confirmable as "fair and equitable" under section 1129(b)(2)(A)(iii) (as opposed to section 1129(b)(2)(A)(ii), which, as noted, expressly preserves a secured creditor's credit-bidding rights). *See In re Philadelphia Newspapers, LLC*, 599 F.3d 298 (3rd Cir. 2010); *In re Pacific Lumber Co.*, 584 F.3d 229, 246–47 (5th Cir. 2009). The Seventh Circuit rejected that approach in *River Road*, ruling that a debtor cannot skirt the dictates of section 1129(b)(2)(A)(ii) by attempting to provide the indubitable equivalent of a secured claim under 1129(b)(2)(A)(iii). In *RadLAX*, the U.S. Supreme Court unequivocally endorsed the *River Road* approach to this important issue.

NEWSWORTHY

Jones Day was recommended in the practice area of Finance—Corporate Restructuring in *The Legal 500 United States* (2012).

Eight attorneys, all of whom were formerly practicing at Dewey & LeBoeuf, have joined Jones Day's Business Restructuring & Reorganization Practice in California. The group is led by ***Bruce Bennett (Los Angeles)***, one of the leading bankruptcy attorneys in the U.S. He was joined by ***Sidney Levinson***, ***Joshua Mester***, ***James Johnston***, ***Monika S. Wiener***, ***Jason R. Wolf***, ***Michael C. Schneidereit (all of Los Angeles)***, and ***Joshua D. Morse (San Francisco)***.

Corinne Ball (New York) was recognized as one of the "Top 50 Women Attorneys in the New York Metro Area" for 2011 by *Super Lawyers*.

Paul D. Leake (New York), ***Corinne Ball (New York)***, ***David G. Heiman (Cleveland)***, ***Peter J. Benvenutti (San Francisco)***, ***Tobias S. Keller (San Francisco)***, and ***Brad B. Erens (Chicago)*** were recommended in the 11th edition of the Practical Law Company's *Restructuring and Insolvency Multi-Jurisdictional Guide*.

Aldo La Fiandra (Atlanta) was recommended in the practice area of Finance—Capital Markets: Debt Offerings in *The Legal 500 United States* (2012).

Volker Kammel (Frankfurt), ***Sion Richards (London)***, and ***Laurent Assaya (Paris)*** were recommended as "Leaders in their Field" for Restructuring/Insolvency and Bankruptcy in the 2012 edition of *Chambers Europe*.

Corinne Ball (New York) was named a "Leading Lawyer" in the practice area of Finance—Corporate Restructuring in *The Legal 500 United States* (2012).

Amy Edgy Ferber (Atlanta) was honored at the "40 Under 40 *M&A Advisor* Recognition Awards—Central Region" on June 7.

Bruce Bennett (Los Angeles) was named a "Leading Lawyer" in the practice area of Finance—Municipal Bankruptcy in *The Legal 500 United States* (2012).

Bruce Bennett (Los Angeles), ***Corinne Ball (New York)***, ***James Johnston (Los Angeles)***, ***Jane Rue Wittstein (New York)***, ***Jeffrey B. Ellman (Atlanta)***, ***Paul D. Leake (New York)***, and ***Sidney Levinson (Los Angeles)*** were recommended in the practice area of Finance—Corporate Restructuring in *The Legal 500 United States* (2012).

Heather Lennox (New York and Cleveland) was quoted in an article entitled "Delaware bench, bar try to clear jams at intersection of state, federal law" in the April 23, 2012, edition of the *Westlaw Journal Delaware Corporate Law*.

NEWSWORTHY *(continued)*

Paul D. Leake (New York) served on a panel discussing "Dueling Debtors, Receivers and Liquidators: Complex Cross-Border Disputes in Bankruptcies" at the American Bankruptcy Institute's 14th Annual New York City Bankruptcy Conference on May 9.

Brett J. Berlin (Atlanta) was selected to serve as a board member of the Bankruptcy Section of the Atlanta Bar Association for the 2012–2013 term.

Jane Rue Wittstein (New York) joined the Honorable Robert D. Drain in presenting "Current Jurisdictional and Procedural Issues—*Stern v. Marshall*" at the Practising Law Institute seminar "Bankruptcy & Reorganizations 2012: Current Developments" on April 12 in New York City.

Volker Kammel (Frankfurt) was recommended in the field of restructuring and insolvency in *The Legal 500: Europe, Middle East & Africa* (2012).

An article written by ***Paul D. Leake (New York)***, ***Peter J. Benvenutti (San Francisco)***, and ***Mark G. Douglas (New York)*** entitled "9th Cir. Firsts: Equitable Mootness and Arbitration" appeared in the May 1, 2012, edition of *Bankruptcy Law360*.

An article written by ***Daniel J. Merrett (Atlanta)*** and ***John H. Chase (Dallas)*** entitled "Safe Harbor Supernova: Is Section 546(e)'s Stellar Protection of Private LBO Transactions About to Burn Out?" appeared in the May 2012 edition of the *Norton Journal of Bankruptcy Law and Practice*.

Dan Winikka (Dallas) moderated a panel on "Intercreditor Issues in Complex Bankruptcies" at the American Bankruptcy Institute's Annual Spring Meeting on April 21 in Washington, D.C.

Richard L. Wynne (Los Angeles) participated in a panel discussion entitled "Our Favorite Bizarre Bankruptcy Cases of 2011" on April 16 at the Los Angeles Bankruptcy Forum. He has also been asked to serve as a consultant for the National Conference of Bankruptcy Judges; in this capacity, he will help design, prepare, and produce 17 programs for the October 24–27 meeting in San Diego.

An article written by ***Joseph M. Tiller (Chicago)*** entitled "Case Study: *In re XMH Corp.*" appeared in the January 27, 2012, issues of *Bankruptcy Law360*, *Intellectual Property Law360*, and *Appellate Law360*.

An article written by ***Joseph M. Witalec (Columbus)*** and ***Mark G. Douglas (New York)*** entitled "Ch. 9 Descends into the Sewer to Clean Up" was published in the March 6, 2012, edition of *Bankruptcy Law360*.

Joseph M. Tiller (Chicago) coached a moot-court team from Chicago's John Marshall Law School for the Duberstein Bankruptcy Moot Court Competition, sponsored by St. John's University School of Law and the American Bankruptcy Institute and held March 10–12 in New York. The team was an octo-finalist and won the "Outstanding Brief" award.

FIRST IMPRESSIONS: DEFINING THE LIMITS OF A BANKRUPTCY COURT'S DISCRETION IN CHAPTER 15

Pedro A. Jimenez and Mark G. Douglas

October 17, 2012, will mark the seven-year anniversary of the effective date of chapter 15 of the Bankruptcy Code, which was enacted as part of the comprehensive bankruptcy reforms implemented under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. Governing cross-border bankruptcy and insolvency cases, chapter 15 is patterned after the Model Law on Cross-Border Insolvency (the "Model Law"), a framework of legal principles formulated by the United Nations Commission on International Trade Law in 1997 to deal with the rapidly expanding volume of international insolvency cases. The Model Law has now been adopted in one form or another by 19 nations or territories.

The jurisprudence of chapter 15 has evolved since 2005, as courts have transitioned from considering the theoretical implications of a new legislative regime governing cross-border bankruptcy and insolvency cases to confronting the new law's real-world applications. An important step in that evolution was the subject of a ruling recently handed down by a Florida federal district court in *SNP Boat Service S.A. v. Hotel Le St. James*, 2012 WL 1355550 (S.D. Fla. Apr. 18, 2012). Addressing an apparent matter of first impression concerning the ability of a U.S. bankruptcy court presiding over a chapter 15 case to examine foreign-court decisions to determine whether litigants received their due-process rights, the court upheld a bankruptcy court's ruling ordering discovery of a foreign debtor's principals notwithstanding a French "blocking statute" that would have prohibited discovery. However, the district court concluded that the bankruptcy court abused its discretion in ordering discovery for the purpose of examining whether a creditor's interests were sufficiently protected in a specific French bankruptcy proceeding. The district court also reversed the bankruptcy court's dismissal of the debtor's chapter 15 case as a sanction for failing to comply with its discovery orders.

PROCEDURES AND RELIEF UNDER CHAPTER 15

Under chapter 15, a duly accredited representative of a foreign debtor may file a petition in a U.S. bankruptcy court seeking "recognition" of a "foreign proceeding." "Foreign proceeding" is defined as:

> a collective judicial or administrative proceeding in a foreign country, including an interim proceeding, under a law relating to insolvency or adjustment of debt in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation.

Because more than one bankruptcy or insolvency proceeding may be pending against the same foreign debtor in different countries, chapter 15 contemplates recognition in the U.S. of both a "main" proceeding—a case pending in the country that contains the debtor's "center of main interests"—and "nonmain" proceedings, which may have been commenced in countries where the debtor merely has an "establishment."

Upon recognition of a foreign main proceeding, certain provisions of the Bankruptcy Code automatically come into force, such as the automatic stay. Recognition of a foreign proceeding (main or nonmain) also empowers the U.S. bankruptcy court to grant other relief by way of "additional assistance" to the foreign representative. In addition, relief that may be granted upon recognition of a foreign proceeding (main or nonmain) includes, pursuant to section 1521(a)(5), "entrusting the administration or realization of all or part of the debtor's assets within the territorial jurisdiction of the United States to the foreign representative or another person . . . authorized by the court." Pursuant to section 1521(b), such relief may also include "entrust[ing] the distribution of all or part of the debtor's assets located in the United States to the foreign representative or another person . . . authorized by the court, *provided that the court is satisfied that the interests of creditors in the United States are sufficiently protected*." (Emphasis added.)

Thus, it would appear that section 1521(b) draws a distinction between U.S. ("local") and non-U.S. creditors. However, section 1522, which is entitled "Protection of creditors and other interested persons," does not expressly make any such distinction, providing in subsection (a) that "[t]he court may grant relief under section 1519 or 1521 . . . only if the interests of *the creditors* and other interested entities, including the debtor, are sufficiently protected." (Emphasis added.)

Section 1501(a) of the Bankruptcy Code provides that the express purpose of chapter 15 is to "incorporate the [Model Law] so as to provide effective mechanisms for dealing with cases of cross-border insolvency." The apparent inconsistency between sections 1521(b) and 1522(a) is addressed by the Guide to the Enactment of the UNCITRAL Model Law on Cross-Border Insolvency (the "Guide") (in which "article 21, paragraph 2" corresponds to section 1521(b), while section 1522(a) is referred to as "article 22, paragraph 1"):

> It should be noted that the Model Law contains several safeguards designed to ensure the protection of local interests before assets are turned over to the foreign representative. Those safeguards include the following: the general statement of the principle of protection of local interests in article 22, paragraph 1; the provision in article 21, paragraph 2, that the court should not authorize the turnover of assets until it is assured that the local creditors' interests are protected; and article 22, paragraph 2, according to which the court may subject the relief that it grants to conditions it considers appropriate.

However, the Guide tempers any perception that local interests are intended to be safeguarded to the exclusion of all others by providing that:

> The idea underlying article 22 is that there should be a balance between relief that may be granted to the foreign representative and the interests of the persons that may be affected by such relief . . . . In many cases the affected creditors will be "local" creditors. Nevertheless, in enacting article 22, it is not advisable to attempt to limit it to local creditors. Any express reference to local creditors in paragraph 1 would require a definition of those creditors. An attempt to draft such a definition (and to establish criteria according to which a particular category of creditors might receive special treatment) would not only show the difficulty of crafting such a definition but would also reveal that there is no justification for discriminating [against] creditors on the basis of criteria such as place of business or nationality.

The precise scope of a U.S. bankruptcy court's discretion to consider whether a nonlocal creditor's interests were sufficiently protected in connection with a motion to transfer custody of U.S.-based assets to the representative of a foreign debtor in a chapter 15 case was addressed by the court in *SNP Boat Service*.

SNP BOAT SERVICE

SNP Boat Service S.A. ("SNP") is a French corporation that designs luxury boats and provides brokerage, charter, and boat-management services. In May 2008, SNP executed a contract for the sale of a vessel. As part of the sale transaction, SNP agreed to accept the trade-in of a separate vessel—the *M/Y Saint James*—from a party other than the purchaser, Hotel Le St. James ("St. James"), a Canadian corporation, in exchange for which St. James would receive a €2.5 million credit to its account.

Upon taking delivery of the *M/Y Saint James*, SNP claimed that the vessel "had not been delivered in good maintenance and operating condition" and was not accompanied by proper documentation. SNP accordingly refused to credit St. James' account. The breach-of-contract dispute between St. James and SNP soon escalated. In October 2008, SNP sued St. James in the commercial court in Cannes, France. The following month, St. James sued SNP in the court of Montreal. The Canadian court rejected SNP's argument that the court lacked both personal jurisdiction over SNP and subject-matter jurisdiction to consider St. James' breach-of-contract claim. Those rulings were upheld on appeal.

On April 7, 2009, the French commercial court approved a French *sauvegarde* proceeding for SNP. Similar to a case under chapter 11 of the U.S. Bankruptcy Code, a *sauvegarde* proceeding allows a debtor to negotiate a restructuring plan with its creditors, failing which the French commercial court can approve a nonconsensual repayment plan over a maximum period of 10 years. However, the court has no power to force creditors to write off debts or to accept a debt-equity swap, nor can it order debts to be generally discharged without creditor consent. If the debtor reaches an agreement with its creditors, the restructuring plan can include many different restructuring measures, including extending the maturity of debts beyond 10 years, creditor write-offs, and debt-equity swaps.

As in cases under the U.S. Bankruptcy Code, a *sauvegarde* proceeding imposes an automatic stay on any legal actions initiated by creditors. The French Supreme Court held in Cour de Cassation [Cass.] 1 e civ., Dec. 19, 1995, Bull. Civ., No. 93-20-424 (Fr.), that this automatic stay has extraterritorial effect.

On August 25, 2009, St. James filed an unsecured claim in the *sauvegarde* proceeding for the price of the *M/Y Saint James*, plus interest, damages, and other costs. Despite the pendency of the *sauvegarde* proceeding, the Canadian court entered a default judgment against SNP in the Canadian litigation on October 16, 2009, in the amount of CAD$4,047,500.

St. James later learned that SNP had assets in Florida, and on February 17, 2010, it domesticated its Canadian judgment in Florida for the purpose of levying on two SNP vessels harbored there. However, before the vessels could be sold to satisfy St. James' judgment, SNP's court-appointed administrator sought recognition from a Florida bankruptcy court of the *sauvegarde* proceeding under chapter 15 of the Bankruptcy Code.

The U.S. bankruptcy court entered an order recognizing the *sauvegarde* proceeding as a foreign main proceeding under chapter 15 on April 28, 2010. The recognition order stayed any further collection proceedings in the U.S. against SNP or its assets.

Shortly afterward, SNP's administrator filed a motion seeking an order of the bankruptcy court: (i) declaring that one of the seized vessels was subject to the jurisdiction of the French court overseeing SNP's *sauvegarde* proceeding; and (ii) entrusting the vessel to the administrator. Before the hearing on that motion was convened, however, the French court ruled that SNP was not liable to St. James for the €2.5 million price of the *M/Y Saint James*.

In anticipation of the hearing before the U.S. bankruptcy court, St. James sought discovery of various documents related to the *sauvegarde* proceeding. Among other things, SNP argued in response that a French "blocking statute," which makes discovery in France not pursuant to the Hague Convention a criminal act, precluded depositions of several SNP representatives. According to SNP, the scope of St. James' discovery requests indicated that St. James was attempting to re-litigate the French court's order approving the *sauvegarde* proceeding, which St. James had appealed and concerning which St. James already had ample opportunity to obtain discovery as a participant. St. James responded by asking the bankruptcy court to compel discovery or, in the alternative, to sanction SNP for its misconduct in refusing to comply by dismissing the chapter 15 case.

On June 30, 2011, the U.S. bankruptcy court ruled that the French blocking statute did not deprive the court of its power to order the parties to engage in discovery. Absent SNP's compliance with discovery requests, the court wrote, it would "conclude that the order granting recognition of the foreign main proceeding was improvidently entered . . . [,] revoke recognition of the foreign main proceeding, and . . . abstain from [the] matter under 11 U.S.C. § 305."

SNP refused to comply with St. James' discovery requests. On October 20, 2011, the bankruptcy court directed the U.S. Marshals Service to transfer the seized vessel to the county sheriff and dismissed SNP's chapter 15 case. SNP appealed the ruling to the Florida district court.

THE DISTRICT COURT'S RULING

The district court affirmed the ruling in part and reversed in part. It did not fault the bankruptcy court for examining whether St. James' interests were sufficiently protected before directing that the seized vessel be turned over to SNP's administrator. According to the court, the Model Law indicates that:

> [A] bankruptcy court *must* be satisfied that *local creditors*' interests are "sufficiently protected" before allowing a foreign representative to distribute property in a foreign proceeding, and though not an express requirement, is *not precluded* from satisfying

itself that *foreign creditors*' interests are "sufficiently protected" before allowing a foreign representative to distribute property in a foreign proceeding.

This interpretation, the court explained, is consistent with the "exceedingly broad" authority provided to the bankruptcy court to grant "any appropriate relief."

The district court also concluded that the bankruptcy court acted within its discretion when it refused to enforce the French "blocking" statute to preclude discovery of SNP's principals. It is well settled, the court explained, that such a statute does " 'not deprive an American court of the power to order a party subject to its jurisdiction to produce evidence even though the act of production may violate that statute.' " (Quoting *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for the S. Dist. of Iowa*, 482 U.S. 522, 544 n.29 (1987).) Deferring to a "blocking" statute, the district court emphasized, would, among other things, provide foreign nationals with preferred status in U.S. courts.

SNP argued that, even if the bankruptcy court properly examined whether St. James' interests were sufficiently protected before ordering that the seized vessel be entrusted to the administrator, the court exceeded its authority by ordering discovery to determine whether those interests were sufficiently protected in the French *sauvegarde* proceeding. The bankruptcy court's actions, SNP claimed, constituted "nothing less than appellate oversight of a specific French bankruptcy proceeding" and were therefore beyond the scope of the court's authority under chapter 15 in keeping with the chapter's underlying purpose (i.e., providing assistance to foreign bankruptcy proceedings consistent with principles of "comity").

The district court agreed. Explaining that chapter 15 incorporates many of the principles that informed jurisprudence under its predecessor, section 304 of the Bankruptcy Code, the court looked for guidance on this issue to decisions applying section 304, including the Second Circuit's ruling in *Victrix S.S. Co., S.A. v. Salen Dry Cargo A.B.*, 825 F.2d 709 (2d Cir. 1987). On the basis of *Victrix*, the district court in *SNP Boat Service* concluded that:

> To inquire into a specific foreign proceeding is not only inefficient and a waste of judicial resources, but more importantly, necessarily undermines the equitable and orderly distribution of a debtor's property by transforming a domestic court into a foreign appellate court where creditors are always afforded the proverbial "second bite at the apple." Chapter 15's directive that courts be guided by principles of comity was intended to avoid such a result. St. James is no more entitled to SNP's assets than any other creditor of SNP outside the determinations of the foreign insolvency proceeding. Thus, it was an abuse of the bankruptcy court's discretion to order discovery for the purposes of determining whether St. James' interests were sufficiently protected in the specific French *sauvegarde* proceeding. St. James has not advanced the argument that creditors' interests are not sufficiently protected under French *sauvegarde* law and this Court has no reason to determine otherwise. In concluding that jurisdiction is limited to a determination that French *sauvegarde* proceedings generally are sufficient to protect creditors' interests, it follows that a bankruptcy court is without jurisdiction to inquire whether a particular creditor's interests are sufficiently protected in any specific foreign proceeding.

Finally, the district court held that dismissal of SNP's chapter 15 case as a sanction for failing to comply with discovery was unwarranted. According to the court, the "severe sanction" of dismissal is appropriate "only as a last resort." Because the bankruptcy court failed to explore whether a lesser sanction would be adequate to compel compliance, and inasmuch as the court improperly inquired into the *sauvegarde* proceeding, the district court ruled that dismissal was an abuse of discretion.

OUTLOOK

Above and beyond the ruling's practical ramifications in the context of discovery in chapter 15 cases, *SNP Boat Service* serves as a reminder that chapter 15, albeit of relatively recent vintage, is the product of a long history of jurisprudence regarding cross-border bankruptcy cases.

That history, which is expressly imprinted on chapter 15, is premised on the principle of comity, or the recognition that one sovereign nation extends within its territory to the legislative, executive, or judicial acts of another sovereign, with due regard for the rights of its own citizens.

Implicit in a U.S. bankruptcy court's order recognizing a foreign main or nonmain proceeding under chapter 15 is a determination that the foreign proceeding warrants the assistance of U.S. courts (i.e., is deserving of comity). This is because, among other things, the foreign proceeding, although not identical to a U.S. bankruptcy case, is governed by a similar regime of legal principles, including basic substantive and procedural safeguards for all parties involved. In *SNP Boat Service*, the district court clarified that, once a U.S. bankruptcy court determines that a foreign proceeding is worthy of recognition, it no longer has discretion to examine whether those safeguards are adequate. According to the court, although a U.S. bankruptcy court may pass on the propriety of a foreign *insolvency regime* in connection with its determination to grant or withhold recognition, it is not permitted to delve into the details of (including specific rulings issued in) any particular foreign *insolvency case*. From a different perspective, this also means that creditors, whether local or foreign, will not be permitted a "second bite at the apple" once a recognition order has been entered by a U.S. court.

CONSTRUING "SUBSTANTIAL CONTRIBUTION" UNDER SECTION 503(b)(3)(D)

Jennifer L. Seidman

In keeping with the courts' narrow construction of what constitutes "substantial contribution" in a chapter 11 case, an Ohio bankruptcy court in *In re AmFin Financial Corp.*, 2012 WL 652018 (Bankr. N.D. Ohio Feb. 28, 2012), denied administrative-expense priority to the fees and expenses of the holders of approximately $100 million in senior notes (the "Senior Noteholders") issued by debtor AmFin Financial Corporation ("AFC"). According to the court, "[T]he efforts by the Senior Noteholders to settle their own claims are not properly characterized as a substantial contribution to the case."

ADMINISTRATIVE-EXPENSE PRIORITY FOR MAKING A "SUBSTANTIAL CONTRIBUTION"

Section 503(b)(3)(D) of the Bankruptcy Code grants administrative-expense priority for the "actual, necessary expenses" incurred by a creditor, among other entities, in making a "substantial contribution" in a case under chapter 11. In addition, section 503(b)(4) of the Bankruptcy Code grants administrative-expense priority for "reasonable compensation for professional services rendered by an attorney . . . of an entity whose expense is allowable under" section 503(b)(3)(D) and "reimbursement for actual, necessary expenses incurred by such attorney." As explained by the *AmFin* court, these provisions are an "accommodation between the two objectives of encouraging meaningful creditor participation in the reorganization process and keeping administrative expenses and fees at a minimum to maximize the estate for creditors."

The Bankruptcy Code neither defines "substantial contribution" nor sets forth criteria to be used in determining whether a substantial contribution has been made in a chapter 11 case. The issue, therefore, of whether a creditor has made a "substantial contribution" is a question of fact, with the moving party bearing the burden of proof. Most courts narrowly construe what constitutes a "substantial contribution" in a chapter 11 case, and most have taken the position that substantial-contribution claims, like other section 503(b) claims, should be strictly limited. The principal test is that there must be actual and demonstrable benefit to the estate and creditors.

THE FACTS

On the day that AFC—a bank holding company whose banking subsidiary, AmTrust Bank, would shortly be seized by the U.S. Office of Thrift Supervision ("OTS")—and its affiliated debtors sought chapter 11 protection in Ohio, the debtors filed an adversary proceeding against the Senior Noteholders seeking to avoid approximately $12 million in payments, guaranties, and liens as preferential and constructively fraudulent transfers. Shortly afterward, OTS took control of AmTrust Bank and appointed the Federal Deposit Insurance Corporation (the "FDIC") as receiver.

The FDIC has two major disputes with the debtors, both of which evolved into litigation before the district court and have yet to be fully resolved. The first dispute revolves around the FDIC's contention that it has claims against AFC in excess of $2 billion, all or substantially all of which is entitled to priority pursuant to section 365(o) of the Bankruptcy Code on the basis of AFC's alleged commitment to maintain the capital of AmTrust Bank. The second dispute involves a 2009 tax refund of approximately $194 million that the FDIC claims is its property. The outcome of the section 365(o) litigation and, to a lesser extent, the tax-refund litigation will determine whether the debtors are able to make distributions to unsecured creditors under a chapter 11 plan.

THE SENIOR NOTEHOLDERS' PURPORTED "SUBSTANTIAL CONTRIBUTION" TO THE CASES

The Senior Noteholders and the debtors resolved their disputes pursuant to a settlement embodied in the debtors' now confirmed chapter 11 plan. The settlement provides, among other things, that $2 million which would otherwise have been distributed to the Senior Noteholders under the plan will instead be distributed to the holders of other general unsecured claims on a pro rata basis. The $2 million redistribution resolved the debtors' approximately $12 million claim that was the subject of the adversary proceeding against the Senior Noteholders.

The Senior Noteholders moved for allowance and payment of $950,000 of fees and expenses incurred in connection with the chapter 11 cases as a substantial-contribution claim pursuant to sections 503(b)(3)(D) and 503(b)(4). As evidence of their substantial contribution, the Senior Noteholders pointed to: (i) their decision to settle the adversary proceeding rather than proceed with litigation that would have reduced the amount of funds available to other creditors; (ii) assistance they provided in developing a defense strategy in the section 365(o) litigation and tax-refund litigation; (iii) their active involvement in responding to discovery in the section 365(o) litigation; and (iv) their agreement to the $2 million redistribution, which the Senior Noteholders argued lowered their payment priority to the direct benefit of the estates' other creditors.

The *AmFin* court's decision—based on the limited record before it—is in keeping with the courts' narrow construction of "substantial contribution" claims and is yet another reminder to creditors of the significant evidentiary burden they bear should they seek administrative-expense priority for their fees and expenses, even in cases where the debtor supports the request.

As part of the settlement, the debtors agreed to support the Senior Noteholders' request for a substantial-contribution claim of up to $950,000. The FDIC and the U.S. Trustee, however, objected to the request, arguing that the Senior Noteholders' actions were taken only in furtherance of their own self-interest and duplicated the efforts of the debtors' professionals.

THE COURT DISALLOWS THE SUBSTANTIAL-CONTRIBUTION CLAIM

The bankruptcy court, siding with the FDIC and the U.S. Trustee, denied the Senior Noteholders' motion in its entirety. The court applauded the Senior Noteholders' decision to settle their disputes with the debtors, stating that their "outstanding cooperation" helped the cases to proceed smoothly and that their counsel "acted with the utmost professionalism." However, the court explained that "[w]hile the settlement spared the estates and other creditors from the expense and inconvenience of litigation, this is true of any settlement reached." According to the court, agreeing to compromise the adversary proceeding for $2 million did "not establish that the settlement benefitted [sic] the estate beyond the benefit that accompanies any settlement; i.e. resolution of issues without expending more time and money." Accordingly, the court held that the efforts by the Senior Noteholders to settle their own claims were not properly characterized as a substantial contribution to the cases.

The court also did not find that the Senior Noteholders made a substantial contribution to the cases by their participation in the section 365(o) litigation and tax-refund litigation. According to the court, the Senior Noteholders' efforts in responding to discovery requests from the FDIC did not benefit any party, much less constitute a substantial contribution, where the FDIC did not use any of the information it obtained from the Senior Noteholders. In addition, the court determined that any assistance provided by the Senior Noteholders in connection with the section 365(o) litigation and tax-refund litigation was duplicative of the efforts of the debtors' counsel, who had the responsibility of defending against the claims asserted by the FDIC. Accordingly, the court held that the Senior Noteholders' assistance with the section 365(o) litigation and tax-refund litigation did not constitute a substantial contribution and, as such, denied the Senior Noteholders' motion.

OUTLOOK

The court's decision regarding the Senior Noteholders' participation in the section 365(o) litigation might have been different had the Senior Noteholders presented more evidence to support their claim. The court noted at the outset of its opinion that the Senior Noteholders did not request an evidentiary hearing on their motion. Later, the court noted that "[o]n the record before it," the court could not conclude that the Senior Noteholders proved a substantial contribution to the cases within the meaning of section 503(b)(3)(D). In particular, the court explained that, although the Senior Noteholders' claim that they had made a substantial contribution in the section 365(o) litigation was "more promising," there was "insufficient evidence to prove this point." Thus, it is possible that, had the Senior Noteholders presented additional evidence, at least some portion of their $950,000 claim might have been granted administrative-expense priority pursuant to sections 503(b)(3)(D) and 503(b)(4).

The *AmFin* court's decision—based on the limited record before it—is in keeping with the courts' narrow construction of "substantial contribution" claims and is yet another reminder to creditors of the significant evidentiary burden they bear should they seek administrative-expense priority for their fees and expenses, even in cases where the debtor supports the request.

COMITY EXTENDED TO ORDER ENTERED IN FOREIGN INSOLVENCY PROCEEDING ENJOINING ACTIONS AGAINST AFFILIATES OF FOREIGN DEBTOR

Jennifer J. O'Neil and Mark G. Douglas

Judge Robert W. Sweet of the U.S. District Court for the Southern District of New York held in *CT Investment v. Carbonell and Grupo Costamex*, 2012 WL 92359 (S.D.N.Y. Jan. 11, 2012), that comity should be extended to an order issued by a Mexican district court overseeing the Mexican bankruptcy proceeding (*concurso mercantil*) of Cozumel Caribe S.A. de C.V. ("Cozumel Caribe") under Mexico's Ley de Concursos Mercantiles (the "Mexican Business Bankruptcy Act"). In so holding, Judge Sweet stayed the U.S. district-court action commenced by Cozumel Caribe's secured creditor, CT Investment Management, LLC ("CT Investment"), wherein CT Investment sought to recover against certain nondebtor affiliates of Cozumel Caribe on guaranties issued in connection with Cozumel Caribe's prepetition debt.

BACKGROUND

Cozumel Caribe, along with its seven affiliates, provides hostelry and tourism services through the operation of luxury hotels and timeshare resort properties in Mexico. Each of Cozumel Caribe and its affiliates owns and operates its own resort property, but the properties collectively are part of and offered as a timeshare arrangement to prospective timeshare owners.

In October 2006, Cozumel Caribe and certain affiliates executed promissory notes evidencing first-priority secured loans extended by CT Investment in the amount of $103 million. As further security, Cozumel Caribe affiliates Pablo González Carbonell and Grupo Costamex, S.A. de C.V., guarantied the debt (the "Guaranty"). On April 27, 2010, Cozumel Caribe filed a voluntary insolvency proceeding under the Mexican Business Bankruptcy Act. In connection with the proceeding, Cozumel Caribe asked the Mexican court to approve certain provisional relief, including a stay, to protect Cozumel Caribe as well as its nondebtor affiliates, with whom Cozumel Caribe's business affairs were closely intertwined. The Mexican court granted that request on May 27, 2010 (the "May 27 Order"), directing, among other things, that all collection actions be stayed during the pendency of the Mexican bankruptcy proceeding, including any actions against nondebtor affiliates to enforce the Guaranty. CT Investment unsuccessfully attempted to appeal or vacate the May 27 Order (as well as a September 30, 2012, order granting Cozumel Caribe's bankruptcy petition).

On July 20, 2010, Nemias Esteban Martinez Martinez, as *conciliador* in Cozumel Caribe's Mexican bankruptcy proceeding (the "foreign representative"), filed a petition on behalf of Cozumel Caribe under chapter 15 of the U.S. Bankruptcy Code in the U.S. Bankruptcy Court for the Southern District of New York. On October 20, 2010, the court entered an order recognizing Cozumel Caribe's Mexican bankruptcy proceeding as a "foreign main proceeding" under chapter 15.

Despite the May 27 Order, CT Investment commenced litigation on September 13, 2010, in the U.S. District Court for the Southern District of New York seeking to recover on the Guaranty. Nearly a year afterward, the foreign representative filed a motion in the U.S. district court for an order extending comity to the Mexican court's order staying any action to collect on the Guaranty pending completion of Cozumel Caribe's Mexican bankruptcy proceeding. CT Investment objected, arguing, among other things, that the foreign representative lacked standing because he was not a party to the district-court litigation and that the court should refuse to recognize the May 27 Order under principles of comity because the order was contrary to U.S. law and public policy.

THE DISTRICT COURT'S RULING

Judge Sweet held that the foreign representative had standing to seek comity and a stay pursuant to section 1509(b) of the Bankruptcy Code, which provides that, upon the granting of recognition to a foreign bankruptcy proceeding:

> (1) the foreign representative has the capacity to sue and be sued in a court in the United States; . . . (2) the foreign representative may apply directly to a court in the United States for appropriate relief in that court; and . . . (3) a court in the United States shall grant comity or cooperation to the foreign representative.

Judge Sweet explained that section 1509(b)'s clear mandate that foreign representatives in recognized proceedings under chapter 15 be granted access to courts in the U.S. is not "limited to cases in which the Chapter 15 debtor is a party."

Judge Sweet rejected CT Investment's argument that, pursuant to section 1509(e) of the Bankruptcy Code, which provides that "[w]hether or not the court grants recognition, . . . a foreign representative is subject to applicable nonbankruptcy law," a foreign representative must intervene in accordance with Rule 24 of the Federal Rules of Civil Procedure. Judge Sweet held that section 1509(e) does not limit the effect of section 1509(b)(2), which, by its plain terms, permits foreign representatives direct access to courts in the U.S. for appropriate relief.

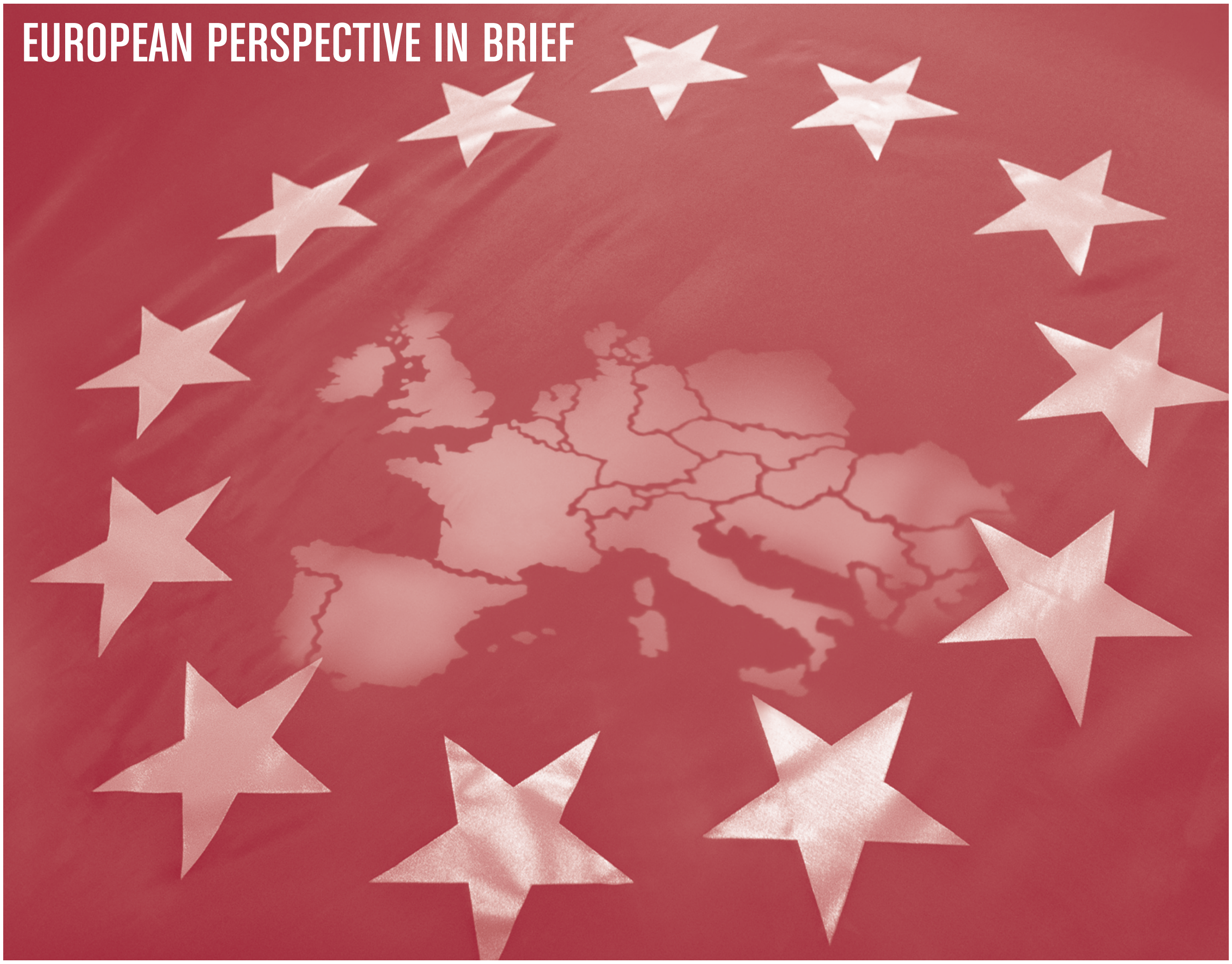
Judge Sweet also rejected CT Investment's argument that the May 27 Order violated U.S. public policy. The mandate to extend comity under section 1509(b)(3), the judge acknowledged, is subject to section 1506, which states that "[n]othing in this chapter prevents the court from refusing to take an action governed by this chapter if the action would be manifestly contrary to the public policy of the United States."

Even so, Judge Sweet concluded that extension of the stay to a nondebtor guarantor under the terms of the May 27 Order was not "manifestly contrary" to U.S. public policy. Several U.S. bankruptcy courts, the judge reasoned, have determined, in appropriate circumstances, that the bankruptcy stay is properly extended to nondebtor parties in order to assist in and maintain the integrity of the administration of a debtor's bankruptcy case. Judge Sweet also relied on other decisions holding that the laws of the foreign jurisdiction and the laws of the U.S. need not be identical to warrant an extension of comity.

Before Judge Sweet handed down his ruling in *CT Investment v. Carbonell and Grupo Costamex*, CT Investment filed an adversary proceeding in Cozumel Caribe's chapter 15 case seeking a declaratory judgment that certain funds held in the U.S. do not belong to Cozumel Caribe and should therefore be subject to levy by CT Investment. The foreign representative responded with a motion to extend comity to the May 27 Order, arguing that the order expressly precludes any collection actions against the U.S. account in question. The adversary proceeding is currently pending before bankruptcy judge Martin Glenn.

Jones Day acted as counsel for the foreign representative in connection with *CT Investment v. Carbonell and Grupo Costamex*.

EUROPEAN PERSPECTIVE IN BRIEF



On May 9, 2012, the English High Court, in *Trillium (Nelson) Properties Ltd v Office Metro Ltd* [2012] EWHC 1191 (Ch) (09 May 2012), for the first time ruled on the requirements governing the existence of an "establishment" under the EC Insolvency Regulation (Council Regulation (EC) No 1346/2000) (the "Regulation"). Under the Regulation, "main" insolvency proceedings may be commenced on behalf of a debtor only in the single jurisdiction in which the debtor's "centre of main interests" (commonly referred to as "COMI") is located. Where a main proceeding has been instituted in one EC Member State, the Regulation provides that "secondary" proceedings may be commenced in another Member State if the debtor "possesses an establishment within the territory of that other Member State." "Establishment" is defined by the Regulation as "any place of operations where the debtor carries out non-transitory economic activity with human means and goods."

The key issue in *Trillium* was whether the English court had jurisdiction to open secondary proceedings for Office Metro Ltd ("Office Metro"), whose main insolvency proceedings had been opened in Luxembourg. The court acknowledged that Office Metro had a "place of operations" in England (even though it neither owned nor leased property there) and that it carried out some functions via agents in England, so as to satisfy the "human means" requirement of the "establishment" definition in the Regulation. However, the court ruled that the continued functions of the company in the UK were "transitory" and did not amount to "economic activity" necessary to create an "establishment." Therefore, the English court dismissed Office Metro's winding-up petition.

IN BRIEF: FROM THE TOP

On May 14, 2012, the U.S. Supreme Court handed down its first ruling of this Term concerning a bankruptcy issue. In *Hall v. U.S.*, _____ S. Ct. _____, 2012 WL 1658486 (May 14, 2012), the court considered whether federal capital-gains-tax liability resulting from the sale by "family farmer" debtors of their farm property during a chapter 12 case is "incurred by the estate" under section 503(b) of the Bankruptcy Code, as required for the debtors to strip the federal government's corresponding tax claim of its priority, to pay the claim pro rata with other general unsecured claims, and to discharge any remaining obligation to the government under section 1222(a)(2)(A)—the priority-stripping provision added to the Bankruptcy Code by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.

The court, affirming a ruling below by the Ninth Circuit Court of Appeals, held that "the federal income tax liability resulting from petitioners' postpetition farm sale is not 'incurred by the estate' under § 503(b) and thus is neither collectible nor dischargeable in the Chapter 12 plan." Writing for the 5-4 majority, Justice Sotomayor explained:

> Certainly, there may be compelling policy reasons for treating postpetition income tax liabilities as dischargeable. But if Congress intended that result, it did not so provide in the statute. Given the statute's plain language, context, and structure, it is not for us to rewrite the statute, particularly in this complex terrain of interconnected provisions and exceptions enacted over nearly three decades. Petitioners' position threatens ripple effects beyond this individual case for debtors in Chapter 13 and the broader bankruptcy scheme that we need not invite. As the Court of Appeals noted, "Congress is entirely free to change the law by amending the text."

Chief Justice Roberts, as well as Justices Scalia, Thomas, and Alito, joined in the majority opinion. Justice Breyer filed a dissenting opinion in which Justices Kennedy, Ginsburg, and Kagan joined.

AMENDED BANKRUPTCY RULES APPROVED BY THE U.S. SUPREME COURT

On April 23, 2012, the U.S. Supreme Court approved amendments to the Federal Rules of Bankruptcy Procedure. The amended rules automatically become effective on December 1, 2012, unless Congress acts before then to reject, modify, or delay the rule changes. Several of the amendments involve technical and conforming changes to eliminate inconsistencies within the existing Bankruptcy Rules, as well as changes designed to make the bankruptcy rules consistent with the Federal Rules of Civil Procedure and the Federal Rules of Appellate Procedure.

The amendment to Bankruptcy Rule 3001 clarifies disclosure obligations regarding proofs of claim based on an open-end or revolving consumer credit account. Under the amended rule, a creditor asserting such a claim, which is commonly based upon a credit-card debt, must attach to its proof of claim a statement providing, among other things, the name of any entity from which the creditor purchased the account, along with current payment information.

Amendments to Bankruptcy Rule 7056 will tie the default deadline for filing a summary-judgment motion to a scheduled hearing date, rather than the close of discovery, as provided in Rule 56 of the Federal Rules of Civil Procedure. According to the rules committee, the change is warranted because hearings in bankruptcy cases sometimes occur shortly after the close of discovery. Under amended Bankruptcy Rule 7056, a summary-judgment motion must be filed 30 days before the initial date set for an evidentiary hearing on any issue for which summary judgment is sought, unless a local rule or court order establishes a different deadline.

A copy of the amended bankruptcy rules as transmitted to Congress is posted at http://pub.bna.com/lw/frbk12.pdf.

Links to the Judicial Conference reports on the amendments are available at http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/PendingRules.aspx.

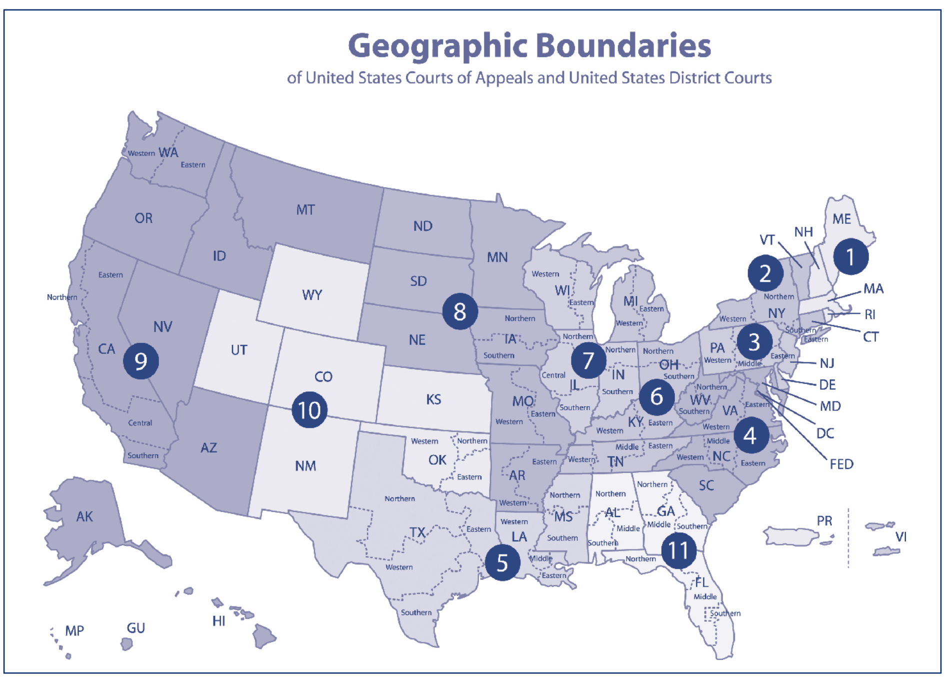
THE U.S. FEDERAL JUDICIARY

U.S. federal courts have frequently been referred to as the "guardians of the Constitution." Under Article III of the Constitution, federal judges are appointed for life by the U.S. president with the approval of the Senate. They can be removed from office only through impeachment and conviction by Congress. The first bill considered by the U.S. Senate—the Judiciary Act of 1789—divided the U.S. into what eventually became 12 judicial "circuits." In addition, the court system is divided geographically into 94 "districts" throughout the U.S. Within each district is a single court of appeals, regional district courts, bankruptcy appellate panels (in some districts), and bankruptcy courts.

As stipulated by Article III of the Constitution, the Chief Justice and the eight Associate Justices of the Supreme Court hear and decide cases involving important questions regarding the interpretation and fair application of the Constitution and federal law. A U.S. court of appeals sits in each of the 12 regional circuits. These circuit courts hear appeals of decisions of the district courts located within their respective circuits and appeals of decisions of federal regulatory agencies. Located in the District of Columbia, the Court of Appeals for the Federal Circuit has nationwide jurisdiction and hears specialized cases such as patent and international trade cases. The 94 district courts, located within the 12 regional circuits, hear nearly all cases involving federal civil and criminal laws. Decisions of the district courts are most commonly appealed to the district's court of appeals.

Bankruptcy courts are units of the federal district courts. Unlike that of other federal judges, the power of bankruptcy judges is derived principally from Article I of the Constitution, although bankruptcy judges serve as judicial officers of the district courts established under Article III. Bankruptcy judges are appointed for a term of 14 years (subject to extension or reappointment) by the federal circuit courts after considering the recommendations of the Judicial Conference of the United States. Appeals from bankruptcy-court rulings are most commonly lodged either with the district court of which the bankruptcy court is a unit or with bankruptcy appellate panels, which presently exist in five circuits. Under certain circumstances, appeals from bankruptcy rulings may be made directly to the court of appeals.

Two special courts—the U.S. Court of International Trade and the U.S. Court of Federal Claims—have nationwide jurisdiction over special types of cases. Other special federal courts include the U.S. Court of Appeals for Veterans' Claims and the U.S. Court of Appeals for the Armed Forces.



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