JONES DAY

RECENT DEVELOPMENTS IN BANKRUPTCY AND RESTRUCTURING

VOLUME 13 ▪ NO. 1 ▪ JANUARY/FEBRUARY 2014

BUSINESS RESTRUCTURING REVIEW

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THE YEAR IN BANKRUPTCY: 2013

Charles M. Oellermann and Mark G. Douglas

The eyes of the financial world were on the U.S. during 2013. The view was dismaying and encouraging in roughly equal parts. The U.S. rang in the new year with a post-last-minute deal to avoid the Fiscal Cliff that kicked negotiations over "sequestration"—$110 billion in across-the-board cuts to military and domestic spending—two months down the road, but raised income taxes (on the wealthiest Americans) for the first time in two decades.

Any spirit of bipartisanship was short-lived. Congress, dysfunctional even by recent standards, fought tooth and nail over nearly everything during 2013. Early in the year, lawmakers failed to engage in meaningful dialogue about raising the nation's debt ceiling, which led to speculation as to whether the U.S. Treasury, under an obscure law meant to apply to commemorative coins, would mint a "trillion-dollar coin" to head off the debt-ceiling battle in Congress.

Legislative gridlock meant that the sequestration "poison pill" began to take effect on March 1, 2013.

Among the most memorable business, economic, and financial sound bites of 2013 were "Fiscal Cliff II," "trillion-dollar coin," "sequestration," "government shutdown," "the Volcker Rule," and "Detroit."

The Capitol Hill donnybrook escalated into an all-out war over the implementation of ObamaCare (the Affordable Care Act) that brought many parts of the U.S. government to a halt on October 1, 2013, throwing 800,000 federal employees out of work temporarily. The shutdown lasted 16 days and has been estimated by Standard & Poor's ("S&P") to have drained $24 billion from the U.S. economy.

U.S. unemployment during 2013 remained stubbornly high, albeit gradually decreasing, ranging from a high of 7.9 percent at the end of January to a low of 6.7 percent at year-end, compared to the 4.9 percent unemployment rate in December 2007 prior to the Great Recession.

On September 17, the U.S. Census Bureau reported that, years after the end of the Great Recession and shortly before the 50th anniversary of President Lyndon Johnson's declaration of a "war on poverty," 46.5 million Americans are still living in poverty. Moreover, U.S. food stamp cuts took effect on November 1, 2013, affecting nearly 48 million people, or one in seven Americans. On December 28, long-term unemployment benefits implemented in 2008 pursuant to a federal emergency relief program expired for 1.3 million jobless U.S. workers after an extension of the program was omitted from a two-year budget deal reached at year-end.

According to the U.S. Consumer Financial Protection Bureau ("CFPB"), there are more than 38 million U.S. student loan borrowers, with more than $1.1 trillion in outstanding debt. In mid-2013, 850,000 private student loans were in default, with an outstanding balance of approximately $8 billion. On July 1, 2013, interest rates on U.S. federally subsidized Stafford student loans doubled from 3.4 percent to 6.8 percent after Congress failed to reach a deal to avert the rate hike. On August 9, however, President Obama signed a measure rolling back the increase.

Now for the good news. In April 2013, the U.S. Treasury announced that, for the first time since 2007—before the recession—it planned to make a down payment on the federal debt.

The U.S. government reported rare surpluses of $113 billion and $116.5 billion in April and June, the largest in five years and a sign of the nation's improving finances. On October 30, the government reported that the budget deficit for fiscal year ("FY") 2013 dropped to $680.3 billion, the first time in five years that the shortfall was below $1 trillion. Although it remains the fifth-largest deficit in history, it is the lowest since 2008 ($458.6 billion).

On December 10, five U.S. federal agencies voted to approve the "Volcker Rule," the keystone of the most sweeping overhaul of financial regulations since the Great Depression. At its core, the rule bans banks from most forms of proprietary trading for their own accounts, one of Wall Street's most lucrative—and riskiest—activities.

Six banks settled charges in 2013 regarding questionable mortgages packaged and sold to Fannie Mae or Freddie Mac during the housing crash: Bank of America/Countrywide Financial ($10 billion), The Royal Bank of Scotland ($153.7 million), JPMorgan Chase ($13 billion), Deutsche Bank ($1.9 billion), Wells Fargo ($591 million), and Citigroup ($968 million). In addition, the U.S. Justice Department filed criminal charges against S&P accusing the firm of inflating ratings of mortgage investments that collapsed when the financial crisis struck.

On December 18, the U.S. Federal Reserve announced that it would reduce its purchases of Treasury bonds and mortgage-backed securities by $10 billion a month beginning in January 2014, a signal that it feels confident enough about the economy that it can dial back its "quantitative easing" ("QE3") strategy.

On December 26, President Obama approved a bipartisan two-year budget that alleviates the harshest effects of automatic budget cuts on the Pentagon and domestic agencies, ending the threat of another partial government shutdown in January 2014.

According to Thomson Reuters, while global deal making was basically flat for a fourth consecutive year, deal volume in the U.S. was up 11 percent in 2013 compared with 2012. U.S. companies announced more than $1 trillion worth of deals during the year, the most since the financial crisis. That led the U.S. to account for 43 percent of all deals worldwide, the biggest proportion since 2001.

MARKETS

With a few notable exceptions in Asia, markets had a banner year in 2013. The Dow Jones Industrial Average (the "Dow") closed at 16,576.66, up 26.5 percent for the year. The NASDAQ Composite Index ("NASDAQ") finished the year up 38 percent, and the S&P 500 Stock Index ("S&P 500") ended the year 30 percent higher.

Japan's Nikkei 225 ended 2013 up 56.7 percent, its best performance in 40 years. Next to Japan, Europe was the surprise gainer of the year. The Stoxx 600, a pan-European equity benchmark, gained 17 percent in 2013; the DAX in Germany ended the year up 25.5 percent; France's CAC 40 rose 18 percent; and the FTSE 100 in London was ahead 14.4 percent.

Chinese markets had a disappointing year. The benchmark Shanghai Composite Index ended 2013 with a decline of 6.8 percent from a year ago.

SNAPSHOT ABROAD

Europe continued to struggle in 2013. The 17-nation eurozone and the 28-member European Union ("EU") continue to be plagued by high unemployment of as much as 12.2 percent and 10.9 percent, respectively. The credit ratings of Britain, Italy, France, and the EU were downgraded by ratings agencies during 2013—a first for Britain.

In April 2013, the EU was forced to provide Cyprus with a €10 billion bailout package intended to keep the country in the eurozone and rebuild its devastated economy. Ireland—the poster child for the alleged utility of austerity measures as a path to economic recovery—slid into its second recession in three years during the first quarter of 2013.

On May 5, 2013, French Finance Minister Pierre Moscovici declared the era of austerity over. A little more than one month afterward, France's National Institute of Statistics (Insee) reported that Europe's second-largest economy fell into recession in the first quarter of 2013.

Even so, 2013 was not without positive developments in Europe. Eurostat, the EU statistics agency, reported on August 14 that Europe broke out of recession in the second quarter of the year amid stronger domestic demand in France and Germany, ending a six-quarter downturn.

Asia faced its own challenges in 2013. Early in the year, the Japanese government approved emergency stimulus spending of more than ¥10.5 trillion ($100 billion) in an aggressive push to jump-start the moribund performance of the world's third-largest economy.

The manufacturing sector in China—the world's second-largest economy—faltered during 2013, underscoring the fragile nature of the global recovery and the difficulties still facing the world's biggest economies.

On August 30, the Central Statistical Office in New Delhi reported that India's economy slowed in the summer of 2013 to its weakest pace since the bottom of the global economic downturn in 2009.

On June 21, Russian President Vladimir Putin announced an ambitious but risky economic stimulus program that would dip into the country's pension reserves for loans of as much as $43.5 billion for long-term infrastructure projects and other investments.

BANKRUPTCY FILINGS

Fewer Americans filed for bankruptcy in 2013. According to data released by the Administrative Office of the U.S. Courts ("AOUSC"), 1,072,805 individuals filed for bankruptcy protection under chapter 7, 11, or 13 in the fiscal year ending September 30, 2013—730,592 under chapter 7 of the Bankruptcy Code, 340,807 under chapter 13, and 1,406 under chapter 11, with an additional 406 "family farmer" filings under chapter 12 of the Bankruptcy Code. This represents a 5 percent decrease from the 1.13 million individual bankruptcy filings in FY 2012.

The calendar year ("CY") 2013 statistics reflect an even more pronounced drop-off in individual bankruptcy filings. According to data provided by Epiq Systems, Inc. ("Epic Systems"), the 988,215 total noncommercial filings during CY 2013 represented a 12 percent drop from the noncommercial filing total of 1,128,173 during CY 2012. Epic Systems predicts that annual bankruptcy filings will continue to drop amid sustained low interest rates and high filing costs.

Business bankruptcy filings dropped off in both FY and CY 2013. According to the AOUSC, business bankruptcy filings in FY 2013 totaled 34,892, down 17 percent from the 42,008 business filings reported in FY 2012. Chapter 11 filings fell to 9,564 (8,158 business and 1,406 nonbusiness cases), down 10 percent from the 10,597 chapter 11 filings reported in FY 2012.

According to court data compiled by Epiq Systems, total commercial bankruptcy filings during CY 2013 were 44,111, a 24 percent drop from the 57,964 filings during CY 2012. There were 6,577 business chapter 11 filings in CY 2013, compared to 7,783 filings in CY 2012, a decline of approximately 15 percent. Total chapter 7 commercial filings numbered 27,617 in 2013, compared to 37,221 in 2012, representing a decline of 26 percent. Once again, the drop-off can be attributed to a number of factors, including the continuation of an "amend and extend" (or "extend and pretend") mentality by many lenders loath to redeploy capital in a market with historically low interest rates.

The number of bankruptcy filings by "public companies" (defined as companies with publicly traded stock or debt) in 2013 was 71, according to data provided by New Generation Research, Inc. ("NGR"). There were 87 public-company filings in 2012, whereas 86 public companies filed for bankruptcy in 2011, 106 filed in 2010, and 211 sought bankruptcy protection in 2009. NGR also reported that, reflecting a growing trend, there were 17 prepackaged chapter 11 cases in 2013, versus 11 in 2012 and only four in 2011—with combined total asset figures of $14 billion, $8 billion, and $3 billion, respectively.

The year 2013 added 10 public-company names to the billion-dollar bankruptcy club, compared to 14 in 2012, 12 in 2011, 19 in 2010, and 52 in 2009. Counting private-company and municipal filings, the billion-dollar club gained 13 members in 2013. This represents the fewest additions to the roll of billion-dollar bankruptcies since 2007, prior to the Great Recession.

The largest bankruptcy filing of 2013—Cengage Learning Inc., with $7.5 billion in assets—was not even within the top 50 largest filings of all time, based upon asset value.

Twenty-four public and private companies with assets greater than $1 billion exited from bankruptcy in 2013—including seven of the 10 billion-dollar public companies that filed in 2013. Perhaps signaling a trend begun in 2012, more of these companies reorganized than were liquidated or sold.

Two of the most prominent names on the list were MF Global, which failed spectacularly on Halloween 2011 to become the eighth-largest bankruptcy of all time, but ultimately provided a 100 percent recovery to customers, and AMR Corporation, the parent of American Airlines, which emerged from bankruptcy after its $11 billion merger with US Airways Group, Inc., as American Airlines Group Inc.—the world's largest air carrier.

The year 2013 saw the largest bankruptcy filing by a U.S. city ever—Detroit—juxtaposed with the continuing financial limbo of a U.S. commonwealth in crisis—Puerto Rico. Under the protective umbrella of chapter 9, Detroit will attempt to implement a plan of adjustment to manage $18 billion in long-term liabilities, including unmanageable employee legacy debts. Puerto Rico, by contrast, is being crushed by $70 billion in widely held public debt (at $19,000 per citizen, four times the per capita debt of the most indebted U.S. state, Massachusetts) and 15 percent unemployment; yet, due to its status as an unincorporated territory of the U.S., it is barred from seeking either protection under the Bankruptcy Code or international financial assistance.

S&P reported on January 9, 2014, that the number of global corporate defaults for 2013 tallied 78, compared to 84 corporate defaults during 2012. Of the 78 defaults in 2013, 34 were due to missed interest, principal, or cash payments; 19 were due to bankruptcy filings; 15 resulted from distressed exchanges; seven were confidential; two were due to regulatory supervision (administration); and one resulted from a failure to refinance or pay off a revolving credit facility. The majority of the defaulters in 2013 were based in the U.S., with 43 issuers defaulting in 2013 compared with 47 in 2012. Defaults in Europe, however, grew substantially, from nine issuers in 2012 to 16 in 2013. The media and entertainment sector—which includes companies as diverse as Atlantic City, New Jersey, casino Revel and Yellow Pages directory publisher SuperMedia—put 19 names on the global default tally and is considered among the most distressed sectors of the economy by S&P.

Twenty-four U.S. banks failed in 2013, compared to 51 in 2012 and 92 in 2011. The 2013 total represents the fewest since 2007, before the financial crisis.

NEWSWORTHY

Jones Day's Business Restructuring & Reorganization Practice was named a *Law360* Bankruptcy Practice Group of the Year for 2013.

David G. Heiman (Cleveland), ***Paul D. Leake (New York)***, ***Bruce Bennett (Los Angeles)***, ***Heather Lennox (New York and Cleveland)***, ***Richard L. Wynne (Los Angeles)***, ***Michael Rutstein (London)***, and ***Corinne Ball (New York)*** were included among *The International Who's Who Legal* for 2014 in the field of Insolvency & Restructuring.

Heather Lennox (New York and Cleveland) was among *Ohio Super Lawyers*' Top 50 Women for 2014.

Joseph M. Tiller (Chicago) was named an Illinois "Rising Star" for 2014 by *Super Lawyers*.

David G. Heiman (Cleveland), ***Charles M. Oellermann (Columbus)***, and ***Todd S. Swatsler (Columbus–Business and Tort Litigation)*** were named Ohio "Super Lawyers" for 2014.

Bruce Bennett (Los Angeles) was named a Bankruptcy MVP for 2013 by *Law360*.

On December 2, 2013, ***Mark A. Cody (Chicago)*** gave a presentation in New York City entitled "Municipal Chapter 9s: What Have We Learned So Far?" at the Beard Group's 2013 Distressed Investing Conference.

Christopher M. Healey (Columbus) was named an Ohio "Rising Star" for 2014 in *Super Lawyers*.

On January 16, 2014, Jones Day hosted a conference entitled "The Puerto Rico Debt Crisis: Navigating Uncharted Territory." The speakers included ***Bruce Bennett (Los Angeles)***; ***Beth Heifetz (Washington–Issues & Appeals)***; Tim Coleman, senior managing director at Blackstone; Sammy Céspedes, local counsel in Puerto Rico; and Alfredo Salazar, former president of the Government Development Bank for Puerto Rico. The conference examined Puerto Rico's fiscal outlook and the implications for its more than $70 billion in outstanding public debt. Please contact ***Scott J. Greenberg (New York)*** or ***Jennifer J. O'Neil (New York)*** with any questions.

Mark A. Cody (Chicago) and ***Brad B. Erens (Chicago)*** were named Illinois "Super Lawyers" for 2014.

An article written by ***Brett J. Berlin (Atlanta)*** entitled "Involuntary Bankruptcy Standard: Ninth Circuit Splits from Fourth Circuit" was published in the December 2013 issue of *The Bankruptcy Strategist*.

An article written by ***Veerle Roovers (New York)*** and ***Mark G. Douglas (New York)*** entitled "Foreign Representative Alert: Chapter 15 Gap Period Relief Subject to Preliminary Injunction Standard" appeared in the November/December 2013 edition of *Pratt's Journal of Bankruptcy Law*.

An article written by ***Brett J. Berlin (Atlanta)*** entitled "Recent Development in S Corporation and Qualified Subchapter S Subsidiary Tax Status in Bankruptcy: *In re Majestic Star Casino*" appeared in the Winter 2014 issue of *Insights* journal.

An article written by ***Dan B. Prieto (Dallas)*** and ***Mark G. Douglas (New York)*** entitled "Secured Creditor May Choose to Take No Action During Chapter 11 Case Without Hazarding Lien Stripping" was published in the November/December 2013 edition of *Pratt's Journal of Bankruptcy Law*.

An article written by ***Oliver S. Zeltner (Cleveland)*** entitled "*In re Putnal*: Adequately Protecting Postpetition Rents" was published in the November/December 2013 edition of *Pratt's Journal of Bankruptcy Law*.

HIGHLIGHTS OF 2013

January 1 The U.S. Senate, in a predawn vote two hours after the deadline passes to avert automatic tax increases, overwhelmingly approves legislation—the American Taxpayer Relief Act of 2012—that would allow tax rates to rise only on affluent Americans while temporarily suspending sweeping, across-the-board spending cuts. Negotiators agree to put off $110 billion in across-the-board cuts to military and domestic programs ("sequestration") for two months while broader deficit-reduction talks continue. The measure, which will be passed by the House later on January 1 and approved by President Obama on January 2, will allow income taxes to rise for the first time in two decades.

January 4 The U.S. Labor Department reports that American employers added 155,000 jobs in December, leaving the unemployment rate unchanged at 7.8 percent. Overall, the country added 1.8 million jobs during 2012.

January 7 Bank of America agrees to pay more than $10 billion to Fannie Mae to settle claims over troubled mortgages that soured during the housing crash, mostly loans issued by the bank's Countrywide Financial subsidiary. Under the terms of the settlement, Bank of America will pay Fannie Mae $3.6 billion and spend $6.75 billion to buy back mortgages from the housing finance giant at a discount from their original value.

January 9 The third-largest stock exchange operator in the U.S., BATS Global Markets, alerts its customers that a programming mistake caused about 435,000 trades to be executed at the wrong price over the last four years, costing traders $420,000. The announcement comes a day after the trading software used by the New Jersey-based National Stock Exchange stopped functioning properly for nearly an hour, forcing other exchanges to divert trades around it. The New York Stock Exchange, the nation's largest exchange, has had two similar, though shorter-lived, breakdowns since Christmas and two separate problems with its data-reporting system. In addition, traders were left in the dark on January 3 after the reporting system for stocks listed on the NASDAQ exchange, the second-biggest exchange, broke down for nearly 15 minutes.

January 10 The CFPB unveils new rules imposing a range of obligations and restrictions on home mortgage lenders, including bans on the risky "interest-only" and "no-documentation" loans that helped inflate the housing bubble. Under the new rules, which become effective in 2014, lenders will be required to verify and inspect borrowers' financial records to discourage lenders from saddling borrowers with total debt payments amounting to more than 43 percent of their annual income, including existing debts like credit cards and student loans.

January 11 The Japanese government approves emergency stimulus spending of more than $100 billion as part of an aggressive push by Prime Minister Shinzo Abe to kick-start growth in Japan's long-moribund economy.

January 12 The U.S. Treasury Department announces that it will not mint a trillion-dollar platinum coin to head off an imminent battle with Congress over raising the government's borrowing limit. By virtue of an obscure law meant to apply to commemorative coins, the Treasury Secretary could order the production of a high-denomination platinum coin and deposit it at the Federal Reserve, where it would count as a government asset and give the country more breathing room under its debt ceiling. Once Congress raised the debt ceiling, the Treasury Secretary could then order the coin destroyed.

January 21 Barack Hussein Obama II is sworn in for a second term as President of the U.S.

January 23 British Prime Minister David Cameron promises Britons a decisive referendum within five years on membership in the EU—provided he wins the next election. The pledge comes a day after the leaders of France and Germany met in Berlin to celebrate 50 years of sometimes uneasy partnership. (French President Charles de Gaulle and German Chancellor Konrad Adenaur signed the Elysée Treaty in 1963 to effect a reconciliation between the two nations.) Mr. Cameron's plea for acknowledgment of British distinctions reflects some of the deepest political and philosophical differences between Britain and Continental Europe on integration.

January 31 The U.S. Senate Judiciary Committee approves a new subcommittee, Bankruptcy and the Courts, for the 113th Congress. The jurisdiction of the subcommittee includes: (i) federal court jurisdiction, administration, and management; (ii) rules of evidence and procedure; (iii) creation of new courts and judgeships; (iv) bankruptcy; (v) legal reform and liability issues; and (vi) local courts in territories and possessions.

February 1 The U.S. Labor Department reports that the U.S. unemployment rate rose to 7.9 percent from 7.8 percent in December 2012.

The Dow closes above 14,000 for the first time since 2007.

February 4 The U.S. Justice Department files civil fraud charges against S&P, the nation's largest credit-ratings agency, accusing the firm of inflating the ratings of mortgage investments that collapsed when the financial crisis struck. The suit is the first significant federal action against the ratings industry, which reaped record profits as it bestowed near–risk-free ratings on complex bundles of home loans that quickly went sour.

February 5 The U.S. Postal Service announces that it intends to stop delivering mail on Saturdays but will continue to deliver packages six days a week under a plan aimed at saving about $2 billion. The move would accentuate one of the agency's strong points—package delivery has increased by 14 percent since 2010, whereas the delivery of letters and other mail has declined with the increasing use of email and other internet services. The post office will back away from its plan on April 10, criticizing Congress for taking the cost-cutting proposal off the table.

February 11 The American Bar Association adopts a resolution supporting the position that bankruptcy judges can, in certain circumstances, adjudicate "core" proceedings that go beyond a court's constitutional authority, in a response to confusion over the U.S. Supreme Court's landmark *Stern v. Marshall* decision. The resolution says that bankruptcy judges should be allowed to rule on matters in a "core" proceeding even if the matters underlying the proceeding are beyond the court's constitutional authority, provided the parties in the proceeding consent to the bankruptcy court's jurisdiction.

The U.S. Government Accountability Office ("GAO") issues a report stating that the loss in U.S. economic output during the Great Recession could be as much as $13 trillion—on top of trillions more in home equity that evaporated because of the housing crisis.

Moody's Investors Service ("Moody's") strips the U.K. of its AAA credit rating, predicting that economic weakness will weigh on public finances for years to come. The downgrade for the U.K. is the first ever from a major agency.

March 1 Without any agreement among U.S. lawmakers and President Obama, "sequestration," or $85 billion in across-the-board government spending cuts over seven months (eventually resulting in a reduction of the U.S. deficit by $1.2 trillion), begins to take effect. The cuts were devised as a "poison pill" during debt-ceiling negotiations that resulted in a temporary compromise in August 2011.

Eurostat, the statistical office of the EU, reports that unemployment in the 17-nation eurozone stood at 11.9 percent in January, a new record. For the 27 nations of the EU, the January jobless rate stood at 10.8 percent, up from 10.7 percent in December 2012.

Michigan Governor Rick Snyder announces that the state will intervene to appoint an emergency manager for the City of Detroit with the power to cut city spending, change contracts with labor unions, merge or eliminate city departments, urge the sale of city assets and, if all else fails, recommend bankruptcy proceedings. Once the cradle of the American auto industry and the nation's fifth-most populous city, Detroit is now less than half the size that it was decades ago; with only 700,000 residents, it is currently the 18th-largest city in the U.S., with a $327 million budget deficit, a public sector plagued by more than $18 billion in long-term liabilities, and annual worries of cash shortfalls. Detroit is the largest U.S. city ever targeted for takeover.

European executive pay comes under attack for the second time in less than a week as Swiss voters overwhelmingly back curbs on corporate salaries. The move comes on the heels of Europe-wide steps to address top management pay, which has been a lightning rod for public anger since the financial crisis began. EU proposals to cap bankers' bonuses at twice their salaries shocked London, with senior bankers warning that the cap will drive top personnel to Asia or New York and eventually prompt a shift in operations from London. The referendum in Switzerland introduces an even broader set of curbs after 68 percent of voters approve rules that include giving shareholders a binding say on executive pay, banning golden hellos and goodbyes, requiring annual reelections for directors, and threatening criminal sanctions for noncompliance.

March 4 *Forbes* releases its list of the world's richest people in 2013. The list includes 1,426 billionaires, a record number, with a total net worth of $5.4 trillion, up from $4.6 trillion in the previous ranking. There are 210 new billionaires from 42 countries, including 27 from the U.S. The U.S. had the most billionaires with 442, followed by Asia-Pacific with 386; Europe with 366; the Americas, excluding the U.S., with 129; and the Middle East and Africa with 103. Mexico's telecom mogul, Carlos Slim, remained the richest person, with a fortune of $73 billion, and Microsoft cofounder Bill Gates held on to the No. 2 spot, with a net worth of $67 billion. Spain's Amancio Ortega, the cofounder of the Inditex fashion group, leaped over Warren Buffett and France's Bernard Arnault to become the world's third-richest person in the 27th annual ranking of billionaires, with an estimated net worth of $57 billion. Buffett, with a fortune of $53.5 billion, and Oracle Corp's Larry Ellison, with a fortune of $43 billion, rounded out the top five in the rankings.

The Dow surpasses its previous record close of 14,164.53, which it achieved nearly five and a half years ago. The Dow will go on to set record highs 52 times in 2013.

'Sa' Nyu Wa Inc., a tribally chartered corporation wholly owned by the Hualapai Indian Tribe, files a chapter 11 petition in Arizona. The petition raises a question of first impression for the bankruptcy court—whether a tribal corporation (as distinguished from a federally recognized tribe, which is excluded from filing for bankruptcy relief as a "governmental unit") is eligible to be a debtor under the Bankruptcy Code.

March 7 The U.S. Federal Reserve reports that the net worth of U.S. families rose by $1.17 trillion at the end of 2012 to the highest level since late 2007, as rising home values and gains in stock holdings boosted household balance sheets. U.S. households' net worth—the value of homes, stocks, and other investments minus debts and other liabilities—rose 1.8 percent to $66.07 trillion from October through December, the highest level since the fourth quarter of 2007.

U.S. Federal Reserve stress tests reflect that the biggest banks in the U.S. are better able to withstand a severe economic shock, having a much stronger capital position than before the financial crisis. The 18 bank holding companies were tested under a hypothetical stress scenario that included a peak unemployment rate of 12.1 percent, a drop in equity prices of more than 50 percent, a decline in housing prices of more than 20 percent, and a sharp market shock for the largest trading firms.

March 8 The U.S. Labor Department reports that the unemployment rate fell to 7.7 percent in February, the lowest since December 2008.

Fitch Ratings, Inc. ("Fitch") cuts Italy's sovereign credit rating, citing the abrupt emergence of fresh political turmoil that could push one of the eurozone's most pivotal economies, already in a deep slump, into a further slowdown.

March 15 In the largest-ever settlement of an insider-trading action, SAC Capital Advisors ("SAC"), the giant hedge fund owned by the billionaire investor Steven A. Cohen, agrees to pay U.S. securities regulators $602 million to resolve a civil lawsuit related to improper trading at the fund. The landmark penalty exceeds the fines meted out in the 1980s-era scandals involving Ivan F. Boesky and Michael R. Milken. It also underscores SAC's central role in the government's recent push to prosecute illegal conduct on trading desks and in executive suites, an effort that has yielded about 180 civil actions and more than 75 criminal prosecutions.

March 16 Eurozone leaders and the International Monetary Fund ("IMF") announce an unprecedented levy on all deposits in Cypriot banks as the sting in the tail of a €10 billion bailout for the near-bankrupt government in Nicosia. Intended to apply to everyone from pensioners to Russian oligarchs alleged to have billions stashed away in what officials say is a bloated Cypriot banking sector, the "stability levy" immediately raises a flood of concerns among finance experts over a possible bank run in bigger eurozone economies, where fragile public finances are also under scrutiny. The "upfront, one-off" tax is expected to raise €5.8 billion on top of the loans still to be finalized by eurozone parliaments. The levy consists of charges of 9.9 percent on deposits exceeding €100,000 and 6.75 percent on lesser deposits. Pending execution of the levy, all Cypriot banks are forbidden to allow withdrawals, but cash machines are emptied.

March 25 EU leaders agree on a bailout package intended to keep Cyprus in the eurozone and rebuild its devastated economy. The deal drastically prunes the size of Cyprus's oversized banking sector, bloated by billions from Russia and elsewhere in the former Soviet Union. The deal scraps the highly controversial idea of a tax on bank deposits, although it would still require forced losses for depositors and bondholders.

March 27 The Bank of England informs U.K. lenders that they need to raise £25 billion ($38 billion) of additional capital to cover bigger potential losses on commercial real estate and from the eurozone.

A U.S. bankruptcy court approves American Airlines' historic merger with US Airways Group, Inc., but withholds approval of a $19.9 million severance payment for Tom Horton, the chief executive of American's parent, AMR Corporation. The merger would create the world's largest airline, with an expected market value of approximately $11 billion. AMR Corp.'s next step is to file a chapter 11 plan based on the merger, which is still subject to regulatory approval.

April 1 — Automatic adjustments to the dollar amounts specified in various provisions of the U.S. Bankruptcy Code, other related statutes, accompanying rules, and official forms that are mandated every three years by section 104 of the Bankruptcy Code take effect.

A California bankruptcy court denies a bondholder group's motion to dismiss the chapter 9 case of Stockton, California, making the municipality the largest U.S. city ever to successfully file for chapter 9 protection. The city's daunting task of drafting a confirmable restructuring plan will test a municipality's ability to puncture the California pension system. Stockton is trying to reduce its $900 million liability to the California Public Employees' Retirement System (CalPERS), its largest creditor.

April 2 — Eurostat reports that unemployment in the eurozone rose to yet another record high in the first two months of the year, providing confirmation that the economy remains in a deep freeze. The jobless rate reached 12 percent in both January and February, the highest since the creation of the euro in 1999. For the overall EU, the February jobless rate rose to 10.9 percent from 10.8 percent in January, with more than 26 million people without work across the 27-nation bloc.

Mortgage giant Fannie Mae reports that it earned $7.6 billion in the last quarter of 2012, the biggest quarterly profit in its history. The gain was driven by an improving housing market that has lifted home prices and a $3.6 billion legal settlement with Bank of America. U.S. taxpayers spent $116 billion to rescue Fannie during the financial crisis. The company has so far paid back $35.6 billion. Its smaller rival, Freddie Mac, earlier reported a record $11 billion profit. Nearly all of that will be paid as dividends to the Treasury, as partial payback for the $188 billion in bailout funds the two companies needed after being seized by the government in 2008.

April 4 — A report by Louis J. Freeh, the bankruptcy trustee for MF Global Holdings, lays much of the blame for the company's 2011 demise at the feet of former chief executive (and ex-New Jersey Governor) Jon S. Corzine, accusing him of implementing trading strategies with minimal oversight and exceeding board-approved limits for some European trades the company made under his stewardship.

April 8 — Former U.K. Prime Minister Margaret Thatcher dies from a stroke at 87. During her tenure (1979 to 1990), Thatcher, the longest-serving British Prime Minister in the 20th century and the only female to hold the office, introduced a series of political and economic initiatives to reverse high unemployment and Britain's struggles in the wake of the Winter of Discontent and an ongoing recession. Her political philosophy and economic policies emphasized deregulation (especially in the financial sector), flexible labor markets, the privatization of state-owned companies, and reducing the power and influence of trade unions.

April 18 — Germany's Lower House of Parliament approves the bailout package for Cyprus, bringing an end to months of debate in Berlin. The package includes €9 billion ($11.7 billion) in contributions from EU members. The IMF is to contribute an additional €1 billion.

April 19 — Fitch strips Britain of its top AAA credit score, citing a weaker economic outlook that continues to hinder the country in its efforts to keep its debt under control.

April 24 — An eight-story building housing several garment factories collapses in Dhaka, Bangladesh, killing more than 1,110 workers. It is the worst disaster in the history of the garment industry and forces global retailing giants such as Walmart, Sears, Target, Walt Disney, Tommy Hilfiger, Calvin Klein, Gap, and H&M to reexamine their reliance on cheap overseas labor working in sweatshop and unsafe conditions. Bangladesh, the world's second-largest apparel exporter after China, has the lowest minimum wage in the world—$37 per month—which has helped it attract billions of dollars in orders from the West.

April 29 Statistics released by the AOUSC indicate that U.S. bankruptcy filings fell 14.4 percent in the 12-month period ending on March 31, 2013, as compared to the 12-month period ending on March 31, 2012. There were 1,170,324 bankruptcies filed in the year ending on March 31, 2013, as compared to 1,367,006 in the year ending on March 31, 2012. Nonbusiness bankruptcy filings totaled 1,132,772, down from the 1,320,613 nonbusiness bankruptcy filings in the previous year. Business filings also fell, from 46,393 to 37,552. Chapter 11 filings totaled 9,811, down from 11,339 in the previous year. Chapter 12 filings totaled 463, down from 606 in the previous year.

The U.S. Treasury announces that, for the first time since 2007, it is planning to make a down payment on the federal debt. Due to government spending cuts and higher tax receipts, the Treasury states that it expects to repay $35 billion in debt during the second quarter of 2013, compared to an earlier forecast that it would have to borrow $103 billion. The budget deficit has been shrinking more than expected. In the 12 months through March 2013, the deficit totaled $911 billion, or 5.7 percent of gross domestic product ("GDP"). In the first three months of CY 2013—that is, since the increase in payroll and income tax rates took effect on January 1—the deficit averaged just 4.5 percent of GDP on a seasonally adjusted basis, less than half the peak annual deficit of 10.1 percent of GDP in FY 2009.

April 30 Eurostat reports that the unemployment rate in the 17-nation eurozone ticked up to a record 12.1 percent. For the 27-nation EU, the jobless rate is unchanged at 10.9 percent. Eurostat estimates that 26.5 million men and women are unemployed in Europe, including 5.7 million young people. Jobless figures for both the eurozone and the EU are the highest Eurostat has reported since it began keeping the data in 1995, in the days before the euro.

A new claim-trading fee of $25 per claim approved by the Judicial Conference of the U.S. in September 2012 becomes effective in U.S. bankruptcy courts. CY 2012 saw 18,632 claim trades worth more than $41 billion in 500 bankruptcy cases, according to SecondMarket, Inc. If the fees had been in effect, bankruptcy courts would have collected $465,800 from those trades.

May 3 The U.S. Labor Department announces that the U.S. unemployment rate fell to 7.5 percent in March.

The Dow briefly surges over the 15,000 mark for the first time ever. The S&P 500 closes at 1,613.91, the highest ever, and the tech-laden NASDAQ composite index closes at 3,377.60, its highest trading level in more than 12 years.

May 5 French Finance Minister Pierre Moscovici declares the era of austerity over after his German counterpart offered flexibility on deficit cutting amid renewed bickering between Europe's two biggest economies. The gap between the French Socialist finance chief's view and the election-year positioning of Germany's Wolfgang Schäuble underscores the divergence between their economies and the wrangling that has marked the crisis since François Hollande replaced Nicolas Sarkozy as the French leader a year ago.

May 7 Moody's reports that the number of U.S. municipal bond defaults has increased since the financial crisis began, but those defaults remain few in number. In 2012 there were five Moody's-rated defaults and 23 since the beginning of the recession in 2008, with an average of 4.6 defaults per year, up from 1.3 in the 1970–2007 period.

May 8 Freddie Mac announces that it earned $4.6 billion in the first quarter of 2013, helped by a stronger housing market. Freddie also states that it will pay a dividend of $7 billion to the U.S. Treasury Department in June and that it will not request any additional federal aid for the fourth consecutive quarter.

May 9 The CFPB publishes a report ("Student Loan Affordability: Analysis of Public Input on Impact and Solutions") warning of the potential domino effect that mounting student loan debt could have on other sectors of the U.S. economy, most notably the recovering housing market. There are more than 38 million student loan borrowers, with over $1.1 trillion in outstanding debt, according to the CFPB. While federally guaranteed student loans through the U.S. Department of Education frequently provide income-based repayment plans for borrowers with financial hardship, as well as rehabilitation options for borrowers who default on their loans, such practices are not common among privately backed student loans. There are approximately 850,000 private student loans in default, with an outstanding balance of roughly $8 billion.

May 10 The financially troubled U.S. Postal Service posts a net loss of $1.9 billion in the second quarter of FY 2013, compared with a $1.3 billion loss in the previous quarter, when holiday shopping and heavy spending on political advertising during the 2012 election helped the agency. The Postal Service continues to lose $25 million per day as it waits for Congress to pass legislation to overhaul the postal system.

A U.S. bankruptcy court approves the merger of chapter 11 debtor AMR Corp. (the parent of American Airlines) and US Airways. Subject to regulatory approvals and approval by US Airways shareholders, completion of the merger is expected in the third quarter of 2013.

The U.S. government reports a rare surplus of $113 billion for April 2013, the largest in five years and a sign of the nation's improving finances. Steady economic growth and higher tax rates have increased tax revenue in recent months, keeping the 2013 annual budget deficit on pace to be the smallest since 2008. Through the first seven months of the budget year, the deficit was $488 billion, less than last year's deficit of $720 billion over the same period. Even with the improvement, however, the deficit for the full year will still be large: the U.S. Congressional Budget Office ("CBO") expects it will reach $845 billion when the budget year ends on September 30. Although that would be the first annual deficit below $1 trillion since 2008, it would still be the fifth-largest deficit in U.S. history.

May 14 The emergency manager for the City of Detroit releases a 44-page report detailing the city's financial woes. The report describes long-term obligations of at least $15 billion, unsustainable cash flow shortages, and miserably low credit ratings that make it difficult to borrow. City operations in Detroit are portrayed as being in need of significant repair, including overhauls of the city's police and fire departments. Retirees from the city now outnumber current workers by more than two to one, and pension and health-care costs must be addressed. At least 60,000 parcels of land across the city are vacant, as are 78,000 buildings.

A report is issued by the Bipartisan Policy Center stating that the U.S. Congress should consider changes to the Bankruptcy Code to improve the process of winding down troubled banks, addressing the "too big to fail" ("TBTF") issue in an effort to ensure that the problems of systemically important financial institutions can be resolved without triggering a market panic or bailout. The report states that the TBTF problem arises when government officials must choose between bailouts or the collapse of the financial system. If those two choices are the only ones available, officials will typically opt for a bailout, and regulators must have an alternative.

May 23 The CBO lowers its estimate on the lifetime cost of the U.S. government's Wall Street bailout program to $21 billion because of stock market gains. In its report on TARP, the CBO states that the cost estimate fell from the $24 billion included in the agency's previous report on TARP in October 2012. The $3 billion decrease in the estimated subsidy cost stems primarily from an increase in the market value of the government's investments in carmaker General Motors Co. ("GM"). By the CBO's estimate, $428 billion of the initially authorized $700 billion will be disbursed through TARP—the $419 billion already handed out and $9 billion in additional projected disbursements. The estimated costs stem largely from assistance to insurer American International Group, Inc. ("AIG"); aid to the automobile industry; and grant programs intended to avoid home mortgage foreclosures.

May 28 The S&P/Case-Shiller Home Price Indices indicate that U.S. home prices jumped 10.9 percent in March 2013 compared with the previous year, the most since April 2006. A growing number of buyers are bidding on a tight supply of homes, driving prices higher and helping the housing market recover. The indices also show that all 20 cities measured by the report posted year-over-year gains for the third straight month.

May 29 China's biggest pork producer, Shuanghui International, agrees to buy Smithfield Foods, the 87-year-old Virginia-based meat giant with brands like Armour and Farmland, for $7.1 billion in cash and debt. If completed, the deal would be the biggest takeover of an American company by a Chinese concern, but it must first overcome close examination by U.S. regulators tasked with clearing deals for national security.

May 31 Eurostat reports that unemployment in the 17 eurozone countries hit another record high (12.2 percent) in April.

June 4 Chapter 9 debtor Jefferson County, Alabama, announces plans to settle its sewer-related debt dispute by means of three refinancing agreements that will pay $1.8 billion to its major creditors, including JPMorgan Chase Bank, N.A. The agreements will "form the backbone" of the county's anticipated plan of adjustment. The county's sewer debt weighs in at approximately $3 billion, of which JPMorgan, bond insurers including Assured Guaranty Municipal Corp., and seven hedge funds hold about $2.4 billion, or 78 percent.

June 6 AIG and GM rejoin the S&P 500, marking a key milestone in the recovery of two companies that needed billions of dollars to stay afloat during the financial crisis. AIG received $182 billion in U.S. funds, while GM took $50 billion during the economic recession in 2008 and 2009.

June 7 The U.S. Labor Department reports that the unemployment rate ticked up to 7.6 percent in May.

June 11 The U.S. Trustee issues new guidelines for the payment of attorneys' fees and expenses in large chapter 11 bankruptcy cases (those with $50 million or more in assets and $50 million or more in liabilities). The updated guidelines will apply to cases filed on or after November 1, 2013.

June 14 The City of Detroit proposes to pay unsecured lenders less than 10 cents on the dollar as part of a restructuring plan that would invest $1.25 billion in public safety and blight removal. Detroit emergency manager Kevyn Orr also announces that the city will stop making payments on billions of dollars in unsecured municipal debt as part of a move to save cash, but that city employees and vendors will continue to be paid.

June 19 U.S. Federal Reserve Chairman Ben Bernanke announces that the Federal Reserve, increasingly confident in the durability of economic growth, expects to start pulling back later this year from its efforts to stimulate the economy. Bernanke states that the central bank intends to gradually scale down its monthly purchases of Treasury securities and mortgage-backed bonds, beginning later this year and ending when the unemployment rate hits 7 percent, which the Fed expects to happen by the middle of next year. The central bank would then take several more years to unwind the rest of its extraordinary stimulus campaign, slowly raising short-term interest rates from essentially zero to more normal levels after the jobless rate has fallen to 6.5 percent or lower.

June 20 British authorities tell five of the country's largest banks to raise a combined £13.4 billion ($20.7 billion) in extra capital by the end of the year to protect against future financial shocks. The demand is part of an effort by the Prudential Regulatory Authority to strengthen the capital reserves of British banks after many experienced huge losses during the financial crisis.

S&P reports that the total number of global corporate issuer defaults for 2013 stands at 43. Eighteen of the defaults are the result of missed interest, principal, or cash payments; 11 are due to bankruptcy filings; seven are due to distressed exchanges; four are confidential; one is the result of a failure to refinance or pay off a revolving credit facility; one is due to regulatory supervision; and one is due to subpar bond buybacks.

June 21 Faced with meager growth worldwide and a worrisome ebbing of Russia's own oil and gas revenues, President Vladimir Putin announces an economic stimulus program, along with a novel amnesty plan for imprisoned white-collar criminals, intended to improve investor confidence. He proposes to dip into the country's pension reserves for loans of up to $43.5 billion for three big infrastructure projects and other investments.

In a departure from long-established practice, the recently confirmed chairwoman of the U.S. Securities and Exchange Commission ("SEC"), Mary Jo White, announces that defendants will no longer be allowed to settle some cases while "neither admitting nor denying" wrongdoing. The policy change follows years of criticism that the SEC has been too lenient, especially with the large institutions that were at the center of the financial crisis.

June 26 EU finance ministers agree on a plan that would require shareholders and creditors (rather than governments) to take significant losses when banks collapse. The new system specifies the order in which banks' investors and creditors, and then their uninsured depositors (with deposits exceeding €100,000), will face losses. The agreement to "bail in" rather than bail out failing banks represents a new approach to the way the EU will address crises like the ones that crippled Cyprus and Ireland in recent years and threatened to sink the euro. The draft bill still needs the approval of the European Parliament before it can become European law.

June 27 The Irish government reports that Ireland slid into its second recession in three years during the first quarter of 2013. Consumers and businesses, still reeling from steep tax increases, government spending cuts, and a long stretch of sluggish economic activity, have sharply curbed spending. The announcement is sobering news, as Ireland prepares to become the first European country to exit its international bailout and politicians across Europe have promoted it as a model for the use of austerity measures to help countries emerge stronger from the crisis.

July 1 Interest rates on U.S. federally subsidized Stafford student loans double, soaring from 3.4 percent to 6.8 percent after Congress fails to reach a deal to avert the rate hike. If not for the rollback that President Obama will sign on August 9, the rate increase would have cost the average college student an additional $2,600.

Thomson Reuters reports that, despite a strong start that yielded several blockbuster transactions—Dell's proposed $24.4 billion sale to its founder; H.J. Heinz's planned $23 billion takeover by Berkshire Hathaway and 3G Capital; and Thermo Fisher Scientific's $13.6 billion purchase of Life Technologies—the first half of 2013 was the slowest first six months for mergers in four years. Deals worth about $996.8 billion were announced in that period, a sum that was down 13 percent compared with the year earlier. The number of deals announced worldwide for the first six months was 16,808, the fewest for the period since 2003. Many analysts are confused by the drop-off, as the price of borrowing money remains near historic lows, giving corporate buyers and private equity firms alike relatively low costs for acquisitions.

July 2 The U.S. Federal Reserve and the FDIC release "living wills" for four banks: Wells Fargo & Company, HSBC Holdings plc, The Royal Bank of Scotland Group plc, and BNP Paribas S.A., all of which fall under the category of nonbank financial institutions and bank holding companies with assets between $100 billion and $250 billion. The banks' plans divide their assets into several material entities, which would undergo various bankruptcy or receivership proceedings if the bank as a whole were to fail, giving the regulators a basic road map for the supposed worst-case scenario. The first wave of banks to file resolution plans occurred in July 2012, with the global behemoths with $250 billion or more in consolidated assets submitting their living wills, including Bank of America Corp., Barclays PLC, Citigroup Inc., Credit Suisse AG, Deutsche Bank AG, the Goldman Sachs Group Inc., JPMorgan Chase & Co., Morgan Stanley, and UBS AG.

July 9 The parent company of the New York Stock Exchange wins a contract to administer and improve the London Interbank Offered Rate ("Libor"), the benchmark interest rate, which has long been set by the British Bankers' Association. The move is a symbolic blow to a British financial industry that has been rocked by scandals and forced to look to the outside for leadership.

The U.S. Financial Stability Oversight Council, making its first nonbank financial company designations, selects American International Group and General Electric Capital Corporation for heightened supervision, citing the firms' interconnectedness within the financial system. The announcement by the council marks the first use of its authority under Title I of the Dodd-Frank Act to subject a nonbank financial company to consolidated supervision and enhanced prudential standards. Designation of the two firms subjects them to supervision by the Federal Reserve and to enhanced prudential standards.

July 10 The European Commission proposes creating a single entity for winding down failed eurozone banks. Under the Single Resolution Mechanism proposed, the European Central Bank ("ECB") would take the lead in determining when a bank within the group of countries that use the euro as their currency needs to be dismantled and would then supervise the process of winding down that financial institution in conjunction with national authorities.

July 11 U.S. Federal Reserve Chairman Ben Bernanke announces that the central bank will not begin to pare back its QE3 bond-buying program.

The U.S. Treasury reports that the U.S. posted a $116.5 billion budget surplus in June, the biggest surplus since April 2008.

July 12 Fitch cuts France's credit rating to AA+ from AAA on the basis of the country's uncertain economic outlook amid the ongoing eurozone crisis and the need for structural reform.

July 18 The financially embattled City of Detroit files for bankruptcy protection in the largest-ever chapter 9 case for a city in U.S. history.

The GAO releases a report examining the advantages and disadvantages of certain proposed bankruptcy reforms, including the possibility of "giving financial regulators a greater role in financial company bankruptcies." The report, entitled "Financial Company Bankruptcies: Need to Further Consider Proposals' Impact on Systemic Risk," found that proposals to increase the role of financial regulators in order to manage systemic risk may have "limited impact and raise certain implementation issues." The GAO is required under Dodd-Frank to report on ways to make the Bankruptcy Code "more effective in resolving certain failed financial companies."

July 19 — A Michigan state court rules that Detroit's chapter 9 filing violates the state constitution because it threatens the accrued benefits of retirees.

July 20 — At a summit in Moscow, G20 nations pledge to put growth before austerity, seeking to revive a global economy that "remains too weak" and adjusting stimulus policies with care so that recovery is not derailed by volatile financial markets. Finance ministers and central bankers sign off on a communiqué that acknowledges the benefits of expansive policies in the U.S. and Japan but highlights the recession in the eurozone and a slowdown in emerging markets.

August 2 — The U.S. Labor Department reports that the unemployment rate decreased to 7.4 percent in July.

August 8 — Michigan's Saginaw County calls off a planned $60 million bond offering in an indication that Detroit's unprecedented chapter 9 case is having reverberating effects on the $3.7 trillion municipal bond market.

August 9 — U.S. President Obama signs into law a measure restoring lower interest rates for student loans. The legislation links student loan interest rates to the financial markets. If the economy improves as expected, it will become more costly for the government to borrow money, and that cost would be passed on to students.

August 13 — After a decade of supporting consolidation in the airline industry, the U.S. Justice Department sues to block the proposed merger between American Airlines and US Airways. The move, joined by attorneys general from six states and the District of Columbia, surprises industry officials, who had expected little resistance to the deal, but it underscores a newly aggressive approach by the Justice Department's Antitrust Division, which has been more closely scrutinizing proposed mergers as the economy recovers.

August 14 — Eurostat reports that Europe broke out of recession in the second quarter of the year amid stronger domestic demand in France and Germany, ending a six-quarter downturn. The GDP of the 17-nation eurozone grew by 0.3 percent in the April–June period from the previous three months. On an annualized basis, the eurozone grew by 1.2 percent in the second quarter, short of the second-quarter showing of 1.7 percent by the U.S. and 2.6 percent by Japan. This figure is nonetheless a relief to Europe, which has weathered an unemployment rate that has risen to 12.1 percent and a sovereign debt crisis that raised existential questions about the euro. The economy of the EU as a whole, which consists of 28 nations, also grew by 0.3 percent in the second quarter.

August 22 — A study conducted by accounting experts at Duke University suggests that companies are reasonably good predictors of their own bankruptcies, lending weight to an unpopular new accounting rule that would require management to discuss company insolvency prospects in securities filings. The study looked at the "management discussion and analysis" section of SEC filings for 262 companies that went bankrupt between 1995 and 2011. The researchers looked for either an explicit mention of insolvency or subtler language that suggested a rocky future, such as "liquidate," "deficit," and "challenging." It found an 85 percent correlation, 50 percent being pure chance and 100 percent being the ability to pinpoint bankruptcies. Other indicators, such as auditor opinions and working capital ratios, bumped the precision to 91 percent. According to the authors, the findings support the new rule proposed by the Financial Accounting Standards Board, which sets generally accepted accounting rules for U.S. companies, mandating these "red flag" disclosures in 10-K filings.

August 26 — The City of Harrisburg, Pennsylvania, reaches an agreement with its creditors to restructure the city's debt outside bankruptcy. A 357-page restructuring plan dubbed the "Harrisburg Strong Plan" is filed with the state appellate court that is expected to consider the plan's confirmation in the next two to three weeks. The two key components of the plan are the sale of Harrisburg's garbage incinerator and the leasing of its parking assets.

August 30 The Central Statistical Office in New Delhi releases statistics showing that India's economy slowed in early summer to its weakest pace since the bottom of the global economic downturn in 2009. The accumulating signs of economic distress—slower growth, a widening current-account deficit, higher oil prices, and rising inflation in general—suggest that the month-long fall of the Indian rupee in currency markets may be a symptom of fundamental troubles in the Indian economy and not just part of the broader difficulties experienced by Asian emerging-market currencies in recent weeks. Broader investor disenchantment with emerging markets has been compounded by worries about India's economy, the third-largest in Asia after China's and Japan's. Manufacturing and mining have been hit the hardest.

September 3 The U.S. Federal Reserve and the FDIC release a guide to be followed by smaller banks (those with $50 million to $100 million in assets) as they prepare Dodd-Frank–mandated "tailored resolution plans." In the plans, the banks must provide hedging strategies, lists of counterparties, and other information that could be important to winding down a bank during a crisis.

September 6 The U.S. Labor Department reports that the unemployment rate decreased to 7.3 percent in August.

September 12 A U.S. bankruptcy court confirms a chapter 11 plan for AMR Corp. that hinges on the now uncertain $11 billion merger with US Airways Group, Inc.

EU legislators overwhelmingly approve a law that puts 130 of the eurozone's largest banks under the direct scrutiny of the ECB. To take effect, however, the measure still needs approval from the EU governments, although that is expected to be a formality. The Single Supervisory Mechanism, the body it creates, is expected to start work during the autumn of 2014 after the ECB conducts a "stress test" on the lenders coming within its purview.

September 16 *Forbes* publishes its 34th annual listing of the richest people in America—"The Forbes 400." The combined wealth of those on the list is $2 trillion, up from $1.7 trillion in 2012, and the highest ever, due in part to the strength of both the U.S. stock and real estate markets. Bill Gates retains the top spot on the Forbes 400 for the 20th straight year, at $72 billion. He is once again the world's richest person, having passed up Mexico's Carlos Slim in May. Warren Buffett (No. 2) is the biggest dollar gainer this year at $58.5 billion, up $12.5 billion from last year. Larry Ellison (No. 3) remains unchanged on the list with $41 billion. Mark Zuckerberg is the second-biggest gainer; ranked 20th with $19 billion, he returns to the Top 20 after dropping to No. 36 last year, while Carl Icahn is back in the Top 20 for the first time since 2008, ranked 18th with $20.3 billion.

The World Economic Forum releases its Global Competitiveness Index for 2012–2013, which ranks Switzerland atop the list of the world's strongest economies. The list is based upon 12 pillars, including institutions, infrastructure, microeconomic environment, health and primary education, higher education and training, goods market efficiency, labor market efficiency, financial market development, technological readiness, market size, business sophistication, and innovation. Rounding out the Top 10 on the list are Singapore, Finland, Sweden, the Netherlands, Germany, the U.S., the U.K., Hong Kong, and Japan.

September 17	The U.S. Census Bureau reports that 46.5 million Americans are still living in poverty. Meanwhile, median household income fell slightly to $51,017 per year in 2012, down from $51,100 in 2011. Income has tumbled since the recession hit and is still 8.3 percent below where it was in 2007. Americans were richest in 1999, when median household income was $56,080, adjusted for inflation. Women made 77 percent of what men made, unchanged from the year before but up from 61 percent in 1960. The recession pushed many more people into poverty. In 2010, the poverty rate equaled 15.1 percent and has barely fallen since then, the first time since 1965 that the poverty rate has remained at or above 15 percent three years running. Those making $23,492 per year for a family of four, or $11,720 for an individual, were considered to be living in poverty. While the ranks of the poor are still elevated from the recession, overall poverty remains far below the 1959 rate of 22.4 percent, when the Census first began tracking the data. Over the last 25 years, the poverty rate has averaged just over 13 percent.
September 18	The U.S. Federal Reserve announces that it has decided not to begin tapering off the third round of its QE3 program, sending markets soaring. The S&P 500 and the Dow close at all-time highs of 1,725.53 and 15,676.94, respectively.
September 19	A Pennsylvania Commonwealth Court judge announces that she will approve a financial recovery plan aimed at bringing the City of Harrisburg out from under the shadow of hundreds of millions of dollars in debt and allowing it to avoid a chapter 9 bankruptcy filing. The plan addresses more than $350 million in debt by providing for, among other things, the sale of a debt-laden trash-to-energy incinerator facility and the monetization of city parking facilities through their lease to a private company.
September 27	The Obama administration announces a plan committing at least $320 million in federal aid to the City of Detroit as it attempts to reorganize in chapter 9.
September 29	The U.S. government barrels toward its first shutdown in 17 years after the Republican-run House, choosing a hard line, votes to attach a one-year delay of President Obama's health-care law and the repeal of a tax to pay for it to legislation to keep the government running. The House's vote all but ensures that large parts of the government will be shuttered as of 12:01 a.m. on October 1. More than 800,000 federal workers deemed nonessential face furloughs; millions more could be working without paychecks.
September 30	The U.S. Postal Service defaults on a $5.6 billion payment for retiree health benefits. Postal officials have long complained about a congressional mandate that requires them to set aside billions of dollars for a retiree health-care fund each year, pointing out that no other federal agencies are required to prefund for retirees this way. The Postal Service defaulted on these prefund payments last year as well. In FY 2012, the Postal Service lost a total of $15.9 billion, including $11.1 billion in defaulted payments that it owes to prefund health benefits for retirees. In addition, the Postal Service hit its debt limit last year, which means that it cannot borrow any more money from the U.S. Treasury. The Postal Service plans to cut 150,000 workers through 2015 and recently proposed a price hike for stamps, but officials have said that the crisis will not go away until Congress eliminates the prefunding requirement.
October 1	At midnight, 800,000 U.S. federal workers are thrown temporarily out of work as the U.S. government partially shuts down for the first time in 17 years in a standoff between President Obama and congressional Republicans over health-care reform. However, the standoff does not prevent the Obama administration from rolling out enrollment in health insurance marketplaces, the centerpiece of the most ambitious U.S. social program in five decades. Republicans in the House of Representatives are trying to block the Affordable Care Act by tying continued government funding to measures that would undermine it, but the Democratic-controlled Senate has repeatedly rejected those efforts.

October 8	U.S. President Obama nominates Janet L. Yellen to lead the U.S. Federal Reserve System. If confirmed by the Senate, Ms. Yellen, 67, would be the first woman to lead the Fed.
October 9	In its "Global Financial Stability Report," the IMF warns that the world's financial system is still not as safe as it should be five years after the fall of investment bank Lehman Brothers. One of the main reasons for the concerns is the winding down of the U.S. Federal Reserve's $85 billion-a-month QE3 strategy. The report states that the primary challenge will be managing the side effects after the eventual withdrawal of accommodative monetary policy in the U.S.
October 15	Wilbur Ross, whose Talmer Bancorp agreed to invest $97 million to take over Capitol Bancorp's stakes in its four remaining banks, announces that such deals without government assistance are fast becoming the model for rescuing troubled banks. His private equity arm, WL Ross & Co., has invested more than $2 billion in recent years to buy up struggling regional banks in the U.S. The use of chapter 11 to acquire banks before they fail could also provide a welcome respite to weary bank regulators such as the Federal Reserve, which is in charge of bank holding companies, and the FDIC, the agency in charge of taking over what is left of the banks after their assets are seized and sold.
October 16	Puerto Rico's Governor, Alejandro García Padilla, denies that Puerto Rico is near bankruptcy or might need U.S. federal intervention. The territory is struggling with $70 billion in public debt and a 13.9 percent unemployment rate, higher than that of any U.S. state.
October 17	U.S. President Obama signs a bill that opens the government, summons more than 300,000 government employees back to work, and raises the nation's $16.7 trillion borrowing limit, putting an end to a 16-day federal government shutdown and ending the threat of a potential default on U.S. obligations.
October 18	The Centre for Economic Policy Research, a network of more than 700 economists based primarily in European universities, issues a report stating that: (i) it is too early to declare that the eurozone has emerged from recession; and (ii) the single-currency area's return to growth in the second quarter may prove temporary. By contrast, figures released in August 2013 by the EU's official statistics agency, Eurostat, showed that Europe broke out of recession in the second quarter of the year amid stronger domestic demand in France and Germany, ending a six-quarter downturn.
October 22	The U.S. unemployment rate ticks down to 7.2 percent, reflecting continuing lackluster job growth and suggesting that the U.S. Federal Reserve will continue its QE3 bond-buying stimulus program.
October 23	Bank of America is found liable by a jury for having sold defective mortgages, a victory for the government in its aggressive effort to hold banks accountable for their role in the housing crisis. The jury also found a top manager at Bank of America's Countrywide Financial unit personally liable. Prosecutors have asked that Bank of America pay a fine of $848 million.
October 29	The Dutch lender Rabobank admits to criminal wrongdoing by its employees and agrees to pay more than $1 billion in criminal and civil penalties to settle investigations by U.S., British, and other authorities into the Libor scandal. The bank is the fifth financial firm to settle accusations that its employees manipulated Libor.

October 30	The U.S. government reports that the budget deficit for FY 2013 dropped to $680.3 billion, less than half of what it was when President Obama first took office; it is the first time in five years that the shortfall has been below $1 trillion. While it remains the fifth-largest deficit in history, it is the lowest since the figure of $458.6 billion in 2008. Among the reasons cited are a growing economy, the end of a temporary Social Security tax cut, higher tax rates on wealthy Americans, and the series of across-the-board spending cuts known as "sequestration."
October 31	Eurostat reports that the number of unemployed in the 17-nation eurozone reached a record high of 12.2 percent in September as the bloc's nascent recovery failed to generate jobs.
November 1	U.S. food stamp cuts take effect, affecting nearly 48 million people, or one in seven Americans. The change in the food stamp program, officially known as the "Supplemental Nutrition Assistance Program," or "SNAP," cuts monthly benefits by 13.6 percent—or, more precisely, ends a 13.6 percent increase in SNAP benefits from the American Recovery and Reinvestment Act of 2009. The food stamp cuts, which are projected to reduce federal spending by $5 billion in the current fiscal year and $6 billion over the next two years, are separate from additional cuts that House and Senate negotiators are considering as they work out a farm bill, of which the food stamp program is a component.
November 7	The Royal Bank of Scotland agrees to pay the SEC $153.7 million to settle charges that it misled investors into buying a risky mortgage-backed security offering, the latest move in a crackdown on the mortgage practices that fueled the financial crisis.
	Typhoon Haiyan (known in the Philippines as "Typhoon Yolanda"), unofficially the strongest recorded tropical cyclone to make landfall, with wind speeds up to 315 km/h (195 mph), strikes the Philippines, killing thousands, displacing millions, and wreaking havoc on the island nation's economy.
November 8	In the wake of the 16-day U.S. government shutdown, the U.S. Labor Department reports that the unemployment rate rose from 7.2 percent to 7.3 percent.
	S&P downgrades France's credit rating one notch from AA+ to AA, saying the government's current policy initiatives do not appear capable of addressing impediments to economic growth.
November 12	The U.S. Justice Department reaches a preliminary agreement to settle its fight with American Airlines and US Airways over their proposed merger.
November 13	The U.S. Energy Information Administration reports that U.S. domestic oil production in October exceeded imports for the first time in nearly two decades and that total crude oil imports were the lowest since February 1991.
November 19	JPMorgan Chase and the U.S. Justice Department finalize a $13 billion settlement (the largest fine paid by a bank in U.S. history), punctuating a long legal battle over the risky mortgage practices that became synonymous with the financial crisis. The civil settlement resolves an array of state and federal investigations into JPMorgan's sale of troubled mortgage securities to pension funds and other investors from 2005 through 2008. Of the $13 billion total settlement, $7 billion will go to the Federal Housing Finance Agency, which oversees Fannie Mae and Freddie Mac, and to other investors that sustained losses on securities sold by JPMorgan and by two banks it bought during the financial crisis, Bear Stearns and Washington Mutual. Another $4 billion is earmarked for mortgage relief for homeowners. The only penalty would be $2 billion to $3 billion for the dubious securities sold by JPMorgan itself. The $13 billion deal comes just days after the bank struck a separate $4.5 billion deal with a group of investors over the sale of soured mortgage-backed securities.

November 20	The Dow closes above 16,000, its first daily finish over that threshold.
November 22	A bankruptcy judge confirms a chapter 9 plan for Jefferson County, Alabama, that cuts its $3.1 billion sewer debt nearly in half but places a heavy repayment burden on residents for decades to come. The plan incorporates a sewer bond–repayment strategy and difficult cost-cutting measures that elected leaders have implemented since putting the 658,000-resident county under chapter 9 protection two years ago. The plan is premised upon a negotiated reduction of the county's bond debt by approximately $1.4 billion.
November 29	Eurostat reports that unemployment in the 17-member eurozone dropped to 12.1 percent in October, the first drop in the unemployment rate since February 2011. The unemployment rate in the 28 EU countries was unchanged at 10.9 percent.
December 3	A U.S. bankruptcy court rules that the City of Detroit is eligible to file for chapter 9 bankruptcy and that employee pensions are not entitled to any "heightened" protection in chapter 9, notwithstanding provisions under the Michigan Constitution. Meanwhile, Alabama's Jefferson County closes on a $1.78 billion sewer bond deal, ending what had been the biggest U.S. municipal bankruptcy before Detroit filed for chapter 9 protection in July.
	The EU fines a group of global financial institutions (including, for the first time, two American banks) a combined €1.7 billion to settle charges that they colluded to fix Libor and the Euro Interbank Offered Rate (Eurobor).
	The Illinois legislature passes a deal to shore up the state's debt-engulfed pension system by trimming retiree benefits and increasing state contributions. With one of the U.S.'s worst-financed state employee pension systems—some $100 billion in arrears—Illinois has been the focus of attention across the country as states and municipalities struggle to come to grips with their own public pension problems.
December 6	The U.S. Department of Labor reports that the unemployment rate for November fell to 7 percent, down from its most recent peak of 10 percent in October 2009.
December 9	AMR Corp. and US Airways Group, Inc., announce the completion of their merger to officially form American Airlines Group Inc., the world's largest airline, with a global network of nearly 6,700 daily flights to more than 330 destinations in over 50 countries and employing more than 100,000 people worldwide.
	The U.S. Treasury sells the last of its remaining 31.1 million shares of GM stock. The taxpayer loss on the GM bailout is $10.5 billion.
December 10	Five U.S. federal agencies vote to approve the "Volcker Rule," the keystone of the most sweeping overhaul of financial regulation since the Great Depression. The rule bans banks from most forms of proprietary trading. It also requires banks to shape compensation so that it does not reward "prohibited proprietary trading" and requires chief executives to attest that they have established programs for complying with the rule.
	U.S. House and Senate budget negotiators agree on a budget deal that would raise military and domestic spending over the next two years, shifting the pain of across-the-board cuts to other programs over the coming decade and raising fees on airline tickets to pay for airport security. The agreement, which would finance the government through September 30, 2015, would eliminate $63 billion in across-the-board domestic and military cuts but would provide $23 billion in deficit reduction by extending a 2 percent cut to Medicare providers through 2023.

December 16 Euler Hermes, the global leader in trade credit insurance, publishes its latest research on global business insolvencies, forecasting that global insolvencies will increase by 2 percent in 2014, but that, by volume, the total number of 2014 insolvencies will be 24 percent higher than the pre-crisis (2000–2007) average.

December 18 The U.S. Federal Reserve announces that it will reduce its purchases of Treasury bonds and mortgage-backed securities by $10 billion a month beginning in January 2014. The Fed will still buy $75 billion worth of these assets every month, but the $10 billion reduction is a sign that it feels confident enough about the economy to dial back its QE3 strategy.

EU finance ministers reach an agreement on a general approach to winding down failed lenders. The future Single Resolution Mechanism and Single Resolution Fund are key pillars of the planned banking union for the eurozone, as well as an overhaul of financial rules throughout the 28-nation EU to keep countries from being dragged down by weak financial institutions. The agreement still has to pass muster with EU legislators, who have voiced concerns about being cut out of financing decisions concerning collapsing banks.

December 20 S&P strips the EU of its AAA credit rating in the wake of a bitter budget battle and the debt problems afflicting a number of its members.

The U.S. Commerce Department reports that the U.S. economy grew at a surprisingly robust 4.1 percent annual pace in the third quarter, the strongest advance in nearly two years and only the third time since 2006 that the economy had expanded so quickly from one quarter to the next. It is the latest evidence that the generally sluggish recovery is gaining strength.

Deutsche Bank agrees to pay $1.9 billion to settle claims that it misled Fannie Mae and Freddie Mac over the quality of home loans bundled into mortgage-backed securities, becoming the latest big bank to reach a settlement with federal housing regulators. The Germany-based bank is the sixth entity to reach a settlement with the Federal Housing Finance Agency, which had sued 18 banks and financial institutions in September 2011, alleging that the institutions misled Fannie and Freddie before the financial crisis over the creditworthiness of borrowers and the quality of the loans that were packaged into securities.

December 26 U.S. President Obama gives his imprimatur to a two-year budget that alleviates the harshest effects of automatic budget cuts on the Pentagon and domestic agencies, ending the threat of another partial government shutdown in January 2014.

December 27 S&P reports that the number of corporate defaults for 2013 rose to 75, compared to 84 corporate defaults during the full year of 2012.

December 28 Long-term unemployment benefits implemented in 2008 pursuant to a federal emergency relief program expire for 1.3 million jobless U.S. workers after an extension of the program is omitted from the two-year budget deal approved by President Obama on December 26.

December 29 France’s top court approves a proposal for companies to pay a 75 percent tax on annual salaries exceeding €1 million, in line with President François Hollande’s drive to limit executive pay at a time of economic hardship.

TOP 10 BANKRUPTCIES OF 2013

As in 2012, banking and financial services companies were conspicuously absent from the Top 10 List of public-company bankruptcy filings for 2013. Only one brokerage firm and a single bank holding company made the cut, further demonstrating that the chaff in the banking and financial services sectors has largely been winnowed in the aftermath of the 2008 financial crisis. Four of the Top 10 filings in 2013 involved publishing or advertising media companies still struggling to adapt to the rapid transformation from print to web- and phone-based forms of media. The remaining Top 10 filings were made by companies in the shipping, manufacturing, distilling, and entertainment industries. Each company gracing the Top 10 List for 2013 entered bankruptcy with assets valued at more than $1 billion. Seven of the 10 both filed for and emerged from bankruptcy in 2013.

Cengage Learning Inc. ("Cengage"), a textbook-publishing company based in Stamford, Connecticut, with 5,500 employees, grabbed the brass ring for the largest public-company bankruptcy filing of 2013. Cengage filed for chapter 11 protection on July 2, 2013, in New York with $7.5 billion in assets. The filing was part of a restructuring agreement with lenders that will eliminate approximately $4 billion of its $5.8 billion in debt, much of it incurred in connection with the 2007 acquisition of Cengage by a partnership led by private equity company Apax Partners LLP. One of the nation's largest publishers of textbooks and other educational content, Cengage also sought bankruptcy protection to support its long-term business strategy of transitioning from traditional print models to digital educational and research materials.

Plano, Texas-based ***Penson Worldwide, Inc.*** ("Penson"), a provider of financial clearing services and related products, traded into the No. 2 position on the Top 10 list for 2013 when it filed for chapter 11 protection in Delaware on January 11, 2013, with $6.2 billion in assets and plans to sell off its assets, including U.S. operating subsidiary Nexa Technologies, Inc. Once a major handler of securities trades for U.S. brokerages, Penson never recovered from the global financial crisis. The company stated that its bankruptcy filing was triggered by lower equity trading volume that, combined with historically low interest rates, led to a liquidity crisis. The Delaware bankruptcy court confirmed a liquidating chapter 11 plan for Penson on July 31, 2013.

Yellow Pages company ***Dex One Corporation*** ("Dex One") took the No. 3 spot on the Top 10 List for 2013 when it (re)turned the page into chapter 11 in Delaware on March 17, 2013, with $2.8 billion in assets. Dex One filed a prepackaged bankruptcy as part of a previously announced all-stock merger deal with rival SuperMedia LLC ("SuperMedia")—No. 9 on the 2013 Top 10 List. Dex One was created as the successor to directories-publishing giant R.H. Donnelley Corp., which emerged from chapter 11 protection in February 2010. Like the newspaper industry, the Yellow Pages business has not benefited from a broader advertising recovery, since more consumers and advertising dollars have migrated to the internet, accelerating the decline for the industry over the past few years. Now known as Dex Media, Inc., the merged companies exited from bankruptcy on April 30, 2013, as a marketing services company that helps local businesses reach potential customers. The merger brought together directory operations formerly part of Ameritech in Illinois, Qwest and Verizon, for the first time since the Bell System divestiture. Since merging, the two companies have continued to conduct business at the local market level under the SuperMedia and Dex One brands.

Athens-based ***Excel Maritime Carriers Ltd.*** ("Excel") steamed into the No. 4 berth on the Top 10 List for 2013 when it filed a prenegotiated chapter 11 case in New York on July 1, 2013, with $2.7 billion in assets to implement a restructuring with the help of a capital infusion of up to $50 million and the release of another $30 million in restricted cash. Excel owns and operates dry bulk carriers and provides worldwide seaborne transportation services for dry bulk cargoes, such as iron ore, coal, and grain, as well as bauxite, fertilizer, and steel products. The company owns a fleet of 39 vessels with a total stowage capacity of approximately 3.6 million dead-weight tonnage (DWT). Secured lenders were vastly under water at the time of the filing due to volatility and overall declines in charter rates.

Under the chapter 11 plan originally proposed by Excel, secured lenders were to receive a restructured $771 million credit facility and 100 percent of the reorganized company's stock. Through a side agreement, 60 percent of that stock would be transferred to Ivory Shipping Co., which is controlled by Excel chairman Gabriel Panayotides, allowing him to retain control of Excel. Unsecured bondholders

initially challenged the fairness of the plan, which proposed a 3 percent recovery to bondholders while effectively allowing Panayotides to maintain control of the company. However, Excel and its bondholders agreed on the terms of a revised plan in late November, and a confirmation hearing was scheduled for January 27, 2014.

Madison, Wisconsin-based ***Anchor BanCorp Wisconsin Inc.*** ("Anchor BanCorp") vaulted into the No. 5 position on the Top 10 List for 2013 when it filed for chapter 11 protection in Wisconsin on August 12, 2013, with $2.4 billion in assets and $2.43 billion in debt. Anchor BanCorp filed a prepackaged chapter 11 case, the highlight of which is an agreement whereby investors infused $175 million of new capital into the company in exchange for 96.7 percent of new common stock in the reorganized company. Anchor BanCorp's sole preferred shareholder, the U.S. Department of the Treasury, received 3.3 percent of the new common stock in the restructured company. Anchor BanCorp owed $110 million in Troubled Asset Relief Program ("TARP") funds as of July 31, 2013, the fifth-largest outstanding TARP investment. The new capital infusion was the keystone of a chapter 11 plan that the bankruptcy court confirmed on August 30, 2013. The funding allowed Anchor BanCorp to recapitalize AnchorBank, its bank subsidiary and Wisconsin's third-largest depository, with 55 branches. AnchorBank did not file for bankruptcy.

Milton, Georgia-based lead-acid battery manufacturer ***Exide Technologies*** ("Exide") powered into the No. 6 spot on the Top 10 List for 2013 when it filed for chapter 11 protection for the second time in little more than a decade in Delaware on June 10, 2013, with $2.2 billion in assets. With nearly 10,000 employees, Exide manufactures and supplies lead-acid batteries for transportation and industrial applications worldwide under the Centra, DETA, Exide, Exide Extreme, Exide NASCAR Select, Orbital, Fulmen, and Tudor brand names, among others. Rising production costs, intense competition, and reduced access to credit drained the battery maker's earnings and liquidity in recent years. In addition, Exide was hurt by the global economic retraction and trouble with toxic substance regulators in connection with its battery-recycling facility in California. In 2002, Exide filed a chapter 11 case to deal with $2.5 billion in acquisition debt. Its confirmed chapter 11 plan in that case eliminated $1.3 billion in debt.

The No. 7 position on the Top 10 List for 2013 went to Warsaw-based (but Mount Laurel, New Jersey-headquartered) ***Central European Distribution Corp.*** ("CEDC"), one of the largest producers of vodka in the world as well as Central and Eastern Europe's largest integrated spirit beverages business. Headed by Russian billionaire Roustam Tariko, CEDC filed for chapter 11 protection in Delaware on April 7, 2013, with $2.1 billion in assets to manage heavy bond debt by means of a prepackaged restructuring plan aimed at cutting approximately $700 million in liabilities. The distiller lost nearly 50 percent of its market value in 2012 amid slumping sales, rising debt, and management transitions. On May 13, 2013, CEDC obtained confirmation of its prepackaged chapter 11 plan. Under the plan, Tariko received 100 percent of CEDC's newly issued stock in return for a new $277 million capital infusion. Confirmation of the plan created an alliance between CEDC and Russian Standard, the rival vodka maker also owned by Tariko.

No. 8 on the Top 10 List for 2013 was dog-eared by ***RDA Holding Co.*** ("RDA Holding"), a New York City-based company that, through its subsidiaries, produces, publishes, and sells print and digital magazines (including the iconic, 91-year-old pocket-sized publication, *Reader's Digest*, the highest-circulated paid magazine in the world), along with books, music, and videos, through various media channels. RDA Holding reopened its chapter 11 book when it filed for bankruptcy protection for the second time in four years in New York on February 17, 2013, with $1.6 billion in assets. Having emerged from an earlier bankruptcy in February 2010 with a healthier balance sheet and a smaller publication footprint, RDA Holding returned to chapter 11 in an effort to further pare down its debt. RDA Holding was also hurt by continuing changes in the print media industry that caused declines in its North American book and home entertainment businesses, as well as certain portions of its European business. RDA Holding reprised its exit from chapter 11 after obtaining confirmation of a plan on June 28, 2013, that ceded control of the company to bondholders in exchange for the cancellation of $231 million in debt.

SuperMedia LLC ("SuperMedia") (formerly Idearc Media LLC ("Idearc")), a marketing company based in Dallas that provides print, mobile, and internet advertising to small- and

medium-sized businesses, snagged the No. 9 position on the Top 10 List for 2013. As discussed above, ninth-ranked SuperMedia, which emerged from the bankruptcy of Idearc in January 2010, filed a prepackaged chapter 11 case in Delaware on March 17, 2013, with $1.4 billion in assets for the purpose of consummating a merger with Yellow Pages company Dex One—No. 3 on 2013's Top 10 List. Since its merger with Dex One Corporation and exit from bankruptcy in April 2013, SuperMedia has operated as a subsidiary of Dex Media, Inc., the postmerger entity. Since merging, the two companies have continued to conduct business at the local market level under the SuperMedia and Dex One brands.

Atlantic City casino and resort owner ***Revel AC, Inc.*** ("Revel") folded into the final position on the Top 10 List for 2013 when it filed a prepackaged chapter 11 case in New Jersey on March 25, 2013, with $1.2 billion in assets. Built at a cost of $2.4 billion, Revel opened for business in April 2012 and began to falter almost immediately. Revel misread customer demand in the downtrodden New Jersey gambling mecca—consumers wanted inexpensive, fast, and simple options rather than over-the-top glamour. Revel exited bankruptcy on May 23, 2013, after the court confirmed a debt-for-equity-swap reorganization plan that pared more than $1.2 billion, or 80 percent, of $1.5 billion in debt from the company's balance sheet. Revel has 1,399 hotel rooms and a casino with more than 2,400 slot machines and 130 table games.

Other notable debtors (public and private) in 2013 included:

The City of Detroit, which became the largest U.S. city ever to seek bankruptcy protection when it filed a chapter 9 petition in Michigan on July 18, 2013. Detroit—which has lost 300,000 residents since 1995—is overwhelmed by as much as $18 billion in long-term liabilities, including $9.4 billion in special revenue bonds as well as debt related to the city's general fund and health-care benefits. Faced with a shrunken tax base, a 139-square-mile metropolitan area to maintain, and unsustainable health-care and pension costs, the city's expenditures have exceeded revenues in each of the last four years by an average of $100 million annually.

STX Pan Ocean Co. Ltd. ("STX"), a South Korean cargo-shipping company on behalf of which a chapter 15 petition was filed in New York on June 20, 2013, seeking recognition of the company's South Korean rehabilitation proceedings shortly after four STX vessels were detained in Washington, California, and Texas. The chapter 15 petition for STX, which suffered from a decrease in cargo traffic volume and ocean freight fares due to the global financial crisis, as well as an increased supply of ships from Chinese shipbuilders, listed $6.0 billion in assets and $4.4 billion in debt. The U.S. bankruptcy court entered an order recognizing STX's Korean reorganization as a "foreign main proceeding" on July 12, 2013.

Privately held Taiwanese (but Houston-headquartered) shipping company ***TMT USA Shipmanagement*** ("TMT"), which filed for chapter 11 protection in Texas on July 20, 2013, listing $1.5 billion in assets and $1.46 billion in debt, after the holders of $800 million in bank debt seized seven of its 17 vessels in ports from Antwerp to China. Owned by Taiwanese shipping magnate Nobu Su, TMT has suffered from the same drop in shipping rates that has plagued the entire industry since 2008.

Hoku Corp. ("Hoku"), a Pocatello, Idaho-based company that operates as a solar energy products and services company primarily in the U.S. Hoku filed a chapter 7 petition on July 2, 2013, in Idaho for the purpose of liquidating assets listed at $670 million. With Chinese backing, Hoku invested more than $600 million in a polysilicon plant in Pocatello that was never completed and has now been abandoned. Two failed auctions in the bankruptcy court yielded bids of no more than $5 million for the mothballed facility until the court sanctioned an $8.3 million offer for the plant on December 23, 2013, by a Washington State construction company.

St. Louis-based ***Furniture Brands International, Inc.*** ("Furniture Brands"), one of the largest U.S. furniture manufacturers—its brands include Broyhill, Lane, Drexel Heritage, and Thomasville. The company filed for chapter 11 protection in Delaware on September 9, 2013, with $618 million in assets and a plan to sell all but its Lane business to investment firm Oaktree Capital Management for $166 million. Like other domestic furniture manufacturers, Furniture Brands has been hurt by the lingering effects of the recession and by foreign competition. The company had sales of approximately $1 billion in 2012, roughly half of what it generated a decade ago, and has not made a profit since 2006. After an auction, the

bankruptcy court approved the sale on November 22, 2013, but to a different purchaser, private equity firm KPS Capital Partners LP, for $280 million.

Oklahoma City-based independent oil and natural gas exploration and production company ***GMX Resources Inc.*** ("GMX"), which filed for chapter 11 protection on April 1, 2013, in Oklahoma with $542 million in assets. GMX was a victim of depressed natural gas commodity prices and needed capital expenditures for oil and gas operations. It has proposed a chapter 11 plan whereby new common stock would be exchanged for approximately $500 million in bond debt, ceding control of the company to creditors.

Global Aviation Holdings Inc. ("Global Aviation"), a Peachtree, Georgia-based company that, through its subsidiaries, World Airways and North American Airlines, provides customized, nonscheduled passenger and cargo air transport services worldwide (both military and civilian). Global Aviation reprised its role as chapter 11 debtor for the second time in less than a year when it filed for bankruptcy on November 12, 2013, in Delaware, listing between $500 million and $1 billion in assets. The company traced its most recent financial difficulties to decreased demand for military cargo and passenger services and the shutdown of the U.S. government in October 2013, which significantly delayed payments owed to the carrier for military flights.

Fairport, New York-based newspaper publisher ***GateHouse Media, Inc.*** ("GateHouse"), which filed for chapter 11 protection in Delaware on September 27, 2013, with $470 million in assets and a prenegotiated plan to restructure approximately $1.2 billion in debt. At the end of 2012, GateHouse owned and operated 406 publications located in 21 states, including daily and weekly newspapers, shoppers, and Yellow Pages directories, as well as locally focused websites and mobile sites. On November 6, 2013, the bankruptcy court confirmed GateHouse's chapter 11 plan, which canceled existing stock and ceded control of the company to creditors. The plan, however, awarded warrants to old shareholders to purchase shares in New Media Investment Group Inc., a new holding company that also includes Local Media Group, a chain of 33 local papers in seven states run by GateHouse.

Boca Raton, Florida-based ***FriendFinder Networks, Inc. (f.k.a. Penthouse Media Group)*** ("FriendFinder"), publisher of the late Bob Guccione's iconic *Penthouse* magazine and the operator of numerous adult-entertainment and dating websites, which filed for chapter 11 protection in Delaware on September 17, 2013, with $452 million in assets to consummate a deal with noteholders that would reduce debt by $300 million in exchange for ownership of the company. While social media sites like Facebook and LinkedIn have boomed in recent years, FriendFinder has not turned a net profit since at least 2008. FriendFinder obtained confirmation of its debt-for-equity-swap chapter 11 plan on December 16, 2013, and emerged from bankruptcy, now known as PMGI Holdings Inc., on December 20, 2013.

Privately held, Mexico City-based telecommunications company ***Maxcom Telecomunicaciones S.A.B. de C.V.*** ("Maxcom"), which, together with 14 affiliates, filed for chapter 11 protection in Delaware on July 23, 2013, with $400 million in assets and $402 million in debt. Maxcom proposed a prepackaged plan for recapitalization and debt restructuring involving a $45 million cash infusion and tender offer for all its shares from private equity firm Ventura Capital Privado, S.A. The bankruptcy court confirmed Maxcom's prepackaged chapter 11 plan on September 10, 2013.

LEGISLATIVE/REGULATORY DEVELOPMENTS

United States—Commission to Study Proposed Changes to Chapter 11. On April 19, 2012, a commission established by the American Bankruptcy Institute (the "ABI Commission") to study the reform of chapter 11 of the Bankruptcy Code convened its first public meeting in Washington, D.C. The ABI Commission, which comprises nearly 130 corporate restructuring experts serving on 13 advisory committees, conducted 11 public field hearings during 2013. The wide range of testimony addressed proposals to: (i) change bankruptcy venue rules; (ii) abolish the hard deadline on chapter 11 plan exclusivity; (iii) reduce reorganization costs in small- to middle-market cases; (iv) establish a uniform structure and process for section 363 sales; (v) recognize the new value corollary to the absolute priority rule; (vi) adopt uniform procedures for filing section 503(b)(9) claims for administrative expenses; (vii) change the rules governing section 524(g) asbestos trusts; (viii) amend rules governing pensions and retiree benefits; (ix) change rules governing claims trading; (x) alter rules governing nonresidential real property leases, intellectual property licenses, trademarks, and patents; and (xi) revise the safe-harbor provisions for financial contracts.

The ABI Commission expects to issue a written report of its recommendations during ABI's Winter Leadership Conference in December 2014.

United States—Proposed Chapter 14 of the Bankruptcy Code for Failing Banks. On December 19, 2013, Senators John Cornyn (R-Texas) and Pat Toomey (R-Pennsylvania) introduced legislation that would eliminate a section of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the "Dodd-Frank Act" or "Dodd-Frank") and create "chapter 14" of the Bankruptcy Code to prevent any systemically important financial institution ("SIFI") from being bailed out with taxpayer funds. The bill, denominated the "Taxpayer Protection and Responsible Resolution Act" ("TPRRA"), would create the new chapter 14 as a vehicle for resolving failing SIFIs in lieu of Title II of the Dodd-Frank Act, also known as the Orderly Liquidation Authority (OLA) provision, which would be repealed. TPRRA would authorize the Federal Deposit Insurance Corporation ("FDIC") to be appointed as a receiver to carry out the liquidation of a failing financial institution. A bank could file for chapter 14 protection if it were insolvent, unable to pay its debts as they mature, or left with depleted capital, or if one of these circumstances were likely "sufficiently soon," such that filing for bankruptcy would prevent substantial harm to the financial stability of the U.S. Failed banks' risky assets would be transferred to bridge companies, which would operate as new, solvent companies that could continue to meet the failed banks' financial obligations. Shareholders of the banks and long-term creditors would bear responsibility for the banks' "bad decisions." The U.S. government would be prohibited from providing bailout financing to a chapter 14 debtor.

United States—Proposed Changes to Bankruptcy Asbestos Trust Rules to Promote Transparency. On November 13, 2013, the U.S. House of Representatives approved H.R. 982, the Furthering Asbestos Claim Transparency Act of 2013 (the "FACT Act"). If enacted, the Fact Act would amend the Bankruptcy Code to require all trusts established under section 524(g) of the Bankruptcy Code in order to deal with asbestos claims against chapter 11 debtors to file publicly available reports on a quarterly basis, disclosing the details of payment demands and disbursements, including the names and exposure histories of claimants, except as provided in a protective order or as necessary to prevent disclosure of confidential medical records or protect against identity theft. As proposed, the FACT Act would apply retroactively to bankruptcy cases commenced and bankruptcy trusts established before its passage.

United States—Final Bankruptcy-Fee Guidelines Issued. Following the culmination of two public comment periods spanning more than a year, the Office of the United States Trustee, a unit of the U.S. Department of Justice ("DOJ") assigned to oversee bankruptcy cases, issued final guidelines on June 11, 2013, governing the payment of attorneys' fees and expenses in large chapter 11 cases—those with $50 million or more in assets and $50 million or more in liabilities. The guidelines, which apply to cases filed on or after November 1, 2013, are intended to "enhance disclosure and transparency in the compensation process and to help ensure that attorneys' fees and expenses are based on market rates," according to a June 11 press release from the DOJ. According to the DOJ, the new guidelines reflect "significant

changes that have occurred in the legal industry as well as the increasing complexity of business bankruptcy reorganization cases."

United States—Proposed Changes to Treatment of Collective Bargaining Agreements and Retiree Benefits in Bankruptcy. On January 3, 2013, the Protecting Employees and Retirees in Business Bankruptcies Act of 2013 (H.R. 100) was introduced by Representative John Conyers (D-Michigan). The proposed legislation would amend sections 1113 and 1114 and various other provisions of the Bankruptcy Code to improve employee and retiree recoveries for unpaid wages, severance pay, stock losses, and Worker Adjustment and Retraining Notification Act damage; would promote good-faith bargaining in connection with motions to reject or revise collective bargaining agreements; and would revise the standards for court approval of executive and management retention, incentive, and other bonus programs. Among other things, the bill proposed that collective bargaining agreements could be modified only to create the "minimum savings essential to permit the debtor to exit bankruptcy, such that confirmation of a chapter 11 plan would not be likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor (or any successor to the debtor) in the short-term." The bill is identical to bills proposed in the House of Representatives and the Senate in 2012.

United States—Proposed Student Loan Relief. On January 24, 2013, Senator Richard Durbin (D-Illinois) introduced the Fairness for Struggling Students Act of 2013 to address the growing student loan crisis. The bill is intended to restore fairness in student lending by treating privately issued student loans the same as other types of private debt for purposes of discharge in bankruptcy. Since 1978, government-issued or guaranteed student loans have been non-dischargeable under the Bankruptcy Code. In 2005, the law was changed to give private student loans the same status in bankruptcy as government student loans. A companion bill, the Know Before You Owe Private Student Loan Act of 2013 (H.R. 3612), would require schools to counsel students before they incur expensive private student loan debt and to inform them if they have any untapped eligibility for federal student aid. It would also require the prospective borrower's school to confirm the student's enrollment status, cost of attendance, and estimated federal financial aid assistance before a private student loan is approved.

Spain—Bank Restructuring Progresses. The capital structure of the Asset Management Company for Assets Arising from Bank Restructuring ("SAREB") established in late November 2012 by the Fund for Orderly Bank Restructuring (*Fondo de Reestructuración Ordenada Bancaria* ("FROB")) in connection with the Spanish banking sector's recapitalization and restructuring process was completed in 2013. The exclusive purpose of SAREB is the ownership, management, and administration (whether direct or indirect), as well as the acquisition and sale, of distressed assets that have been transferred to it by: (i) financial institutions that required public assistance from FROB; and (ii) institutions that require public funds, according to the Bank of Spain's judgment and independent analysis of the capital needs and the quality of the assets of the Spanish financial system. SAREB will be managing total assets of more than €50 billion.

Germany—Coordination of Affiliated Insolvency Cases. On January 3, 2013, the German Ministry of Justice circulated draft legislation that would establish procedures to govern the coordination of insolvency proceedings of affiliated companies. Existing German law does not provide for a joint approach to such insolvencies, but is instead structured to accommodate companies on an individual basis. The proposed legislation is intended to change this, consistent with broader EU legislative activity promoting closer cooperation between courts and officeholders in the insolvency proceedings of group companies engaged in economic activity in different EU member states. Among other things, it provides for a single insolvency court to have jurisdiction over all members of an affiliated group.

France—New Law Governing Systemically Important Financial Institutions. On July 26, 2013, Law No. 2013-672 was enacted to regulate banking activities in response to lessons learned from the 2007–2008 financial crisis, which highlighted the limited number of tools available to supervisory authorities to limit the risks created in the financial

system by systemically important financial institutions. The provisions of the law extend over a broad array of issues, such as the ring-fencing of certain proprietary trading activities, anti–tax haven rules, money laundering, high-frequency trading, mandatory clearing, and central supervision of counterparties. The law creates a new banking resolution regime that applies to most financial institutions. Among other powers, the French Prudential Control and Resolution Authority (*Autorité de contrôle prudentiel et de résolution*) now has the ability to implement a number of resolution measures with respect to a failing institution, including changing governance, recapitalizing, and suspending or prohibiting certain business operations.

The Netherlands—Proposal for Prospective Insolvency Trustees. The Minister of Justice proposed legislation in 2013 that would authorize the court appointment of a prospective trustee (*beoogd curator*) for a company prior to the commencement of formal insolvency proceedings for the purpose of exploring potential restructuring and/or sale opportunities. The proposal is part of a broader legislative initiative that includes a proposal for compulsory extrajudicial compositions and various measures designed to encourage the continuation and reorganization of insolvent companies.

NOTABLE BUSINESS BANKRUPTCY DECISIONS OF 2013

ALLOWANCE/DISALLOWANCE/PRIORITY/DISCHARGE OF CLAIMS

In *Official Committee of Unsecured Creditors v. UMB Bank, N.A. (In re Residential Capital, LLC)*, 2013 BL 317120 (Bankr. S.D.N.Y. Nov. 15, 2013), the court held that unamortized original issue discount ("OID") arising from fair-market-value debt exchanges should not be disallowed as unmatured interest under section 502(b) of the Bankruptcy Code. According to the court, there existed "no commercial or business reason, or valid theory of corporate finance, to justify treating claims generated by face value and fair value exchanges differently in bankruptcy" because: (i) the market value of the old debt is likely depressed in both a fair-value and a face-value exchange; (ii) OID is created for tax purposes in both fair-value and face-value exchanges; and (iii) there are concessions and incentives in both fair-value and face-value exchanges. Furthermore, the court emphasized, both kinds of exchanges offer companies out-of-court restructuring opportunities to avoid the cost and expense of a bankruptcy filing. Accordingly, the court held that the Second Circuit's ruling in *LTV Corp. v. Valley Fidelity Bank & Trust Co. (In re Chateaugay Corp.)*, 961 F.2d 378 (2d Cir. 1992), which addressed the bankruptcy treatment of OID generated in connection with a face-value exchange (i.e., one in which the principal amount of the debt is not reduced), should control in fair-value and face-value situations.

Section 1111(b) provides that a secured claim will be treated as a recourse claim even if it is not actually recourse to the debtor by contract or under applicable state law. This means that the creditor will have a secured claim to the extent of the value of its collateral and an unsecured claim for any deficiency, unless the class of claims of which the secured creditor is a member makes a "section 1111(b) election" to have all claims in the class treated as fully secured. In *In re B.R. Brookfield Commons No. 1, LLC*, 2013 BL 305268 (7th Cir. Nov. 4, 2013), the Seventh Circuit concluded that "under § 1111(b)(1)(A), the existence of a valid and enforceable lien is the only prerequisite for § 1111(b)(1)(A) to apply," and hence, regardless of whether a nonrecourse second-lien claim is secured by any value in the collateral, section 1111(b)(1)(A) treats the nonrecourse claim as if it had recourse against the estate.

In *In re MDC Systems, Inc.*, 488 B.R. 74 (Bankr. E.D. Pa. 2013), the court rejected the majority view concerning which law should be consulted to calculate the cap on future rent claims under section 502(b)(6) of the Bankruptcy Code. The court ruled that "[i]n no sense should the state law determination of whether a 'surrender' or 'repossession' occurred such as would eliminate any future claim for rent reserved control the [Bankruptcy Code's limitation on landlord claims]."

AUTOMATIC STAY

In *In re Pax Am. Dev., LLC*, 2013 BL 317133 (Bankr. C.D. Cal. Nov. 15, 2013), the bankruptcy court, relying on the Ninth Circuit's ruling in *Tilley v. Vucurevich (In re Pecan Groves of Arizona)*, 951 F.2d 242 (9th Cir. 1991), held that, because the only legal beneficiaries of the automatic stay are the debtor and the bankruptcy trustee, a creditor does not have standing to seek damages for violation of the automatic stay.

By contrast, in *In re Killmer*, 2013 BL 317124 (Bankr. S.D.N.Y. Nov. 15, 2013), the court ruled that "[s]ince the automatic stay is meant to prevent creditors from racing to the courthouse to the detriment of other creditors, the Court sees no reason why a creditor who has been harmed by a stay violation should not be able to seek redress for its injury."

In *In re Ampal-American Israel Corp.*, 2013 BL 345421 (Bankr. S.D.N.Y. Dec. 16, 2013), the court similarly concluded that a creditor has standing to seek damages for violation of the automatic stay and that, if the creditor is an individual, he or she may seek damages for willful violation of the stay under section 362(k) of the Bankruptcy Code. However, because the complaining individuals were former officers and directors of the debtor (i.e., potential litigation defendants), the court ruled that the movants lacked "prudential" standing, since they: (i) lacked creditor status; and (ii) were complaining about a third party's potential assertion of estate claims (which, if true, would cause only generalized rather than specific injury).

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

In re Tronox Inc., 2013 BL 344086 (Bankr. S.D.N.Y. Dec. 12, 2013), raised "issues of first impression regarding the application of the fraudulent conveyance laws in the face of significant environmental and tort liability." The bankruptcy court ruled that entities which orchestrated the divestiture of a group of companies' oil and gas assets valued at approximately $14 billion, while leaving the companies with billions in legacy environmental and tort liabilities, acted with intent to "hinder and delay" the companies' creditors and that the spinoff transaction was consequently avoidable in the chapter 11 cases of the debtor companies as an actual fraudulent transfer under Oklahoma's version of the Uniform Fraudulent Transfer Act and section 544(b) of the Bankruptcy Code. The court also ruled that the transaction was avoidable as a constructively fraudulent transfer because the debtors were rendered insolvent as a consequence of the spinoff transaction and did not receive reasonably equivalent value in exchange.

The court determined that the debtors were entitled to recover damages but that the transferee defendants would be entitled to a claim against the bankruptcy estates under section 502(h) of the Bankruptcy Code in the amount of whatever damages they could prove they suffered as a consequence of avoidance. The bankruptcy court rejected the defendants' argument that the transferee of an avoided fraudulent transfer is always entitled to a section 502(h) claim equal to the amount of the avoided transfer, but it left for another day a calculation of the allowed amount of the claim. That calculation will require consideration of, among other things, the percentage dividend realized by general unsecured creditors under the debtors' confirmed chapter 11 plan and whether the percentage dividend should be adjusted to account for the "dilutive effect" of inclusion of the section 502(h) claim in the creditor pool.

In *The Majestic Star Casino, LLC v. Barden Development, Inc. (In re The Majestic Star Casino, LLC)*, 716 F.3d 736 (3d Cir. 2013), the Third Circuit considered as a matter of first impression whether a nondebtor company's decision to abandon its classification as an "S" corporation for federal tax purposes—forfeiting the pass-through tax benefits that the parent company and its chapter 11 debtor subsidiary had enjoyed—is void as a postpetition transfer of "property of the bankruptcy estate" or is avoidable under sections 362, 549, and 550 of the Bankruptcy Code. Rejecting the rationale of *In re Trans-Lines West, Inc.*, 203 B.R. 653 (Bankr. E.D. Tenn. 1996), and its progeny, the Third Circuit ruled that S-corp status is neither

"property" nor "property of the estate" within the meaning of section 541 of the Bankruptcy Code and, consequently, that the parent company's actions were not void or avoidable.

In *Paloian v. LaSalle Bank, N.A.*, 619 F.3d 688 (7th Cir. 2010), the Seventh Circuit ruled as a matter of first impression that the trustee of a securitized investment pool can be a "transferee" within the meaning of section 550(a)(1) of the Bankruptcy Code for the purpose of avoiding transfers. However, the court of appeals rejected a bankruptcy court's finding that a chapter 11 debtor was insolvent by valuing its contingent liabilities at 100 percent, while valuing contingent assets at zero, and it remanded the case below for further findings on the issue of solvency. As part of that analysis, the bankruptcy court had considered whether a purportedly bankruptcy-remote special purpose entity ("SPE") formed as a subsidiary of the chapter 11 debtor whose sole purpose was to purchase and hold the debtor's receivables was truly a separate entity and therefore bankruptcy-remote.

On remand, the bankruptcy court ruled in *Paloian v. LaSalle Bank, N.A. (In re Doctors Hosp. of Hyde Park, Inc.)*, 2013 BL 273656 (Bankr. N.D. Ill. Oct. 4, 2013), that the SPE was indeed "operationally" separate and distinct from the debtor. Cognizant of the repercussions for the distressed lending industry if it concluded otherwise, the court wrote that "[an SPE's] status as an independent economic unit is the entire basis on which the lender chooses to extend credit" and that there is "good reason to avoid judicial disruption of commercial transactions based on a balancing of factors susceptible to subjective interpretation." The bankruptcy court dismissed the fraudulent transfer claims because the trustee failed to establish that the debtor was insolvent or that the payments the trustee sought to recover were made with the debtor's property (as distinguished from the SPE's property).

In *Richardson v. Checker Acquisition Corp. (In re Checker Motors Corp.)*, 495 B.R. 355 (Bankr. W.D. Mich. 2013), the court held that: (i) insolvency for the purpose of avoiding a constructive fraudulent transfer under section 548(a)(1)(B) of the Bankruptcy Code is determined solely on the basis of claims within the meaning of the definition of "claim" in section 101(5); and (ii) a chapter 11 debtor's withdrawal liability from a multi-employer pension plan does not become a "claim" within the meaning of section 101(5) until the debtor has actually withdrawn from the plan. The court ruled that the chapter 11 trustee could not rely upon the debtor's *potential* withdrawal liability to establish constructive fraud under section 548(a)(1)(B) because the debtor had not withdrawn from the multi-employer plan prior to the commencement of its bankruptcy case.

BANKRUPTCY COURT POWERS/JURISDICTION

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 as equity and the circumstances warranting recharacterization. The Ninth Circuit had an opportunity to consider this issue in *Official Committee of Unsecured Creditors v. Hancock Park Capital II, L.P. (In re Fitness Holdings International, Inc.)*, 714 F.3d 1141 (9th Cir. 2013). The court ruled that "a court has the authority to determine whether a transaction creates a debt or an equity interest for purposes of § 548, and that a transaction creates a debt if it creates a 'right to payment' under state law." By its ruling, the Ninth Circuit overturned long-standing Ninth Circuit bankruptcy appellate panel precedent to the contrary and became the sixth federal circuit court of appeals to hold that the Bankruptcy Code authorizes a court to recharacterize debt as equity.

In *Lindsey v. Pinnacle Nat'l Bank (In re Lindsey)*, 726 F.3d 857 (6th Cir. 2013), the Sixth Circuit contributed to a growing split in authority by holding that it did not have appellate jurisdiction to review a district court's affirmance of a bankruptcy court order confirming a chapter 11 plan. The Sixth Circuit joined the Second, Eighth, Ninth, and Tenth Circuits in foreclosing an automatic right of appellate review from an order denying confirmation of a plan. *See In re Lievsay*, 118 F.3d 661 (9th Cir. 1997); *In re Lewis*, 992 F.2d 767 (8th Cir. 1993); *In re Simons*, 908 F.2d 643 (10th Cir. 1990); *Maiorino v. Branford Savings Bank*, 691 F.2d 89 (2d Cir. 1982). By contrast, the Third, Fourth, and Fifth Circuits have held that a debtor may seek immediate appellate review of an order denying confirmation of its proposed plan when, on balance, consideration of certain pragmatic factors, such as judicial economy and expeditious resolution of the bankruptcy case, lean in the

debtor's favor. *See Mort Ranta v. Gorman*, 721 F.3d 241 (4th Cir. 2013); *In re Armstrong World Indus.*, 432 F.3d 507 (3d Cir. 2005); I*n re Bartee*, 212 F.3d 277 (5th Cir. 2000).

The U.S. Supreme Court's 2011 ruling in *Stern v. Marshall*, 132 S. Ct. 56 (2011), continues to complicate the day-to-day operation of bankruptcy courts scrambling to deal with a deluge of challenges—strategic or otherwise—to the scope of their "core" authority to issue final orders and judgments on a wide range of disputes. In *Stern*, the court ruled that, to the extent that 28 U.S.C. § 157(b)(2)(C) purports to confer authority on a bankruptcy court to finally adjudicate a state law counterclaim against a creditor which filed a proof of claim, the provision is constitutionally invalid. The mayhem among bankruptcy and appellate courts continued throughout 2013.

In *Wellness Int'l Network, Ltd. v. Sharif*, 727 F.3d 751 (7th Cir. 2013), the Seventh Circuit sided with the Sixth Circuit (s*ee Waldman v. Stone*, 698 F.3d 910 (6th Cir. 2012)), by ruling that: (i) a constitutional objection based on *Stern* is not waivable because it implicates separation-of-powers principles, and thus, the objection may be raised for the first time on appeal; and (ii) consent cannot cure such a constitutional deficiency. The Seventh Circuit based its ruling on many of the same principles articulated in *Waldman*, noting that *Stern* did not raise questions of subject matter jurisdiction (which is not waivable), but instead called into question the structural division of authority between Article III courts and non-Article III courts (e.g., bankruptcy courts), as contemplated by the U.S. Constitution.

The Seventh Circuit also questioned the current practice of many courts of resolving *Stern* issues by permitting appellate courts to "construe" orders of bankruptcy courts as reports and recommendations, subject to adoption by the district court, should the district court decide that the bankruptcy court lacked the constitutional authority to enter a final order. The Seventh Circuit suggested in dicta that bankruptcy courts may not hear pretrial matters because there is no explicit statutory authorization for bankruptcy courts to hear such matters, as is the case with magistrate judges.

In *Peterson v. Somers Dublin Ltd.*, 729 F.3d 741 (7th Cir. 2013), the Seventh Circuit ruled that a waiver of the right to a judgment by an Article III court is enforceable and that the court's decision in *Wellness Int'l* (issued only two weeks earlier) had involved the issue of "forfeiture" rather than "waiver," or "a belated objection rather than unanimous consent." The Seventh Circuit also noted the following about the effect of the defendant's filing of a proof of claim:

> The current dispute comes within a bankruptcy judge's authority, notwithstanding *Stern*, because all of the defendants submitted proofs of claim as the Funds' creditors and thus subjected themselves to preference-recovery and fraudulent-conveyance claims by the Trustee. *See* 11 U.S.C. § 502(d). The Supreme Court held in [*Katchen v. Landy*, 382 U.S. 323 (1966), and *Langenkamp v. Culp*, 498 U.S. 1043 (1991)] that Article III authorizes bankruptcy judges to handle avoidance actions against claimants. *Stern* stated that its outcome is consistent with those decisions. [*Wellness Int'l*] likewise observes . . . that there is no constitutional problem when a bankruptcy judge adjudicates a trustee's avoidance actions against creditors who have submitted claims.

On June 24, 2013, the U.S. Supreme Court agreed to review the Ninth Circuit's 2012 ruling that a *Stern* objection is waivable. *See Executive Benefits Insurance Agency, Inc. v. Arkison (In re Bellingham Insurance Agency, Inc.)*, 702 F.3d 553 (9th Cir. 2012), *cert. granted*, 133 S. Ct. 2880 (2013). In *Bellingham Insurance*, the Ninth Circuit ruled that, even though a federal statute empowers bankruptcy judges to enter final judgments in fraudulent conveyance actions against a "non-claimant" (i.e., someone who has not filed a proof of claim), the U.S. Constitution forbids entry of a final order because those claims do not fall within the "public rights exception." However, the court explained, defendants in such avoidance proceedings may (and in this case did) consent to the entry of a final judgment by the bankruptcy court, even if that consent was implied from the defendants' failure to assert their right to entry of final judgment by an Article III court. In addition, the Ninth Circuit emphasized that a bankruptcy court may still hear and make recommendations regarding any statutorily "core" proceedings in which the court lacks the authority to enter a final judgment.

In *Frazin v. Haynes & Boone, LLP (In re Frazin)*, 732 F.3d 313 (5th Cir. 2013), the Fifth Circuit held that, under *Stern*, the bankruptcy court lacked jurisdiction to enter a final judgment on a chapter 13 debtor's state law negligence, deceptive trade practices, and breach-of-fiduciary-duty counterclaims against attorneys seeking payment of fees for services performed in connection with the representation of the debtor in nonbankruptcy litigation. The court noted that "[a]lthough the [Supreme] Court stated that its decision [in *Stern*] was 'narrow,' its reasoning was sweeping." The Fifth Circuit concluded that, with respect to state law counterclaims that are not necessarily resolved in the claims-allowance process, *Stern* unequivocally overruled circuit precedent holding that a bankruptcy court can enter final judgments in all statutorily core proceedings. The Fifth Circuit rejected the argument that a debtor can consent to final adjudication in a bankruptcy court, writing that when "separation of powers is implicated in a given case, the parties cannot by consent cure the constitutional difficulty."

In *BP RE, LP v. RML Waxahachie Dodge, LLC (In re BP RE, LP)*, 2013 BL 313900 (5th Cir. Nov. 11, 2013), the Fifth Circuit held that, on the basis of *Stern*, if the parties to a noncore state law adversary proceeding brought by a debtor against a third party consent to bankruptcy court adjudication, the bankruptcy court has statutory power to adjudicate the case but lacks constitutional authority to enter a final judgment. According to the court, "Parties cannot consent to circumvention of Article III that impinges on the structural interests of the judicial branch," and "notions of consent and waiver cannot be dispositive because the limitations serve institutional interests that the parties cannot be expected to protect." The Fifth Circuit vacated the bankruptcy court's putative final judgment and remanded the case below for the court to issue proposed findings of fact and conclusions of law as to the debtor's state law claims that were related to the bankruptcy estate.

In *Nortel Networks Inc. v. Joint Adm'rs for Nortel Networks UK Ltd.*, 2013 BL 339861 (3d Cir. Dec. 6, 2013), the Third Circuit declined to compel arbitration between divisions of Nortel Networks Corp. ("Nortel") and their creditors in a battle over the division of $7.5 billion in liquidation proceeds of the defunct Canadian telecom company, ruling that the agreement at the heart of the dispute does not require arbitration. The court affirmed a bankruptcy court ruling (*see In re Nortel Networks Inc.*, 2013 BL 92666 (Bankr. D. Del. Apr. 3, 2013)), rejecting a request by the U.K. division of Nortel to prevent the bankruptcy court from deciding the dispute over the company's asset allocation.

Nortel liquidated substantially all of its assets in 2009 after seeking court protection in the U.S., the U.K., and Canada, raising approximately $9 billion. The company, its global affiliates, and other creditors reached an agreement at the outset of the bankruptcy proceedings to expedite the sale process by deferring any decision regarding allocation of the sales proceeds among the stakeholders involved. Of those proceeds, approximately $7.5 billion are being held in an escrow account in New York. According to the Third Circuit, the absence of any express use of the word "arbitration" in the agreement demonstrated that there was no intent to use arbitration as a means of resolving disputes over sales proceeds. The administrators of Nortel's U.K. division argued that the parties agreed to arbitration because the contract used the term "dispute resolver." However, the Third Circuit concluded that the term could encompass many things, including arbitrators, mediators, or the courts. The court also rejected the U.K. administrators' contention that the bankruptcy court authorized arbitration when it approved the agreement.

CHAPTER 11 PLANS

Until 2013, no circuit court of appeals had weighed in on the implications of the U.S. Supreme Court's pronouncement in *Bank of Amer. Nat'l Trust & Savings Ass'n v. 203 North LaSalle Street P'ship*, 526 U.S. 434 (1999), that property retained by a junior stakeholder under a cram-down chapter 11 plan in exchange for new value "without benefit of market valuation" violates the "absolute priority rule." That changed with *In re Castleton Plaza, LP*, 707 F.3d 821 (7th Cir. 2013), where the Seventh Circuit reversed a bankruptcy court ruling that a proposed plan under which an "insider" of the debtor would receive 100 percent of the equity in the reorganized company in exchange for a cash contribution passed muster under the absolute priority rule despite less than full payment of senior creditors. As a matter of first impression, the Seventh Circuit ruled that: (i) a distribution under the plan of new equity to the insider (the sole former shareholder's spouse) conferred

a benefit on the former shareholder; and (ii) the sufficiency of the "new value" proffered by the insider had not been tested by competition and thus violated the absolute priority rule.

Soon after the Seventh Circuit handed down *Castleton Plaza*, a bankruptcy court in the Seventh Circuit applied the ruling to preclude confirmation of a new value plan providing for distribution of new equity to an insider without competition. *See In re GAC Storage Lansing, LLC*, 2013 BL 53422 (Bankr. N.D. Ill. Feb. 27, 2013) ("In light of the *Castleton* decision, the Court determines that the absolute priority rule applies, despite the fact that Schwartz is not a direct owner or investor. The Debtor's Plan proposes to give Schwartz, an insider of the Debtor, preferential access to an investment opportunity in the Reorganized Debtor and is therefore subject to competitive bidding, as the holding in *Castleton* instructs."), *amended sub nom. In re GAC Storage El Monte, LLC*, 489 B.R. 747 (Bankr. N.D. Ill. 2013).

In *In re RTJJ, Inc.*, 2013 BL 31910 (Bankr. W.D.N.C. Feb. 6, 2013), the court held that market valuation is not necessary when the debtor's exclusive right to propose and solicit acceptances for a plan has expired. "[W]hen exclusivity has expired and there is no option value to the right to propose a plan," the court wrote, "the value of the property being retained should be determined based on normal valuation basis (i.e., the balance sheet of the reorganized debtor or by capitalizing its projected income)."

A long-standing legal principle is that liens pass through bankruptcy unaffected. Like every general rule, however, this tenet has exceptions. One of them can be found in section 1141(c) of the Bankruptcy Code, which provides that, under certain circumstances, "the property dealt with by [a chapter 11] plan is free and clear of all claims and interests of creditors." Although the language of the provision is unambiguous, several courts have added a judicial gloss by requiring the creditor to "participate in the reorganization" as a prerequisite to the application of section 1141(c).

Precisely what constitutes such "participation," however, is an unsettled question. This controversial issue was addressed by the Fifth Circuit in *Acceptance Loan Co., Inc. v. S. White Transp., Inc. (In re S. White Transp., Inc.)*, 725 F.3d 494 (5th Cir. 2013), wherein the court ruled that the level of participation necessary to trigger extinguishment of a lien under section 1141(c) "requires more than mere passive receipt of effective notice" of the chapter 11 case. The ruling is a cautionary tale for plan proponents intent upon ensuring that the terms of a chapter 11 plan providing for the treatment of secured creditor claims are binding.

The importance of finality in the context of confirmation of a chapter 11 plan that provides for the reorganization or liquidation of a debtor was the subject of the Fifth Circuit's ruling in *Anti-Lothian Bankr. Fraud Comm. v. Lothian Oil, Inc. (In re Lothian Oil, Inc.)*, 2013 BL 17873 (5th Cir. Jan. 23, 2013). The court ruled that the 180-day limitation period in section 1144 of the Bankruptcy Code for seeking revocation of a plan confirmation order on the basis of fraud may not be tolled.

In *In re Indianapolis Downs, LLC*, 486 B.R. 286 (Bankr. D. Del. 2013), the debtor's equity holders attempted to thwart confirmation of a prenegotiated chapter 11 plan by arguing that a "lockup," or plan support, agreement among the debtors and a large group of secured creditors violated the solicitation requirements of the Bankruptcy Code and that the votes of the signatory creditors should therefore be disallowed, or "designated." The bankruptcy court rejected the argument in an important ruling that may finally put to rest any lingering doubts about the validity of postpetition lockup agreements, at least in Delaware.

In *In re Residential Capital, LLC*, 2013 BL 171624 (Bankr. S.D.N.Y. June 27, 2013), the court concluded that the business judgment standard applies when considering whether a postpetition plan support agreement among chapter 11 debtors and various stakeholders should be approved. It also held that the "solicitation" prohibition in section 1125 of the Bankruptcy Code did not apply to the plan support agreement because approval of such an agreement does not ensure that a plan embodying its terms will be confirmed, nor does it bind the objecting parties from challenging, or the court from rejecting, a plan substantially on the terms set forth in the agreement.

The process of classifying claims and interests under a chapter 11 plan is sometimes an invitation for creative machinations designed to muster adequate support for confirmation of the plan. "Strategic" classification can entail,

among other things, "artificial impairment," or the discretionary "manufacturing" of an impaired class as a way to satisfy section 1129(a)(10) of the Bankruptcy Code, which provides that a plan may be confirmed only if a class of impaired claims accepts the plan. In *Western Real Estate Equities, LLC v. Village at Camp Bowie I, LP (In re Village at Camp Bowie I, LP)*, 710 F.3d 239 (5th Cir. 2013), the Fifth Circuit joined the Ninth Circuit (*see L & J Anaheim Assocs. v. Kawasaki Leasing Intl., Inc. (In re L & J Anaheim Assocs.)*, 995 F.2d 940 (9th Cir. 1993)), in holding that section 1129(a)(10) "does not distinguish between discretionary and economically driven impairment." However, the court held that artificial impairment may be relevant in assessing whether a chapter 11 plan has been proposed in bad faith.

In *In re Texas Grand Prairie Hotel Realty, LLC*, 2013 BL 56845 (5th Cir. Mar. 4, 2013), the Fifth Circuit clarified its position regarding the applicability of the Supreme Court's decision in *Till v. SCS Credit Corp.*, 541 U.S. 465 (2004), to the selection of an appropriate cram-down interest rate in a chapter 11 plan. The court affirmed a lower-court ruling in which the debtors and their secured creditor stipulated to the use of *Till*'s "prime rate plus" method, but it emphasized that *Till*, which was a plurality decision construing cram-down confirmation in a chapter 13 case, does not provide the exclusive methodology by which chapter 11 cram-down interest rates are set. The Fifth Circuit explained that *Till*'s "prime-plus approach" was endorsed by a plurality of the Supreme Court and many bankruptcy courts, and thus, the court could not find that relying on *Till* constituted reversible error. However, the court wrote that "we do not suggest that the prime-plus formula is the only—or even the optimal—method for calculating the Chapter 11 cram down rate."

CLAIMS/DEBT TRADING

In re KB Toys Inc., 2013 BL 317570 (3d Cir. Nov. 15, 2013), added yet another chapter to the ongoing controversy concerning whether sold or assigned claims can be subject to disallowance under section 502(d) of the Bankruptcy Code on the basis of the seller's receipt of a voidable transfer. The decision was an unwelcome missive for claims traders. For the first time since the enactment of the Bankruptcy Code in 1978, a circuit court of appeals concluded that "because § 502(d) permits the disallowance of a claim that was originally owned by a person or entity who received a voidable preference that remains unreturned, the cloud on the claim continues until the preference payment is returned." By its ruling, which the court was careful to emphasize "only concerns trade claims," the Third Circuit staked out what now can fairly be characterized as the majority approach to this issue.

In *Westcon Grp. N. Am., Inc. v. RBS Citizens, N.A. (In re NobleHouse Techs., Inc.)*, 2013 BL 355106 (Bankr. N.D.N.Y. Dec. 24, 2013), the court denied a motion under section 510(c) of the Bankruptcy Code to equitably subordinate a claim asserted by an assignee of bank debt based in part on misconduct alleged to have been committed by the assignor. Even so, the court, citing *Enron Corp. v. Avenue Special Situations Fund II, LP (In re Enron Corp.)*, 333 B.R. 205 (Bankr. S.D.N.Y. 2005), noted that "[t]he parties agree that Citizens did not engage in inequitable conduct. [But] [t]he transfer of CAC's claim to Citizens . . . was subject to all defenses and liabilities, including, equitable subordination."

CREDITOR RIGHTS

The latest salvo regarding "triangular setoff" in bankruptcy was fired by a Delaware bankruptcy court in *Sass v. Barclays Bank PLC (In re American Home Mortgage Holdings, Inc.)*, 501 B.R. 44 (Bankr. D. Del. 2013). The court ruled that, without moving for relief from the stay, the nondebtor counterparty to a swap or repurchase agreement cannot exercise control over estate property by retaining funds in exercising alleged triangular setoff rights because the mutuality required by section 553 of the Bankruptcy Code is lacking.

Section 552(b)(2) of the Bankruptcy Code provides that if a creditor prior to bankruptcy obtained a security interest in rents paid to the debtor, that security interest extends to postpetition rents, to the extent provided in the security agreement. Courts have disagreed, however, on the question of whether the debtor must provide "adequate protection" with respect to such postpetition rents. In *Putnal v. SunTrust Bank*, 489 B.R. 285 (M.D. Ga. 2013), the court joined what appears to be a growing majority of courts in holding that a secured creditor's interest in postpetition rents is entitled to separate and independent adequate protection, even if the creditor's interest in the rent-producing real property itself is adequately protected. In so ruling, the district court expressly

rejected two approaches—the "replacement lien" and "dual valuation" theories—which some courts have employed in holding that no separate adequate protection with respect to postpetition rents is required.

CROSS-BORDER BANKRUPTCY CASES

October 17, 2013, marked the eight-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 20 nations or territories. There were several notable rulings handed down in 2013 in connection with cross-border bankruptcy cases.

In a matter of first impression, the Second Circuit ruled in *Morning Mist Holdings Ltd. v. Krys (In re Fairfield Sentry Ltd.*), 714 F.3d 127 (2d Cir. 2013), that a foreign debtor's center of main interests ("COMI") must be determined on the basis of the debtor's "activities at or around the time the Chapter 15 petition is filed," rather than on the commencement date of the foreign proceeding. The court also held that the "public policy" exception to chapter 15 relief in section 1506 of the Bankruptcy Code is to be narrowly construed.

In *Jaffé v. Samsung Electronics Co., Ltd.*, 2013 BL 335753 (4th Cir. Dec. 3, 2013), the bankruptcy court had entered an order in July 2009 recognizing the German insolvency proceeding of Qimonda AG ("Qimonda"), once one of the world's largest manufacturers of dynamic random access memory, as well as a supplemental order pursuant to section 1521 of the Bankruptcy Code (authorizing discretionary relief) that made section 365 of the Bankruptcy Code, which does not normally apply to cases under chapter 15, "applicable in this proceeding." The German administrator informed licensees of Qimonda's 4,000 cross-licensed U.S. patents that their licenses were being canceled in the German insolvency proceeding pursuant to a provision in the German Insolvency Code akin to section 365. Thereafter, certain U.S. patent licensees asserted that they were entitled to the protections of section 365(n), which, unlike section 365's counterpart in German law, limits a bankruptcy trustee's ability to unilaterally reject licenses to the debtor's intellectual property by giving licensees the option to retain their rights under the licenses.

The administrator then sought modification of the U.S. bankruptcy court's supplemental order to remove the reference to section 365 altogether or to qualify it by inserting a proviso that section 365 would apply "only if the Foreign Representative rejects an executory contract pursuant to Section 365 (rather than simply exercising the rights granted . . . pursuant to the German Insolvency Code)." In *In re Qimonda AG*, 2009 BL 249856 (Bankr. E.D. Va. Nov. 19, 2009), the court ruled that deference to German law was appropriate, and it entered an amended supplemental order that maintained the general applicability of section 365 but included the proviso (somewhat modified) requested by the administrator. The licensees appealed to the district court, which affirmed the ruling in part in *In re Qimonda AG Bankruptcy Litigation*, 433 B.R. 547 (E.D. Va. 2010), but remanded the case below to determine whether restricting the applicability of section 365(n) was "manifestly contrary to the public policy of the United States" and whether the licensees would be "sufficiently protected" if section 365(n) did not apply.

On remand, the bankruptcy court ruled in *In re Qimonda AG*, 462 B.R. 165 (Bankr. E.D. Va. 2011), that the protections of section 365(n) 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 and resulted in the licensees' not being "sufficiently protected." The court accordingly denied the foreign representative's motion to strike section 365(n) from the amended supplemental order. Due to the importance of the issue, the district court certified a direct appeal of the ruling to the Fourth Circuit. *See Jaffé v. Samsung Electronics Co., Ltd. (In re Qimonda AG)*, 470 B.R. 374 (E.D. Va. 2012).

The Fourth Circuit affirmed in *Jaffé v. Samsung*. At the outset, the court observed that:

> [t]his appeal presents the significant question under Chapter 15 of the U.S. Bankruptcy Code of how to mediate between the United States' interests in recognizing and cooperating with a foreign insolvency proceeding and its interests in protecting creditors of the foreign debtor with respect to U.S. assets, as provided in 11 U.S.C. §§ 1521 and 1522.

The Fourth Circuit ruled, among other things, that the bankruptcy court reasonably exercised its discretion in balancing the interests of the licensees against the interests of the debtor and in finding that application of section 365(n) was necessary to ensure that licensees of Qimonda's U.S. patents were sufficiently protected.

In *In re Drawbridge Special Opportunities Fund LP*, 2013 BL 341634 (2d Cir. Dec. 11, 2013), the Second Circuit, on direct appeal from a bankruptcy court, held that a foreign debtor must have either a business or property in the U.S. to make the debtor's foreign bankruptcy or insolvency proceeding eligible for recognition under chapter 15. The court reversed a bankruptcy court's 2012 order granting chapter 15 recognition to the Australian bankruptcy proceeding of Queensland, Australia-based property finance group Octaviar Administration Pty Ltd. ("Octaviar"), concluding that the bankruptcy court: (i) erroneously found that section 109(a) of the Bankruptcy Code, which requires a debtor to either own property or conduct business in the U.S., does not apply to a foreign entity seeking relief under chapter 15; and (ii) improperly granted chapter 15 recognition to Octaviar's Australian bankruptcy proceeding in the absence of any evidence that Octaviar was domiciled, did business, or had assets in the U.S.

Section 103(a) of the Bankruptcy Code, the Second Circuit explained, clearly states that "this chapter"—i.e., chapter 1, which includes section 109(a)—and "sections 307, 362(o), 555 through 557, and 559 through 562 apply in a case under chapter 15." Among other things, the court rejected arguments by Octaviar's foreign representatives that: (i) Octaviar need not comply with section 109(a) because technically it is a debtor not under the Bankruptcy Code, but under Australian law, noting that "the presence of a debtor is inextricably intertwined with the very nature of a Chapter 15 proceeding, both in terms of how such a proceeding is defined and in terms of the relief that can be granted"; and (ii) to qualify for recognition of its Australian bankruptcy proceeding under chapter 15, Octaviar was required only to meet the definition of "debtor" in section 1502(1) (i.e., "an entity that is the subject of a foreign proceeding") and not section 109(a).

In re Fairfield Sentry Limited, 484 B.R. 615 (Bankr. S.D.N.Y. 2013), contributed to the ongoing debate about the role of "comity" (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) in cross-border bankruptcy cases under chapter 15. Recourse to chapter 15 generally, and the utilization of section 363 of the Bankruptcy Code in chapter 15, can be especially valuable in cases where the representative of a foreign debtor wants to monetize assets located in the U.S. and where the foreign insolvency scheme involved does not provide for "free and clear" sales. In *Fairfield Sentry*, the court emphasized the preeminent role of comity in chapter 15, ruling that plenary review by a U.S. court under section 363 of a sale transaction approved by a foreign tribunal is not appropriate.

By contrast, the bankruptcy court in *In re Kemsley*, 489 B.R. 346 (Bankr. S.D.N.Y. 2013), was more critical of a foreign court's determinations that would support a finding of COMI or an "establishment" for purposes of recognition under chapter 15. In *Kemsley*, the U.S. bankruptcy court concluded that the COMI of an individual chapter 15 debtor should be determined as of the date of the commencement of his foreign bankruptcy proceeding, rather than the chapter 15 petition date. Because the debtor was living in the U.S. at the time he commenced an insolvency proceeding in the U.K., the bankruptcy court ruled that his COMI was in the U.S. at that time, despite the U.K. court's determination that he was eligible to file for insolvency in the U.K. The bankruptcy court accordingly refused to recognize the debtor's U.K. bankruptcy case as a "foreign main proceeding" under chapter 15. Also, on the basis of its conclusion that the debtor did not even have a "place of operations" in the U.K. for carrying out nontransitory economic activity, the court denied the petition for recognition of the U.K. bankruptcy case as a "foreign nonmain proceeding."

In *In re Worldwide Educ. Services, Inc.*, 494 B.R. 494 (Bankr. C.D. Cal. 2013), the court ruled that "the standard of proof for preliminary injunctive relief should apply" to a foreign representative's emergency motion during the "gap" period

between the filing of a chapter 15 petition and the court's entry of an order of recognition for implementation of a provisional stay under sections 105, 362, and 1519 of the Bankruptcy Code. However, the court also noted that an adversary proceeding subject to the procedural rules set forth in Part VII of the Federal Rules of Bankruptcy Procedure is not required to request provisional injunctive relief during the gap period.

In *In re ABC Learning Ctrs. Ltd.*, 728 F.3d 301 (3d Cir. 2013), the Third Circuit held that an Australian liquidation proceeding should be recognized as a "foreign main proceeding" under chapter 15 even though: (i) the debtor's assets were fully encumbered by liens; and (ii) an Australian receivership was pending concurrently with the liquidation. The court also ruled that the automatic stay prevented the efforts of an unsecured judgment creditor to levy on the debtor's U.S. assets because, although fully leveraged, the assets were "property of the debtor."

In *In re AJW Offshore, Ltd.*, 488 B.R. 551 (Bankr. E.D.N.Y. 2013), the court ruled that the Bankruptcy Code does not prohibit a bankruptcy court from authorizing a foreign representative in a chapter 15 case to employ turnover powers available under sections 542 and 543 of the Bankruptcy Code. According to the court, access to turnover powers under section 1521(a)(7) is conditioned upon the provision of sufficient protections to creditors and other stakeholders under section 1522, which requires a balancing of the respective parties' interests.

In *In re Millard*, 2013 BL 325599 (Bankr. S.D.N.Y. Nov. 21, 2013), the court ruled that a foreign debtor need not be insolvent as a condition to recognition of the debtor's foreign bankruptcy or insolvency proceeding under chapter 15 of the Bankruptcy Code. According to the court, a ruling to the contrary "would require a rewriting of [chapter 15]."

In *In re Sino-Forest Corporation*, 2013 BL 328891 (Bankr. S.D.N.Y. Nov. 25, 2013), the bankruptcy court, addressing the issue for the first time since the Fifth Circuit's decision in *Ad Hoc Group of Vitro Noteholders v. Vitro S.A.B. de C.V. (In re Vitro S.A.B. de C.V.)*, 701 F.3d 1021 (5th Cir. 2012), ruled that an order of a foreign insolvency court approving a third-party nondebtor release as part of a global settlement is entitled to comity in a chapter 15 case.

ESTATE PROPERTY

In *Rajala v. Gardner*, 709 F.3d 1031 (10th Cir. 2013), the Tenth Circuit joined the Second Circuit and departed from the Fifth Circuit by holding that an allegedly fraudulently transferred asset is not property of the estate until recovered pursuant to section 550 of the Bankruptcy Code and therefore is not covered by the automatic stay. According to the court, its decision "gives Congress's chosen language its ordinary meaning, and abides by a rule against surplusage."

EXECUTORY CONTRACTS AND UNEXPIRED LEASES

In *In re Eastman Kodak Co.*, 495 B.R. 618 (Bankr. S.D.N.Y. 2013), the court, in an apparent matter of first impression, held that a commercial lease timely assumed under section 365(d)(4) of the Bankruptcy Code may be assigned at a later date after the expiration of the provision's 210-day deadline. According to the court, interpreting the Bankruptcy Code to permit the assignment of a previously assumed commercial lease beyond the deadline for assumption "reasonably balances the goal of providing protection to landlords and the goal of maximizing the value of a debtor's estate."

Section 365(d)(3) of the Bankruptcy Code mandates a trustee or chapter 11 debtor in possession to timely satisfy postpetition "obligations" under any unexpired lease of commercial property with respect to which the debtor is the lessee pending a decision to assume or reject the lease. The timing of certain "obligations" arising under an unexpired lease has created some controversy. In a matter of first impression, the court held in *WM Inland Adjacent LLC v. Mervyn's LLC (In re Mervyn's Holdings, LLC)*, 2013 BL 5408 (Bankr. D. Del. Jan. 8, 2013), that a claim arising from an indemnification obligation under a commercial lease was entitled to administrative expense status under section 365(d)(3). According to the court, although the indemnification "claim" arose prepetition because it was contained in a prepetition contract, the indemnification "obligation" for purposes of section 365(d) did not arise until litigation was filed for breach postpetition.

FILING ELIGIBILITY

In *Marciano v. Chapnick (In re Marciano)*, 708 F.3d 1123 (9th Cir. 2013), the Ninth Circuit disagreed with the Fourth Circuit's approach in *Platinum Fin. Servs. Corp. v. Byrd (In re Byrd)*, 357

F.3d 433 (4th Cir. 2004), ruling that an unstayed, enforceable state court judgment—despite an appeal—is per se a claim against the debtor that is not contingent as to liability or the subject of a bona fide dispute as to liability or amount for the purpose of determining whether the claimant is eligible to be a petitioning creditor in an involuntary bankruptcy case under section 303(b)(1) of the Bankruptcy Code.

By contrast, in *In re Fustolo*, 2013 BL 347141 (Bankr. D. Mass. Dec. 16, 2013), the court adopted the minority *Byrd* approach to the question on the basis of: (i) First Circuit bankruptcy and appellate panel precedent adopting the burden-shifting approach set forth in *Byrd*, although not specifically with respect to unstayed state court judgments on appeal; and (ii) evidence that a bona fide dispute existed in the case before it regarding the amount of the judgment, which satisfied the standard articulated in *Byrd*. Although respectful of the rationale of the Ninth Circuit in *Marciano*, the court wrote that "the instant case exemplifies the rare circumstance where the amount of the judgment is in bona fide dispute." The court also held that, where only part of a claim is subject to dispute, the claimant can nevertheless qualify as a petitioning creditor, provided the undisputed portion of the claim exceeds the statutory threshold in section 303(b)(1).

FINANCIAL CONTRACTS/SETOFFS

"Safe harbors" in the Bankruptcy Code designed to minimize "systemic risk"—disruption in the securities and commodities markets that could otherwise be caused by a counterparty's bankruptcy filing—have been the focus of a considerable amount of judicial scrutiny in recent years. A ruling handed down by the Second Circuit in 2013 widens a rift among the federal circuit courts of appeal concerning the scope of the Bankruptcy Code's "settlement payment" defense to avoidance of a preferential or constructively fraudulent transfer. In *Official Committee of Unsecured Creditors v. American United Life Insurance Co. (In re Quebecor World (USA) Inc.)*, 719 F.3d 94 (2d Cir. 2013), the Second Circuit held that securities transfers may qualify for this section 546(e) safe harbor even if the financial institution involved in the transfer is "merely a conduit."

In *Grayson Consulting, Inc. v. Wachovia Securities, LLC (In re Derivium Capital LLC)*, 716 F.3d 355 (4th Cir. 2013), the Fourth Circuit, in addition to finding that the transfer of certain securities as part of a Ponzi scheme could not be avoided because it did not involve "property of the debtor," ruled as a matter of first impression at the court of appeals level that commission payments can be shielded from recovery by the "settlement payment" defense of section 546(e).

In *Whyte v. Barclays Bank PLC,* 494 B.R. 196 (S.D.N.Y. 2013), the trustee of a chapter 11 plan litigation trust to which certain creditors' state law claims had been assigned attempted to avoid payments made to a swap participant as constructive fraudulent transfers under state law and section 544(b) of the Bankruptcy Code, despite the safe harbor for such transfers in section 546(g). The trustee argued that, because section 546(g) applies only to "an estate representative who is exercising federal avoidance powers under [section 544 of] the Bankruptcy Code," section 546(g) should not apply to "claims asserted by creditors" or by a litigation trustee acting on their behalf. The court rejected this contention, holding that section 546(g) impliedly preempted the trustee's attempt to resuscitate fraudulent-avoidance claims as the assignee of certain creditors "where, as here, she would be expressly prohibited by section 546(g) from asserting those claims as assignee of the debtor-in-possession's rights (or, indeed, as the functional equivalent of a bankruptcy trustee)."

In re Lehman Brothers Holdings Inc., 2013 BL 349216 (Bankr. S.D.N.Y. Dec. 19, 2013), is the most recent decision considering the scope of the safe harbor for liquidating, terminating, and accelerating swap agreements. The court examined what it means for a nondefaulting swap counterparty to have the unlimited contractual right to liquidate a swap agreement and whether that protected right extends to the contractually prescribed procedures for calculating amounts due and owing from one counterparty to another. It concluded that "the right of the non-defaulting party to rely upon contractual norms for disposing of collateral is an integrated aspect of what it means to cause the liquidation of a swap agreement and necessarily is protected by the language of Section 560 of the Bankruptcy Code." A contrary ruling, the court wrote, "would strip away the defining characteristics of a contractual right to liquidation that by statute may not be limited in any manner," relegating the nondefaulting party "to the bare ability to cause a liquidation without reference to the related

provisions of the swap agreement that enable counterparties to achieve a predictable, agreed resolution of their respective contractual obligations."

LABOR AND EMPLOYMENT ISSUES

In *Sun Capital Partners III, LP v. New England Teamsters & Trucking Indus. Pension Fund*, 724 F.3d 129 (1st Cir. 2013), the First Circuit held as a matter of first impression that a private equity fund which exercised management control over one of its portfolio companies qualified as a "trade or business" that could be held jointly and severally liable for the multiemployer pension plan withdrawal liability incurred by the portfolio company under the Employee Retirement Income Security Act of 1974.

Angles v. Flexible Flyer Liquidating Trust (In re Flexible Flyer Liquidating Trust), 2013 BL 35609 (5th Cir. Feb. 11, 2013), examined a debtor-employer's responsibilities under the federal Worker Adjustment and Retraining Notification Act, 29 U.S.C. § 2101 *et seq.* ("WARN"). The Fifth Circuit affirmed a bankruptcy court determination that a debtor-employer was not required to give 60-day WARN notification to its employees because a sudden, unanticipated termination of financing which forced the company to file for bankruptcy protection satisfied WARN's notification exception for "unforeseeable business circumstances."

LITIGATION/DISCOVERY ISSUES

In *In re Motions for Access of Garlock Sealing Technologies LLC*, 488 B.R. 281 (D. Del. 2013), the court reversed lower-court rulings denying a chapter 11 debtor access to exhibits accompanying statements filed under Rule 2019 of the Federal Rules of Bankruptcy Procedure by attorneys representing multiple asbestos claimants in 12 separate bankruptcy cases. According to the court, "As the 2019 Exhibits are judicial records that were filed with the Bankruptcy Court, there is a presumptive right of public access to them," and the appellees failed to rebut that presumption. The ruling reflects a growing trend promoting the public interest in transparency in asbestos-related bankruptcy cases.

MUNICIPAL DEBTORS

In *In re City of Detroit*, 2013 BL 337226 (Bankr. E.D. Mich. Dec. 5, 2013), the bankruptcy court ruled that the City of Detroit is eligible to be a debtor under chapter 9 of the Bankruptcy Code, making Detroit the largest U.S. city ever to be adjudged eligible for bankruptcy protection. Among other things, the court concluded that: (i) chapter 9 does not violate the uniformity requirement of the Bankruptcy Clause (Art. I § 8) or the Contract Clause (Art. I § 10) of the U.S. Constitution; (ii) chapter 9 does not violate the Tenth Amendment in accordance with long-standing U.S. Supreme Court precedent; (iii) the Michigan law (§ 18 of P.A. 436, M.C.L. § 141.1558 ("P.A. 436")) specifically authorizing a municipality to file for chapter 9 protection is not unconstitutional; (iv) the state court's ruling in *Webster v. State of Michigan*, No. 13-734-CZ (Mich. July 19, 2013), that P.A. 436 violates the Michigan Constitution is void because it was entered after the chapter 9 filing date in violation of the automatic stay; (v) Detroit is insolvent within the meaning of section 101(32)(C) of the Bankruptcy Code; (vi) the size of Detroit's debts and problems made it "impracticable" for Detroit's emergency manager to negotiate concessions from creditors before recommending the chapter 9 filing; and (vii) Detroit filed its chapter 9 petition in good faith, as required by section 921(c).

The court also made it clear that the Pensions Clause of the Michigan Constitution (Art. IX § 24) simply ensures that public employee pensions are treated as contractual obligations rather than gratuitous promises. According to the court, "Because under the Michigan Constitution, pension rights are contractual rights, they are subject to impairment in a federal bankruptcy proceeding" like other contractual obligations. The court cautioned, however, that it would be careful before approving any cuts in monthly payments to retirees, noting that it "will not lightly or casually exercise the power under federal bankruptcy law to impair pensions." On December 17, 2013, the bankruptcy court certified that Detroit's eligibility for bankruptcy involves a matter of public importance, so that if an appeal is authorized, it should go directly to the Sixth Circuit. At the same time, however, the bankruptcy court recommended that no appeal should be authorized at this time because it would disrupt the progress of the ongoing bankruptcy case.

Jones Day is representing the City of Detroit in connection with its chapter 9 filing.

In *In re City of Stockton*, 486 B.R. 194 (Bankr. E.D. Cal. 2013), the court ruled that Rule 9019 of the Federal Rules of Bankruptcy Procedure, which applies to settlements in cases under other chapters of the Bankruptcy Code, does not apply to chapter 9 debtors due to the jurisdictional limitations imposed on a bankruptcy court by section 904 of the Bankruptcy Code. Section 904 provides that, absent the consent of a chapter 9 debtor, a bankruptcy court "may not . . . interfere with . . . any of the political or governmental powers of the debtor . . . [or] any of the property or revenues of the debtor." The court reasoned that a settlement and payments made pursuant thereto would fall within the purview of section 904 because it would necessarily involve the use of the debtor's property and revenues. On the basis of the provision's plain language, the court held that, although a chapter 9 debtor may seek court approval of a settlement with creditors, it is not required to do so.

SOVEREIGN DEBTORS

On October 7, 2013, the U.S. Supreme Court (*see Argentina v. NML Capital, Ltd.*, 2013 BL 277670 (Oct. 7, 2013)), denied the Republic of Argentina's seemingly premature petition for the court to review a nonfinal 2012 ruling by the Second Circuit (*NML Capital, Ltd. v. Republic of Argentina*, 699 F.3d 246 (2d Cir. 2012)). That ruling upheld a lower court's orders barring Argentina from paying holders of debt restructured in 2005 and 2010 without also paying holdout bondholders in full, but it remanded to the trial court on the issue of implementation of the remedy.

On November 1, 2013, in a summary order without explanation, a three-judge panel of the Second Circuit refused to lift a stay of execution, pending possible en banc or U.S. Supreme Court review, of its August 23, 2013, ruling upholding a lower court's order directing Argentina to pay holdout bondholders $1.33 billion. *See NML Capital, Ltd. v. Republic of Argentina*, 727 F.3d 230 (2d Cir. 2013).

On November 18, 2013, the Second Circuit rejected Argentina's request that the court reconsider its August 23 ruling en banc. The court also denied requests by groups holding restructured bonds to reconsider the case.

FROM THE TOP

The U.S. Supreme Court handed down only one bankruptcy decision in 2013. In a unanimous ruling, the court held in *Bullock v. BankChampaign N.A.*, 133 S. Ct. 1754 (2013), that the term "defalcation" for purposes of denying discharge of a debt under section 523(a)(4) of the Bankruptcy Code includes a "culpable state of mind" requirement involving knowledge of, or gross recklessness with respect to, the improper nature of a fiduciary's behavior.

On June 17, 2013, the Court granted a petition for a writ of certiorari in *Law v. Siegel (In re Law)*, 2011 BL 148411 (9th Cir. June 6, 2011), *cert. granted*, 133 S. Ct. 2824 (2013), a case involving the question of whether a bankruptcy trustee has the power to impose an "equitable surcharge" against exempt property as a result of a chapter 7 debtor's misconduct in fabricating a lien on his homestead to deceive creditors. The First and Ninth Circuits have held that, under certain circumstances, bankruptcy courts have the power to impose an equitable surcharge on otherwise exempt property which a debtor shielded from creditors, but the Tenth Circuit has ruled otherwise.

On June 24, 2013, the Supreme Court agreed to review a Ninth Circuit decision that a party may waive its right to object, on the basis of the Supreme Court's ruling in *Stern v. Marshall*, 132 S. Ct. 56 (2011), to a bankruptcy court's entry of a final order resolving a matter outside the court's "core" jurisdiction. *See Executive Benefits Insurance Agency, Inc. v. Arkison (In re Bellingham Insurance Agency, Inc.*), 702 F.3d 553 (9th Cir. 2012), *cert. granted*, 133 S. Ct. 2880 (2013).

On November 26, 2013, the Supreme Court granted a writ of certiorari in *Clark v. Rameker*, 714 F.3d 559 (7th Cir. 2013), *cert. granted*, 2013 BL 328399 (Nov. 26, 2013), to decide whether an inherited individual retirement account ("IRA") is exempt from a bankruptcy estate under section 522 of the Bankruptcy Code, which exempts "retirement funds to the extent that those funds are in a fund or account that is exempt from taxation" under certain provisions of the Internal Revenue Code. In *Clark*, the Seventh Circuit ruled that an IRA which the debtor inherited from her mother was not exempt from the bankruptcy estate. The ruling conflicted with a Fifth Circuit decision, creating a circuit split that may now be resolved by the Supreme Court.

NOTABLE EXITS FROM BANKRUPTCY IN 2013

Company	Filing Date (Bankr. Court)	Conf. Date Effective Date	Assets	Industry	Result
MF Global Holdings Ltd. and MF Global Finance USA, Inc.	10/31/2011 (S.D.N.Y.)	04/05/2013 CD 06/04/2013 ED	$40.5 billion	Financial Services	Liquidation
AMR Corporation	11/29/2011 (S.D.N.Y.)	10/21/2013 CD 12/09/2013 ED	$25.0 billion	Airline	Reorganization/Merger
Ambac Financial Group, Inc.	11/08/2010 (S.D.N.Y.)	03/04/2013 CD 04/29/2013 ED	$18.9 billion	Financial Services	Reorganization
Residential Capital LLC	05/14/2012 (S.D.N.Y.)	12/11/2013 CD 12/17/2013 ED	$15.7 billion	Mortgage Banking	Liquidation
FirstFed Financial Corp.	01/06/2010 (C.D. Cal.)	11/13/2012 CD 01/02/2013 ED	$7.5 billion	Bank Holding	Reorganization
Eastman Kodak Co.	01/19/2012 (S.D.N.Y.)	08/20/2013 CD 09/03/2013 ED	$6.2 billion	Imaging	Reorganization
Penson Worldwide, Inc.	01/11/2013 (D. Del.)	07/31/2013 CD 08/15/2013 ED	$6.2 billion	Banking and Finance	Liquidation
Jefferson County, Alabama	11/09/2011 (N.D. Ala.)	11/22/2013 CD 12/03/2013 ED	$4.3 billion debt	Municipality	Adjustment
Dex Media, Inc. (formerly Dex One Corp. and SuperMedia, Inc.)	03/17/2013 (D. Del.)	04/29/2013 CD 04/30/2013 ED	$4.2 billion	Marketing	Reorganization/Merger
The PMI Group, Inc.	11/23/2011 (D. Del.)	07/25/2013 CD 10/01/2013 ED	$4.2 billion	Mortgage Insurance	Reorganization
Dynegy Inc.	07/06/2012 (S.D.N.Y.)	06/04/2013 CD 11/04/2013 ED	$4.1 billion	Energy	Reorganization
PFF Bancorp, Inc.	12/05/2008 (D. Del.)	04/26/2012 CD 08/29/2013 ED	$4.0 billion	Financial Services	Liquidation
Patriot Coal Corp.	07/09/2012 (S.D.N.Y., moved to E.D. Mo.)	12/17/2013 CD 12/18/2013 ED	$3.8 billion	Mining	Reorganization
TOUSA, Inc.	01/29/2008 (S.D. Fla.)	08/01/2013 CD 08/22/2013 ED	$2.8 billion	Homebuilding	Liquidation
Hawker Beechcraft, Inc.	05/03/2012 (S.D.N.Y.)	02/01/2013 CD 02/15/2013 ED	$2.8 billion	Aircraft Manufacturing	Reorganization
First Regional Bancorp	06/19/2012 (C.D. Cal.)	08/23/2013 CD 11/05/2013 ED	$2.5 billion	Bank Holding	Liquidation
Anchor BanCorp Wisconsin Inc.	08/12/2013 (D. Wis.)	08/30/2013 CD 09/27/2013 ED	$2.4 billion	Bank Holding	Reorganization
Central European Distribution Corp.	04/07/2013 (D. Del.)	05/13/2013 CD 06/05/2013 ED	$2.1 billion	Distilling	Reorganization
Ames Department Stores, Inc.	08/20/2001 (S.D.N.Y.)	11/13/2013 CD 11/19/2013 ED	$2.0 billion	Retail	Liquidation
AmericanWest Bancorporation	10/28/2010 (E.D. Wash.)	08/30/2013 CD 10/04/2013 ED	$1.7 billion	Bank Holding	Reorganization

Company	Filing Date (Bankr. Court)	Conf. Date Effective Date	Assets	Industry	Result
RDA Holding Co. (Reader's Digest Association)	02/17/2013 (S.D.N.Y.)	06/28/2013 CD 07/31/2013 ED	$1.6 billion	Media	Reorganization
Pinnacle Airlines Corp.	04/01/2012 (S.D.N.Y.)	04/17/2013 CD 05/01/2013 ED	$1.5 billion	Air Transport	Reorganization
TerreStar Corp. (Parent of TerreStar Networks)	02/16/2011 (S.D.N.Y.)	10/24/2012 CD 03/07/2013 ED	$1.4 billion	Telecom	Reorganization
Revel AC, Inc.	03/25/2013 (D.N.J.)	05/13/2013 CD 05/23/2013 ED	$1.2 billion	Entertainment	Reorganization
Global Aviation Holdings Inc.	02/05/2012 (E.D.N.Y.)	02/10/2013 CD 02/13/2013 ED	$690 million	Air Transport	Reorganization
Ahern Rentals, Inc.	12/22/2011 (D. Nev.)	06/06/2013 CD 06/24/2013 ED	$628 million	Constr. Equip. Rental	Reorganization
A123 Systems, Inc.	10/16/2012 (D. Del.)	05/20/2013 CD 06/28/2013 ED	$626 million	Automotive	Liquidation
Omega Navigation Enterprises, Inc.	07/08/2011 (S.D. Tex.)	05/21/2013 CD 05/22/2013 ED	$527 million	Marine Transport	Reorganization
Geokinetiks Inc.	03/10/2013 (D. Del.)	04/25/2013 CD 05/10/2013 ED	$514 million	Geosciences	Reorganization
Rural/Metro Corp.	08/04/2013 (D. Del.)	12/17/2013 CD 12/31/2013 ED	$500 million+	Health-Care Services	Reorganization
Physiotherapy (Assocs.) Holdings Inc.	11/12/2013 (D. Del.)	12/17/2013 CD 12/31/2013 ED	$500 million+	Health-Care Services	Reorganization
Indianapolis Downs, LLC	04/07/2011 (D. Del.)	03/20/2013 CD 04/11/2013 ED	$500 million	Entertainment	Sale
GateHouse Media, Inc.	09/27/2013 (D. Del.)	11/06/2013 CD 11/26/2013 ED	$470 million	Media	Reorganization
School Specialty, Inc.	01/28/2013 (D. Del.)	05/23/2013 CD 06/11/2013 ED	$464 million	Educational Products	Reorganization
FriendFinder Networks, Inc. (f.k.a. Penthouse Media Group)	09/17/2013 (D. Del.)	12/16/2013 CD 12/20/2013 ED	$452 million	Adult Entertainment	Reorganization
LodgeNet Interactive Corp.	01/27/2013 (S.D.N.Y.)	03/07/2013 CD 03/28/2013 ED	$409 million	Interactive Media	Sale
Maxcom Telecomunicaciones S.A.B. de C.V.	07/23/2013 (D. Del.)	09/10/2013 CD 10/11/2013 ED	$400 million	Telecom	Reorganization
Conexant Systems, Inc.	02/28/2013 (D. Del.)	06/06/2013 CD 07/12/2013 ED	$387 million	Microchip Developer	Reorganization
Grubb & Ellis Company	02/20/2012 (S.D.N.Y.)	03/06/2013 CD 04/01/2013 ED	$287 million	Real Estate	Sale
Dewey & LeBoeuf	03/28/2012 (S.D.N.Y.)	02/27/2013 CD 03/22/2013 ED	$193 million	Law	Liquidation

SECOND CIRCUIT RULES THAT FOREIGN DEBTOR'S INSOLVENCY PROCEEDING MAY NOT BE RECOGNIZED UNDER CHAPTER 15 UNLESS DEBTOR HAS PLACE OF BUSINESS OR PROPERTY IN THE U.S.

Veerle Roovers and Jordan M. Schneider

The U.S. Court of Appeals for the Second Circuit recently held in *Drawbridge Special Opportunities Fund LP v. Barnet (In re Barnet)*, 2013 BL 341634 (2d Cir. Dec. 11, 2013), that section 109(a) of the Bankruptcy Code, which requires a debtor "under this title" to have a domicile, a place of business, or property in the U.S., applies in cases under chapter 15 of the Bankruptcy Code. In *Barnet,* the Second Circuit vacated a bankruptcy court order granting recognition under chapter 15 to a debtor's Australian liquidation, concluding that the court erred in ruling that section 109(a) does not apply in chapter 15 cases and that it improperly recognized the debtor's Australian liquidation in the absence of any evidence that the debtor had a domicile, a place of business, or property in the U.S.

RECOGNITION OF FOREIGN INSOLVENCY PROCEEDINGS BY U.S. BANKRUPTCY COURTS

Enacted in 2005, chapter 15 of the Bankruptcy Code is patterned on the 1997 UNCITRAL Model Law on Cross-Border Insolvency (the "Model Law"), which was designed to provide effective mechanisms for dealing with cross-border insolvency cases. The basic requirements for recognition of a "foreign proceeding" in the U.S. under chapter 15 are outlined in section 1517(a) of the Bankruptcy Code: (i) the proceeding must be "a foreign main proceeding or foreign nonmain proceeding" within the meaning of section 1502; (ii) the foreign representative applying for recognition must be "a person or body"; and (iii) the petition must be supported by the documentary evidence specified in section 1515.

"Foreign proceeding" is defined in section 101(23) of the Bankruptcy Code 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.

More than one bankruptcy or insolvency proceeding may be pending with respect to the same foreign debtor in different countries. Chapter 15 therefore contemplates recognition in the U.S. of both a "main" proceeding—a proceeding pending in the country where the debtor's "center of main interests" is located—and "nonmain" proceedings, which may have been commenced in countries where the debtor merely has an "establishment," i.e., "any place of operations where the debtor carries out a nontransitory economic activity."

WHO MAY BE A DEBTOR UNDER CHAPTER 15?

Section 109(a) of the Bankruptcy Code provides that, "[n]otwithstanding any other provision of this section, only a person that resides or has a domicile, a place of business, or property in the United States, or a municipality, may be a debtor under this title." Section 103(a) provides that "this chapter"—i.e., chapter 1, including section 109(a)—"appl[ies] in a case under chapter 15."

Even so, chapter 15, unlike chapters 7, 9, 11, 12, and 13, contains its own definition of "debtor." Section 1502(1) of the Bankruptcy Code defines a "debtor," "[f]or the purposes of [chapter 15]," as "an entity that is the subject of a foreign proceeding." The Second Circuit addressed the apparent inconsistency between sections 109(a) and 1502(1) in *Barnet*.

BARNET

In July 2009, Octaviar Administration Pty Ltd. ("OA"), a company incorporated in Queensland, Australia, had been ordered to liquidate by an Australian court. As part of an investigation into OA's affairs, various Australian affiliates of Drawbridge Special Opportunities Fund LP ("Drawbridge") were sued in Australia.

In August 2012, the OA liquidators, as foreign representatives, sought recognition of the Australian liquidation as a foreign main proceeding under chapter 15 in a New York bankruptcy court. Drawbridge objected on the basis that OA did not meet the requirements for a debtor set forth in section 109(a) of the Bankruptcy Code.

The bankruptcy court entered an order recognizing OA's Australian liquidation on September 6, 2012. It overruled Drawbridge's objection, ruling that the definition of "debtor" in section 1502(1) determines whether a foreign debtor can be granted relief under chapter 15 and that the debtor need not have a domicile, property, or a place of business in the U.S.

See Transcript of Hearing at 30, l. 1–13, *In re Octaviar Admin. Pty Ltd.*, No. 12-13443 (Bankr. S.D.N.Y. Sept. 6, 2012) [Document No. 22]. In response to a joint request by Drawbridge and OA's foreign representatives, the bankruptcy court certified a direct appeal of the recognition order to the Second Circuit, which agreed to review the case.

THE SECOND CIRCUIT'S RULING

After determining that it had jurisdiction over Drawbridge's appeal of the recognition order, the Second Circuit considered whether section 109(a) applies in a chapter 15 case. The court ruled that it does, on the basis of a "straightforward" interpretation of the statute, because section 103(a) expressly provides that chapter 1—of which section 109(a) is a part— applies in a case under chapter 15. "Section 109, of course," the Second Circuit wrote, "is within Chapter 1 of Title 11 and so, by the plain terms of the statute, it applies 'in a case under chapter 15.' "

The court emphasized that "[s]ection 109(a) . . . creates a requirement that must be met by any debtor." Because OA's foreign representatives had made no attempt to establish that OA had a domicile, a place of business, or property in the U.S., the Second Circuit explained, the bankruptcy court should not have granted recognition to OA's Australian liquidation.

The Second Circuit rejected the foreign representatives' argument that section 109(a) does not apply because OA is a "debtor" under the Australian Corporations Act (rather than under the Bankruptcy Code) and the foreign representatives (rather than the debtor) were seeking recognition of the foreign proceeding. According to the court:

> [T]he presence of a debtor is inextricably intertwined with the very nature of a Chapter 15 proceeding . . . [and] [i]t stretches credulity to argue that the ubiquitous references to a debtor in both Chapter 15 and the relevant definitions of Chapter 1 do not refer to a debtor under the title [title 11] that contains both chapters.

In addition to the statutory definitions of "foreign representative," "foreign main proceeding," "debtor," and "foreign proceeding," the court noted, the automatic and discretionary relief provisions that accompany recognition of a foreign main proceeding (*see* sections 1520 and 1521) are similarly "directed towards debtors."

The Second Circuit flatly rejected the foreign representatives' argument that, even if OA were required to qualify as a debtor under the Bankruptcy Code, it need satisfy only the chapter 15-specific definition of "debtor" in section 1502(1), and not the section 109 requirements. "This argument also fails," the court wrote, "as we cannot see how such a preclusive reading of Section 1502 is reconcilable with the explicit instruction in Section 103(a) to apply Chapter 1 to Chapter 15."

According to the Second Circuit, not only a "plain meaning" analysis but also the context and purpose of chapter 15 support the application of section 109(a) to chapter 15. The court explained that Congress amended section 103 to state that chapter 1 applies in cases under chapter 15 at the same time it enacted chapter 15, which strongly supports the conclusion that lawmakers intended section 103(a) to mean what it says—namely, that chapter 1 applies in cases under chapter 15.

The court acknowledged that the strongest support for the foreign representatives' arguments lies in 28 U.S.C. § 1410, which provides a U.S. venue for chapter 15 cases even when "the debtor does not have a place of business or assets in the United States." However, the Second Circuit explained that this venue statute "is purely procedural" and that, "[g]iven the unambiguous nature of the substantive and restrictive language used in Sections 103 and 109 of Chapter 15, to allow the venue statute to control the outcome would be to allow the tail to wag the dog."

Finally, the Second Circuit found that the purpose of chapter 15 is not undermined by making section 109(a) applicable in chapter 15 cases. Section 1501(a) of the Bankruptcy Code provides that the purpose of chapter 15 "is to incorporate the Model Law . . . so as to provide effective mechanisms for dealing with cases of cross-border insolvency." Although section 109(a), or its equivalent, is not included in the Model Law, the Second Circuit emphasized, the Model Law allows a country enacting it to "modify or leave out some of its provisions." In any case, the court concluded, the omission of a provision similar to section 109(a) from the Model Law does not suffice to outweigh the express language Congress used in adopting sections 103(a) and 109(a).

The Second Circuit accordingly vacated the recognition order and remanded the case to the bankruptcy court for further proceedings consistent with its ruling.

GOING FORWARD

It remains to be seen what impact, if any, *Barnet* will have on the availability of chapter 15 to assist foreign companies in their cross-border restructurings. In many, if not most, complex cross-border restructurings, the foreign debtor maintains a presence, or owns property located, in the U.S. As such, the holding in *Barnet* would not be implicated. Similarly, the requirement for a U.S. presence or assets contained in section 109(a) has been broadly interpreted by courts in the U.S. to mean the presence of *any* property in the U.S., no matter how small. *See, e.g., In re Global Ocean Carriers Ltd.*, 251 B.R. 31 (Bankr. D. Del. 2000). Therefore, foreign debtors should not meet any significant obstacle in satisfying this requirement.

It also remains to be seen whether courts in other circuits will follow the Second Circuit's lead. However, at least one bankruptcy court in another circuit has already disagreed with *Barnet*. Six days after the Second Circuit handed down its ruling, a Delaware bankruptcy court (which is in the Third Circuit) issued a bench ruling to the contrary in *In re Bemarmara Consulting A.S.*, Case No. 13-13037(KG) (Bankr. D. Del. Dec. 17, 2013). Bankruptcy judge Kevin Gross ruled that section 109(a) does not apply in chapter 15 because it is the foreign representative, and not the debtor in the foreign proceeding, who petitions the court. Moreover, the judge wrote, "there is nothing in [the] definition [of "debtor"] in Section 1502 which reflects upon a requirement that [a] Debtor have assets." *See* Transcript of Hearing at 9, l. 11–18, *In re Bemarmara Consulting A.S.*, Case No. 13-13037(KG) (Bankr. D. Del. Dec. 17, 2013) [Document No. 39]. "A Debtor," he noted, "is an entity that is involved in a foreign proceeding."

It bears noting that chapter 15's predecessor—section 304 of the Bankruptcy Code (repealed in 2005), which gave U.S. bankruptcy courts discretion to grant a limited range of ancillary (principally injunctive) relief by way of assistance to the duly appointed representatives of foreign debtors with U.S. assets—did not require a foreign debtor to qualify as a "debtor" under section 109(a) as a condition to relief. *See, e.g., Goerg v. Parungao (In re Goerg)*, 844 F.2d 1562 (11th Cir. 1988); *Saleh v. Triton Container Intl., Ltd. (In re Saleh)*, 175 B.R. 422 (Bankr. S.D. Fla. 1994). *Barnet* suggests that chapter 15 departed from section 304 on this point, whereas *Bemarmara* adopts a contrary view.

NO SURCHARGE FOR YOU: THIRD CIRCUIT RULES THAT SECTION 506(c) SURCHARGE IS "SHARPLY LIMITED"

Lauren M. Buonome and Mark G. Douglas

The ability to "surcharge" a secured creditor's collateral in bankruptcy is an important resource available to a bankruptcy trustee or chapter 11 debtor in possession ("DIP"), particularly in cases where there is little or no equity in the estate to pay administrative costs, such as the fees and expenses of estate-retained professionals. However, as demonstrated by a ruling handed down by the Third Circuit Court of Appeals, the circumstances under which collateral may be surcharged are narrow. In *In re Towne, Inc.*, 2013 BL 232068 (3d Cir. Aug. 29, 2013), the court of appeals affirmed an order denying a motion by special counsel to direct payment of its fees and expenses by surcharging the proceeds of a secured creditor's collateral because the law firm's services did not directly benefit—and in some cases sought to disadvantage—the secured creditor.

SURCHARGE OF COLLATERAL

Section 506(c) of the Bankruptcy Code provides an exception to the general rule that the payment of expenses associated with administering a bankruptcy estate, including the administration of assets pledged as collateral, must derive from unencumbered assets. Under section 506(c), a trustee or DIP "may recover from property securing an allowed claim the reasonable, necessary costs and expenses of preserving, or disposing of, such property to the extent of any benefit to the holder of such claim." The purpose of the provision is to prevent secured creditors from obtaining a financial windfall at the expense of the estate and unsecured creditors by ensuring that the secured creditors are responsible for the same collateral disposition costs within a bankruptcy case that normally would arise in a foreclosure or similar state law proceeding outside bankruptcy. *See Loudoun Leasing Development Co. v. Ford Motor Credit Co. (In re K & L Lakeland, Inc.)*, 128 F.3d 203 (4th Cir. 1997); *In re TIC Memphis RI 13, LLC*, 498 B.R. 831 (Bankr. W.D. Tenn. 2013).

Three elements must be satisfied in order to surcharge collateral under the terms of section 506(c): (i) the expenditure must be necessary; (ii) the amounts expended must be reasonable; and (iii) the secured creditor must benefit from the expense. The inquiry into what costs are reasonable and

necessary, and the extent to which they benefit the party being surcharged, is factual, and the party seeking recovery has the burden of establishing those elements. *See* 4 Collier on Bankruptcy ¶ 506.05[9] (16th ed. 2014). If an expense satisfies the requirements of section 506(c), the proceeds from the sale or other disposition of the collateral must be used first to pay the surcharged expense, with any excess applied to payment of the claim(s) secured by the property. In *Towne*, the Third Circuit considered whether the sale proceeds of collateral in a chapter 7 case could be surcharged to pay the fees and expenses of special counsel retained by the DIP before the case was converted from chapter 11 to chapter 7.

TOWNE

Towne, Inc., and its affiliate, DMD Towne, LLC (collectively, the "Debtors"), owned and operated a franchised BMW car dealership in Oyster Bay, New York. The Debtors' assets, which consisted of the franchise agreement, the real property on which the dealership was located, and various inventory, were fully encumbered by liens securing approximately $9 million owed to BMW Financial Services, NA, LLC ("BMW").

The Debtors filed for chapter 11 protection in New Jersey in April 2009. The bankruptcy court later authorized the Debtors to retain The Margolis Law Firm ("Margolis") as special counsel for the purpose of finding prospective purchasers.

Shortly after the petition date, BMW sought relief from the automatic stay to foreclose on its collateral. In opposing the motion, Margolis represented that it had received an offer to purchase the Debtors' assets for $6 million. The bankruptcy court granted relief from the stay, but BMW agreed to forbear from foreclosing immediately to allow the Debtors to pursue the proposed sale transaction.

On the Debtors' behalf, Margolis commenced litigation against BMW, seeking, among other things, to reduce the amount of BMW's secured claim to $6 million, which relief would have allowed the proposed $6 million sale of the assets to proceed free and clear of BMW's liens under section 363(f)(3) of the Bankruptcy Code. Margolis also conducted an investigation that led to the commencement of a state court administrative proceeding against BMW regarding its lending and franchise relationship with the Debtors.

Due to the ongoing litigation, BMW, which could have blocked the proposed sale because it was significantly undersecured, refused to consent to the transaction unless the Debtors, as a quid pro quo, released BMW from the claims that had been asserted against it. The Debtors refused to do so, and the sale fell through.

> *Towne* reinforces the Third Circuit's prior decisions that surcharging collateral under section 506(c) is possible only under "sharply limited" circumstances.

In August 2009, the bankruptcy court converted the Debtors' cases to chapter 7 and appointed a trustee to liquidate the estate. Shortly afterward, BMW contacted prospective purchasers of the Debtors' assets, and the trustee and BMW selected a buyer willing to pay $5.5 million from several bidders. As part of the proposed transaction, the trustee agreed to execute releases in favor of BMW on behalf of the estate. The bankruptcy court approved the sale in early 2010. The court's order included a consensual carve-out from the sale proceeds in the amount of $177,000 for the benefit of the trustee, as well as a 10 percent distribution to general unsecured creditors.

Margolis subsequently filed a motion under section 506(c) seeking payment from the sale proceeds of approximately $90,000 in fees and expenses for services provided as special counsel to the Debtors prior to conversion of the cases. The bankruptcy court denied the request, concluding that Margolis's services benefited primarily the Debtors and their principals and that any benefit to BMW was "purely incidental and thus outside the scope of section 506(c)." The district court affirmed on appeal.

THE THIRD CIRCUIT'S RULING

Margolis fared no better with the Third Circuit. In its unpublished ruling, the court of appeals acknowledged its prior decisions holding that, ordinarily, an attorney's fees and expenses "may be charged only against the surplus of the debtor's estate." Section 506(c), the Third Circuit explained, "provides a limited exception to this rule" that permits a claimant to recover expenses from secured collateral "only under 'sharply limited' circumstances" (quoting *In re Visual Indus., Inc.*, 57 F.3d 321, 325 (3d Cir. 1995)).

The Third Circuit concluded that Margolis failed to meet the requirements of section 506(c) because it did not prove that its legal services and related expenses were necessary to

preserve or dispose of the collateral or that such services provided a direct benefit to BMW. Although Margolis detailed its efforts to market the Debtors' assets to potential purchasers and to consummate purchase agreements for the sale of the collateral, the Third Circuit explained, such "efforts did not result in an actual sale."

Moreover, the court added, Margolis was not responsible for, or involved in any way in, the sale transaction that was later consummated. The Third Circuit agreed with the bankruptcy court's "purely speculative" characterization of Margolis's contention that it "prevented termination of the Franchise" and thereby benefited BMW by preserving the value of the collateral. In fact, the court of appeals emphasized, Margolis's legal services benefited primarily the Debtors rather than BMW and were "actually contrary to [BMW's] interests" in many respects.

The Third Circuit rejected Margolis's remaining arguments, including the contention that BMW consented to a surcharge of its collateral to pay the law firm's fees and expenses. According to the court, Margolis demonstrated nothing more than BMW's "limited cooperation with [Margolis's] initial efforts to effectuate a sale of the Collateral," which would not support a finding that BMW consented to be surcharged for Margolis's fees and expenses.

OUTLOOK

Towne reinforces the Third Circuit's prior decisions that surcharging collateral under section 506(c) is possible only under "sharply limited" circumstances. Unless a secured creditor explicitly consents to a carve-out, a trustee or DIP attempting to surcharge collateral must be prepared to demonstrate that the costs of preserving or disposing of collateral are necessary and reasonable and provide a direct benefit to the secured creditor.

BUSINESS RESTRUCTURING REVIEW

Business Restructuring Review is a publication of the Business Restructuring & Reorganization Practice of Jones Day.

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