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ENERGY FUTURE REDUX: NO AUTOMATIC STAY RELIEF TO DECELERATE NOTES AND COLLECT MAKE-WHOLE PREMIUMS

Jonathan M. Fisher and Mark G. Douglas

In *Del. Trust Co. v. Energy Future Intermediate Holding Co. LLC (In re Energy Future Holdings Corp.)*, 527 B.R. 178 (Bankr. D. Del. 2015), the bankruptcy court ruled that, even though a chapter 11 debtor repaid certain bonds prior to maturity, a "make-whole" premium was not payable under the plain terms of the bond indenture because automatic acceleration of the debt triggered by the debtor's chapter 11 filing was not a "voluntary" repayment. In this initial decision, the court reserved judgment on the indenture trustee's request for relief from the automatic stay to revive the make-whole premium claim by decelerating the bonds, as permitted under the terms of the indenture.

In a later decision, however, the bankruptcy court denied the indenture trustee's motion for relief from the stay. *See Del. Trust Co. v. Energy Future Intermediate Holding Co. LLC (In re Energy Future Holdings Corp.)*, 2015 BL 222532 (Bankr. D. Del. July 8, 2015). In its ruling, the court wrote:

> As the debtor's estate and its stakeholders would be greatly prejudiced by lifting the automatic stay and the harm to the creditor cannot substantially outweigh the harm to the debtor's estate, under the totality of the circumstances, relief from the automatic stay is almost certainly unavailable, regardless of the creditor's likelihood of success on the merits.

ENFORCEABILITY OF MAKE-WHOLE PREMIUMS IN BANKRUPTCY

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

Bankruptcy courts almost uniformly refuse to enforce no-call provisions against debtors, allowing debtors to repay outstanding debt despite such provisions. *See, e.g., HSBC Bank USA, N.A. v. Calpine Corp.*, No. 07 Civ. 3088, 2010 U.S. Dist. LEXIS 96792, at *17 (S.D.N.Y. Sept. 14, 2010); *Cont'l Sec. Corp. v. Shenandoah Nursing Home P'ship*, 188 B.R. 205, 213 (W.D. Va. 1995); *In re Vest Assocs.*, 217 B.R. 696, 698 (Bankr. S.D.N.Y. 1998). Further, the majority of courts have disallowed a lender's claim for payment of a make-whole premium when the premium is not explicitly payable in the event of acceleration. Such courts find that acceleration due to the debtor's bankruptcy filing, and any subsequent repayment of the debt during the bankruptcy case as part of a chapter 11 plan or otherwise, is not voluntary and therefore does not trigger any make-whole premium obligations. *See*, *e.g.*, *Bank of New York Mellon v. GC Merchandise Mart, LLC (In re Denver Merchandise Mart, Inc.)*, 740 F.3d 1052, 1059 (5th Cir. 2014); *U.S. Bank Trust Nat'l Assoc. v. Am. Airlines, Inc. (In re AMR Corp.)*, 730 F.3d 88, 105 (2d Cir. 2013); *In re MPM Silicones, LLC*, 2014 BL 250360 (Bankr. S.D.N.Y. Sept. 9, 2014) (memorializing bench ruling of Aug. 26, 2014), *aff'd, U.S. Bank National Association v. Wilmington Savings Fund Society, FSB (In re MPM Silicones, LLC)*, 531 B.R. 321 (S.D.N.Y. 2015); *Premier Entm't Biloxi, LLC v. U.S. Bank Nat'l Ass'n (In re Premier Entm't Biloxi, LLC)*, 445 B.R. 582, 627–28 (Bankr. S.D. Miss. 2010); *In re Solutia Inc.*, 379 B.R. 473, 488 (Bankr. S.D.N.Y. 2007); *but see In re School Specialty, Inc.*, No. 13-10125, 2013 Bankr. LEXIS 1897, at *19 (Bankr. D. Del. Apr. 22, 2013) (allowing claim for make-whole premium under New York law where loan agreement specifically provided for make-whole premium in event of "either prepayment or acceleration" and make-whole premium was not plainly disproportionate to lender's probable loss).

The courts are divided on the alternative argument that a lender should be entitled to contract damages (apart from a make-whole premium) for "dashed expectations" when its outstanding debt has been paid prior to its original maturity. *Compare Calpine*, 2010 U.S. Dist. LEXIS 96792, at *18 (noteholders were not entitled to expectation damages because notes did not provide for payment of premiums upon acceleration and claims for expectation damages violated prohibition against unmatured interest under section 502(b)(2)) *with Premier Entm't Biloxi*, 445 B.R. at 631 (although lenders were not entitled to secured claim for make-whole damages because indenture required prepayment penalties only if debtor repaid loan prior to maturity, and maturity was automatically accelerated due to bankruptcy filing, lenders were entitled to unsecured claim for dashed expectations).

ENERGY FUTURE

Known as TXU Corp. until 2007, when it was acquired in what was then the largest leveraged buyout ever, Texas-based Energy Future Holdings Corp. and its subsidiaries (collectively, "Energy Future") filed for chapter 11 protection in the District of Delaware on April 29, 2014, to implement a restructuring that would split the company and eliminate more than $26 billion in debt.

Energy Future's pre-bankruptcy capital structure included $4 billion of first-lien notes divided into two separate tranches bearing different interest rates and maturities. Both issuances of first-lien notes included identical make-whole provisions designed to protect the noteholders from early redemption. In particular, the indenture governing each tranche of notes, in specifying what constitutes an "Optional Redemption," stated that "at any time prior to December 1, 2015, the Issuer may redeem all or a part of the Notes at a redemption price equal to 100% of the principal amount of the Notes redeemed plus the Applicable Premium." The "Applicable Premium" was defined as an amount equal to the greater of: (i) 1 percent of the principal amount of the notes; and (ii) the excess, if any, of the present value of the notes' redemption price and the required interest payments to maturity over the outstanding principal amount of the notes.

The indenture also stated that an "Event of Default" occurs when Energy Future "commences proceedings to be adjudicated bankrupt or insolvent." If such an Event of Default should occur, the indenture provided that "all outstanding Notes shall be due and payable immediately without further action or notice." In the event of acceleration, the indenture gave the indenture trustee a qualified right to effectively decelerate the first-lien notes upon the request of the holders of at least a majority in principal amount of the notes.

On the bankruptcy petition date, Energy Future filed a restructuring support and lockup agreement that documented a broad settlement reached among Energy Future and various creditors. This "global settlement" included a settlement between Energy Future and some of the first-lien noteholders that was to be implemented by means of a postpetition tender offer. The tender offer proposed a "roll-up"—an exchange of existing first-lien notes for new notes bearing a lower interest rate to be issued under a $5.4 billion debtor-in-possession financing facility.

In exchange for new notes valued at 105 percent of outstanding principal and 101 percent of accrued interest, participating noteholders would agree to release their make-whole premium claims. Of Energy Future's two tranches of first-lien debt, 97 percent of one tranche and 34 percent of the other tranche accepted the tender offer. Nonsettling noteholders retained the right to litigate the validity of their make-whole premium claims.

On the basis of these results, the bankruptcy court approved the settlement with accepting first-lien noteholders on June 6, 2014. That order was later upheld on appeal in *Del. Trust Co. v. Energy Future Intermediate Holding Co. LLC (In re Energy Future Holdings Corp.)*, 527 B.R. 157 (D. Del. 2015). Prior to the bankruptcy court's approval of the settlement, the indenture trustee for the tranche of first-lien notes that had not overwhelmingly accepted the tender offer filed an adversary proceeding seeking, among other things, a determination that the nonsettling noteholders were entitled to a secured claim for a make-whole premium in the amount of approximately $660 million.

The indenture trustee also simultaneously filed a motion seeking a declaration that it could decelerate the first-lien notes without violating the automatic stay or, alternatively, for an order lifting the stay for this purpose. Shortly afterward, a majority in dollar amount of the noteholders notified the trustee that, conditioned on relief from the stay or a determination that it did not apply, they waived all defaults under the indenture and rescinded any acceleration resulting from a bankruptcy default.

The bankruptcy court later bifurcated the adversary proceeding into two phases. In the first phase, it considered: (i) whether Energy Future was liable for the make-whole premium or other damages for breach of the no-call provision in the note indenture; and (ii) whether Energy Future intentionally defaulted on the notes in order to avoid paying the make-whole premium or other damages. The court assumed for purposes of this phase of the litigation that Energy Future was solvent and able to pay all creditor claims in full. The indenture trustee and Energy Future cross-moved for summary judgment on these issues.

The court granted Energy Future's motion for summary judgment in part and denied the trustee's motion in its entirety. The court ruled, among other things, that the plain language of the indenture governing the first-lien notes did not require payment of a make-whole premium following acceleration due to a default caused by the commencement of a "proceeding to be adjudicated bankrupt or insolvent." The court explained that the indenture provision, specifying the consequences of an event of default triggered by a bankruptcy filing, did not include any reference to "anything that would support the Trustee's position that the Applicable Premium is owed upon a bankruptcy event of default and acceleration." The court agreed with the approach applied in *Calpine*, *Premier Entm't*, *MPM Silicones*, and *Solutia*, ruling that "the acceleration provision in the Indenture does not include clear and unambiguous language that a make-whole premium (here, the 'Applicable Premium') is due upon the repayment of the Notes following a bankruptcy acceleration."

However, the court held that the indenture trustee had a qualified right under the indenture to rescind the automatic acceleration triggered by Energy Future's bankruptcy filing. If the rescission were to be effective retroactively (i.e., prior to the June 2014 repayment date), the court explained, Energy Future's repayment of the first-lien notes would in fact constitute an Optional Redemption, and the make-whole premium would be payable. Although the trustee could not rescind the acceleration without violating the automatic stay, the court ruled that there was a material issue of fact as to whether "cause" existed to lift the stay. It accordingly denied Energy Future's motion for summary judgment on this issue, stating that a trial must be held to consider the indenture trustee's ability to decelerate the first-lien notes retroactively.

INTERLUDE

Five weeks after the bankruptcy court issued its make-whole premium decision in *Energy Future*, the U.S. District Court for the Southern District of New York affirmed the bankruptcy court's rulings in *MPM Silicones* regarding make-whole premiums, subordination provisions in an intercreditor agreement, and the appropriate rate of interest to be paid to secured creditors under a cramdown chapter 11 plan. *See U.S. Bank National Association v. Wilmington Savings Fund Society, FSB (In re MPM Silicones, LLC)*, 531 B.R. 321 (S.D.N.Y. 2015). In affirming the bankruptcy court's order denying the payment of a make-whole premium to senior noteholders, the district court wrote that "[n]either the 2012 Indentures nor the Senior Lien Notes themselves clearly and unambiguously provide that the Senior Lien Noteholders are entitled to a make-whole payment in the event of an acceleration of debt caused by the voluntary commencement of a bankruptcy case."

The district court in *MPM Silicones* also affirmed the bankruptcy court's denial of the noteholders' motion for relief from the automatic stay to rescind the bankruptcy-triggered acceleration. The court noted, among other things, that "[t]he potential for an automatic stay and the effect of the Code's automatic acceleration of the Notes upon the filing of a bankruptcy case is a part of the bargain to which the parties agreed."

THE STAY RELIEF RULING

The bankruptcy court in *Energy Future* denied the indenture trustee's motion for relief from the automatic stay on July 8, 2015. Initially, the court explained that the factors which courts generally consider when determining whether "cause" exists to grant relief from the stay are: (i) whether lifting the stay will cause any great prejudice to either the bankruptcy estate or the debtor; (ii) whether the hardship to the party seeking relief from the stay considerably outweighs the hardship to the debtor; and (iii) the probability that the creditor will prevail on the merits.

The bankruptcy court found that Energy Future and its estate would be greatly harmed if the stay were lifted to allow deceleration of the first-lien notes because payment of the $431 million make-whole premium "would substantially reduce the value of the [Energy Future] stakeholder recoveries, including recoveries to equity." The court rejected the indenture trustee's argument that, because Energy Future is solvent and can pay its creditors' claims, "there is no relevant harm to its estate." According to the court, the indenture trustee failed to cite any authority for the proposition that solvency alone provides "cause" to grant relief from the automatic stay. Moreover, the court noted, the notion that a solvent debtor's estate cannot suffer harm "would effectively remove equity holders from the 'bankrupt estate.' "

The court also explained that, if the stay were lifted to permit deceleration of the first-lien notes, Energy Future's other noteholders would likely assert additional make-whole premium claims in an approximate aggregate amount exceeding $400 million. This would bring the total potential loss to Energy Future's estate as a consequence of modification of the stay to approximately $900 million.

On the other hand, the court noted, if it declined to modify the stay, the first-lien noteholders would be deprived of the $431 million make-whole premium. Therefore, the court concluded that Energy Future had satisfied its burden of demonstrating that the economic harm to the noteholders did not "considerably outweigh" the harm to Energy Future. In addition, citing the district court's ruling in *MPM Silicones*, which, as noted previously, addressed the same issue, the bankruptcy court in *Energy Future* found that any harm to the noteholders' expectations was insufficient to alter this conclusion:

> The Court agrees that the best evidence of the bargain between the parties, and therefore the parties' expectations, is the governing contract—in this case, the Indenture. . . . [T]he bargain struck does not contemplate for the payment of the Applicable Premium after a bankruptcy-caused acceleration. . . . In other words, the Trustee and the Noteholders bargained for the automatic acceleration of debt in the event of a bankruptcy default and must live with the consequences of their bargain. They did not bargain for a make-whole premium in the event of an automatic acceleration following an event of default as a result of a bankruptcy filing by [Energy Future], but they could have. True, the Noteholders also bargained for the right to rescind acceleration, but that right was blocked by the automatic stay.

Finally, the bankruptcy court determined that the indenture trustee demonstrated a likelihood of succeeding on the merits in light of the court's previous finding that the trustee had the right under the indenture to waive the bankruptcy default and decelerate the notes. However, it ruled that, "under the totality of the circumstances, cause does not exist to lift the automatic stay."

OUTLOOK

Viewed as a whole, the rulings in *Energy Future*, *Calpine*, *Premier Entm't*, *MPM Silicones*, and *Solutia* send a clear message: In Delaware and New York, a bond indenture or other governing instrument must expressly and unequivocally provide that repayment is not permitted prior to the maturity date and that a make-whole premium is payable upon an automatic acceleration of the notes caused by a bankruptcy default. If such express and unequivocal provisions were included in the *Energy Future* bond indentures, the nonsettling first-lien noteholders would not have been forced to rely on the uncertain (and ultimately fruitless) prospect that the court might grant

relief from the stay to permit retrospective deceleration of the notes. The bankruptcy court concluded its opinion by emphasizing this point:

> That is not to say that a creditor can never successfully pursue a make-whole claim. For example, unlike in this case, an indenture might provide for payment of a make-whole claim in a manner that does not implicate the automatic stay. Whether such a claim would be successful is an issue for another day. Under the facts of this case, however, the Trustee must obtain relief from the automatic stay for the Applicable Premium to be due and owing to the non-settling Noteholders and there is insufficient cause for the Court to lift the stay.

Without unequivocal drafting, *Energy Future* and *MPM Silicones* paint a bleak picture for parties seeking stay relief as a means of collecting a make-whole premium in bankruptcy. Because the relative harms to the party seeking stay relief and to the estate are, as articulated by the *Energy Future* court, normally "in equipoise," it would not be difficult in most cases for a debtor to demonstrate that the harm to the movant if stay relief were denied does not "considerably" outweigh the harm to the debtor.

FIRST IMPRESSIONS: SECOND CIRCUIT RULES THAT LIEN IS EXTINGUISHED UNDER CHAPTER 11 PLAN ONLY IF SECURED CREDITOR PARTICIPATES IN CASE

Dan B. Prieto and Mark G. Douglas

A hornbook principle of U.S. bankruptcy jurisprudence is that valid liens pass through bankruptcy unaffected. This long-standing principle, however, is at odds with 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," except as otherwise provided in the plan or the order confirming the plan. Several courts have attempted to reconcile the pass-through principle with the statute by requiring the creditor to "participate in the reorganization" as a prerequisite to the application of section 1141(c).

This judicial gloss clouds the question of whether the terms of a chapter 11 plan providing for the treatment of secured creditor claims are binding on nonparticipating secured creditors. The Second Circuit Court of Appeals recently weighed in on this issue as a matter of first impression. In *City of Concord, N.H. v. Northern New England Telephone Operations LLC (In re Northern New England Telephone Operations LLC)*, 2015 BL 248853 (2d Cir. Aug. 4, 2015), the court ruled that a lien is extinguished by a chapter 11 plan if: (i) the text of the plan does not preserve the lien; (ii) the plan is confirmed; (iii) the property encumbered by the lien is "dealt with" by the plan; and (iv) the secured creditor participated in the bankruptcy case.

SECTION 1141(c)

Section 1141(c) states:

> Except as provided in subsections (d)(2) [debts of individual debtors excepted from discharge under section 523] and (d)(3) [denial of discharge for, among others, liquidating corporations] of this section and except as otherwise provided in the plan or in the order confirming the plan, after confirmation of a plan, the property dealt with by the plan is free and clear of all claims and interests of creditors, equity security holders, and of general partners in the debtor.

With respect to liens and security interests, section 1141(c) means that "unless the plan of reorganization, or the order confirming the plan, says that a lien is preserved, it is extinguished by the confirmation." *In re Penrod*, 50 F.3d 459, 463 (7th Cir. 1995); *accord JCB, Inc. v. Union Planters Bank, NA*, 539 F.3d 862 (8th Cir. 2008); *but see Bowen v. United States (In re Bowen)*, 174 B.R. 840 (S.D. Ga. 1994) (holding that a "lien" is not an "interest" within the meaning of section 1141(c); any release of a lien must rely on section 506(d)). A concern regarding the impact of lien stripping has led a number of (principally appellate) courts to add a judicial gloss to section 1141(c) requiring the secured creditor to have "participated in the reorganization" before its lien will be deemed extinguished.

In *Penrod*—apparently, the first decision to add the participation gloss to section 1141(c)—the debtor's chapter 11 plan made provision for payment of a secured claim, but neither the plan nor the order confirming it stated whether the lien would be extinguished. The Seventh Circuit, acknowledging the "old saw" that liens pass through bankruptcy unaffected, nevertheless concluded that "when lienholders participate in a bankruptcy proceeding, and especially in a reorganization, they know that their liens are likely to be affected, and indeed altered." It ruled that liens are "interests" covered by section 1141(c) and that "unless the plan of reorganization, or the order confirming the plan, says that a lien is preserved, it is extinguished by the confirmation . . . provided, we emphasize, that the holder of the lien participated in the reorganization."

In *Elixir Indus., Inc. v. City Bank & Trust Co. (In re Ahern Enters., Inc.)*, 507 F.3d 817 (5th Cir. 2007), the Fifth Circuit held that four conditions must be met for a lien to be voided under section 1141(c): (i) the plan must be confirmed; (ii) the collateral must be dealt with by the plan; (iii) the lienholder must participate in the reorganization; and (iv) the lien must not be preserved under the plan. Other courts have similarly required secured creditor participation in the case as a condition to lien extinguishment under section 1141(c). *See, e.g., Airadigm Communications, Inc. v. FCC (In re Airadigm Communications, Inc.)*, 519 F.3d 640 (7th Cir. 2008); *FDIC v. Union Entities (In re Be-Mac Transport Co.)*, 83 F.3d 1020 (8th Cir. 1996); *Penrod*, 50 F.3d at 463; *In re Omega Optical, Inc.*, 476 B.R. 157 (Bankr. E.D. Pa. 2012).

Although the four-part *Ahern* test has been adopted in one form or another by many other courts, relatively few have examined what constitutes "participation" for purposes of the test. *See, e.g., Ahern*, 507 F.3d at 823 (filing a proof of claim as an unsecured priority creditor constitutes participation); *In re Regional Bldg. Systems, Inc.*, 254 F.3d 528 (4th Cir. 2001) (participation is found where the creditor sat on the unsecured creditors' committee and filed a proof of unsecured claim, yet failed to object to confirmation of the plan after the realization of settlement proceeds that would have rendered its claim partially secured); *Greater Am. Land Res., Inc. v. Town of Brick*, 2012 BL 122346 (D.N.J. May 17, 2012) (no participation where the creditor taxing authority did not file a proof of claim and the plan neither listed nor treated the tax claim); *Omega Optical*, 467 B.R. at 165 (to the extent participation is required by section 1141(c), filing a proof of claim, then entering a notice of appearance of counsel, constitutes participation); *In re WorldCom, Inc.*, 382 B.R. 610 (Bankr. S.D.N.Y. 2008) (the secured creditor participated by filing a proof of claim).

The unsettled question regarding what constitutes participation was addressed again 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). 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. In that case, the secured creditor never filed a proof of claim or otherwise became involved in the bankruptcy case, although it did receive notice of the chapter 11 plan, which provided for no recovery with respect to the secured creditor's claim. The court framed the issue as whether the secured creditor's "passive receipt of notice constitutes participation within the meaning of the test" stated in *Ahern*. It ruled that passive receipt of notice does not constitute participation. "Participation," the Fifth Circuit explained, "connotes activity, and not mere nonfeasance," consistent with the definition contained in *Black's Law Dictionary* as well as the U.S. Supreme Court's ruling in *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2587 (2012), where the court distinguished between "activity" and a "deci[sion] not to do something" or a "fail[ure] to do it."

NEW ENGLAND TELEPHONE

Northern New England Telephone Operations LLC ("NNET") and its parent company, FairPoint Communications, Inc. ("FairPoint"), filed for chapter 11 protection on October 26, 2009, in the Southern District of New York. NNET owned several properties in Concord, New Hampshire. The City of Concord ("Concord") billed NNET for property taxes on a quarterly basis. When NNET filed its bankruptcy petition, Concord had already issued tax bills for the first and second quarters ("Q1" and "Q2") of the 2009 tax year.

NEWSWORTHY

Scott J. Greenberg (New York), Thomas A. Howley (Houston), Richard L. Wynne (Los Angeles), Pedro A. Jimenez (Miami and New York), Lisa G. Laukitis (New York), Paul D. Leake (New York), James O. Johnston (Los Angeles), Heather Lennox (New York and Cleveland), Gregory M. Gordon (Dallas), David G. Heiman (Cleveland), Corinne Ball (New York), Carl E. Black (Cleveland), Bruce Bennett (Los Angeles), Brad B. Erens (Chicago), and ***Aldo L. LaFiandra (Atlanta and New York)*** were recognized in *Best Lawyers in America* (2016) in the field of Bankruptcy and Creditor Debtor Rights/Insolvency and Reorganization Law.

Heather Lennox (New York and Cleveland) was named "Lawyer of the Year" for 2016 by *Best Lawyers* in the field of Bankruptcy and Creditor Debtor Rights/Insolvency and Reorganization Law.

Sidney P. Levinson (Los Angeles), Carl E. Black (Cleveland), Corinne Ball (New York), James O. Johnston (Los Angeles), Paul D. Leake (New York), and ***Bruce Bennett (Los Angeles)*** were recognized in *Best Lawyers in America* (2016) in the field of Litigation-Bankruptcy.

Laurent Assaya (Paris) was featured on the cover of the September 7, 2015, issue of *CapitalFinance*. In the accompanying article, he discussed the prepackaged asset sale of leading communication services expert NextiraOne France to Butler Industries, which was approved by the commercial court of Paris on June 22, 2015, in the first implementation of the new 2014 regime for prepackaged insolvency sales for a large business in France. Jones Day advised NextiraOne both prior to and during the insolvency proceedings.

Amy Edgy Ferber (Atlanta) participated in a panel discussion on September 11, 2015, entitled "How to Make the Pitch Perfect," at the Turnaround Management Association's 16th Annual Northwest Cross-Border Conference in Portland, Oregon.

Kevyn D. Orr (Washington) will moderate a panel at the International Insolvency & Restructuring Symposium in Madrid on October 23, 2015. The panel will discuss current trends in U.S. insolvencies and restructurings, explore current legislation, comment on developments in the financial sector for distressed lending, and highlight emerging trends.

Thomas A. Howley (Houston) and ***Gregory M. Gordon (Dallas)*** were named Texas Super Lawyers for 2015 in the field of Business Bankruptcy.

Richard L. Wynne (Los Angeles), Bennett L. Spiegel (Los Angeles), Lori Sinanyan (Los Angeles), Erin N. Brady (Los Angeles), Alex M. Sher (New York), and ***Aaron M. Gober-Sims (Cleveland)*** are representing Los Angeles-based studio and production company Relativity Media, LLC, and 50 affiliates in connection with chapter 11 cases filed by the companies on July 30, 2015, in the U.S. Bankruptcy Court for the Southern District of New York.

Heather Lennox (New York and Cleveland) was selected to appear in the 2015 *Banking, Finance and Transactional Expert Guide* as one of the world's leading attorneys in the field of Insolvency and Restructuring.

David G. Heiman (Cleveland), Carl E. Black (Cleveland), Thomas A. Wilson (Cleveland), Jeffrey B. Ellman (Atlanta), Robert W. Hamilton (Columbus), and ***Daniel J. Merrett (Atlanta)*** are representing Alpha Natural Resources, Inc., the second-largest U.S. coal company, and certain affiliates in connection with chapter 11 cases filed by the companies on August 3, 2015, in the U.S. Bankruptcy Court for the Eastern District of Virginia.

For their roles in the chapter 9 municipal restructuring case of the City of Detroit, ***Heather Lennox (New York and Cleveland)*** and ***Thomas A. Wilson (Cleveland)*** were selected as 2015 recipients of the Turnaround Management Association's award for Transaction of the Year: Mega Company.

Lori Sinanyan (Los Angeles) participated in a debate on September 11, 2015, regarding whether "Acceleration of a Debt Obligation Under a Credit Agreement Should Act to Prevent the Lender From Enforcing a Prepayment Premium" at the American Bankruptcy Institute's 23rd Annual Southwest Bankruptcy Conference in Las Vegas.

Amy Edgy Ferber (Atlanta) participated in a Turnaround Management Association webinar on September 24, 2015, entitled "Everything You Don't Want to Learn About Directors & Officers' Insurance Policies … After It's Too Late!"

Kevyn D. Orr (Washington) gave a presentation on September 24, 2015, entitled "Bouncing Back Stronger: Distress, Recovery & New Tools for Fiscal Resiliency" at the 2015 Cost of Government Summit in Washington, D.C.

Heather Lennox (New York and Cleveland) participated in a panel discussion on September 28, 2015, entitled "Un-*Till* Death Do Us Part?" at the 89th Annual Meeting of the National Conference of Bankruptcy Judges in Miami.

Sidney P. Levinson (Los Angeles) moderated a panel discussion on September 28, 2015, entitled "From Vegas With Love—The Story of the Fontainebleau Las Vegas" at the 89th Annual Conference of the National Conference of Bankruptcy Judges in Miami.

Concord filed proofs of claim in NNET's chapter 11 case for the Q1 and Q2 taxes. It billed NNET on November 20, 2009, for the third- and fourth-quarter ("Q3" and "Q4") taxes—prior to the April 26, 2010, bar date for the filing of claims against NNET by governmental units—but did not timely file proofs of claim for the Q3 and Q4 taxes.

The bankruptcy court confirmed a joint chapter 11 plan for NNET and FairPoint on January 13, 2011. The plan provided, among other things, that "[a]s of the Effective Date, all property of FairPoint [, NNET] and Reorganized FairPoint shall be free and clear of all Claims, Liens and interests, except as specifically provided in the Plan, the Confirmation Order, or the New Credit Agreement."

Nine months after confirmation of the plan, Concord asked the bankruptcy court to allow its claims for the Q3 and Q4 taxes, arguing that the tax claim was secured by a lien and was not discharged by the plan.

The bankruptcy court denied Concord's motion, citing the "free and clear" plan provision quoted above and holding that the lien securing the Q3 and Q4 taxes was extinguished. The district court affirmed the ruling.

THE SECOND CIRCUIT'S RULING

Noting that "[w]e have not previously considered the circumstances under which a plan extinguishes a lien," a three-judge panel of the Second Circuit affirmed.

The court explained that section 1141(c) provides a caveat to the long-standing "background" rule that "liens pass through bankruptcy unaffected" (citing *Dewsnup v. Timm*, 502 U.S. 410, 417 (1992), and *Penrod*, 50 F.3d at 461). The court also noted that the phrase "interests of creditors" in section 1141(c) includes liens and that, despite the absence of any express reference to lien extinguishment in section 1141(c), courts have uniformly held that confirmation of a chapter 11 plan can act to extinguish liens (citing *In re Chrysler LLC*, 576 F.3d 108, 126 (2d Cir.) (citing cases), *vacated as moot sub nom. Ind. State Police Pension Tr. v. Chrysler LLC*, 558 U.S. 1087 (2009)).

The Second Circuit reasoned that "whether a plan extinguishes a lien depends on the requirements embedded in § 1141(c)." The court concluded that a requirement of lienholder participation "is located squarely within" the provision. According to the Second Circuit, "The text of the Code allows a plan to extinguish a lien only if the underlying property is 'dealt with,' and that condition cannot be fairly satisfied in the absence of the interested parties, including the security holder."

According to the Second Circuit, this conclusion is reinforced by the interaction between section 1141(c), which permits certain liens to be extinguished, and section 506(d), which preserves certain liens. Section 506(d) provides in relevant part:

> To the extent that a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void unless . . . (2) such claim is not an allowed secured claim due only to the failure of any entity to file a proof of such claim under section 501 of this title.

Thus, the Second Circuit observed:

> Section 506(d)(2) . . . preserves liens of *non-participating lienholders* whose liens would otherwise be extinguished *solely as a result of their non-participation*. If extinguishment under § 1141(c) is consistent with this provision (as we must and do assume), then § 1141(c) must apply only to liens located outside of § 506(d)(2)'s safe harbor. Reading the "dealt with" limitation in § 1141(c) to include only *participating lienholders* harmonizes these provisions (citing 8 COLLIER ON BANKRUPTCY ¶ 1141.04[1] (16th ed. 2013)).

Accordingly, the Second Circuit ruled that a lien is extinguished by a plan pursuant to section 1141(c) only if: (i) the text of the plan does not preserve the lien; (ii) the plan is confirmed; (iii) the property subject to the plan is "dealt with" under the terms of the plan; and (iv) the lienholder has participated in the bankruptcy case.

The court found that these requirements were satisfied. The Second Circuit concluded, among other things, that: (a) the plan clearly provided that all property of NNET and FairPoint was "free and clear" of liens, unless the plan specified otherwise, which, in this case, it did not; and (b) Concord participated in the bankruptcy case by filing proofs of claim for the Q1 and Q2 taxes due on the same six properties for which it sought payment of Q3 and Q4 taxes. According to the court, "[A]n inference of sufficient participation follows the fact that a single lien secured payment of tax bills as to which [Concord] participated and tax bills as to which [Concord] stayed silent."

The court deflected Concord's argument that, even if section 1141(c) applied, extinguishment of its lien "is so inequitable a result that the lien should survive nonetheless." Acknowledging that it had not previously decided whether equitable principles may rescue a lien which would otherwise be extinguished by a plan, the Second Circuit wrote that "[w]e need not decide that question on appeal, because the equities in this case would not support an exception."

Finally, the Second Circuit rejected Concord's argument that the bankruptcy court should have allowed Concord to file its proofs of claim for the Q3 and Q4 taxes more than two years after confirmation of the plan under the doctrine of "excusable neglect."

OUTLOOK AND RELATED DEVELOPMENTS

The Second Circuit's approach to section 1141(c) is more nuanced than those taken by most of the other courts that have adopted the participation requirement as a condition to lien extinguishment. According to the Second Circuit, encumbered property is "dealt with" under a plan only if the secured creditor participates in the case. It reached this conclusion on the basis of its view that section 1141(c) must be harmonized with section 506(d)(2), which does not require a secured creditor to file a proof of claim to preserve its lien. Because it construes the language of section 1141(c) in this way, rather than simply requiring participation as a judicial gloss that is arguably found nowhere in the express language of the provision, *New England Telephone* may be less objectionable to statutory constructionists.

Regardless of the rationale supporting it, the participation requirement means that a secured creditor cannot be stripped of its lien under section 1141(c), even if it receives notice of the chapter 11 plan and deliberately ignores it, unless the creditor actively participates in the case by, among other things, filing a proof of claim. Thus, absent active participation by the secured creditor, a plan proponent may not be permitted to modify or avoid the creditor's lien solely through the plan confirmation process, but instead may be required to affirmatively object to the secured claim or initiate an adversary proceeding to challenge the lien. Given this, some have criticized the participation requirement because it means that a secured creditor can opt to wait in the wings during the bankruptcy case and then proceed to exercise its remedies in a more favorable forum after confirmation of a plan, without regard for the plan's terms.

Like the Second Circuit, the Seventh Circuit in *In re Pajian*, 785 F.3d 1161 (7th Cir. 2015), which involved a chapter 13 case, acknowledged that a secured creditor's lien is not extinguished merely because it failed to file a proof of claim. In *Pajian*, a secured mortgage lender filed a proof of claim more than three months after the expiration of the deadline established in Rule 3002(c) of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules") for filing proofs of claim in an individual debtor's chapter 13 case—generally, 90 days after the date first set for the section 341 meeting of creditors. The lender's claims consisted of a claim secured by a mortgage on a commercial property and an unsecured claim for a deficiency judgment resulting from a state foreclosure proceeding on a residential property.

The debtor objected to the claims, arguing that they were barred from inclusion in his chapter 13 plan because the lender had missed the deadline imposed by Bankruptcy Rule 3002(c). The lender countered that: (i) a secured creditor need not file a proof of claim in order to secure distributions under a chapter 13 plan; (ii) a pleading the lender previously filed in the case prior to the deadline amounted to an "informal" proof of claim; and (iii) Bankruptcy Rule 3002(c)'s deadline is inapplicable to secured claims.

The bankruptcy court rejected the first two arguments. However, persuaded by the third argument, it ruled that a secured creditor seeking distributions under a chapter 13 plan need only file a proof of claim prior to confirmation of the plan. The court accordingly sustained the debtor's objection with respect to the unsecured claim, but overruled the objection as to the secured claim. The debtor appealed the ruling directly to the Seventh Circuit.

Initially, the Seventh Circuit noted that "[t]he appeal raises a legal question that requires this court to break new ground and resolve conflicting decisions among bankruptcy courts." The court then explained that, pursuant to Bankruptcy Rule 3021 and section 502(a) of the Bankruptcy Code, a creditor must file a proof of claim in order to participate in distributions under a plan (under any chapter). However, the Seventh Circuit emphasized, "while all creditors—secured and unsecured—must file a proof of claim in order to receive distributions, a secured creditor who fails to do so can still enforce its lien through a foreclosure action, even after the debtor receives a discharge" (citing *Penrod*, 50 F.3d at 461–62). "In other words," the court wrote, "a secured creditor's lien is largely unaffected by the bankruptcy discharge, regardless of whether the creditor filed a proof of claim."

The Seventh Circuit noted that bankruptcy courts have reached conflicting conclusions regarding whether the language of Bankruptcy Rule 3002(c), which does not expressly refer to "secured creditors," applies to unsecured creditors only. The Seventh Circuit ruled that "[w]e think the better interpretation is that all creditors—unsecured and secured alike—are bound by the Rule 3002(c) deadline." According to the court, this conclusion is supported by principles of sound judicial administration:

> Requiring all creditors to file claims by the same date allows the debtor to craft and finalize a Chapter 13 plan without the concern that other creditors might swoop in at the last minute and upend a carefully constructed repayment schedule. If we held otherwise, secured creditors could wreak havoc on the ability of the debtor and the bankruptcy court to assemble and approve an effective plan. Each tardy filing from a secured creditor would likely require the debtor to file a modified plan, which would have to be served on all interested parties and considered by the court. All this would often lead to disruptive delays in plan confirmation hearings and would ultimately hinder the bankruptcy court's ability to manage its docket.

Finally, the court noted that its conclusion is bolstered by a recent proposal of the U.S. Judicial Conference's Advisory Committee on Bankruptcy Rules to amend Bankruptcy Rule 3002 to clarify that secured creditors as well as unsecured creditors must file a proof of claim for their claims to be allowed.

However, the Seventh Circuit held, a secured creditor's failure to file a proof of claim "does not void the creditor's lien." Rather, a secured creditor whose claim is disallowed because it fails to file a proof of claim prior to the deadline stated in Bankruptcy Rule 3002(c) is simply not entitled to any distributions under a chapter 13 plan.

Interestingly, amending section 1141(c) to clarify whether secured creditor participation in a chapter 11 case is a condition to lien extinguishment under a plan was not among the more than 260 recommendations contained in the final report issued on December 8, 2014, by the American Bankruptcy Institute Commission to Study the Reform of Chapter 11. Thus, uncertainty is likely to continue regarding the effect of plan confirmation on liens.

CHAPTER 15 PROVIDES RESTRUCTURING AVENUE FOR BRAZILIAN COMPANIES

Pedro A. Jimenez and Mark G. Douglas

The chapter 15 cases of OAS S.A. ("OAS") and its affiliates represent the second time in less than one year that a U.S. bankruptcy court has been confronted with a serious challenge to the recognition of insolvency proceedings in Brazil by a group of U.S. creditors. The latest challenge focused on two separate lines of attack: (1) whether the "foreign representative" authorized to commence a chapter 15 case can be appointed by the company rather than the foreign insolvency court; and (2) whether Brazilian insolvency law is manifestly contrary to U.S. public policy.

The U.S. Bankruptcy Court for the Southern District of New York ruled in favor of OAS on both issues. In *In re OAS S.A.*, 533 B.R. 83 (Bankr. S.D.N.Y. 2015), the court held that: (i) a foreign representative need not be appointed by a foreign court, but may be authorized to seek chapter 15 recognition by a foreign debtor's board of directors; (ii) OAS's foreign representative successfully established that the debtor's "center of main interests" ("COMI") for purposes of chapter 15 was Brazil rather than its country of incorporation (Austria); and (iii) recognition of the Brazilian proceedings was not manifestly contrary to U.S. public policy.

The decision is an endorsement of Brazilian proceedings and the manner in which they are conducted before Brazilian courts, especially in light of arguments that OAS engaged in fraudulent transfers prior to commencing its Brazilian proceedings. The ruling also underscores how U.S. courts and chapter 15 can play a meaningful role in the restructuring of a Brazilian company whose debt is denominated in U.S. dollars.

PROCEDURES AND RELIEF UNDER CHAPTER 15

Enacted in 2005, chapter 15 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.

Under chapter 15, the representative of a foreign debtor may file a petition in a U.S. bankruptcy court seeking "recognition" of a "foreign proceeding." "Foreign representative" is defined in section 101(24) of the Bankruptcy Code as "a person or body, including a person or body appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of such foreign proceeding."

"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 case pending in the country where the debtor's COMI is located—and "nonmain" proceedings, which may have been commenced in countries where the debtor merely has an "establishment."

The Bankruptcy Code does not define "center of main interests." However, section 1516(c) provides that, "[i]n the absence of evidence to the contrary, the debtor's registered office, or habitual residence in the case of an individual, is presumed to be" the debtor's COMI. An "establishment" is defined in section 1502(2) as "any place of operations where the debtor carries out a nontransitory economic activity."

Various factors have been deemed relevant by courts in examining COMI, including the location of the debtor's headquarters, managers, employees, investors, primary assets, or creditors, as well as which jurisdiction's law would apply to most disputes. *See In re SPhinX, Ltd.*, 351 B.R. 103, 117 (Bankr. S.D.N.Y. 2006), *aff'd*, 371 B.R. 10 (S.D.N.Y. 2007). In addition, courts have considered any relevant activities, including liquidation activities and administrative functions. *See Morning Mist Holdings Ltd. v. Krys (In re Fairfield Sentry Ltd.)*, 714 F.3d 127, 137 (2d Cir. 2013). Courts may also consider the situs of the debtor's "nerve center," including the location from which the debtor's "activities are directed and controlled, in determining a debtor's COMI." *Id*. at 138. "[R]egularity and ascertainability" by creditors are also important factors in the COMI analysis. *Id*.

Section 1517 of the Bankruptcy Code provides that, subject to section 1506, "an order recognizing a foreign proceeding shall be entered" if the proceeding qualifies as a foreign main or nonmain proceeding, the foreign representative is "a person or body," and the petition itself complies with the evidentiary requirements set forth in section 1515. Section 1506 states that "[n]othing in this chapter prevents the court from refusing to take an action governed by this chapter if the action would be manifestly contrary to the public policy of the United States."

If a U.S. bankruptcy court recognizes a foreign main proceeding under chapter 15, section 1520(a)(1) of the Bankruptcy Code provides that actions against the foreign debtor or "property of the debtor that is within the territorial jurisdiction of the United States" are stayed under section 362—the Bankruptcy Code's "automatic stay."

Following recognition of a foreign main or nonmain proceeding, the bankruptcy court may also provide "additional assistance" to a foreign representative. This can include injunctive relief or authority to distribute the proceeds of all or part of the debtor's U.S. assets. However, under section 1507(b), in granting such relief, the court must conclude, "consistent with the principles of comity," that such assistance will reasonably ensure, among other things, the just treatment of creditors and other stakeholders, the protection of U.S. creditors against prejudice and inconvenience in pursuing their claims in the foreign proceeding, and the prevention of fraudulent or preferential dispositions of the debtor's property.

OAS

The OAS Group is a construction, engineering, and infrastructure investment enterprise headquartered in Brazil, with projects located throughout Latin America, the Caribbean, and Africa. The parent company of the OAS Group is OAS. Its network of subsidiaries and affiliates comprises both engineering and financing companies, including financing subsidiary OAS Investments GmbH ("OAS Investments"), which maintains its registered office in Vienna, Austria.

In 2012 and 2014, OAS Investments issued $875 million in notes due in 2019 (the "2019 Notes"). The 2019 Notes, which are governed by New York law, are guaranteed by OAS and two affiliates, Construtora OAS S.A. ("Construtora") and OAS Investimentos S.A. ("Investimentos").

OAS is one of the many companies implicated in "*Operação Lava Jato*" ("Operation Carwash"), a government anti-corruption investigation in Brazil involving Petrobras—the state-owned oil company—and certain of its contract counterparties. In November 2014, Petrobras announced that it was temporarily suspending the ability of 23 companies, including the OAS Group entities, to compete for new contracts. This development and a general slowdown in the Brazilian economy created liquidity and credit difficulties for the OAS Group.

In documents later filed in various courts, certain holders of the 2019 Notes (the "2019 Noteholders") alleged that, in December 2014, OAS engaged in a series of transactions which were fraudulent or otherwise impaired their ability to collect on the 2019 Notes. OAS Investments defaulted on the 2019 Notes shortly after the challenged transactions occurred. The 2019 Noteholders commenced litigation in New York state and U.S. federal court, alleging, among other things, that the transactions were fraudulent.

On March 31, 2015, OAS, Construtora, OAS Investments, and certain other OAS affiliates filed for bankruptcy protection in Brazil. In its April 1, 2015, order approving commencement of the joint reorganization proceedings, the Brazilian bankruptcy court observed that, although Brazil has not yet adopted the Model Law, the COMI of OAS is Brazil, and the remaining debtors, including those incorporated abroad, are part of the same economic group controlled from Brazil.

The 2019 Noteholders asked the Brazilian court to administer the cases of each debtor separately, arguing that joint administration and/or consolidation of the cases would be prejudicial. The court denied the request. That ruling was affirmed by an appellate court, which noted that the challenge was premature because the debtors had not yet proposed a plan, no creditors' meeting had been convened, and the bankruptcy court could still modify its order after examining the debtors' affairs.

In April 2015, OAS's board of directors granted Renato Fermiano Tavares ("Tavares") power of attorney to represent the debtors in connection with their Brazilian proceedings. The OAS board also appointed Tavares as the debtors' attorney and agent for the purpose of seeking relief under chapter 15.

Tavares filed petitions in the U.S. bankruptcy court in April 2015 that sought recognition of the Brazilian reorganization cases of OAS, Construtora, and OAS Investments as "foreign main proceedings" under chapter 15. The petitions were accompanied by a motion to enjoin the state and federal court litigation commenced by the 2019 Noteholders.

Opposing recognition, the 2019 Noteholders argued that: (i) Tavares was not a qualified foreign representative; (ii) the Brazilian proceeding of OAS Investments should not be recognized under chapter 15 because the company's COMI is not in Brazil, but in Austria; and (iii) recognition should be denied because certain aspects of Brazilian bankruptcy law, or the Brazilian bankruptcy cases themselves, are "manifestly contrary to public policy."

THE BANKRUPTCY COURT'S RULING

Foreign Representative Need Not Be Judicially Appointed

The bankruptcy court ruled that Tavares is a valid "foreign representative" for purposes of chapter 15 of the Bankruptcy Code. Adopting the reasoning of the Fifth Circuit Court of Appeals in *Ad Hoc Grp. of Vitro Noteholders v. Vitro S.A.B. de C.V. (In re Vitro S.A.B. de C.V.)*, 701 F.3d 1031 (5th Cir. 2012), the *OAS* court rejected the argument that Tavares had to be authorized by a Brazilian court, rather than a debtor's board of directors, to qualify as a foreign representative. Although section 101(24) of the Bankruptcy Code provides that a foreign representative must be "authorized in a foreign proceeding," the bankruptcy court, like the Fifth Circuit in *Vitro*, concluded that the phrase is ambiguous and could be read to mean "authorized *in the context of* a foreign proceeding." The *OAS* court also noted that, in an unpublished ruling, the bankruptcy court in *In re Compania Mexicana de Aviacion, S.A. de C.V.*, No. 10-14182 (MG) (Bankr. S.D.N.Y. Nov. 8, 2010), held that a Mexican corporation could authorize a person to act as its foreign representative in a chapter 15 case because, under Mexican law, the debtor essentially acted as a debtor-in-possession.

Foreign Representative Duly Qualified and Authorized to Act on Debtors' Behalf

The court rejected the argument that the foreign representative must be authorized by the foreign court to administer the assets and affairs of the debtors. Neither the Bankruptcy Code nor the Model Law, the court noted, explains what it means to "administer the reorganization or the liquidation of the debtor's assets or affairs," as required by section 101(24). However, the Guide to Enactment of the Model Law on Cross-Border Insolvency (the "UNCITRAL Guide") states that the "foreign representative may be a person authorized in the foreign proceeding to administer those proceedings, which would include seeking recognition, relief and cooperation in another jurisdiction." Tavares, the court explained, was authorized by the debtors' board to represent the debtors and act as their agent in administering their reorganization in the Brazilian proceedings. He was also authorized to exercise the authority available to a foreign representative under chapter 15. Thus, the court ruled that Tavares had the powers necessary to qualify as the OAS debtors' foreign representative.

OAS Investments' COMI Is *in* Brazil

The bankruptcy court found that OAS Investments' COMI is in Brazil. Initially, the court acknowledged that "the COMI analysis when applied to a special purpose financing vehicle proves less straightforward than the typical case." Although the COMI of OAS Investments was presumed to be in Austria, where it was incorporated, the evidence showed that the company maintains only a post office box there and does not conduct business, own assets, have a physical location, or employ anyone in Austria. Also, the company's predominant creditors are the 2019 Noteholders, which are located worldwide.

"Having issued the 2019 Notes," the court wrote, "OAS Investments had no other business except to pay them off." Moreover, the only source of repayment to satisfy those obligations must come from the Brazilian proceedings. Consistent with the legitimate expectation of its creditors, the court found that OAS Investments' "nerve center" is Brazil and that the company's COMI was located in Brazil when Tavares filed its chapter 15 petition.

Recognition Not Manifestly Contrary to Public Policy

Perhaps most important, the court found that Brazilian insolvency law and the Brazilian proceedings are not manifestly contrary to U.S. public policy. The court explained that both applicable precedent and resources interpreting a corresponding provision in the Model Law suggest that the public-policy exception set forth in section 1506 of the Bankruptcy Code should be invoked only under exceptional circumstances (citing *In re Fairfield Sentry Ltd.*, 714 F.3d 127 (2d Cir. 2013), and UNCITRAL Guide ¶ 104). U.S. lawmakers recognized this idea in enacting chapter 15, noting in the legislative history that "[t]he word 'manifestly' in international usage restricts the public policy exception to the most fundamental policies of the United States." H.R. Rep. No. 109-31, pt. 1, at 109 (2005).

Rejecting the 2019 Noteholders' arguments in this regard, the court ruled that objections based on, among other things, "speculation" that the Brazilian court "will approve a plan or plans that permit substantive consolidation, unfair distributions or the elimination of creditor fraudulent transfer claims are premature."

Also, the court explained, having participated in the Brazilian bankruptcy cases, the 2019 Noteholders received due process in Brazil. Furthermore, they will have an opportunity to object to any plan proposed in the Brazilian cases and may challenge any attempt to enforce the terms of a plan in the U.S.

According to the court, the practice in Brazil in which opposing parties meet *ex parte* with a Brazilian judge is not manifestly contrary to the public policy of the U.S., which recognizes exceptions to the general rule forbidding *ex parte* communications.

Finally, the bankruptcy court noted, even a "definitive" substantive consolidation order is not manifestly contrary to U.S. law because the remedy is expressly authorized under U.S. law. "Although Brazilian law may impose different requirements for substantive consolidation," the court wrote, "the different standards, standing alone, do not signify that Brazilian Bankruptcy Law is manifestly contrary to our own public policy." The only requirement is that the foreign law must be "substantially similar and not repugnant to United States law" (quoting *In re Compania de Alimentos Frago, S.A.*, 376 B.R. 427, 437 (Bankr. S.D.N.Y. 2007)).

OUTLOOK

The ruling in *OAS* is not the end of the story for OAS's ongoing disputes with the 2019 Noteholders. In accordance with the court's ruling, the 2019 Noteholders are, among other things, free to renew their complaint that recognition of any plan which substantively consolidates the OAS debtors' estates would be manifestly contrary to public policy.

In addition, recognition of OAS's Brazilian insolvency proceedings does not end the ongoing state court litigation commenced by the 2019 Noteholders against OAS and certain affiliates. The recognition order (as well as the automatic stay) applies only to OAS entities for which chapter 15 petitions were filed—certain OAS Group defendants in the state court litigation are not chapter 15 debtors.

The significance of the decision lies principally in its message that foreign bankruptcy proceedings (and the laws governing them) need not be identical to their U.S. counterparts in order to qualify for chapter 15 relief.

FIFTH CIRCUIT JETTISONS *PRO-SNAX* "MATERIAL BENEFIT" STANDARD FOR BANKRUPTCY PROFESSIONAL COMPENSATION

Alex M. Sher and Mark G. Douglas

Professionals retained in a bankruptcy case by a trustee, a chapter 11 debtor-in-possession ("DIP"), or an official committee may be awarded "reasonable compensation" for "actual, necessary services" performed on behalf of their clients under section 330 of the Bankruptcy Code. In assessing whether particular services should be compensable, most courts, including the Second, Third, and Ninth Circuit Courts of Appeal, examine whether "the services were objectively beneficial toward the completion of the case at the time they were performed"—an approach sometimes referred to as the "reasonableness" test.

The Fifth Circuit, however, established a different standard for professional compensation in *Andrews & Kurth LLP v. Family Snacks, Inc. (In re Pro-Snax Distribs., Inc.)*, 157 F.3d 414 (5th Cir. 1998). In *Pro-Snax*, the Fifth Circuit ruled that, to be compensable under section 330, services must result in "an identifiable, tangible, and material benefit to the bankruptcy estate." The "material benefit" test, which focuses on outcomes rather than reasonable expectations, endured for 17 years.

The Fifth Circuit finally abandoned the material benefit test in *Barron & Newburger, P.C. v. Tex. Skyline, Ltd. (In re Woerner)*, 783 F.3d 266 (5th Cir. 2015). In *Woerner*, the court, after agreeing to a rehearing en banc of a previous panel ruling upholding *Pro-Snax*, reasoned that both the text of section 330 and its legislative history require a court to consider the reasonableness of services provided *at the time the services were performed*, rather than to evaluate the material benefit of the services with the assistance of hindsight.

COMPENSATION FOR PROFESSIONAL SERVICES IN BANKRUPTCY

Under section 330(a)(1) of the Bankruptcy Code, the bankruptcy court may order payment by the estate of "reasonable compensation for actual, necessary services rendered" by, among others, professionals employed by a trustee, DIP, or official committee. Awards of compensation, however, are within the court's discretion. Thus, section 330(a)(2) provides that the court may "award compensation that is less than the amount . . . requested" by such professionals.

To determine whether requested compensation is "reasonable," section 330(a)(3) directs bankruptcy courts to consider "the nature, the extent, and the value" of the services provided, "taking into account all relevant factors," including:

(A) the time spent on such services;

(B) the rates charged for such services;

(C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a bankruptcy case;

(D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed;

(E) with respect to a professional person, whether the person is board certified or otherwise has demonstrated skill and experience in the bankruptcy field; and

(F) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

Section 330(a)(4) provides that, with certain exceptions, compensation cannot be awarded for unnecessary duplication of services, or for services which were not reasonably likely to benefit the estate or necessary to the administration of the case.

Sections 330(a)(3) and 330(a)(4) were added to the Bankruptcy Code in 1994. *See* Pub. L. No. 103-394, § 224 (1994). Prior to 1994, the leading cases regarding the factors to be considered in determining a reasonable allowance of compensation were *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), a nonbankruptcy case, and *In re First Colonial Corp. of America*, 544 F.2d 1291 (5th Cir. 1977), a pre-Bankruptcy Code case that applied the *Johnson* approach in bankruptcy. *Johnson* articulated 12 factors to be considered in determining and awarding "reasonable" attorneys' fees. Most of those factors are now codified in section 330(a)(3).

In *Pro-Snax* (which was decided in 1995), creditors filed an involuntary chapter 7 bankruptcy case against the debtor. The bankruptcy court converted the case to chapter 11 but later appointed a chapter 11 trustee after denying the petitioning creditors' motion to reconvert the case to chapter 7. The court denied confirmation of a plan proposed by the debtor (prior to the trustee's appointment) and ultimately granted the petitioning creditors' renewed motion to convert the case to a chapter 7 liquidation.

A law firm provided legal services to the debtor both before and after the case was converted to chapter 11, including after the chapter 11 trustee was appointed. The bankruptcy court granted the firm's application for an allowance of $30,000 in fees and $7,500 in expenses. The district court reversed the award, ruling that section 330 of the Bankruptcy Code precluded the firm from being compensated from the assets of the estate for work performed after the chapter 11 trustee was appointed. However, because the petitioning creditors conceded on appeal that the firm could be compensated for services it had performed prior to appointment of the chapter 11 trustee, the district court remanded the case to the bankruptcy court for a recalculation of the fees requested.

The law firm appealed the ruling to the Fifth Circuit. In its decision, the Fifth Circuit examined, among other things, the appropriate standard to evaluate the firm's fee application for services rendered to the debtor before the trustee was appointed. It rejected the reasonableness test in favor of the hindsight approach advocated by the petitioning creditors, which, as noted, inquires whether the services "resulted in an identifiable, tangible, and material benefit to the bankruptcy estate."

The Fifth Circuit affirmed the district court's decision. In so ruling, the court of appeals adopted the stricter "hindsight," or "material benefit," approach, noting that "we are disinclined to hold that any service performed at any time need only be reasonable to be compensable."

Until *Woerner*, the material benefit test was the standard for bankruptcy professional compensation in the Fifth Circuit.

WOERNER

In 2006, Clifford Woerner ("Woerner") and Texas Skyline, Ltd. ("Texas Skyline") formed a limited partnership to pursue a real estate venture. Over the next three years, Woerner allegedly misappropriated partnership funds for personal use. Texas Skyline subsequently sued Woerner in state court for breach of the partnership agreement and for breach of fiduciary duties. After a bench trial, the state court held in favor of Texas Skyline. However, before the court could rule on potential remedies, Woerner filed for chapter 11 protection in the Western District of Texas.

Woerner was authorized by the bankruptcy court to retain the law firm of Barron & Newburger ("B&N") as counsel. However, the bankruptcy judge converted the chapter 11 case to a chapter 7 liquidation, in part because the court found that Woerner was not forthright in listing assets.

B&N filed an application for an allowance of approximately $130,000 in fees and $5,800 in expenses for the 11 months during which it acted as Woerner's counsel. According to B&N, those services included: (i) assisting with the filing of schedules, a statement of financial affairs, and other disclosures; (ii) defending Woerner in two adversary proceedings, including one brought by Texas Skyline seeking a denial of discharge; (iii) unsuccessfully defending against Texas Skyline's motion to lift the automatic stay to continue the state court litigation; (iv) negotiating with creditors and participating in mediation; (v) unsuccessfully seeking approval of a settlement; (vi) investigating potential causes of action against various parties; and (vii) drafting a disclosure statement and chapter 11 plan.

The United States Trustee and Texas Skyline objected to the fee application, arguing, among other things, that the requested fees were unreasonable because Woerner never had the means to fund a plan and that B&N's actions were dilatory and required creditors to incur unnecessary attorneys' fees.

After evaluating each category of fees, the bankruptcy court awarded only $19,409—an 85 percent reduction from the requested amount. In so ruling, the court applied the material benefit test set forth in *Pro-Snax*. B&N appealed to the district court, which affirmed.

THE FIFTH CIRCUIT'S RULINGS

Initially, a three-judge panel of the Fifth Circuit affirmed the district court's judgment, noting that "*Pro-Snax* is still the governing standard." *See In re Woerner*, 758 F.3d 693, 702 (5th Cir. 2014), *vacated on rehearing*, 783 F.3d 266 (5th Cir. 2015). However, all three members of the panel specially concurred to call for en banc reconsideration of the ruling and, in particular, the viability of *Pro-Snax*. *See In re Woerner*, 771 F.3d 820 (5th Cir. 2014).

On en banc reconsideration, the Fifth Circuit cast *Pro-Snax* aside, concluding that the " 'material benefit standard' . . . conflicts with the text and legislative history of § 330 and unnecessarily places [the Fifth Circuit] at odds with [its] sister circuits."

The Fifth Circuit explained that both section 330(a)(3)(C) and section 330(a)(4)(A)(ii) of the Bankruptcy Code contemplate compensating professionals in situations where their services were reasonable when rendered but failed to produce a material benefit to the estate. In particular, as quoted above, section 330(a)(3)(C) states that a relevant factor in determining the amount of reasonable compensation to be awarded is whether the services were "beneficial *at the time at which the service was rendered* toward the completion of" the bankruptcy case (emphasis added). Similarly, section 330(a)(4)(A)(ii) directs the court to disallow compensation for services that "were not . . . reasonably likely to benefit the debtor's estate." "Read together," the Fifth Circuit observed, "a court may compensate an attorney for services that are 'reasonably likely to benefit' the estate and adjudge that reasonableness 'at the time at which the service was rendered.' "

According to the Fifth Circuit, section 330 "explicitly contemplates compensation for attorneys whose services were reasonable when rendered but which ultimately may fail to produce an actual, material benefit." The provision uses the term "reasonable," the court explained, to account for the risk inherent in any form of litigation:

> The statute permits a court to compensate an attorney not only for activities that were "necessary," but also for good gambles—that is, services that were objectively reasonable at the time they were made—even when those gambles do not produce an "identifiable, tangible, and material benefit." What matters is that, prospectively, the choice to pursue a course of action was reasonable.

The Fifth Circuit found support for its conclusion in section 330's legislative history. When Congress enacted section 330 in 1978, it intended to relax both the prevailing "stringent standard" applied to professional fee awards under the former Bankruptcy Act and the mindset that estates should be administered with optimal efficiency. In part, lawmakers sought to align compensation for bankruptcy estate professionals with compensation provided to attorneys in nonbankruptcy cases.

According to the Fifth Circuit, Congress took additional steps toward a reasonableness standard for compensation when it added sections 330(a)(3)(C) and 330(a)(4)(A) to the Bankruptcy Code in 1994. Therefore, the Fifth Circuit concluded that Congress considered and rejected a compensation standard based solely on the actual benefit provided to an estate by professionals.

The Fifth Circuit also looked to precedent from its sister circuits for support. It noted that the Second, Third, and Ninth Circuits have rejected a hindsight approach which looks to the actual benefit derived for the estate by professionals. Instead, those circuits have adopted prospective standards that consider the reasonableness of the services provided at the time they were rendered. *See In re Ames Dep't Stores, Inc.*, 76 F.3d 661 (2d Cir. 1996); *In re Top Grade Sausage, Inc.*, 227 F.3d 123 (3d Cir. 2000), *abrogated on other grounds*, *Lamie v. U.S. Trustee*, 540 U.S. 526 (2004); *In re Smith*, 317 F.3d 918 (9th Cir. 2002); *see also In re Taxman Clothing Co.*, 49 F.3d 310 (7th Cir. 1995) (applying similar rule without specifically relying on post-1994 amendments).

In determining reasonableness, the Fifth Circuit directed lower courts to consider, among other factors: (i) the probability of success at the time the services were rendered; (ii) the reasonable costs of pursuing a course of action; (iii) what services a reasonable professional would have performed under the same circumstances; (iv) whether the professional's services could have been rendered by the bankruptcy trustee; and (v) any potential benefits to the estate, as distinguished from the individual debtor. Most important, the Fifth Circuit emphasized that "[w]hether the services were ultimately successful is relevant to, but not dispositive of, attorney compensation."

Because the Fifth Circuit adopted a new legal standard for awarding compensation under section 330, the court remanded the case to the bankruptcy court to evaluate B&N's fee application under the new standard. On remand, the bankruptcy court allowed some fees previously disallowed under the *Pro-Snax* standard, although it continued to disallow certain other fees due to the lack of any likelihood of success of the legal strategy at the time the fees were incurred. *See In re Woerner*, 2015 BL 270736 (Bankr. W.D. Tex. Aug. 21, 2015).

OUTLOOK

Woerner is undeniably a positive development for professionals retained in Fifth Circuit bankruptcy cases. By aligning itself with many of its sister circuits, the Fifth Circuit has recognized that successful outcomes are not necessarily the litmus test for compensable professional services. For example, attorneys retained in a bankruptcy case on behalf of the estate must have the flexibility to take calculated litigation risks under appropriate circumstances. Even if a particular strategy fails, the associated services provided should be compensable so long as the "gamble," to use the Fifth Circuit's terminology, was a reasonable one.

Woerner does not mean that fee applications will be subjected to less exacting scrutiny in the Fifth Circuit. For example, in *In re Digerati Technologies, Inc.*, 2015 BL 270718 (Bankr. S.D. Tex. Aug. 21, 2015), a post-*Woerner* case, the bankruptcy court noted that "merely because *Pro-Snax* is gone does not necessarily mean that fee applications will more easily be approved in their entirety." Applying the new standard to a fee application submitted in a case with a 100 percent dividend to unsecured creditors, the bankruptcy court reduced counsel's fees by 26 percent because of excessive charges, vague and repetitive time entries, and unnecessary services.

SOVEREIGN DEBT UPDATE

ARGENTINA

The long-running dispute continues between Argentina, which defaulted on its sovereign debt for the second time in July 2014, and holdout bondholders from two previous debt restructurings.

On August 10, 2015, the U.S. Court of Appeals for the Second Circuit overturned for the third time U.S. district court judge Thomas Griesa's certification of bondholder classes in eight lawsuits stemming from Argentina's 2001 default on as much as $100 billion in bonds. *See Puricelli v. Republic of Argentina*, 2015 BL 255625 (2d Cir. Aug. 10, 2015). Judge Griesa had certified classes in the suits beginning in 2004. As part of the class certification process, he drew up a damages estimate, which the Second Circuit deemed to be inflated and struck down, for the first time in 2010.

The Second Circuit invalidated a revised damages estimate in 2012, remanding the case to Judge Griesa with explicit, detailed instructions for calculating damages anew after conducting an evidentiary hearing. Judge Griesa later entered an order amending the class certification but never conducted an evidentiary hearing.

The Second Circuit vacated the order on August 10, 2015. Noting that "[o]ur directive . . . was clear," the Second Circuit wrote that "[e]ven though it did not expressly preclude recertification, it cannot be read to have permitted the district court to disregard our instructions and expand the plaintiff classes as a solution to a problem for which we had already prescribed a specific response."

On August 12, 2015, Judge Griesa granted motions filed by NML Capital Ltd. and certain other holdout bondholders seeking the imposition of sanctions on Argentina for "willfully and resolutely" refusing to comply with a September 25, 2013, discovery order directing disclosure of, among other things, information concerning Argentina's U.S. assets. The sanctions include a finding that any property of Argentina in the U.S., with the exception of military or diplomatic property, is deemed to be used for commercial purposes (and consequently may be subject to attachment). Judge Griesa directed Argentina to identify privileged documents within 10 days, failing which any privilege would be deemed waived. He declined to impose sanctions on U.S. entities alleged by holdout bondholders to be alter egos of Argentina.

The U.S. Court of Appeals for the Second Circuit on August 31, 2015, reversed a 2013 ruling by Judge Griesa that allowed holdout bondholders seeking to collect debt from Argentina to proceed against the country's central bank, finding that the bondholders failed to show that the bank is Argentina's alter ego. The three-judge Second Circuit panel reversed a 2013 Griesa decision that denied Banco Central de la República Argentina's motion to dismiss the case. The court of appeals remanded the case with instructions to dismiss the suit on sovereign immunity grounds. In its ruling, the court wrote that an alter ego argument requires a showing that either a principal-agent relationship exists between the entities or treating them as separate would result in fraud. The bondholders failed to demonstrate either, the court ruled. They filed a petition on September 14, 2015, asking the Second Circuit to reconsider its decision en banc.

On September 15, 2015, the Second Circuit vacated a 2014 ruling by Judge Griesa that expanded the scope of a class of plaintiffs in litigation brought by bondholders against Argentina to collect on defaulted debt. In litigation commenced by lead plaintiff Henry Brecher, who holds a beneficial interest of €52,000 ($58,700) in Argentine bonds, Judge Griesa initially defined the class to consist of "all persons who continuously held beneficial interests" in the bonds as of 2009. Following a series of appellate decisions in related class actions, however, Judge Griesa directed in 2014 that the definition of the class must be altered to remove the continuous holder requirement and include bondholders who acquired the bonds in the secondary market.

The Second Circuit vacated that ruling in *Brecher v. Republic of Argentina*, 2015 BL 298783 (2d Cir. Sept. 16, 2015). According to the court of appeals, the expanded definition would make it impossible for Argentina to ascertain which bondholders would be members of the class and therefore violates a federal rule that requires a class definition to be "sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member."

GLOBAL

On September 10, 2015, the United Nations General Assembly, in an initiative prompted by Argentina's sovereign debt crisis, approved "basic principles" for sovereign debt restructuring processes to improve the global financial system. One hundred thirty-six countries voted in favor of the resolution, six (including the U.S.) voted against it, and 41 member nations abstained. The resolution, which is nonbinding but carries political weight, was submitted to the 193-nation General Assembly by South Africa. The vote came little more than a year after the General Assembly agreed to negotiate and adopt a multilateral legal framework for sovereign debt restructurings.

The resolution urges debtors and creditors to, among other things, "act in good faith and with a cooperative spirit to reach a consensual rearrangement" of sovereign debt. It also states that "[a] sovereign state has the right . . . to design its macroeconomic policy, including restructuring its sovereign debt, which should not be frustrated or impeded by any abusive measures."

The resolution states that nations should be immune from domestic court decisions related to sovereign debt restructuring, adding that any exceptions should be limited. It further provides that debt restructurings should lead to stable debt situations which preserve creditors' rights while supporting economic growth.

Argentina applauded the adoption of the resolution. The U.S. and the other countries which voted against it claim that a statutory mechanism for debt restructurings would create uncertainty and instability in financial markets. They also maintain that the United Nations is not the appropriate venue to resolve sovereign debt issues.

GREECE

On August 14, 2015, eurozone finance ministers approved €86 billion ($96 billion) in new bailout loans for Greece. This third round of bailout financing in five years capped six months of turbulent negotiations between Greece's left-wing government, led by Prime Minister Alexis Tsipras, and Greece's creditors, including the European Central Bank and the International Monetary Fund. Without a deal, Greece and the 19-nation eurozone confronted the prospect of "Grexit," or Greece's forced departure from the currency union.

Although Greece's parliament approved the terms of the preliminary agreement, the aid deal still faces major obstacles. On August 20, 2015, embattled Prime Minister Tsipras, in a gamble aimed at bolstering his power and ability to implement the bailout deal, resigned to clear the way for early elections slated for September 20. He was forced to call snap elections due to the large-scale defection of Syriza party lawmakers during the parliamentary vote on August 14.

On September 20, 2015, Tsipras was returned to power by Greek voters, many of whom stated that Tsipras had fought hard to get them a better deal from the nation's creditors and deserved a second chance at governing. The new government now faces the challenges of implementing unpopular austerity measures mandated by the bailout deal, including implementing steep budget cuts, lobbying for action by other eurozone countries to ease Greece's debt load, and dealing with the added financial strain of Europe's refugee crisis.

UKRAINE

Credit-rating agency Standard & Poor's ("S&P") declared Ukraine's sovereign debt to be in "selective default" on September 25, 2015, due to the debt crisis and deep economic depression precipitated by the war with pro-Russian insurgents in Ukraine's eastern industrial heartland. The default means that S&P believes that Ukraine will not repay its debt to all commercial bondholders in full.

On August 27, 2015, Ukraine announced that it had reached an agreement with creditors to restructure approximately $19 billion in bond debt. According to the Ukrainian Finance Ministry, private creditors, including the U.S.-based mutual fund Franklin Templeton Investments, agreed to a 20 percent haircut on their bond holdings as well as a four-year extension of the maturity of the debt.

The deal is a condition to Ukraine's ability to access billions of dollars in emergency financing and follows months of stalemate that threatened to derail the country's $40 billion international bailout. The agreement must be approved by Ukraine's parliament. It represents a major victory for the pro-Western government of President Petro Poroshenko, which is attempting to push through a package of politically tough economic overhauls, including increased taxes, pension overhauls, and privatization of state assets, and to revive Ukraine's fragile economy.

However, the smoldering conflict with Russian-backed separatists in eastern Ukraine continues to exact a heavy toll on government finances, and the debt relief deal does not ensure economic viability for a nation that has long struggled to stay afloat.

To encourage Ukraine's efforts, the U.S. recently indicated that it is prepared to offer a third round of billion-dollar loan guarantees if the bailout program remains on track.

LEGISLATIVE UPDATE—INTERNATIONAL EDITION

ITALIAN INSOLVENCY LAW REFORMS

On August 5, 2015, the Italian Parliament approved Italian Law Decree No. 83 of June 27, 2015 (the "Decree"), as part of the reform process for pre-insolvency proceedings under Italian bankruptcy law (Royal Decree No. 267 of March 16, 1942). The purpose of the reform is to provide distressed Italian entities with a more modern and flexible insolvency law system based on private rather than judicial initiative. The Decree introduces measures designed to, among other things: (i) give distressed Italian entities greater access to rescue financing; (ii) promote the active participation of creditors in pre-insolvency proceedings (e.g., by giving creditors the ability to propose alternative restructuring plans under certain circumstances); (iii) empower Italian courts to approve asset sales as part of a restructuring plan by means of competitive bidding; and (iv) introduce certain special rules applicable to debt restructuring agreements entered into by distressed entities with obligations principally to banks and/or financial intermediaries.

FRENCH INSOLVENCY LAW REFORMS

On August 6, 2015, France adopted legislation designed to promote economic growth, activity, and equal opportunity, named after the French Minister of Economy, Emmanuel Macron (the "Macron Law"). The Macron Law has implications for various areas of the French economy. It includes measures to expand the workweek to include Sunday, liberalize the transport sector, and modify the French insolvency regime. The new legislation completes, among other things, reforms to French insolvency law first undertaken in 2014. With the implementation of these reforms, which include the creation of specialized insolvency courts for large cases and the introduction of rules that permit "cramdown" of shareholder interests in reorganization proceedings, the new French regime creates a level playing field on which creditors will assume an increasingly greater role in insolvency proceedings.

AMENDMENTS TO SPAIN'S INSOLVENCY ACT AND PUBLIC SECTOR CONTRACTS ACT

On October 1, 2015, the Public Sector Legal Regime Act (*Ley 40/2015, de 1 de octubre, de Régimen Jurídico del Sector Público*) (the "PSLR Act") was passed by the Spanish Parliament. The PSLR Act introduces, among other things, the following reforms to the Spanish Insolvency Act (*Ley* 22/2003, *de* 9 *de Julio, Concursal*) and the Spanish Public Sector Contracts Act (*Real Decreto Legislativo* 3/2011, *de* 14 *de noviembre, por el que se aprueba el texto refundido de la Ley de Contratos del Sector Público*):

a) A clarification of the ranking in insolvency proceedings of debts secured by pledges granted over future credit rights;

b) The addition of a provision requiring prior approval by the relevant contracting authority for the granting of pledges over credit rights arising from the liability of the National Institute of Public Administration due to the termination of public concessions (*responsabilidad patrimonial de la Administración*, or "RPA");

c) Certain amendments to the legal regime applicable to the calculation and payment of RPA; and

d) The creation of a National Evaluation Office (*Oficina Nacional de Evaluación*) to analyze the financial sustainability of public works and public-services concessions before such concessions are awarded.

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