Recent Developments in Bankruptcy and Restructuring
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BUSINESS RESTRUCTURING REVIEW

THE YEAR IN BANKRUPTCY: 2015

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The world's second-largest economy (China) stumbled; Japan receded; the U.K. showed signs of life; the war-torn Middle East reeled; oil revenue-dependent Russia, Brazil, and Venezuela took body blows; and the European Union exhaled after narrowly avoiding Grexit (and possibly Brexit), only to confront a refugee crisis of alarming (and expensive) proportions, as well as a demonstrated terrorist threat from the self-proclaimed Islamic State.

A GOOD YEAR FOR THE U.S.

By comparison, 2015 was a relatively good year for the U.S., with modest growth in the economy (approximately 2 percent), the lowest budget deficit ($439 billion) as a percentage of gross domestic product (2.5 percent) since 2007, persistently low inflation (just over 1 percent), and the lowest unemployment rate (5 percent) in more than seven years. Perhaps the biggest business news of 2015 was that, heralding the end of the post-Great Recession period of easy money, these developments prompted the U.S. Federal Reserve on December 16 to raise its benchmark interest rate from near zero for the first time since December 2008.

Unlike in 2013, the U.S. Congress averted another government shutdown, passing a $1.8 trillion spending bill on December 18 with broad bipartisan support in both houses, both controlled by Republicans for the first time in nine years.

HIGHLIGHTS OF 2015

Among the most memorable business, economic, and financial sound bites of 2015 were "Swiss franc crash," "Grexit," "commodities rout," "VW sensorgate," "high yield rout," and "U.S. Fed interest rate hike."

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COMMODITIES MELTDOWN

The other big stories in the turbulent business, financial, and economic narrative of 2015 included a commodities meltdown precipitated by weak demand (principally from China) and rock-bottom prices for oil, gas, coal, and minerals, all of which sent hundreds of overleveraged U.S. and foreign producers and related companies scrambling down the road to bankruptcy.

The U.S. surpassed Saudi Arabia and Russia in 2015 to become the world's largest oil and natural gas producer combined. A massive oversupply of oil caused by increased U.S. production and the refusal of a bloc of producers led by Saudi Arabia to stem their production meant that oil prices plummeted 30 percent in 2015 to as little as $35 a barrel, after having plunged from more than $100 a barrel to nearly $50 a barrel in 2014. The fallout among energy-sector companies will likely continue well into 2016 and beyond.

A RECORD YEAR FOR M&A

The year 2015 was the biggest year ever for mergers and acquisitions. Buoyed by rising boardroom confidence, (still) inexpensive debt, pressure to become more efficient in a slow-growth economy, and a desire to keep up with consolidating competitors, companies agreed to merge at a dizzying pace in 2015. Dealogic estimated that the total value of M&A transactions in 2015 approached $5 trillion, a record. Some of the biggest names agreeing to tie the knot in 2015 were Pfizer/Allergan ($160 billion), Anheuser-Busch InBev/SABMiller ($117 billion), Royal Dutch Shell/BG Group ($81.5 billion), Charter Communications/Time Warner Cable ($79.6 billion), Dow Chemical/DuPont ($68.6 billion), and HJ Heinz/Kraft Foods ($62.6 billion).

SOVEREIGN AND COMMONWEALTH DEBT

The sovereign debt crises of several nations, including Greece, Argentina, and Ukraine, and the calamitous financial straits of a U.S. commonwealth—Puerto Rico—were writ large in 2015 headlines. Greece received a (third) bailout of up to €86 billion in loans from the eurozone in August 2015 after defaulting on a €1.55 billion repayment to the International Monetary Fund (the "IMF") at the end of June. Argentina, which defaulted on its sovereign debt for the second time in July 2014, continued its standoff with holdout bondholders from two previous debt restructurings, despite having lost—repeatedly—at every level of the U.S. judiciary regarding its obligation to pay.

In February 2015, the IMF agreed to a new $17.5 billion bailout for Ukraine, hoping to stabilize the country as it teeters on the edge of default and economic collapse precipitated by the separatist uprising that began in 2014 with Russia's annexation of the Crimea. In December, the Ukrainian government declared a moratorium on repaying $3.5 billion in debt to Russia.

HIGHLIGHTS OF 2015

January 20—China's National Bureau of Statistics reports that economic growth has slowed to a level not seen in a quarter century, firmly marking the end of a high-growth heyday which buoyed global demand for almost everything. The slipping momentum in China reverberates around the world, sending prices for commodities tumbling and weakening an already soft global economy.

Puerto Rico struggled throughout 2015 to manage its more than $72 billion in debt. Because the island commonwealth is a U.S. territory, its heavily indebted public corporations are precluded from seeking the debt-adjustment relief that is available to most state public agencies under chapter 9 of the U.S. Bankruptcy Code. Puerto Rico's long-standing efforts to change the law were unsuccessful in 2015, although several bills were introduced in the U.S. Congress to deal with the problem in various ways. Puerto Rico also attempted to enact its own legislation that would provide debt relief to its instrumentalities, but the law was struck down as being unconstitutional by the courts. Those rulings will be reviewed by the U.S. Supreme Court in 2016.

On September 16, the U.N. General Assembly, in an initiative prompted by Argentina's sovereign debt crisis and the perceived heavy-handed tactics of holdout creditors, approved "basic principles" for sovereign debt restructuring processes to improve the global financial system. The resolution, which is nonbinding but carries political weight, urges debtors and creditors "to act in good faith and with a cooperative spirit to reach a consensual rearrangement" of sovereign debt.

U.S. MARKETS

After recovering from a summer rout, U.S. stock markets finished 2015 relatively flat. The Standard & Poor's 500 finished the year

down 0.7 percent, well below the solid gains of the last three years, but up 63 percent over the last five years. The Dow Jones Industrial Average finished the year down 2.2 percent, its first annual decline since 2008. The technology-heavy NASDAQ Composite did better than the other two benchmarks in 2015, rising 5.7 percent for the year.

BUSINESS BANKRUPTCY FILINGS

Business bankruptcy filings continued a downward trend in 2015. The Administrative Office of the U.S. Courts reported that business bankruptcy filings in the fiscal year ("FY") which ended on September 30, 2015, totaled 24,985, down 12 percent from the 28,319 business filings in FY 2014. Chapter 11 filings totaled 7,040 in FY 2015, down 8 percent from 7,658 in FY 2014.

Seventy-four chapter 15 cases were filed in FY 2015, compared to 70 in FY 2014. There were seven chapter 9 filings in FY 2015, compared to 10 in FY 2014.

The data for bankruptcy filings in calendar year ("CY") 2015 paint a similar portrait, with two notable exceptions. According to Epiq Systems, total business bankruptcy filings during CY 2015 were 30,018, a 14 percent drop from the 34,749 filings during CY 2014. However, chapter 11 business filings were 5,309 for 2015, compared to 5,188 for 2014, representing an increase of about 2 percent. This represents the first year-over-year increase in business chapter 11 filings since 2009. Ninety chapter 15 petitions were filed on behalf of foreign business debtors in CY 2015, compared to 59 in CY 2014—roughly a 50 percent increase. Only three municipal debtors filed for chapter 9 protection in CY 2015, compared to 10 in CY 2014.

The number of bankruptcy filings by "public companies" (defined as companies with publicly traded stock or debt) in CY 2015 was 79, according to data provided by New Generation Research, Inc.'s bankruptcydata.com, compared to 52 public company filings in CY 2014. At the height of the Great Recession, 138 public companies filed for bankruptcy in 2008 and 211 in 2009.

The combined asset value of the 79 public companies that filed for bankruptcy in 2015 was $81.2 billion, compared to $72 billion in 2014. By contrast, the 138 public companies that filed for bankruptcy in 2008 had prepetition assets valued at $1.16 trillion in aggregate. Unlike in the three previous years, when the health-care and medical sector claimed the largest number of bankruptcies, energy, mining, and related-sector companies led the pack in 2015, representing almost half of the total public company bankruptcy filings in 2015 (and all but one of the filings in December).

The year 2015 added 18 public company names to the billion-dollar bankruptcy club (measured by value of assets), compared to 11 in 2014 and 10 in 2013. Counting private company and foreign debtor filings, the billion-dollar club gained 27 members in 2015. But the largest bankruptcy filing of 2015—Caesars Entertainment Operating Co., Inc., with $15.9 billion in assets—did not crack the Top 30 List of the largest public company bankruptcy filings in history.

Twelve public and private companies with assets valued at more than $1 billion exited from bankruptcy in 2015—including six of the 18 billion-dollar public companies that filed in 2015. Continuing a trend begun in 2012, more of these companies (seven) reorganized than were liquidated or sold.

BANKS AND PENSION INSURANCE

The Federal Deposit Insurance Corporation shuttered eight banks in 2015, compared to 18 in 2014 and 24 in 2013. This represents the lowest number of bank failures since 2007. There were 157 bank failures in 2010 and 140 in 2009, during the height and immediate aftermath of the Great Recession.

HIGHLIGHTS OF 2015

February 6—A U.S. federal district court rules that Puerto Rico's 2014 Public Corporations Debt Enforcement and Recovery Act, patterned on chapters 9 and 11 of the U.S. Bankruptcy Code, is unconstitutional.

On November 18, the Pension Benefit Guaranty Corporation (the "PBGC"), which insures pensions for approximately 40 million Americans, reported that its deficit increased 23 percent to $76.4 billion, with the agency's program for multi-employer pension plans continuing to account for a large share ($52.3 billion). The deficit reported for FY 2015 was the widest in the 41-year history of the PBGC, which has now run shortfalls for 13 straight years.

GLOBAL DEFAULTS

According to Standard & Poor's Ratings Services, 112 companies worldwide defaulted on their obligations in 2015, the highest year-end tally since 2009, when the default figure hit 268. Fifty-nine percent of 2015's global defaults came from U.S. borrowers, up from 55 percent in 2014. After the U.S., companies from emerging markets (Brazil and Russia) were the second-largest defaulters, followed by companies in Europe and other developed nations. The oil and gas sector led the 2015 default tally with 29 defaulters, or 26 percent of the global total. Seventeen defaults (15 percent of the global total) came from issuers in the metals, mining, and steel sector. The consumer products and bank sectors were tied for the third-highest concentration at 13 issuers (12 percent each).

Of the 112 defaulting entities in 2015, 36 defaulted because of distressed exchanges, 32 defaults were due to missed interest or principal payments, 22 followed a bankruptcy filing, 11 reflected regulatory intervention, seven are confidential, one followed a judicial reorganization, one followed a judicial recovery, one was due to the filing of an administration proceeding, and one followed the completion of a de facto debt-for-equity swap.

HIGHLIGHTS OF 2015

April 7—Cloud Live, a troubled Chinese restaurant chain turned technology company, announces that it cannot make debt repayment commitments in what Chinese state media call a "landmark," noting that the default is the country's first domestic bond interest default.

TOP 10 BANKRUPTCIES OF 2015

All but two of the Top 10 public company bankruptcies of 2015 were filed by companies in the oil and gas or mining (principally coal) industries, reflecting the dire straits of these sectors caused by weakened worldwide demand and plummeting prices. The two exceptions came from the banking and the lodging and entertainment sectors. Each company gracing the Top 10 List for 2015 entered bankruptcy with assets valued at more than $2 billion. Six of the 10 companies on the Top 10 List filed pre-negotiated or prepackaged chapter 11 cases.

The bouncing ball on the roulette wheel for the largest public company bankruptcy filing in 2015 landed on hotel and gaming giant ***Caesars Entertainment Operating Co., Inc.*** ("CEOC"). CEOC, together with its parent company (Caesars Entertainment Corporation ("CEC")) and its affiliates, owns, operates, or manages 50 gaming and resort properties in 14 U.S. states and four foreign countries, primarily under the Caesars, Harrah's, and Horseshoe brand names. On August 4, 2014, Wilmington Savings Fund Society, FSB ("WSFS"), as indenture trustee for second priority noteholders, commenced an action against CEC, CEOC, certain of their affiliates, and certain directors for, among other things, recovery of fraudulent transfers of CEOC's assets, breaches of fiduciary duty, and declaratory relief with respect to CEC's guarantee of the second priority notes.

On January 12, 2015, holders of second priority notes filed an involuntary bankruptcy petition against CEOC in the District of Delaware. CEOC and 172 of its subsidiaries filed voluntary chapter 11 petitions on January 15, 2015, in the Northern District of Illinois after entering into a restructuring support agreement with CEC and certain of CEOC's first priority noteholders. CEOC listed $15.9 billion in assets and approximately $19 billion in debt, a significant portion of which was incurred during a 2008 leveraged buyout ("LBO") of CEC (then known as Harrah's Entertainment, Inc.) in one of the largest LBOs in history. On February 2, 2015, the U.S. Bankruptcy Court for the District of Delaware transferred CEOC's involuntary bankruptcy case to the Northern District of Illinois. Thereafter, an examiner was appointed to investigate claims of fraudulent transfer and breach of fiduciary duty, among others.

Jones Day represents the Official Committee of Second Priority Noteholders, WSFS as indenture trustee for $3.7 billion in

second priority notes, and the petitioning creditors in CEOC's involuntary proceeding.

The No. 2 spot on the Top 10 List for 2015 was excavated by Bristol, Virginia-based ***Alpha Natural Resources, Inc.*** ("Alpha"). As of the bankruptcy filing, Alpha was engaged in the extraction, processing, and marketing of steam and metallurgical coal in 54 active mines and 22 coal preparation plants located in Kentucky, Pennsylvania, Virginia, West Virginia, and Wyoming. Alpha is the nation's largest supplier and exporter of the type of coal used to produce steel. The company filed for chapter 11 protection on August 3, 2015, in the Eastern District of Virginia, showing $10.7 billion in assets against $7.1 billion in debt on its balance sheet. A severe slump in coal prices continues to wreak havoc on the industry. Alpha and many of its rivals are facing historically adverse market conditions, a difficult regulatory environment, and intense industry competition, while also burdened by debt taken on when the industry's outlook was rosier. Jones Day represents Alpha in connection with its chapter 11 filing.

San Juan, Puerto Rico-based bank holding company ***Doral Financial Corporation*** ("DFC") collapsed into the No. 3 spot on the Top 10 List for 2015 when it filed for chapter 11 protection on March 11, 2015, in the Southern District of New York with $8.5 billion in assets—the largest bank failure since 2010. DFC's banking operation—Doral Bank—was hit hard by falling residential housing prices and underperforming loans, but the *coup de grace* was an appellate court's ruling in favor of Puerto Rican tax authorities in protracted litigation surrounding an accounting fraud and DFC's entitlement to a $229 million tax refund. DFC filed for bankruptcy to liquidate its remaining assets after the unsuccessful resolution of the tax dispute forced undercapitalized Doral Bank, Puerto Rico's only community lender, into receivership on February 27, 2015, where it was purchased by Banco Popular de Puerto Rico.

Privately owned, Tulsa, Oklahoma-based oil and gas producer ***Samson Resources Corporation*** ("Samson") trickled into the No. 4 spot on the Top 10 List for 2015 when it filed for chapter 11 protection in the District of Delaware on September 16, 2015, with $5.6 billion in assets and $4.3 billion in debt. Samson filed for bankruptcy with a pre-negotiated plan to give equity in the restructured company to junior lenders and wipe more than $3.25 billion in debt from its books. Samson was taken private in 2011 in a $7.2 billion LBO—the biggest-ever LBO for an oil and gas producer.

Birmingham, Alabama, and Vancouver, British Columbia-based coal miner and exporter ***Walter Energy, Inc.*** ("Walter") struck the No. 5 lode on the Top 10 List for 2015 when Walter's U.S. units filed for chapter 11 protection on July 15, 2015, in the Northern District of Alabama with $5.4 billion in assets against $5 billion in debt. Walter is the world's leading publicly traded, "pure play" metallurgical coal producer for the global steel industry. It filed for bankruptcy with a prepackaged chapter 11 plan that, if confirmed, would convert $1.8 billion of debt to equity and transfer ownership of the company to senior secured creditors. With the recent plunge in coal prices and greatly reduced Chinese import demand, Walter has struggled to service its high-yield debt.

HIGHLIGHTS OF 2015

June 15—In *Starr Int'l Co. v. United States*, 2015 BL 188318 (Fed. Cl. June 15, 2015), the Federal Court of Claims rules that the U.S. government acted with undue harshness, and in violation of Section 13(3) of the Federal Reserve Act, in taking over American International Group in 2008. However, the court rules that no damages are owed for this conduct, since the alternative was a complete wipeout of shareholders in a bankruptcy.

Cayman Islands exempted offshore oil rig operator ***Offshore Group Investments Limited*** ("Offshore"), a wholly owned subsidiary of Vantage Drilling Co. ("Vantage"), barreled into the No. 6 spot on the Top 10 List for 2015 when Offshore and 23 subsidiaries filed for chapter 11 protection on December 3, 2015, in the District of Delaware with a prepackaged chapter 11 plan to swap $1.15 billion in debt for control of the company. The plan, which was confirmed by the bankruptcy court on January 14, 2016, leaves Offshore intact while Vantage is being wound down in the Cayman Islands. Like others in the oil and gas industry, Offshore has been crippled by stubbornly low oil prices, with the price of U.S. crude oil plummeting to $35 a barrel from more than $100 a year and a half ago. The offshore drilling sector has also faced an oversupply of drilling rigs since late 2013, with customers turning their focus to onshore shale gas drilling. Finally, Offshore has been buffeted by bribery, money-laundering, and corruption allegations linked to the corruption scandal at Brazil's state-run oil firm, Petróleo Brasileiro SA ("Petrobras"),

once Offshore's biggest customer. Offshore listed $3.5 billion in assets and $3 billion in debt in its chapter 11 petition.

Greenwood, Colorado-based ***Molycorp, Inc.*** ("Molycorp"), the only U.S. supplier of rare-earth minerals used in electric cars and wind turbines, excavated the No. 7 lode on the Top 10 List for 2015 when it filed for chapter 11 protection along with its North American subsidiaries on June 25, 2015, in the District of Delaware with $2.6 billion in assets against $1.7 billion in debt. Molycorp's plight mirrors the dramatic rise and fall of the rare-earth market over the past five years. Prices for the group of 17 metals soared dramatically in 2011 after exports were curbed by China, the world's largest supplier. However, by the end of 2011, prices were falling as consumers sought cheaper substitutes. Molycorp filed for bankruptcy with a pre-negotiated chapter 11 plan that, if confirmed, would cancel $700 million in unsecured debt and surrender majority control of the reorganized company to senior secured noteholders. Jones Day is representing Molycorp and its subsidiaries in connection with their chapter 11 cases.

HIGHLIGHTS OF 2015

July 13—Greece and its European creditors announce a tentative agreement intended to resolve the country's debt crisis and keep it in the eurozone by providing Greece with a bailout package of up to €86 billion in loans—the nation's third bailout in five years.

Privately held, Houston-based exploration and production company ***Sabine Oil & Gas Corp.*** ("Sabine") drilled into the No. 8 spot on the Top 10 List for 2015 when it filed for chapter 11 protection on July 15, 2015, in the Southern District of New York with $2.4 billion in assets against $2.9 billion in debt. Like many of its competitors, Sabine has been hamstrung by a combination of cratering oil prices, low natural gas prices, and substantial debt. It has been negotiating with creditors since March 2015 to restructure its obligations, so far without success.

Houston, Texas-based shale oil driller ***Swift Energy Company*** ("Swift") struck the penultimate vein in the Top 10 List for 2015 when it filed for chapter 11 protection on December 31, 2015, in the District of Delaware with $2.2 billion in assets and $1.35 billion in debt. Swift became the latest U.S. shale driller—and the 40th North American oil producer in 2015 (20 headquartered in Texas)—to succumb to the brutal 68 percent slide in U.S. crude oil prices during the past 19 months. Swift filed a pre-negotiated chapter 11 plan that, if confirmed by the bankruptcy court, would de-lever the company's balance sheet by converting $905 million in unsecured debt to equity. Jones Day represents Swift in its chapter 11 case.

The final spot on the Top 10 list for 2015 belonged to St. Louis, Missouri-based ***Patriot Coal Corporation*** ("Patriot Coal"), which operated eight mining complexes in West Virginia. Patriot Coal revisited bankruptcy on May 12, 2015, when it filed for chapter 11 protection in the Eastern District of Virginia with $2 billion in assets against $2.4 billion in debt. Patriot Coal first filed for bankruptcy in July 2012. In addition to being strained by union and pension obligations, the company had been hit hard by dropping coal prices brought on by a glut of cheap natural gas. The U.S. Bankruptcy Court for the Eastern District of Missouri confirmed a chapter 11 plan in the first Patriot Coal bankruptcy on December 17, 2013, following a new capital infusion of $250 million and a settlement with its former parent company of claims that subsidiary spinoffs violated the Employee Retirement Income Security Act.

Legacy employee obligations, environmental obligations, and depressed coal prices brought Patriot Coal back to bankruptcy 18 months later. The U.S. Bankruptcy Court for the Eastern District of Virginia confirmed a chapter 11 plan in Patriot Coal's second bankruptcy case on October 8, 2015. Under the plan, Patriot Coal's mines were sold at auction to Blackhawk Mining LLC and a unit of the nonprofit Virginia Conservation Legacy Fund in exchange for assumed liabilities.

Other notable debtors (public, private, and foreign) in 2015 included the following:

Houston, Texas-based ***Hercules Offshore, Inc.*** ("Hercules Offshore"), a worldwide oil and gas drilling services company that operates a fleet of 27 jack-up rigs and 21 liftboats. Another casualty of plunging oil prices, Hercules Offshore filed a prepackaged chapter 11 case on August 13, 2015, in the District of Delaware to implement a $1.2 billion debt-for-equity swap with its bondholders. The company listed $2 billion in assets against $1.3 billion in debt. The bankruptcy court confirmed Hercules Offshore's prepackaged chapter 11 plan on September 24, 2015.

Falls Church, Virginia-based ***Altegrity, Inc.*** ("Altegrity"), owner of the company that carried out background checks on former National Security Agency contractor Edward Snowden and Navy Yard shooter Aaron Alexis. Altegrity filed for chapter 11 protection on February 8, 2015, in the District of Delaware with $1.7 billion in assets against $1.8 billion in debt. A slimmed-down Altegrity emerged from bankruptcy on September 1, 2015, under new ownership after jettisoning its troubled U.S. Investigations Services Inc. subsidiary, but retaining its Kroll private security unit and its HireRight employee screening business.

Iconic 94-year-old consumer-electronics chain ***RadioShack Corporation*** ("RadioShack"), which filed for chapter 11 protection in the District of Delaware on February 5, 2015 ($1.6 billion in assets against $1.4 billion in debt) with a dual-track strategy to maximize value by: (i) entering into a strategic alliance with Sprint and selling approximately half of RadioShack's 4,000 stores as going concerns; and (ii) liquidating its remaining assets, both on an expedited timeline. The strategy succeeded, as the proposed store sale was approved by the bankruptcy court in less than 60 days, enabling the company to preserve more than 7,000 jobs and avoid the fate of many other retailers whose chapter 11 filings resulted in a complete cessation of operations and full chain liquidations. The bankruptcy court confirmed RadioShack's liquidating chapter 11 plan on an expedited basis on October 2, 2015. Jones Day represented RadioShack in connection with its chapter 11 case.

Irving, Texas-based oil and gas producer ***Magnum Hunter Resources Corporation*** ("Magnum"), yet another victim of the glut of cheap energy—including a 14-year low in natural gas prices—and a heavy debt load. Magnum filed a pre-negotiated chapter 11 case on December 15, 2015, in the District of Delaware with $1.7 billion in assets against $1.1 billion in debt. If confirmed, Magnum's plan would cede control of the company to creditors by means of a debt-for-equity swap.

Montvale, New Jersey-based ***Great Atlantic & Pacific Tea Company, Inc.*** ("A&P"), operator of A&P, Best Cellars, Food Basics, Food Emporium, Pathmark, Superfresh, and Waldbaum's supermarkets. A&P filed for chapter 11 protection for the second time in five years on July 20, 2015, in the Southern District of New York ($1.6 billion in assets against $2.3 billion in debt), with a plan to sell its businesses to competitors. As of January 2016, A&P had sold more than 200 stores to new owners and was still seeking buyers for approximately 50 supermarkets.

Reno, Nevada-based ***Allied Nevada Gold Corp.*** ("Allied Nevada"), the operator of the gaming state's Hycroft mine. Allied Nevada filed a prepackaged chapter 11 case on March 10, 2015 ($1.5 billion in assets against $664 million in debt) in the District of Delaware after operational setbacks and plunging gold prices eroded profitability at its sole working property. On October 8, 2015, the bankruptcy court confirmed a chapter 11 plan for Allied Nevada whereby unsecured creditors swapped their debt for equity in the reorganized company and the company swapped in new first-lien debt.

HIGHLIGHTS OF 2015

August 3—A Puerto Rico agency defaults for the first time when it misses a $58 million bond payment, initiating a clash with creditors as the struggling commonwealth seeks to renegotiate its $72 billion debt load.

Santa Ana, California-based, for-profit college operator ***Corinthian Colleges, Inc.*** ("Corinthian"), which once operated nearly 100 schools in 25 U.S. states and 14 campuses in Ontario, Canada, under the Wyotech, Heald College, and Everest University brand names, with an enrollment of more than 85,000 students. Corinthian filed for chapter 11 protection on May 4, 2015, in the District of Delaware as the final step toward a full shutdown in the wake of a financial crisis which began in the summer of 2014 and scores of lawsuits brought by state attorneys general and federal agencies alleging that the company had used illegal tactics in marketing itself to students and had inflated reported job placement rates. The bankruptcy court confirmed a chapter 11 plan of liquidation for Corinthian on August 28, 2015. In June and December 2015, the federal government announced that student loans to tens of thousands of Corinthian's former students would be forgiven.

Brazil-based ***OAS S.A.*** ("OAS"), parent company of the OAS Group, a construction, engineering, and infrastructure investment enterprise with projects located throughout Latin America, the Caribbean, and Africa. OAS experienced a liquidity crisis after the company was implicated in "Operation Carwash," a government anti-corruption investigation in Brazil involving Petrobras, the state-owned oil company. The U.S. Bankruptcy Court for the Southern District of New York entered

an order on July 13, 2015, recognizing the Brazilian bankruptcy cases of OAS and its affiliates under chapter 15 of the Bankruptcy Code, which stayed U.S. litigation against the company by bondholders.

Privately held Bahamian resort and hotel developer ***Baha Mar Ltd.*** ("Baha Mar"). Baha Mar filed for chapter 11 protection in the District of Delaware on June 29, 2015, with more than $1 billion in assets, weeks after opening U.S. bank accounts to establish eligibility for a U.S. bankruptcy filing. The U.S. bankruptcy court entered an order less than three months afterward abstaining from exercising jurisdiction over the chapter 11 case in deference to a pending Bahamian bankruptcy proceeding.

Los Angeles-based studio and production company ***Relativity Media LLC*** ("Relativity"), the independent television studio behind such recent releases as *The Lazarus Effect* and hits like MTV's *Catfish*. Relativity filed for chapter 11 protection on July 30, 2015, in the Southern District of New York. The bankruptcy court approved the sale of Relativity's reality television unit on October 20, 2015, and the company has proposed a reorganization plan based on recapitalizing its film and other business units. Relativity recently announced that Kevin Spacey and his producing partner will be leading Relativity's film division as part of the restructuring. Jones Day is representing the company and its affiliates in connection with their chapter 11 cases.

San Diego-based, privately held ***Millennium Health LLC*** ("Millennium"), one of the nation's largest drug-testing laboratories. Millennium filed a prepackaged chapter 11 case in the District of Delaware on November 10, 2015, one month after agreeing to pay $256 million to settle whistleblower allegations that it fraudulently billed Medicare and Medicaid for medically unnecessary tests and provided free items to physicians who agreed to refer business to it. The bankruptcy court confirmed a chapter 11 plan for Millennium on December 14, 2015, providing for a $1.15 billion debt-for-equity swap that handed control of the reorganized company to lenders. On January 12, 2016, the bankruptcy court certified a direct appeal of the confirmation order to the Third Circuit to determine the validity of the plan's nonconsensual third-party releases.

American Apparel, Inc. ("American Apparel"), the manufacturer and retailer of edgy, made-in-America apparel. American Apparel filed for chapter 11 protection on October 5, 2015, in the District of Delaware. The filing followed a deal struck with American Apparel's secured lenders to reduce the retailer's debt by $200 million through a debt-for-equity swap. American Apparel garnered the support of the official unsecured creditors' committee by means of a settlement to be incorporated into the company's chapter 11 plan. The plan was confirmed by the bankruptcy court on January 25, 2016, ending American Apparel's less than 120-day stay in bankruptcy. Jones Day represented American Apparel in connection with its chapter 11 case.

HIGHLIGHTS OF 2015

August 13—The U.S. Federal Reserve reports that U.S. student loan debt now totals $1.27 trillion, an amount which tops the $1 trillion owed in auto loans and $901 billion in credit card debt.

NEWSWORTHY

With significant successful chapter 11 cases in 2015, including NII Holdings and RadioShack, and major cases such as American Apparel, Alpha Natural Resources, Molycorp, Relativity Media, and Swift Energy pending in 2016, ***Jones Day*** was designated by *Law360* as a Bankruptcy Group of the Year.

Gregory M. Gordon (Dallas), Thomas A. Howley (Houston), Dan B. Prieto (Dallas), Jonathan M. Fisher (Dallas), Paul M. Green (Houston), and ***Amanda Suzuki (Dallas)*** are representing Houston, Texas-based shale oil driller Swift Energy Company in connection with its December 31, 2015, chapter 11 filing in the District of Delaware. Swift Energy filed a prenegotiated chapter 11 plan that, if confirmed by the bankruptcy court, would de-lever the company's balance sheet by converting $905 million in unsecured debt to equity.

The Chapter 9 Reorganization of the City of Detroit, Michigan, was the winner of the "Restructuring Deal of the Year (Over $1 Billion)" at the 14th Annual *M&A Advisor* Awards.

Philip J. Hoser (Global Disputes; Sydney) was named a "Leader in his Field" in the practice area of Restructuring/Insolvency by *Chambers Asia-Pacific 2016*.

Gregory M. Gordon (Dallas) and ***Scott J. Greenberg (New York)*** were among the 12 "Outstanding Restructuring Lawyers" recognized by *Turnarounds & Workouts* for 2015.

Ben Larkin (London), Juan Ferré (Madrid), and ***Laurent Assaya (Paris)*** were recommended as "Leaders in their Field" for Restructuring/Insolvency by *Chambers Europe 2016*.

Kevyn D. Orr (Washington) was the keynote speaker at The Bond Buyer's National Outlook Conference on January 26, 2016, in New York City.

Carl E. Black (Cleveland) was recognized in the field of Creditor Debtor Rights in the 2015 *Super Lawyers Business Edition*.

Jones Day won a *Corporate LiveWire* Global Award for 2016 in the category Bankruptcy & Restructuring.

Kevyn D. Orr (Washington) spoke at a George Washington Law School policy roundtable entitled "Public/Private Partners in Revitalizing Detroit" on December 6, 2015, in Washington, D.C.

Gregory M. Gordon (Dallas), Thomas A. Howley (Houston), Heather Lennox (Cleveland and New York), Erin N. Brady (Los Angeles), Joshua M. Mester (Los Angeles), Bruce Bennett (Los Angeles), Lisa G. Laukitis (New York), Corinne Ball (New York), Jeffrey B. Ellman (Atlanta), Brad B. Erens (Chicago), David G. Heiman (Cleveland), James O. Johnston (Los Angeles), Paul D. Leake (New York), Sidney P. Levinson (Los Angeles), Charles M. Oellermann (Columbus), Mark A. Cody (Chicago), Bennett L. Spiegel (Los Angeles), and ***Richard L. Wynne (Los Angeles)*** were recognized in the field of Bankruptcy in the 2015 *Super Lawyers Business Edition*.

Kevyn D. Orr (Washington) gave a presentation entitled "Comeback Cities: Detroit as a Case Study" on January 15, 2016, in Atlanta at the HOPE Global Forums Annual Meeting.

Corinne Ball (New York) and ***Kevyn D. Orr (Washington)*** gave a WebEx presentation on November 19, 2015, entitled "Jones Day: Lessons Learned from the Detroit Bankruptcy."

Philip J. Hoser (Global Disputes; Sydney) was named a "Leading Individual" in the field of Restructuring and Insolvency in *The Legal 500 Asia Pacific 2016*.

Yuichiro Mori (M&A; Tokyo) was recommended in the field of "Restructuring and Insolvency—International firms and joint ventures" in *The Legal 500 Asia Pacific 2016*.

Kevyn D. Orr (Washington) was the keynote speaker at the American Bankruptcy Institute program "Delaware Views from the Bench" on November 23, 2015, in Wilmington.

Joseph M. Tiller (Chicago) was named an Illinois "Rising Star" for 2016 by *Super Lawyers*.

Kevyn D. Orr (Washington) gave a presentation on January 27, 2016, in Las Vegas at the CFA's Asset-Based Capital Conference, entitled "Lessons Learned on the Restructuring of Detroit."

LEGISLATIVE/REGULATORY DEVELOPMENTS

PROPOSED CHAPTER 16 OF THE U.S. BANKRUPTCY CODE

On December 18, 2015, the National Bankruptcy Conference (the "NBC") submitted proposed legislation to the U.S. House of Representatives' Subcommittee on Regulatory Reform, Commercial and Antitrust Law and the Senate's Committee on the Judiciary outlining proposed changes to the Bankruptcy Code intended to address the unanimity requirement—referred to by some as the "holdout problem"—of section 316(b) of the Trust Indenture Act (the "TIA"). This problem was highlighted by 2014–15 rulings involving Caesars Entertainment Corporation and Education Management Corporation in which the courts interpreted the TIA to restrict the ability of parties to strip guarantees from dissenting bondholders in out-of-court restructurings without the bondholders' unanimous consent.

The NBC argues that even though the TIA's unanimity requirement successfully shields "the minority from majority abuse," it also "impedes beneficial out of court restructurings." The NBC further contends that "a chapter 11 filing necessitated solely by a holdout problem can inflict serious 'collateral damage' on a debtor."

The draft legislation would create a new chapter 16 of the Bankruptcy Code that would permit debtors to modify the rights, including payment terms, of one or more classes of claims by obtaining the acceptance of a two-thirds supermajority of "disinterested" creditors of each impaired class. According to the NBC, proposed chapter 16 would allow parties to avoid "triggering the whole panoply of Bankruptcy Code provisions, requirements and limitations that typically accompany the filing of a petition under the Bankruptcy Code." Instead, chapter 16 would create a "streamlined court-sanctioned process" that can provide "a far less burdensome alternative that remains consistent with the purpose of the TIA."

Congress elected not to include a provision that would have limited the scope of section 316(b) of the TIA as part of the federal transportation bill which was signed into law on December 4, 2015. The proposed amendment was sharply criticized by both Republicans and Democrats as well as a group of finance and bankruptcy scholars. Last-minute efforts to include proposed changes to the TIA in the omnibus spending bill signed into law on December 18, 2015, were similarly unsuccessful.

U.S. BANKRUPTCY RULE AND OFFICIAL BANKRUPTCY FORM CHANGES

On December 1, 2015, changes to certain Federal Rules of Bankruptcy Procedure and comprehensive revisions to the Official Bankruptcy Forms as part of the Forms Modernization Project became effective.

BILLS INTRODUCED IN THE U.S. CONGRESS TO AMEND THE BANKRUPTCY CODE AND RELATED STATUTES

The "Puerto Rico Chapter 9 Uniformity Act of 2015," S. 1774 and H.R. 870, would amend the Bankruptcy Code to make Puerto Rico's public agencies eligible to restructure their debts under chapter 9.

The "Puerto Rico Financial Stability and Debt Restructuring Choice Act of 2015," H.R. 4199, would amend the Bankruptcy Code to give Puerto Rico's public agencies access to chapter 9 in exchange for which a five-member federal "Financial Stability Council" would have the authority to oversee and approve or disapprove of the island's financial planning and annual budgets, in a bid to restore investor confidence and improve tax collection and budgeting practices.

The "Puerto Rico Assistance Act of 2015," S. 2381, would provide up to $3 billion to Puerto Rico to help stabilize its budget and debt; establish the "Puerto Rico Financial Responsibility and Management Assistance Authority," which could issue bonds; provide assistance in improving the commonwealth's accounting and disclosure practices; and provide a five-year, 50 percent cut on the employee side of the payroll tax.

The "Puerto Rico Emergency Financial Stability Act of 2015," H.R. 4290 and S. 2436, would impose a short-term moratorium on creditor lawsuits against the Commonwealth of Puerto Rico by establishing an "automatic stay" patterned on section 362 of the Bankruptcy Code that would prevent creditor collection efforts until March 31, 2016. Creditors could seek relief from the automatic stay for cause, including a lack of adequate protection, or to avoid irreparable damage.

The "Bailout Prevention Act of 2015," H.R. 2625 and S. 1320, would amend the Federal Reserve Act and the Bank Holding Company Act to prohibit megabank bailouts during a financial crisis by limiting the Federal Reserve Board's lending authority, and to close a loophole that creates risk-taking exemptions for certain megabanks. Among other things, the bills would limit the Federal Reserve Board's emergency lending authority by requiring such lending programs to be truly broad-based, restricting lending to those institutions that are not insolvent, and requiring loans to be provided at a penalty rate.

The "Financial Institution Bankruptcy Act of 2015," H.R. 2947, would amend the Bankruptcy Code to establish procedures to resolve (wind up or liquidate) systemically important financial institutions, including banks and bank holding companies with at least $50 billion in assets, in a new subchapter V of chapter 11.

The "Taxpayer Protection and Responsible Resolution Act of 2015," S. 1841, would replace taxpayer-funded bailouts for large financial institutions by creating a new chapter 14 of the Bankruptcy Code for certain financial corporations and eliminating the "orderly liquidation authority" in Title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act.

The "Consumer Reporting Fairness Act of 2015," S. 1773, would force major banks and other creditors to notify credit reporting agencies when an individual's debt has been discharged in bankruptcy, thereby eradicating "zombie" debts. The bill would also empower credit card borrowers who have inaccurate credit reports after a bankruptcy filing to sue banks and third-party debt purchasers for damages.

The "Christopher Bryski Student Loan Protection Act," H.R. 3474 and S. 1958, would: (i) amend the Truth in Lending Act to require private education lenders to, among other things, describe clearly and conspicuously in writing the cosigner's obligations regarding such a loan and ensure that the borrower and any cosigner receive comprehensive information on the loan's terms and conditions; (ii) direct the Consumer Financial Protection Bureau to publish a model form describing the cosigner's obligations regarding a private education loan; and (iii) amend the Higher Education Act of 1965 to require learning institutions to provide the borrower of a federal education loan with information at the loan's inception concerning his or her obligations, as well as repayment, refinancing, deferment, forbearance, or forgiveness opportunities available in the event of the borrower's or cosigner's death, disability, or inability to engage in gainful activity.

HIGHLIGHTS OF 2015

August 21—A report by the U.S. Department of Education shows that nearly 7 million Americans have gone at least a year without making a payment on their federal student loans, a high level of default which suggests that a widening swath of households is unable or unwilling to pay back school debt.

The "Student Loan Debt Protection Act of 2015," H.R. 3634, and the "Student Loan Borrower's Bill of Rights Act of 2015," H.R. 1352, would: (i) repeal section 523(a)(8) of the Bankruptcy Code, which restricts to cases of "undue hardship" the dischargeability of federally insured or guaranteed student loans as well as some private student loans, and amend the Higher Education Act of 1965 to reinstate a six-year statute of limitations for actions to collect such loans; (ii) prohibit offsets against Social Security benefits and tax refunds as well as wage garnishments to collect federal student loans; (iii) exclude from taxable income student loans discharged or forgiven; (iv) prohibit suspension of professional licenses due to student loan defaults; (iv) prohibit loss of access to an educational transcript due to a student loan default; and (v) make eligible for loan cancellation borrowers of student loans who have been employed in public-service jobs for five years.

The "Student Loan Bankruptcy Parity Act of 2015," H.R. 3451, would repeal section 523(a)(8) of the Bankruptcy Code, which restricts to cases of "undue hardship" the dischargeability of federally insured or guaranteed student loans as well as some private student loans.

The "National Guard and Reservist Debt Relief Extension Act of 2015," H.R. 4246, would amend the National Guard and Reservists Debt Relief Act of 2008 to exempt for an additional four-year period qualifying Armed Forces reserve components and National Guard members from the application of the means-test presumption of abuse under chapter 7 of the Bankruptcy Code.

HIGHLIGHTS OF 2015

October 7—The Loan Syndications and Trading Association, the principal advocate for the corporate loan market, issues "The Trouble with Unneeded Bankruptcy Reform: The LSTA's Response to the ABI Chapter 11 Commission Report." The objections include a challenge to a key narrative underpinning the ABI's report—namely, that the Bankruptcy Code has become outdated due to the evolution of financial markets and the increased use of secured credit.

The "Protecting Employees and Retirees in Business Bankruptcies Act of 2015," S. 1156 and H.R. 97, would amend the Bankruptcy Code to improve protections for employees and retirees by, among other things: (i) increasing the amount of wage and benefit claims entitled to priority under section 507(a) and eliminating the requirement that wages or benefits be earned within 180 days of an employer's bankruptcy filing; (ii) allowing employees to assert claims for losses in certain defined contribution plans due to employer fraud or breach of fiduciary duty; (iii) establishing a new priority administrative expense for severance pay; (iv) restricting the conditions under which collective bargaining agreements and commitments to fund retiree pensions and health benefits may be modified under sections 1113 and 1114; (v) requiring full disclosure and court approval of executive compensation packages; and (vi) restricting the payment of bonuses and other forms of incentive compensation to senior officers.

The "PACT (Protecting All College Tuition) Act of 2015," H.R. 2267, would amend section 548 of the Bankruptcy Code to preclude avoidance as a fraudulent transfer of good-faith payments made by parents of post-secondary education tuition for their children.

The "Fairness for Struggling Students Act of 2015," S. 729, and the "Private Student Loan Bankruptcy Fairness Act of 2015," H.R. 1674, would amend section 528(a)(8) of the Bankruptcy Code to make private student loans dischargeable.

The "Protecting Gun Owners in Bankruptcy Act of 2015," H.R. 1488, would amend section 522 of the Bankruptcy Code to designate as exempt property a firearm or firearms with an aggregate value of up to $3,000.

The "Furthering Asbestos Claim Transparency (FACT) Act of 2015," H.R. 526 and S. 357, would amend the Bankruptcy Code to require public disclosure by trusts established under section 524(g) of quarterly reports that contain detailed information regarding the receipt and disposition of claims for injuries based on exposure to asbestos.

UNITED NATIONS SOVEREIGN DEBT RESTRUCTURING RESOLUTION

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 nonbinding resolution, six (including the U.S.) voted against it, and 41 abstained. 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."

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 Decree includes 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) implement 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. The new legislation completes reforms to French insolvency law first undertaken in 2014, including the creation of specialized insolvency courts for large cases and the implementation of rules that permit "cramdown" of shareholder interests in reorganization proceedings.

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

On October 1, 2015, the Spanish Parliament passed the Public Sector Legal Regime Act, which amended the Spanish Insolvency Act (2003) and the Spanish Public Sector Contracts Act (2011). Among other things, the new law clarifies the ranking in insolvency proceedings of debts secured by pledges granted over future credit rights and requires advance approval of pledges over credit rights arising from the liability of the National Institute of Public Administration due to the termination of public concessions.

AUSTRALIAN INSOLVENCY LAW AMENDMENTS

In December 2015, the Australian government announced a number of important changes to its insolvency (bankruptcy) legislation. Among the amendments are: (i) a safe harbor protecting company directors from personal liability if they appoint a restructuring advisor to assist in attempting to rescue the company; (ii) a provision making unenforceable any "ipso facto" clauses that cause a contract to terminate (or allow the contract to be terminated) upon the insolvency of a contract party; and (iii) a reduction from three years to 12 months of the period after which an individual debtor may receive a discharge of debts.

REVISED RUSSIAN BANKRUPTCY REGULATIONS

On March 24, 2015, the Russian government enacted new bankruptcy procedures, including amendments to rules governing insolvency cases that involve tax debts. Decree No. 265 implements reforms authorized by Order No. 1358-r of July 24, 2014. Among other things, the decree permits greater interaction between the Russian Federal Tax Service (the "FTS") and other federal and municipal agencies in insolvency cases where the FTS acts as the government's representative with respect to claims for taxes, fees, and customs duties. Decree No. 265 also allows for a greater exchange of information (electronic and otherwise) between the FTS and other federal and municipal agencies.

NEW POLISH RESTRUCTURING LAW

On April 9, 2015, Poland's National Assembly adopted a new Restructuring Law, with the goal of introducing an effective mechanism to restructure a debtor-company's business and prevent liquidation. The Restructuring Law, which became effective on June 1, 2015 (with certain exceptions), makes the existing Bankruptcy and Reorganization Law applicable to liquidation proceedings only and establishes new rules and procedures governing restructuring proceedings patterned on chapter 11 of the U.S. Bankruptcy Code, the English scheme of arrangement, and the French *sauvegarde* proceeding.

HIGHLIGHTS OF 2015

November 30—By adopting formal restrictions on its ability to help failing financial firms, the U.S. Federal Reserve takes the final step to ensure that it cannot repeat the extraordinary measures taken to rescue American International Group and Bear Stearns Cos. in 2008.

PROPOSED INDIAN BANKRUPTCY LAW REFORMS

On November 3, 2015, the Indian government published long-awaited proposals to overhaul India's outdated and overburdensome bankruptcy process, calling for public comment on what could become the country's first unified bankruptcy legislation. The proposed bill aims to expedite decisions on whether to rehabilitate or liquidate ailing companies, in a move to curb asset stripping and ensure higher recovery rates for creditors, both of which are key to fostering a modern credit market and increased investment in India. If adopted, the reforms would include provisions: (i) entrusting the resolution process to insolvency professionals; (ii) establishing creditors' committees to participate in bankruptcy cases; and (iii) ending government involvement that has created decades of judicial gridlock.

NOTABLE BUSINESS BANKRUPTCY RULINGS OF 2015

ALLOWANCE OF CLAIMS—MAKE-WHOLE PREMIUMS

Whether a provision in a bond indenture or loan agreement obligating a borrower to pay a "make-whole" premium is enforceable in bankruptcy has been the subject of heated debate in recent years. A Delaware bankruptcy court weighed in on this issue in a pair of rulings in 2015—*Del. Trust Co. v. Energy Future Intermediate Holding Co. LLC (In re Energy Future Holdings Corp.)*, 527 B.R. 178 (Bankr. D. Del. 2015), and *Computershare Tr. Co. v. Energy Future Intermediate Holding Co. LLC (In re Energy Future Holdings Corp.)*, 539 B.R. 723 (Bankr. D. Del. 2015).

Aligning itself with a number of New York bankruptcy courts, the court granted partial summary judgment to the debtor-borrower in both cases, which involved claims for make-whole premiums asserted by first- and second-lien noteholders. The court ruled that, although the debtor repaid the bonds prior to maturity, make-whole premiums were not payable under the plain terms of the bond indentures because automatic acceleration of the debt triggered by the debtor's chapter 11 filing was not a "voluntary" repayment.

In the *Del Trust Co.* case cited above, however, 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. The bankruptcy court subsequently denied that request in *Del. Trust Co. v. Energy Future Intermediate Holding Co. LLC (In re Energy Future Holdings Corp.)*, 533 B.R. 106 (Bankr. D. Del. 2015). The court concluded that stay relief was unwarranted because the debtor's estate and its stakeholders would be greatly prejudiced by lifting the stay, and the harm to the noteholders did not substantially outweigh the harm to the debtor's estate.

In *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), the district court affirmed a bankruptcy court order confirming a chapter 11 plan that did not provide for the payment of a make-whole premium to senior noteholders according to the same rationale stated in the *Energy Future* cases. 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."

ALLOWANCE OF CLAIMS—UNSECURED CREDITORS' RIGHT TO POSTPETITION ATTORNEY'S FEES

Courts have long been divided over the issue of whether postpetition attorney's fees and costs of an unsecured creditor can be included as part of its allowed claim in a bankruptcy case. A bankruptcy court weighed in on this issue in *In re Tribune Media Co.*, 2015 BL 381838 (Bankr. D. Del. Nov. 19, 2015). In upholding a mediator's recommendation, the court concluded that "the plain language of § 502(b) and § 506(b), when read together, indicate[s] that postpetition interest, attorney's fees and costs are recoverable only by oversecured creditors." A more detailed discussion of the ruling can be found elsewhere in this issue.

> **HIGHLIGHTS OF 2015**
>
> **December 2—**2015 officially becomes the biggest year ever for mergers and acquisitions as announced transactions push global M&A volume to $4.304 trillion.

APPEALS—EQUITABLE MOOTNESS

Since the development of the doctrine of equitable mootness nearly a quarter century ago, courts have struggled to apply it in a way that strikes an appropriate balance between the need to ensure the finality and certainty of a chapter 11 plan for stakeholders, on the one hand, and the need to exercise the court's jurisdiction and honor the right to appellate review, on the other. In *JPMCC 2007-C1 Grasslawn Lodging, LLC v. Transwest Resort Props. Inc. (In re Transwest Resort Props., Inc.)*, 801 F.3d 1161 (9th Cir. 2015), the Ninth Circuit curbed the application of the equitable mootness doctrine where the appellant diligently sought to stay consummation of a confirmed chapter 11 plan and where the plan was not so complex that uninvolved third parties (as distinguished from sophisticated investors for whom appellate consequences are a foreseeable result) would be harmed. The court also rejected the Second Circuit's strict approach of imposing a presumption of mootness upon substantial consummation of a plan.

The ruling reflects growing concern among courts (especially in the Third Circuit) regarding overbroad application of the equitable mootness doctrine, with recent calls to limit the doctrine and, in some cases, eliminate it altogether, particularly where the parties affected by the appeal are well aware of the potential for reversal.

AVOIDANCE ACTIONS—EXCEPTIONS TO PREFERENCE AVOIDANCE

Section 547(c)(2) of the Bankruptcy Code excepts from the trustee's power to avoid preferential transfers any transaction in which the debtor conveys property to a creditor in the "ordinary course of business." Exactly what constitutes "ordinary course of business," however, is not a settled question of law. In *Jubber v. SMC Electrical Products (In re C.W. Mining Co.)*, 798 F.3d 983 (10th Cir. 2015), the Tenth Circuit held that a first-instance transaction between a debtor and a creditor can satisfy the ordinary course exception if: (i) the debt was ordinary in accordance with the past practices of the debtor and the creditor when dealing with other, similarly situated parties; and (ii) the payment was made in the ordinary course of business of the debtor and the transferee. The court accordingly affirmed rulings below that a two-day-early installment payment on a first-instance equipment purchase could not be avoided by a bankruptcy trustee as a preference. A more detailed discussion of *C.W. Mining* can be found elsewhere in this edition.

AVOIDANCE ACTIONS—INSIDER PREFERENCE LIABILITY

Settling what it characterized as an "unresolved issue" of bankruptcy law, the Ninth Circuit held in *Stahl v. Simon (In re Adamson Apparel, Inc.)*, 785 F.3d 1285 (9th Cir. 2015), that a corporate insider who personally guaranteed a loan to the company was shielded from preference liability arising from repayment of a portion of the loan shortly before the company filed for bankruptcy because the insider guarantor, having waived the right to indemnification by the company in the event the guarantee was triggered, was not a "creditor," as required by section 547 of the Bankruptcy Code. A dissenting judge wrote, "I would follow every bankruptcy court to have decided the issue [since Congress amended section 547 in 1994 to eliminate the inequity of imposing preference liability on the lender rather than an insider guarantor] and hold that insider-guarantors . . . are 'creditors.' "

BANKRUPTCY SETTLEMENTS

In *Del. Trust Co. v. Energy Future Intermediate Holding Co. LLC (In re Energy Future Holdings Corp.)*, 527 B.R. 157 (D. Del. 2015), the district court affirmed a bankruptcy court order approving a settlement between the debtors and certain secured noteholders. The vehicle for the settlement was a postpetition tender offer of old notes for new notes to be issued under a debtor-in-possession financing facility. The district court ruled that a tender offer may be used to implement a classwide debt exchange in bankruptcy outside a plan of reorganization. It also held that the Bankruptcy Code's confirmation requirements do not apply to a pre-confirmation settlement and that the settlement at issue did not constitute a *sub rosa* chapter 11 plan. In so ruling, the *Energy Future* court rejected the reasoning of other courts that have applied certain chapter 11 plan confirmation requirements—such as the absolute priority rule—to pre-confirmation settlements.

CHAPTER 9 ELIGIBILITY—PUERTO RICO

Puerto Rico is an unincorporated territory of the U.S. This means, among other things, that its public instrumentalities are barred from seeking protection under the Bankruptcy Code to deal with the commonwealth's $72 billion in debt. In an effort to remedy this problem in part, Puerto Rico enacted legislation in 2014 that created a judicial debt relief process—the Puerto Rico Public Corporations Debt Enforcement and Recovery Act (the "Recovery Act")—for certain public corporations, modeled on chapters 9 and 11 of the U.S. Bankruptcy Code.

A federal district court struck down the Recovery Act as being unconstitutional in *BlueMountain Capital Management, LLC v. García-Padilla*, No. 14-01569 (D.P.R. Feb. 6, 2015). According to the court, "Because the Recovery Act is preempted by the federal Bankruptcy Code, it is void pursuant to the Supremacy Clause of the United States Constitution." Shortly afterward, Puerto Rico's representative in the U.S. Congress reintroduced a bill—the Puerto Rico Chapter 9 Uniformity Act of 2015 (H.R. 870)—to allow Puerto Rico's public agencies to be debtors under chapter 9. Companion legislation was introduced in the U.S. Senate on July 15, 2015.

The First Circuit affirmed the decision declaring the Recovery Act unconstitutional in *Franklin California Tax-Free Trust v. Commonwealth of Puerto Rico*, 805 F.3d 322 (1st Cir. 2015). In its opinion, the First Circuit wrote, "In denying Puerto Rico the power to choose federal Chapter 9 relief, Congress has retained

for itself the authority to decide which solution best navigates the gauntlet in Puerto Rico's case."

The U.S. Supreme Court granted Puerto Rico's petition for review of the First Circuit's ruling on December 4, 2015. *See Commonwealth of Puerto Rico v. Franklin California Tax-Free Trust*, No. 15-233, 2015 BL 398499 (Dec. 4, 2015).

CHAPTER 11 PLANS—CURE OF DEFAULTS

In 1994, Congress amended the Bankruptcy Code to add section 1123(d), which provides that, if a chapter 11 plan proposes to "cure" a default under a contract, the cure amount must be determined in accordance with the underlying agreement and applicable nonbankruptcy law. Since then, a majority of courts have held that such a cure amount must include any default-rate interest required under either the contract or applicable nonbankruptcy law.

In *JPMCC 2006-LDP7 Miami Beach Lodging, LLC v. Sagamore Partners, Ltd. (In re Sagamore Partners, Ltd.)*, 2015 BL 280922 (11th Cir. Aug. 31, 2015), the Eleventh Circuit joined the majority camp in concluding that section 1123(d) requires the payment of default-rate interest as a condition to curing a default under a loan agreement which is to be reinstated under a plan, provided that the obligation to pay default-rate interest is contained in the underlying loan agreement or authorized under applicable nonbankruptcy law. Like other courts endorsing the majority view, the Eleventh Circuit conclusively rejected the contrary approach adopted by the Ninth Circuit in *Great Western Bank & Trust v. Entz-White Lumber and Supply, Inc. (Entz-White Lumber and Supply, Inc.)*, 850 F.2d 1338 (9th Cir. 1988).

CHAPTER 11 PLANS—EXTINGUISHMENT OF LIENS

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 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)*, 795 F.3d 343 (2d Cir. 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.

CHAPTER 11 PLANS—THIRD-PARTY RELEASES

In *SE Prop. Holdings, LLC v. Seaside Eng'g & Surveying, Inc. (In re Seaside Eng'g & Surveying, Inc.)*, 780 F.3d 1070 (11th Cir. 2015), the Eleventh Circuit reaffirmed its position sanctioning, under appropriate circumstances, nonconsensual third-party release provisions in chapter 11 plans as a permissible exercise of discretion under section 105(a) of the Bankruptcy Code. The court affirmed lower court decisions approving a debtor's chapter 11 plan that released the debtor's former principals over the objection of a noninsider equity holder. Among other things, the Eleventh Circuit, noting that the bankruptcy court had described the chapter 11 case as a "death struggle," stated that "the non-debtor releases are a valid tool to halt that fight." In so ruling, the Eleventh Circuit maintained its alignment with the majority position on the third-party release issue, along with the Second, Third, Fourth, Sixth, and Seventh Circuits.

HIGHLIGHTS OF 2015

December 14—U.S. oil prices fall below $35 a barrel in New York for the first time since 2009, reflecting continued U.S. oversupply and weak Chinese manufacturing.

In *Caesars Entm't Operating Co. v. BOKF N.A. (In re Caesars Entm't Operating Co.)*, 2015 BL 422741 (7th Cir. Dec. 23, 2015), lenders sued the debtor's parent company for $12 billion, alleging that, prior to the debtor's chapter 11 filing, the parent improperly disavowed guarantees and caused the debtor to transfer assets fraudulently to the parent. After filing for bankruptcy, the

debtor separately alleged that its nondebtor parent caused the debtor to engage in fraudulent transfers.

The debtor asserted that continuation of the lender's litigation against the nondebtor parent would severely disrupt the debtor's chances for a successful chapter 11 case because the parent was expected to contribute substantial sums to fund the reorganization. The debtor asked the bankruptcy court to exercise its broad equitable powers under section 105(a) of the Bankruptcy Code to enjoin the litigation. The bankruptcy court held that litigation against a nondebtor may be enjoined under section 105(a) only if it arises out of the "same acts" of the nondebtor which gave rise to the disputes in the bankruptcy case. The "same acts" requirement was not satisfied here, the court explained, because the dispute in the debtor's bankruptcy case arose out of the parent's alleged fraudulent transfers, whereas the lender's claims arose out of the parent's repudiation of the loan guarantees. The district court affirmed.

The Seventh Circuit vacated the rulings, finding that the lower courts had interpreted the powers granted by section 105(a) too narrowly. Rather than applying the "same acts" test, the Seventh Circuit explained, the bankruptcy court should have questioned whether the injunction was likely to enhance the prospects for a successful resolution of the disputes in the bankruptcy case. According to the Seventh Circuit, if the injunction would contribute to the odds of a successful reorganization, and if denial of the injunction would endanger the success of the case, the injunction would, according to the language of section 105(a), be appropriate to carry out the provisions of the Bankruptcy Code.

CHAPTER 11 PLANS—UNSECURED CREDITORS' ENTITLEMENT TO POSTPETITION INTEREST

In *In re Energy Future Holdings Corp.*, 540 B.R. 109 (Bankr. D. Del. 2015), the court ruled that a cramdown chapter 11 plan for a solvent debtor need not provide for payment of postpetition interest to the holders of unsecured notes to be "fair and equitable" within the meaning of section 1129(b) of the Bankruptcy Code, even where the plan provides for a distribution to holders of equity interests. Rather, the court has the discretion to exercise its equitable powers to require the payment of postpetition interest, which may be at the contract rate or such other rate as the court deems appropriate.

The court further held that the chapter 11 plan need not provide for the payment of postpetition interest at the contract rate to the unsecured noteholders to render their claims not "impaired" within the meaning of section 1124 of the Bankruptcy Code. However, the court noted, in order for the unsecured noteholder class to be unimpaired, the plan must provide that the court may award postpetition interest at an appropriate rate if it determines to do so under its equitable power. A more detailed discussion of *Energy Future* can be found elsewhere in this issue.

CROSS-BORDER RESTRUCTURINGS—ABSTENTION FROM CHAPTER 11 CASES

The representative of a corporate debtor in a foreign bankruptcy proceeding that has assets located in the U.S. may file a petition in a U.S. bankruptcy court seeking recognition of the foreign proceeding under chapter 15 of the Bankruptcy Code. Alternatively, the foreign representative can file a "plenary" case in the U.S. on the debtor's behalf under chapter 7 or chapter 11, provided that the debtor meets the eligibility requirements for the chapter chosen (7 or 11). However, as illustrated by *In re Northshore Mainland Services Inc.*, 537 B.R. 192 (Bankr. D. Del. Sept. 15, 2015), even if a foreign debtor is eligible to file for chapter 11 protection in the U.S., a U.S. bankruptcy court may exercise its discretion to abstain from the case under section 305 of the Bankruptcy Code.

In *Northshore*, the debtor, which owns the Baha Mar resort in the Bahamas, filed for chapter 11 protection in the U.S. shortly after opening U.S. bank accounts to establish eligibility for a U.S. bankruptcy filing. It simultaneously sought recognition of the U.S. bankruptcy case from a Bahamian court, which refused to grant it; instead, the court appointed liquidators entrusted with devising a plan that could reverse the debtor's insolvency. Given the company's strong contacts with the Bahamas, rather than with the U.S., and the U.S. bankruptcy court's conviction that allowing the chapter 11 case to proceed would not bring stakeholders to the table and would invite further litigation in multiple forums, the bankruptcy court abstained from exercising jurisdiction over the U.S. chapter 11 case. The ruling suggests that, at least in some circumstances, foreign debtors' access to U.S. bankruptcy courts may be limited to chapter 15, where the scope of relief is more limited.

CROSS-BORDER RESTRUCTURINGS—AVOIDANCE ACTIONS UNDER FOREIGN LAW

In *Hosking v. TPG Capital Management LP (In re Hellas Telecomms. (Luxembourg) II SCA)*, 524 B.R. 488 (Bankr. S.D.N.Y. 2015), the bankruptcy court presiding over the chapter 15 case of a London-based company dismissed claims asserted by the company's U.K. liquidators against private equity companies to avoid nearly $1 billion in payments made in connection with a 2006 "debt refinancing." The cross-border transactions involved entities in Luxembourg, the U.K., and the U.S. (principally New York), as well as agreements and securities governed by the different laws of those jurisdictions.

The court ruled that the liquidators' cause of action under New York law alleging constructive fraudulent transfers must be dismissed under choice of law principles because: (i) an actual conflict exists between New York law and the laws of the U.K. and Luxembourg, which do not provide for the avoidance of constructively (as distinguished from actually) fraudulent transfers; and (ii) the U.K. and Luxembourg have a more significant interest in applying their laws to the dispute. The court also concluded that it need not decide whether New York fraudulent transfer law may be given extraterritorial effect or whether the liquidators could assert the avoidance claims in light of section 1521(a)(7) of the Bankruptcy Code, which expressly precludes a U.S. bankruptcy court from granting relief in a chapter 15 case that would allow a foreign representative to seek avoidance of transfers under section 544(b) of the Bankruptcy Code (which generally authorizes the prosecution of avoidance actions under nonbankruptcy statutes such as the N.Y. Debtor and Creditor Law).

In *Hosking v. TPG Capital Mgmt., L.P. (In re Hellas Telecomms. (Luxembourg) II SCA)*, 535 B.R. 543 (Bankr. S.D.N.Y. 2015), the bankruptcy court granted the liquidators' motion to amend their complaint to add causes of action against the defendants under U.K. law for avoidance of actual fraudulent transfers. Among other things, the bankruptcy court ruled that, even though U.K. law governed the actual fraudulent transfer claims, a U.S. bankruptcy court has jurisdiction to resolve them applying U.K. law.

CROSS-BORDER RESTRUCTURINGS—CHAPTER 15 ELIGIBILITY

The bankruptcy court in *In re Berau Capital Resources Pte Ltd*, 2015 BL 353631 (Bankr. S.D.N.Y. Oct. 28, 2015), considered what qualifies as U.S. property for the purposes of chapter 15 eligibility and venue. The court ruled that a debtor subject to a Singapore debt moratorium was eligible to file a chapter 15 case in the Southern District of New York, even though the debtor did not have a place of business in the U.S., because, among other things, the debtor had deposited a retainer with its New York City attorneys and the debtor had $450 million in U.S. dollar-denominated debt issued under an indenture governed by New York law with a New York choice of forum clause. A more detailed discussion of the ruling can be found elsewhere in this edition.

OUT-OF-COURT RESTRUCTURINGS—THE TRUST INDENTURE ACT

In a pair of 2015 decisions—*BOKF, N.A. v. Caesars Entm't Corp.*, 2015 BL 277004 (S.D.N.Y. Aug. 27, 2015), and *MeehanCombs Global Credit Opportunities Funds, LP v. Caesars Entm't Corp.*, 80 F. Supp. 3d 507, 2015 BL 9980 (S.D.N.Y. Jan. 15, 2015)—the district court broadly interpreted section 316(b) of the Trust Indenture Act (the "TIA") to restrict the ability of parties to strip guarantees from dissenting bondholders in out-of-court restructurings without the bondholders' unanimous consent.

In these rulings, the court held that section 316(b) protects bondholders "against non-consensual debt restructurings" which, as a practical matter, materially impair bondholders' ability to collect their debt and rejected the narrower interpretation that section 316(b) protects bondholders only from "majority amendment of certain 'core terms.' " Moreover, the rulings are significant because they establish that the TIA protects a bondholder's substantive right to receive actual payment and not merely the bondholder's procedural right to sue under the indenture. They thus continue a recent trend that emerged with the late 2014 ruling in *Marblegate Asset Mgmt. v. Educ. Mgmt. Corp.*, 2014 BL 366259 (S.D.N.Y. Dec. 30, 2014).

As a consequence of these decisions, minority bondholders may have increased leverage when negotiating with issuers and other creditors, including the ability to delay or disrupt the consummation of some types of out-of-court restructurings. In addition, issuers seeking to implement a restructuring may be more willing to resort to chapter 11, where unanimity is not required. A draft of the conference report prepared by the lead House and Senate committees working to reach a resolution on the federal transportation bill that was enacted on December 4, 2015 (the "Fixing

America's Surface Transportation Act," or the "FAST Act") included language which would have amended section 316(b) of the TIA to provide that bondholders' rights would not be impaired under the circumstances present in *Marblegate* and *Caesars*. The provision was not included in the final text of the FAST Act, nor, due to an outpouring of opposition from legal scholars and other parties, was the proposed TIA modification attached to the fiscal year 2016 Omnibus Appropriations bill to continue funding the government, which was passed on December 18.

HIGHLIGHTS OF 2015

December 16—The U.S. Federal Reserve raises its benchmark interest rate from near zero for the first time since December 2008, emphasizing that it will likely lift the rate gradually thereafter in a test of the economy's capacity to stand on its own with less support from super-easy monetary policy.

PRIORITY OF CLAIMS—MANDATORY SUBORDINATION

In *Pensco Trust Co. v. Tristar Esperanza Props., LLC (In re Tristar Esperanza Props., LLC)*, 782 F.3d 492 (9th Cir. 2015), the Ninth Circuit held that a claim asserted by a former member of a limited liability company based on a several-year-old judgment affirming an arbitration award establishing the value of her membership interest upon withdrawal should be subordinated under section 510(b) of the Bankruptcy Code. Under section 510(b),

> a claim arising from rescission of a purchase or sale of a security of the debtor or of an affiliate of the debtor . . . [or] for damages arising from the purchase or sale of such a security, or for reimbursement or contribution . . . on account of such a claim, shall be subordinated to all claims or interests that are senior to or equal the claim or interest represented by such security.

The holding arguably departs from precedent set by courts in both the Second and Third Circuits, which have previously severed the causal link between a debt claim and an equity interest where the connection was attenuated.

In *ANZ Sec., Inc v. Giddens (In re Lehman Brothers, Inc.)*, 2015 BL 408529 (2d Cir. Dec. 14, 2015), the debtor, Lehman Brothers Inc. ("LBI"), was the lead underwriter for unsecured notes issued by its affiliate and parent, Lehman Brothers Holdings Inc. ("Lehman Holdings"). After Lehman Holdings filed for bankruptcy and a case under the Securities Investor Protection Act was commenced for LBI, junior underwriters that incurred defense and settlement costs in connection with noteholder losses filed claims for contribution or reimbursement against LBI.

The Second Circuit affirmed lower court rulings subordinating the contribution and reimbursement claims under section 510(b). In discussing the extent to which a claim for contribution or reimbursement should be subordinated under section 510(b), the court wrote:

> We hold that in the affiliate securities context, [section 510(b)'s reference to] "the claim or interest represented by such security" means a claim or interest of the same type as the affiliate security. Claims arising from securities of a debtor's affiliate should be subordinated in the debtor's bankruptcy proceeding to all claims or interests senior or equal to claims in the bankruptcy proceeding that are of the same type as the underlying securities (generally, secured debt, unsecured debt, common stock, etc.; and in some circumstances potentially a narrower sub-category).

PROFESSIONAL COMPENSATION

Professionals retained in a bankruptcy case by a trustee, a chapter 11 debtor-in-possession, or an official committee may be awarded "reasonable compensation" under section 330 of the Bankruptcy Code for "actual, necessary services" performed on behalf of their clients. In assessing whether particular services should be compensable, most courts, including the Second, Third, and Ninth Circuits, 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, 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.

SECTION 363 SALES—DISTRIBUTION OF PROCEEDS

In *In re LCI Holding Company, Inc.*, 802 F.3d 547 (3d Cir. 2015), a secured lender purchased the debtor's assets by means of a credit bid in an auction sale under section 363(b) of the Bankruptcy Code. The lender separately funded trusts for the payment of administrative fees, wind-down costs, and unsecured claims. The court ruled that those funds need not be distributed in accordance with the Bankruptcy Code's priority rules because they were not property of the debtor's estate.

With *LCI Holding* and its ruling in *Official Committee of Unsecured Creditors v. CIT Group/Business Credit Inc. (In re Jevic Holding Corp.)*, 787 F.3d 173 (3d Cir. 2015), *reh'g denied*, No. 14-1465 (3d Cir. Aug. 18, 2015) (discussed elsewhere in this article), the Third Circuit has provided debtors flexibility to utilize section 363 sales or settlements outside the plan content to expedite the resolution of chapter 11 cases.

STRUCTURED DISMISSALS

A "structured dismissal" of a chapter 11 case following a sale of substantially all of the debtor's assets has become increasingly common as a way to minimize costs and maximize creditor recoveries. However, only a handful of rulings have been issued on the subject, perhaps because bankruptcy and appellate courts are unclear as to whether the Bankruptcy Code authorizes the remedy.

The Third Circuit weighed in on this issue in *Official Committee of Unsecured Creditors v. CIT Group/Business Credit Inc. (In re Jevic Holding Corp.)*, 787 F.3d 173 (3d Cir. 2015), *reh'g denied*, No. 14-1465 (3d Cir. Aug. 18, 2015). The court ruled that "absent a showing that a structured dismissal has been contrived to evade the procedural protections and safeguards of the plan confirmation or conversion processes, a bankruptcy court has discretion to order such a disposition." The court also held that "bankruptcy courts may approve settlements that deviate from the priority scheme of [the Bankruptcy Code]," but only if the court has "specific and credible grounds" to justify the deviation.

HIGHLIGHTS OF 2015

December 18—Britain's last underground coal mine closes, calling time on an industry that helped propel the U.K. to superpower status in the 19th century. One hundred years ago, more than a million men made their living digging coal from deep beneath U.K. soil.

The Third Circuit affirmed lower court rulings approving, as part of a structured dismissal of a chapter 11 case, a settlement providing for payments to unsecured creditors but providing no recovery to priority wage claimants. The Third Circuit agreed with the bankruptcy court's findings that: (a) absent approval of the settlement, there was "no realistic prospect" of a meaningful distribution to anyone other than secured creditors; (b) there was "no prospect" of a confirmable chapter 11 plan (of either reorganization or liquidation); and (c) conversion to a chapter 7 liquidation would have been unavailing because a chapter 7 trustee would not have sufficient funds "to operate, investigate or litigate."

FROM THE TOP

The U.S. Supreme Court issued six rulings in 2015 involving issues of bankruptcy law.

In *Bullard v. Blue Hills Bank*, 135 S. Ct. 1686 (2015), the Court unanimously affirmed a First Circuit ruling that an order of a bankruptcy appellate panel affirming a bankruptcy court's denial of confirmation of a chapter 13 plan is not a final order and therefore is not appealable under 28 U.S.C. § 158(d), so long as the debtor remains free to propose an amended plan. In so ruling, the Supreme Court resolved a circuit split in favor of the majority position adopted by the Second, Sixth, Eighth, Ninth, and Tenth Circuits.

In *Harris v. Viegelahn*, 135 S. Ct. 1829 (2015), the Court considered whether undistributed funds held by a chapter 13 trustee after the debtor's case is converted from a chapter 7 liquidation must be distributed to creditors or revert to the debtor, a question that has divided courts for 30 years and created a circuit split between the Third and Fifth Circuits. The court unanimously ruled that, on the basis of the Bankruptcy Code's statutory framework, including section 348(f), postpetition wages must be returned to the debtor in the absence of bad faith.

In *Wellness Int'l Network, Ltd. v. Sharif*, 135 S. Ct. 1932 (2015), a divided Supreme Court resolved the circuit split regarding whether a bankruptcy court may, with the consent of the litigants, adjudicate a claim that, though statutorily denominated as "core," is not otherwise constitutionally determinable by a bankruptcy judge. The 5-4 majority held that so long as consent—whether express or implied—is "knowing and voluntary," Article III of the U.S. Constitution is not violated by a bankruptcy court's adjudication of such a claim. The ruling builds upon the Supreme Court's recent decisions in *Stern v. Marshall*, 131 S. Ct. 2594 (2011), and *Executive Benefits Insurance Agency v. Arkison*, 134 S. Ct. 2165 (2014). *Wellness* nonetheless leaves many significant jurisdictional and constitutional questions unanswered, including: (i) what constitutes "knowing and voluntary" consent or when such consent (express or implied) must be given in order to cure any constitutional deficiency; and (ii) which claims, as a constitutional matter, can be finally determined by a bankruptcy judge.

In a pair of related bankruptcy cases—*Bank of Am., N.A. v. Caulkett*, 135 S. Ct. 1995 (2015), and *Bank of Am., N.A. v. Toledo-Cardona*, 135 S. Ct. 1995 (2015), the Supreme Court ruled that, under section 506(d) of the Bankruptcy Code, a chapter 7 debtor may not "strip off" a junior mortgage lien in its entirety when the outstanding debt owed to a senior lienholder exceeds the current value of the collateral. In reversing Eleventh Circuit rulings, the court unanimously held that its previous ruling in *Dewsnup v. Timm*, 502 U.S. 410 (1992)—that a chapter 7 debtor could not "strip down" a partially secured lien under section 506(d)—cannot be read to permit lien stripping of a wholly unsecured junior lien in a chapter 7 case. The Supreme Court later vacated the judgments in 13 Eleventh Circuit bankruptcy cases addressing the same issue as *Caulkett* and *Toledo-Cardona* and remanded each case to the Eleventh Circuit for further consideration in light of the rulings.

In *Baker Botts LLP et al. v. ASARCO LLC*, 135 S. Ct. 2158 (2015), the Court, in a 6-3 decision, affirmed a Fifth Circuit ruling that the Bankruptcy Code does not authorize compensation for the costs bankruptcy professionals bear to defend their fee applications. Writing for the majority, Justice Clarence Thomas explained that, in accordance with the "American Rule," each litigant pays its own attorney's fees, win or lose, unless a statute or contract provides otherwise. According to Justice Thomas, the text of section 330(a)(1) of the Bankruptcy Code cannot displace the American Rule because the language of the statute "neither specifically nor explicitly authorizes courts to shift the costs of adversarial litigation from one side to the other—in this case, from the attorneys seeking fees to the administrator of the estate."

On November 6, 2015, the Supreme Court granted certiorari in *Husky Int'l Elecs., Inc. v. Ritz (In re Ritz)*, No. 15-00145, 2015 BL 366786 (Nov. 6, 2015), to review a Fifth Circuit decision that barring the discharge of a debt for "actual fraud" under section 523(a)(2)(A) of the Bankruptcy Code requires a false representation by the debtor. *See Husky Int'l Elecs., Inc. v. Ritz (In re Ritz)*, 787 F.3d 312 (5th Cir. 2015). The Fifth Circuit's ruling is at odds with a Seventh Circuit case from 2000—*McClellan v. Cantrell*, 217 F.3d 890 (7th Cir. 2000)—where the court held that fraudulent conduct can be enough to constitute "actual fraud" even if no false representation is made. Shortly after the Fifth Circuit's decision, the First Circuit also weighed in on this issue and adopted the Seventh Circuit's approach. *See Sauer Inc. v. Lawson (In re Lawson)*, 791 F.3d 214 (1st Cir. 2015).

On December 4, 2015, the Supreme Court granted certiorari in *Commonwealth of Puerto Rico v. Franklin California Tax-Free Trust*, Nos. 15-233 and 15-255, 2015 BL 398499 (Dec. 4, 2015), to review the First Circuit's affirmance of a district court ruling that Puerto Rico's Recovery Act establishing a mechanism patterned on chapter 9 and chapter 11 to restructure the obligations of Puerto Rico's public corporations is unconstitutional. *See Franklin California Tax-Free Trust v. Commonwealth of Puerto Rico*, 2015 BL 215414 (1st Cir. July 6, 2015).

OF INTEREST: BANKRUPTCY COURT HAS EQUITABLE POWER TO AWARD POSTPETITION INTEREST TO UNSECURED CREDITORS UNDER CRAMDOWN CHAPTER 11 PLAN

Aaron M. Gober-Sims and Mark G. Douglas

In *In re Energy Future Holdings Corp.*, 540 B.R. 109 (Bankr. D. Del. 2015), the bankruptcy court ruled that, although a chapter 11 plan proposed by solvent debtors need not provide for the payment of postpetition interest on unsecured claims to render the claims unimpaired, the plan must provide that the court has the discretion to award such interest at an appropriate rate "under equitable principles." The ruling highlights the important distinction between the allowance of a claim in bankruptcy and the permissible treatment of the claim under a chapter 11 plan.

FACTS

In 2012, Energy Future Intermediate Holding Co. LLC and EFIH Finance Inc. (collectively, the "debtors") issued approximately $1.4 billion in unsecured notes. The note indenture provided for the payment of postpetition interest on overdue principal at the contract rate.

In April 2014, the debtors filed for chapter 11 relief in the District of Delaware. They proposed a chapter 11 plan under which holders of general unsecured claims, including the noteholders, would receive payment in full in cash of the allowed amount of their claims "or other treatment rendering such Claim[s] unimpaired." The proposed plan further provided that allowed claims would include accrued principal, fees, and interest due as of the petition date, plus "accrued postpetition interest at the Federal Judgment Rate."

The proof of claim filed by the indenture trustee on behalf of the noteholders included a claim for postpetition interest at the contract rate. The debtors objected, contending that: (i) postpetition (i.e., "unmatured") interest on an unsecured claim is disallowed under section 502(b)(2) of the Bankruptcy Code; and (ii) to the extent that a claim for postpetition interest is allowed, it should be limited under sections 726(a)(5) and 1129(a)(7)(A)(ii) to "interest at the legal rate," which the debtors argued is the federal judgment rate.

UNMATURED INTEREST DISALLOWED

Initially, the bankruptcy court held that, even though the debtors were solvent, the claim for amounts due under the notes was limited to unpaid principal, interest, and fees as of the bankruptcy petition date. Any claim for postpetition interest at the contract rate specified in the indenture, the court explained, must be disallowed under section 502(b)(2) as "unmatured interest."

However, the court noted, "[T]o say that [the indenture trustee's] allowed claim excludes post-petition interest is the beginning of the analysis[,] not the end." According to the court, because the debtors filed for relief under chapter 11, the Bankruptcy Code's plan confirmation requirements dictate what the unsecured noteholders and other stakeholders must receive under a confirmable chapter 11 plan. This is a "critical distinction," the court wrote.

"BEST INTERESTS" TEST MAY REQUIRE PAYMENT OF POSTPETITION INTEREST ON UNSECURED CLAIMS

The chapter 11 plan confirmation requirements include section 1129(a)(7) of the Bankruptcy Code—the "best interests" test—which mandates that, unless each claimant in an "impaired" class (discussed elsewhere in this article) accepts a chapter 11 plan, the claimant must receive at least as much under the plan as it would receive in a chapter 7 liquidation of the debtor. Thus, because the chapter 7 distribution scheme under section 726 of the Bankruptcy Code designates as fifth, in priority of payment, interest on allowed unsecured claims "at the legal rate," a chapter 11 plan for a solvent debtor may have to provide for the payment of postpetition interest on unsecured claims to satisfy section 1129(a)(7).

The court emphasized that these provisions do not conflict with section 502(b). Although section 502(b)(2) disallows unsecured claims for postpetition interest, the court explained, a chapter 11 plan for a solvent debtor (due to the "best interests" test) may be confirmable only if it provides for the payment of interest "at the legal rate" on the unsecured claim. The court concluded that "the legal rate" should be the federal judgment rate.

"FAIR AND EQUITABLE" DOES NOT MEAN PAYMENT OF POSTPETITION INTEREST ON UNSECURED CLAIMS

The court also considered the application of the plan cramdown provisions set forth in section 1129(b)(2) of the Bankruptcy Code. That subsection specifies the requirements which a cramdown chapter 11 plan must meet to be "fair and equitable" with respect to each dissenting class of secured claims, unsecured claims, or interests.

On the basis of its examination of the text of the statute and relevant case law, the bankruptcy court ruled that section 1129(b)(2)—despite its nonexclusive language—does not require a chapter 11 plan providing value to a junior class to pay postpetition interest to a more senior class of objecting unsecured creditors. Instead, the court held, section 1129(b)(2) permits (but does not require) a court to exercise its equitable powers to direct the payment of postpetition interest at whatever rate of interest the court deems appropriate.

FAILURE TO PAY POSTPETITION INTEREST IMPAIRMENT?

Finally, the court examined the concept of "impairment" under section 1124 of the Bankruptcy Code. Only impaired classes of creditors are entitled to vote on a chapter 11 plan. Section 1124 provides that a class is impaired under a plan unless, among other things, the plan: (1) "leaves unaltered the legal, equitable, and contractual rights" to which the claimant is entitled; or (2) cures any defaults (with limited exceptions), reinstates the maturity and other terms of the obligation, and compensates the claimant for resulting losses.

Section 1124 originally included a third option for rendering a claim unimpaired—by providing the claimant with cash equal to the allowed amount of its claim. In *In re New Valley Corp.*, 168 B.R. 73 (Bankr. D.N.J. 1994), the court ruled that a solvent debtor's chapter 11 plan which paid unsecured claims in full in cash, without postpetition interest, did not impair the claims. Under the *New Valley* rationale, a solvent debtor could avoid paying postpetition interest to "unimpaired" unsecured creditors by paying them in full in cash, even if the plan provided a distribution to a junior class, while the same solvent debtor would be obligated to pay postpetition interest to an "impaired" dissenting class of unsecured creditors.

Due to the perceived unfairness of *New Valley*, Congress removed this option from the Bankruptcy Code in 1994. Since then, most courts considering the issue have held that, if an unsecured claim is paid in full in cash with postpetition interest at an appropriate rate, the claim is unimpaired under section 1124(1).

According to the *Energy Future* court, because postpetition interest on an unsecured claim is disallowed by statute—section 502(b)—rather than a chapter 11 plan, such "statutory impairment" may not constitute impairment under section 1124(1). According to the court, this is a logical extension of *In re PPI Enterprises (U.S.), Inc.*, 324 F.3d 197 (3rd. Cir. 2003). In *PPI*, the Third Circuit held that a landlord's future rent claim capped under section 502(b)(6) of the Bankruptcy Code was not impaired because the text of section 1124(1) mandates that the relevant barometer for impairment is whether the plan itself, as distinguished from another provision of the Bankruptcy Code, limits the claimant's legal, equitable, or contractual rights. However, the *Energy Future* court noted that this extension of *PPI* resurrects the inequity which Congress sought to excise in amending section 1124 in 1994.

To reconcile this, the court explained that section 1124(1) also provides that a plan must leave *equitable* rights unaltered to render a claim unimpaired. It further noted that allowing postpetition interest on an allowed claim to unimpaired unsecured creditors in a solvent debtor case might be appropriate to preserve such equitable rights.

Ultimately, the bankruptcy court ruled that the debtors' chapter 11 plan need not provide for the payment of postpetition interest on the unsecured noteholder claims to render the claims unimpaired. However, the court held that the plan must provide for the payment of postpetition interest at an appropriate rate "under equitable principles." According to the court, "[T]he fair and equitable test as applied to unsecured creditors in solvent debtor cases . . . must also be met in solvent debtor cases for such creditors to be unimpaired." Whether such interest would be awarded and at what rate in this case, the court wrote, "cannot be determined at this time."

FIRST-INSTANCE TRANSACTION MAY QUALIFY FOR "ORDINARY COURSE OF BUSINESS" PREFERENCE DEFENSE

Jonathan Noble Edel

Section 547(c)(2) of the Bankruptcy Code excepts from the trustee's power to avoid preferential transfers any transaction in which the debtor transfers property to a creditor in the "ordinary course of business." Exactly what constitutes "ordinary course of business," however, is not a settled question of law. In *Jubber v. SMC Electrical Products (In re C.W. Mining Co.)*, 798 F.3d 983 (10th Cir. 2015), the U.S. Court of Appeals for the Tenth Circuit considered whether a first-time transaction between a debtor and a creditor can satisfy the ordinary course exception. The Tenth Circuit held that a first-instance transaction can qualify if: (i) the debt was ordinary in accordance with the past practices of the debtor and the creditor when dealing with other, similarly situated parties; and (ii) the payment was made in the ordinary course of business of the debtor and the transferee. The court accordingly affirmed rulings below that a two-day-early installment payment on a first-instance equipment purchase could not be avoided by a bankruptcy trustee as a preference.

THE LAW

Section 547(b) of the Bankruptcy Code empowers a bankruptcy trustee to avoid transfers made by an insolvent debtor to creditors within 90 days of a bankruptcy filing if, as a consequence of the transfer, the creditor received a greater amount in respect of its claim than it would in a chapter 7 liquidation. Certain otherwise preferential transfers, however, are excepted from the trustee's avoidance powers. Among these—as specified in section 547(c)(2)—are transfers in payment of a debt incurred by the debtor in the ordinary course of business, which payments were "(A) made in the ordinary course of business . . . or (B) made according to ordinary business terms."

These exceptions enable a financially distressed company to continue operating its business in the ordinary course, prior to filing for bankruptcy, ultimately preserving the value of the assets of the estate as well as staving off the proverbial "race to the courthouse" by creditors. At the same time, by leaving undisturbed only the normal financial relations of debtors and creditors, this exception does not extend to unusual and risky behaviors, which could adversely affect the interests of creditors and the estate. *See Union Bank v. Wolas*, 502 U.S. 151 (1991).

Prior to 2005, many courts construed section 547(c)(2) to require that both subsections (A) and (B) must be satisfied to insulate a transfer from avoidance under the ordinary course of business exception—i.e., that a transfer was made in the ordinary course and that it was made according to ordinary business terms. *See* 5 COLLIER ON BANKRUPTCY § 547.04[2] (16th ed. 2015). However, Congress amended the statute in 2005 to make clear that subparagraphs (A) and (B) are alternatives. Because the language of each alternative is unchanged, pre-2005 case law interpreting each continues to be relevant.

Under alternative (A) of section 547(c)(2), the debt must be incurred and the payment must be made in the ordinary course of business of both the debtor and the transferee. Some courts, however, have required the incurrence of the debt and the payment to be in the ordinary course of the business relations *between* the debtor and the transferee. *See, e.g., Fitzpatrick v. Cent. Commc'ns & Elecs., Inc. (In re Tenn. Valley Steel Corp.)*, 203 B.R. 949 (Bankr. E.D. Tenn. 1996); *Brizendine v. Barrett Oil Distribs., Inc. (In re Brown Transp. Truckload, Inc.)*, 152 B.R. 690 (Bankr. N.D. Ga. 1992). Under this approach, any first-time transaction would be ineligible for the exception because there is no prior course of dealing between the debtor and the transferee.

Because section 547(c)(2) expressly refers to the "ordinary course of business or financial affairs of the debtor and the transferee," rather than *between* the debtor and the transferee, the Sixth, Seventh, and Ninth Circuits have rejected this approach, ruling that a first-time transaction can qualify for the exception. *See Gosch v. Burns (In re Finn)*, 909 F.2d 903 (6th Cir. 1990); *Kleven v. Household Bank F.S.B.*, 334 F.3d 638 (7th Cir. 2003); *Wood v. Stratos Prod. Dev., LLC (In re Ahaza Sys. Inc.)*, 482 F.3d 1118 (9th Cir. 2007). As the Ninth Circuit wrote in *Ahaza*:

> With the "ordinary course of business" exception, Congress aimed not to protect well-established financial relations, but rather to "leave undisturbed normal financial relations, because [the exception] does not detract from the general policy of the preference section to discourage unusual action by either the debtor or his creditors during the debtor's slide into bankruptcy."

Ahaza, 482 F.3d at 1125 (quoting *Union Bank*, 502 U.S. at 160). The Tenth Circuit adopted this approach in *C.W. Mining*.

C.W. MINING

In mid-2007, Utah-based C.W. Mining Company ("C.W. Mining") decided to convert to a "longwall mining" operation in an attempt to reinvigorate its business. In furtherance of this strategy, C.W. Mining purchased certain equipment from SMC Electrical Products ("SMC") for approximately $1 million. SMC delivered an invoice to C.W. Mining setting forth deadlines for various installment payments, the first of which—a payment of $200,000—C.W. Mining made to SMC on October 16, 2007, which was two days earlier than the deadline specified in the invoice.

On January 8, 2008, certain C.W. Mining creditors filed an involuntary chapter 11 petition against the company in the District of Utah. After the case was converted to a chapter 7 liquidation, the chapter 7 trustee sued SMC, seeking avoidance of the $200,000 installment payment as a preference. SMC moved for summary judgment, asserting that the debt arose in the ordinary course of business and was therefore insulated from avoidance under section 547(c)(2).

The bankruptcy court granted the motion, holding that the first-instance transaction between C.W. Mining and SMC qualified as an ordinary course of business transaction. The trustee appealed the ruling to a Tenth Circuit bankruptcy appellate panel, which affirmed. The trustee then appealed to the Tenth Circuit.

THE TENTH CIRCUIT'S RULING

A three-judge panel of the Tenth Circuit affirmed. After examining the language and purpose of the ordinary course of business exception, the court noted that requiring a challenged transaction to be in the ordinary course of business *between* the parties—as required by some courts—would necessarily render first-instance transactions ineligible for the protections of section 547(c)(2). Any such per se rule, the court explained, would be inconsistent with the purpose of the provision (i.e., to leave normal business practices undisturbed, protect asset values, and curb the race to the courthouse).

"With the 'ordinary course of business' exception," the court wrote, "Congress aimed not to protect well-established financial relations, but rather to leave undisturbed normal financial relations" (quoting *Ahaza*, 482 F.3d at 1125). On the basis of this reasoning, as well as the rationale articulated by the Seventh Circuit in *Kleven* and the Sixth Circuit in *Finn*, the Tenth Circuit panel added that nothing would discourage the inception of new business relationships between a distressed entity and a potential creditor more than the knowledge that the ordinary course of business defense would be unavailable to combat a preference challenge in any subsequent bankruptcy.

According to the Tenth Circuit panel, its interpretation of the exception would not render superfluous section 547(c)(2)(B) (protecting transactions entered into according to "ordinary business terms"). The court explained that "we have defined *ordinary business terms* to mean 'those used in "normal financing relations": the kinds of terms that creditors and debtors use in ordinary circumstances, when debtors are healthy' " (quoting *Clark v. Balcor Real Estate Fin., Inc. (In re Meridith Hoffman Partners)*, 12 F.3d 1549, 1553 (10th Cir. 1993)). The court concluded that the "ordinary business terms" defense in section 547(c)(2)(B) contemplates routine dealings within a particular industry, which is not necessarily the same as the ordinary business practices employed by a particular debtor or creditor.

The Tenth Circuit panel cautioned that this approach is not a license to authorize "unusual action by either the debtor or [its] creditors during the debtor's slide into bankruptcy" (quoting *Ahaza*, 482 F.3d at 1135). Courts should examine how the debtor and the creditor have dealt with similar transactions in the past; if the parties have a history of past practices with each other, compliance with those practices would satisfy this requirement. If, however, a first-time transaction is involved, the court should examine the past practices of the debtor and the creditor with other, similarly situated parties.

By way of example, the court analyzed *Harrah's Tunica Corp. v. Meeks (In re Armstrong)*, 291 F.3d 517 (8th Cir. 2002). The debtor in *Armstrong* lost $48,800 over a two-day period while gambling at a casino he had visited for the first time in 1995 shortly before an involuntary chapter 7 case was filed against him. The chapter 7 trustee sued the casino to avoid the transfer as a preference. The Eighth Circuit ultimately ruled that, although the debt arose in the ordinary course of the casino's business, it did not arise in the ordinary course of the debtor's business, and therefore the transfer did not qualify for the section 547(c)(2) exception.

In *C.W. Mining*, the Tenth Circuit panel found *Armstrong* to be instructive, albeit unusual on its facts. Because every business effort is essentially a gamble, the court distinguished between a debtor's reasonable business risks, taken in a good-faith effort to

reenergize the enterprise, and gambles made solely because the business is "playing with house money." According to the Tenth Circuit, "[A] debt incurred for an unduly risky project that can be justified only because the risk is borne solely by the company's creditors is not a debt incurred in the ordinary course of business."

The Tenth Circuit panel ruled that C.W. Mining incurred the debt and tendered the $200,000 payment to SMC in the ordinary course of business and that the transfer was therefore insulated from avoidance under section 547(c)(2). The court found, among other things, that the transaction's sole purpose was to assist in mining operations and that the parties had engaged in arm's-length negotiations in entering into the transaction. In addition, although C.W. Mining tendered its first installment payment to SMC two days prior to the due date, the tender was not unreasonable, according to the parties' past practices in similar situations with other entities.

The Tenth Circuit panel also noted that even though the trustee might have argued that C.W. Mining's new strategy was in fact a "gamble" sufficient to remove it from the ordinary course of business exception, he failed to do so. The court also wrote:

> [I]n some instances a debt may be incurred in the ordinary course of business even though it was incurred only because the debtor was sliding into bankruptcy. For example, certain expenditures unique to struggling businesses—such as hiring a turnaround consultant, *see Ciesla v. Harney Mgmt. Partners (In re KLN Steel Prods. Co., LLC)*, 506 B.R. 461, 470-72 (Bankr. W.D. Tex 2014)—are likely to qualify for the exception. The concern is only with what might be termed "gambling" by a failing business.

OUTLOOK

With *C.W. Mining*, the Tenth Circuit joins the Sixth, Seventh, and Ninth Circuits in ruling that a first-instance transaction can satisfy the requirements for the ordinary course of business preference defense set forth in section 547(c)(2). Although this ruling broadens the scope of potential transfers that can be shielded from avoidance, it arguably comports with the purpose of, and the policy underpinning, the Bankruptcy Code's preferential transfer avoidance provisions. Under the Tenth Circuit's reasoning, provided that the debtor's decision to transfer property is reasonable and not a gamble by a failing business, a per se rule disqualifying first-instance transactions would discourage vendors or other third parties from providing goods or services which might enable the debtor to avoid a bankruptcy filing.

IN BRIEF: SPLIT CONTINUES OVER UNSECURED CREDITORS' RIGHT TO POSTPETITION ATTORNEY'S FEES

In *Travelers Cas. & Sur. Co. of America v. Pacific Gas and Elec. Co.*, 549 U.S. 443 (2007), the U.S. Supreme Court rejected the Ninth Circuit's long-standing *Fobian* rule disallowing claims against a bankruptcy estate for attorney's fees arising from litigating issues that are "peculiar to federal bankruptcy law," rather than basic contract enforcement. In so ruling, the Court recognized the presumption that "claims enforceable under applicable state law will be allowed in bankruptcy unless they are expressly disallowed."

However, the Court did not address whether section 506(b) of the Bankruptcy Code, which expressly states that the secured claim of an *oversecured* creditor includes any fees, costs, or other charges provided for under its security agreement or applicable state law, "categorically disallows *unsecured* claims for contractual attorney's fees" because the issue was not raised in the lower courts. The Court wrote that "we express no opinion with regard to whether, following the demise of the *Fobian* rule, other principles of bankruptcy law might provide an independent basis for disallowing . . . [a] claim for attorney's fees."

Courts have long been divided—both before and after *Travelers*—over the issue of whether an unsecured creditor can include postpetition attorney's fees and costs as part of its allowed claim in a bankruptcy case. *See SNTL Corp. v. Centre Ins. Co. (In re SNTL Corp.)*, 571 F.3d 826 (9th Cir. 2009) (discussing split and listing cases). The majority of courts to date have concluded that the answer to this question is no.

For example, in *Global Indus. Tech. Serv. Co. v. Tangelwood Inv., Inc. (In re Global Indus. Tech., Inc.)*, 327 B.R. 230 (Bankr. W.D. Pa. 2005), the bankruptcy court, in ruling that an unsecured creditor may not include postpetition attorney's fees in its claim, recognized four arguments in support of what has become the majority position:

(i) Although section 506(b) expressly provides for the allowance of postpetition attorney's fees for oversecured creditors, neither section 506(b) nor any other provision of the Bankruptcy Code provides for the allowance of such fees for unsecured creditors. Therefore, unsecured creditors "have no clear entitlement to postpetition attorney's fees."

(ii) In *United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assoc.*, 484 U.S. 365 (1988), the Supreme Court held that section 506(b) permits only oversecured creditors to recover postpetition interest on their claims. Thus, "[b]ecause § 506(b) provides for the allowance of postpetition fees and interest, courts apply this reasoning to restrict allowance of postpetition fees only to oversecured creditors."

(iii) Section 502(b) of the Bankruptcy Code "requires a court to determine the amount of a claim as of the date the petition was filed." According to the *Global Indus.* court, "It is axiomatic that, as of the petition date, postpetition attorney's fees have not been incurred[,]" and therefore, "unsecured prepetition claims cannot include postpetition attorney's fees." Section 506(b) then allows the addition of "postpetition interest and fees to the extent a creditor is oversecured."

(iv) It would be "inequitable to allow certain unsecured creditors to recover postpetition attorney's fees at the expense of similarly situated claimants." Allowing one group of unsecured creditors to recover more than their prepetition debt "unfairly discriminates against the others because it reduces the pool of assets available to all unsecured creditors pro rata."

Post-*Travelers*, some courts have adhered to this approach in disallowing postpetition attorney's fees as part of an unsecured claim. *See, e.g., In re Old Colony, LLC*, 476 B.R. 1 (D. Mass. 2012); *In re Seda France, Inc.*, 2011 BL 191775 (Bankr. W.D. Tex. July 22, 2011); *In re Elec. Mach. Enters., Inc.*, 371 B.R. 549 (Bankr. M.D. Fl. 2007). Others, including the Ninth Circuit, have ruled to the contrary, reasoning that this approach is inconsistent with the Bankruptcy Code's broad definition of "claim" and incorrectly conflates the allowance functions of section 502(b) and section 506(b). *See SNTL Corp.*, 571 F.3d at 843–45; *In re Holden*, 491 B.R. 728 (Bankr. E.D.N.C. 2013); *see also Ogle v. Fidelity & Deposit Co. of Md.*, 586 F.3d 143, 148 (2d Cir. 2009) ("section 506(b) does not implicate unsecured claims for post-petition attorney's fees, and it therefore interposes no bar to recovery").

Recently, the bankruptcy court in *In re Tribune Media Co.*, 2015 BL 381838 (Bankr. D. Del. Nov. 19, 2015), weighed in on this issue. The chapter 11 plan confirmed for Tribune Media Company ("TMC") provided that Wilmington Trust Company, as indenture trustee for certain unsecured notes, could assert a general unsecured claim against TMC's estate for fees and expenses arising under the indenture.

In the indenture, TMC agreed to reimburse WTC "for all reasonable expenses, disbursements and advances incurred or made by [WTC] in accordance with any provision of this Indenture (including the reasonable compensation and the expenses and disbursements of its agents and counsel)." Other provisions of the indenture: (i) obligated TMC, in the event of a default, to pay amounts "to cover the costs and expenses of collection, including the reasonable compensation, expenses, disbursement and advances of [WTC], its agents and counsel"; and (ii) authorized WTC to file a proof of claim in any TMC bankruptcy case for such costs and expenses of collection.

WTC filed a claim for more than $30 million in postpetition fees and expenses. After TMC objected to the claim, a mediator appointed by the bankruptcy court to resolve the dispute recommended that the fee claim be disallowed.

U.S. bankruptcy judge Kevin J. Carey adopted the mediator's recommendation and disallowed the fee claim. Initially, Judge Carey explained that the Third Circuit has not decided this issue. However, he found the reasoning of *Global Indus.* to be persuasive, concluding that "the plain language of § 502(b) and § 506(b), when read together, indicate[s] that postpetition interest, attorney's fees and costs are recoverable only by oversecured creditors."

According to Judge Carey, denying postpetition attorney's fees to unsecured creditors does not leave these claimants without recourse. He explained that unsecured creditors may seek payment of postpetition fees and expenses under sections 503(b)(3)(D) and 503(b)(4), which allow an administrative expense claim for actual, necessary expenses, and reasonable compensation for professional services, on the part of creditors (and certain other parties) that provide a "substantial contribution" to the bankruptcy estate.

FOREIGN DEBTOR WITH U.S. DOLLAR-DENOMINATED DEBT ELIGIBLE FOR CHAPTER 15

Veerle Roovers and Mark G. Douglas

In December 2013, the U.S. Court of Appeals for the Second Circuit held as a matter of first impression in *Drawbridge Special Opportunities Fund LP v. Barnet (In re Barnet)*, 737 F.3d 238 (2d Cir. 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. The Second Circuit accordingly vacated a bankruptcy court order granting recognition under chapter 15 to a debtor's Australian liquidation proceeding, concluding that the bankruptcy 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 proceeding in the absence of any evidence that the debtor had a domicile, a place of business, or property in the U.S.

However, the Second Circuit did not provide guidance as to how extensive a foreign debtor's property holdings in the U.S. must be to qualify for chapter 15 relief. The *Barnet* bankruptcy court provided one answer to that question in 2014 on remand from the Second Circuit's ruling. In *In re Octaviar Administration Pty Ltd.*, 511 B.R. 361 (Bankr. S.D.N.Y. 2014), the bankruptcy court found that, consistent with case law analyzing the scope of section 109 for the purpose of determining who is eligible to commence a case under chapter 11, the requirement of property in the U.S. is satisfied when the debtor has causes of action governed under U.S. law against parties in the U.S. as well as an undrawn attorney retainer maintained there.

More recently, the bankruptcy court in *In re Berau Capital Resources Pte Ltd*, 540 B.R. 80 (Bankr. S.D.N.Y. 2015), had an opportunity to consider what qualifies as U.S. property for the purposes of chapter 15 eligibility and venue. In *Berau*, the court ruled that a debtor which had been granted a Singapore debt moratorium was eligible to file a chapter 15 case in the Southern District of New York, even though the debtor did not have a place of business in the U.S., because: (i) the debtor had deposited a retainer with its New York City attorneys; (ii) the debtor had $450 million in U.S. dollar-denominated debt issued under an indenture governed by New York law with a New York choice of forum clause; (iii) the debtor had appointed an authorized agent for the service of process in New York; and (iv) the debt was in default when the debtor's foreign representative filed the chapter 15 case.

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 [the Bankruptcy Code]." Section 101(13) defines a "debtor" as a "person [which includes a partnership or corporation] or municipality concerning which a case under [the Bankruptcy Code] has been commenced." Section 103(a) provides that "this chapter"—i.e., chapter 1, including sections 101(13) and 109(a)—"appl[ies] in a case under chapter 15."

However, chapter 15, unlike chapters 7, 9, 11, 12, and 13, contains its own definition of "debtor." Section 1502(1) of the Bankruptcy Code defines "debtor," "[f]or the purposes of [chapter 15]," as "an entity that is the subject of a foreign [bankruptcy or insolvency] proceeding."

VENUE FOR A CHAPTER 15 CASE

Twenty-eight U.S.C. § 1410 provides that a chapter 15 case may be filed in a district in which the debtor has "its principal place of business or principal assets in the United States" or, absent a place of business or assets in the U.S., in a district "in which there is pending against the debtor an action or proceeding" in a federal or state court. If neither of those requirements is satisfied, the chapter 15 case may be filed in a district "in which venue will be consistent with the interests of justice and convenience of the parties, having regard to the relief sought by the foreign representative."

BARNET

In *Barnet*, the Second Circuit ruled that section 109(a) applies in a chapter 15 case on the basis of a "straightforward" interpretation of the statute. According to the court, 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 the Australian company's foreign representatives had made no attempt to establish that the company had a domicile, a place of business, or property in the U.S., the Second Circuit held that the bankruptcy court should not have granted recognition to the company's Australian liquidation proceeding.

The Second Circuit flatly rejected the foreign representatives' argument that, even if the Australian debtor 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), rather than 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."

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 . . . , to allow the venue statute to control the outcome would be to allow the tail to wag the dog."

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

On remand, the bankruptcy court ruled that, because the Australian debtor had property in the U.S. consisting of claims or causes of action against various U.S. entities and an undrawn retainer in the possession of the foreign representatives' U.S. counsel, the debtor was eligible for relief under chapter 15. In so ruling, the court concluded that the debtor's causes of action should be deemed to be located in the U.S. because the debtor's foreign representatives "have asserted claims under U.S. law that involve defendants located in the United States and include allegations that certain funds were wrongfully transferred by . . . U.S. entities to the United States." "As a general matter," the court wrote, "where a court has both subject matter and personal jurisdiction, the claim subject to the litigation is present in that court."

Noting that *Barnet* "continues to be a frequent subject of discussion and criticism at international bankruptcy conferences and in scholarly writing" (*see generally* Daniel M. Glosband and Jay Lawrence Westbrook, *Chapter 15 Recognition in the United States: Is a Debtor "Presence" Required?*, 24 INT'L INSOLV. REV. 28 (2015)), the bankruptcy court in *Berau* revisited what constitutes U.S. property for the purpose of chapter 15 eligibility.

BERAU

Berau Capital Resources Pte Ltd. ("BCR"), a unit of Indonesian coal mining concern PT Berau Coal Energy Tbk, was granted a debt moratorium in July 2015 by a Singapore court to implement a restructuring agreement. BCR is headquartered in Singapore. It does not have a place of business in the U.S.

BCR is an obligor on approximately $450 million of U.S. dollar-denominated notes. The note indenture is expressly governed by New York law and contains a New York choice of forum clause. Under the indenture, BCR appointed an authorized agent for the service of process in New York City. The company also retained New York lawyers, with whom BCR deposited a retainer.

After BCR defaulted on the notes and the Singapore court granted a debt moratorium, BCR's foreign representative filed a chapter 15 petition for BCR in the Southern District of New York.

The bankruptcy court ruled that, consistent with the rulings in *Barnet*, the existence of an attorney retainer in the U.S. provides a sufficient basis for chapter 15 eligibility. However, the court also held that the note indenture "is property of [BCR] in the United States, thereby satisfying the section 109(a) eligibility requirement."

The bankruptcy court explained that a debtor's contract rights are intangible property and that section 1502(8) of the Bankruptcy Code expressly provides that the location of intangible property is to be determined under applicable nonbankruptcy law. Because the notes issued by BCR "are to be discharged in New York City," the court concluded, "[t]he attributes of the indenture would be sufficient to establish the situs of the property in New York."

continued on page 32

NOTABLE PLAN CONFIRMATIONS OR EXITS FROM BANKRUPTCY IN 2015

Company	Filing Date (Bankr. Court)	Conf. Date Effective Date	Assets	Industry	Result
Energy Future Holdings Corp.	04/29/2014 (D. Del.)	12/03/2015 CD	$41 billion	Electric Utility	Reorganization
NII Holdings, Inc.	09/15/2014 (S.D.N.Y.)	06/19/2015 CD 06/26/2015 ED	$8.7 billion	Telecom	Reorganization
LightSquared Inc.	03/12/2012 (S.D.N.Y.)	03/26/2015 CD	$4.5 billion	Telecom	Reorganization
Exide Technologies	06/10/2013 (D. Del.)	03/27/2015 CD 04/30/2015 ED	$2.2 billion	Manufacturing	Reorganization
Hercules Offshore, Inc.	08/13/2015 (D. Del.)	09/24/2015 CD 11/06/2015 ED	$2.0 billion	Oil & Gas	Reorganization
Patriot Coal Corporation	05/12/2015 (E.D. Va.)	10/08/2015 CD 10/28/2015 ED	$2.0 billion	Mining	Sale
Altegrity, Inc.	02/08/2015 (D. Del.)	08/14/2015 CD 09/01/2015 ED	$1.7 billion	Security Services	Reorganization
RadioShack Corporation	02/05/2015 (D. Del.)	10/02/2015 CD 10/08/2015 ED	$1.6 billion	Retail	Liquidation
Allied Nevada Gold Corp.	03/10/2015 (D. Del.)	10/08/2015 CD 10/22/2015 ED	$1.5 billion	Mining	Reorganization
Revel AC, Inc.	06/09/2014 (D.N.J.)	06/30/2015 CD 06/30/2015 ED	$1.15 billion	Casino	Liquidation
ITR Concession Company	09/22/2014 (N.D. Ill.)	10/28/2014 CD 05/27/2015 ED	$1.0 billion+	Toll Road	Sale
Corinthian Colleges, Inc.	05/04/2015 (D. Del.)	08/28/2015 CD 09/22/2015 ED	$1.0 billion	Education	Liquidation
Chassix Holdings Inc.	03/12/2015 (S.D.N.Y.)	07/02/2015 CD 07/29/2015 ED	$833 million	Auto Parts	Reorganization
Global Geophysical Services, Inc.	03/25/2014 (S.D. Tex.)	02/06/2015 CD 02/09/2015 ED	$553 million	Seismic Data	Reorganization
Millennium Health LLC	11/10/2015 (D. Del.)	12/14/2015 CD 12/18/2015 ED	$500 million	Health Care	Reorganization
The Standard Register Company	03/12/2015 (D. Del.)	11/19/2015 CD 12/18/2015 ED	$481 million	Commercial Services	Sale
Dendreon Corp.	11/10/2014 (D. Del.)	06/02/2015 CD 06/10/2015 ED	$434 million	Biotechnology	Liquidation
BPZ Resources, Inc.	03/09/2015 (S.D. Tex.)	11/12/2015 CD 12/31/2015 ED	$407 million	Oil & Gas	Liquidation
EveryWare Global, Inc.	04/07/2015 (D. Del.)	05/22/2015 CD 06/02/2015 ED	$340 million	Housewares	Reorganization
The Wet Seal, Inc.	01/15/2015 (D. Del.)	10/30/2015 CD 12/31/2015 ED	$152 million	Retail	Liquidation

30 LARGEST PUBLIC COMPANY BANKRUPTCY FILINGS

Company	Filing Date	Industry	Assets
Lehman Brothers Holdings Inc.	09/15/08	Investment Banking	$691 billion
Washington Mutual, Inc.	09/26/08	Banking	$328 billion
WorldCom, Inc.	07/21/02	Telecommunications	$104 billion
General Motors Corporation	06/01/09	Automobiles	$91 billion
CIT Group Inc.	11/01/09	Banking & Leasing	$80 billion
Enron Corp.	12/02/01	Energy Trading	$66 billion
Conseco, Inc.	12/17/02	Financial Services	$61 billion
Energy Future Holdings Corp.	04/29/14	Utilities	$41 billion
MF Global Holdings Ltd.	10/31/11	Commodities	$40.5 billion
Chrysler LLC	04/30/09	Automobiles	$39 billion
Thornburg Mortgage, Inc.	05/01/09	Mortgage Lending	$36.5 billion
Pacific Gas and Electric Company	04/06/01	Utilities	$36 billion
Texaco, Inc.	04/12/87	Oil & Gas	$35 billion
Financial Corp. of America	09/09/88	Financial Services	$33.8 billion
Refco Inc.	10/17/05	Brokerage	$33.3 billion
IndyMac Bancorp, Inc.	07/31/08	Banking	$32.7 billion
Global Crossing, Ltd.	01/28/02	Telecommunications	$30.1 billion
Bank of New England Corp.	01/07/91	Banking	$29.7 billion
General Growth Properties, Inc.	04/16/09	Real Estate	$29.6 billion
Lyondell Chemical Company	01/06/09	Chemicals	$27.4 billion
Calpine Corporation	12/20/05	Utilities	$27.2 billion
New Century Financial Corp.	04/02/07	Financial Services	$26.1 billion
Colonial BancGroup, Inc.	08/25/09	Banking	$25.8 billion
UAL Corporation	12/09/02	Aviation	$25.2 billion
AMR Corporation	11/29/11	Aviation	$25 billion
Delta Air Lines, Inc.	09/14/05	Aviation	$21.9 billion
Adelphia Communications Corp.	06/25/02	Cable Television	$21.5 billion
Capmark Financial Group, Inc.	10/25/09	Financial Services	$20.6 billion
MCorp	03/31/89	Banking	$20.2 billion
Mirant Corporation	07/14/03	Energy	$19.4 billion

In addition, the court noted, the New York State Legislature has adopted several laws clearly making New York a situs of the property, including: (i) sections 5-1401 and 5-1402 of the N.Y. General Obligations Law, which, with certain exceptions, make enforceable New York choice of law and choice of forum provisions in contracts; and (ii) section 327(b) of the N.Y. Civil Practice Law and Rules, which provides that a court may not stay or dismiss an action on the grounds of inconvenient forum where the action relates to a contract with an enforceable choice of law or forum clause. These provisions, the court wrote, are "sufficient to fix the situs of the contracts in New York, whether [or not] the contract has a situs elsewhere for other purposes."

OUTLOOK

Because U.S. dollar-denominated debt subject to New York governing law and a New York forum selection clause is quite common in international finance, the rulings in *Barnet* and *Berau* offer relatively easy access to chapter 15 for foreign debtors that otherwise qualify for relief under chapter 15. However, this low threshold is arguably consistent with the goals of chapter 15 in, among other things, providing an effective vehicle for foreign debtors to collect and preserve assets outside the jurisdiction where their primary insolvency proceedings are pending.

It bears noting that *Barnet* does not represent the only view on whether U.S. assets are required before a foreign proceeding can be recognized under chapter 15, although the Second Circuit is the only circuit court to have addressed the issue to date. 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). In that case, the court ruled that section 109(a) does not apply in chapter 15 because it is the foreign representative, rather than the debtor in the foreign proceeding, who petitions the court. Moreover, the court wrote, "there is nothing in [the] definition [of "debtor"] in Section 1502 which reflects upon a requirement that [a] Debtor have assets." 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," the court noted, "is an entity that is involved in a foreign proceeding."

Finally, the bankruptcy court in *Berau* did not address whether other kinds of contract rights, such as rights under patents, trademarks, or other intellectual property, might also suffice as a basis for chapter 15 eligibility.

Additional discussion of the rulings in *Barnet* and *Octaviar* can be found in the January/February 2014 and September/October 2014 editions of the *Business Restructuring Review*, both of which are accessible at www.jonesday.com.

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