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BUSINESS RESTRUCTURING REVIEW

FIRST IMPRESSIONS: THIRD CIRCUIT RULES THAT A TERMINATED COLLECTIVE BARGAINING AGREEMENT MAY BE REJECTED UNDER SECTION 1113

T. Daniel Reynolds and Mark G. Douglas

In *In re Trump Entm't Resorts UNITE HERE Local 54*, 810 F.3d 161 (3d Cir. 2016), the U.S. Court of Appeals for the Third Circuit answered a question of apparent first impression among the circuit courts of appeal by ruling that section 1113 of the Bankruptcy Code permits a bankruptcy trustee or chapter 11 debtor-in-possession ("DIP") to reject a collective bargaining agreement ("CBA") even after the agreement has expired. Lower courts have been divided over whether such terminated contracts can be rejected or if the surviving terms of an expired CBA continue in force until a new agreement is executed.

COLLECTIVE BARGAINING AGREEMENTS IN BANKRUPTCY

Under section 365 of the Bankruptcy Code, a trustee or DIP has the ability to assume, assume and assign, or reject "executory contracts," which are contracts where material performance is due by both parties as of the bankruptcy petition date. Rejection does not result in termination of an executory contract. Rather, it is considered a court-authorized breach of the contract, relieving the debtor from any obligation to continue performing.

An unexpired CBA, much like any employment agreement, is an executory contract because both the employer and the covered employees have material ongoing obligations. However, given the special attention Congress often provides to issues regarding employees and retirees, lawmakers added section 1113 to the Bankruptcy Code in 1984 to provide a specific process by which a trustee or DIP may assume, reject, or modify a CBA, thereby removing such contracts from the umbrella of section 365 of the Bankruptcy Code in chapter 11 cases.

Section 1113 of the Bankruptcy Code was passed in response to the Supreme Court's decision in *National Labor Relations Board v. Bildisco & Bildisco*, 465 U.S. 513 (1984). In *Bildisco*, the Court ruled that a CBA can be rejected under section 365 if it burdens the estate, the equities favor rejection, and the debtor made

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reasonable efforts to negotiate a voluntary modification without any likelihood of producing a prompt, satisfactory solution. The Court also held (by a five-to-four majority) that the debtor need not follow the contract modification procedures set forth in the National Labor Relations Act (the "NLRA") because, for purposes of the NLRA, a CBA is "no longer immediately enforceable, and may never be enforceable again."

Congress changed that later the same year, when it enacted section 1113 of the Bankruptcy Code in response to a groundswell of protest from labor interests. Section 1113 provides CBAs with enhanced protection by mandating an expedited negotiation process for modifying a CBA and by mandating judicial evaluation of a motion to reject a CBA if negotiations are unsuccessful. Specifically, section 1113 provides that a trustee or DIP may reject a CBA only if the bankruptcy court determines that: (i) the trustee or DIP has made a proposal (supported by relevant information necessary to evaluate it) to the authorized representative of covered employees "which provides for those necessary modifications in the employees['] benefits and protections that are necessary to permit the reorganization of the debtor and assures that all creditors, the debtor and all of the affected parties are treated fairly and equitably"; (ii) the authorized representative refused to accept the proposal "without good cause"; and (iii) "the balance of the equities clearly favors rejection of such agreement." Section 1113(f) explicitly forbids a trustee or DIP from terminating or altering any provision of a CBA prior to complying with these requirements.

Under the NLRA, once a collective bargaining relationship has been established, an employer may not make a change affecting certain mandatory bargaining subjects without affording the union the opportunity to bargain over the change. Even when a CBA expires, the employer must maintain the status quo under the agreement until the employer enters into a new CBA or bargains to an impasse. *See* 29 U.S.C. § 158(a)(5); *NLRB v. Katz*, 369 U.S. 736 (1962) (an employer commits an unfair labor practice if, without bargaining to an impasse, it unilaterally changes existing terms or conditions of employment).

Unlike section 365, which expressly allows a trustee or DIP to assume or reject "any executory contract or unexpired lease" (with certain specified exceptions), section 1113 does not specifically require a CBA to be "executory" in order to be assumed or rejected. Thus, bankruptcy courts and a handful of appellate panels have been divided on whether section 1113 permits a trustee or DIP to reject an expired CBA. *Compare In re Hoffman Bros. Packing Co.*, 173 B.R. 177, 184 (B.A.P. 9th Cir. 1994) (CBA "continues 'in effect,' as recognized by § 1113(e) and as was implicit in § 1113(c)"); *In re 710 Long Ridge Rd. Operating Co., II*, 518 B.R. 810 (Bankr. D.N.J. 2014) (section 1113 applies to CBAs that have expired prepetition); *In re Karykeion, Inc.*, 435 B.R. 663 (Bankr. C.D. Cal. 2010); *In re Ormet Corp.*, 316 B.R. 662 (Bankr. S.D. Ohio 2004), *appeal dismissed*, 2005 BL 80155 (S.D. Ohio Aug. 19, 2005), *with In re San Rafael Baking Co.*, 219 B.R. 860 (B.A.P. 9th Cir. 1998) (section 1113(c) is applicable only to unexpired CBAs; rejecting *Hoffman Bros.* as dicta); *In re Hostess Brands, Inc.*, 477 B.R. 378 (Bankr. S.D.N.Y. 2012); *In re Sullivan Motor Delivery, Inc.*, 56 B.R. 28 (Bankr. E.D. Wis. 1985); *see also In re Chas. P. Young Co.*, 111 B.R. 410 (Bankr. S.D.N.Y. 1990) (noting that rejection of a CBA pursuant to § 1113(c) is a moot issue if the agreement expired by its own terms and before the bankruptcy court holds a hearing on rejection). According to a leading commentator, the position that section 1113 does not apply to an expired CBA is the majority rule. *See* COLLIER ON BANKRUPTCY ¶ 1113.02[d] (16th ed. 2016).

The Third Circuit addressed this issue as a matter of apparent first impression in the circuit courts of appeal in *Trump Entertainment*.

TRUMP ENTERTAINMENT

Trump Entertainment Resorts Inc. and its affiliates (collectively, "TER") own and operate the Trump Taj Mahal Casino in Atlantic City, New Jersey. The casino has 2,953 employees, 1,467 of whom are unionized. UNITE HERE Local 54 (the "union") is the largest of the employee unions.

The most recent CBA between the union and TER provided that it would "remain in effect until 11:59 p.m. on September 14, 2014 and shall continue in full force and effect from year to year thereafter, unless either party serves sixty (60) days written notice of its intention to terminate, modify, or amend the Collective Bargaining Agreement."

Under the CBA, TER was required to make more than $3.5 million per year in pension contributions, as well as $10 to $12 million per year in health and welfare contributions—payments it could not afford if it were to continue operating. Its financial health deteriorating, TER attempted to negotiate a new agreement in 2014.

On March 7, 2014, TER gave the union notice of its "intention to terminate, modify or amend" the CBA and asked the union to begin negotiations for a new agreement. The union did not respond. On April 10, 2014, TER repeated its request. The union responded on April 30 that "while [it is] also anxious to commence bargaining, the Union is simply not ready, some five months out [from expiration of the CBA], to commence negotiations," but it would "contact [TER] within the next several months."

It remains to be seen how other courts will react to the Third Circuit's ruling in *Trump Entertainment*. If other circuit courts disagree, the resulting split may invite U.S. Supreme Court review of an issue that has already divided many lower courts. In fact, stating that the case "involves a crucial intersection between bankruptcy law and federal labor law," the union filed a certiorari petition on April 14, 2016, asking the Supreme Court to review the Third Circuit's ruling.

On August 20, 2014, TER and the union met to discuss the terms of a new CBA. Although TER disclosed its critical financial situation, the union was not receptive to negotiations, and no agreement was reached. TER filed for chapter 11 protection in the District of Delaware on September 9, 2014. Two days afterward, TER asked the union to extend the term of the CBA, but the union refused, unless TER agreed to terminate the extension upon the filing of a motion under section 1113. With no new agreement in place and with TER having served notice in March 2014 to terminate, modify, or amend the existing agreement, the CBA expired on September 14, 2014. After providing the union with a proposal to modify the CBA, together with documentation of its financial condition, TER filed a motion on September 26, 2014, to reject the CBA.

THE BANKRUPTCY COURT'S RULING

The bankruptcy court granted the motion. Among other things, the court concluded that even an expired CBA can be rejected under section 1113:

> Congress did not use the word "executory" anywhere in Section 1113 but instead selected the phrase "continues in effect" in Section 1113(e). There is a good reason why Congress made this selection as it could have very easily used the word "executory" to mirror Section 365 of the Bankruptcy Code. . . . The Court is persuaded that Congress selected the phrase "continues in effect" in Section 1113(e) with the intention of giving debtors the authority to modify the continuing effects of an expired collective bargaining agreement. It follows that the concept that a post-expiration collective bargaining agreement which "continues in effect" may be rejected is implicit in Section 1113(c) since there is "no logic to support Congressional intent allowing interim modifications to an expired CBA if essential to a Debtor's business or to avoid irreparable harm to the estate as permitted by [Section] 1113(e) but not allowing the rejection of the expired CBA terms if necessary to further the purpose of reorganization provided the conditions of Section 1113(c) are satisfied."

In re Trump Entm't Resorts, Inc., 519 B.R. 76, 85 (Bankr. D. Del. 2014) (quoting *710 Long Ridge*, 518 B.R. at 829).

The bankruptcy court explained that interpreting section 1113(c) to permit rejection of an expired CBA "also comports with the legislative policies underlying Section 1113 and the Bankruptcy Code generally." In enacting section 1113, the court noted, "Congress struck a balance between affording debtors the flexibility to restructure their labor costs on a comparatively expedited basis . . . while interposing a certain level of court oversight and requirements for good faith bargaining." However, unlike the NLRA, section 1113 does not require the trustee or DIP to bargain to an impasse. Thus, the bankruptcy court emphasized, it is clear that "Congress intended for rejection under § 1113 to be a far more expedited process than collective bargaining under the NLRA."

Noting that, in many cases, "time is the enemy of a successful restructuring," the bankruptcy court concluded that "[t]his concern applies with equal force in a situation where the debtor is bound by the terms of a recently expired collective bargaining agreement pursuant to its status quo obligations under the NLRA." According to the court, to rule otherwise would "effectively give labor unions the power to hold up a debtor's bankruptcy case until the union's demands were met, but only in cases where there is an expired but still controlling collective bargaining agreement." Although giving a union such hold-up power may be appropriate or even necessary outside of bankruptcy, "in a bankruptcy case it wholly ignores the policy and bargaining power balances Congress struck in Section 1113 and exalts form over substance."

The Third Circuit granted the union's motion to certify a direct appeal of the bankruptcy court's ruling that an expired CBA may be rejected under section 1113.

THE THIRD CIRCUIT'S RULING

A three-judge panel of the Third Circuit affirmed.

In holding that Congress intended to incorporate expired CBAs under the purview of section 1113, the Third Circuit, like the bankruptcy court, focused on the gap between the NLRA and section 365 of the Bankruptcy Code, which section 1113 was designed to bridge:

> § 1113 was enacted to balance the needs of economically-stressed debtors in avoiding liquidation and the unions' needs in preserving labor agreements and safeguarding employment for their members. Section 1113 meets a gap in the schemes to permit reorganizations when labor obligations will prevent the success of a reorganization. . . . Section 1113 was enacted to ensure that relief from a CBA was granted only in situations where relief was necessary to permit the reorganization. It is a counter to the precedent in *Bildisco* which permitted modification of a CBA without close scrutiny by the Bankruptcy Court. Under § 1113, approval will be granted only if the debtor's modifications are necessary to permit reorganization. In this context, when the employer's statutory obligations to maintain the status quo under the terms of an expired CBA will undermine the debtor's ability to reorganize and remain in business, it is the expertise of the Bankruptcy Court which is needed rather than that of the [National Labor Relations Board]. For that reason, whether the CBA is in effect or is expired, it is the Bankruptcy Court which should make the review and decide on the necessity of the modification. We conclude, therefore, that § 1113 applies to a CBA after it has expired.

The Third Circuit flatly rejected the union's argument that because a debtor cannot reject an expired executory contract under section 365 of the Bankruptcy Code, rejection under section 1113 would be improper. This contention, the court wrote, "ignores an important distinction" between a CBA and any other executory contract. Namely, the court explained, "the key terms and conditions of a CBA continue to burden the debtor after the agreement's expiration . . . [such that] [r]ejection of those terms . . . is not a moot issue as would be in the case of other contracts or leases."

OUTLOOK

The Third Circuit's ruling in *Trump Entertainment* attempts to harmonize two statutes that are sometimes at odds but share the goal of promoting good faith bargaining. The NLRA effectively allows a CBA to live on after its expiration. By doing so, it prevents employers from "running out the clock" and refusing to negotiate with employee representatives. However, the enduring nature of an expired CBA can create leverage for unions by giving them an incentive to delay coming to the table in an effort to extract concessions from an employer. If the trustee or DIP could not reject an expired CBA under section 1113, the terms of the CBA would remain in effect, preserving the status quo and leveraging union bargaining power, while pressuring the employer to negotiate a new agreement.

The Bankruptcy Code cannot abide such delay, at least according to the Third Circuit and most of the lower courts that have considered the issue. As the Supreme Court noted in *Bildisco*, "[T]he fundamental purpose of reorganization is to prevent a debtor from going into liquidation, with an attendant loss of jobs and possible misuse of economic resources." Section 1113 of the Bankruptcy Code shares the goal of the NLRA in compelling both unions and employers to come to the table and bargain in good faith, but section 1113 recognizes that the process in bankruptcy must be expedited, even with respect to expired CBAs.

It remains to be seen how other courts will react to the Third Circuit's ruling in *Trump Entertainment*. If other circuit courts disagree, the resulting split may invite U.S. Supreme Court review of an issue that has already divided many lower courts. In fact, stating that the case "involves a crucial intersection between bankruptcy law and federal labor law," the union filed a certiorari petition on April 14, 2016, asking the Supreme Court to review the Third Circuit's ruling. *See UNITE HERE Local 54 v. Trump Entm't Resorts, Inc.*, No. 15-1286 (cert. petition filed Apr. 14, 2016).

Notably, the National Labor Relations Board filed an amicus brief with the Third Circuit, taking the position that an expired CBA cannot be rejected under section 1113 and that an employer is obligated under the NLRA to abide by the terms of the CBA until an impasse is reached in NLRA-regulated negotiations.

SEVENTH CIRCUIT RULES THAT PREPETITION NONRESIDENTIAL LEASE TERMINATION IS VOIDABLE "TRANSFER" IN BANKRUPTCY

Timothy Hoffmann and Mark G. Douglas

Even before Congress added section 365(c)(3) to the Bankruptcy Code in 1984, it was generally understood that a nonresidential real property lease which has been validly terminated under applicable law prior to a bankruptcy filing by the debtor-former tenant cannot be assumed or assigned in bankruptcy. Moreover, the terminated leasehold interest is excluded from the debtor's bankruptcy estate, and any action by the landlord to obtain possession of the formerly leased premises is not prohibited by the automatic stay.

However, a ruling recently handed down by the Seventh Circuit Court of Appeals indicates that, even if a nonresidential real property lease has been terminated prepetition, the termination may be avoidable in bankruptcy as a preferential or fraudulent transfer. In *Official Committee of Unsecured Creditors v. T.D. Investments I, LLP (In re Great Lakes Quick Lube LP)*, 2016 BL 74950 (7th Cir. Mar. 11, 2016), the Seventh Circuit ruled that a debtor-tenant's voluntary prepetition termination of a commercial real estate lease may be an avoidable "transfer" under section 547 or 548 of the Bankruptcy Code, thereby allowing the bankruptcy trustee or chapter 11 debtor-in-possession ("DIP") to seek recovery of the value of the lease from the landlord.

POWER TO ASSUME OR REJECT CONTRACTS EXCLUDES TERMINATED NONRESIDENTIAL REAL PROPERTY LEASES

Section 365 of the Bankruptcy Code authorizes a trustee or DIP to assume, assume and assign, or reject most kinds of executory contracts and unexpired leases.

However, section 365(c)(3) provides that:

> [t]he trustee may not assume or assign any executory contract or unexpired lease of the debtor, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties, if . . . such lease is of nonresidential real property and has been terminated under applicable nonbankruptcy law prior to the order for relief.

Correspondingly, section 541(b)(2) of the Bankruptcy Code provides that "property of the estate" does not include:

> any interest of the debtor as a lessee under a lease of nonresidential real property that has terminated at the expiration of the stated term of such lease before the commencement of the case under this title, and ceases to include any interest of the debtor as a lessee under a lease of nonresidential real property that has terminated at the expiration of the stated term of such lease during the case.

In addition, the automatic stay in section 362 does not preclude any act to obtain possession of leased premises by a lessor under a nonresidential lease of real property "that has terminated by the expiration of the stated term of the lease" prepetition. 11 U.S.C. § 362(b)(10).

The purpose of all of these related provisions, which were added to the Bankruptcy Code in 1984, is to facilitate "the re-leasing of commercial property during bankruptcy proceedings by forbidding the trustee to interfere with the occupancy of the new tenants." *Great Lakes*, 2016 BL 74950, *3 (citing *Robinson v. Chicago Housing Authority*, 54 F.3d 316, 319 (7th Cir. 1995)); *accord In re Lakes Region Donuts, LLC*, 2014 BL 83792, *4 (Bankr. D.N.H. Mar. 27, 2014).

Many courts have interpreted these provisions as not being limited simply to instances where the calendar date specified as the end of the lease term has passed—rather, these courts have held, their scope extends to cases where a lease has been effectively terminated under applicable non-bankruptcy law prior to the expiration of its stated term. *See, e.g.*, *In re Policy Realty Corp.*, 242 B.R. 121 (S.D.N.Y. 1999), *aff'd*, 213 F.3d 626 (2d Cir. 2000); *Lakes Region Donuts*, 2014 BL 83792, *5; *In re G. Force Invs., Inc.*, 442 B.R. 646 (Bankr. N.D. Ohio 2010); *In re Southcoast Express, Inc.*, 337 B.R. 739 (Bankr. D. Mass. 2006); *see also Robinson*, 54 F.3d at 320 (explaining that the Bankruptcy Code "draw[s] no meaningful distinction between 'unexpired' and 'terminated' " leases in the context of section 365).

AVOIDANCE OF PREFERENTIAL OR FRAUDULENT TRANSFERS

Section 547(b) of the Bankruptcy Code provides that the trustee may avoid any "transfer" by a debtor within 90 days of filing for bankruptcy (or up to one year, if the transferee is an insider) if:

NEWSWORTHY

Jones Day won the award for "Turnaround of the Year" at the 2016 Turnaround Atlas Awards for its work in connection with the NII Holdings Chapter 11 Plan of Reorganization, and Sale of Nextel Mexican to AT&T. The Firm also won the award for "Insolvency of the Year" for its work in connection with the RadioShack Chapter 11 Plan of Reorganization, including the sale of stores to General Wireless, affiliate of Standard General and Sprint; and the liquidation of remaining assets.

Amy Edgy (Washington), ***Thomas A. Howley (Houston)***, ***David G. Heiman (Cleveland)***, ***James O. Johnston (Los Angeles)***, ***Sidney P. Levinson (Los Angeles)***, ***Brad B. Erens (Chicago)***, ***Heather Lennox (Cleveland and New York)***, ***Jeffrey B. Ellman (Atlanta)***, ***Carl E. Black (Cleveland)***, ***Bennett L. Spiegel (Los Angeles)***, ***Corinne Ball (New York)***, ***Paul D. Leake (New York)***, ***Bruce Bennett (Los Angeles)***, ***Charles M. Oellermann (Columbus)***, ***Gregory M. Gordon (Dallas)***, and ***Richard L. Wynne (Los Angeles)*** were designated "Leaders in their Field" or "Recognized Practitioners" in the area of Bankruptcy/Restructuring by *Chambers USA* 2016.

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

Richard L. Wynne (Los Angeles), ***Ben Larkin (London)***, ***David G. Heiman (Cleveland)***, ***Sion Richards (London)***, ***Paul D. Leake (New York)***, ***Bruce Bennett (Los Angeles)***, ***Heather Lennox (Cleveland and New York)***, and ***Corinne Ball (New York)*** have been recommended in the area of Restructuring/Insolvency or Bankruptcy/Restructuring by *Chambers Global* 2016.

Paul D. Leake (New York), ***Lisa G. Laukitis (New York), Brad B. Erens (Chicago)***, ***Robert W. Hamilton (Columbus)***, ***George R. Howard (New York)***, ***Joseph M. Tiller (Chicago)***, ***Bryan M. Kotliar (New York)***, and ***Lauren M. Buonome (New York)*** were part of a team of Jones Day lawyers who represented mineral producer Molycorp, Inc., in connection with the confirmation on March 30, 2016, of a chapter 11 plan of reorganization for the company by the U.S. Bankruptcy Court for the District of Delaware.

Bruce Bennett (Los Angeles), ***Corinne Ball (New York)***, ***Erin N. Brady (Los Angeles)***, ***Scott J. Greenberg (New York)***, ***James O. Johnston (Los Angeles)***, ***Lisa G. Laukitis (New York)***, ***Sidney P. Levinson (Los Angeles)***, ***Paul D. Leake (New York)***, ***Joshua M. Mester (Los Angeles)***, ***Bennett L. Spiegel (Los Angeles)***, ***Richard L. Wynne (Los Angeles)***, ***Jeffrey B. Ellman (Atlanta)***, ***Mark A. Cody (Chicago)***, ***Gregory M. Gordon (Dallas)***, ***Brad B. Erens (Chicago)***, ***Carl E. Black (Cleveland)***, ***Dave G. Heiman (Cleveland)***, ***Thomas A. Howley (Houston)***, and ***Heather Lennox (Cleveland and New York)*** were recommended in the field of bankruptcy by *Super Lawyers* 2016.

Joseph M. Tiller (Chicago) and ***Paul M. Green (Houston)*** were recommended as "Rising Stars" in the field of bankruptcy by *Super Lawyers* 2016.

Corinne Ball (New York) was included in the "Top 50: 2016 Women New York—Metro Super Lawyers List."

Ben Larkin (London) gave a presentation on March 19, 2016, regarding schemes of arrangement at the ILA Annual Conference and Academic Forum in Oxford, England.

Philip J. Hoser (Sydney) gave a presentation on March 21, 2016, entitled "When Is A Secured Creditor Done Out Of Its Debt By A DOCA?," at the Practical Insolvency Conference in Sydney, Australia.

Gregory M. Gordon (Dallas), ***Thomas A. Howley (Houston)***, ***Dan B. Prieto (Dallas)***, ***Jonathan M. Fisher (Dallas)***, ***Paul M. Green (Houston)***, and ***Amanda Suzuki (Dallas)*** represented Houston-based shale oil driller Swift Energy Company in connection with the confirmation on March 31, 2016, of a

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chapter 11 plan of reorganization for the company by the U.S. Bankruptcy Court for the District of Delaware.

Corinne Ball (New York) was designated one of *The Lawdragon 500 Leading Lawyers in America* for 2016.

Amy Edgy (Washington), global cochair of the Turnaround Management Association Network of Women, hosted the 2016 TMA NOW Summit in Philadelphia on April 19, 2016.

Erin N. Brady (Los Angeles) was named a "Rising Star" for 2016 in the field of Bankruptcy by *Law360*.

An article written by ***Pedro A. Jimenez (Miami and New York)*** and ***Amanda A. Parra Criste (Miami)***, entitled "Restructuring on the rise for Venezuelan companies," was published in the April 11, 2016, issue of *Global Restructuring Review*.

Kevyn D. Orr (Washington) was the keynote speaker at the CUNY Graduate School of Journalism's Ravitch Fiscal Reporting Program Editors Conference on March 31, 2016, in New York City.

An article written by ***Corinne Ball (New York)***, entitled "Collective Bargaining Agreement Rejected in the Third Circuit," appeared in the February 25, 2016, issue of the *New York Law Journal*.

On April 7, 2016, ***Kevyn D. Orr (Washington)*** participated in a panel discussing "Bentley's Grand Bargain Event" at the Gerald R. Ford Presidential Library in Ann Arbor, Michigan.

On April 7, 2016, ***Corinne Ball (New York)*** moderated a panel discussing "Insolvency and the Multinational Enterprise" at the ABA Business Law Section Spring Meeting in Montreal.

An article written by ***Timothy Hoffmann (Chicago)*** and ***Mary M. Shepro (Chicago)***, entitled "Oil And Gas Values: Restructuring Amid Falling Values," was published in the April 11, 2016, edition of the *Oil & Gas Financial Journal*.

An article written by ***Corinne Ball (New York)***, entitled "Pensions and Distress M&A: Control or Structure or Both?," was published in the April 28, 2016, edition of the *New York Law Journal*.

An article written by ***Pedro A. Jimenez (Miami and New York)*** and ***Mark G. Douglas (New York)***, entitled "US Courts Continue To Closely Scrutinize Ch. 15 Petitions," appeared in the April 21, 2016, issue of *Law360*.

An article written by ***Charles M. Oellermann (Columbus)*** and ***Mark G. Douglas (New York)***, entitled "2015: How Was It for Your Jurisdiction?," was published in the April 2016 issue of *Corporate Rescue and Insolvency*.

(a) the transfer was to a creditor on account of an antecedent debt; (b) the debtor was insolvent or was rendered insolvent due to the transfer; and (c) the creditor, by reason of the transfer, receives more than it would have received if, assuming the transfer had not been made, the debtor were liquidated in chapter 7.

Great Lakes is a cautionary tale for commercial landlords. At least in the Seventh Circuit, even if a prebankruptcy lease termination is voluntary and valid under applicable non-bankruptcy law, the trustee or DIP may be able to recover the value forfeited by the debtor due to the termination of a profitable or below-market lease. It remains to be seen whether courts elsewhere will embrace this approach, which would appear to be the minority view.

Section 548(a)(1) of the Bankruptcy Code authorizes the trustee to avoid any "transfer" of an interest of the debtor in property or any obligation incurred by the debtor within the two years preceding a bankruptcy filing if: (i) the transfer was made, or the obligation was incurred, "with actual intent to hinder, delay, or defraud" any creditor; or (ii) the transaction was constructively fraudulent because the debtor was insolvent and received "less than a reasonably equivalent value in exchange for such transfer or obligation."

Section 550 of the Bankruptcy Code authorizes the trustee or DIP, in the event that a transfer is avoided under section 547 or 548 (among other provisions of the Bankruptcy Code), to recover the property transferred or its value from the transferee(s).

"Transfer" is defined in section 101(54) of the Bankruptcy Code (as most recently amended in 2005) as "the creation of a lien; . . . the retention of title as a security interest; . . . the foreclosure of a debtor's equity of redemption; or . . . *each mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with . . . property; or . . . an interest in property*." 11 U.S.C. § 101(54) (emphasis added).

Focusing on the broad definition of "transfer," some courts have held that the termination of a lease or contract is a transfer subject to avoidance under sections 547 and 548. *See*, *e.g.*, *In re Indri*, 126 B.R. 443 (Bankr. D.N.J. 1991); *In re Harvey Co., Inc.*, 68 B.R. 851 (Bankr. D. Mass. 1987); *In re Queen City Grain, Inc.*, 51 B.R. 722 (Bankr. S.D. Ohio 1985); *In re Fashion World, Inc.*, 44 B.R. 754 (Bankr. D. Mass. 1984).

Other courts, reasoning that other provisions in the Bankruptcy Code specifically govern executory contracts and unexpired leases, have ruled to the contrary. *See*, *e.g.*, *Sullivan v. Willock (In re Wey)*, 854 F.2d 196 (7th Cir. 1988); *In re Coast Cities Truck Sales, Inc.*, 147 B.R. 674 (D.N.J. 1992); *Edwards v. Federal Home Loan Mortgage Corp. (In re LiTenda Mortgage Corp.)*, 246 B.R. 185 (Bankr. D.N.J. 1999); *In re Egyptian Bros. Donut, Inc.*, 190 B.R. 26 (Bankr. D.N.J. 1995); *Haines v. Regina C. Dixon Trust (In re Haines)*, 178 B.R. 471 (Bankr. W.D. Mo. 1995); *In re Jermoo's, Inc.*, 38 B.R. 197 (Bankr. W.D. Wis. 1984).

The Seventh Circuit weighed in on this issue in *Great Lakes*.

GREAT LAKES

Great Lakes Quick Lube LP ("GLQ") owns a chain of oil change and automotive maintenance stores throughout the Midwest. GLQ leased five of its more than 100 locations from T.D. Investments I, LLP ("TDI").

On February 10, 2012, with GLQ's debts mounting, GLQ and TDI agreed to terminate the leases for these five locations, even though two of the leased stores were profitable. According to GLQ, it decided to terminate the profitable leases for a number of reasons, including a strained relationship with TDI and fear of eviction because GLQ had fallen behind on its lease payments.

GLQ filed for chapter 11 protection in the Eastern District of Wisconsin on April 2, 2012. It later sought and obtained court authority to reject a number of leases, including the leases with TDI, to the extent that the leases had not already been terminated prior to the petition date.

The bankruptcy court confirmed a chapter 11 plan for GLQ in January 2013. The plan assigned avoidance claims owned by GLQ's estate to the official committee of unsecured creditors.

The committee sued to avoid the termination of the two profitable leases as either preferential or constructive fraudulent transfers under sections 547(b) and 548(a)(1)(B). In its complaint, the committee alleged that the value of the two store leases to GLQ's estate was at least $825,000. It accordingly sought recovery of that amount from TDI under section 550 of the Bankruptcy Code.

The bankruptcy court dismissed the complaint, ruling that "if a nonresidential lease has been terminated under state law prior to the petition, the termination is not an avoidable transfer under § 547 or § 548 of the Bankruptcy Code." *Official Comm. of Unsecured Creditors of Great Lakes Quick Lube, LP v. T.D. Invs. I, LLP (In re Great Lakes Quick Lube LP)*, 528 B.R. 893, 898 (Bankr. E.D. Wis. 2015). According to the bankruptcy court, "The specific statutory provision regarding validly terminated nonresidential leases in § 365(c)(3) must control over the more general statutes allowing the avoidance of preferences and fraudulent transfers." *Id.* On this point, the court was persuaded by the reasoning of *Egyptian Bros.*, where the court wrote:

> The structure of the Bankruptcy Code reflects this understanding of the difference between the loss of rights under an executory contract and other transfers of property. A separate section (11 U.S.C. § 365) governs the treatment of executory contracts. It would be anomalous, to say the least, to expect that the drafters of a generally thrifty codification of bankruptcy law would devote a substantial section of the Code to the subject of the assumption or rejection of executory contracts and unexpired leases, while at the same time allowing a portion of that subject to spill over into the section governing fraudulent transfers and obligations. . . . A statute should be construed as a harmonious whole.

Id. (citing *Egyptian Bros.*, 190 B.R. at 30; *Jermoo's*, 38 B.R. at 204). TDI was granted permission to appeal the ruling directly to the Seventh Circuit.

THE SEVENTH CIRCUIT'S RULING

A three-judge panel of the Seventh Circuit reversed.

Writing for the panel, circuit judge Richard Posner rejected TDI's two-step argument that the leases were abandoned rather than transferred, "and if they were not transferred the creditors have no valid avoidance claims." He explained that section 101(54)(D) defines "transfer" broadly to include "parting with . . . an interest in property." GLQ parted with its leasehold interests, Judge Posner concluded, by transferring them to TDI.

The Seventh Circuit ruled that the bankruptcy court's reliance on section 365(c)(3) was misguided because it "would place section 365(c)(3) on a collision course with section 101(54)(D)." According to Judge Posner, section 365(c)(3) simply does not apply because the relief sought by the committee is not at odds with the purpose of section 365(c) in preventing the trustee from interfering with the occupancy of a terminated leasehold estate by new tenants. GLQ's creditors, the judge wrote, "are seeking not the leases but the *value* of the leases." He further explained that the distinction between the value of the leases and the leases themselves "enables the purpose of section 365(c)(3) to be fulfilled without making inroads into section 101(54)(D)."

The Seventh Circuit accordingly reversed the bankruptcy court's ruling and remanded the case below for a determination of the value of the leasehold interests transferred to TDI as well as an assessment of any defenses to avoidance that TDI might have.

OUTLOOK

Great Lakes is a cautionary tale for commercial landlords. At least in the Seventh Circuit, even if a pre-bankruptcy lease termination is voluntary and valid under applicable non-bankruptcy law, the trustee or DIP may be able to recover the value forfeited by the debtor due to the termination of a profitable or below-market lease. It remains to be seen whether courts elsewhere will embrace this approach, which would appear to be the minority view.

Faced with that possibility, landlords would do well to consider measures designed to limit their potential liability in avoidance litigation, such as specifically quantifying—ideally in a lease termination agreement negotiated at arm's length—the value of benefits provided to the tenant (which presumably would affect the value surrendered by the tenant, at least to some degree) in connection with terminating a lease or group of leases.

Interestingly, in its ruling, the Seventh Circuit failed to mention *Wey* or an earlier Seventh Circuit decision—*In re Commodity Merchants*, 538 F.2d 1260 (7th Cir. 1976), which interpreted the avoidance provisions of the Bankruptcy Act of 1898. In both rulings, the Seventh Circuit concluded, albeit under circumstances not involving a voluntary pre-bankruptcy termination, that "[w]hen a termination is pursuant to the terms of a contract, there is no transfer" for purposes of the avoidance provisions. *Wey*, 854 F.2d at 199 (citing *Commodity Merchants*, 538 F.2d at 1063).

BLOCKING MEMBER PROVISION IN LLC AGREEMENT DESIGNED TO PREVENT BANKRUPTCY FILING UNENFORCEABLE

Mark A. Cody and Mark G. Douglas

A contractual waiver of an entity's right to file for bankruptcy is generally invalid as a matter of public policy. Nonetheless, lenders sometimes attempt to prevent a borrower from seeking bankruptcy protection by conditioning financing on a covenant, bylaw, or corporate charter provision that restricts the power of the borrower's governing body to authorize such a filing. One such restriction—a lender-designated "special member" with the power to block a bankruptcy filing—was recently invalidated by the court in *In re Lake Mich. Beach Pottawattamie Resort LLC*, 2016 BL 109205 (Bankr. N.D. Ill. Apr. 5, 2016). The court ruled that the "blocking" member provision in the membership agreement of a limited liability company ("LLC") was unenforceable because it did not require the member to comply with his fiduciary obligations under applicable non-bankruptcy law.

PUBLIC POLICY AGAINST BANKRUPTCY WAIVERS

The enforceability of prepetition waivers of the right to seek bankruptcy protection or specific bankruptcy benefits (such as the automatic stay) has been the subject of substantial litigation. Under case law dating back to at least the 1930s, the general rule as a matter of public policy has been that a waiver of the right to file for bankruptcy is unenforceable. *See In re Weitzen*, 3 F. Supp. 698 (S.D.N.Y. 1933); *accord Continental Ins. Co. v. Thorpe Insulation Co. (In re Thorpe Insulation Co.)*, 671 F.3d 1011 (9th Cir. 2012); *Wank v. Gordon (In re Wank)*, 505 B.R. 878 (B.A.P. 9th Cir. 2014); *Nw. Bank & Trust Co. v. Edwards (In re Edwards)*, 439 B.R. 870 (Bankr. C.D. Ill. 2010); *Double v. Cole (In re Cole)*, 428 B.R. 747 (Bankr. N.D. Ohio 2009); *see also In re Madison*, 184 B.R. 686 (Bankr. E.D. Pa. 1995) (agreement not to file bankruptcy for certain time period is not binding).

If the law were otherwise, "astute creditors would require their debtors to waive." *Bank of China v. Huang (In re Huang)*, 275 F.3d 1173, 1177 (9th Cir. 2002). By contrast, pre-bankruptcy waivers of the automatic stay are sometimes enforceable. *See, e.g.*, *In re BGM Pasadena, LLC*, 2016 BL 134299, *3 (Bankr. C.D. Cal. Apr. 27, 2016) ("While it is true that courts have generally treated waivers of the automatic stay as unenforceable when they are contained in prepetition agreements between a lender and a borrower (because the interests of third parties, such as unsecured creditors, for whose benefit the automatic stay exists were not considered at the time the agreement was made), the same cannot be said of waivers that are approved after notice and an opportunity for hearing in the context of an earlier bankruptcy case"); *In re DB Capital Holdings, LLC*, 454 B.R. 804 (Bankr. D. Colo. 2011); *In re Bryan Road, LLC*, 382 B.R. 844, 848 (Bankr. S.D. Fla. 2008). *But see Ostano Commerzanstalt v. Telewide Systems, Inc.*, 790 F.2d 206, 207 (2d Cir. 1986) ("Since the purpose of the stay is to protect creditors as well as the debtor, the debtor may not waive the automatic stay").

SPECIAL PURPOSE ENTITIES AND BLOCKING DIRECTORS

As a general rule, corporate formalities and applicable state law must be satisfied in commencing a bankruptcy case. *See In re NNN 123 N. Wacker, LLC*, 510 B.R. 854 (Bankr. N.D. Ill. 2014) (citing *Price v. Gurney*, 324 U.S. 100 (1945); *In re Gen-Air Plumbing & Remodeling, Inc.*, 208 B.R. 426 (Bankr. N.D. Ill. 1997)); *In re Comscape Telecommunications, Inc.*, 423 B.R. 816 (Bankr. S.D. Ohio 2010). As a result, the unenforceability of *contractual* provisions that prohibit a bankruptcy filing as a matter of public policy may not close the door on measures designed to preclude a debtor from filing for bankruptcy.

Seizing on this point, lenders, investors, and other parties seeking to prevent or limit the possibility of a bankruptcy filing have attempted to sidestep the public policy invalidating contractual waivers of a debtor's right to file for bankruptcy protection by eroding or eliminating the debtor's authority to file for bankruptcy under its governing organizational documents. *See, e.g.*, *DB Capital Holdings, LLC v. Aspen HH Ventures, LLC (In re DB Capital Holdings, LLC)*, 2010 WL 4925811 (B.A.P. 10th Cir. Dec. 6, 2010); *NNN 123 N. Wacker*, 510 B.R. at 862; *In re Houston Regional Sports Network, LP*, 505 B.R. 468 (Bankr. S.D. Tex. 2014); *In re Quad-C Funding LLC*, 496 B.R. 135 (Bankr. S.D.N.Y. 2013); *Green Bridge Capital S.A. v. Ira Shapiro (In re FKF Madison Park Group Owner, LLC)*, 2011 BL 24531 (Bankr. D. Del. Jan. 31, 2011); *In re Global Ship Sys. LLC*, 391 B.R. 193 (Bankr. S.D. Ga. 2007); *In re Kingston Square Associates*, 214 B.R. 713 (Bankr. S.D.N.Y. 1997). These structures have not always been enforced, particularly where the organizational documents include an outright prohibition of any bankruptcy filing. *See In re Bay Club Partners-472, LLC*, 2014 BL 125871 (Bankr. D. Or. May 6, 2014) (refusing to enforce restrictive covenant in debtor limited liability company's operating agreement, rather than loan agreement, prohibiting bankruptcy filing and stating that covenant "is no less the maneuver of an 'astute creditor' to preclude [Bay Club Partners] from availing itself of the protections of the Bankruptcy Code prepetition, and it is unenforceable as such, as a matter of public policy") (a more detailed discussion of *Bay Club Partners* can be found in the July/August 2014 issue of the *Business Restructuring Review*).

Many of these efforts have been directed toward "bankruptcy remote" special purpose entities ("SPEs"). An SPE is an entity created in connection with a financing or securitization transaction structured to ring-fence the SPE's assets from all creditors except secured creditors or investors (e.g., trust certificate holders) that provide financing or capital to the SPE.

The entity is generally designed to be bankruptcy remote to minimize exposure to a voluntary bankruptcy filing by limiting the circumstances under which the SPE's board or managing members can put the entity into bankruptcy. A common way of achieving this goal is the appointment to the SPE's governing body of an "independent" or "blocking" director.

The organizational documents of an SPE typically will provide that a bankruptcy filing and certain other significant actions must be approved unanimously by the board of directors or other governing body. A director nominated by the lender then has the power to prevent a bankruptcy filing by withholding consent. The documents will further provide that actions requiring unanimity may not be taken if that director's seat is vacant and that the documents may not be amended without the consent of all directors.

Exposure to involuntary bankruptcy can be limited by specifically restricting the secured and unsecured debt that an SPE can incur, thereby limiting the pool of qualified petitioning creditors for an involuntary bankruptcy petition. Finally, SPEs are typically structured to reduce the risk that the corporate structures of an SPE and related entities are disregarded (e.g., through veil piercing or substantive consolidation) by requiring the SPE to observe corporate formalities.

Recent court rulings have led to significant questions regarding the efficacy of the SPE model as an effective means of achieving bankruptcy remoteness. For example, in *In re Gen. Growth Props., Inc.*, 409 B.R. 43 (Bankr. S.D.N.Y. 2009), the court denied a motion by secured lenders to dismiss voluntary chapter 11 filings by several SPE subsidiaries of real estate investment trust General Growth Properties, Inc. ("GGP"). The lenders argued, among other things, that the loan agreements with the SPEs provided that an SPE could not file for bankruptcy without the approval of an independent director nominated by the lenders. The lenders also argued that, because the SPEs had no business need to file for bankruptcy and because GGP exercised its right to replace the independent directors less than 30 days before the bankruptcy filings, the SPE's chapter 11 filings had not been undertaken in good faith.

The bankruptcy court ruled that it was not bad faith to replace the SPEs' independent directors with new independent directors days before the bankruptcy filings because the new directors had expertise in real estate, commercial mortgage-backed securities, and bankruptcy matters. The court determined that, even though the SPEs had strong cash flows, no debt defaults, and bankruptcy remote structures, the chapter 11 filings had not been made in bad faith. The court found that it could consider the interests of the entire group of affiliated debtors as well as each individual debtor in assessing the legitimacy of the chapter 11 filings.

Among the potential flaws in the bankruptcy remote SPE structure brought to light by *General Growth* was the requirement under applicable Delaware law that independent directors must consider not only the interests of creditors, as mandated in the charter or other organizational documents, but also the interests of shareholders. Thus, an independent director or manager who simply votes to block a bankruptcy filing at the behest of a secured creditor without considering the impact on shareholders could be deemed to have violated its fiduciary duties of care and loyalty.

DISMISSAL OF A CHAPTER 11 CASE: BAD FAITH FILING AND LACK OF AUTHORITY

Section 1112(b) of the Bankruptcy Code provides that a chapter 11 case may be dismissed or converted to a chapter 7 liquidation for "cause." Section 1112(b)(4) sets forth a nonexclusive list of grounds that constitute cause, including, among other things, "the absence of a reasonable likelihood of rehabilitation," failure to file or confirm a chapter 11 plan within the time fixed by the Bankruptcy Code or the court, or the inability to effect "substantial consummation of a confirmed plan."

Although "bad faith" is not listed in section 1112(b)(4), courts have consistently found that the absence of good faith in connection with the filing of a chapter 11 case is cause for dismissal or conversion. The good faith filing requirement is designed to ensure that the burdens imposed on creditors are justified by fulfillment of chapter 11's objectives: preserving going concerns and maximizing assets available to satisfy creditors. The basic thrust of the good faith inquiry has traditionally been whether, viewing the totality of the circumstances, the debtor needs chapter 11 relief. *See C-TC 9th Ave. P'ship v. Norton Co. (In re C-TC 9th Ave. P'ship)*, 113 F.3d 1304, 1309–10 (2d Cir. 1997) (dismissal warranted if "there was no reasonable likelihood that the debtor intended to reorganize and no reasonable probability that it would eventually emerge from bankruptcy proceedings"); *NMSBPCSLDHB, L.P. v. Integrated Telecom Express, Inc. (In re Integrated Telecom Express, Inc.)*, 384 F.3d 108, 119–20 (3d Cir. 2007) (test focuses on "whether the petition serves a valid bankruptcy purpose . . . [and] whether the petition is filed merely to obtain a tactical litigation advantage"); *Maryland Port Admin. v. Premier Auto. Servs., Inc. (In re Premier Auto. Servs., Inc.)*, 492 F.3d 274, 279–80 (4th Cir. 2004) ("a lack of good faith in filing a Chapter 11 petition requires a showing of 'objective futility' and 'subjective bad faith' ").

In addition, lack of authority to commence a bankruptcy case, although not specifically enumerated in section 1112(b)(4), also constitutes cause for dismissal. *See NNN 123 N. Wacker, LLC*, 510 B.R. at 858; *In re ComScape Telecommunications, Inc.*, 423 B.R. 816 (Bankr. S.D. Ohio 2010); *In re A-Z Elec., LLC*, 350 B.R. 886 (Bankr. D. Idaho 2006). Moreover, a bankruptcy court need not rely on section 1112(b) for authority to dismiss a case if it concludes that the filing was not duly authorized under applicable non-bankruptcy law. *In re Southern Elegant Homes, Inc.*, 2009 BL 123847 (Bankr. E.D.N.C. June 9, 2009); *N2N Commerce*, 405 B.R. at 41; *In re Telluride Income Growth Ltd. P'ship*, 311 B.R. 585 (Bankr. D. Colo. 2004).

In *Lake Michigan*, the court considered the enforceability of a blocking director structure included in the membership agreement of a bankruptcy remote SPE in connection with a lender's motion to dismiss the SPE's chapter 11 case as having been both unauthorized and filed in bad faith.

LAKE MICHIGAN

Lake Michigan Beach Pottawattamie Resort LLC ("LM"), a Michigan LLC, owns a vacation resort property in Coloma, Michigan. In 2014, LM granted a first-priority lien on the property in connection with a secured loan extended by BCL Bridge Funding LLC ("BCL") to LM in the amount of approximately $1.8 million.

Lake Michigan indicates that corporate or LLC structures designed to achieve bankruptcy remoteness are not foolproof. Designation by a lender of independent or blocking directors, or granting lenders special member status, in order to minimize the possibility of a bankruptcy filing is still subject to fiduciary obligations that may be violated by blocking such a filing under all circumstances.

LM defaulted on the loan in July 2015. As part of a forbearance agreement with BCL, LM executed an amendment to its LLC operating agreement, which established BCL as LM's fifth "special member," with the right to approve or disapprove "material actions," including the commencement of a bankruptcy case. BCL had no interest in LM's profits or losses, nor was it required to make capital contributions.

The amendment provided that, in exercising its rights as a special member, BCL "shall be entitled to consider only such interests and factors as it desires, including its own interests, and shall to the fullest extent permitted by applicable law, have no duty or obligation to give any consideration to any interest of or factors affecting [LM] or the Members." The section of the amendment entitled "Special Member" further stated that "[t]his Section is written for the express benefit of the Lender . . . and shall supersede any conflicting or inconsistent provision of this Agreement."

LM defaulted on its obligations under the forbearance agreement. On November 2, 2015, BCL commenced a foreclosure sale proceeding with respect to the resort property. The foreclosure sale was stayed when LM, which had ceased operating, filed a voluntary chapter 11 petition on December 16, 2015, in the Northern District of Illinois. Four of LM's members authorized the filing; BCL did not. At the time of the filing, the property was valued at significantly more than the amount owed to BCL.

BCL moved to dismiss the chapter 11 case, arguing that, because LM had filed for bankruptcy on the eve of foreclosure and without BCL's approval, the case had been filed in bad faith in addition to being unauthorized.

THE BANKRUPTCY COURT'S RULING

The bankruptcy court flatly rejected BCL's argument that LM had filed for chapter 11 in bad faith simply because there was only a single asset around which to reorganize. The court explained, among other things, that the filing of a bankruptcy petition on the eve of foreclosure does not, by itself, establish bad faith. It further noted that "a debtor may, in good faith, use the bankruptcy system to give it a breathing spell to become cash-flow solvent when it is, as the Debtor is in this case, balance sheet solvent."

The court then addressed BCL's argument that LM's chapter 11 filing should be dismissed because it had not been duly authorized. Under Michigan law, the court explained, a simple majority of members is ordinarily required to approve actions on behalf of an LLC, unless the operating agreement provides otherwise. In this case, LM's operating agreement, as amended, provided that BCL's consent was required for a bankruptcy filing.

However, the court emphasized, BCL's contractual right to block a bankruptcy filing was subject to one important caveat:

> [C]ommon wisdom dictates that the corporate control documents should not include an absolute prohibition against bankruptcy filing. . . . Even though the blocking director structure . . . impairs or in operation denies a bankruptcy right, it adheres to that wisdom. It has built into it a saving grace: the blocking director must always adhere to his or her general fiduciary duties to the debtor in fulfilling the role. That means that, at least theoretically, there will be situations where the blocking director will vote in favor of a bankruptcy filing, even if in so doing he or she acts contrary to [the] purpose of the secured creditor for whom he or she serves.

Consistent with the rulings in *General Growth* and *Kingston Square*, the court in *Lake Michigan* concluded that a blocking "special member" may withhold consent for a bankruptcy filing only if, in doing so, the member complies with its fiduciary duties. As such, the court wrote that "in some circumstances[, blocking members must] vote in favor of a bankruptcy filing, even if it is not in the best interests of the creditor that they were chosen by." The court concluded, however, that "BCL's playbook was, unfortunately, missing this page."

Under Michigan law, the court explained, members of an LLC have a duty to consider the interests of the entity as well as their individual interests. According to the court, although the amendment to LM's operating agreement did provide a "savings clause" whereby the specified limitations on BCL's duties were allowed "to the fullest extent permitted by applicable law," the prohibition of a bankruptcy filing without BCL's consent "has no application other [than] that which is impermissible under Michigan law." The court accordingly ruled that the provision requiring BCL's consent to a bankruptcy filing was unenforceable under both Michigan corporate and federal bankruptcy law.

OUTLOOK

As noted, the enforceability of bankruptcy waivers or restrictions frequently arises in the context of SPEs that are designed to be bankruptcy remote as a way to encourage investment and limit the risks of both investors and lenders. *Lake Michigan* indicates that corporate or LLC structures designed to achieve bankruptcy remoteness are not foolproof. Designation by a lender of independent or blocking directors, or granting lenders special member status, in order to minimize the possibility of a bankruptcy filing is still subject to fiduciary obligations that may be violated by blocking such a filing under all circumstances.

The general rule against waiver of the right to file for bankruptcy, as distinguished from waivers by individual debtors of the right to file for bankruptcy or to receive a discharge, has been the subject of considerable debate. Some commentators, for example, have argued that bankruptcy waivers or restrictions should be enforceable for business entities like SPEs, provided that they are solvent. *See*, *e.g.*, Comment, *Bankruptcy-Remote Special Purpose Entities and a Business's Right to Waive Its Ability to File for Bankruptcy*, 28 EMORY BANKR. DEV. J. 507 (2012). Whether such waivers should be enforceable was one of the many issues considered by the American Bankruptcy Institute's Commission to Study the Reform of Chapter 11, but it was not addressed in the Commission's final report, which was issued on December 8, 2015.

OIL AND GAS INDUSTRY UPDATE

Thomas A. Howley, Jeffrey A. Schlegel, and Omar Samji

SABINE BANKRUPTCY JUDGE AUTHORIZES REJECTION OF GAS GATHERING AGREEMENTS

In *In re Sabine Oil & Gas Corp.*, 2016 BL 70494 (Bankr. S.D.N.Y. Mar. 8, 2016), Judge Shelley C. Chapman of the U.S. Bankruptcy Court for the Southern District of New York permitted Sabine Oil & Gas Corporation ("Sabine") to reject three gas gathering and handling agreements with Nordheim Eagle Ford Gathering, LLC ("Nordheim") and HPIP Gonzales Holdings, LLC ("HPIP"). All of the agreements are governed by Texas law.

In connection with its efforts to restructure, Sabine filed a motion to reject the gathering agreements with Nordheim and HPIP. Sabine argued that it could not deliver the required minimum amounts of gas and condensate and that rejection would save it as much as $115 million. Nordheim opposed the motion to reject, arguing that rejection was not a proper exercise of Sabine's business judgment because the agreements included dedications that were stated to be covenants running with the land, which would continue to burden the debtor's interests following rejection. While HPIP did not oppose rejection, it also argued that the relevant hydrocarbon dedications were covenants running with the land which would survive rejection. Sabine's response to the objections was that, among other things, the purported dedications lacked the requisite intent and privity to establish covenants running with the land and were not consistent with real property conveyances under Texas law, as they lacked traditional real property terms and were instead more consistent with services agreements.

Judge Chapman held that Sabine's rejection of the midstream agreements was a proper exercise of Sabine's business judgment, but she determined that the questions of Texas real property law were not properly before the court because the court could not adjudicate the issues in the context of a motion to reject an executory contract. In a nonbinding portion of the court's analysis of applicable Texas law, however, the court noted that the agreements fail to meet Texas's five-part test for covenants running with the land, remarking that "none of the covenants run with the land either as a real covenant or as an equitable servitude." In particular, the court explained that the covenants merely identify the rights and obligations related to the services to be provided under the agreements and do not convey interests in the underlying real property.

The court recognized that, in the event that the agreements were later determined to include covenants running with the land, the producer would likely be required to work out a deal with existing gatherers on terms consistent with the dedications, notwithstanding Sabine's rejection of the agreements. If, however, it were ultimately determined that the agreements do not contain covenants running with the land—which, as noted, the court indicated in dicta was its understanding of Texas law—the producer would be free to seek other providers of midstream services.

After reading her bench decision to the parties at the hearing on Sabine's motion to reject the agreements, Judge Chapman stated that "[i]t might be time to talk about a commercial resolution of some of these issues, but that's for you and your clients to decide."

QUICKSILVER DROPS MOTION TO REJECT MIDSTREAM AGREEMENTS IN CONNECTION WITH CLOSING OF SALE TO BLUESTONE NATURAL RESOURCES

On April 7, 2016, Quicksilver Resources Inc. ("Quicksilver") announced that it had closed the sale of its U.S. assets for $245 million to BlueStone Natural Resources II ("BlueStone") in connection with Quicksilver's bankruptcy cases and pursuant to an asset purchase agreement which had been approved by Judge Laurie Selber Silverstein of the U.S. Bankruptcy Court for the District of Delaware in January 2016. Under the original terms of the asset purchase agreement, BlueStone's obligation to close the transaction was conditioned on the court's issuance of a final order approving the rejection of three gas gathering and processing agreements and a joint operating agreement between Quicksilver and Crestwood Midstream Partners ("Crestwood"). Crestwood and BlueStone have announced that they entered into new, long-term gathering and processing agreements in the Barnett Shale, replacing the three agreements which had been subject to rejection, and the rejection motion has been withdrawn with the consent of both Crestwood and BlueStone.

The Quicksilver transaction comes on the heels of the March 8, 2016, ruling in *Sabine* (discussed previously). In its motion to reject the agreements with Crestwood, Quicksilver advanced arguments similar to those made in *Sabine*.

Quicksilver initially sought to reject the agreements with Crestwood on the basis that rejection was necessary for BlueStone to consummate the court-approved sale of Quicksilver's assets. Crestwood countered that the agreements contained covenants running with the land or, in the alternative, equitable servitudes and that such covenants (or servitudes) could not be rejected in bankruptcy. In amici curiae ("friend of the court") briefs, the Gas Processors Association and the Texas Pipeline Association argued that the issues before the court involve nuanced Texas property law and that the decision of the court would have profound implications on the oil and gas midstream industry. In its reply to Crestwood's objection, Quicksilver contended, among other things, that Crestwood could not meet its burden of establishing either a covenant running with the land or an equitable servitude under Texas law.

The settlement in *Quicksilver* highlights the industry's reaction to the question of whether gas gathering and processing agreements are protected from rejection in bankruptcy if they include "covenant running with the land" language of the type routinely used in the industry for years (or whether, in fact, the covenants themselves can survive the rejection of the underlying midstream agreements). As the validity of these contract provisions continues to be challenged in bankruptcy cases, parties are beginning to renegotiate the underlying commercial arrangements both in and outside of court.

For example, in addition to Quicksilver, Swift Energy Co. ("Swift Energy") (also a chapter 11 debtor in the District of Delaware, but before Judge Mary F. Walrath) recently settled a similar rejection dispute by renegotiating a gas services agreement with Eagle Ford Gathering LLC. (Jones Day represents Swift Energy in its chapter 11 case.) Another Delaware chapter 11 case involving attempted midstream contract rejection is that of Magnum Hunter Resources Corporation. Bankruptcy judge Kevin Gross is expected to provide a ruling at a later date, which may provide further guidance on how bankruptcy courts can be expected to rule on this issue. In the meantime, since the landscape remains uncertain, the industry is likely to see continued efforts to renegotiate contracts.

SABINE BANKRUPTCY JUDGE ISSUES BINDING RULING THAT COVENANTS IN REJECTED MIDSTREAM AGREEMENTS DO NOT RUN WITH THE LAND

On May 3, 2016, Judge Chapman issued a binding ruling in the *Sabine* chapter 11 cases that the covenants in the rejected midstream gathering agreements "do not run with the land either as real covenants or as equitable servitudes." *See Sabine Oil & Gas Corp. v. HPIP Gonzales Holdings, LLC (In re Sabine Oil & Gas Corp.)*, 2016 BL 140707 (Bankr. S.D.N.Y. May 3, 2016).

After Judge Chapman authorized Sabine to reject the gathering agreements on March 8, 2016, Sabine commenced adversary proceedings against Nordheim and HPIP, seeking a declaratory judgment that the covenants contained in the agreements do not run with the land.

The court granted Sabine's motion for summary judgment in that proceeding for substantially the same reasons articulated in the March 8 opinion. Among other things, the court concluded that, in accordance with Texas law, the covenants in the agreements do not "touch and concern" Sabine's real property. "By the plain terms of the [agreements]," the court wrote, "the mineral dedications concern only minerals extracted from the ground, which indisputably constitute personal property, not real property, under Texas law."

The court also concluded that, even if "horizontal privity of estate" were a requirement under Texas law for a covenant to run with the land, such privity does not exist between Sabine and Nordheim or between Sabine and HPIP. The court explained that horizontal privity is created by "the conveyance of an interest in property that itself is being burdened with the relevant covenant, not the conveyance of an interest in property that is distinct from (even if somewhat related to) the property burdened by the covenant."

Finally, the court ruled that the covenants at issue do not limit the use of or burden Sabine's mineral estate such that they could run with the land as equitable servitudes, because the agreements with Nordheim and HPIP "are fundamentally service contracts relating to personal property of Sabine."

The treatment of covenants running with the land and similar rights that parties have historically incorporated into midstream gas and handling agreements varies from state to state. The court's rulings with respect to dedications in such agreements that do not qualify as real property interests under Texas law could have a significant impact on the oil and gas industry moving forward. The potential that the existence of such dedications will not be deemed to be an impediment to rejection of the underlying agreements in other bankruptcy cases, and that such dedications themselves might not be protected in a bankruptcy, may affect other oil and gas producer bankruptcies in the near term and may deter other midstream companies from building infrastructure in the future in reliance on long-term producer dedications on similar terms.

On May 13, 2016, Nordheim filed a motion seeking permission to appeal directly to the Second Circuit Court of Appeals Judge Chapman's rulings in *Sabine* authorizing rejection of the gathering agreements and finding that the covenants in the agreements do not run with the land under Texas law. On May 17, 2016, Judge Chapman authorized Sabine to enter into an alternative gas gathering agreement with DCP South Central Texas LLC.

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SUN CAPITAL UPDATE: DISTRICT COURT DOUBLES DOWN ON IMPOSITION OF PENSION LIABILITY FOR PRIVATE EQUITY FUNDS

Lisa G. Laukitis and Aaron M. Gober-Sims

Amendments to the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001 *et seq.*, in 1980 made "trade[s] or business[es]" that are under "common control"—which has since been defined by regulation to mean 80 percent common ownership—jointly and severally liable for each other's withdrawal liability under a multi-employer pension plan. In addition, withdrawal liability must be assessed "without regard" to any transaction whose "principal purpose" is to "evade or avoid" withdrawal liability.

In the November/December 2013 edition of the *Business Restructuring Review*, we discussed a groundbreaking ruling by the U.S. Court of Appeals for the First Circuit in *Sun Capital Partners III, LP v. New England Teamsters & Trucking Indus. Pension Fund*, 724 F.3d 129 (1st Cir. 2013). The decision fired a shot across the bow of private equity funds with portfolio companies that are participants in multi-employer pension plans. In *Sun Capital*, the First Circuit held that a private equity fund was a "trade or business" which could be held jointly and severally liable under ERISA for the pension plan withdrawal liability incurred by one of its portfolio companies.

However, the First Circuit remanded the case to the district court to determine: (i) whether a related private equity fund was also a trade or business under ERISA; and (ii) whether the second prong of the test for imposing joint and several liability under ERISA—i.e., "common control"—had been met with respect to the group of related portfolio companies. On remand, the district court concluded in *Sun Capital Partners III, LP v. New England Teamsters & Trucking Indus. Pension Fund*, 2016 BL 95418 (D. Mass. Mar. 28, 2016), that the answer to both of these questions is "yes."

SUN CAPITAL

In 2007, two private equity funds of Sun Capital Advisors, Inc.—Sun Capital III and Sun Capital IV (collectively, the "Sun Capital funds")—acquired 30 percent and 70 percent stakes, respectively, in Scott Brass, Inc. ("Scott Brass"), a brass and copper manufacturer, through a series of jointly owned subsidiaries, including Sun Scott Brass, LLC ("SSB"). Scott Brass was a participant in a multi-employer pension plan, the New England Teamsters and Trucking Industry Pension Fund ("NETTI"). In the fall of 2008, following a collapse in the price of copper, Scott Brass breached its loan covenants and was unable to obtain sufficient credit to stay in business. The company stopped making pension contributions in October 2008, and an involuntary bankruptcy petition was filed against it the following month in the District of Rhode Island.

In December 2008, NETTI demanded that Scott Brass pay more than $4.5 million in withdrawal liability, and it also demanded payment from the Sun Capital funds. The funds sued NETTI in federal district court in Massachusetts, seeking a declaratory judgment that they were not jointly and severally liable for the withdrawal liability. The district court granted summary judgment in favor of the funds. Among other things, the court reasoned that, since the funds were "passive" and had no employees or offices, neither was a "trade or business" under section 1301(b)(1) of ERISA. NETTI appealed to the First Circuit.

Construing section 1301(b)(1) of ERISA, the First Circuit conducted a fact-specific "investment plus" approach and ruled that one of the funds—Sun Capital IV—was a trade or business within the meaning of the provision. The court predicated its ruling on factual findings that: (i) Sun Capital IV was actively involved in the management of Scott Brass and had the ability to control the company's board of directors; and (ii) Sun Capital IV received an economic benefit which an ordinary passive investor would not have derived in the form of an offset against fees it otherwise would have had to pay to its general partner.

The First Circuit remanded the case to the district court to determine whether Sun Capital III was also a trade or business within the meaning of section 1301(b)(1) and whether ERISA's common control requirement had been satisfied for the Sun Capital funds.

THE DISTRICT COURT'S RULING ON REMAND

As an initial matter, the Sun Capital funds represented that the facts on which the First Circuit relied in determining whether Sun Capital IV was a trade or business were inaccurate because they pertained to Sun Capital III rather than Sun Capital IV. As a consequence, the district court examined whether: (i) in light of this confusion of the facts, the First Circuit's ruling concerning Sun Capital IV was clearly erroneous; (ii) Sun Capital III was a trade or business; and (iii) the Sun Capital funds were under common control.

The district court began its analysis of whether Sun Capital III was a trade or business within the meaning of section 1301(b)(1) by considering whether Sun Capital III derived an economic benefit from its activities. From 2005 through 2012, the court explained, the fees that Sun Capital III owed to its general partner had been reduced by the amount which Scott Brass had paid to Sun Capital III's general partner. On this basis, the court concluded that Sun Capital III qualified as a trade or business within the meaning of section 1301(b)(1) of ERISA.

Sun Capital IV argued that it was not a trade or business within the meaning of section 1301(b)(1) because it, unlike Sun Capital III, did not benefit from a corresponding reduction of management fees owed to its general partner. According to Sun Capital IV, although it owed and paid management fees in the years before and after the acquisition of Scott Brass, Sun Capital IV's general partner waived its management fees from 2005 through 2009. On the basis of this waiver, Sun Capital IV argued that, because it received a "carryforward" which was not guaranteed, it did not receive a direct economic benefit from 2007, when it acquired its interest in Scott Brass, through 2009, when Scott Brass was in bankruptcy, and therefore, it could not be a trade or business within the meaning of section 1301(b)(1) of ERISA.

The district court rejected this argument, stating that it offered "too crabbed a view" of the test articulated by the First Circuit in its ruling. The First Circuit, the district court explained, determined that the carryforward constituted a benefit to Sun Capital IV because it gave Sun Capital IV the potential to reduce future management fees by $58 million.

The district court also rejected the contention that the First Circuit's holding required a direct economic benefit for purposes of determining whether the "investment plus" approach was satisfied. According to the district court, the First Circuit instructed it to determine whether Sun Capital IV had received *any* benefit from the fee offset.

In support of its contention that the Sun Capital funds were under common control, NETTI argued that: (i) Sun Capital III and Sun Capital IV formed a partnership or joint venture; (ii) the partnership or joint venture was engaged in a trade or business; and (iii) the partnership or joint venture was the indirect parent of Scott Brass.

The Sun Capital funds countered that, because they intentionally invested in Scott Brass through SSB, rather than directly, the district court was obligated to respect organizational formalities.

The district court rejected the Sun Capital funds' argument. The question of organizational liability, the court explained, must reflect the economic realities of the business entities that were created for the acquisition. According to the court: (a) the Sun Capital funds intentionally engaged in conduct supporting the existence of a partnership or joint venture that owned Scott Brass; (b) the funds were intimately involved in managing and operating Scott Brass; and (c) SSB was created as an attempt to limit withdrawal liability, not as a truly independent entity.

The district court also concluded, examining the Sun Capital funds' pre-acquisition activities and the manner in which the acquisition of Scott Brass was structured, that a partnership-in-fact existed sufficient to aggregate the funds' interests and place them under common control with Scott Brass.

Finally, the district court determined that this partnership-in-fact was a trade or business within the meaning of section 1301(b)(1) of ERISA. The court found, among other things, that the partnership-in-fact was involved in the active management of Scott Brass, controlled the company's board through a joint effort, and engaged in activities which were intended to generate compensation that an ordinary, passive investor would not have derived.

OUTLOOK

The *Sun Capital* decisions expose to pension withdrawal liability private equity funds that are actively involved in the management of their portfolio companies. They indicate that a private equity fund may be considered a trade or business under ERISA even if the fund does not receive direct economic benefits from its ownership of portfolio companies. In addition, affiliated private equity funds which individually stay below ERISA's 80 percent ownership threshold may still be subject to withdrawal liability if a court determines that a partnership-in-fact exists among affiliates whose aggregate holdings exceed the 80 percent threshold.

The Sun Capital funds appealed the district court's most recent ruling on April 4, 2016. If affirmed on appeal, the decision, together with the First Circuit's previous ruling, will likely have serious consequences for private equity funds, which may be forced to reevaluate their structuring practices where multiemployer pension plans are at issue.

SOVEREIGN DEBT UPDATE

The Republic of Argentina returned to global debt markets after a 15-year absence on April 19, 2016, when it sold $16 billion in bonds to fund a series of landmark settlements reached earlier this year with holdout bondholders from the South American nation's 2005 and 2010 debt restructurings. This latest development in the more than decade-long battle between Argentina and the holdouts—led by hedge funds Aurelius Capital Master Ltd. ("Aurelius") and NML Capital Ltd. ("NML")—may provide an unlikely, albeit welcome, dénouement to a story that has long captivated the international community—so much so, that Argentina's protracted sovereign debt saga even prompted the United Nations and other international organizations to call for the implementation of regulations specifically designed to curb perceived abuse by "vulture" investors speculating in sovereign debt.

The story began in December 2001, when Argentina announced that it was suspending payments on approximately $90 billion in bonds marketed during the previous decade to individual, and in some cases institutional, investors in Argentina, Italy, other parts of Europe and Latin America, and the U.S. The ensuing default in 2002 pushed Argentina into the worst economic crisis in its history.

Argentina restructured its debt in 2005 and again in 2010 by exchanging new bonds for defaulted bonds. The holders of 93 percent of the defaulted debt agreed to the exchanges. Pursuant to a "temporary moratorium" renewed each year, Argentina made payments to exchange bondholders but did not pay bondholders who did not participate in the exchanges. Holdout bondholders (representing the remaining 7 percent of Argentina's defaulted debt)—many of which, like Aurelius and NML, acquired the debt at a steep discount—sued Argentina in the U.S. District Court for the Southern District of New York (the old bond instruments having been governed by New York law) to collect unpaid principal and interest. The holdouts ultimately obtained several large judgments against Argentina, all of which were affirmed on appeal to the U.S. Court of Appeals for the Second Circuit. According to these rulings, holdout bondholders were entitled to be repaid the full face value of the bonds they held.

On February 23, 2012, U.S. district court judge Thomas P. Griesa ruled that Argentina's continued payments to exchange bondholders violated the *pari passu*, or "equal treatment," clause in the original bond indenture, and he enjoined further payments to exchange bondholders without corresponding payments to holdout bondholders. The Second Circuit Court of Appeals upheld that ruling in *NML Capital, Ltd. v. Republic of Argentina*, 699 F.3d 246 (2d Cir. 2012). The U.S. Supreme Court refused to review that ruling on October 7, 2013.

Issuance of the injunction sparked an all-out war of litigation between the holdouts and Argentina, with Argentine President Cristina Fernández de Kirchner vowing never to surrender to "vulture" investors. The ensuing three years saw a flurry of court rulings, all of which reaffirmed Argentina's obligation to pay the holdouts in full, failing which it could not make payments on exchange bonds despite the specter of another default on its sovereign debt.

Key events during this period included the following:

October 3, 2013—Judge Griesa issues an order barring Argentina from proceeding with a plan by President de Kirchner to exchange restructured bonds, which are governed by New York law, for debt instruments governed by Argentine law. The judge notes that the plan is "an apparent attempt to evade" his February 23, 2012, orders barring Argentina from paying exchange bondholders without also paying holdout bondholders.

June 16, 2014—Despite Argentina's warning that it may once again be forced to default on its sovereign debt, the U.S. Supreme Court denies Argentina's petition seeking review of the Second Circuit's rulings affirming the February 2012 injunction and directing Argentina to pay holdout bondholders $1.4 billion. In a separate ruling handed down on the same day, the court affirms a Second Circuit decision directing two banks, in connection with Argentina's long-running dispute with holdout bondholders, to disclose comprehensive information concerning assets Argentina owns outside the U.S.

June 30, 2014—Argentina fails to make a $539 million payment to exchange bondholders as a consequence of Judge Griesa's injunction.

July 30, 2014—Argentina defaults on its sovereign debt for the second time in approximately 13 years when the 30-day grace period expires following the payment default that occurred on June 30.

August 6, 2014—Judge Griesa issues an order barring Argentina from making payments on euro-denominated exchange bonds as part of his larger decision that forbids Argentina from paying holders of dollar-denominated exchange bonds.

August 29, 2014—The International Capital Market Association, a group of banks and investors, announces a proposal designed to reduce the ability of holdout investors to undermine sovereign debt restructurings. Under the proposal, *pari passu* clauses would be interpreted to bind all bondholders to the terms of any debt restructuring agreement approved by at least 75 percent of bondholders.

September 4, 2014—In an effort to end-run Judge Griesa's orders, Argentina's Senate passes a bill authorizing its government to bypass U.S. courts and pay its bondholders through local channels. The proposal is approved by Argentina's lower legislative body, the Chamber of Deputies, on September 11, 2014.

September 9, 2014—The United Nations (the "UN") General Assembly passes a resolution to begin an "intergovernmental negotiation process aimed at increasing the efficiency, stability and predictability of the international financial system." That process would include negotiations toward the implementation of a global bankruptcy process for sovereign debtors. The resolution passes by a supermajority vote of 124–11 with 41 abstentions. The U.S. votes "no" along with 10 other countries. Such a bankruptcy process could make it more difficult for holdout bondholders to prevent countries from successfully restructuring their debts and could limit future defaults.

September 26, 2014—The UN Human Rights Council passes a resolution condemning "vulture funds" like Argentina's holdout bondholders. Among other things, the resolution notes that "vulture funds, through litigation and other means, oblige indebted countries to divert financial resources saved from debt cancellation and diminish the impact of, or dilute the potential gains from, debt relief for these countries, thereby undermining the capacity of [a Government] to guarantee the full enjoyment of human rights of its population." The resolution, which was tabled by Argentina, Brazil, Russia, Venezuela, and Algeria, passes in the 47-member council with 33 votes in favor. Nine member states abstain and five—the Czech Republic, Britain, Germany, Japan, and the U.S.—oppose the text.

October 6, 2014—The International Monetary Fund (the "IMF") releases a series of new proposals entitled "Strengthening the Contractual Framework to Address Collective Action Problems in Sovereign Debt Restructuring." The proposals include reforms to sovereign debt agreements, including strengthened collective action clauses and modification of *pari passu* clauses.

October 30, 2014—Argentina again defaults on its sovereign debt when it fails to make a coupon payment on $5.4 billion in bonds issued under foreign law, thus increasing the risk of acceleration and economic collapse. If the debt is accelerated, Argentina could be obligated to pay investors $30 billion immediately—$2 billion more than the South American nation holds in its national reserves.

December 23, 2014—The Second Circuit Court of Appeals upholds a lower court order directing Argentina and several banks to disclose information to holdout bondholders about the country's assets, including diplomatic and military property, rejecting Argentina's claims that sovereign immunity shields it from complying with such discovery requests under the Foreign Sovereign Immunities Act.

December 29, 2014—The UN votes 128 to 16 to begin negotiations to create a global bankruptcy process. The legal framework is held out to prevent a global financial crisis, minimize sovereign debt defaults, and prevent predatory behavior. Sixteen nations vote against the resolution, including the U.S., Japan, Australia, and much of the European Union. Although these nations express support for improving debt restructuring and stopping predatory funds, they advocate the discussion of such measures not by the UN, but by the IMF or the Paris Club, an informal group of officials from creditor countries whose role is to find coordinated and sustainable solutions to the payment difficulties experienced by debtor nations.

December 31, 2014—The "rights upon future offers" ("RUFO") clause in indentures governing bonds that were not exchanged as part of Argentina's 2005 and 2010 debt restructurings expires, paving the way for a potential settlement between Argentina and holdout bondholders. The RUFO clause prevented Argentina from settling with holdout bondholders on more favorable terms than those accepted by exchange bondholders in the debt restructurings. The clause could have triggered as much as $120 billion in new claims if the nation had settled with holdout bondholders prior to the clause's expiration.

March 3, 2015—"Me too" holdout bondholders seeking compensation for debt owed by Argentina since the country's 2002 default lodge claims with the U.S. District Court for the Southern District of New York for between $7 billion and $8 billion, in the hope of gaining from Argentina's ongoing legal battle with holdout bondholders.

April 20, 2015—Argentina announces that, in an effort to evade U.S. restrictions on its market access, the country will issue $500 million of a new series of "BONAR 2024" bonds.

June 5, 2015—Judge Griesa grants partial summary judgment to the group of 526 "me too" plaintiffs in 36 separate lawsuits, finding that, consistent with his previous ruling in litigation commenced by holdout bondholders, Argentina violated the *pari passu* clause in bonds issued to the "me too" bondholders by refusing to make payments on their bonds at the same time that it paid holders of restructured debt. The decision obligates Argentina to pay the plaintiffs $5.4 billion before it can make payments on restructured debt.

December 10, 2015—Mauricio Macri succeeds Cristina Fernández de Kirchner as President of Argentina. President Macri pledges to return Argentina from credit markets exile and to make a fresh start by resolving disputes with holdout bondholders. By contrast, former President de Kirchner systematically refused to negotiate with the holdouts for eight years, characterizing them as "economic terrorists."

February 2, 2016—Argentina announces that it has reached a $1.35 billion settlement with 50,000 Italian holdout bondholders.

February 5, 2016—Argentina announces that it has reached a $1.1 billion settlement with holdout bondholders EM Ltd. and Montreux Partners LP.

February 29, 2016—Argentina announces that it has reached a $4.6 billion settlement with NML, Aurelius, and other major holdout bondholders.

March 2, 2016—Judge Griesa enters an order conditionally dissolving his injunctions precluding Argentina from making payments on its restructured debt unless it also pays amounts owed to holdout bondholders. However, certain holdouts, including NML and Aurelius, appeal the order to the Second Circuit, contending that the ruling "rests on the erroneous premise that 'changed circumstances' necessary to warrant lifting the Injunctions exist solely on the basis of Argentina's hope that it will pay some subset of creditors who agreed to terms under coercive conditions."

March 16, 2016—Argentina's Chamber of Deputies approves legislation to issue new debt and repeal the sovereign payment law and the "Lock Law," which prohibits payments to bondholders other than holders of exchange bonds. The repeals would permit Argentina to consummate settlements it has reached with holdout bondholders.

March 30, 2016—Argentina's Senate approves the repeal legislation. The law allows Argentina to issue $12 billion in bonds and use part of the proceeds to fund settlements with holdout bondholders.

April 13, 2016—The Second Circuit Court of Appeals affirms Judge Griesa's ruling provisionally lifting the injunctions, paving the way for the South American country to begin funding $6 billion in settlements.

April 19, 2016—Argentina returns to the global capital markets, completing an oversubscribed, $16.5 billion bond issue that will enable the nation to pay outstanding creditors and fund economic priorities. The bond issue marks the largest debt deal ever for an emerging-markets country or company, eclipsing an $11 billion corporate bond issuance by Brazilian energy giant Petrobras in 2013.

April 22, 2016—Argentina pays holdout bondholders more than $6 billion. Judge Griesa confirms the payments and issues an order vacating his previous injunctions and allowing Argentina to resume servicing its exchange bonds.

The End?

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