Recent Developments in Bankruptcy and Restructuring
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BUSINESS RESTRUCTURING REVIEW

THE YEAR IN BANKRUPTCY: 2017

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The initial year of the Trump administration colored much of the political, business, and financial headlines of 2017, both in the U.S. and abroad. Key administration-related developments in 2017 included U.S. withdrawal from the Paris climate accord; decertification of the Iranian nuclear deal; steps to renegotiate the North American Free Trade Agreement; the continued investigation of Russian election interference; the showdown with North Korea over nuclear weapons; U.S. recognition of Jerusalem as the capital of Israel; and the largest U.S. tax reforms in more than 30 years, which included both large corporate tax cuts and repeal of the insurance coverage mandate imposed by the Affordable Care Act, after Republican efforts to repeal the Act in its entirety failed earlier in the year.

These events sometimes overshadowed other newsworthy political and financial global developments, such as the surprisingly good year for economies globally; the messy (and costly) divorce proceedings between the U.K. and the EU; the #MeToo movement; record-setting devastation from natural disasters; the dismantling of the Islamic State and the continuing refugee crisis; and the economic and humanitarian crises in both Venezuela and Puerto Rico.

ANOTHER GOOD YEAR FOR THE U.S.

The year 2017 was a good year for the U.S., with better-than-expected growth in the economy (approximately 2.5 percent); persistently low inflation (approximately 1.7 percent for the second year running); and the lowest unemployment rate (4.1 percent) since February 2001.

HIGHLIGHTS OF 2017

Among the most memorable business, economic, and financial sound bites of 2017 were "the Trump administration," "Hurricane Harvey," "Hurricane Irma," "Hurricane Maria," "the Equifax breach," "the Paradise Papers," "the Retail Apocalypse," and "the Bitcoin boom/bubble."

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These developments prompted the U.S. Federal Reserve to raise its benchmark federal-funds interest rate in December 2017 to 1.5 percent, marking the third increase for the benchmark rate during the year.

Even so, the federal budget deficit widened in fiscal year ("FY") (the period from October 1 through September 30) 2017 to the sixth-highest deficit on record ($668 billion, up 14 percent from the $586 billion deficit in FY 2016), as government spending growth outpaced growth in tax collections for the second year in a row. Moreover, in September 2017, for the first time in its history, the federal government reached (and surpassed) the $20 trillion milestone in outstanding debt.

The value of the U.S. dollar relative to other major currencies dropped 10 percent in 2017, the largest annual decrease since 2003.

North America (and the rest of the world) also experienced record-breaking natural disasters in 2017, with Hurricanes Harvey, Irma, and Maria; California wildfires; a devastating earthquake in Mexico; and widespread flooding in South Asia. In its annual natural catastrophe review, German reinsurer Munich Re reported that insurers will pay out approximately $135 billion for 2017, the most ever. Moreover, total losses in 2017, including those not insured, were $330 billion, the second-worst in history after 2011, when an earthquake and tsunami wreaked havoc in Japan.

The U.S. comprised approximately 50 percent of global insured losses last year. Hurricane Harvey was the most costly natural disaster of 2017, causing losses of $85 billion. Including Hurricanes Irma and Maria, the 2017 hurricane season caused the most damage ever, with losses reaching $215 billion. The National Oceanic and Atmospheric Administration estimated total losses (insured and uninsured) in the U.S. in 2017 at $306 billion, making 2017 the most expensive year on record for natural disasters.

ANOTHER GOOD YEAR FOR M&A

According to Thomson Reuters, worldwide M&A activity during calendar year ("CY") 2017 totaled $3.6 trillion, on par with CY 2016 levels and the fourth consecutive year to surpass $3 trillion. Overall, 49,448 worldwide deals were announced during CY 2017, an increase of 3 percent over 2016 and the strongest year for M&A, by number of deals, since records began in 1980. By amount, M&A activity peaked in CY 2015, when it totaled $4.66 trillion.

M&A deals for European targets totaled $867.5 billion during CY 2017, an increase of 17 percent over CY 2016.

With $1.4 trillion in announced deals during CY 2017, the aggregate value of U.S. deals was off 16 percent from CY 2016, even though the number of deals increased by 14 percent.

HIGHLIGHTS OF 2017

January 20—Donald J. Trump is inaugurated as the 45th president of the United States.

Globally, private equity-backed M&A activity totaled $322.6 billion in CY 2017, an increase of 27 percent over the previous year.

Among the biggest acquisitions announced in the U.S. during 2017 were drugstore-chain operator CVS Health Corp.'s acquisition of health insurer Aetna Inc. for $69 billion (the year's largest corporate acquisition), Walt Disney Co.'s $52 billion acquisition of film and television businesses from Twenty-First Century Fox Inc., and United Technologies Corp.'s $30 billion acquisition of Rockwell Collins Inc.

SOVEREIGN AND COMMONWEALTH DEBT

Unlike the previous two years, when the biggest sovereign debt stories featured Greece and Argentina, the sovereign debt focus in 2017 was on the economic and humanitarian calamity in Venezuela, which is in the throes of the worst economic crisis in its history. Beginning during the tenure of deceased President Hugo Chávez and continuing through the administration of current President Nicolás Maduro, the crisis has been marked by hyperinflation, devaluation of the nation's currency, contraction of the economy, severe unemployment, and privation. Venezuela, with some of the world's largest proven crude oil reserves, was crippled when crude oil prices plummeted in 2015. It is widely anticipated that the country will default on its $110 billion in sovereign debt absent a radical reversal of fortune.

Closer to home, another big story in 2017 involved the continuing debt crisis in Puerto Rico. The commonwealth has been struggling for several years to manage more than $144 billion in debt. A 2016 law—the Puerto Rico Oversight, Management, and Economic Stability Act ("PROMESA")—created a mechanism to implement bond debt-adjustment plans in a case comparable to chapter 9 of the Bankruptcy Code, which applies to U.S. municipalities.

On May 3, 2017, Puerto Rico's oversight board filed a Title III petition of PROMESA on behalf of the commonwealth in the largest-ever bankruptcy filing by a governmental entity in the U.S. Title III filings for several Puerto Rico instrumentalities followed shortly afterward. The filings ignited new rounds of litigation with Puerto Rico's bondholders, which collectively hold more than $74 billion in bond debt. Puerto Rico's financial crisis intensified into a humanitarian one in September 2017, when Hurricane Maria caused widespread devastation.

MARKETS, THE BITCOIN BOOM/BUBBLE, AND REBOUNDING OIL

U.S. stock markets closed out their best year since 2013, with major indices hitting a series of record highs buoyed by a combination of strong economic growth, solid corporate earnings, low interest rates, and anticipation of a corporate tax cut. The Dow Jones Industrial Average, the Standard & Poor's 500, and the NASDAQ Composite surged 25.2 percent, 19.5 percent, and 28.2 percent, respectively, during 2017.

HIGHLIGHTS OF 2017

February 8—Moody's Investors Service reports that more than $1 trillion of junk-rated corporate debt is slated to mature over the next five years, the highest such total ever recorded by the ratings firm over a five-year period, including the highest single-year volume in 2021, when $402 billion of junk-rated corporate debt is scheduled to come due.

The Dow hit 71 record highs during 2017—the most ever in a single calendar year—and finished the year just shy of 25,000. The S&P 500 posted 36 new 52-week highs, while the NASDAQ Composite recorded 81 new highs. Technology companies fueled the gains, with e-commerce giants growing in size and earnings, resulting in increased share prices for companies like Facebook Inc. and Apple Inc. Another key factor underpinning the record increase in U.S. stock prices during 2017: a surprising decline in the U.S. dollar. After years of strength, the biggest decrease for the dollar in a decade boosted corporate profitability and made exports cheaper.

The virtual currency Bitcoin went on a roller-coaster ride in 2017, fueling debate over whether the rush to invest in the volatile cryptocurrency ignited a boom or a bubble. Its price climbed from less than $1,000 apiece at the end of 2016 to nearly $20,000 in December, with sometimes enormous swings in value on a daily basis. The attraction of Bitcoin spawned many other virtual currencies, including Ripple, Ethereum, Litecoin, Dash, and even Petro, the first state-sponsored virtual currency (Venezuela).

Oil prices rebounded in 2017, bringing some prospect for relief to the embattled oil and gas industry. Crude oil hit a multiyear low just above $25 a barrel at the beginning of 2016, but closed 2017 trading above $60—gaining 12 percent on the year—for the first time in more than two years, a sign that cuts in inventories are helping to bring oil supply back in line with increasing global demand.

BUSINESS BANKRUPTCY FILINGS

According to data provided by the Administrative Office of the U.S. Courts, there were 23,157 business bankruptcy filings during CY 2017, compared to 24,114 in CY 2016. Chapter 11 filings in CY 2017 (both business and personal) totaled 7,442, up from 7,292 in CY 2016.

Ninety chapter 15 petitions were filed in CY 2017, compared to 180 in CY 2016. Eight municipal debtors filed for chapter 9 protection in CY 2017, compared to six in CY 2016.

PUBLIC COMPANY BANKRUPTCY FILINGS

Technically, the largest bankruptcy of CY 2017 was filed not by a public or private company, but by Puerto Rico, a U.S. territory. As noted, Puerto Rico filed a petition under PROMESA on May 3, 2017, to restructure its $74 billion in public bond debt in the largest-ever bankruptcy filing by a governmental entity in the U.S.

According to data provided by New Generation Research, Inc.'s BankruptcyData.com, the uptick in bankruptcy filings for "public companies" (defined as companies with publicly traded stock or debt) since 2014 reversed in 2017, which saw a 27 percent reduction in filings, marking a sharp departure from the respective 25 percent and 48 percent increases seen in the previous two years.

The number of public company bankruptcy filings in CY 2017 was 71, compared to 99 in CY 2016. At the height of the Great Recession, 138 public companies filed for bankruptcy in CY 2008 and 211 in CY 2009.

The combined asset value of the 71 public companies that filed for bankruptcy in CY 2017 was $106.9 billion, compared to $104.6 billion in 2016. By contrast, the 138 public companies that filed for bankruptcy in 2008 had prepetition assets valued at $1.16 trillion in aggregate.

HIGHLIGHTS OF 2017

March 2—Bloomberg News reports that U.S. states and local governments have about $2 trillion less than what they need to cover retirement benefits, the result of investment losses, inadequate contributions, and perks granted in boom times.

As in 2016, companies in the oil and gas, energy, and mining industries led the charge in public company bankruptcy filings in 2017, with no fewer than 21, or 30 percent, of the year's 71 public bankruptcies, and four of the 10 largest chapter 11 filings of 2017 (compared to eight in 2016).

Although only one of the 10 largest public company bankruptcy filings in 2017 (and two of the 20 largest) came from the retail sector, 2017 was an especially bad year for the industry—so much so that the frequency of failures has been dubbed the "Retail Apocalypse." Amid declining foot traffic and the rise of e-commerce giants like Amazon, bankruptcies among U.S. retailers reached a six-year high in 2017. Fifty public and private retailers filed for bankruptcy in 2017, including retail giants like Toys "R" Us, RadioShack (for the second time), and Payless ShoeSource. According to S&P Global, this represents the highest number of retail bankruptcies since 2011, when 59 companies filed for protection. Overall, the retail sector saw the second-largest volume of public company bankruptcy filings in 2017, with 11 percent of the total.

Mall-based stores and "big-box" stores have been most affected by the retail crisis. According to real estate research firm CoStar, big-box stores accounted for 43 percent, or about 43 million square feet, of shuttered U.S. retail space in 2017. Of the 50 retail bankruptcies, 21 occurred at major retailers. Other companies to file included Wet Seal, hhgregg, rue21, Gander Mountain, American Apparel, Eastern Outfitters, Perfumania, Gordmans, Gymboree, True Religion, Vitamin World, and Charming Charlie. Several retail bankruptcies in 2017 were repeat ("chapter 22") chapter 11 filings.

Other sectors with a significant number of public filings in 2017 included healthcare and medical (9 percent), banking and finance (9 percent), and computers and software (7 percent).

The year 2017 added 22 public company names to the billion-dollar bankruptcy club (measured by value of assets), compared to 25 in 2016. However, the largest public company bankruptcy filing of 2017—global offshore drilling services provider Seadrill Limited, with $21.6 billion in assets—was only the 31st largest public company bankruptcy filing in history.

Twenty-five public and private companies with assets valued at more than $1 billion exited from bankruptcy in 2017—including 10 of the 22 billion-dollar public companies that filed in 2017. Continuing a trend begun in 2012, many more of these companies (23) reorganized than were liquidated or sold.

Seventeen, or 24 percent, of the 71 public company bankruptcy filings in 2017 were prenegotiated or prepackaged chapter 11 cases.

BANKS AND PENSION INSURANCE

The Federal Deposit Insurance Corporation shuttered eight banks in 2017, compared to five in 2016. By comparison, there were 140 bank failures in 2009 and 157 in 2010, during the height and immediate aftermath of the Great Recession.

In its annual report, the Pension Benefit Guaranty Corporation (the "PBGC"), which insures pensions for approximately 40 million Americans, reported that its overall deficit decreased from $79.4 billion in FY 2016 to $76 billion in FY 2017. However, the deficit in the PBGC's multi-employer program increased by more than $6 billion in FY 2017 to $65.1 billion, a new all-time high. The PBGC distributed $141 million in pension insurance payments to 72 multi-employer plans in 2017, as 30,000 newly retired workers became eligible for benefits. The agency has now run shortfalls in its multi-employer program for 15 straight years. In its most recent Projections Report, the PBGC estimated that there is a 50 percent chance that its multi-employer program will run out of money by the end of FY 2025, and there is considerable risk that it will run out even sooner without congressional action.

DISTRESSED DEBT AND BANKRUPTCY RESTRUCTURING

According to Thomson Reuters, completed distressed debt and bankruptcy restructuring activity during 2017 (both in- and out-of-court) totaled $282.2 billion globally, an 18 percent decrease from 2016. The number of completed deals also decreased, with 302 deals during 2017, compared to 350 during 2016. Deals involving companies in the Energy & Power sector accounted for 28 percent of the total, while companies in the Industrials and the Government & Agencies sectors followed, capturing market shares of 13 percent and 11 percent, respectively.

U.S. completed deal activity totaled $114.4 billion during 2017, a 38 percent decrease from 2016. There were 106 restructuring transactions completed in the U.S. in 2017, 20 fewer deals than in 2016. Deals involving Energy & Power sector companies accounted for 34 percent of the U.S. debt restructuring market, while Media & Entertainment sector company deals followed, with 17 percent of the total.

HIGHLIGHTS OF 2017

March 29—In one of the most consequential diplomatic events in Britain since World War II, U.K. Prime Minister Theresa May sends formal notice of the country's intention to withdraw from the European Union, starting a tortuous two-year divorce littered with pitfalls.

TOP 10 BANKRUPTCIES OF 2017

Continuing a trend reflecting the persistent vulnerability of oil and gas producers to weakened worldwide demand and oil prices that, despite breaking the elusive $60-per-barrel mark at year-end, have been chronically depressed, four of the 10 companies on the Top 10 List of "public company" (defined as a company with publicly traded stock or debt) bankruptcies of 2017, and nearly half of the Top 20, came from the oil and gas industry (compared to nine of the Top 10 bankruptcies in 2016). Three companies on the Top 10 List were in the banking and financial services industry, whereas the retail, telecom, and utilities sectors each had one representative. Each company gracing the Top 10 List for 2017 entered bankruptcy with assets valued at approximately $3 billion. Six of the companies on the Top 10 List filed prepackaged or prenegotiated chapter 11 cases.

Hamilton, Bermuda-headquartered, global offshore drilling services provider ***Seadrill Limited*** ("Seadrill") grabbed the brass ring for 2017 when it filed for chapter 11 protection on September 12, 2017, in the Southern District of Texas, listing $21.6 billion in assets and $11.6 billion in debt. Concurrent with its chapter 11 filing, Seadrill announced its entry into a prenegotiated restructuring agreement with more than 97 percent of its secured bank lenders, approximately 40 percent of its bondholders, and a consortium of investors led by its largest shareholder. Under the agreement, Seadrill will be recapitalized with $860 million of secured notes and $200 million of equity. Seadrill's secured lenders agreed to defer the maturities of $5.7 billion in secured credit facilities and, assuming unsecured creditors support the plan, Seadrill's $2.3 billion in unsecured bonds and other unsecured claims will be converted into approximately 15 percent of the post-restructuring equity. Holders of Seadrill common stock will receive approximately 2 percent of the post-restructured equity. Seadrill was forced to file for chapter 11 protection due to maturing debts and a downturn in the offshore drilling business.

Walter Investment Management Corp. ("Walter Investment"), a Fort Washington, Pennsylvania-based originator and servicer of residential mortgage loans that operates through Ditech Financial LLC ("Ditech") and Reverse Mortgage Solutions Inc. ("Reverse Mortgage"), defaulted into the No. 2 spot on the Top 10 List for 2017 when it filed a prepackaged chapter 11 case on November 30, 2017, in the Southern District of New York with $16.8 billion in assets and $16.5 billion in debt. The plan, which was confirmed by the bankruptcy court on January 18, 2018, reduced Walter Investment's debt by $806 million and turned ownership of most of the company over to bondholders. From 2010 through 2015, Walter Investment expanded its servicing and originations businesses by acquiring Reverse Mortgage and Security One Lending Inc. Debt incurred in connection with those deals contributed to the company's financial problems, including a liquidity crunch due to pressures from lenders. Management has also been trying to cut costs while shifting Walter Investment's business model toward a "fee for service" model in lieu of heavy investment in mortgage servicing rights. Ditech and Reverse Mortgage did not file for bankruptcy.

HIGHLIGHTS OF 2017

May 3—The oversight board established for Puerto Rico under the Puerto Rico Oversight, Management, and Economic Stability Act ("PROMESA") files a petition under Title III of PROMESA to restructure the commonwealth's $74 billion in public bond debt, in the largest bankruptcy case ever filed by a U.S. governmental entity.

Another victim of the retail malaise that dragged more than 50 companies into bankruptcy in 2017 and created mayhem in the toy industry, Wayne, New Jersey-based ***Toys "R" Us, Inc.*** ("Toys 'R' Us") played into the No. 3 spot on the Top 10 List for 2017 when it filed for chapter 11 protection on September 19, 2017, in the Eastern District of Virginia, listing $6.9 billion in assets and $8 billion in debt. Toys "R" Us, the largest toy retailer in the U.S., with approximately 1,600 stores, struggled with a rising debt load and competition from rivals Amazon, Wal-Mart, and Target. The bankruptcy filing was triggered when vendors and suppliers tightened terms with the company ahead of the key holiday selling season, which accounted for 40 percent of its $11.5 billion in revenue in 2016. The company's Canadian subsidiary also sought protection under the Companies' Creditors Arrangement Act in the Ontario Superior Court of Justice.

California and New Jersey-based multinational technology company ***Avaya Inc.*** ("Avaya") dialed into the No. 4 spot on the Top 10 List for 2017 when it filed for chapter 11 protection on January 19, 2017, in the Southern District of New York, listing $6.8 billion in assets and $10.2 billion in debt. Avaya filed for bankruptcy on the same day it revealed it had rejected a $3.9 billion bid for its call center software business, citing the filing as a "critical step" in its shift in focus from telecommunications hardware to software and related services. Avaya emerged from bankruptcy on December 15, 2017, after the bankruptcy court confirmed a chapter 11 plan under which first-lien lenders and the Pension Benefit Guaranty Corporation swapped their debt for substantially all of Avaya's new equity.

The gusher of oil and gas sector bankruptcies continued when Luxembourg-based floating-rig drilling contractor ***Pacific Drilling S.A.*** ("Pacific Drilling") splashed into the No. 5 spot on the Top 10 List for 2017 by filing for chapter 11 protection on November 12, 2017, in the Southern District of New York, listing $6 billion in assets and $3.3 billion in debt. Like other drilling companies, Pacific Drilling has been plagued by the global downturn in the oil and gas industry.

The No. 6 berth in the Top 10 List for 2017 belonged to New Orleans-based offshore oil sector services company ***Tidewater Inc.*** ("Tidewater"), which filed a prepackaged chapter 11 case on May 17, 2017, in the District of Delaware, listing $5 billion in assets and $2.3 billion in debt. Tidewater operates a fleet of more than 250 seagoing vessels that support the oil drilling industry with services which include towing, anchor handling, supply and personnel transportation, and specialized services such as pipe and cable laying. The company is yet another victim of the dramatic drop in oil prices that has sent many companies to the harbor of chapter 11 protection. Many Tidewater customers are still operating at reduced capacity and spending less on the company's products and services. On July 13, 2017, the bankruptcy court confirmed Tidewater's prepackaged plan, which provides for a $2 billion debt-for-equity swap.

Chesterbrook, Pennsylvania-based ***J.G. Wentworth Inc.*** ("J.G. Wentworth"), a financial services firm and buyer of deferred payments in the form of annuities, structured settlements, life insurance policies, and other hard-to-sell assets, cashed out into the No. 7 spot on the Top 10 List for 2017 when it filed a prepackaged chapter 11 case on December 12, 2017, in the District of Delaware with $5 billion in both assets and debt. J.G. Wentworth faced heavy debt loads and increased competition. The bankruptcy court confirmed a chapter 11 plan for J.G. Wentworth on January 17, 2018. The plan eliminates $450 million in debt from the company's balance sheet through a debt-for-equity swap with lenders. J.G. Wentworth's operating units, which include a mortgage-lending business, were not part of the bankruptcy filing. It was J.G. Wentworth's second chapter 11 filing in eight years.

Houston, Texas-based power producer ***GenOn Energy, Inc.*** ("GenOn") fizzled into the No. 8 spot on the Top 10 List for 2017 when it filed a prenegotiated chapter 11 case on June 14, 2017, in the Southern District of Texas with $4.9 billion in assets and $4.5 billion in debt. Under the plan, which was confirmed by the bankruptcy court on December 12, 2017, GenOn's parent company NRG Energy Inc. ("NRG"), the largest independent U.S. power producer, ceded control of GenOn to the company's bondholders. Profits at NRG and GenOn have suffered in recent years from weak demand and plunging electricity prices brought on by cheap natural gas.

HIGHLIGHTS OF 2017

June 1—President Trump announces that the U.S. will withdraw from the Paris climate accord, an agreement within the U.N. Framework Convention on Climate Change dealing with greenhouse gas emissions mitigation, adaptation, and finance which was negotiated by representatives of 196 nations in December 2015. Withdrawal could take nearly four years to complete, meaning a final decision would be up to the American voters in the next presidential election.

New Orleans-based ***First NBC Bank Holding Company*** ("FNBC Holding") failed into the No. 9 spot on the Top 10 List for 2017 when it filed a liquidating chapter 11 case on May 11, 2017, in the Eastern District of Louisiana. FNBC Holding was the parent company of First NBC Bank, a New Orleans metropolitan area and Florida panhandle nonmember bank closed by the Louisiana Office of Financial Institutions on April 28, 2017, and subsequently placed into receivership with the Federal Deposit Insurance Corporation. As a result of First NBC Bank's closure, FNBC Holding's asset values fell from $4.7 billion reported in its most recent 10-K filing to no more than $10 million listed in its bankruptcy filings.

Houston, Texas-based ***Memorial Production Partners LP*** ("MPP") wildcatted into the final spot on the Top 10 List for 2017 when it filed a prepackaged chapter 11 case on January 16, 2017, in the Southern District of Texas with $2.9 billion in assets and $2.3 billion in debt. MPP, through its subsidiary, Memorial Production Operating LLC, engaged in the acquisition, development, exploitation, and production of oil and natural gas properties in Texas, Louisiana, Colorado, Wyoming, and offshore Southern California. Now known as Amplify Energy Corp., MPP emerged from bankruptcy on May 4, 2017, as a corporation, rather than a master limited partnership, after the bankruptcy court confirmed its prepackaged plan, which reduced the company's debt burden by approximately $1.3 billion.

Other notable debtors (public, private, and foreign) in 2017 included the following:

The Commonwealth of Puerto Rico, which filed a petition on May 3, 2017, in the District of Puerto Rico under Title III of PROMESA, legislation patterned on chapters 9 and 11 of the Bankruptcy Code, for the purpose of restructuring $74 billion in public bond debt, in what would be the largest restructuring ever by a governmental entity in the U.S.

Houston, Texas-based oil and natural gas property developer ***Vanguard Natural Resources LLC***, which filed a prenegotiated chapter 11 case in the Southern District of Texas on February 1, 2017, and emerged from bankruptcy on August 1, 2017, after the court confirmed a plan that eliminated $708 million in debt through a debt-for-equity swap.

HIGHLIGHTS OF 2017

August 25—Category 4 Hurricane Harvey hits Texas, setting off the most devastating and costly natural-disaster year in U.S. history and ultimately affecting 13 million people in Texas, Louisiana, Mississippi, Tennessee, and Kentucky.

Privately held ***Takata Americas***, a U.S. unit of Japanese airbag maker Takata Corporation, which filed for chapter 11 protection on June 25, 2017, in the District of Delaware to manage more than 40 million recalls for defective airbag inflators and thousands of related lawsuits. Takata Americas hopes to sell substantially all of its assets in bankruptcy for $1.6 billion to competitor Key Safety Systems Inc., with some of the sale proceeds going toward the $825 million the company owes the U.S. Department of Justice in connection with the company's $1 billion criminal plea deal in 2016.

Atlanta, Georgia-based radio giant ***Cumulus Media Inc.***, owner and operator of 446 radio stations across 90 U.S. media markets, as well as approximately 8,000 stations affiliated with its Westwood One platform, which filed a prenegotiated chapter 11 case on November 29, 2017, in the Southern District of New York to deal with a significant debt overhang left by years of underperformance and stiff competition from its rival, iHeartMedia Inc.

Homer City Generation, L.P., a GE Capital-owned power plant operator that owns a 1,884-megawatt coal-fired plant in Pennsylvania, which filed its second prepackaged chapter 11 case in four years on January 11, 2017, in the District of Delaware to slash $600 million in debt by means of a debt-for-equity swap with noteholders and emerged from bankruptcy on April 6, 2017.

Air Berlin PLC & Co. Luftverkehrs KG, Germany's second-largest airline (after Lufthansa), whose foreign representative filed a chapter 15 petition on August 8, 2017, seeking recognition of the budget airline's German insolvency proceedings and protection of the company's U.S. assets from seizure by creditors.

Privately held 1,300-store children's clothing retailer ***Gymboree Corp.***, which filed a prenegotiated chapter 11 case on June 11, 2017, in the Eastern District of Virginia to restructure more than $1.1 billion in debt incurred during a 2010 leveraged buyout by means of a debt-for-equity swap and emerged from bankruptcy on September 29, 2017.

M&G USA Corp., the U.S. chemicals business of Italian plastics multinational Mossi Ghisolfi Group, which filed for chapter 11 protection on October 31, 2017, in the District of Delaware together with several affiliates due to a liquidity problem caused by overruns at an unfinished Corpus Christi, Texas, factory for making resins used in drink bottles (the world's largest facility for manufacturing polyethylene terephthalate (PET) resin), after its ultimate parent filed a creditor arrangement proceeding in Italy on October 17, 2017.

Privately held Florida-based ***21st Century Oncology Holdings, Inc.***, one of the largest integrated U.S. networks of cancer treatment centers and affiliated physicians, with 145 clinics in 16 states. The company filed a prenegotiated chapter 11 case on May 25, 2017, in the Southern District of New York to slash $550 million in debt amid declining profits due to lower reimbursement rates and higher denials of coverage, changes in Medicare radiation payments, the need to comply with electronic health records regulations, uncertainty in the health insurance market, and allegations of civil and criminal misconduct. The court confirmed the chapter 11 plan on January 11, 2018.

Georgia-Pacific affiliate ***Bestwall LLC***, a former manufacturer of asbestos-containing joint compound used to seal drywall, which filed for chapter 11 protection on November 2, 2017, in the Western District of North Carolina. In the filing, the company stated its intention to establish a chapter 11 plan trust to manage more than 62,000 asbestos claims pending against it and deal with the financial burden that resulted from being named a defendant in approximately 70 to 80 percent of all mesothelioma cases filed in the U.S. each year.

Toshiba Corporation subsidiary ***Westinghouse Electric Company***, the renowned provider of nuclear power plant products and services that was instrumental in the development of nuclear energy and the electric grid itself. It filed for chapter 11 protection on March 29, 2017, in the Southern District of New York as the company's corporate parent scrambled to stanch huge losses stemming from Westinghouse's troubled nuclear construction projects in the American South amid slowing demand for electricity, tumbling prices for natural gas, safety concerns regarding nuclear power, and rapidly maturing alternative-energy sources like wind and solar power.

NOTABLE BUSINESS BANKRUPTCY RULINGS IN 2017

APPEALS—MOOTNESS

In *Beem v. Ferguson (In re Ferguson)*, 683 Fed. Appx. 924, 2017 BL 101650 (11th Cir. Mar. 30, 2017), the U.S. Court of Appeals for the Eleventh Circuit addressed the distinction between constitutional mootness (a jurisdictional issue that precludes court review of an appeal) and equitable mootness (which allows a court to exercise its discretion to refuse to hear an appeal under certain circumstances). The Eleventh Circuit ruled that an appeal from an order confirming a chapter 11 plan was not constitutionally moot because an "actual case or controversy" existed. Although the court declined to dismiss the appeal under the doctrine of equitable mootness, it ultimately held on the merits that the district court did not err in dismissing the appeal.

In *Brown v. Ellmann (In re Brown)*, 851 F.3d 619 (6th Cir. 2017), the U.S. Court of Appeals for the Sixth Circuit expanded the ability of parties to appeal a bankruptcy court's approval of a sale of assets notwithstanding the statutory mootness rule set forth in section 363(m) of the Bankruptcy Code. While a majority of courts have adopted a per se rule automatically mooting such appeals where there is no stay of the order approving the sale, the Sixth Circuit joined the Third and Tenth Circuits in requiring proof that the reviewing court is unable to "grant effective relief without impacting the validity of the sale."

AVOIDANCE ACTIONS—EXTRATERRITORIALITY OF AVOIDANCE LAWS

In *Spizz v. Goldfarb Seligman & Co. (In re Ampal-Am. Israel Corp.)*, 562 B.R. 601 (Bankr. S.D.N.Y. 2017), the court, disagreeing with other courts both within and outside its own district, ruled that the avoidance provisions of the Bankruptcy Code do not apply outside the U.S. because, on the basis of the language and context of the provisions, Congress did not intend for them to apply extraterritorially.

In *Emerald Capital Advisors Corp. v. Bayerische Motoren Werke Aktiengesellschaft (In re FAH Liquidating Corp.)*, 572 B.R. 117 (Bankr. D. Del. 2017), the court held to the contrary. It ruled that Congress intended section 548 of the Bankruptcy Code (authorizing avoidance of fraudulent transfers) to apply extraterritorially but that a liquidating trustee's separate avoidance claims under section 544(b) must be dismissed because they were governed by German law.

AVOIDANCE ACTIONS—INTENTIONAL FRAUDULENT TRANSFERS

In *Kirschner v. FitzSimons (In re Tribune Co. Fraudulent Conveyance Litig.)*, 2017 BL 5202 (S.D.N.Y. Jan. 6, 2017), the district court held that, in the context of an action to avoid an intentionally fraudulent transfer under section 548 of the Bankruptcy Code: (i) when determining whether a debtor corporation had the intent to hinder, delay, or defraud its creditors, courts must examine the intent of the corporate actors who effectuated the transaction on behalf of the corporation; (ii) the intent of a debtor corporation's officers can be imputed to the debtor only if the officers were in a position to control the disposition of the debtor's property; and (iii) a chapter 11 plan litigation trustee failed to plead facts sufficient to allege that the debtor's corporate actors possessed the intent to hinder, delay, or defraud creditors through a leveraged buyout.

HIGHLIGHTS OF 2017

September 6—Category 5 Hurricane Irma, among the most powerful Atlantic hurricanes, with 185-mile-per-hour winds, makes landfall in the Caribbean, then turns toward Florida.

AVOIDANCE ACTIONS—PREFERENTIAL TRANSFERS

In *Schoenmann v. Bank of the West (In re Tenderloin Health)*, 849 F.3d 1231 (9th Cir. 2017), a divided panel of the U.S. Court of Appeals for the Ninth Circuit addressed as a matter of apparent first impression whether a bankruptcy court can consider hypothetical preference actions in analyzing whether a creditor-transferee in preference litigation received more than it would have received in a hypothetical chapter 7 liquidation, as required by section 547(b)(5) of the Bankruptcy Code. The majority ruled that a court may account for hypothetical preference actions against the creditor in applying this "greater amount test" when "factually warranted, supported by appropriate evidence, and so long as the hypothetical preference action would not result in a direct conflict with another section of the Bankruptcy Code."

AVOIDANCE ACTIONS—RECOVERY OF TRANSFERS

Courts disagree as to whether the amount that a bankruptcy trustee or chapter 11 debtor-in-possession can recover in fraudulent transfer avoidance litigation should be capped at the total amount of unsecured claims against the estate. The U.S. Bankruptcy Court for the District of Delaware weighed in on this issue in *PAH Litigation Trust v. Water Street Healthcare Partners, L.P. (In re Physiotherapy Holdings, Inc.)*, 2017 BL 397882 (Bankr. D. Del. Nov. 1, 2017). Noting the absence of any guidance on the question from the U.S. Court of Appeals for the Third Circuit, the bankruptcy court ruled that, unlike most state fraudulent transfer laws, which limit a creditor's recovery to the amount of its unpaid claim against the transferor, section 550 of the Bankruptcy Code imposes no such limitation on the estate's recovery. A more detailed discussion of *Physiotherapy* can be found elsewhere in this issue.

HIGHLIGHTS OF 2017

September 7—Equifax, one of the three major consumer credit-reporting agencies, announces that hackers gained access to company data which potentially compromised sensitive information for 143 million Americans, including Social Security numbers and driver's license numbers.

BANKRUPTCY ASSET SALES—CHAPTER 15

In 2013, the U.S. Bankruptcy Court for the Southern District of New York ruled that a chapter 15 debtor's sale of claims against Bernard Madoff's defunct brokerage company was not subject to review as an asset sale under section 363(b) of the Bankruptcy Code. The U.S. Court of Appeals for the Second Circuit vacated that decision in 2014 and remanded the case to the bankruptcy court, with specific instructions to subject the sale to review under section 363. In October 2015, the bankruptcy court granted a motion by the chapter 15 debtor's foreign representative to abandon the sale due to intervening developments that made the claims more valuable. After conducting a section 363(b) analysis, the court held that the liquidator of the debtor's estate should be permitted either to collect on distributions made in respect of the claims or to sell them at a much higher price. After the district court affirmed that ruling on appeal, the Second Circuit affirmed the decisions below in *Farnum Place, LLC v. Krys (In re Fairfield Sentry Ltd.)*, 690 Fed. Appx. 761, 2017 BL 169478 (2d Cir. May 22, 2017), *cert. denied*, 199 L. Ed. 2d 127 (U.S. 2017).

BANKRUPTCY ASSET SALES—FREE AND CLEAR

Courts disagree as to whether the rights of a lessee or sublessee under section 365(h)(1) of the Bankruptcy Code (giving the nondebtor lessee, upon rejection of the lease, the option to retain its rights under the lease for the balance of the lease term) are effectively extinguished if the leased real property is sold free and clear of any "interest" under section 363(f). Until 2017, only one court of appeals had weighed in on this question. In *Precision Industries, Inc. v. Qualitech Steel SBQ*, 327 F.3d 537 (7th Cir. 2003), the Seventh Circuit articulated what has become the minority position among all courts on this issue, holding that a real property lease can be extinguished in a free-and-clear sale of the property under section 363(f). However, in *Pinnacle Rest. at Big Sky, LLC v. CH SP Acquisitions, LLC (In re Spanish Peaks Holding II, LLC)*, 862 F.3d 1148 (9th Cir. 2017), the Ninth Circuit also adopted this position, indicating that the majority rule may be eroding.

BANKRUPTCY TRUSTEES AND ESTATE REPRESENTATIVES

Named for the decision in *Barton v. Barbour*, 104 U.S. 126 (1881), the Barton Doctrine requires permission of the appointing forum to be obtained by any party wishing to commence litigation in a nonappointing forum against a trustee for the acts done in the trustee's official capacity and within the trustee's authority as a court officer. Although originally applicable to litigation against receivers, the doctrine has long been applied to bankruptcy trustees as well. However, courts sometimes disagree as to whether the Barton Doctrine protects estate representatives other than bankruptcy trustees. In *MF Glob. Holdings Ltd. v. Allied World Assurance Co. (In re MF Glob. Holdings Ltd.)*, 562 B.R. 866 (Bankr. S.D.N.Y. 2017), *leave to appeal denied*, 2017 BL 225702 (S.D.N.Y. June 28, 2017), the bankruptcy court, noting that the Second Circuit has not articulated a test for determining the application of the Barton Doctrine to parties other than a receiver or trustee, ruled that the doctrine applied to the court-appointed administrator of the debtors' confirmed chapter 11 plan. The court held that certain of the debtors' insurers violated the doctrine by commencing litigation in non-U.S. courts.

CHAPTER 11 PLANS—IMPAIRMENT

In *In re Ultra Petroleum Corp.*, 575 B.R. 361 (Bankr. S.D. Tex. 2017), *motion for direct appeal granted*, No. 17-90039 (5th Cir. Dec. 19, 2017), the U.S. Bankruptcy Court for the Southern District of Texas ruled that certain private-placement noteholders were entitled to receive a "make-whole" premium in excess of $200 million under a chapter 11 plan which rendered the noteholders' claims unimpaired. The ruling is significant because the court determined that: (i) a "model form" make-whole provision triggered by a bankruptcy filing created an enforceable liquidated damages claim, an issue with respect to which there have been conflicting decisions (*compare Del. Tr. Co. v. Energy Future Intermediate Holding Co. LLC (In re Energy Future Holdings Corp.)*, 842 F.3d 247 (3d Cir. 2016) (reversing lower court rulings disallowing the claims of noteholders for make-whole premiums allegedly due under public indentures) *with Momentive Performance Materials Inc. v. BOKF, NA (In re MPM Silicones, L.L.C.)*, 874 F.3d 787 (2d Cir. 2017) (upholding the lower courts' denial of the noteholders' make-whole claim)); and (ii) the chapter 11 debtors must pay the make-whole amount in full to render the noteholders' claims "unimpaired."

HIGHLIGHTS OF 2017

September 8—For the first time in its history, the U.S. federal government reaches (and surpasses) $20 trillion in outstanding debt.

CHAPTER 11 PLANS—SENIOR CLASS GIFTING

In *Hargreaves v. Nuverra Envtl. Sols., Inc. (In re Nuverra Envtl. Sols., Inc.)*, 2017 BL 271460 (D. Del. Aug. 3, 2017), the U.S. District Court for the District of Delaware denied a motion for a stay pending appeal of a bankruptcy court order (*In re Nuverra Envtl. Sols.*, No. 17-10949 (Bankr. D. Del. July 24, 2017)) confirming a chapter 11 plan despite disparate "gifted" consideration between classes of general unsecured creditors. The bankruptcy court determined that the gift from secured creditors to certain classes of general unsecured creditors, but not the class of unsecured bondholders, created a rebuttable presumption of unfair discrimination but did not violate the absolute priority rule. According to the bankruptcy court, because the proposed classification scheme was necessary to foster reorganization and maintain ongoing business relationships, the plan was confirmable. The district court did not fault the bankruptcy court's reasoning in denying a stay pending appeal.

HIGHLIGHTS OF 2017

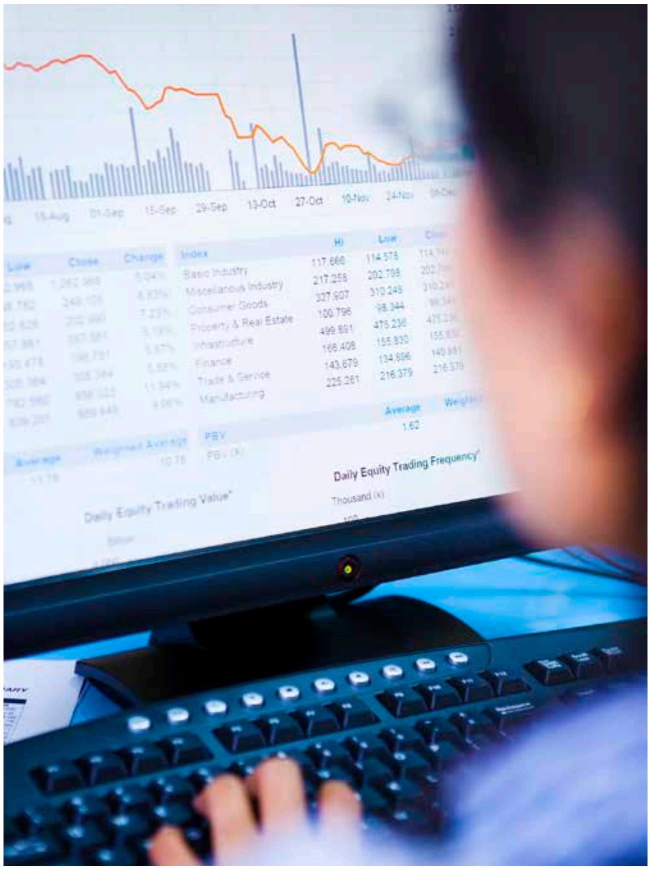
September 19—Category 4 Hurricane Maria makes landfall in Puerto Rico, causing widespread devastation.

CHAPTER 11 PLANS—THIRD-PARTY RELEASES

Many chapter 11 plans include nonconsensual third-party releases that preclude certain nondebtors from pursuing claims against other nondebtors as part of a restructuring deal in which such releases are a quid pro quo for financial contributions made by such parties as prepetition lenders or old equity holders. However, bankruptcy and appellate courts disagree as to whether such nonconsensual plan releases should be permitted, due to, among other things, concerns regarding the scope of a bankruptcy court's subject matter jurisdiction and constitutional authority. Several court rulings handed down in 2017 addressed these concerns.

For example, In *In re Midway Gold US, Inc.*, 575 B.R. 475 (Bankr. D. Colo. 2017), the court held that, although Tenth Circuit law does not categorically forbid third-party releases in chapter 11 plans, it lacked jurisdiction to "adjudicate" plan releases of claims against nondebtors because the underlying claims should not be considered part of the proceedings to confirm the plan and were neither within its "core" nor "related to" jurisdiction. In addition, in *In re SunEdison, Inc.*, 2017 BL 401968 (Bankr. S.D.N.Y. Nov. 8, 2017), the court ruled that, as a matter of contract law, merely implied consent for plan releases is insufficient, and it lacked subject matter jurisdiction to approve releases which were overly broad.

By contrast, in *In re Millennium Lab Holdings II, LLC*, 2017 BL 354864 (Bankr. D. Del. Oct. 3, 2017), the U.S. Bankruptcy Court for the District of Delaware ruled that it had the constitutional authority to grant nonconsensual third-party releases in an order confirming a chapter 11 plan. In so ruling, the court rejected an argument made by a group of creditors that a provision in the plan releasing racketeering claims against the debtor's former shareholders was prohibited by the U.S. Supreme Court's ruling in *Stern v. Marshall*, 564 U.S. 462 (2011),



which limited claims that can be finally adjudicated by a bankruptcy judge.

CHAPTER 11 PLANS—TREATMENT OF SECURED CLAIMS

In *Momentive Performance Materials Inc. v. BOKF, NA (In re MPM Silicones, L.L.C.)*, 874 F.3d 787 (2d Cir. 2017), the U.S. Court of Appeals for the Second Circuit affirmed a number of lower court rulings on hot-button bankruptcy issues, including allowance (or, in this case, denial) of a claim for a "make-whole" premium and contractual subordination of junior notes. However, the Second Circuit disagreed with the lower courts on the appropriate interest rate for replacement notes ("cramdown notes") issued to secured creditor classes that voted to reject a chapter 11 plan. In doing so, it joined the Sixth Circuit in requiring cramdown notes to bear a market rate of interest if an efficient market exists; if no such market exists, the notes may bear interest at the typically below-market formula rate.

In *First Southern Nat'l Bank v. Sunnyslope Hous. LP (In re Sunnyslope Hous. LP)*, 2017 BL 216965 (9th Cir. June 23, 2017), *cert. denied*, No. 17-455 (U.S. Jan. 8, 2018), the U.S. Court of Appeals for the Ninth Circuit held en banc that, in determining whether a chapter 11 plan may be confirmed over the objection of a secured creditor, the creditor's collateral must be valued in accordance with the debtor's intended use of the property, even if the property could be sold for more in a foreclosure sale because of the existence of restrictive covenants. According to the Ninth Circuit, this conclusion was mandated by section 506(a)(1) of the Bankruptcy Code and U.S. Supreme Court precedent.

CLAIMS—ALLOWANCE, PRIORITY, AND SUBORDINATION

Section 510(b) of the Bankruptcy Code provides a mechanism designed to preserve the creditor/shareholder risk allocation paradigm by categorically subordinating most types of claims asserted against a debtor by equity holders in respect of their equity holdings. However, courts do not always agree on the scope of this provision in attempting to implement its underlying policy objectives. In *In re Lehman Brothers Holdings Inc.*, 855 F.3d 459 (2d Cir. 2017), the U.S. Court of Appeals for the Second Circuit reaffirmed the broad scope of section 510(b), ruling that breach-of-contract claims asserted by employees who were awarded restricted stock units entitling them to common stock were properly subordinated under section 510(b).

HIGHLIGHTS OF 2017

November 2—President Trump nominates Jerome H. Powell to chair the U.S. Federal Reserve, bypassing Janet L. Yellen for a second term but selecting a replacement who is expected to stay the course on monetary policy if the economy continues its steady growth.

Section 503(b)(9) of the Bankruptcy Code gives vendors an administrative expense priority claim for the value of goods "received by the debtor" during the 20-day period before the bankruptcy petition date. In *In re World Imports, Ltd.*, 862 F.3d 338 (3d Cir. 2017), the U.S. Court of Appeals for the Third Circuit considered section 503(b)(9) and its relationship with another important vendor protection—reclamation rights under section 546 and related nonbankruptcy law. The Third Circuit reversed lower court rulings that the phrase "received by the debtor" in section 503(b)(9) includes constructive possession of goods at the time title is transferred, in addition to physical possession of the goods. Subsequently, in *In re SRC Liquidation, LLC*, 573 B.R. 537 (Bankr. D. Del. 2017), the U.S. Bankruptcy Court for the District of Delaware relied on *World Imports* in ruling that goods drop-shipped directly to a debtor's customers were not "received by the debtor" for purposes of section 503(b)(9).

HIGHLIGHTS OF 2017

November 5—The Paradise Papers are released. The latest in a series of leaks made public by the International Consortium of Investigative Journalists, the Papers shed light on the trillions of dollars moving through offshore tax havens.

CROSS-BORDER BANKRUPTCIES—COMI MIGRATION

With the significant increase in cross-border bankruptcy filings in the 43 nations or territories that have adopted the UNCITRAL Model Law on Cross-Border Insolvency, including the U.S., the incidence of "COMI migration"—the shifting of a debtor's "center of main interests" ("COMI") to a country with more favorable insolvency laws—has also increased. As demonstrated by a ruling handed down by the U.S. Bankruptcy Court for the Southern District of New York, COMI migration may be justified and legitimate under circumstances that do not represent bad-faith "COMI manipulation." In *In re Ocean Rig UDW Inc.*, 570 B.R. 687 (Bankr. S.D.N.Y. 2017), the court ruled that scheme of adjustment proceedings pending in the Cayman Islands (the "Caymans") should be recognized as "foreign main proceedings" under chapter 15 of the Bankruptcy Code, even though the debtors' COMI had been shifted to the Caymans less than a year before the proceedings were commenced, because the country in which the debtors' COMI had previously been located did not have a law permitting corporate restructurings.

CROSS-BORDER BANKRUPTCIES—CHAPTER 15 RECOGNITION

Pursuant to sections 101(23) and 1502 of the Bankruptcy Code, a "foreign main proceeding" is a bankruptcy, insolvency, or equivalent proceeding commenced in the jurisdiction containing the debtor's COMI, whereas "foreign nonmain proceeding[s]" may be commenced in jurisdictions where the debtor maintains merely an "establishment." Section 1517(a) provides that a foreign proceeding "shall" be recognized by a U.S. bankruptcy court if certain stated requirements are met. Section 1517(d) authorizes a bankruptcy court to modify or terminate chapter 15 recognition upon a showing that the grounds for recognition "were fully or partially lacking or have ceased to exist."

In *In re Oi Brasil Holdings Coöperatief U.A.*, 2017 BL 432505 (Bankr. S.D.N.Y. Dec. 4, 2017), *notice of appeal filed*, No. 17-11888 (Bankr. S.D.N.Y. Jan. 8, 2018), the U.S. Bankruptcy Court for the Southern District of New York ruled that section 1517(d), rather than section 1517(a), supplied the standard for determining whether a U.S. bankruptcy court should recognize a debtor's Dutch insolvency proceeding filed after the court had already recognized a Brazilian insolvency proceeding commenced by the debtor and members of its Brazilian-based corporate group.

Applying section 1517(d), the court held that the grounds for granting recognition of the Brazilian proceeding were not "fully or partially lacking" and had not "ceased to exist." Relying on its prior ruling that the debtor was affiliated with the Brazilian corporate group, the court effectively engaged in a "group COMI" analysis which focused on the Brazilian entities, notwithstanding the debtor's corporate separateness and its lack of physical presence or business activity in Brazil. In addition, the court disregarded the actions of the Dutch insolvency trustee, finding that creditor expectations and economic reality were that the debtor's reorganization would occur as part of the Brazilian insolvency proceeding.

The decision leaves unsettled how the affiliated companies can emerge from the Brazilian proceeding, given that the Dutch proceeding has been recognized in Europe as a "foreign main proceeding" under the Model Law on Cross-Border Insolvency (upon which chapter 15 is patterned). The conflict between the U.S. ruling and European recognition of the Dutch proceeding is significant and could, for example, impair the group's ability to raise new capital necessary to fund a restructuring. The decision also creates a split between European and U.S. courts regarding the definition of COMI under chapter 15 and the Model Law.

HIGHLIGHTS OF 2017

November 20—The Pension Benefit Guaranty Corporation reports that the deficit in its multi-employer pension plan insurance program is $65.1 billion, a more than $6 billion increase from the last fiscal year and a new all-time high, and that the insurance program stands a greater than 50 percent chance of running out of reserve funds by the end of fiscal year 2025.

EMPLOYEE ISSUES—THE WARN ACT

In *Varela v. AE Liquidation, Inc. (In re AE Liquidation, Inc.)*, 866 F.3d 515 (3d Cir. 2017), the U.S. Court of Appeals for the Third Circuit became the sixth circuit to rule that a "probability standard" applies in determining whether an employer is relieved from giving 60 days' advance notice to employees of a mass layoff under the Worker Adjustment and Retraining Notification Act of 1988 (the "WARN Act"). The court upheld lower court rulings that a chapter 11 debtor-employer could rely on the WARN Act's "unforeseeable business circumstances" exception because a proposed sale of the company as a going concern under section 363(b) of the Bankruptcy Code collapsed due to the failure of a Russian bank to honor its commitment to provide the buyer with acquisition financing.

HIGHLIGHTS OF 2017

November 28—The cryptocurrency Bitcoin trades at $10,000 for the first time, igniting a roller coaster of investment speculation that fuels the Bitcoin boom/bubble.

EXECUTORY CONTRACTS AND UNEXPIRED LEASES—ASSUMPTION, REJECTION, AND ASSIGNMENT

In *HPIP Gonzales Holdings, LLC v. Sabine Oil & Gas Corp. (In re Sabine Oil & Gas Corp.)*, 567 B.R. 869 (S.D.N.Y. 2017), the U.S. District Court for the Southern District of New York affirmed 2016 bankruptcy court rulings authorizing a chapter 11 debtor to reject certain gas gathering and handling agreements. According to the district court, the bankruptcy court did not err in finding that the agreements could be rejected under section 365 of the Bankruptcy Code because, under applicable nonbankruptcy law, the agreements contained neither real covenants which run with the land nor equitable servitudes.

OFFICIAL COMMITTEES—THE RIGHT TO INTERVENE

In *Assured Guaranty Corp. v. Fin. Oversight & Mgmt. Bd. for Puerto Rico*, 872 F.3d 57 (1st Cir. 2017), the U.S. Court of Appeals for the First Circuit ruled that section 1109(b) of the Bankruptcy Code gave an official unsecured creditors' committee an "unconditional right to intervene," within the meaning of Fed. R. Civ. P. 24(a)(1), in an adversary proceeding commenced during the course of a bankruptcy case. The court reversed a district court order denying a motion to intervene filed by the official committee of unsecured creditors appointed in the quasi-bankruptcy cases filed on behalf of certain Puerto Rico instrumentalities under the Puerto Rico Oversight, Management, and Economic Stability Act. The First Circuit's decision deepens a circuit split on whether an official committee's unconditional right to intervene applies to adversary proceedings.

OUT-OF-COURT DEBT RESTRUCTURINGS—THE TRUST INDENTURE ACT

A divided panel of the U.S. Court of Appeals for the Second Circuit ruled in *Marblegate Asset Mgmt., LLC v. Educ. Mgmt. Corp.*, 846 F.3d 1 (2d Cir. 2017), *reh'g denied*, No. 15-2124 (2d Cir. Mar. 21, 2017), that an out-of-court debt restructuring which impaired the practical ability of noteholders to be repaid (by removing parent guarantees of the notes) did not violate section 316(b) of the Trust Indenture Act of 1939 because it did not amend an indenture's "core payment terms." The Second Circuit's decision reversed a 2014 district court ruling, which had concluded that section 316(b) provides "broad protection against nonconsensual debt restructuring" and prohibits such restructuring transactions if they adversely impact a noteholder's practical ability to be repaid. *See Marblegate Asset Mgmt. v. Educ. Mgmt. Corp.*, 75 F. Supp. 3d 592, 610 (S.D.N.Y. 2014).

POWER OF BANKRUPTCY COURTS—SUBSTANTIVE CONSOLIDATION

In *Clark's Crystal Springs Ranch, LLC v. Gugino (In re Clark)*, 692 Fed. Appx. 946, 2017 BL 240043 (9th Cir. July 12, 2017), the U.S. Court of Appeals for the Ninth Circuit ruled that: (i) the remedy of "substantive consolidation" is governed by federal bankruptcy law, not state law; and (ii) because the Bankruptcy Code does not expressly forbid the substantive consolidation of debtors and nondebtors, the U.S. Supreme Court's decision in *Law v. Siegel*, 134 S. Ct. 1188 (2014), does not bar bankruptcy courts from ordering the remedy.

SETTLEMENTS—SENIOR CLASS GIFTING

In *In re Short Bark Indus, Inc.*, No. 17-11502 (KG) (Bankr. D. Del. Sept. 11, 2017), the bankruptcy court approved a settlement embodied in a debtor-in-possession financing order in which the debtors, the unsecured creditors' committee, and the debtors' prepetition secured lender agreed to distribute certain proceeds from the sale of the debtors' assets directly from the lender to unsecured creditors. In so deciding, the court overruled an objection that the settlement incorporated a priority-skipping distribution which was not affirmatively provided for by the Bankruptcy Code and therefore violated the Supreme Court's ruling in *Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 2017 BL 89680 (U.S. Mar. 27, 2017). The court reasoned that *Jevic* was "all about a structured dismissal," whereas, in this case, the extent of the debtors' estate and the claims against it were "not yet fully resolved." The court also found, unlike in *Jevic*, where the Court rejected the priority-skipping distribution because it did not meet any "significant, offsetting, bankruptcy-related justification," the settlement in this case would enable the debtors to continue with their businesses while preserving the committee's right to bring actions against insiders

HIGHLIGHTS OF 2017

December 14—The U.S. Federal Communications Commission votes to repeal net neutrality rules imposed during the Obama administration.

FROM THE TOP

In bankruptcy cases under chapter 11, debtors sometimes opt for a "structured dismissal" when a consensual plan of reorganization or liquidation cannot be reached or conversion to chapter 7 would be too costly. In *Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 2017 BL 89680 (Mar. 27, 2017), the U.S. Supreme Court held that the Bankruptcy Code does not allow bankruptcy courts to approve distributions in structured dismissals which violate the Bankruptcy Code's ordinary priority rules. The Court rejected a Third Circuit decision that had allowed for such structured dismissals in "rare" circumstances. The Supreme Court's opinion, however, left room for the creative use of settlements that provide only for interim (rather than final) distributions deviating from the Bankruptcy Code's priority scheme, and the Court did not directly question the use of settlements that involve "gifts" from senior to junior creditors.

In *Midland Funding, LLC v. Johnson*, 137 S. Ct. 1407, 2017 BL 161314 (May 15, 2017), the U.S. Supreme Court ruled that a credit collection agency does not violate the Fair Debt Collection Practices Act ("FDCPA") when it files a claim in a bankruptcy case to collect on a debt which would be time-barred in another court.

In another case construing the FDCPA, but not in a bankruptcy context, the Court ruled in *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718 (June 12, 2017), that the purchaser of a defaulted debt is not a "debt collector" subject to the FDCPA.

On March 27, 2017, the Court granted certiorari in *U.S. Bank N.A. v. The Village at Lakeridge LLC*, No. 15-1509, 137 S. Ct. 1372 (2017), where it will consider the correct standard of review for determining "insider" status under the Bankruptcy Code for the purpose of voting on a nonconsensual chapter 11 plan. The U.S. Court of Appeals for the Ninth Circuit held in *U.S. Bank N.A. v. The Village at Lakeridge, LLC (In re The Village at Lakeridge,*

NEWSWORTHY

Jones Day's ***Business Restructuring & Reorganization Practice*** was named a "Practice Group of the Year—Bankruptcy" for the second consecutive year by *Law360*. The Practice was featured in the January 18, 2018, edition of *Bankruptcy Law360*.

In 2017, for the second year in a row, the "Best Law Firms" survey published jointly by *U.S. News* and *Best Lawyers* named ***Jones Day*** "Law Firm of the Year" in the field of Bankruptcy and Creditor Debtor Rights/Insolvency and Reorganization Law.

Jones Day received an M&A Advisor Turnaround Deal of the Year Award for 2017 in the category Restructuring Deal of the Year (Over $10 Billion) for the chapter 11 restructuring of Peabody Energy Corp.

For 2018, for the second consecutive year, ***Jones Day*** topped The BTI Consulting Group's "Client Service A-Team" ranking, which identifies the top law firms for client service through a national survey of corporate counsel. Jones Day is the only law firm to earn "Best of the Best" in all 17 activities in the 17 years BTI has been publishing this report.

Jones Day received an M&A Advisor Sector Deal of the Year Award for 2017 in the category Energy Deal of the Year (Over $100 Million) for the chapter 11 restructuring of Peabody Energy Corp.

Bruce Bennett (Los Angeles and New York) was one of the two Jones Day lawyers named to the *Daily Journal*'s list of the Top 100 California Lawyers for 2017. This list is a compilation of California attorneys doing the most cutting-edge legal work around the nation.

Heather Lennox (Cleveland and New York) was named "MVP of the Year 2017" in the field of Bankruptcy by *Law360*. She was featured in the December 19, 2017, issue of *Bankruptcy Law360*.

Jones Day received an M&A Advisor Turnaround Deal of the Year Award for 2017 in the category Distressed M&A Deal of the Year (Over $250 Million to $500 Million) in connection with the acquisition of U.S. Manufacturing Corporation by Dana Inc.

Gregory M. Gordon (Dallas) and ***Thomas A. Howley (Houston)*** were both selected as 2017 *Texas Super Lawyers* for Bankruptcy: Business. No more than 5 percent of eligible Texas attorneys receive this honor.

The *Global Restructuring Review* ("GRR") included ***Jones Day*** on its list of standout firms. Two key factors were taken into account: an analysis of Jones Day's top 10 cases and its performance in GRR's sister publication, *Who's Who Legal: Restructuring & Insolvency* 2017.

Roger Dobson (Sydney) was named a "Leader in his Field" in the practice area of Restructuring/Insolvency by *Chambers Asia-Pacific* 2018.

An article written by ***Paul M. Green (Houston)*** and ***Thomas A. Howley (Houston)*** entitled "Abandonment in the Oil Patch: Can Debtors Shed P&A Liability in Bankruptcy?" was published in the January 2018 edition of *Pratt's Journal of Bankruptcy Law*.

An article written by ***Charles M. Oellermann (Columbus)*** and ***Mark G. Douglas (New York)*** entitled "Recent Rulings Deepen the Divide on Whether the Bankruptcy Code's Avoidance Provisions Apply Extraterritorially" was featured in the December 2017 *University of Oxford Business Law Blog* and the November 2017 *Harvard Law School Bankruptcy Roundtable*.

A "Distressed Mergers and Acquisitions" column written by ***Corinne Ball (New York)*** is published bimonthly by the *New York Law Journal*. Her column entitled "SDNY Bankruptcy Court Chimes in on Bankruptcy Court's Jurisdiction to Consider Third-Party Releases" appeared in the December 27, 2017, edition.

LLC), 634 Fed. Appx. 619 (9th Cir. 2016), that a third party does not become an insider by acquiring a claim from an insider. The Court heard argument in the case on October 31, 2017.

On May 1, 2017, the Court agreed to hear *Merit Management Group v. FTI Consulting*, No. 16-784, 137 S. Ct. 2092 (2017). Hearing the case on appeal from the U.S. Court of Appeals for the Seventh Circuit (*see FTI Consulting, Inc. v. Merit Management Group, LP*, 830 F.3d 690 (7th Cir. 2016)), the Court could resolve a circuit split as to whether section 546(e) of the Bankruptcy Code can shield from fraudulent conveyance attack transfers made through financial institutions where such financial institutions are merely "conduits" in the relevant transaction. The Court heard argument in the case on November 6, 2017.

On June 27, 2017, the Court granted certiorari in *PEM Entities LLC v. Levin*, No. 16-492, 137 S. Ct. 2326 (2017), in which it would have had the opportunity to consider "[w]hether bankruptcy courts should apply a federal rule of decision (as five circuits have held) or a state law rule of decision (as two circuits have held, expressly acknowledging a split of authority) when deciding to recharacterize a debt claim in bankruptcy as a capital contribution." However, on August 10, 2017, the Court entered a summary disposition of the writ of certiorari. *See PEM Entities LLC v. Levin*, 198 L. Ed. 2d 768, 2017 BL 279440 (U.S. Aug. 10, 2017). The summary disposition states only that the "petition for a writ of certiorari is dismissed as improvidently granted."

LEGISLATIVE AND REGULATORY DEVELOPMENTS OF 2017

PROPOSED U.S. BANKRUPTCY LEGISLATION

H.R. 1667, the "Financial Institution Bankruptcy Act of 2017" ("FIBA"), and H.R. 10, the "Financial CHOICE Act of 2017" (the "CHOICE Act"), would allow financial institutions to seek protection under chapter 11 of the Bankruptcy Code. Among other key provisions, both bills call for the creation of a new subchapter V to chapter 11 of the Bankruptcy Code. However, unlike FIBA, the CHOICE Act would repeal Title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act, stripping the FDIC's receivership of failing financial institutions. Instead, subchapter V would serve as the sole method for managing distressed financial institutions.

H.R. 3969, the "Prioritizing Our Workers Act," would amend section 503(b) of the Bankruptcy Code to include unfunded vested benefits in a defined-benefit pension plan and withdrawal liability determined under the Employee Retirement Income Security Act of 1974 as administrative expenses in bankruptcy. The Senate version is S. 1963.

S. 1262, the "Fairness for Struggling Students Act of 2017," would amend section 523(a)(8) of the Bankruptcy Code to clarify the scope of student loan debts that may or may not be discharged in bankruptcy. The House version of the bill, H.R. 2527, is entitled the "Private Student Loan Bankruptcy Fairness Act of 2017."

H.R. 2366, the "Discharge Student Loans in Bankruptcy Act of 2017," would make all student loan debts dischargeable in bankruptcy by removing section 523(a)(8) of the Bankruptcy Code.

S. 1237, the "Family Farmer Bankruptcy Clarification Act of 2017," would amend section 1232 of the Bankruptcy Code to clarify the rule allowing discharge as a nonpriority claim of governmental claims arising from the disposition of farm assets under chapter 12 bankruptcies.

H.R. 134, the "Home Foreclosure Reduction Act of 2017," would amend section 1322 and certain other provisions of the Bankruptcy Code to specify the circumstances under which a chapter 13 plan can modify mortgages on personal residences.

H.R. 141, the "Preventing Termination of Utility Services in Bankruptcy Act of 2017," would amend section 366 of the Bankruptcy Code to dispense with the requirement that a bankruptcy trustee or chapter 11 debtor-in-possession provide assurance of payment for utility services under certain circumstances.

H.R. 139, the "Protecting Employees and Retirees in Municipal Bankruptcies Act of 2017," would amend chapter 9 of the Bankruptcy Code to improve protections for employees and retirees in municipal bankruptcies.

H.R. 138, the "Protecting Employees and Retirees in Business Bankruptcies Act of 2017," would amend various provisions of the Bankruptcy Code, including sections 502, 503, 507, 1113, 1114, and 1129, to improve protections for employees and retirees in business bankruptcies.

HIGHLIGHTS OF 2017

December 18—The Dow Jones Industrial Average rises 5,000 points in a year for the first time ever.

AMENDMENTS TO U.S. BANKRUPTCY RULES

Certain changes to the Federal Rules of Bankruptcy Procedure took effect on December 1, 2017. Although the changes deal principally with consumer bankruptcy cases, some of the amendments apply more broadly, including: (i) amended Rule 3002(a), pursuant to which, with certain exceptions, a secured creditor is now required to file a proof of claim to receive any distribution from the estate (although, in accordance with section 506(d) of the Bankruptcy Code, failure to do so does not void the creditor's lien); and (ii) amended Rule 3012, which provides that (a) a request to determine the amount of a secured claim may now be made by motion (rather than an adversary proceeding), a claim objection or, except for secured claims held by governmental units, in a chapter 12 or 13 plan, and (b) a request to determine the priority amount of a claim can be made only by motion after the claim is filed or in a claim objection.

NEW EU REGULATION ON CROSS-BORDER PRESERVATION OF ACCOUNTS POTENTIALLY USEFUL TOOL FOR SECURING ASSETS IN EU MEMBER STATES

January 18, 2017, was the effective date of EU Regulation No. 655/2014 of May 15, 2014 (the "Regulation"). The main purpose of the Regulation was the establishment of a European Account Preservation Order procedure: a uniform, harmonized procedure that makes it easier for creditors to obtain protective measures within the EU. The Regulation enables a creditor to obtain a "preservation order" designed to ensure that the creditor can enforce its claims against a debtor or its assets in a cross-border EU context.

REVISIONS TO EU INSOLVENCY REGULATION

A revised version of the EU Insolvency Regulation (EU Regulation No. 2015/848 of May 20, 2015; the "Revised IR") entered into force on June 26, 2017. One of the main features of the Revised IR is the new Chapter V on "Insolvency Proceedings of Members of a Group of Companies." This chapter contains new rules designed to promote cross-border cooperation and coordination between courts and insolvency practitioners in insolvency proceedings concerning group companies in Europe.

REFORMS TO GERMAN INSOLVENCY CODE AVOIDANCE ACTION PROVISIONS

In February 2017, the German legislature enacted reforms designed to improve procedures governing the avoidance of pre-insolvency transfers and to encourage workouts between debtors and creditors. The reform amends, among other things, the fraudulent transfer provisions in the German Insolvency Code by reducing the longest-possible avoidance look-back period and by changing the rules governing the circumstances under which a transferee will be deemed to have knowledge of the debtor-transferor's insolvency or intent to defraud creditors.

GERMAN INSOLVENCY LAW REFORMS TO PROMOTE CORPORATE GROUP INSOLVENCIES

Major German insolvency law reforms designed to facilitate corporate group insolvencies will become effective on April 21, 2018. When the reforms come into force, they will supplement and complement the Revised IR that became effective on June 26, 2017. The new German legislation will permit corporate group insolvencies with individual proceedings, on an entity-by-entity basis, presided over by a single German insolvency court and administered by a single insolvency administrator, unless a unitary approach is impracticable. In the case of impracticability, the courts and administrators involved are obligated to cooperate for the purpose of coordinating the separate proceedings.

SINGAPORE, U.K., B.V.I., BERMUDA, DELAWARE, AND NEW YORK COURTS ADOPT GUIDELINES FOR COMMUNICATION AND COOPERATION BETWEEN COURTS IN CROSS-BORDER INSOLVENCY MATTERS

On February 1, 2017, the Supreme Court of Singapore and the U.S. Bankruptcy Court for the District of Delaware announced that they had formally implemented Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters (the "Guidelines"). The U.S. Bankruptcy Court for the Southern District of New York adopted the Guidelines on February 17, 2017. In the U.K., the Chancery Guide, which applies to the bankruptcy and companies courts, was amended on May 4, 2017, to include the Guidelines. They are set forth in Local Bankruptcy Rule 9029-2 in Delaware and General Order M-511 in New York. The Guidelines were also adopted by the courts of Bermuda and the British Virgin Islands in March and June 2017, respectively.

SINGAPORE ENACTS NEW CORPORATE BANKRUPTCY LAW IN BID TO BECOME CENTER FOR INTERNATIONAL DEBT RESTRUCTURING

On March 10, 2017, Singapore's Parliament approved the Companies (Amendment) Bill 2017 (the "Act") to, among other things, enhance the country's corporate debt restructuring framework. The Act was assented to by President Tony Tan Keng Yam on March 29, 2017, and will become effective in its entirety in 2018. The Act is a groundbreaking development in Singapore's corporate rescue laws and includes major changes to the rules governing schemes of arrangement, judicial management, and cross-border insolvency. The Act also incorporates several features of chapter 11 of the U.S. Bankruptcy Code, including super-priority rescue financing, cramdown powers, and prepackaged restructuring plans.

HIGHLIGHTS OF 2017

December 21—The U.S. Congress gives final approval to a $1.5 trillion tax cut. The plan, which is expected to add more than $1 trillion to the deficit over 10 years, permanently cuts corporate tax rates, provides individual tax-rate cuts that will expire in 10 years if Congress does not act to renew them, repeals the individual mandate in the Affordable Care Act, and aims to simplify the tax code by eliminating and trimming some deductions.

RUSSIAN INSOLVENCY LAW REFORMS

Significant changes to Russian insolvency law became effective on July 30, 2017. Among other things, new Federal Law No. 266-FZ (July 29, 2017) supersedes provisions concerning the vicarious liability of "controlling persons" for a bankrupt corporate debtor's obligations set forth in RF Law No. 127-FZ on Insolvency (October 26, 2002).

PROPOSED DUTCH INSOLVENCY LAW REFORMS

On September 5, 2017, the Ministry of Justice and Security of the Netherlands published its second draft of the Continuity of Enterprises Act II, which would enable debtors in the Netherlands to restructure their debts and avoid bankruptcy through the incorporation of a plan in an out-of-court process, while providing the ability to seek the court's intervention to impose the plan on dissenting creditors and shareholders.

NOTABLE PLAN CONFIRMATIONS AND EXITS FROM BANKRUPTCY IN 2017

COMPANY	FILING DATE (BANKR. COURT)	CONF. DATE EFFECTIVE DATE	ASSETS	INDUSTRY	RESULT	PRE P OR N
Energy Future Holdings Corp.	04/29/2014 (D. Del.)	08/26/2016 CD 02/17/2017 CD	$41.0 billion	Utility	Sale	
Caesars Entertainment Operating Co., Inc.	01/15/2015 (N.D. Ill.)	01/17/2017 CD 10/06/2017 ED	$15.9 billion	Lodging/ Entertainment	Reorganization	
SunEdison Inc.	04/21/2016 (S.D.N.Y.)	07/28/2017 CD 12/29/2017 ED	$11.5 billion	Solar Energy	Liquidation	
Peabody Energy Corporation	04/13/2016 (E.D. Mo.)	03/17/2017 CD 04/03/2017 ED	$11.0 billion	Oil & Gas	Reorganization	
LINN Energy, LLC	05/11/2016 (S.D. Tex.)	01/26/2017 CD 02/28/2017 ED	$10.0 billion	Oil & Gas	Reorganization	Pre N
Nortel Networks, Inc.	01/14/2009 (D. Del.)	01/24/2017 CD 05/08/2017 ED	$9.0 billion	Telecom	Liquidation	
Avaya Inc.	01/19/2017 (S.D.N.Y.)	11/28/2017 CD 12/15/2017 ED	$6.8 billion	Telecom	Reorganization	
Samson Resources Corp.	09/16/2015 (D. Del.)	02/13/2017 CD 03/01/2017 ED	$5.6 billion	Oil & Gas	Reorganization	
Tidewater Inc.	05/17/2017 (D. Del.)	07/13/2017 CD 07/31/2017 ED	$5.0 billion	Oil & Gas Transportation	Reorganization	Pre P
GenOn Energy, Inc.	06/14/2017 (S.D. Tex.)	12/12/2017 CD	$4.9 billion	Utility	Reorganization	Pre N
Republic Airways Holdings Inc.	02/25/2016 (S.D.N.Y.)	04/20/2017 CD 04/30/2017 ED	$3.5 billion	Aviation	Reorganization	
Paragon Offshore plc	02/14/2016 (D. Del.)	06/07/2017 CD 07/18/2017 ED	$3.3 billion	Oil & Gas	Reorganization	Pre N
Memorial Production Partners LP (n.k.a. Amplify Energy Corp.)	01/16/2017 (S.D. Tex.)	04/14/2017 CD 05/04/2017 ED	$2.9 billion	Oil & Gas	Reorganization	Pre P
Vanguard Natural Resources LLC (n.k.a. Vanguard Natural Resources Inc.)	02/01/2017 (S.D. Tex.)	07/18/2017 CD 08/01/2017 ED	$2.7 billion	Oil & Gas	Reorganization	Pre N
CHC Group Ltd.	05/05/2016 (N.D. Tex.)	03/03/2017 CD 03/23/2017 ED	$2.3 billion	Helicopter Services	Reorganization	
C&J Energy Services Ltd.	07/20/2016 (S.D. Tex.)	12/16/2016 CD 01/06/2017 ED	$2.2 billion	Oil & Gas	Reorganization	Pre N
Homer City Generation, L.P.	01/11/2017 (D. Del.)	02/15/2017 CD 04/06/2017 ED	$2.0 billion	Utility	Reorganization	Pre P
Global A&T Electronics Ltd.	12/17/2017 (S.D.N.Y.)	12/22/2017 CD 01/12/2018 ED	$1.4 billion	Manufacturing	Reorganization	Pre P
Stone Energy Corp.	12/14/2016 (S.D. Tex.)	02/15/2017 CD 02/28/2017 ED	$1.4 billion	Oil & Gas	Reorganization	Pre P
Modular Space Holdings Corp.	12/21/2016 (D. Del.)	02/15/2017 CD 03/02/2017 ED	$1.3 billion	Storage	Reorganization	Pre N
Bonanza Creek Energy, Inc.	01/04/2017 (D. Del.)	04/07/2017 CD 05/01/2017 ED	$1.3 billion	Oil & Gas	Reorganization	Pre P
Chaparral Energy, Inc.	05/09/2016 (D. Del.)	03/10/2017 CD 03/20/2017 ED	$1.3 billion	Oil & Gas	Reorganization	
Illinois Power Generating Co.	12/09/2016 (S.D. Tex.)	01/25/2017 CD 02/02/2017 ED	$1.2 billion	Utility	Reorganization	Pre P
The Gymboree Corp.	06/11/2017 (E.D. Va.)	09/08/2017 CD 09/29/2017 ED	$1.2 billion	Retail	Reorganization	Pre N
GulfMark Offshore, Inc.	05/17/2017 (D. Del.)	10/04/2017 CD 11/14/2017 ED	$1.1 billion	Oil & Gas Transportation	Reorganization	Pre N
Essar Steel Minnesota LLC (ESML Holdings Inc.)	07/08/2016 (D. Del.)	06/13/2017 CD 12/22/2017 ED	$1.0 billion +	Mining	Reorganization	
City of San Bernardino, CA [Chapter 9]	08/01/2012 (C.D. Cal.)	01/27/2017 CD 06/15/2017 ED	$1.0 billion +	Municipality	Adjustment	
Ultra Petroleum Corp.	04/29/2016 (S.D. Tex.)	03/14/2017 CD 04/12/2017 ED	$972 million	Oil & Gas	Reorganization	
Ultrapetrol (Bahamas) Ltd.	02/06/2017 (S.D.N.Y.)	03/21/2017 CD 03/31/2017 ED	$850 million	Shipping	Reorganization	Pre P
Performance Sports Group	10/31/2016 (D. Del.)	12/20/2017 CD 12/21/2017 ED	$845 million	Sporting Goods	Sale	
Roust Corp.	12/30/2016 (S.D.N.Y.)	01/06/2017 CD 02/17/2017 ED	$820 million	Distilling	Reorganization	Pre P
Payless ShoeSource Inc.	04/04/2017 (E.D. Mo.)	07/27/2017 CD 08/10/2017 ED	$500 million +	Retail	Reorganization	Pre P

FRAUDULENT TRANSFER AVOIDANCE RECOVERY NOT LIMITED TO TOTAL AMOUNT OF CREDITOR CLAIMS

Jane Rue Wittstein
Mark G. Douglas

Courts disagree as to whether the amount that a bankruptcy trustee or chapter 11 debtor-in-possession ("DIP") can recover in fraudulent transfer avoidance litigation should be capped at the total amount of unsecured claims against the estate. A Delaware bankruptcy court recently weighed in on this issue in *PAH Litigation Trust v. Water Street Healthcare Partners, L.P. (In re Physiotherapy Holdings, Inc.)*, 2017 WL 5054308 (Bankr. D. Del. Nov. 1, 2017). Noting the absence of any guidance on the question from the U.S. Court of Appeals for the Third Circuit, the bankruptcy court ruled that, unlike most state fraudulent transfer laws, which limit a creditor's recovery to the amount of its unpaid claim against the transferor, section 550 of the Bankruptcy Code imposes no such limitation on the estate's recovery.

FRAUDULENT TRANSFER AVOIDANCE AND RECOVERY UNDER SECTIONS 548 AND 550

Section 548 of the Bankruptcy Code provides that a trustee or DIP "may avoid any transfer . . . of an interest of the debtor in property, or any obligation . . . incurred by the debtor" within two years before a bankruptcy filing if the transaction was actually or constructively fraudulent.

Section 548(c) sets forth a savings provision for certain good-faith transferees. It provides that, except to the extent a transfer or obligation is otherwise voidable under section 544, 545, or 547 of the Bankruptcy Code:

> a transferee or obligee . . . that takes for value and in good faith has a lien on or may retain any interest transferred or may enforce any obligation incurred, as the case may be, to the extent that such transferee or obligee gave value to the debtor in exchange for such transfer or obligation.

Section 548(c) thus requires both the provision of value and good faith, which, if established, permit a good-faith transferee to, among other things, retain the transferred property "to the extent" it gave value to the debtor. *See Williams v. FDIC (In re Positive Health Mgmt.)*, 769 F.3d 899, 908 (5th Cir. 2014) (under the "netting approach," where a good-faith transferee gave value for a vessel that was less than reasonably equivalent value, the transfer was voidable only to the extent of the shortfall).

If a transfer is avoided under section 548, section 550(a) provides that, with certain exceptions, "the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property," from both initial and subsequent transferees of the transferred property.

Section 550(b) provides that the trustee may not recover from subsequent transferees who take for value and in good faith from the initial transferee.

Finally, section 550(e) gives good-faith transferees a lien on property recovered by the trustee to secure the lesser of: (i) post-transfer improvement costs incurred by the transferee, less profits; or (ii) any increase in the value of the property due to the improvements.

Some courts have ruled that, because the fraudulent transfer laws are remedial, rather than punitive, recovery under section 550 should be limited to the amount necessary to satisfy creditor claims, thereby preventing a windfall. *See, e.g.*, *Slone v. Lassiter (In re Grove-Merritt)*, 406 B.R. 778 (Bankr. S.D. Ohio 2009); *Murphy v. Town of Harrison (In re Murphy)*, 331 B.R. 107 (Bankr. S.D.N.Y. 2005).

However, other courts, including two circuit courts of appeal, have ruled that the amount a trustee can recover under section 550 is not capped at the aggregate amount of unsecured claims against the estate. *See, e.g.*, *In re JTS Corp.*, 617 F.3d 1102 (9th Cir. 2010); *Stalnaker v. DLC, Ltd.*, 376 F.3d 819 (8th Cir. 2004); *Clinton v. Acequia, Inc. (In re Acequia, Inc.)*, 34 F.3d 800 (9th Cir. 1994); *MC Asset Recovery, LLC v. Southern Co.*, 2006 WL 5112612 (N.D. Ga. Dec. 11, 2006); *Lim v. Miller Parking Co.*, 526 B.R. 202 (Bankr. E.D. Mich. 2015); *In re Tronox Inc.*, 464 B.R. 606 (Bankr. S.D.N.Y. 2012).

For example, in *Acequia*, the defendant-transferee in fraudulent transfer litigation argued that the court should limit recovery under section 550(a) to "an amount sufficient to satisfy all unsecured claims" to prevent a windfall to the estate. 34 F.3d at 810. The court refused to cap recovery, writing that "the [estate] has a greater equitable claim to the transferred funds than does [the defendant wrongdoer]." *Id.* at 812.

The court rejected the same windfall argument in *Tronox*, stating that:

> [i]n other words, the "for the benefit of the estate" clause in § 550 sets a minimum floor for recovery in an avoidance action—at least some benefit to the estate—but does not impose any ceiling on the maximum benefits that can be obtained once that floor is met.

464 B.R. at 614.

In *MC Asset Recovery*, after reviewing the relevant case law, the court wrote that "all have found that a trustee who brings an action to avoid or recover a fraudulent transfer may avoid or recover in its entirety, even when the value of the transfer exceeds the value of all allowed claims of unsecured creditors." 2006 WL 5112612 at *5; *see also* Collier on Bankruptcy ¶ 548.10 (16th ed. 2017) ("The amount that the trustee can recover from the initial or subsequent transferee is not limited by the total amount of allowed unsecured claims. The trustee's avoiding powers are not just for the benefit of the creditors, but are for the benefit of the estate as a whole. . . . However, fraudulent transfer law generally is not intended to aid the debtor-transferor to recover property; a transfer is generally valid as between the debtor and the transferee. Consequently, the transferee should be entitled to retain the property transferred if the estate is sufficient to satisfy all claims, including administrative expenses.") (footnotes omitted).

TRUSTEE'S ABILITY TO AVOID TRANSFERS THAT ARE AVOIDABLE UNDER STATE LAW

A trustee or DIP may also recover certain transfers that are avoidable by creditors under state law. Section 544(b)(1) of the Bankruptcy Code provides in relevant part that "the trustee may avoid any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is voidable under applicable law by a creditor holding an unsecured claim that is allowable under section 502 of this title."

The phrase "applicable law" in section 544(b) has generally been interpreted to mean state law. *See Ebner v. Kaiser (In re Kaiser)*, 525 B.R. 697 (Bankr. N.D. Ill. 2014); *Wagner v. Ultima Holmes (In re Vaughan)*, 498 B.R. 297 (Bank. D.N.M. 2013).

Unlike the Bankruptcy Code, state fraudulent transfer statutes (generally, versions of the Uniform Fraudulent Conveyance Act or the Uniform Fraudulent Transfer Act (the "UFTA"), which was recently amended and renamed the "Uniform Voidable Transactions Act"), expressly include a cap on recovery. Section 7 of the UFTA provides that a creditor may avoid a transfer or obligation "to the extent necessary to satisfy the creditor's claim." Similarly, section 8 of the UFTA provides that "the creditor may recover judgment for the value of the asset transferred . . . or the amount necessary to satisfy the creditor's claim, whichever is less."

In *Physiotherapy*, the bankruptcy court considered whether recovery under section 550 of the Bankruptcy Code and the Pennsylvania Uniform Fraudulent Transfers Act (the "PUFTA") should be capped at the amount of unsecured claims against a chapter 11 debtor's estate.

PHYSIOTHERAPY

In 2012, private equity firm Court Square Capital Partners II, L.P. ("Court Square") acquired Physiotherapy Holdings, Inc. ("Physiotherapy"), one of the largest providers of outpatient physical therapy services in the U.S., through a reverse-triangular merger. The leveraged buyout ("LBO") transaction was financed by, among other things, a $100 million term loan secured by Physiotherapy's assets and the issuance of $210 million in senior notes that were assumed by the post-merger Physiotherapy. As part of the transaction, Physiotherapy's prior owners—Water Street Healthcare Partners, L.P., and Wind Point Partners IV, L.P. (collectively, the "defendants")—received $248.6 million for their interests in the company.

On November 12, 2013, Physiotherapy filed a prepackaged chapter 11 case in the District of Delaware. The bankruptcy court confirmed the plan in December 2013. The plan provided that: (i) noteholders, who were owed approximately $238 million in principal and unpaid accrued interest, would have an allowed claim for $210 million, in exchange for which accepting noteholders would receive a pro rata share of Physiotherapy's new equity as well as a pro rata share of one-half of any recoveries by a litigation trust established under the plan; and (ii) any remaining litigation trust recoveries would be paid to Court Square. Expert testimony pegged the value of the post-reorganization company's equity at a midpoint of $96 million. In its disclosure statement, however, Physiotherapy valued the equity to be received by the noteholders under the plan at 40.3 percent of their allowed claims, or approximately $85 million.

In September 2015, the litigation trustee sued the defendants, alleging that they had engaged in accounting fraud for years prior to the LBO. According to the complaint, through the LBO transaction, Physiotherapy incurred a massive amount of new debt that was predicated on false financial statements and used to cash out the old shareholders, rendering Physiotherapy insolvent. On the basis of those allegations, the complaint sought to avoid and recover certain transfers (including the payments to the defendants) as actual and constructive fraudulent transfers under both federal law (sections 544, 548, and 550 of the Bankruptcy Code) and the PUFTA.

The defendants moved to dismiss the complaint, arguing that the constructive fraudulent transfer claims were precluded by the settlement payment "safe harbor" contained in section 546(e) of the Bankruptcy Code. In *PAH Litigation Trust v. Water Street Healthcare Partners, L.P. (In re Physiotherapy Holdings, Inc.)*, 2016 WL 3611831 (Bankr. D. Del. June 20, 2016), *leave to appeal denied*, 2017 WL 6524524 (D. Del. Dec. 21, 2017), the bankruptcy court, rejecting the Second Circuit's reasoning in *Deutsche Bank Trust Co. Ams. v. Large Private Beneficial Owners (In re Tribune Co. Fraudulent Conveyance Litig.)*, 818 F.3d 98 (2d Cir. 2016), held that section 546(e) (which expressly exempts from its scope actual fraudulent transfer claims under section 548) did not preempt the constructive fraudulent transfer claim under the PUFTA that had been assigned to the litigation trust.

In March 2016, Select Medical Corporation acquired reorganized Physiotherapy for $421 million in cash, of which approximately $282 million was paid to the noteholders in exchange for their equity interests.

The defendants again moved to dismiss the complaint, this time arguing that the noteholders' receipt of $282 million in respect of equity valued at $85 million foreclosed recovery under section 550 and the PUFTA. The litigation trustee countered that the value of the debt the noteholders agreed to release under the terms of the plan in exchange for the new equity and litigation recoveries (at maturity, approximately $470 million, with interest, had Physiotherapy not filed for bankruptcy) significantly exceeded $282 million.

The parties' contrary positions on the potential damages stymied court-ordered mediation of the dispute. The bankruptcy court agreed to break the deadlock by ruling on the potential damages issue.

THE BANKRUPTCY COURT'S RULING

In ruling on cross-motions for partial summary judgment, the bankruptcy court assumed, without deciding, that the litigation trustee successfully proved that the $248.6 million transfer was actually fraudulent under section 548(a)(1)(A) of the Bankruptcy Code and constructively fraudulent under the PUFTA.

After reviewing relevant decisions, the court noted that the Third Circuit has not spoken on the damages cap issue. The bankruptcy court concluded, however, that recovery under section 550 should not be capped at the aggregate amount of unpaid creditor claims. Otherwise, it wrote, "it would mean that if Defendants are in fact liable for the fraudulent transfer, they would keep most if not all of the transferred money"—an "inequitable result" which the court "cannot countenance."

The bankruptcy court noted that, in addition to *Acequia*, *MC Asset Recovery*, *Tronox*, and other similar rulings, its conclusion is supported by the U.S. Supreme Court's ruling in *Moore v. Bay*, 284 U.S. 4 (1931). In *Moore*, the Court held that a bankruptcy trustee in a case under the former Bankruptcy Act of 1898 could avoid a fraudulent transfer in its entirety for the benefit of the estate and that recovery was not limited to the amount of unsatisfied creditor claims. *Id.* at 4–5; *see also Stalnaker v. DLC, Ltd. (In re DLC, Ltd.)*, 295 B.R. 593, 606 (B.A.P. 8th Cir. 2003) (noting that *Moore* is codified by section 550).

The bankruptcy court rejected the defendants' argument that the phrase "for the benefit of the estate" in section 550 means for the benefit of creditors. The court wrote that "[t]he estate is more than the interests of creditors" and includes the interests of other stakeholders—in this case, Court Square. The court also rejected the argument that the noteholders would necessarily receive a windfall if successful in the litigation. According to the court, had there been no bankruptcy, the noteholders would have received approximately $470 million at maturity, with a present value of $380 million.

Finally, the court ruled that the cap on recovery under the PUFTA, which tracks the language of the UFTA (*see* 12 PA. STAT. AND CONS. STAT. ANN. §§ 5107(a)(1) and 5108) would be implicated only if the litigation trust ultimately recovered more than approximately $250 million on the state fraudulent transfer claim. The court determined this amount by assuming that the noteholders, who had a 50 percent interest in litigation recoveries, received new equity valued at approximately $85 million, which left them with a $125 million deficit based on their allowed $210 million claim.

OUTLOOK

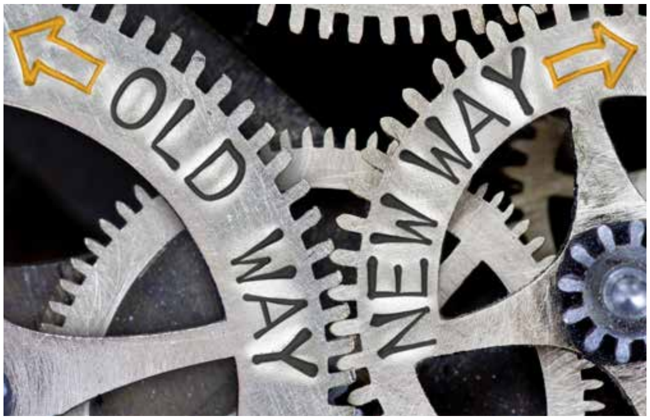
Physiotherapy is significant for a number of reasons. First, the ruling reinforces the idea that federal and state fraudulent transfer avoidance laws are intended to be remedial rather than punitive. Under state law, this understandably means that an avoidance recovery is limited to the amount necessary to make an injured creditor whole. Under federal bankruptcy law, recoveries must benefit the bankruptcy estate, which includes the interests of creditors and other stakeholders.

Second, the facts in *Physiotherapy* were unusual. The chapter 11 plan involved a debt-for-equity swap and a distribution of value in the form of speculative litigation recoveries split equally between the noteholders and old interest holders, even though the noteholders were not being paid in full. However, in an unanticipated (and highly atypical) development, about two years after the bankruptcy, the noteholders cashed out their new equity for $282 million—an amount that greatly exceeded both their allowed claims in the bankruptcy case and the estimated value of the new equity on the plan confirmation date. According to the bankruptcy court, additional payments to the noteholders from avoidance litigation recoveries did not amount to a windfall because they would have realized more had Physiotherapy not filed for bankruptcy.

Because the plan provided that Court Square was entitled to one-half of any avoidance recoveries, Physiotherapy's old equity holder—which was clearly out of the money when the plan was confirmed—might also realize a significant recovery. However, the defendants never challenged this aspect of the plan in connection with the confirmation proceedings. As such, the court appeared to give less weight to their belated arguments that section 550 should not be used to benefit the old equity holder.

Finally, while *Physiotherapy* permits an estate to recover damages under section 550 even where the actual amount later received for equity bestowed under a plan exceeds creditors' allowed claims, the court noted that the noteholders' recovery under the litigation trust would be limited to the amount necessary to pay their allowed claims in full. The valuation evidence provided at confirmation pegged the value of the equity awarded to the noteholders at $85 million, leaving a deficit of $125 million on $210 million of allowed noteholder claims. Because the litigation trust recoveries were evenly divided between the noteholders and Court Square, the noteholders' allowed claims would not be satisfied in full unless the litigation trust recovered $250 million in the avoidance litigation. The court's reasoning highlights the importance of recognizing that both the terms for satisfying claims under a chapter 11 plan and plan valuations may be binding in post-confirmation litigation.

The defendants filed a motion in the district court for leave to appeal the bankruptcy court's ruling on November 15, 2017. Briefing on the motion was completed in mid-December.



LEASE PROFIT-SHARING PROVISION UNENFORCEABLE CONDITION TO ASSIGNMENT IN BANKRUPTCY

Isel M. Perez

In *Antone Corp. v. Haggen Holdings, LLC (In re Haggen Holdings, LLC)*, 2017 WL 3730527 (D. Del. Aug. 30, 2017), the U.S. District Court for the District of Delaware considered whether, as part of a bankruptcy asset sale, a chapter 11 debtor could assume and assign a nonresidential real property lease without giving effect to a clause in the lease requiring the debtor to share 50 percent of any net profits realized upon assignment. The district court ruled that, in approving the sale, the bankruptcy court did not err in holding that the profit-sharing provision was unenforceable under section 365(f)(1) of the Bankruptcy Code because it conditioned assignment of the lease.

SECTION 365(f)(1) AND PROFIT-SHARING PROVISIONS

Under section 365(f)(1), with certain exceptions, a bankruptcy trustee or chapter 11 debtor-in-possession ("DIP") may assign an executory contract or an unexpired lease notwithstanding a provision in the contract or lease or in applicable law that "prohibits, restricts, or conditions" assignment. The purpose of the provision is to maximize the value of a debtor's assets for the benefit of the estate and creditors. *See Angelone v. Great Atlantic & Pacific Tea Co., Inc. (In re Great Atlantic & Pacific Tea Co., Inc.)*, 2016 WL 6084012, *4 (S.D.N.Y. Oct. 17, 2016) (affirming an order invalidating a profit-sharing clause in an assigned lease and stating that section 365(f) is a "powerful tool for advanc[ing] one of the Code's central purposes, the maximization of the value of the bankruptcy estate for the benefit of creditors") (internal quotation marks and citations omitted).

In addition, section 365(f)(3) of the Bankruptcy Code invalidates any provision in an executory contract or unexpired lease assigned by the trustee or DIP that "terminates or modifies, or permits a party other than the debtor to terminate or modify, such contract or lease or a right or obligation under such contract or lease on account of an assignment."

To be unenforceable under section 365(f)(1), a challenged provision does not have to directly prohibit assignment—indirect interference is sufficient. For example, many courts have held that a provision in a lease obligating the lessee to share with the landlord any profits realized from assignment is an unenforceable condition which limits "the debtor's ability to realize the full value of its leasehold interest" by requiring payment to one creditor and diminishing distributions to all other creditors. *In re Jamesway Corp.*, 201 B.R. 73, 78 (Bankr. S.D.N.Y. 1996); *accord In re Standor Jewelers West, Inc.*, 129 B.R. 200 (B.A.P. 9th Cir. 1991); *Great Atlantic*, 2016 WL 6084012, at *6.

In *Haggen Holdings*, the Delaware district court considered whether the bankruptcy court below erred in approving the assumption and assignment of a lease without enforcing a profit-sharing provision.

HAGGEN HOLDINGS

Prior to filing for chapter 11 protection in September 2015 in the District of Delaware, Haggen Holdings, LLC, and its affiliates (collectively, the "Debtors") owned and operated 164 grocery stores and a pharmacy. In October 2015, the Debtors sought court approval of bidding and notice procedures to govern the sale of various stores, as well as the assumption and assignment of certain related executory contracts and unexpired leases, including a 1993 nonresidential real property lease (the "Lease") between one of the Debtors and Antone Corporation ("Antone"). The Lease provided that "[i]n the event Tenant assigns this Lease . . . , Tenant shall deliver to Landlord fifty percent (50%) of any 'net profits' . . . within thirty (30) days of Tenant's receipt thereof pursuant to such assignment."

After the Debtors filed a notice identifying Good Food Holdings (Bristol Farms) as the successful bidder for the store subject to the Lease, Antone objected to the sale and the assignment, contending that the Lease could not be assigned without enforcing the profit-sharing provision.

The Debtors argued that the profit-sharing provision in the Lease was unenforceable as an anti-assignment provision prohibited by section 365(f)(1). Antone countered that the profit-sharing provision at issue was distinguishable from similar provisions invalidated in other cases. According to Antone, the provision was a bargained-for term given in exchange for below-market rent, and it should therefore be enforced by the bankruptcy court.

The bankruptcy court overruled Antone's objection, concluding that the profit-sharing provision was unenforceable under section 365(f)(1). In approving the sale and the related assumption and assignment of the Lease, the court wrote that enforcing the profit-sharing provision "would defeat the purpose of section 365(f)(1), which is to … enable the Debtor to realize the full value of its assets." Antone appealed the ruling.

THE DISTRICT COURT'S RULING

On appeal, Antone argued that the bankruptcy court erred by not analyzing the facts and circumstances of the case, including evidence of the bargained-for exchange of below-market rent and the profit-sharing provision. According to Antone, the profit-sharing provision was "economically interdependent" with the below-market rent provision and thus should have been enforced. The Debtors countered that the bankruptcy court correctly found that a profit-sharing provision, like the one in the Lease, is a de facto anti-assignment provision which is unenforceable under section 365(f)(1) on the basis of the plain language of the statute and the clear weight of authority.

The district court began its analysis by stating that de facto anti-assignment provisions include provisions which require payment of some portion of the proceeds or profit realized upon assignment, like the provision in the Lease. The court found that the provision at issue conditioned assignment because it required the Debtors to pay Antone 50 percent of net profits received if the Debtors assigned the Lease, which would result in a diminished distribution to all other creditors. The court ruled that, as a matter of law, the profit-sharing provision in the Lease was unenforceable under section 365(f)(1).

The district court noted that other courts considering this issue have similarly refused to enforce profit-sharing provisions as anti-assignment provisions and that Antone failed to cite any decisions to the contrary. It rejected Antone's argument that this case is factually distinguishable from other cases invalidating profit-sharing provisions under section 365(f)(1).

The court also concluded that Antone mistakenly relied on cases involving the enforceability of rights of first refusal and cross-default provisions. The court explained that, unlike a profit-sharing provision, which extracts value from the estate, a right of first refusal could benefit the estate by creating a bidding war between potential purchasers. Moreover, the court noted, cases involving cross-default provisions are inapposite because they deal with provisions in one or more economically interdependent contracts, as distinguished from different provisions in a single contract.

In so ruling, the district court agreed with the reasoning in *Great Atlantic*, where the district court affirmed a ruling invalidating a profit-sharing provision under section 365(f)(1) as a matter of law. In *Great Atlantic*, the court rejected the landlord's argument that the profit-sharing provision should be enforced due to the parties' bargained-for exchange in resolving litigation over the debtor's prior defaults. The district court concluded that: (i) the landlord's interest had to yield to the policy interest of maximizing the value of the estate for the benefit of all creditors; and (ii) the bankruptcy court was not required to balance the equities, given the unenforceability of the profit-sharing provision as a matter of law.

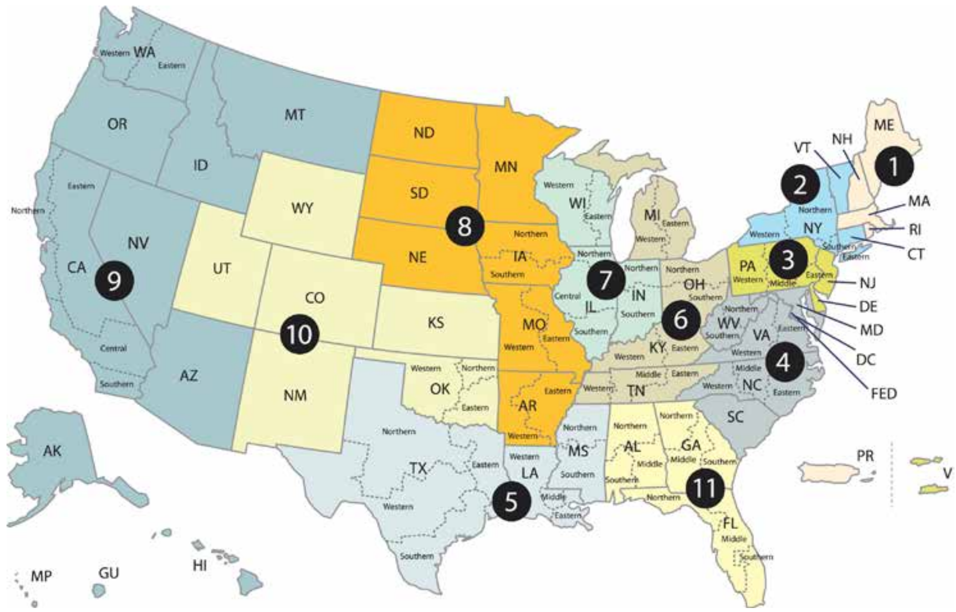
OUTLOOK

Haggen Holdings is consistent with other rulings on the application of section 365(f)(1). The purpose of assumption and assignment of executory contracts and unexpired leases—maximization of value for the benefit of the bankruptcy estate and creditors—is a fundamental bankruptcy policy. Section 365(f)(1) accordingly is read broadly to render unenforceable a wide range of contract provisions that prohibit, restrict, or condition assignment.

THE U.S. FEDERAL JUDICIARY

Geographic Boundaries

of United States Courts of Appeal and United States District Courts



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

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

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

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

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