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BUSINESS RESTRUCTURING REVIEW

THE YEAR IN BANKRUPTCY: 2018

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Rumors of another recession multiplied as the tumultuous second year of the Trump administration came to a close. Highlights of 2018 included a simmering trade war with China; political upheaval after the House of Representatives was retaken by Democrats in the midterm elections; mayhem in financial markets; and, in December, the beginning of the longest government shutdown in U.S. history, triggered by lawmakers' refusal to provide $5.7 billion in funding for a U.S.-Mexican border wall.

Despite the political roller-coaster ride and indications of trouble on the horizon, 2018 was a good year economically for the U.S., with strong growth in the economy (2.8 percent); low inflation (2.2 percent); and the lowest unemployment rate in 50 years (3.9 percent).

These developments prompted the U.S. Federal Reserve to raise its benchmark federal-funds interest rate in December 2018 to a band of 2.25 to 2.50 percent, the highest rate since the spring of 2008, marking the fourth increase for the benchmark rate during the year.

HIGHLIGHTS OF 2018

Among the most memorable business, economic, and financial sound bites of 2018 were "bomb cyclone," "trade war," "Facebook data-harvesting scandal," "Camp Fire," "Woolsey Fire," "yield curve inversion," and "NAFTA 2.0."

However, as corporate tax revenues sharply declined after the 2017 tax cuts took effect, the federal budget deficit widened in fiscal year (the period from October 1 through September 30 (the "FY")) 2018 to $779 billion, up 17 percent from the $668 billion deficit in FY 2017. Moreover, the gross national debt increased by more than $2 trillion during the last two years, reaching $22 trillion at the end of 2018.

U.S. stock markets closed out 2018 with their steepest annual declines since the financial crisis, reflecting growing unease among investors about the health of the nearly decade-long bull run. For the year, the Dow Jones Industrial Average was down 5.6 percent, the S&P 500 was off 6.2 percent, and the NASDAQ Composite finished the year down 3.9 percent.

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BUSINESS BANKRUPTCY FILINGS

According to the Administrative Office of the U.S. Courts, business bankruptcy filings during calendar year ("CY") 2018 totaled 22,232, down from 23,157 in CY 2017. Chapter 11 filings declined nearly 5 percent to 7,095 in CY 2018, from 7,442 in CY 2017. Of the CY 2018 chapter 11 filings, 6,078 chapter 11 cases were filed by businesses and 1,017 cases were filed by non-business debtors. The most frequent venues for business chapter 11 filings in CY 2018 were the Southern District of New York (626 cases), the District of Delaware (615 cases), and the Southern District of Texas (453 cases).

> **HIGHLIGHTS OF 2018**
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> **March 1—**President Trump announces he will impose stiff tariffs on imports of steel and aluminum, rattling stock markets as the prospect of a global trade fight appears imminent.

One hundred petitions seeking recognition of a foreign bankruptcy proceeding under chapter 15 of the Bankruptcy Code were filed in CY 2018, compared to 81 in CY 2018. The venues with the greatest number of chapter 15 filings in CY 2018 were the Southern District of New York (59 cases) and the Southern District of Florida (20 cases). Four municipal debtors filed for chapter 9 protection in CY 2018, compared to seven in CY 2017.

Research firm Reorg reported that there were 336 chapter 11 filings by companies with at least $10 million in liabilities during 2018, down 4.5 percent from the 352 filings in 2017. Retail filings (consisting of companies in the consumer discretionary and consumer staples sectors) led the pack, with 105 filings, followed by companies in the financial (63 filings), healthcare (45 filings), energy (36 filings), and industrials (35 filings) sectors. Forty-five of those chapter 11 cases (13 percent) were prepackaged or prenegotiated.

PUBLIC COMPANY BANKRUPTCY FILINGS

According to data provided by New Generation Research, Inc.'s BankruptcyData.com, bankruptcy filings for "public companies" (defined as companies with publicly traded stock or debt) fell for the second year in a row in 2018, with the volume of prepetition assets halving from 2017 to its lowest level since 2013.

The number of public company bankruptcy filings in 2018 was 58, compared to 71 in 2017. At the height of the Great Recession, 138 public companies filed for bankruptcy in 2008 and 211 in 2009.

The combined asset value of the 58 public companies that filed for bankruptcy in 2018 was $52 billion, compared to $106.9 billion in 2017. By contrast, the 138 public companies that filed for bankruptcy in 2008 had prepetition assets valued at $1.16 trillion in aggregate.

Companies in the oil and gas/energy and retail and supermarket sectors led the charge in public company bankruptcy filings in 2018, with 22 percent (13 cases) and 17 percent (10 cases), respectively, of the year's 58 public bankruptcies. Other sectors with a significant number of public filings in 2018 included chemicals and allied products (nine cases), healthcare and medical (five cases), and computers and software (three cases).

Five of the 10 largest public company bankruptcy filings in 2018 (and seven of the 20 largest) came from the retail and supermarket sector. The second-most-represented sector was

oil and gas/energy, with two cases in the Top 10 and five in the Top 20.

The year 2018 added 12 public company names to the billion-dollar bankruptcy club (measured by value of assets), compared to 22 in 2017. However, the largest public company bankruptcy filing of 2018—media and entertainment giant iHeartMedia, Inc., with $12.8 billion in assets—did not crack the list of the 40 largest public bankruptcy filings of all time. By asset value, the remaining public companies among the 10 largest bankruptcy filings in 2018 were Sears Holdings Corp. ($7.2 billion in assets); FirstEnergy Solutions Corp. ($5.5 billion in assets); Claire's Stores, Inc. ($2 billion in assets); Southeastern Grocers, LLC (a.k.a. Winn-Dixie, BI-LO, and Harveys Supermarkets) ($1.8 billion in assets); Aegean Marine Petroleum Network Inc. ($1.8 billion in assets); EV Energy Partners, L.P. ($1.6 billion in assets); The Bon-Ton Stores, Inc. ($1.5 billion in assets); Westmoreland Coal Co. ($1.4 billion in assets); and Tops Holding II Corp. ($1 billion in assets).

HIGHLIGHTS OF 2018

March 17—This date marks the 10-year anniversary of the Bear Stearns rescue and the onset of the Great Recession.

Twenty-five public and private companies with assets valued at more than $1 billion obtained confirmation of chapter 11 plans or exited from bankruptcy in 2018. Continuing a trend begun in 2012, many more of these companies (19) reorganized than were liquidated or sold.

Seven, or 12 percent, of the 58 public company bankruptcy filings in 2018 were prenegotiated or prepackaged chapter 11 cases, down from 23 percent (16 cases) in 2017.

TERRITORIAL AND MUNICIPAL DEBT

The ongoing debt crisis in Puerto Rico continued to grab headlines in 2018. In May 2017, Puerto Rico's oversight board filed a petition under Title III of the Puerto Rico Oversight, Management, and Economic Stability Act in the largest-ever bankruptcy filing by a governmental entity in the United States. 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 of Puerto Rico's $144 billion in debt. The commonwealth's financial woes have been compounded by the damage and humanitarian crisis wrought in 2017 by Hurricane Maria, from which the island territory has yet to recover.

In June 2018, the Puerto Rico Sales Tax Financing Corporation (known as COFINA) reached a milestone settlement with municipal bondholders and other creditors regarding claims to roughly $18 billion in pledged Puerto Rico sales tax collections. The settlement was ultimately incorporated into a plan of adjustment for COFINA that was confirmed by the court on February 4, 2019.

HIGHLIGHTS OF 2018

March 22—President Trump announces he will impose about $60 billion worth of annual tariffs on Chinese imports. The measures come as the White House grants a long list of exemptions to American allies from steel and aluminum tariffs.

Puerto Rico and its creditors also reached an out-of-court agreement in 2018 to restructure approximately $4 billion in debt issued by the commonwealth's Government Development Bank.

The City of Detroit exited decades of state financial oversight in 2018, a development indicating that the city has made strides toward reversing the long economic and fiscal decline that propelled it into the largest municipal bankruptcy filing ever. Detroit filed its chapter 9 case in 2013 and obtained confirmation of a plan of adjustment in 2014 that eliminated more than $7 billion in debt. Established in 2014 to monitor the Motor City, Detroit's Financial Review Commission voted unanimously in April 2018 to end its oversight of a city that has been under some form of outside supervision since 1975. With its landmark reorganization, Detroit arrested a downward spiral that resulted from decades of population loss, declining tax revenue, and the disappearance of automobile-industry jobs.

BANKS

In a development last seen in 2006, the Federal Deposit Insurance Corporation did not shutter any banks in 2017. By comparison, there were 140 bank failures in 2009 and 157 in 2010, during the height and immediate aftermath of the Great Recession.

HIGHLIGHTS OF 2018

March 23—China announces that it plans to impose retaliatory tariffs on $3 billion worth of American-produced fruit, pork, wine, seamless steel pipes, and more than 100 other goods.

NOTABLE BUSINESS BANKRUPTCY RULINGS IN 2018

APPEALS—MOOTNESS

In bankruptcy cases, appellees often invoke the doctrine of "equitable mootness" as a basis for precluding appellate review of an order confirming a chapter 11 plan. In *Bennett v. Jefferson County, Alabama*, 899 F.3d 1240 (11th Cir. 2018), the U.S. Court of Appeals for the Eleventh Circuit ruled as a matter of first impression that the doctrine applies in chapter 9 cases. According to the Eleventh Circuit panel, "[T]he correct result is to join the Sixth Circuit and the Ninth Circuit B.A.P. in allowing equitable mootness to apply in the Chapter 9 context." The court held that an appeal filed by county sewer ratepayers of an order confirming a chapter 9 plan of adjustment was equitably moot because the ratepayers failed to seek a stay pending appeal and because the plan had been substantially consummated. The panel also concluded that a chapter 9 plan subjecting ratepayers to rate increases over time, "instead of forcing them to bear the financial pain all at once, does not transmogrify it into one that per se violates the ratepayers' constitutional rights."

> **HIGHLIGHTS OF 2018**
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> **April 4—**Facebook publicly acknowledges that the personal data of 87 million users had been "improperly shared" with Cambridge Analytica, an obscure U.K. data analysis firm.

Also as a matter of first impression, the U.S. Court of Appeals for the Ninth Circuit similarly relied on the doctrine to dismiss an appeal of an order confirming a chapter 9 plan of adjustment in *In re City of Stockton, California*, 909 F.3d 1256 (9th Cir. 2018). The court ruled that an appeal from an unstayed chapter 9 plan confirmation order must be dismissed as equitably moot where the appellant had not sought a stay from the bankruptcy court or a bankruptcy appellate panel, where the city's plan had been substantially consummated, and where the relief sought by the appellant—vacatur of the confirmation order based on the plan's failure to provide for an alleged $1 million Takings Clause claim—would completely knock the props out from under the plan and undermine settlements negotiated with unions, pension plan participants and retirees, and other creditors. "Adamantly" dissenting, one judge on the three-judge panel would have ruled that a Takings Clause claim for just compensation under the Fifth and Fourteenth Amendments is not subject to the bankruptcy power and is automatically excepted from discharge, regardless of whether the appeal otherwise would be dismissed as equitably moot.

In *In re Old Cold LLC*, 879 F.3d 376 (1st Cir. 2018), the U.S. Court of Appeals for the First Circuit ruled that the U.S. Supreme Court's decision in *Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973 (2017), which invalidated creditor distributions that deviate from the Bankruptcy Code's priority scheme as part of a "structured dismissal," does not apply to an asset sale under section 363(b) of the Bankruptcy Code. Instead, the court of appeals applied section 363(m) of the Bankruptcy Code to render statutorily moot an appellate challenge to an asset sale to a good-faith purchaser. Section 363(m) moots any appeal of an order approving a sale of bankruptcy estate assets to a good-faith purchaser unless the sale order has been stayed pending appeal.

> **HIGHLIGHTS OF 2018**
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> **April 9—**The nonpartisan Congressional Budget Office reports that the federal government's annual budget deficit is expected to top $1 trillion in 2020 despite healthy economic growth and that the national debt, which has exceeded $21 trillion, will soar to more than $33 trillion in 2028.

In *Tanguy v. West (In re Davis)*, 2018 WL 4232063 (5th Cir. Sept. 5, 2018), the U.S. Court of Appeals for the Fifth Circuit revisited the circumstances under which section 363(m) of the Bankruptcy Code moots an appeal of a bankruptcy court's order approving a sale of assets. The Fifth Circuit reaffirmed its adherence to the majority rule on the issue, ruling that, absent evidence that the purchaser did not acquire the property in good faith, the challengers' failure to obtain a stay pending appeal moots any appeal of a sale order. The court also held that the challengers abandoned any argument that the appeal was not moot by failing to raise it before the bankruptcy court.

AVOIDANCE ACTIONS—EXTRATERRITORIALITY OF AVOIDANCE LAWS

In *In re CIL Ltd.*, 582 B.R. 46 (Bankr. S.D.N.Y. 2018), *amended on reconsideration*, 2018 WL 3031094 (Bankr. S.D.N.Y. June 15, 2018), the U.S. Bankruptcy Court for the Southern District of New York, disagreeing with other courts both within and outside its own district, ruled that the "transfer of an equity interest in a U.K. entity to a Marshall Islands entity was a foreign transfer" and that the Bankruptcy Code's avoidance provisions do not apply extraterritorially because "[n]othing in the language of sections 544, 548 and 550 of the Bankruptcy Code suggests that Congress intended those provisions to apply to foreign transfers." Opposing views on this issue among courts in the Second Circuit may soon be resolved in an appeal pending before the court of appeals in *Securities Investor Protection Corp. v. Bernard L. Madoff Investment Securities LLC (In re Bernard L. Madoff Investment Securities LLC)*, 513 B.R. 222 (S.D.N.Y. 2014), *appeal filed*, No. 17-2992 (2d Cir. Sept. 27, 2017) (oral argument on Nov. 26, 2018). In *Madoff*, the U.S. District

Court for the Southern District of New York ruled that section 550 of the Bankruptcy Code cannot be used to recover stolen funds from a subsequent foreign transferee, given the presumption against extraterritorial application of U.S. statutes.

AVOIDANCE ACTIONS—SAFE HARBOR FOR CERTAIN SECURITIES TRANSACTIONS

In *Merit Management Group LP v. FTI Consulting Inc.*, 138 S. Ct. 883 (2018), the U.S. Supreme Court resolved a long-standing circuit split over the scope of the Bankruptcy Code's "safe harbor" provision exempting certain securities transaction payments from avoidance as fraudulent transfers. The unanimous Court held that section 546(e) of the Bankruptcy Code does not protect transfers made through a financial institution to a third party, regardless of whether the financial institution had a beneficial interest in the transferred property. Instead, the relevant inquiry is whether the transferor or the transferee in the transaction the avoidance of which is sought is itself a financial institution (i.e., a bank, broker, or "financial participant"). Courts in the Second and Third Circuits, which preside over the greatest volume of cases involving transactions that may implicate the section 546(e) safe harbor, have long ruled to the contrary.

> **HIGHLIGHTS OF 2018**
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> **April 30—**Detroit's Financial Review Commission, set up in 2014 to monitor the Motor City, ends its oversight of a city which officials said has been under some form of outside supervision since 1975 and which concluded the largest municipal bankruptcy in history in 2014.

In *Fairfield Sentry Ltd. v. Amsterdam (In re Fairfield Sentry Ltd.)*, 2018 WL 6431741 (Bankr. S.D.N.Y. Dec. 6, 2018), the bankruptcy court ruled that the safe harbor in section 546(e) applies extraterritorially, even though the plaintiffs were foreign liquidators suing in the chapter 15 case of a British Virgin Islands ("BVI") company to avoid under BVI law redemption payments made abroad to feeder funds of Bernard Madoff's defunct brokerage firm. The court rejected the argument that, because the district court in *Madoff* (discussed above) ruled that the Bankruptcy Code's avoidance provisions do not apply extraterritorially, the safe harbor should also have no extraterritorial application. Instead, the court concluded that another provision—section 561(d) of the Bankruptcy Code—makes the safe harbor applicable in chapter 15 cases even if avoidance of a non-U.S. transfer is sought under non-U.S. law. Section 561(d) provides in substance that any provisions in the Bankruptcy Code relating to securities contracts (and certain other types of contracts) "shall apply in a chapter 15 case" to limit avoidance powers to the same extent as in a chapter 7 or chapter 11 case. However, in view of the Supreme Court's ruling in *Merit Management* (discussed above), the court stopped short of invoking the safe harbor until it has an opportunity to decide whether each transferor was a "financial participant."

AVOIDANCE ACTIONS—PREFERENTIAL TRANSFERS

In *Kaye v. Blue Bell Creameries, Inc. (In re BFW Liquidation, LLC)*, 899 F.3d 1178 (11th Cir. 2018), the U.S. Court of Appeals for the Eleventh Circuit broadened the scope of section 547(c)(4) of the Bankruptcy Code's "subsequent new value" defense against preference actions by holding that the provision applies to all new value supplied by the creditor during the preference period and not merely to new value that remains unpaid on the bankruptcy petition date. In adopting this approach, the Eleventh Circuit joined the Fourth, Fifth, Eighth, and Ninth Circuits in applying a more expansive reading of section 547(c)(4).

CHAPTER 11 PLANS—DISQUALIFICATION OF VOTES

In *Pacific Western Bank v. Fagerdala USA-Lompoc, Inc. (In re Fagerdala USA-Lompoc, Inc.)*, 891 F.3d 848 (9th Cir. 2018), the U.S. Court of Appeals for the Ninth Circuit reexamined the circumstances under which a vote on a chapter 11 plan can be disallowed, or "designated," under section 1126(e) of the Bankruptcy Code because it had been cast in bad faith. The court ruled that a bankruptcy court erred in designating votes cast by a secured creditor who purchased certain unsecured claims for the purpose of blocking confirmation of the debtor's chapter 11 plan. According to the Ninth Circuit, a bankruptcy court may not designate claims for bad faith simply because: (i) a creditor offers to purchase only a subset of available claims in order to block a plan of reorganization; and/or (ii) blocking the plan will adversely impact the remaining creditors. "[A]t a minimum," the court wrote, there must be some evidence that the creditor is "seeking to secure some untoward advantage over other creditors for some ulterior motive."

> **HIGHLIGHTS OF 2018**
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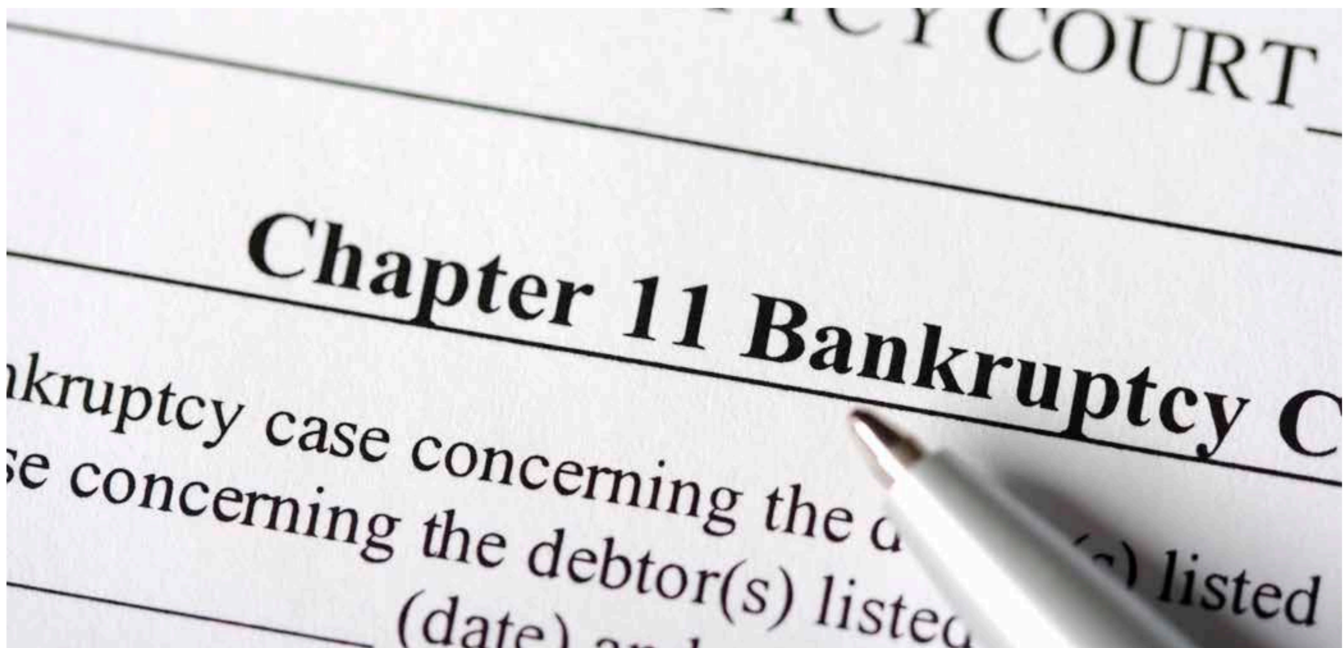
> **June 22—**The EU fights back against the Trump administration's tariffs, slapping penalties on $3.2 billion of American products, including bourbon, motorcycles, and orange juice.

CHAPTER 11 PLANS—CRAMDOWN

In *Law Debenture Trust Co. of New York v. Tribune Media Co. (In re Tribune Media Co.)*, 587 B.R. 606 (D. Del. 2018), *appeal filed*, No. 18-2909 (3d Cir. Sept. 4, 2018), the U.S. District Court for the District of Delaware ruled that, under a plain reading of section 1129(b)(1) of the Bankruptcy Code, a cramdown chapter 11 plan need not recognize the priority set forth in a subordination agreement between senior and subordinated bondholders. Section 1129(b)(1) provides that, "[n]otwithstanding section 510(a)" of the Bankruptcy Code (recognizing contractual subordination agreements in bankruptcy), a nonconsensual chapter 11 plan may be confirmed over the objection of an



impaired dissenting class of creditors only if the plan does not discriminate unfairly (among other requirements). The court concluded that, because the percentage difference between the senior bondholders' distribution share under the plan versus the outcome under the subordination agreement was immaterial, the plan's treatment of the senior bondholders' claims was not presumed to constitute unfair discrimination.

> **HIGHLIGHTS OF 2018**
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> **August 2—**Apple's worth surpasses $1 trillion when its shares briefly climb to $207.05, making it the world's most valuable company.

CHAPTER 11 PLANS—RETIREE BENEFITS

In *In re Walter Energy, Inc.*, 2018 WL 6803736 (11th Cir. Dec. 27, 2018), the U.S. Court of Appeals for the Eleventh Circuit ruled that section 1114 of the Bankruptcy Code authorizes a bankruptcy court to terminate a debtor-employer's statutory obligation under the Coal Industry Retiree Health Benefit Act of 1992 (the "Coal Act") to pay premiums for lifetime employee healthcare benefits when the bankruptcy court finds that such termination is necessary for the coal company to sell its assets as a going concern and to avoid piecemeal liquidation. The Eleventh Circuit concluded that: (i) the bankruptcy court had jurisdiction to terminate the debtor-employer's obligation to pay premiums owed under its employee/retiree benefit plan because such premiums do not qualify as taxes for purposes of the Anti-Injunction Act; (ii) even if such premiums did qualify as taxes, an exception to the Anti-Injunction Act applies because the debtor had no available alternative remedy; (iii) the premiums qualified as "retiree benefits" under section 1114 even though the obligation to pay them was statutory rather than contractual; (iv) in enacting the Coal Act, Congress did not express a "clear and manifest" intent to bar bankruptcy courts from modifying such premiums; and (v) the term "reorganization" as used in section 1114(g)(3) refers both to restructurings and liquidations under chapter 11.

The U.S. Bankruptcy Court for the Southern District of Texas came to the same conclusion in *Trustees of United Mine Workers of Am. 1992 Benefit Plan v. Westmoreland Coal Co. (In re Westmoreland Coal Co.)*, 2018 WL 6920227 (Bankr. S.D. Tex. Dec. 29, 2018). The bankruptcy court certified a direct appeal of its ruling to the U.S. Court of Appeals for the Fifth Circuit.

CHAPTER 11 PLANS—SENIOR CLASS GIFTING

In *Hargreaves v. Nuverra Environmental Solutions Inc. (In re Nuverra Environmental Solutions Inc.)*, 590 B.R. 75 (D. Del. 2018), the U.S. District Court for the District of Delaware affirmed a bankruptcy court order confirming a nonconsensual chapter 11 plan that included "gifted" consideration from a senior secured creditor to fund unequal distributions to two separate classes of unsecured creditors. The court also ruled that, even though the appeal was equitably moot, the plan's separate classification and differing treatment of unsecured noteholders and trade creditors: (i) did not unfairly discriminate between, or improperly classify, the two unsecured classes because there was a rational basis for the classification scheme; and (ii) were "fair and equitable" because they did not constitute "vertical gifting" that violated applicable precedent and they promoted the debtor's reorganization.

CHAPTER 11 PLANS—THIRD-PARTY RELEASES

In *Opt-Out Lenders v. Millennium Lab Holdings II, LLC (In re Millennium Lab Holdings II, LLC)*, 591 B.R. 559 (D. Del. 2018), the U.S. District Court for the District of Delaware affirmed a bankruptcy court's ruling that it had the constitutional authority to grant nonconsensual third-party releases in an order confirming the chapter 11 plan of a laboratory testing company. 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 2011 ruling in *Stern v. Marshall*, 564 U.S. 462 (2011), which limited claims that can be finally adjudicated by a bankruptcy judge. The court concluded that *Stern* does not apply because the "operative proceeding" before the court was a chapter 11 plan confirmation proceeding rather than litigation of the racketeering claims.

> **HIGHLIGHTS OF 2018**
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> **September 4—**Amazon becomes the second U.S. corporation with a valuation of more than $1 trillion.

The U.S. District Court for the Southern District of New York reached the same conclusion in *Lynch v. Lapidem Ltd. (In re Kirwan Offices SARL)*, 592 B.R. 489 (S.D.N.Y. 2018). In affirming an order confirming a cramdown chapter 11 plan that enjoined arbitration of claims over whether the bankruptcy filing was authorized, the court ruled that "[a] bankruptcy court acts pursuant to its core jurisdiction when it considers the involuntary release of claims against a third-party non-debtor in connection with the confirmation of a proposed plan of reorganization, which is a statutorily defined core proceeding."

CHAPTER 11 PLANS—TREATMENT OF SECURED CLAIMS AND ACCEPTANCE

In *Grasslawn Lodging, LLC v. Transwest Resort Properties Inc. (In re Transwest Resort Properties, Inc.)*, 881 F.3d 724 (9th Cir. 2018), the U.S. Court of Appeals for the Ninth Circuit ruled that a cramdown chapter 11 plan need not provide a due-on-sale clause for an undersecured creditor who elects to be treated as fully secured under section 1111(b)(2) of the Bankruptcy Code. It also ruled, as a matter of first impression among the circuits, that section 1129(a)(10)'s impaired class acceptance requirement applies on a "per plan" rather than a "per debtor" basis.

CLAIMS—TRANSFERS AND ALLOWANCE

In *In re Woodbridge Group of Companies, LLC*, 590 B.R. 99 (Bankr. D. Del. 2018), the U.S. Bankruptcy Court for the District of Delaware ruled that, because an anti-assignment clause in a promissory note was enforceable under state law, the associated claim asserted in bankruptcy by the purchaser of the note must be disallowed. The court noted, among other things, that "[t]he evidence does not support the claims trader's argument that enforcing the anti-assignment clause would disrupt the market."

> **HIGHLIGHTS OF 2018**
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> **September 15—**This date marks the 10th anniversary of the chapter 11 filing by Lehman Brothers, the largest bankruptcy of all time.

In *In re Caesars Entertainment Operating Co., Inc.*, 588 B.R. 32 (Bankr. N.D. Ill. 2018), the U.S. Bankruptcy Court for the Northern District of Illinois disallowed assigned tort and contract claims because the tort claims were unassignable under applicable non-bankruptcy law and because, pursuant to a purchase and sale agreement, the contract claims could not be assigned without consent. The court also held that Rule 3001(e) of the Federal Rules of Bankruptcy Procedure, which establishes procedures for claims transfers, does not create substantive rights for claims transferees.

In *In re Westinghouse Electric Co. LLC*, 2018 WL 3655702 (Bankr. S.D.N.Y. Aug. 1, 2018), the U.S. Bankruptcy Court for the Southern District of New York ruled that, because a series of email exchanges between the holder and the purported purchaser of a claim did not create a binding contract under applicable non-bankruptcy law, the notice of transfer of the claim should be canceled and the original holder recognized as the claimant. The court rejected the argument that customs in the claims trading industry demanded a contrary ruling, noting that industry participants "ought to be clear and direct in setting forth their agreements in the emails they exchange," especially when dealing with less experienced counterparties.

> **HIGHLIGHTS OF 2018**
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> **November 6—**Democrats regain control of the U.S. House of Representatives in midterm elections, but Republicans expand their majority in the Senate.

CREDITORS' RIGHTS—RESTRICTIONS ON BORROWER'S BANKRUPTCY FILING

In *Franchise Services of North America, Inc. v. Macquarie Capital (USA), Inc. (In re Franchise Services of North America, Inc.)*, 891 F.3d 198 (5th Cir. 2018), the U.S. Court of Appeals for the Fifth Circuit affirmed a bankruptcy court order dismissing a chapter 11 case filed by a corporation without obtaining—as required by its corporate charter—the consent of a preferred shareholder that was also controlled by a creditor of the corporation. The Fifth Circuit ruled that: (i) state law determines who has the authority to file a voluntary bankruptcy petition

on behalf of a corporation; (ii) federal law does not strip a bona fide equity holder of its preemptive voting rights merely because it is also a creditor; and (iii) the preferred shareholder-creditor was not a controlling shareholder under applicable state law such that it had a fiduciary duty to the corporation that would impact any decision to approve or prevent a bankruptcy filing.

CROSS-BORDER BANKRUPTCIES—CHAPTER 15 RECOGNITION

In *Halo Creative & Design Ltd. v. Comptoir Des Indes Inc.*, 2018 WL 4742066 (N.D. Ill. Oct. 2, 2018), the U.S. District Court for the Northern District of Illinois denied a motion for a stay of U.S. litigation in light of the pendency of the defendant's Canadian bankruptcy proceeding because a U.S. bankruptcy court had not recognized the Canadian bankruptcy under chapter 15 of the Bankruptcy Code.

HIGHLIGHTS OF 2018

November 8—The "Camp Fire," the deadliest and most destructive wildfire in California history, erupts in northern California and eventually results in at least 88 fatalities; destroys 18,804 structures, including nearly all of the Town of Paradise; and causes billions of dollars of insured damage alone. On the same day, the "Woolsey Fire" erupts in Los Angeles and Ventura Counties. The fire destroys 1,643 structures, kills three persons, and prompts the evacuation of more than 295,000 people.

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

In *Mission Product Holdings, Inc. v. Tempnology, LLC (In re Tempnology, LLC)*, 879 F.3d 389 (1st Cir. 2018), the U.S. Court of Appeals for the First Circuit ruled that the rejection of a trademark license in bankruptcy means that the licensee loses the ability to use the licensed intellectual property because trademarks are not among the categories of "intellectual property" afforded special protection under the Bankruptcy Code. In so ruling, the First Circuit effectively embraced the approach articulated by the Fourth Circuit in *Lubrizol Enters., Inc. v. Richmond Metal Finishers, Inc. (In re Richmond Metal Finishers Inc.)*, 756 F.2d 1043 (4th Cir. 1985), and rejected the contrary approach endorsed by the Seventh Circuit—the only other court of appeals that has directly addressed the issue—in *Sunbeam Prods., Inc. v. Chicago Am. Manuf., LLC*, 686 F.3d 372 (7th Cir. 2012), *cert. denied*, 133 S. Ct. 790 (2012). The U.S. Supreme Court agreed on October 26, 2018, to review a portion of the First Circuit's ruling and has scheduled the case for argument on February 20, 2019. *See Mission Product Holdings, Inc. v. Tempnology, LLC*, 2018 WL 2939184 (U.S. Oct. 26, 2018).

INTERCREDITOR ISSUES

In a ruling with potentially wide-ranging implications in intercreditor disputes and intercreditor agreement drafting and negotiations, the U.S. District Court for the Southern District of New York in *In re MPM Silicones, L.L.C.*, 2018 WL 6324842 (S.D.N.Y. Nov. 30, 2018), *as amended*, 2019 WL 121003 (S.D.N.Y. Jan. 4, 2019), upheld a bankruptcy court ruling dismissing intercreditor actions filed by a debtor's first-lien and 1.5-lien noteholders seeking to hold second-lien noteholders accountable for alleged losses resulting from their votes accepting, and the bankruptcy court's confirmation of, the debtor's cramdown chapter 11 plan, which distributed new equity to second-lien noteholders. Because the second-lien noteholders wore both "secured and unsecured hats" in the case, the district court affirmed the bankruptcy court's finding that many of the second-lien noteholders' actions in the case were permitted by a provision of the intercreditor agreement allowing the second-lien noteholders to exercise rights as unsecured creditors. According to the district court, the "growing consensus is that agreements that seek to limit or waive junior noteholders' voting rights must contain express language to that effect."

The district court also held that, where a secured lender's liens are reinstated under a chapter 11 plan providing the secured lender with a stream of payments having a present value equal to the value of the lender's collateral, the secured lender's lien does not extend to the reorganized equity issued under the chapter 11 plan. Thus, the distribution under the plan of new equity to the second-lien noteholders did not violate the intercreditor agreement.

POWER OF BANKRUPTCY COURTS—SUBSTANTIVE CONSOLIDATION

In *Official Committee of Unsecured Creditors v. Archdiocese of St. Paul and Minneapolis (In re Archdiocese of St. Paul and Minneapolis)*, 888 F.3d 944 (8th Cir. 2018), the U.S. Court of Appeals for the Eighth Circuit affirmed lower court rulings that the assets of parishes and other entities associated with a Catholic archdiocese were not, by means of "substantive consolidation," available to fund bankruptcy settlements with clergy sexual-abuse victims. According to the Eighth Circuit, a bankruptcy court's authority to issue "necessary or appropriate" orders under section 105 of the Bankruptcy Code does not permit it to order substantive consolidation of the assets and liabilities of a debtor archdiocese with the assets and liabilities of nondebtor entities who also operated as nonprofits, because the remedy would contravene the prohibition of involuntary bankruptcy filings against nonprofits.

FROM THE TOP IN 2018

The U.S. Supreme Court issued four rulings in 2018 involving issues of bankruptcy law.

In *Merit Management Group LP v. FTI Consulting Inc.*, 138 S. Ct. 883 (2018), the Court issued a highly anticipated ruling resolving a long-standing circuit split over the scope of the Bankruptcy Code's "safe harbor" provision exempting certain securities transaction payments from avoidance as fraudulent transfers. The unanimous Court held that section 546(e) of the Bankruptcy Code does not protect transfers made through a financial institution to a third party, regardless of whether the financial institution had a beneficial interest in the transferred property. Instead, the relevant inquiry is whether the transferor or the transferee in the transaction the avoidance of which is sought is itself a financial institution.

In *U.S. Capital Bank N.A. v. Village at Lakeridge, LLC*, 138 S. Ct. 960 (2018), the Court held that an appellate court should apply a deferential standard of review to a bankruptcy court's decision as to whether a creditor is a "nonstatutory" insider of the debtor for the purpose of determining whether the creditor's vote in favor of a nonconsensual chapter 11 plan can be counted. The Court, however, declined in its opinion to rule on the validity of the standard applied by the lower courts to determine nonstatutory insider status and expressly declined to consider whether a noninsider automatically inherits a statutory insider's status when the noninsider acquires the insider's claim.

HIGHLIGHTS OF 2018

November 25—More than four decades after Britain tied itself to its Continental neighbors, Prime Minister Theresa May obtains the approval of the other 27 EU members on Brexit, a formal divorce pact from the bloc. Her biggest challenge may be obtaining the approval of Britain's Parliament for a Brexit plan.

In *Deutsche Bank Trust Company Americas v. Robert R. McCormick Foundation*, 138 S. Ct. 1162 (2018), the Court issued an order that, in light of its recent ruling in *Merit Management Group LP v. FTI Consulting Inc.*, the Court would defer consideration of a petition seeking review of a 2016 decision by the U.S. Court of Appeals for the Second Circuit in the Tribune Co. chapter 11 case. In that case, the Second Circuit ruled that the Bankruptcy Code's "safe harbor" shielding certain securities transactions from avoidance as fraudulent transfers preempts creditors' state law constructive fraudulent transfer claims and applies to any transfer that passes through a financial intermediary, regardless of whether the banks and brokers at issue had any beneficial interest in the funds.

In *Lamar, Archer & Cofrin, LLP v. Appling*, 138 S. Ct. 1752 (2018), the Court ruled that an individual debtor's false statement about a single asset, as distinguished from the debtor's overall financial status, can make a debt for money, property, services, or credit obtained on the basis of the statement nondischargeable in the debtor's bankruptcy case, but only if the statement is in writing.

HIGHLIGHTS OF 2018

November 30—The U.S., Mexico, and Canada enter into a new pact that overhauls their quarter-century-old free-trade zone when leaders sign the recast North American Free Trade Agreement (NAFTA)—rebranded as the U.S.-Mexico-Canada Agreement, or USMCA. The pact is expected to pass easily in both Canada and Mexico but faces a more difficult path in the U.S. Congress.

On October 26, 2018, the Court granted a writ of certiorari in *Mission Product Holdings, Inc. v. Tempnology, LLC*, No. 17-1657, 2018 WL 2939184 (U.S. Oct. 26, 2018). In granting the petition, the Court agreed to consider whether, under section 365 of the Bankruptcy Code, a debtor-licensor's rejection of a trademark license agreement, which constitutes a breach of such a contract under section 365(g), "terminates rights of the licensee that would survive the licensor's breach under applicable non-bankruptcy law." This question, arising out of a 1988 amendment to the Bankruptcy Code, has recently split the circuits. The Court has scheduled the case for argument on February 20, 2019.

LEGISLATIVE AND REGULATORY DEVELOPMENTS OF 2018

PROPOSED U.S. BANKRUPTCY LEGISLATION

The "Small Business Reorganization Act of 2018," S. 3689, H.R. 7190 (introduced on November 29, 2018), would have amended various provisions of the Bankruptcy Code to ease many of the restrictions, limitations, duties, costs, and requirements applicable to small-business debtors; this legislation was introduced in response to the perception that small-business owners are avoiding bankruptcy because of the cost and concerns that they will be forced to sell their companies.

The "U.S. Territorial Relief Act of 2018," S. 3262 (introduced on July 25, 2018), would have given self-governing territories of the U.S. (i.e., Puerto Rico, Guam, the Commonwealth of the Northern Mariana Islands, the U.S. Virgin Islands, and American Samoa) and their instrumentalities the ability to discharge unsecured debts once every seven years, provided that certain financial conditions are met, including prolonged economic downturn and declines in population or natural disasters that cause an unsupportable debt burden that cannot realistically be repaid without imposing undue hardship on the territory's citizens and residents.

HIGHLIGHTS OF 2018

December 1—The U.S. and China call a truce in their trade war after President Trump agrees to hold off on new tariffs and President Xi Jinping pledges to increase Chinese purchases of American products. The two also set the stage for more painstaking negotiations to resolve deeply rooted differences over trade.

The "Student Loan Bankruptcy Act of 2018," H.R. 6588 (introduced on July 26, 2018), would have amended section 523(a)(8) of the Bankruptcy Code to modify the circumstances under which an individual debtor could receive a discharge of certain educational loans and educational benefits received more than five years before the commencement of a bankruptcy case.

The "Medical Debt Tax Relief Act," H.R. 5493 (introduced on April 12, 2018), would have amended the Internal Revenue Code of 1986 to exclude from income any medical debts that are discharged in a bankruptcy case.

The "Providing Responsible Oversight of Trusts to Ensure Compensation and Transparency for Asbestos Victims Act of 2018," S. 2564 (introduced on March 15, 2018), would have amended section 524(g) of the Bankruptcy Code to promote the investigation of fraudulent claims against asbestos trusts established in a bankruptcy case by, among other things, providing penalties for fraudulent claims.

The "Bankruptcy Venue Reform Act of 2018," S. 2282 (introduced on January 8, 2018), would have amended title 28 of the United States Code to, among other things, limit the venue of a bankruptcy filing by a corporate debtor to: (i) the district in which the debtor's principal place of business or principal assets have been located for the 180 days preceding the bankruptcy petition date; or (ii) the district in which a properly venued bankruptcy case of a controlling affiliate of the debtor is pending.

HIGHLIGHTS OF 2018

December 4—Part of the U.S. Treasury yield curve "inverts," igniting debate over whether the inversion portends the onset of another recession.

U.S. TREASURY DEPARTMENT REPORT PROPOSING CHAPTER 14 OF THE BANKRUPTCY CODE TO GOVERN BANK DISSOLUTIONS

On February 21, 2018, the U.S. Treasury Department issued the Orderly Liquidation Authority and Bankruptcy Reform Report (the "Report") advocating enhancement of the Bankruptcy Code as it applies to financial institutions. The Report is in stark opposition to the Financial CHOICE Act of 2017, which seeks to undo much of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") and fully repeal the orderly liquidation authority (the "OLA") established in Dodd-Frank. Under Dodd-Frank, the Federal Deposit Insurance Corporation is authorized to control the assets of any financial institution the failure of which might disrupt the U.S. financial markets. Opponents of the OLA argue that risky bank behavior is incentivized by providing what amounts to a guarantee fund. The Report, rather than proposing elimination of the OLA, suggests limiting the use of the OLA to only the most distressed cases. The Report also calls for Congress to add a new chapter 14 to the Bankruptcy Code that would allow banks to dissolve without causing a market-wide credit freeze.

PROPOSED AMENDMENTS TO CHAPTER 15 OF THE BANKRUPTCY CODE

On August 20, 2018, the National Bankruptcy Conference submitted a letter (the "Letter") to representatives of the House Subcommittee on Regulatory Reform, Commercial and Antitrust Law and the House Committee on the Judiciary that proposed certain technical and substantive amendments to chapter 15 of the Bankruptcy Code.

AMENDMENTS TO U.S. BANKRUPTCY RULES

Changes to the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules") took effect on December 1, 2018. Most of the amendments apply to the Bankruptcy Rules governing appeals, reflecting corresponding changes to the Federal Rules of Appellate Procedure and the Federal Rules of Civil Procedure. A notable exception is the amendment of Bankruptcy Rule 5005 to require electronic filing of court documents absent good cause on a nationwide basis. In addition, Bankruptcy Rule 8018.1 has been added to allow a district court to treat an appealed bankruptcy court order or judgment as proposed findings of fact and conclusions of law, if the district court concludes that the bankruptcy court lacked constitutional authority to enter the order or judgment.

HIGHLIGHTS OF 2018

December 22—After congressional and White House officials fail to compromise on a spending bill that the White House insists must include $5.7 billion for a U.S.-Mexico border wall, the federal government shuts down in what will become the longest shutdown in U.S. history.

INCREASED U.S. TRUSTEE FEES

Effective January 1, 2018, chapter 11 quarterly fees were increased for the first time in a decade as part of the Bankruptcy Judgeship Act of 2017. The amended fee schedule affects only about the largest 10 percent of chapter 11 debtors, or about 750 cases filed per year. Under the amended fee schedule, debtors who make $1 million or more in quarterly disbursements pay the lesser of 1 percent of disbursements or $250,000. Quarterly fees—along with a portion of filing fees paid by debtors in chapters 7, 11, 12, and 13—are deposited into the U.S. Trustee System Fund to offset appropriations made to the U.S. Trustee Program.

NO COMITY EXTENDED TO FOREIGN BANKRUPTCY WITHOUT CHAPTER 15 RECOGNITION

Dan T. Moss
Mark G. Douglas

U.S. courts have a long-standing tradition of recognizing or enforcing the laws and court rulings of other nations as an exercise of international "comity." Prior to the enactment of chapter 15 of the Bankruptcy Code in 2005, the procedure for obtaining comity from a U.S. court in cases involving a foreign bankruptcy or insolvency case was haphazard and unpredictable. A ruling recently handed down by the U.S. District Court for the Northern District of Illinois indicates that the enactment of chapter 15 was a game changer in this context. In *Halo Creative & Design Ltd. v. Comptoir Des Indes Inc.*, 2018 WL 4742066 (N.D. Ill. Oct. 2, 2018), the court denied a motion for a stay of U.S. litigation in light of the pendency of the defendant's Canadian bankruptcy proceeding because a U.S. bankruptcy court had not recognized the Canadian bankruptcy under chapter 15.

COMITY

"Comity" is "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws." *Hilton v. Guyot*, 159 U.S. 113, 164 (1895). International comity has been interpreted to include two distinct doctrines: (i) "legislative," or "prescriptive," comity; and (ii) "adjudicative comity," *Maxwell Communication Corp. v. Societe Generale (In re Maxwell Communication Corp.)*, 93 F.3d 1036, 1047 (2d Cir. 1996).

The former "shorten[s] the reach of a statute"—one nation will normally "refrain from prescribing laws that govern activities connected with another state when the exercise of such jurisdiction is unreasonable." *Official Comm. of Unsecured Creditors of Arcapita Bank B.S.C.(c) v. Bahrain Islamic Bank (In re Arcapita Bank B.S.C.(c))*, 575 B.R. 229, 237 (Bankr. S.D.N.Y. 2017).

"Adjudicative comity," or "comity among courts," is an act of deference whereby the court of one nation declines to exercise jurisdiction in a case that is properly adjudicated in a foreign court. Because a foreign nation's interest in the equitable and orderly distribution of a foreign debtor's assets is an interest deserving respect and deference, U.S. courts generally defer to foreign bankruptcy proceedings and decline to adjudicate creditor claims that are the subject of such proceedings. *See Canada Southern Railway Co. v. Gebhard*, 109 U.S. 527, 548 (1883) ("the true spirit of international comity requires that [foreign schemes of arrangement], legalized at home, should be

recognized in other countries"); *accord In re Int'l Banking Corp. B.S.C.*, 439 B.R. 614, 624 (Bankr. S.D.N.Y. 2010) (citing cases).

Prior to 2005, as an exercise of comity, U.S. courts regularly enforced stays of creditor collection efforts against foreign debtors or their U.S. assets issued in connection with foreign bankruptcy proceedings. *See, e.g.*, *Philadelphia Gear Corp. v. Philadelphia Gear de Mexico, S.A.*, 44 F.3d 187 (3d Cir. 1994) (deferring to a Mexican bankruptcy proceeding); *Badalament, Inc. v. Mel-O-Ripe Banana Brands, Ltd.*, 265 B.R. 732 (E.D. Mich. 2001) (deferring to a Canadian bankruptcy proceeding); *Lindner Fund, Inc. v. Polly Peck Int'l PLC*, 143 B.R. 807 (S.D.N.Y. 1992) (citing cases and dismissing litigation brought in the U.S. against a U.K. company that was a debtor in U.K. insolvency proceedings); *Cornfeld v. Investors Overseas Services, Ltd.*, 471 F. Supp. 1255 (S.D.N.Y. 1979) (deferring to a Canadian bankruptcy proceeding), *aff'd*, 614 F.2d 1286 (2d Cir. 1979).

In many such cases, U.S. courts recognized and enforced the stays of foreign courts in granting relief in an "ancillary proceeding" brought by the representative of a foreign debtor under section 304 of the Bankruptcy Code—the repealed precursor to chapter 15 of the Bankruptcy Code. Section 304 expressly authorized a U.S. bankruptcy court to enjoin the commencement or continuation of any action against a foreign debtor with respect to property involved in a foreign bankruptcy case. *See, e.g.*, *JP Morgan Chase Bank v. Altos Hornos de Mexico S.A. de C.V.*, 412 F.3d 418 (2d Cir. 2005); *Cunard S.S. Co. v. Salen Reefer Servs. AB*, 773 F.2d 452 (2d Cir. 1985); *Hoffman v. Joint Official Liquidators (In re Nat'l Warranty Ins. Risk Retention Grp.)*, 306 B.R. 614 (B.A.P. 8th Cir.), *aff'd*, 384 F.3d 959 (8th Cir. 2004).

However, an ancillary proceeding under section 304 was "not the exclusive remedy for foreign debtors opposing actions by local creditors against assets located in the United States." *Hembach v. Quikpak Corp.*, 1998 WL 54737, *4 (E.D. Pa. Jan. 8, 1998). The foreign representative could request that the U.S. court recognize foreign bankruptcy proceedings as a matter of international comity, without seeking relief under section 304. *See Interpool, Limited v. Certain Freights of the M/VS Venture Star, Mosman Star, Fjord Star, Lakes Star, Lily Star*, 878 F.2d 111 (3d Cir. 1989); *Remington Rand Corporation–Delaware v. Business Sys. Inc.*, 830 F.2d 1260, 1267–68 (3d Cir. 1987) (section 304 "expresse[d] Congressional recognition of an American policy favoring comity for foreign bankruptcy proceedings . . . [and was] not the exclusive source of comity"); *In re Enercons Virginia, Inc.*, 812 F.2d 1469, 1471–72 (4th Cir. 1987); *see generally* COLLIER ON BANKRUPTCY ¶ 1509.02 (16th ed. 2019) ("Thus, foreign representatives could, theoretically at least, try their luck in a variety of courts, with failure in one not precluding a second try in another.").

CHAPTER 15 ALTERS THE LANDSCAPE

Even though comity is alive and well in both bankruptcy and non-bankruptcy contexts, the enactment of chapter 15 in 2005 changed the requirements for seeking recognition and enforcement in the U.S. of foreign bankruptcy court orders or laws impacting a foreign debtor or its U.S. assets.

Under section 1515 of the Bankruptcy Code, the representative of a foreign debtor may file a petition in a U.S. bankruptcy court seeking "recognition" of a "foreign proceeding." A "foreign proceeding" is defined in section 101(23) of the Bankruptcy Code as:

> a collective judicial or administrative proceeding in a foreign country, including an interim proceeding, under a law relating to insolvency or adjustment of debt in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation.

More than one bankruptcy or insolvency proceeding may be pending with respect to the same foreign debtor in different countries. Chapter 15 therefore contemplates recognition in the U.S. of both a "foreign main proceeding"—a case pending in the country where the debtor's center of main interests is located (*see* 11 U.S.C. § 1502(4))—and "foreign nonmain proceedings," which may have been commenced in countries where the debtor merely has an "establishment" (*see* 11 U.S.C. § 1502(5)).

If the bankruptcy court recognizes a foreign proceeding as either a main or nonmain proceeding, the automatic stay prevents creditor collection efforts in the U.S. (*see* section 1520(a)), and section 1521(a) authorizes the court to grant a broad range of provisional and other relief designed to preserve the foreign debtor's assets (including injunctive relief) or otherwise to provide assistance to the court presiding over the debtor's foreign proceeding.

Section 1509(b) provides that, if the U.S. bankruptcy court recognizes a foreign proceeding, the foreign representative may apply directly to another U.S. court for appropriate relief, and

a U.S. court "shall grant comity or cooperation to the foreign representative." Section 1509(c) accordingly specifies that a request for comity or cooperation from another U.S. court "shall be accompanied by a certified copy of an order granting recognition" under chapter 15. This provision reflects lawmakers' intention that chapter 15 be the "exclusive door to ancillary assistance to foreign proceedings," with the goal of controlling such cases in a single court. COLLIER ON BANKRUPTCY ¶ 1509.03 (16th ed. 2019) (quoting H.R. Rep. No. 109-31(I), 110 (2005) ("Parties would be free to avoid the requirements of [chapter 15] and the expert scrutiny of the bankruptcy court by applying directly to a state or Federal court unfamiliar with the statutory requirements. . . . This section concentrates the recognition and deference process in one United States court, ensures against abuse, and empowers a court that will be fully informed of the current status of all foreign proceedings involving the debtor.")).

If a U.S. bankruptcy court denies a petition for recognition of a foreign proceeding, section 1509(d) authorizes the court to "issue any appropriate order necessary to prevent the foreign representative from obtaining comity or cooperation" from U.S. courts. However, a foreign representative's failure to commence a chapter 15 case or to obtain recognition does not prevent the foreign representative from suing in a U.S. court "to collect or recover a claim which is the property of the debtor." 11 U.S.C. § 1509(f).

Therefore, unlike practice before the enactment of chapter 15, a foreign representative must comply with the requirements of chapter 15 to obtain the various forms of relief or assistance contemplated by the chapter, including a stay of U.S. court proceedings against a foreign debtor or its assets. *See Oak Point Partners, Inc. v. Lessing*, 2013 WL 1703382 (N.D. Cal. Apr. 19, 2013); *Orchard Enter. NY, Inc. v. Megabop Records Ltd.*, 2011 WL 832881 (S.D.N.Y. Mar. 4, 2011); *Econ. Premier Assurance Co. v. CPI Plastics Grp., Ltd.*, 2010 WL 11561369 (W.D. Ark. June 7, 2010); *Reserve Int'l Liquidity Fund, Ltd. v. Caxton Int'l Ltd.*, 2010 WL 1779282 (S.D.N.Y. Apr. 29, 2010); *Andrus v. Digital Fairway Corp.*, 2009 WL 1849981 (N.D. Tex. June 26, 2009); *U.S. v. J.A. Jones Const. Grp., LLC*, 333 B.R. 637 (E.D.N.Y. 2005); *see also Giant Screen Sports LLC v. Sky High Entm't*, 2007 WL 627607 (N.D. Ill. Feb. 27, 2007) (granting a stay where the debtor's foreign proceeding was recognized under chapter 15). *But see Bickerton v. Bozel S.A. (In re Bozel S.A.)*, 434 B.R. 86 (Bankr. S.D.N.Y. 2010) (without mentioning section 1509(b), allowing a liquidator appointed in the British Virgin Islands ("BVI") liquidation proceedings of a BVI company to seek relief in the chapter 11 case of its subsidiary).

HALO CREATIVE

Halo Creative & Design Ltd. and its affiliates (collectively, "Halo") were designers and distributors of high-end furniture and lighting. In 2014, Halo sued a competitor—Comptoir

Des Indes Inc. ("CDI")—for copyright, trademark, and patent infringement in the U.S. District Court for the Northern District of Illinois. A jury awarded Halo $3.6 million in damages in January 2018.

On March 9, 2018, CDI filed for bankruptcy in Canada under the Canadian Bankruptcy and Insolvency Act (the "CBIA"). Section 69 of the CBIA provides for a stay of all creditor collection actions during the pendency of a debtor's bankruptcy case.

After filing for bankruptcy, CDI filed several post-judgment motions in the U.S. district court, including a motion to stay all proceedings in the litigation consistent with section 69 of the CBIA. In its motion, CDI cited section 1515 of the Bankruptcy Code, which provides that a petition for recognition of a foreign proceeding under chapter 15 shall be accompanied by appropriate evidence of the pendency of the foreign proceeding. It also cited several pre-2005 decisions for the proposition that "[a] Canadian automatic stay, like that of the U.S. Bankruptcy Code, would prohibit prosecution of claims against the debtor's estate, and U.S. courts usually honor that stay" as an exercise of comity. *See Banyan Licensing, Inc. v. Orthosupport International, Inc.*, 2002 WL 31059365 (N.D. Ohio Aug. 15, 2002); *Mel-O-Ripe Banana*, 265 B.R. at 736–38; *Klesman & Assocs. v. American Sensors Inc.*, 1997 WL 433619 (N.D. Ill. July 29, 1997).

The district court denied the motion for a stay. Initially, the court noted that the problem with CDI's motion for injunctive relief was that CDI had not accompanied its motion with the certified recognition order required by section 1509(c) of the Bankruptcy Code, nor was it evident that CDI had complied with the other rules and procedures laid out in chapter 15.

Next, the district court noted that the case law addressing whether a foreign representative may request a stay of U.S. court proceedings involving a debtor in a foreign liquidation case "'makes clear that foreign representatives must be recognized under Chapter 15 to seek a stay from a federal court'" (quoting *Reserve Int'l Liquidity Fund*, 2010 WL 1779282, at *5).

In the absence of a U.S. bankruptcy court order recognizing CDI's Canadian bankruptcy case, the district court ruled, it had no authority to reconsider CDI's request for a stay. According to the court, all of the cases cited by CDI in support of the motion were decided before the enactment of chapter 15 and were therefore inapposite.

OUTLOOK

Chapter 15 in no way prevents U.S. courts from honoring the long-standing tradition of affording comity to the judgments of foreign courts and the laws of foreign countries. However, as illustrated by *Halo Creative*, in the context of cross-border bankruptcy proceedings, chapter 15 serves as the gatekeeper for obtaining recognition in the U.S. of foreign bankruptcy court orders or foreign bankruptcy laws. Failure to comply with chapter 15's procedures will mean that a U.S. court does not have the power to extend comity to foreign restructuring proceedings.

ELEVENTH CIRCUIT EXPANDS "SUBSEQUENT NEW VALUE" PREFERENCE DEFENSE TO CASES INVOLVING PAID-FOR NEW VALUE

Aroon Jhamb
David Weiss

In *Kaye v. Blue Bell Creameries, Inc. (In re BFW Liquidation, LLC)*, 899 F.3d 1178 (11th Cir. 2018), the U.S. Court of Appeals for the Eleventh Circuit broadened the scope of section 547(c)(4) of the Bankruptcy Code's "subsequent new value" defense against preference actions by holding that the provision applies to all new value supplied by the creditor during the preference period and not merely to new value that remains unpaid on the bankruptcy petition date. In adopting this approach, the Eleventh Circuit joined the Fourth, Fifth, Eighth, and Ninth Circuits in applying a more expansive reading of section 547(c)(4).

THE SUBSEQUENT NEW VALUE DEFENSE TO PREFERENTIAL TRANSFER AVOIDANCE

Section 547(b) of the Bankruptcy Code provides that a bankruptcy trustee or chapter 11 debtor-in-possession may avoid transfers made by an insolvent debtor within 90 days of a bankruptcy petition filing (or up to one year, if the transferee is an insider) to a creditor if the creditor, by reason of the transfer, receives more than it would have received in a chapter 7 liquidation and the transfer had not been made.

Section 547(c) sets forth nine defenses or exceptions to preference avoidance. One of those is the "subsequent new value" defense in section 547(c)(4), which provides as follows:

> The trustee may not avoid under this section a transfer . . . to or for the benefit of a creditor, to the extent that, after such transfer, such creditor gave new value to or for the benefit of the debtor—
>
> (A) not secured by an otherwise unavoidable security interest; and
>
> (B) on account of which new value the debtor did not make an otherwise unavoidable transfer to or for the benefit of such creditor[.]

11 U.S.C. § 547(c)(4). "New value" is defined as:

> [m]oney or money's worth in goods, services, or new credit, or release by a transferee of property previously transferred to such transferee in a transaction that is neither void nor voidable by the debtor or the trustee under any applicable law, including proceeds of such property, but does not include an obligation substituted for an existing obligation[.]

11 U.S.C. § 547(a)(2).

Under the section 547(c)(4) exception, even if a creditor receives a preferential transfer, any subsequent unsecured credit provided to the debtor by the creditor may be offset against the creditor's preference liability. The exception encourages trade creditors—who may fear nonpayment or payment clawback by distressed companies—to continue providing goods and services to such companies by narrowing the circumstances under which a trustee can avoid payment on those goods and services. *See Jones Truck Lines, Inc. v. Full Serv. Leasing Corp.*, 83 F.3d 253, 257 n.3 (8th Cir. 1996).

TWO INTERPRETATIONS OF SECTION 547(c)(4)

If "new value" is paid with a transfer that is avoidable (or that would be avoidable but for the application of the subsequent new value exception), it still qualifies as "new value." *See* COLLIER ON BANKRUPTCY ¶ 547.04[e] (16th ed. 2019) (citing cases). However, courts are divided on whether a payment following the delivery of "subsequent new value" will preclude the section 547(c)(4) defense from reducing a creditor's preference exposure in an amount equal to the amount of the newly conferred value. The two approaches to this issue are known as the "remain unpaid" approach and the "subsequent advance" approach.

The "remain unpaid" approach provides that a payment to a creditor in exchange for previously delivered new value will forfeit the defense as to that payment. Only delivery of new value that is not subsequently paid off by the debtor—in other words, value that "remain[s] unpaid"—is available to reduce the creditor's preference exposure for previously received payments.

In contrast, the "subsequent advance" approach provides that a payment for "subsequent new value" will not prevent such new value from reducing a creditor's overall preference exposure. In other words, a debtor's subsequent payment to the creditor for "subsequent new value" will not obviate the defense as to such payment, allowing it to reduce the creditor's preference liability.

A growing number of circuit courts of appeals have concluded that there is no "remain unpaid" requirement in section 547(c)(4). The Fourth, Fifth, Eighth, and Ninth Circuits have embraced this approach. Adopting a plain text reading of section 547(c)(4)(B), these courts reason that the statutory language "otherwise unavoidable transfer" indicates that, so long as the debtor has not made an avoidable transfer in respect of a "new value" delivery of goods or services, the "subsequent new value" defense is available. *See Hall v. Chrysler Credit Corp. (In re JKJ Chevrolet, Inc.)*, 412 F.3d 545, 551–52 (4th Cir. 2005); *Laker v. Vallette (In re Toyota of Jefferson, Inc.)*, 14 F.3d 1088, 1090–93, 1093 n.2 (5th Cir. 1994); *Jones Truck Lines, Inc. v. Cent. States, Se. & Sw. Areas Pension Fund (In re Jones Truck Lines, Inc.)*, 130 F.3d 323, 329 (8th Cir. 1997); *Mosier v. Ever-Fresh Food Co. (In re IRFM, Inc.)*, 52 F.3d 228, 230–33 (9th Cir. 1995).

By contrast, the Third and Seventh Circuits require new value to "remain unpaid" in order for the section 547(c)(4) defense to apply. *See N.Y.C. Shoes Inc. v. Bentley Int'l Inc. (In re N.Y.C. Shoes Inc.)*, 880 F.2d 679, 680 (3d Cir. 1989); *In re Prescott*, 805 F.2d 719, 731 (7th Cir. 1986). Prior to *Blue Bell Creameries*, the Eleventh Circuit similarly suggested that the section 547(c)(4) defense is restricted to cases in which the new value supplied by the creditor was not paid for by the debtor prior to the bankruptcy. *See Charisma Inv. Co., N.V. v. Airport Sys., Inc. (In re Jet Florida Sys., Inc.)*, 841 F.2d 1082, 1083 (11th Cir. 1988) (noting that stated section 547(c)(4) has "generally been read to require . . . that the new value must remain unpaid").

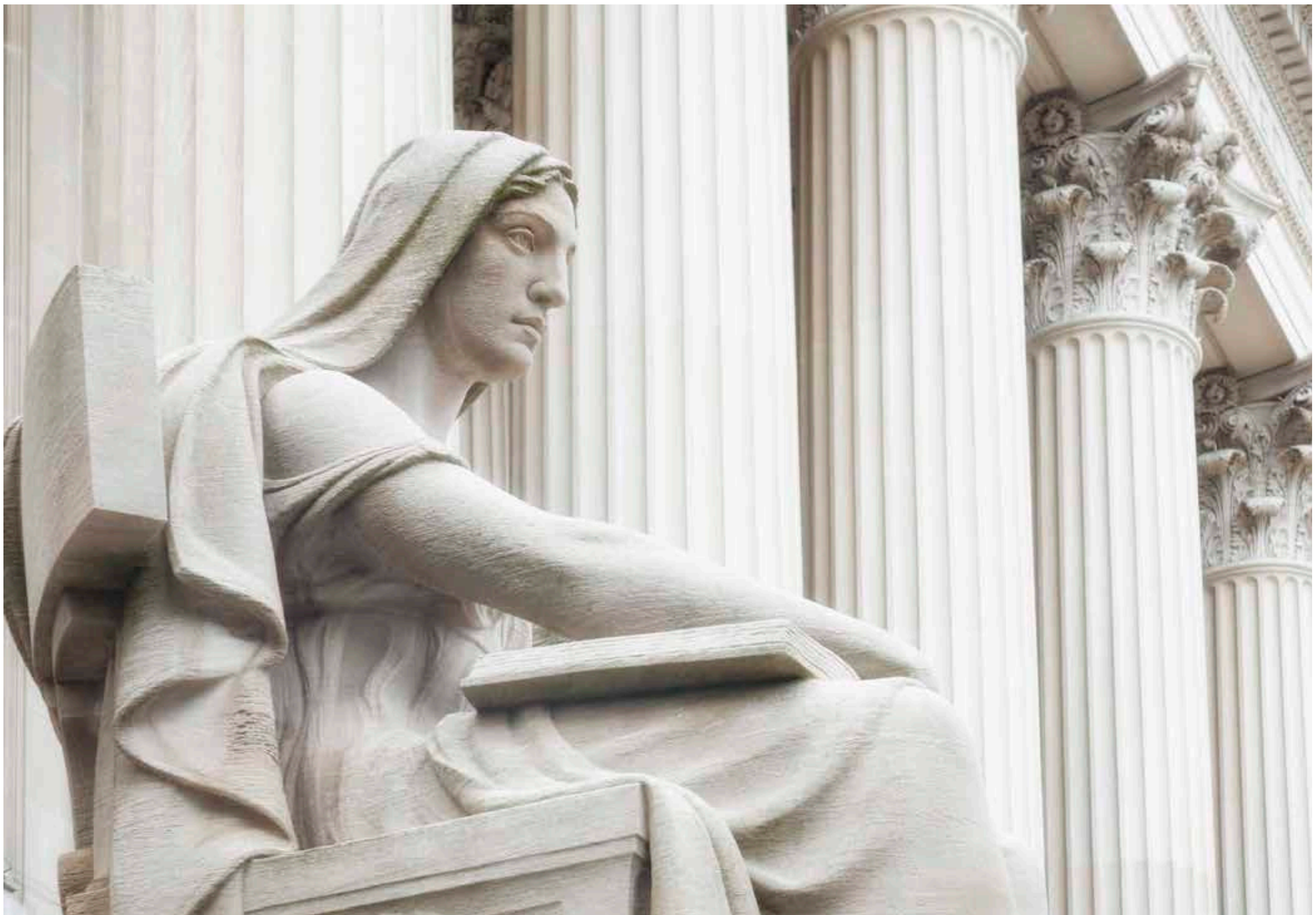
BLUE BELL CREAMERIES

Bruno's Supermarkets, LLC (the "debtor") was a grocery-store chain that operated in Alabama and Florida. Blue Bell Creameries, Inc. ("Blue Bell") sold ice cream and related products to the debtor on credit. When the debtor began experiencing liquidity problems, it reduced the number of checks it wrote to Blue Bell from two per week to one per week and began "stretching" payments by holding checks for a period of time before delivering them. This new "slow pay" policy delayed the time it took the debtor to pay Blue Bell during the 90-day preference period preceding the debtor's February 2009 bankruptcy filing in the Northern District of Alabama. During that period, the debtor paid Blue Bell approximately $564,000 for product deliveries.

The bankruptcy court confirmed a liquidating chapter 11 plan for Blue Bell in September 2009. In January 2011, the liquidating trustee under the plan sued Blue Bell to avoid the $564,000 in payments as preferences.

Although Blue Bell acknowledged that the payments were otherwise preferential, it asserted that, under section 547(c)(4), its preference liability should be reduced by the subsequent new value it contributed to the debtor and that this amount should reflect both deliveries that had been paid for prepetition and those that remained unpaid. Because Blue Bell received payments at irregular intervals during the preference period owing to the debtor's slow-pay policy and delivered goods on short-term credit, Blue Bell could not rely on the other preference defenses set forth in section 547(c).

Citing *Jet Florida*, the bankruptcy court applied the "remain unpaid" approach and held that the trustee could claw back approximately $438,000 as a preference. In calculating the amount that Blue Bell's preference liability would be reduced under the subsequent new value defense, the court excluded all new value based on deliveries to the debtor for which payment was made during the preference period. Accordingly, only the last of Blue Bell's deliveries, for which the debtor had



not yet paid, was available to reduce Blue Bell's preference liability under section 547(c)(4).

The Eleventh Circuit authorized a direct appeal of the ruling by Blue Bell.

THE ELEVENTH CIRCUIT'S RULING

The Eleventh Circuit first noted that its statement on this issue in *Jet Florida* represented nonbinding *dictum*.

The court then stated its conclusion that the plain language of section 547(c)(4) does not limit the subsequent new value defense to situations in which new value was not paid for by the debtor prior to filing for bankruptcy. Instead, the court held that the section provides only that the defense cannot be used if the debtor made an "otherwise unavoidable transfer" to the creditor on account of that new value. In other words, the subsequent new value defense is available to reduce a creditor's preference liability so long as any payment in respect of the subsequent new value is otherwise unavoidable.

The Eleventh Circuit also clarified that the term "otherwise unavoidable transfer," as used in section 547(c)(4)(B), refers to transfers that are unavoidable for reasons other than that provision's subsequent new value defense.

According to the Eleventh Circuit, section 547(c)(4)'s legislative history supports this interpretation. The predecessor to section 547(c)(4) is section 60(c) of the Bankruptcy Act of 1898, which limited the "subsequent new value" defense to new value that had not been paid for at the time of a bankruptcy filing. The court inferred that the replacement of this provision in 1978 with a provision omitting the "remain unpaid" language indicates that Congress intended to eliminate section 60(c)'s requirement that new value must remain unpaid by the debtor. The court found further support for this inference in a specific recommendation in the 1973 Report of the Commission on the Bankruptcy Laws of the United States that the "remain unpaid" requirement be eliminated.

The Eleventh Circuit also explained that its conclusion is supported by the avoidance provisions' policy objective of encouraging vendors to continue dealing with distressed companies. A "remain unpaid" requirement, the court reasoned, would

discourage vendors from providing goods and services to companies experiencing financial difficulties by increasing the likelihood that payments in respect of such goods or services would be clawed back in connection with a subsequent bankruptcy filing. Inevitably, the court concluded, vendors in such a position would be more likely to cut off distressed companies when they are most in need of supplies, accelerating their financial downturn.

The Eleventh Circuit dismissed the concern that its ruling would undermine the policy goal of promoting equality of treatment between "short-term" creditors paid during the preference period and "long-term" creditors who remain unpaid as of the petition date. According to the court, a "remain unpaid" requirement would discourage short-term creditors from shipping goods to distressed companies altogether, leaving the bankruptcy estate—as well as long-term creditors—worse off because of the debtor's hastened financial distress and diminished assets for satisfying all creditors.

OUTLOOK

In *Blue Bell Creameries*, the Eleventh Circuit joined the Fourth, Fifth, Eighth, and Ninth Circuits in holding that there is no "remain unpaid" requirement in section 547(c)(4)—thereby adding to the majority approach on this issue. This approach broadens the scope of transactions into which vendors can safely enter because it diminishes the risk that payments for their goods or services will be clawed back in subsequent preference actions. However, the minority approach on this issue is still alive and well. *See In re Calumet Photographic, Inc.*, 2019 WL 220229, at *1 (Bankr. N.D. Ill. Jan. 9, 2019) ("At issue before the court is the purely legal question of whether the law of [the Seventh Circuit] still holds that only unpaid new value can be used by a creditor to reduce preference liability under 11 U.S.C. § 547(c)(4)(B). . . . [T]he court concludes the answer to that question is yes."). Therefore, it may be left to the U.S. Supreme Court or legislative action to resolve the dispute.

FIFTH CIRCUIT DOUBLES DOWN ON STATUTORY MOOTNESS APPROACH TO BANKRUPTCY SALES

Ashtyn M. Hemendinger
Mark G. Douglas

In *Tanguy v. West (In re Davis)*, 2018 WL 4232063 (5th Cir. Sept. 5, 2018), the U.S. Court of Appeals for the Fifth Circuit revisited the circumstances under which section 363(m) of the Bankruptcy Code moots an appeal of a bankruptcy court's order approving a sale of assets. The Fifth Circuit reaffirmed its adherence to the majority rule on the issue, ruling that, absent evidence that the purchaser did not acquire the property in good faith, the challengers' failure to obtain a stay pending appeal moots any appeal of a sale order. The court also held that the challengers abandoned any argument that the appeal was not moot by failing to raise it before the bankruptcy court.

MOOTNESS UNDER SECTION 363(m)

"Mootness" is a doctrine that precludes a reviewing court from reaching the underlying merits of a controversy. An appeal can be either constitutionally, equitably, or statutorily moot. Constitutional mootness is derived from Article III of the U.S. Constitution, which limits the jurisdiction of federal courts to actual cases or controversies and, in furtherance of the goal of conserving judicial resources, precludes adjudication of cases that are hypothetical or merely advisory.

By contrast, the judge-fashioned remedy of "equitable mootness" bars adjudication of an appeal when a comprehensive change of circumstances has occurred such that it would be inequitable for a reviewing court to address the merits of the appeal. In bankruptcy cases, appellees often invoke equitable mootness as a basis for precluding appellate review of an order confirming a chapter 11 plan.

An appeal can be rendered moot by statute as well. For example, section 363(m) of the Bankruptcy Code provides that the reversal or modification on appeal of an order authorizing a sale of assets does not affect the validity of the sale if the purchaser acted in "good faith" and the party challenging the sale failed to obtain a stay pending appeal:

> The reversal or modification on appeal of an authorization under [section 363(b) or section 363(c)] of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.

Section 363(m) is a powerful protection for good-faith purchasers because it limits appellate review of a consummated sale irrespective of the legal merits of the appeal. *See Made in Detroit, Inc. v. Official Comm. of Unsecured Creditors of Made in Detroit, Inc. (In re Made in Detroit, Inc.)*, 414 F.3d 576 (6th Cir. 2005) (citing *Licensing by Paolo v. Sinatra (In re Gucci)*, 126 F.3d 380 (2d Cir. 1997)).

The statutory mootness provided by section 363(m) serves important public policy considerations. Maximization of value is a fundamental goal of the Bankruptcy Code. *Toibb v. Radloff*, 501 U.S. 157 (1991). Because it protects the finality of bankruptcy sales, section 363(m) maximizes the value of a debtor's estate by encouraging the participation of buyers who are assured that a deal consummated with a debtor or bankruptcy trustee usually will not be modified by an appellate court after a sale transaction closes. *Weingarten Nostat, Inc. v. Serv. Merch. Co.*, 396 F.3d 737 (6th Cir. 2005) (citing *Anheuser-Busch, Inc. v. Miller (In re Stadium Mgmt. Corp.)*, 895 F.2d 845 (1st Cir. 1990)).

The courts of appeals are split regarding whether section 363(m) automatically moots an appeal under all circumstances.

A majority of the circuits, including the First, Second, Fifth, Seventh, Eleventh, and D.C. Circuits, have generally adopted a per se rule that an appeal of a sale order is automatically mooted if the closing of the sale is not stayed pending appeal. *See Ginther v. Ginther Trusts (In re Ginther Trusts)*, 238 F.3d 686 (5th Cir. 2001); *U.S. v. Salerno*, 932 F.2d 117 (2d Cir. 1991); *In re Stadium Mgmt. Corp.*, 895 F.2d 845 (1st Cir. 1990); *In re Charter Co.*, 829 F.2d 1054 (11th Cir. 1987); *In re Sax*, 796 F.2d 994 (7th Cir. 1986); *In re Magwood*, 785 F.2d 1077 (D.C. Cir. 1986). These courts have based the per se rule on the language of section 363(m) and the associated public policy considerations—in particular, maximizing value by protecting the finality of bankruptcy sales. *See Salerno*, 932 F.2d at 123 (discussing the public policy behind the finality of bankruptcy sales); *Stadium Mgmt.*, 895 F.2d at 847 (same); *Sax*, 796 F.2d at 998 (same).

The minority approach, adopted by the Third, Sixth, and Tenth Circuits, rejects the view that section 363(m) automatically moots an appeal. Instead, these courts have held that an appeal is not moot so long as it is possible to grant effective relief without impacting the validity of the sale. *See Brown v. Ellmann (In re Brown)*, 851 F.3d 619 (6th Cir. 2017) (finding that parties alleging statutory mootness under section 363(m) must prove that the reviewing court is unable to grant effective relief); *Krebs Chrysler-Plymouth, Inc. v. Valley Motors*, 141 F.3d 490 (3d Cir. 1997) (holding that an appeal was moot under section 363(m) only after examining each remedy requested by the appellant and determining that each affected the validity of the sale); *Osborn v. Duran Bank & Trust Co. (In re Osborn)*, 24 F.3d 1199 (10th Cir. 1994) (holding that an appeal of a sale order was not mooted by section 363(m) when under Texas state law a constructive trust could be imposed on the sale proceeds).

The Fifth Circuit revisited this issue in *Davis*.

DAVIS

In 2007, Richard Davis commenced a chapter 7 case in the Southern District of Texas. In an adversary proceeding, the chapter 7 trustee obtained a judgment against Philippe Tanguy and two businesses owned and operated by him (collectively, the "Appellants") on a promissory note. To collect on the judgment, the trustee commenced a receivership proceeding against the Appellants in Texas state court, where he recovered a parcel of real property (the "Property") owned by the Appellants on behalf of the chapter 7 estate.

The Appellants, however, disputed that the bankruptcy estate held good title to the Property, claiming that the state court receivership was a "sham." The trustee subsequently filed a motion to sell the Property free and clear of competing interests under section 363(f) of the Bankruptcy Code. The bankruptcy court initially denied the motion, deciding to abstain until the state courts resolved the Property ownership/receivership dispute.

The trustee renewed his motion to sell the Property after a state appellate court upheld the legitimacy of the receivership and the trustee's acquisition of the Property. After an auction, the bankruptcy court overruled the Appellants' objections and approved the sale of the Property to Croix Custom Homes ("Croix")—the only bidder. The Appellants appealed the sale order but did not seek a stay pending appeal.

In the district court, the trustee moved to dismiss the appeal, arguing that, because the Appellants neither sought nor obtained a stay pending appeal, the appeal was moot under section 363(m).

The Appellants countered that, because the Property was subject to a state court receivership and the bankruptcy court had previously abstained from resolving the ownership dispute, the bankruptcy court lacked jurisdiction to approve the sale of the Property. However, nowhere in their objection to the motion to dismiss did the Appellants address the trustee's contention that section 363(m) mooted the appeal. The district court dismissed the appeal as moot, and the Appellants appealed to the Fifth Circuit.

THE FIFTH CIRCUIT'S RULING

The sole issue on appeal to the Fifth Circuit was the district court's decision that the appeal was moot under section 363(m). According to the trustee, the Appellants abandoned any argument contesting this issue because they failed to address it in their submissions below or in their initial briefs filed with the Fifth Circuit. The Appellants countered that their submissions "implicitly" challenged Croix's good faith in purchasing the property, thereby preserving their argument under section 363(m).

Initially, the Fifth Circuit noted that "[a]n assertion that a ruling is being appealed, in the absence of any argument in the body of the brief supporting the appeal, does not preserve the issue on appeal" (citations and internal quotation marks omitted).

The Fifth Circuit rejected the Appellants' "implicit challenge" argument. First, it explained that "[w]e have previously suggested that good faith is a separate argument from § 363(m), such that arguing good faith alone would not preserve an argument that a case was not moot under § 363(m)" (citing *Black v. Shor (In re BNP Petroleum Corp.)*, 642 F. App'x 429, 434 (5th Cir. 2016) (determining that a mootness argument under section 363(m) was abandoned, despite the fact that good faith was briefed)).

Next, the Fifth Circuit concluded that, even if a good-faith argument could preserve a section 363(m) mootness argument for appeal, the Appellants did not contest Croix's (the purchaser's) good faith in their opening briefs, but instead contended that the trustee acted without good faith in failing to adequately disclose the facts surrounding the state court litigation. According to the Fifth Circuit, the trustee's good faith is irrelevant to section 363(m), which focuses on the good faith of the purchaser.

Finally, the Fifth Circuit emphasized that a litigant may not challenge a purchaser's good-faith status under section 363(m) for the first time on appeal. The issue must first be raised in the bankruptcy court. Therefore, the court held that the Appellants had abandoned their argument regarding Croix's status as a good-faith purchaser and that the Appellants had also abandoned their argument that the appeal of the sale order was not moot.

Even if they had not done so, the Fifth Circuit explained, it would still affirm the district court's ruling that the appeal was moot under section 363(m) under the per se mootness rule. "[A]bsent a lack of good faith," the court wrote, "any appeal brought . . . is moot following sale of the property when there was no stay pending appeal," even if the party challenging the sale argues that the bankruptcy court did not have jurisdiction to authorize it (citing *Ginther v. Ginther Trs. (In re Ginther Trs.)*, 238 F.3d 686, 689 (5th Cir. 2001); *Gilchrist v. Westcott (In re Gilchrist)*, 891 F.2d 559, 560–61 (5th Cir. 1990)).

The court rejected the Appellants' argument that they never had an opportunity to contest Croix's good faith in the bankruptcy court because the court estopped them from making that argument on the basis of their lawyers' statements at a status conference that the Appellants did not oppose the sale. According to the Fifth Circuit, the Appellants were never barred from making a bad-faith argument, yet they failed to do so in any of their submissions to the bankruptcy court in connection with the sale of the Property or in contesting the court's order approving it.

OUTLOOK

In *Davis*, the Fifth Circuit reaffirmed that it remains in the majority camp on the issue of statutory mootness under section 363(m) of the Bankruptcy Code. According to this approach, in the absence of a showing that a purchaser or lessor did not acquire or lease property in good faith, the failure to obtain a stay pending appeal of an order approving a sale or lease of property moots the appeal. The other takeaway from the Fifth Circuit's ruling in *Davis* is that a party challenging a sale must expressly raise the issue of the purchaser's good faith in the bankruptcy court to preserve the issue for appeal.

NEW UNCITRAL MODEL LAW ON THE RECOGNITION AND ENFORCEMENT OF INSOLVENCY-RELATED JUDGMENTS

On September 18, 2018, the United Nations Commission on International Trade Law ("UNCITRAL") published its final version of the new Model Law on the Recognition and Enforcement of Insolvency-Related Judgments (the "IRJ Model Law"). The IRJ Model Law creates a framework for the recognition and enforcement of judgments in foreign bankruptcy and insolvency proceedings. It is intended to supplement and complement the 1997 UNCITRAL Model Law on Cross-Border Insolvency (the "CBI Model Law"). The CBI Model Law has been adopted by 44 nations or territories, including the U.S., in chapter 15 of the Bankruptcy Code (enacted in 2005), and the U.K., in the Cross-Border Insolvency Regulations (in force since 2007) (the "CBIR"). The CBI Model Law establishes a framework for cooperation and coordination among courts presiding over cross-border bankruptcy and insolvency proceedings.

The stated purpose of the IRJ Model Law is:

(a) To create greater certainty in regard to rights and remedies for recognition and enforcement of insolvency-related judgments;
(b) To avoid the duplication of insolvency proceedings;
(c) To ensure timely and cost-effective recognition and enforcement of insolvency-related judgments;
(d) To promote comity and cooperation between jurisdictions regarding insolvency-related judgments;
(e) To protect and maximize the value of insolvency estates; and
(f) Where legislation based on the [CBI Model Law] has been enacted, to complement that legislation.

Like the CBI Model Law, the IRJ Model Law promotes a universalist, rather than a territorial, approach to cross-border bankruptcy proceedings. In this context, "universalism" means that bankruptcy or insolvency proceedings should be recognized worldwide, obviating the need for disjointed proceedings in multiple foreign jurisdictions applying local law for the benefit of local creditors in an exercise of territorialism.

The U.S. has embraced this approach in enacting chapter 15 of the Bankruptcy Code. The U.K. has only partially done so in adopting the CBIR. Vestiges of territorialism still exist in the U.K. based on court rulings in *Antony Gibbs & Sons v. La Société Industrielle et Commerciale des Métaux*, [1890] LR 25 QBD 399 (establishing the "*Gibbs* Rule," whereby an English court will not enforce a foreign insolvency judgment discharging or modifying the terms of English-law-governed debt); *Rubin v. Eurofinance*, [2012] UKSC 46 (refusing to recognize a transfer avoidance judgment issued in a U.S. bankruptcy case on the ground that, in the U.K., a judgment entered *in personam* cannot be enforced against a person who has not submitted to the jurisdiction of the court entering the judgment); and, most recently, *OJSC International Bank of Azerbaijan*, [2018] EWCA Civ 2802, 2018 WL 06605589 (Dec. 18, 2018) (ruling that the CBI Model Law is merely procedural and cannot impair substantive English-law contract rights protected by the *Gibbs* Rule).

Like the CBI Model Law, the IRJ Model Law does not have any legal effect unless it is formally implemented in any given nation. UNCITRAL is expected to publish a Guide to Enactment for the IRJ Model Law in the near future.

NEWSWORTHY

For the third 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 18 years BTI has been publishing this report.

Crain's New York Business has named ***Corinne Ball (New York)*** to its second annual list of "Notable Women in Law." This recognition celebrates lawyers who have impacted New York City in major ways. It honors the achievements of the brightest and boldest legal minds—those with both distinguished careers and exceptional civic and philanthropic activities.

Juan Ferré (Madrid) was selected for inclusion in the 11th edition of *The Best Lawyers in Spain* for his work in Banking and Finance Law and Insolvency and Reorganization Law. Juan was also a recipient of the 2019 "Lawyer of the Year" award for his work in Insolvency and Reorganization Law in Madrid.

Scott J. Greenberg (New York), ***Michael J. Cohen (New York)***, ***Stacey L. Corr-Irvine (New York)***, ***Jeremy D. Evans (New York)***, ***Steven A. Domanowski (Chicago; Banking, Finance & Securities)***, ***David S. Torborg (Washington; Business & Tort Litigation)***, and ***C. Lee Wilson (New York; Business & Tort Litigation)*** are representing the term loan lenders of Checkout Holding Corp., a personalized digital media marketing company based in St. Petersburg, Florida, in connection with a prepackaged chapter 11 case that the company filed on December 12, 2018, in the U.S. Bankruptcy Court for the District of Delaware to eliminate $1.6 billion in debt by means of a debt-for-equity swap.

In *The M&A Advisor*'s 13th Annual Turnaround Awards, ***Jones Day*** won the award for "Restructuring of the Year (Over $5B)" for the restructuring of Takata Corporation. ***Jones Day's*** team included ***Corinne Ball (New York)***, ***Dan T. Moss (Washington)***, ***Jane Rue Wittstein (New York)***, and ***Caitlin K. Cahow (Chicago)***.

Scott J. Greenberg (New York), ***Michael J. Cohen (New York)***, ***Nicholas J. Morin (New York)***, and ***Steven A. Domanowski (Chicago; Banking, Finance & Securities)*** are representing the term loan lenders of David's Bridal Inc., the nation's largest wedding retailer, in connection with a prepackaged chapter 11 case filed by the company on November 19, 2018, in the U.S. Bankruptcy Court for the District of Delaware to eliminate $434 million in debt by means of a debt-for-equity swap.

Dan T. Moss (Washington) was featured in the January 2019 issue of the *American Bankruptcy Institute Journal* as one of the ABI's "40 Under 40" honorees.

In *The M&A Advisor*'s 13th Annual Turnaround Awards, ***Jones Day*** won the award for "Out-of-Court Restructuring of the Year (Over $100MM to $1B)" for the out-of-court restructuring of Tweddle Group, Inc. ***Jones Day's*** team included ***Scott J. Greenberg (New York)***, ***Joseph A. Florczak (Chicago)***, ***Peter S. Saba (New York)***, and ***Amanda A. Parra Criste (Miami)***.

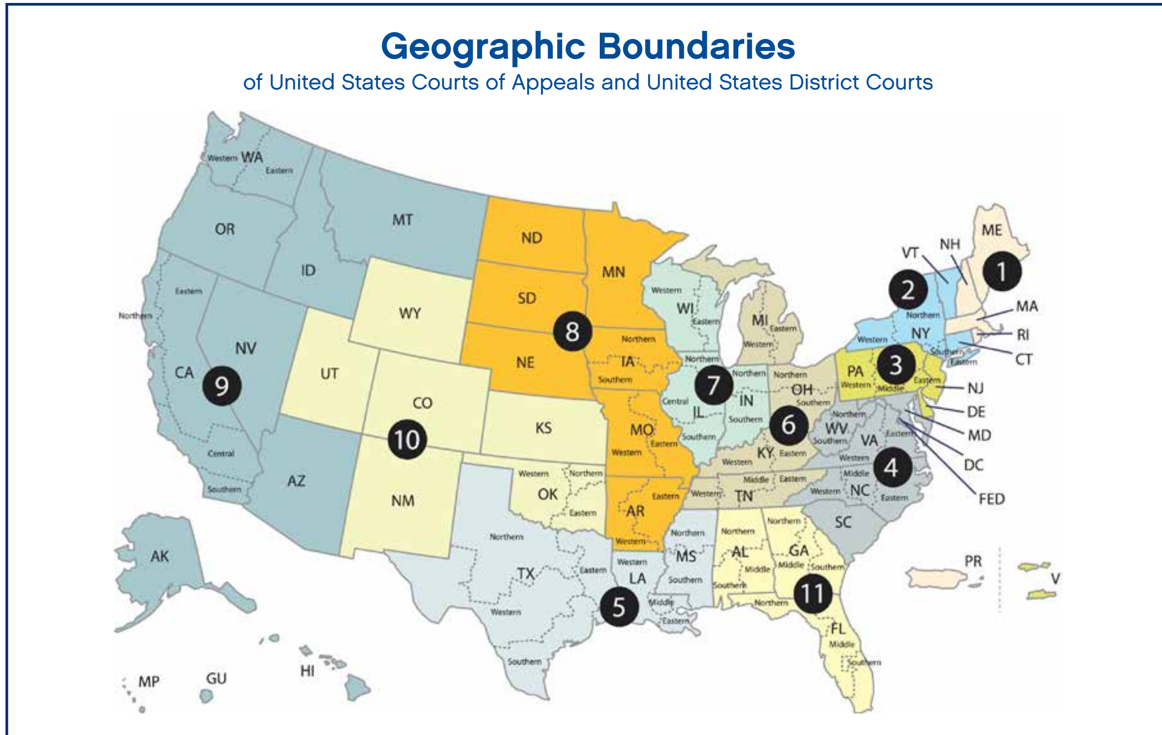
Jones Day was recognized for the 2018 "Global Finance Deal of the Year" by *The American Lawyer* for Oi S.A.'s $20 billion restructuring. ***Jones Day's*** team included ***Corinne Ball (New York)***, ***Jasper Berkenbosch (Amsterdam)***, ***Sophie Beerepoot (Amsterdam)***, ***Erik Schuurs (Amsterdam)***, ***Louis K. Fisher (Washington; Issues & Appeals)***, and ***Caitlin K. Cahow (Chicago)***.

An article written by ***Peter S. Saba (New York)*** entitled "Fifth Circuit Adopts Flexible Approach to Collateral Valuation in Cramdown Chapter 11 Cases" was posted on the December 4, 2018, *Harvard Law School Bankruptcy Roundtable*.

An article written by ***Timothy W. Hoffmann (Chicago)*** and ***Mark G. Douglas (New York)*** entitled "Reports of the Demise of 'Gifting' Chapter 11 Plans Are An Exaggeration" appeared in the January 2019 edition of *The Bankruptcy Strategist*.

An article written by ***Mark A. Cody (Chicago)*** and ***Mark G. Douglas (New York)*** entitled "Shareholder Consent for Bankruptcy Filing" was posted on the December 14, 2018, *Oxford Business Law Blog*.

THE U.S. FEDERAL JUDICIARY



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.

NOTABLE PLAN CONFIRMATIONS AND EXITS FROM BANKRUPTCY IN 2018

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.)	02/26/2018 CD 03/09/2018 ED	$41.0 billion	Utility	Merger	
Seadrill Limited	09/12/2017 (S.D. Tex.)	04/17/2018 CD 07/02/2018 ED	$21.6 billion	Oil & Gas	Reorganization	Pre N
Walter Investment Management Corp.	11/30/2017 (S.D.N.Y.)	01/18/2018 CD 02/09/2018 ED	$16.8 billion	Banking	Reorganization	Pre P
Toys 'R' Us, Inc.	09/19/2017 (E.D. Va.)	11/13/2018 CD	$6.9 billion	Retail	Liquidation	
Pacific Drilling S.A.	11/12/2017 (S.D.N.Y.)	10/31/2018 CD 11/19/2018 ED	$6.0 billion	Oil & Gas	Reorganization	
The JG Wentworth Company	12/12/2017 (D. Del.)	01/17/2018 CD 01/25/2018 ED	$5.0 billion	Financial Services	Reorganization	Pre P
Ascent Resources Marcellus Holdings LLC	02/06/2018 (D. Del.)	02/08/2018 CD 03/30/2018 ED	$5.0 billion	Oil & Gas	Reorganization	Pre N
GenOn Energy, Inc., and NRG REMA LLC (n.k.a. GenOn Holdings, Inc.)	06/14/2017 (S.D. Tex.) 10/18/2018 (S.D. Tex.)	11/01/2018 CD 12/14/2018 ED	$4.9 billion	Utility	Reorganization	Pre N
Westinghouse Electric Company	03/29/2017 (S.D.N.Y.)	03/27/2018 CD 08/01/2018 ED	$4.3 billion	Energy	Sale	
HCR ManorCare, Inc.	03/04/2018 (D. Del.)	06/21/2018 CD 07/26/2018 ED	$4.3 billion	Healthcare	Sale	Pre P
Takata Americas	06/25/2017 (D. Del.)	02/16/2018 CD 04/12/2018 ED	$3.9 billion	Auto Parts	Sale	
Cumulus Media Inc.	11/29/2017 (S.D.N.Y.)	05/02/2018 CD 06/04/2018 ED	$2.4 billion	Media	Reorganization	Pre N
Cobalt International Energy, Inc.	12/14/2017 (S.D. Tex.)	04/05/2018 CD 04/10/2018 ED	$2.2 billion	Oil & Gas	Sale	Pre N
Claire's Stores, Inc.	03/19/2018 (D. Del.)	09/21/2018 CD 10/19/2018 ED	$2.0 billion	Retail	Reorganization	Pre N
Southeastern Grocers, LLC (BI-LO, LLC)	02/27/2018 (D. Del.)	05/14/2018 CD 05/31/2018 ED	$1.8 billion	Retail	Reorganization	Pre P
EV Energy Partners, L.P. (n.k.a. Harvest Oil & Gas Corp.)	04/02/2018 (D. Del.)	05/17/2018 CD 06/04/2018 ED	$1.6 billion	Oil & Gas	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
Breitburn Energy Partners LP (n.k.a. Maverick Natural Resources, LLC)	05/15/2016 (S.D.N.Y.)	03/26/2018 CD 04/12/2018 ED	$1.1 billion	Oil & Gas	Reorganization	
21st Century Oncology Holdings, Inc.	05/25/2017 (S.D.N.Y.)	01/11/2018 CD 01/16/2018 ED	$1.1 billion	Healthcare	Reorganization	Pre N
Tops Holding II Corp.	02/21/2018 (S.D.N.Y.)	11/08/2018 CD 11/19/2018 ED	$1.0 billion	Retail	Reorganization	
Global Brokerage, Inc.	12/11/2017 (S.D.N.Y.)	01/17/2018 CD 02/08/2018 ED	$1.0 billion	Brokerage	Reorganization	Pre P
CGG Holding (U.S.) Inc.	06/14/2017 (S.D.N.Y.)	10/16/2017 CD 02/21/2018 ED	$1.0 billion	Oil & Gas Services	Reorganization	
PES Holdings (a.k.a. Philadelphia Energy Solutions)	01/21/2018 (D. Del.)	03/27/2018 CD 08/07/2018 ED	$1.0 billion	Oil & Gas	Reorganization	Pre P
Mattress Firm, Inc.	10/05/2018 (D. Del.)	11/16/2018 CD 11/21/2018 ED	$1.0 billion	Retail	Reorganization	Pre P
American Tire Distributors, Inc.	10/04/2018 (D. Del.)	12/19/2018 CD 12/21/2018 ED	$1.0 billion	Auto Parts	Reorganization	Pre N
Rex Energy Corp.	05/18/2018 (W.D. Pa.)	10/16/2018 CD 11/14/2018 ED	$942 million	Oil & Gas	Liquidation	Pre N
Remington Outdoor Co.	03/25/2018 (D. Del.)	05/04/2018 CD 05/15/2018 ED	$927 million	Firearms	Reorganization	Pre P

BUSINESS RESTRUCTURING REVIEW

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