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SECOND CIRCUIT RULES THAT BANKRUPTCY CODE'S FRAUDULENT TRANSFER RECOVERY PROVISIONS CAN REACH FOREIGN TRANSFEREES

Charles M. Oellermann ▪ Mark G. Douglas

The ability of a bankruptcy trustee to avoid fraudulent or preferential transfers is a fundamental part of U.S. bankruptcy law. However, when an otherwise avoidable transfer by a U.S. entity takes place outside the United States to a non-U.S. transferee—as is increasingly common in the global economy—courts disagree as to whether the Bankruptcy Code's avoidance provisions apply extraterritorially to avoid the transfer and recover the transferred assets. Several bankruptcy and appellate courts have addressed this issue in recent years, with inconsistent results.

The U.S. Court of Appeals for the Second Circuit recently had an opportunity to weigh in on this question in *In re Picard, Trustee for the Liquidation of Bernard L. Madoff Inv. Sec. LLC*, 917 F.3d 85 (2d Cir. 2019) ("*Madoff*"). A three-judge panel of the Second Circuit vacated a bankruptcy court order dismissing a trustee's litigation against various non-U.S. defendants to recover payments by a U.S. debtor that were allegedly avoidable as intentionally fraudulent transfers.

The bankruptcy court had ruled that the claims against these subsequent foreign transferees must be dismissed because section 550(a)(2) of the Bankruptcy Code, which provides for the recovery of avoided fraudulent transfers from subsequent transferees, does not apply extraterritorially and because principles of international comity limited the provision's scope. In vacating the dismissal, the Second Circuit held that neither the "presumption against extraterritoriality" nor the doctrine of comity barred recovery because: (i) section 550(a)(2) works in tandem with section 548, which "focuses on the debtor's initial transfer of property"; (ii) the initial transfer occurred within the United States, meaning that the case involved domestic, rather than foreign, application of section 550(a); and (iii) comity did not warrant dismissal of the recovery actions because the interest of the United States in applying the Bankruptcy Code's avoidance and recovery provisions "outweighs the interest of any foreign state."

Notably, however, because the Second Circuit found that the case involved a domestic application of section 550(a), it "express[ed] no opinion on whether § 550(a) clearly indicates its extraterritorial application."

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On May 23, 2019, the Second Circuit stayed the effectiveness of its ruling pending a decision by the U.S. Supreme Court on the foreign transferees' petition for a writ of certiorari.

THE PRESUMPTION AGAINST EXTRATERRITORIALITY

"It is a longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'" *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991) (quoting *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949)). This "presumption against extraterritoriality" is a judicially developed rule of statutory construction whereby federal law is presumed not to apply to conduct or property outside the United States "unless a contrary intent appears." *Morrison v. Nat'l Australia Bank Ltd*., 561 U.S. 247, 255 (2010). Contrary intent is shown through "clear evidence," in either the statutory text or the "legislative purpose underlying it." *Smith v. U.S.*, 507 U.S. 197, 204 (1993). However, a law need not explicitly state that "this law applies abroad" to have extraterritorial effect, and context is relevant to infer the statute's meaning. *Morrison*, 561 U.S. at 255.

In *Morrison* and *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090 (2016), the Supreme Court outlined a two-step approach for determining whether the presumption against extraterritoriality forecloses a claim. First, the court examines "whether the presumption against extraterritoriality has been rebutted—that is, whether the statute gives a clear, affirmative indication that it applies extraterritorially." *Nabisco*, 136 S. Ct. at 2101; *accord Morrison*, 561 U.S. at 255. If the conclusion is that the presumption has been rebutted, the inquiry ends.

If the presumption has not been rebutted, the court must determine whether the case involves a domestic application of the statute by examining its "focus." If the conduct relevant to the statute's focus occurred in the United States, "the case involves a permissible domestic application even if other conduct occurred abroad." *Nabisco*, 136 S. Ct. at 2101; *accord Morrison*, 561 U.S. at 266–67. However, if the conduct relevant to the focus of the statute did not occur in the United States, "the case involves an impermissible extraterritorial application regardless of any other conduct that occurred in U.S. territory." *Id.*; *accord Societe Generale plc v. Maxwell Commc'n Corp. plc (In re Maxwell Commc'n Corp. plc)*, 186 B.R. 807, 816 (S.D.N.Y. 1995) ("*Maxwell I*"), *aff'd on other grounds*, 93 F.3d 1036 (2d Cir. 1996) ("*Maxwell II*").

Most courts have adopted a flexible approach in determining whether a transaction occurred in the United States or was extraterritorial for this purpose. Many apply a "center of gravity" test, whereby the court examines the facts of the case to ascertain whether they have a center of gravity outside the United States. *See, e.g.*, *French v. Liebmann (In re French)*, 440 F.3d 145, 149 (4th Cir. 2006), *cert. denied*, 549 U.S. 815 (2006); *In re Florsheim Grp. Inc.*, 336 B.R. 126, 130 (Bankr. N.D. Ill. 2005). This analysis may involve consideration of "all component events of the transfer[]," *Maxwell I*, 186 B.R. at 816, such as "whether the participants, acts, targets, and effects involved in the transaction at issue are primarily foreign or primarily domestic." *French*, 440 F.3d at 150.

EXTRATERRITORIAL OPERATION OF U.S. BANKRUPTCY LAW

In certain respects, U.S. bankruptcy law has explicitly applied extraterritorially for nearly 70 years. In 1952, because of confusion about the scope of a debtor's property to be administered by a bankruptcy trustee under the Bankruptcy Act of 1898, Congress inserted the phrase "wherever located" into section 70a of the act "to make clear that a trustee in bankruptcy is vested with the title of the bankrupt in property which is located without, as well as within, the United States." H.R. REP. No. 82-2320, at 15 (1952), *reprinted in* 1952 U.S.C.C.A.N. 1960, 1976; *see also* Pub. L. No. 82-456, 66 Stat. 420 (July 7, 1952). This language was preserved in section 541(a) of the Bankruptcy Code (enacted in 1978), which states that the bankruptcy estate includes the debtor's property "wherever located and by whomever held." Section 541(a) provides further that such property includes various "interests" of the debtor in property. Similarly, 28 U.S.C. § 1334(e) gives federal district courts—and, by referral pursuant to 28 U.S.C. § 157(a), bankruptcy courts within each district—exclusive jurisdiction of all property of the debtor and its estate, "wherever located."

Many courts have concluded that, because the automatic stay imposed by section 362(a) of the Bankruptcy Code expressly prohibits, among other things, acts to obtain possession of "property of the estate," the stay bars creditor collection efforts with respect to estate property located both within and outside the United States. *See, e.g.*, *Milbank v. Philips Lighting Elecs. N. Am. (In re Elcoteq, Inc.)*, 521 B.R. 189 (Bankr. N.D. Tex. 2014); *In re Nakash*, 190 B.R. 763 (Bankr. S.D.N.Y. 1996).

However, the provisions of the Bankruptcy Code permitting avoidance and recovery of preferential or fraudulent transfers—i.e., sections 544, 547, 548, and 550—do not expressly refer to "property of the estate" as that term is defined in section 541 or even to section 541 itself. Instead, section 544(a) permits the trustee to avoid certain transfers of "property of the debtor"; sections 544(b)(1), 547(b), and 548(a)(1) provide for the avoidance of "an interest of the debtor in property"; and section 550 permits the trustee to recover "the property transferred" or its value from the transferee.

Furthermore, some courts, noting that section 541(a)(3) of the Bankruptcy Code provides that any "interest in property that the trustee recovers under section . . . 550" is part of the estate, have concluded that fraudulently or preferentially transferred property is not estate property *unless and until* it is recovered by the trustee. *See, e.g.*, *FDIC v. Hirsch (In re Colonial Realty Co.)*, 980 F.2d 125 (2d Cir. 1992) (if property that has been fraudulently transferred is included in "property of the estate" under section 541(a)(1), section 541(a)(3) is rendered meaningless with respect to property recovered pursuant to fraudulent transfer actions); *accord Rajala v. Gardner*, 709 F.3d 1031 (10th Cir. 2013). *But see Am. Nat'l Bank of Austin v. MortgageAmerica Corp. (In re MortgageAmerica Corp.)*, 714 F.2d 1266, 1277 (5th Cir. 1983) ("[p]roperty fraudulently conveyed and recoverable under the Texas Fraudulent Transfers Act remains, despite the purported transfer, property of the estate within the meaning of section 541(a)(1)").

PRIOR COURT RULINGS ON THE EXTRATERRITORIAL APPLICATION OF AVOIDANCE PROVISIONS

Some courts have concluded that the Bankruptcy Code's avoidance provisions do not apply extraterritorially. *See, e.g.*, *Maxwell I*, 186 B.R. at 816 (Congress did not clearly express its intention, in statutory language or elsewhere, for section 547 to empower a trustee to avoid foreign preferential transfers); *In re CIL Limited*, 582 B.R. 46 (Bankr. S.D.N.Y. 2018) (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"), *amended on reconsideration*, 2018 WL 3031094 (Bankr. S.D.N.Y. June 15, 2018); *Spizz v. Goldfarb Seligman & Co. (In re Ampal-Am. Israel Corp.)*, 562 B.R. 601 (Bankr. S.D.N.Y. 2017) (the avoidance provisions of the Bankruptcy Code, including section 547(b), do not apply extraterritorially: "Property transferred to a third party prior to bankruptcy . . . is neither property of the estate nor property of the debtor at the time the bankruptcy case is commenced, the only two categories of property mentioned in Bankruptcy Code § 541(a)(1)."); *Barclay v. Swiss Fin. Corp. Ltd. (In re Bankr. Estate of Midland Euro Exch. Inc.)*, 347 B.R. 708, 719 (Bankr. C.D. Cal. 2006) (noting that the court could "find no basis for holding that Congress intended the trustee's avoiding powers to apply extraterritorially").

Other courts have reached the opposite conclusion. *See, e.g.*, *French*, 440 F.3d at 149 ("Congress made manifest its intent that § 548 apply to all property that, absent a prepetition transfer, would have been property of the estate, wherever that property is located."); *In re FAH Liquidating Corp.*, 572 B.R. 117 (Bankr. D. Del. 2017) (ruling that the presumption against extraterritoriality with respect to section 548 was overcome because Congress intended the provision to reach foreign transfers), *leave to appeal denied*, 2018 WL 2793944 (D. Del. June 11, 2018); *Weisfelner v. Blavatnik (In re Lyondell)*, 543 B.R. 127 (Bankr. S.D.N.Y. 2016) (Congress could not have intended to exclude extraterritorial transfers from avoidance under section 548 while explicitly defining "property of the bankruptcy estate" under section 541 to include all of the debtor's property "wherever located and by whomever held").

Finally, some courts, finding that a challenged transfer was domestic rather than foreign, have declined to address (other than in dicta) whether the Bankruptcy Code's avoidance and recovery provisions apply extraterritorially. *See, e.g.*, *In 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 (Bankr. S.D.N.Y. 2017); *Picard v. Bureau of Labor Ins. (In re Bernard L. Madoff Inv. Sec. LLC)*, 480 B.R. 501, 527 (Bankr. S.D.N.Y. 2012) (because the initial transfers of the debtor's assets occurred in the U.S., the trustee was not seeking extraterritorial application of section 550, but noting in dicta that "Congress demonstrated its clear intent for the extraterritorial application of Section 550 through interweaving terminology and cross-references to relevant Code provisions").

COMITY

Even if a U.S. court determines that the Bankruptcy Code's avoidance provisions apply extraterritorially, the court may conclude that they should not be deployed under principles of international 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 II*, 93 F.3d at 1047.

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." *Arcapita*, 575 B.R. at 237.

"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. *Id.* at 238. U.S. courts generally extend comity whenever a foreign court has proper jurisdiction and "enforcement does not prejudice the rights of United States citizens or violate domestic public policy." *CT Inv. Mgmt. Co., LLC v. Cozumel Caribe, S.A. de C.V. (In re Cozumel Caribe, S.A. de C.V.)*, 482 B.R. 96, 114 (Bankr. S.D.N.Y. 2012).

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 In re Int'l Banking Corp. B.S.C.*, 439 B.R. 614, 624 (Bankr. S.D.N.Y. 2010) (citing cases).

In this context, deference to a foreign proceeding is warranted "so long as the foreign proceedings are procedurally fair and . . . do not contravene the laws or public policy of the United States." *Cozumel Caribe*, 482 B.R. at 114; *accord Finanz AG Zurich v. Banco Economico S.A.*, 192 F.3d 240, 249 (2d Cir. 1999) (discussing factors to be considered in assessing procedural fairness).

The Second Circuit considered both of these issues in *Madoff*.

MADOFF

In December 2008, the Securities Investment Protection Corporation commenced a proceeding under the Securities Investor Protection Act ("SIPA") to effect an orderly liquidation of Bernard L. Madoff Investment Securities LLC ("BLMI"), the investment vehicle controlled by convicted Ponzi scheme operator Bernard L. Madoff. The bankruptcy court presides over a SIPA case, and the case proceeds very much like a chapter 7 liquidation, with certain exceptions.

SIPA expressly provides that, to the extent consistent with its provisions, "a liquidation proceeding shall be conducted in accordance with, and as though it were being conducted under[,] chapters 1, 3, and 5 and subchapters I and II of chapter 7 of title 11." 15 U.S.C. § 78fff(b). This means, among other things, that a SIPA trustee has substantially all of the powers of a bankruptcy trustee, including the avoidance powers.

As part of the Madoff Ponzi scheme, BLMI made payments to various domestic and offshore "feeder funds," which then made payments to their investors. BLMI's SIPA trustee, alleging that the payments to the feeder funds were avoidable under section 548(a)(1)(A) as intentionally fraudulent transfers, commenced litigation beginning in 2008 against hundreds of investors as subsequent transferees of the feeder funds, seeking to recover the payments under section 550(a)(2). That provision authorizes a trustee to recover fraudulently transferred property from subsequent transferees. In many cases, the initial transferee was a foreign feeder fund and the subsequent transferee was also a foreign entity. In addition, some of the foreign feeder funds were debtors in foreign liquidation proceedings.

The foreign investor transferees moved to dismiss the complaint, arguing that section 550 does not apply extraterritorially. After withdrawing the reference of the litigation to the bankruptcy court, the U.S. District Court for the Southern District of New York ruled in favor of the foreign investors, but remanded the case to the bankruptcy court rather than dismissing the complaint. *See S.I.P.C. v. Bernard L. Madoff Inv. Sec. LLC*, 513 B.R. 222 (S.D.N.Y. 2014). The district court held that section 550 does not apply extraterritorially and cannot be used to recover property that one foreign entity received from another foreign entity. The court also ruled that comity limited the scope of section 550(a)(2) because the foreign jurisdictions in which feeder fund bankruptcy cases were pending "have a greater interest in applying their own laws than does the United States." *Id.* at 232.

On remand, the bankruptcy court applied the district court's reasoning and dismissed the trustee's complaint, specifically holding that: (i) as to certain foreign investors, the United States "has no interest in regulating the relationship between [the feeder funds] and their investors or the liquidation of [the feeder funds] and the payment of their investors' claims"; (ii) the foreign countries in which liquidation proceedings had been commenced against certain feeder funds had a greater interest than the United States "in regulating the activities that gave rise to the Trustee's subsequent transfer claims"; and (iii) the recovery claims against the remaining foreign investors must be dismissed under the presumption against extraterritoriality. *See S.I.P.C. v. Madoff*, 2016 WL 6900689, at *14–16 (Bankr. S.D.N.Y. Nov. 22, 2016), *vacated and remanded*, 917 F.3d 85 (2d Cir. 2019). The SIPA trustee appealed directly to the Second Circuit.

THE SECOND CIRCUIT'S RULING

The Second Circuit vacated the ruling and remanded the case below.

Initially, the court examined the focus of section 550(a) in assessing whether the litigation at issue involved either a domestic or foreign application of the provision for purposes of the presumption against extraterritoriality. Citing *WesternGeco LLC v. ION Geophysical Corp.*, 138 S. Ct. 2129 (2018), the Second Circuit concluded that it was necessary to look to section 548(a)(1)(A) to determine section 550(a)'s "focus" because the two provisions operate "in tandem."

Examining section 548(a)(1)(A), the Second Circuit determined that the focus of the provision and, by extension, the focus of its "utility provision," section 550(a), is the initial transfer because "[o]nly the initial transfer involves fraudulent conduct, or any conduct, by the debtor." The Second Circuit therefore rejected the district court's conclusion below that "the appropriate 'transaction' to determine the extraterritoriality question is the subsequent transaction." Ignoring section 548(a)(1)(A) entirely and looking only to section 550(a)(2), the Second Circuit noted, would be analyzing the latter provision in a vacuum, which it refused to do.

Next, the Second Circuit ruled that "a domestic debtor's allegedly fraudulent, hindersome, or delay-causing transfer of property from the United States is domestic activity for the purposes of §§ 548(a)(1)(A) and 550(a)." Thus, the presumption against extraterritoriality did not prohibit the SIPA trustee from recovering the transferred property using section 550(a), "regardless of where any initial or subsequent transferee is located."

According to the Second Circuit, the relevant conduct is "the debtor's fraudulent *transfer* of property, not the transferee's *receipt* of property." The court also wrote that "[w]hen a domestic debtor commits fraud by transferring property from a U.S. bank account, the conduct that § 550(a) regulates takes place in the United States." In so ruling, the Second Circuit declined to adopt the balancing test applied by the lower courts, which "weighed the location of the account from which and to which the subsequent transfer was made, and the location or residence of the subsequent transferor and transferee."

Because the case involved domestic application of section 550(a), the Second Circuit "express[ed] no opinion on whether [the provision] clearly indicates its extraterritorial application."

Finally, the Second Circuit ruled that prescriptive comity did not bar the SIPA trustee from attempting to recover the transfers under section 550(a). According to the court, no parallel foreign bankruptcy proceedings were pending to which the U.S. courts should defer as a matter of comity. Any pending liquidation proceedings involved the feeder funds, not BLMI. Moreover, the Second Circuit explained, the interests of the foreign jurisdictions in which such proceedings had been commenced were "not compelling enough" compared to the interest of the United States in applying its law to the disputes:

> The Bankruptcy Code gives us no reason to think Congress would have decided that trustees looking to recover property in domestic proceedings are out of luck when trustees in foreign proceedings may be interested in recovering the same property. In fact, § 550(a)(2) suggests the opposite: that by allowing trustees to recover property from even remote subsequent transferees, Congress wanted these claims resolved in the United States, rather than through piecemeal proceedings around the world.

In early April, the Second Circuit denied the foreign investors' petition for reconsideration of its ruling. However, on April 23, 2019, the Second Circuit granted the investors' motion to stay the effectiveness of its decision pending the disposition of the investors' impending petition asking the U.S. Supreme Court to review it.

OUTLOOK

If undisturbed on possible review by the Supreme Court, *Madoff* is a positive development for bankruptcy (or SIPA) trustees seeking to recover property transferred by U.S. debtors abroad in transactions that are successfully challenged under the Bankruptcy Code's avoidance provisions. By clarifying that a U.S. debtor's fraudulent transfer of property "from the United States" is domestic activity, the Second Circuit appears to have removed the extraterritoriality debate from the equation in many cases.

However, because the Second Circuit concluded that the case involved domestic application of section 550(a), the ruling does not resolve the dispute (even among courts in the Second Circuit) over whether Congress intended the avoidance provisions of the Bankruptcy Code, including section 550(a), to apply extraterritorially. For example, a trustee's ability to avoid and recover transfers by a U.S. debtor of property not located in the United States is still a matter of disagreement.

Moreover, although *Madoff* may give a trustee in some jurisdictions a leg up in avoidance litigation involving foreign transferees, practical problems remain. For example, a U.S. court may lack personal jurisdiction over a non-U.S. transferee, and that would significantly complicate efforts to enforce any avoidance ruling. *See Lyondell*, 543 B.R. at 147 (concluding that a litigation trustee in a chapter 11 case failed to make a prima facie case for the court's exercise of personal jurisdiction consistent with due process over a foreign transferee in avoidance litigation).

NEW YORK DISTRICT COURT RULES THAT CHAPTER 15 RECOGNITION IS NOT PREREQUISITE TO ENFORCEMENT OF FOREIGN BANKRUPTCY JUDGMENT UNDER PRINCIPLES OF COMITY

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." Since chapter 15 of the Bankruptcy Code was enacted in 2005, it has been generally understood that recognition of a foreign bankruptcy proceeding under chapter 15 is a prerequisite to the enforcement by a U.S. court of an order or judgment entered in such a foreign bankruptcy proceeding under the doctrine of comity. A ruling recently handed down by the U.S. District Court for the Southern District of New York directly challenges that principle. In *EMA Garp Fund v. Banro Corp.*, 2019 WL 773988 (S.D.N.Y. Feb. 21, 2019), the court dismissed litigation against a Canadian company and its former CEO, finding that, under principles of comity, the lawsuit was barred by orders approving the company's Canadian bankruptcy proceeding and releasing all claims against the defendants. The district court did so despite the absence of any order issued by a U.S. bankruptcy court recognizing the Canadian bankruptcy proceeding 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 Commc'n Corp. v. Societe Generale (In re Maxwell Commc'n 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 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 UK company that was a debtor in UK insolvency proceedings); *Cornfeld v. Investors Overseas Servs., 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, Ltd. 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 Corp.–Delaware v. Business Sys. Inc.*, 830 F.2d 1260, 1267–68 (3d Cir. 1987) (section 304 "express[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

The enactment of chapter 15 in 2005 changed the requirements for seeking recognition and enforcement in the United States 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 United States of both a "foreign main proceeding"—a case pending in the country where the debtor's center of main interest (COMI) is located (*see* 11 U.S.C. § 1502(4))—and "foreign nonmain proceedings" pending in countries where the debtor merely has an "establishment" (*see* 11 U.S.C. § 1502(5)).

Upon recognition of a foreign main proceeding, section 1520(a) provides that certain provisions of the Bankruptcy Code automatically come into force, including section 362, which imposes an automatic stay preventing creditor collection efforts with respect to the debtor or its U.S. assets. If the bankruptcy court recognizes a foreign proceeding as either a main or nonmain proceeding, section 1521(a) authorizes the court to grant a broad range of provisional and other relief designed to preserve the foreign debtor's assets or otherwise provide assistance to the court or other entity presiding over the debtor's foreign main proceeding.

Section 1509(b) provides that, if a 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 foreign representative's 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. 2018) (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 other 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, the vast majority of courts have held that 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 or dismissal of U.S. court proceedings against a foreign debtor or its assets. *See Halo Creative Design Ltd. v. Comptoir Des Indes Inc.*, 2018 WL 4742066 (N.D. Ill. Oct. 2, 2018); *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); *Iida v. Kitahara (In re Iida)*, 377 B.R. 243 (B.A.P. 9th Cir. 2007); *In re Loy*, 380 B.R. 154 (Bankr. E.D. Va. 2007); *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); *Loy*, 380 B.R. at 166–67 (because the filing of a notice of *lis pendens* does not require the comity or cooperation of a U.S. court, a foreign representative need not first obtain recognition of a foreign proceeding in accordance with section 1509(f)). *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).

However, if there is no foreign representative or other party seeking the assistance of a U.S. court in enforcing an order entered in a non-U.S. bankruptcy proceeding, chapter 15 recognition may not be necessary. For example, in *Trikona Advisers Ltd. v. Chugh*, 846 F.3d 22 (2d Cir. 2017), the U.S. Court of Appeals for the Second Circuit affirmed a district court ruling giving collateral estoppel effect to the findings of a foreign insolvency court, even though no chapter 15 petition had been filed in the United States on behalf of the foreign debtor seeking recognition of its Cayman Islands winding-up proceeding. According to the Second Circuit, because the party seeking such relief was not a "foreign representative" under chapter 15, the provisions of chapter 15 simply did not apply, but the district court nonetheless did not err in granting comity to the foreign insolvency court's factual findings.

In reaching this conclusion, the Second Circuit distinguished an unpublished ruling issued by a Connecticut state court in separate litigation involving some of the same parties. The state court held that the plaintiff could enforce an order of the Cayman Islands court awarding attorney's fees in connection with the debtor's winding-up proceeding only in a chapter 15 case. According to the Second Circuit, even if the ruling was correct as a matter of law, the plaintiffs in the related case had requested "the direct assistance of a court within the United States in enforcing an order issued in connection with a foreign liquidation proceeding[,] . . . a scenario that arguably falls within the scope of Chapter 15." By contrast, the court wrote, in the case before it, the party seeking relief argued that "the findings of fact made in the wind-up proceeding should be given preclusive effect," rather than seeking the assistance of the Connecticut district court in enforcing any judgment of the Cayman Islands court.

EMA GARP FUND

In 2017, Banro Corp. ("Banro"), a Canadian company, commenced a reorganization proceeding in the Ontario Supreme Court of Justice under Canada's Companies' Creditors Arrangement Act (the "CCAA"). Banro's creditors overwhelmingly approved a reorganization plan for Banro, and the Canadian court issued an order confirming the plan on March 27, 2018. The plan entailed a debt-for-equity swap that extinguished Banro's existing equity.

It also released all claims against Banro's officers and directors. Banro's restructuring proceeding concluded on May 3, 2018.

On March 5, 2018—one day prior to the bar date established by the Canadian court—certain Banro shareholders (the "plaintiffs"), who were aware of, but declined to participate in, the Canadian restructuring proceeding, sued Banro and its former CEO (collectively, the "defendants") in the U.S. District Court for the Southern District of New York, seeking compensatory damages for violations of U.S. securities laws. The defendants moved to dismiss the complaint on the basis of international comity.

THE DISTRICT COURT'S RULING

The district court granted the motion to dismiss the complaint. In dismissing the claims against Banro, the court examined the factors indicating "procedural fairness" that many courts applied prior to 2005 in assessing whether a U.S. court should defer to foreign bankruptcy proceedings under principles of comity (citing *Allstate Life Ins. Co. v. Linger Grp. Ltd.*, 994 F.2d 996 (2d Cir. 1993)). The court concluded that: (i) Banro's Canadian restructuring proceeding was procedurally fair (and that the plaintiffs "could have and should have pursued their claims" in such proceeding); (ii) the proceeding was a "parallel proceeding," even though it was no longer pending; (iii) the provisions of Banro's confirmed reorganization plan applied to the plaintiffs, even though they elected not to participate in the case; (iv) the equities favored the defendants because the plaintiffs "engaged in forum shopping by electing to file an action in this Court in lieu of filing a claim in the Banro CCAA Proceeding"; and (v) dismissing the complaint would not violate U.S. law or public policy because deference to the Canadian proceeding was necessary to prevent the plaintiffs from circumventing the Canadian proceeding.

Notably, the district court wrote that "the fact that Defendants did not file a recognition proceeding in [a] U.S. court" was "irrelevant" to its comity determination (citing *Allstate*, 994 F.2d at 999; *Victrix S.S. Co., S.A. v. Salen Dry Cargo A.B.*, 825 F.2d 709, 714 (2d Cir. 1987)). According to the district court, the defendants "were under no obligation to file anything in U.S. courts in order to earn [comity] for the Canadian courts" (citing *Hilton*, 159 U.S. at 164).

The district court also dismissed the claims against Banro's former CEO on the basis of comity. The court explained that the releases in Banro's restructuring plan were an integral part of the plan and essential to its approval by creditors. Permitting the claims to proceed against the former CEO, the district court emphasized, "would directly contravene the CCAA reorganization plan, which released those claims, and thus interfere with the purpose of granting comity in the first place." The district court also noted that the courts in *Allstate* and *Oui Financing LLC v. Dellar*, 2013 WL 5568732 (S.D.N.Y. Oct. 9, 2013), dismissed claims against individual defendants on the basis of comity to a foreign bankruptcy proceeding.

OUTLOOK

The district court's ruling in *EMA Garp Fund* cuts against the grain on the question of whether chapter 15 recognition is a prerequisite for relief from U.S. courts on the basis of comity in cases involving a foreign bankruptcy proceeding. As noted, the vast majority of courts considering the question have ruled to the contrary.

Interestingly, with one exception, the cases relied upon by the district court in *EMA Garp Fund* either were decided prior to the enactment of chapter 15 or involved a chapter 15 case. The exception is *Oui Financing*, in which the district court dismissed on the basis of comity litigation brought by a lender against a company that was a debtor in a French bankruptcy proceeding as well as the borrower's president. Like the court in *EMA Garp Fund*, the *Oui Financing* court engaged in the "procedural fairness" examination conducted by courts in this context prior to 2005.

It is also notable that the court in *EMA Garp Fund* did not discuss: (i) any of the plethora of court rulings requiring chapter 15 recognition as a prerequisite to comity, especially *Halo Creative*, which was handed down only five months previously and also involved a Canadian bankruptcy proceeding; (ii) the Second Circuit's ruling in *Trikona*, which arguably supports the *EMA Garp Fund* court's rationale and was cited by the defendants in their court submissions; and (iii) whether the third-party release of Banro's former CEO should be enforced as a matter of comity, even though it might not be enforceable under U.S. law.

The *EMA Garp Fund* court appears to have been persuaded by the defendants' argument that chapter 15 serves a "limited purpose" and is necessary only when a court presiding over a foreign restructuring proceeding needs assistance from a U.S. court to administer the foreign debtor's assets in the United States. The defendants pointed out that, notwithstanding the fact that Banro's common stock was traded on the New York Stock Exchange, Banro had no significant property in the United States. Hence, they argued, Banro did not need any assistance from a U.S. bankruptcy court, and they accordingly asserted that chapter 15 recognition of Banro's CCAA proceeding was neither necessary nor required. Given the outcome, the court in *EMA Garp Fund* appears to have embraced the notion that chapter 15 is not the exclusive "venue" for comity in cross-border restructurings where the foreign debtor has no significant assets in the United States.

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FOURTH CIRCUIT BOLSTERS CLAIMS FOR POSTPETITION ATTORNEY'S FEES INCURRED BY UNSECURED OR UNDERSECURED CREDITORS

Andrew M. Butler

In *SummitBridge Nat'l Invs. III, LLC v. Faison*, 915 F.3d 288 (4th Cir. 2019), the U.S. Court of Appeals for the Fourth Circuit ruled that an unsecured or undersecured creditor may include postpetition attorney's fees and costs as part of its allowed claim in a bankruptcy case.

UNSECURED CREDITORS AND POSTPETITION ATTORNEY'S FEES AND COSTS

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

However, the Court did not address whether section 506(b) of the Bankruptcy Code "categorically disallows unsecured claims for contractual attorney's fees" because the issue was not raised in the lower courts. Section 506(b) provides that the secured claim of an oversecured creditor shall include "interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement or State statute under which such claim arose." In *Travelers*, the Court wrote that "we express no opinion with regard to whether, following the demise of the *Fobian* rule, other principles of bankruptcy law might provide an independent basis for disallowing . . . [a] claim for attorney's fees."

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

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

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

ii. In *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assoc.*, 484 U.S. 365 (1988), the Supreme Court held that section 506(b) permits only oversecured creditors to recover postpetition interest on their claims. Thus, because section 506(b) provides for the allowance of postpetition fees and interest, only the claims of oversecured creditors for postpetition attorney's fees should be allowed.

iii. Section 502(b) of the Bankruptcy Code "requires a court to determine the amount of a claim as of the date the petition was filed." According to the *Global Industrial* court, "It is axiomatic that, as of the petition date, postpetition attorneys' fees have not been incurred[,]" and therefore, "unsecured prepetition claims cannot include postpetition attorneys' fees."

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

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

In *In re Tribune Media Co.*, 2015 WL 7307305 (Bankr. D. Del. Nov. 19, 2015), *rev'd*, 2018 WL 6167504 (D. Del. Nov. 26, 2018), the indenture trustee for certain unsecured notes filed a claim for more than $30 million in postpetition fees and expenses. After the debtor objected to the claim, a mediator appointed by the bankruptcy court to resolve the dispute recommended that the fee claim be disallowed.

The bankruptcy court adopted the mediator's recommendation and disallowed the fee claim. Noting that the Third Circuit has not decided the issue, the court found the reasoning of *Global Industrial* to be persuasive and concluded that "the plain language of § 502(b) and § 506(b), when read together, indicate[s] that postpetition interest, attorney's fees and costs are recoverable only by oversecured creditors."

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

The *Tribune* ruling was reversed by the district court in late 2018, and the issue is now on appeal before the Third Circuit. *See Tribune Media Co. v. Wilmington Trust Co. (In re Tribune Media Co.)*, No. 18-3793 (3d Cir.). Noting that it "[did] not have anything new to add to this debate," the district court reasoned it could not conclude that section 506(b) "expressly" disallows the claims at issue. The court agreed with the position adopted by every court of appeals faced with the question, ruling that "Section 506(b) does not limit the allowability of unsecured claims for contractual post-petition attorneys' fees under Section 502."

SUMMITBRIDGE

In *SummitBridge*, Branch Banking and Trust Company ("BB&T") loaned $2.1 million to the debtor secured by farmland. In the event of default, the loan agreements obligated the debtor to pay "all costs of collection, including but not limited to reasonable attorneys' fees."

In 2014, the debtor filed for chapter 11 protection in the Eastern District of North Carolina. BB&T filed proof of its secured claims for the outstanding principal and interest due on the loans as of the petition date. BB&T later assigned the loans to SummitBridge National Investments III, LLC ("SBNI"), which began incurring attorney's fees in defending its claims.

The debtor's chapter 11 plan treated SBNI's claims as a single secured claim in the amount of $1,715,000—the value of the farmland securing the loans. That amount was sufficient to cover the outstanding principal, prepetition interest, and some of SBNI's postpetition interest and attorney's fees. The plan provided that SBNI could assert an unsecured claim for its remaining post-petition attorney's fees. However, the debtor objected to SBNI's unsecured claim for those attorney's fees, claiming that, even though SBNI was entitled to collect such fees under the loan agreements and applicable state law, the Bankruptcy Code does not provide for the allowance of an unsecured claim for postpetition attorney's fees or costs. The bankruptcy court ruled in the debtor's favor, and the district court affirmed on appeal. SBNI appealed to the Fourth Circuit.

THE FOURTH CIRCUIT'S RULING

The Fourth Circuit addressed three main arguments.

First, the court considered whether SBNI's unsecured claim for postpetition attorney's fees should be disallowed because the amount of the fees was not determinable as of the petition date in accordance with section 502(b), which requires the court to "determine the amount of such claim . . . as of the date of the filing of the petition." The Fourth Circuit rejected this argument, reasoning that the Bankruptcy Code's definition of "claim" is broad and includes contingent rights to payment. In this case, the court explained, SBNI's right to the attorney's fees arose prepetition, when the debtor signed the loan agreements.

Second, the Fourth Circuit evaluated whether section 506(b) disallowed SBNI's unsecured claim for postpetition attorney's fees. Relying on *Travelers* and the express language of section 506(b), the court rejected the debtor's argument that, because section 506(b) expressly refers only to the allowance of attorney's fee claims asserted by oversecured creditors, the provision by implication disallows fee claims asserted by unsecured or undersecured creditors. According to the Fourth Circuit, *Travelers* creates a presumption that claims enforceable under state law are allowable unless the Bankruptcy Code expressly disallows them. In this case, the court concluded, the Bankruptcy Code is "completely silent" with regard to the issue and thus "cannot rebut the *Travelers* presumption."

Furthermore, the court explained, section 506(b) does not address allowability in the first instance. Instead, Congress provided nine exceptions to the allowance of claims in section 502(b). Quoting *Travelers*, the Fourth Circuit wrote that the "absence of an analogous provision excluding" claims for fees, when Congress knew how to draft a provision that expressly disallows a claim for certain attorney's fees (i.e., section 502(b)(4), which disallows a claim for attorney's fees for services rendered to a debtor that "exceeds the reasonable value of such services"), is "strong evidence" that the Bankruptcy Code does not disallow such claims.

Finally, the Fourth Circuit rejected the policy argument that permitting a secured creditor to assert an unsecured claim for attorney's fees as well would further diminish the assets available to other unsecured creditors "who have yet to recover any principal, let alone fees." Rejecting the argument's premise, the Fourth Circuit hearkened back to the plain language of the Bankruptcy Code. "What matters under § 502 and § 506(b)," the court wrote, "is the status of a given claim, not the status of the creditor asserting it." The Fourth Circuit further noted that a principal rule in bankruptcy is that secured creditors enjoy the benefit of their secured position, and a policy argument advanced in favor of disallowance "would flip this argument on its head."

The Fourth Circuit accordingly ruled that the Bankruptcy Code does not bar a creditor from asserting an unsecured claim for attorney's fees incurred postpetition if the fees are provided for in a prepetition contract.

OUTLOOK

In *SummitBridge*, the Fourth Circuit held that an unsecured or undersecured creditor may include postpetition attorney's fees and costs as part of its allowed claim in a bankruptcy case. The Third Circuit will have an opportunity to weigh in on this issue in the *Tribune* case. Nonetheless, many lower courts in the circuits have taken the opposite position.

TRIBUNE DISTRICT COURT RULES THAT LBO PAYMENTS MAY NOT BE AVOIDED BECAUSE DEBTOR WAS "CUSTOMER" OF "FINANCIAL INSTITUTION"

Brad B. Erens ■ Mark G. Douglas

In *In re Tribune Co. Fraudulent Conveyance Litig.*, 2019 WL 1771786 (S.D.N.Y. Apr. 23, 2019), the U.S. District Court for the Southern District of New York denied a litigation trustee's motion to amend a complaint seeking to avoid alleged fraudulent transfers made to selling shareholders as part of a 2007 leveraged buyout ("LBO") of the Tribune Co. ("Tribune"), ruling that the safe harbor in section 546(e) of the Bankruptcy Code continues to bar such claims notwithstanding the U.S. Supreme Court's February 2018 decision in *Merit Management Group v. FTI Consulting*. According to the district court's ruling, payments made to shareholders as part of the LBO transaction were insulated from avoidance as constructive fraudulent transfers because Tribune hired a commercial bank to serve as the exchange agent for the transfers. As the "customer" of a "financial institution," the court reasoned, Tribune became a "financial institution" itself, thereby triggering application of the safe harbor and avoiding the strictures of *Merit*.

THE SECTION 546(e) SAFE HARBOR

Section 546 of the Bankruptcy Code imposes a number of limitations on a bankruptcy trustee's avoidance powers, which include the power to avoid certain preferential and fraudulent transfers. Section 546(e) provides that the trustee may not avoid, among other things, a pre-bankruptcy transfer that is a settlement payment "made by or to (or for the benefit of) a . . . financial institution [or a] financial participant . . . , or that is a transfer made by or to (or for the benefit of)" any such entity in connection with a securities contract, unless the transfer was made with the actual intent to hinder, delay, or defraud creditors.

Section 101(22) of the Bankruptcy Code defines the term "financial institution" to include:

> a Federal reserve bank, or an entity that is a commercial or savings bank, industrial savings bank, savings and loan association, trust company, federally-insured credit union, or receiver, liquidating agent, or conservator for such entity *and, when any such Federal reserve bank, receiver, liquidating agent, conservator or entity is acting as agent or custodian for a customer (whether or not a "customer", as defined in section 741) in connection with a securities contract (as defined in section 741)*[,] *such customer*.

11 U.S.C. § 101(22) (emphasis added).

The purpose of section 546(e) is to prevent "the insolvency of one commodity or security firm from spreading to other firms and possibly threatening the collapse of the affected market."

H.R. Rep. No. 97-420, at 1 (1982). The provision was "intended to minimize the displacement caused in the commodities and securities markets in the event of a major bankruptcy affecting those industries." *Id.*

Prior to the Supreme Court's ruling in *Merit*, five circuit courts of appeals ruled that the section 546(e) safe harbor extends to transactions even where the financial institution involved is merely a "conduit" for the transfer of funds from the debtor to the ultimate transferee. *See In re Quebecor World (USA) Inc.*, 719 F.3d 94 (2d Cir. 2013) (the safe harbor is applicable where the financial institution was a trustee and where the actual exchange was between two private entities); *Contemporary Indus. Corp. v. Frost*, 564 F.3d 981 (8th Cir. 2009) (section 546(e) is not limited to public securities transactions and protects from avoidance a debtor's payments deposited in a national bank in exchange for the shareholders' privately held stock during an LBO); *In re QSI Holdings, Inc.*, 571 F.3d 545 (6th Cir. 2009) (the safe harbor applied even though the financial institution involved in the LBO was only the exchange agent); *In re Resorts Int'l, Inc.*, 181 F.3d 505, 516 (3d Cir. 1999) (noting that "the requirement that the 'commodity brokers, forward contract merchants, stockbrokers, financial institutions, and securities clearing agencies' obtain a 'beneficial interest' in the funds they handle . . . is not explicit in section 546"); *In re Kaiser Steel Corp.*, 952 F.2d 1230, 1240 (10th Cir. 1991) (rejecting the argument that "even if the payments were settlement payments, § 546(e) does not protect a settlement payment 'by' a stockbroker, financial institution, or clearing agency, unless that payment is to another participant in the clearance and settlement system and not to an equity security holder").

The Eleventh Circuit ruled to the contrary in *In re Munford, Inc.*, 98 F.3d 604 (11th Cir. 1996). In *Munford*, the court held that section 546(e) did not shield from avoidance payments made by the debtor to shareholders in an LBO because the "financial institution" involved was only a conduit for the transfer of funds and securities—the bank never had a "beneficial interest" sufficient to qualify as a "transferee" in the LBO. The Seventh Circuit widened the circuit split on the issue when it agreed with the rationale of *Munford* in *FTI Consulting, Inc. v. Merit Mgmt. Grp., LP*, 830 F.3d 690 (7th Cir. 2016), *aff'd*, 138 S. Ct. 883 (2018). The Supreme Court granted a petition to review the Seventh Circuit's ruling to resolve the circuit split.

THE SUPREME COURT'S RULING IN *MERIT*

In *Merit*, the unanimous Court held that section 546(e) 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 sought to be avoided is itself a financial institution. Because the selling shareholder in the LBO transaction that was challenged as a constructive fraudulent transfer was not a financial institution (even though the conduit banks through which the payments were made met that definition), the Court ruled that the payments fell outside the safe harbor.

In a footnote, the Court acknowledged that the Bankruptcy Code defines "financial institution" broadly to include not only entities traditionally viewed as financial institutions, but also the "customers" of those entities, when they act as agents or custodians in connection with a securities contract. The selling shareholder in *Merit* was a customer of one of the conduit banks, yet never raised the argument that it therefore also qualified as a financial institution for purposes of section 546(e). For this reason, the Court did not address the possible impact of the shareholder transferee's customer status on the scope of the safe harbor. The district court considered this question in *Tribune*.

TRIBUNE

In 2007, Tribune was the target of an LBO that paid its shareholders more than $8 billion in exchange for their shares in the company. There were two separate parts to the transaction. First, Tribune transmitted the cash necessary to purchase its shares in connection with a tender offer to a depositary, Computershare Trust Company, N.A. ("CTC"). CTC then accepted and held tendered shares on Tribune's behalf and paid selling shareholders $34 per share. Second, with CTC acting in the same capacity, Tribune purchased its remaining shares and borrowed an additional $3.7 billion in a go-private merger with a newly formed Tribune entity.

Shortly after the LBO was completed in December 2007, Tribune experienced financial difficulties because of declining advertising revenues and its failure to meet projections. The company filed for chapter 11 protection in December 2008 in the District of Delaware.

In 2010, Tribune's unsecured creditors' committee (the "Committee") sued Tribune's former shareholders and certain other defendants in the bankruptcy court to, among other things, avoid and recover the LBO payments as fraudulent transfers under sections 548(a) and 550 of the Bankruptcy Code. In 2011, finding that Tribune's various creditors (collectively, the "Creditors") regained the right to pursue *state law* constructive fraudulent transfer claims against the selling shareholders because such claims had not been asserted on behalf of Tribune's estate prior to expiration of the statute of limitations under section 546(a), the bankruptcy court modified the stay to permit the Creditors' prosecution of lawsuits asserting such claims in state and federal courts. In December 2011 and March 2012, approximately 40 state and federal cases involving more than 5,000 defendants, including the litigation commenced by the Committee, were consolidated in the U.S. District Court for the Southern District of New York.

The bankruptcy court confirmed Tribune's chapter 11 plan in July 2012. The plan assigned the avoidance claims asserted by the Committee to a litigation trust. Thus, the litigation trustee became the successor plaintiff in that litigation. The plan did not assign the Creditors' state law constructive fraudulent transfer claims to the litigation trust.

In September 2013, the district court granted a motion to dismiss the Creditors' state law fraudulent transfer claims, finding that the automatic stay deprived individual creditors of standing to challenge the same transactions that the litigation trustee was simultaneously seeking to avoid. The Second Circuit affirmed on appeal, but on different grounds, holding that such claims were preempted by the section 546(e) safe harbor. According to the Second Circuit, even though section 546(e) expressly provides that "the trustee" may not avoid certain payments under securities contracts unless such payments were made with the actual intent to defraud, section 546(e)'s language, its history, its purposes, and the policies embedded in the securities laws and elsewhere led to the conclusion that the safe harbor was intended to preempt constructive fraudulent transfer claims asserted by creditors. *See Deutsche Bank Trust Co. Ams. v. Large Private Beneficial Owners (In re Tribune Co. Fraudulent Conveyance Litig.)*, 818 F.3d 98 (2d Cir. 2016).

On September 9, 2016, the Creditors filed a petition for a writ of certiorari with the U.S. Supreme Court.

In January 2017, the district court dismissed the litigation trustee's intentional fraudulent transfer claims against the selling shareholders, ruling that, among other things, any fraudulent intent of Tribune's officers in connection with the LBO could not be imputed to Tribune.

The Supreme Court issued its ruling in *Merit* on February 27, 2018. Shortly afterward, the Tribune litigation trustee sought court permission to amend his complaint to add federal constructive fraudulent transfer claims against the selling shareholders.

On April 3, 2018, the Supreme Court issued an order that, in light of its recent ruling in *Merit*, the Court would defer consideration of the Creditors' petition seeking review of the Second Circuit's 2016 preemption decision. According to the Supreme Court, deferring consideration of whether the Court should review the merits of the Second Circuit's decision "will allow the Court of Appeals or the District Court to consider whether to recall the mandate, entertain a Federal Rule of Civil Procedure 60(b) motion to vacate the earlier judgment, or provide any other available relief in light of this Court's decision in [*Merit*]." *See Deutsche Bank Trust Co. Ams. v. Robert R. McCormick Foundation*, 138 S. Ct. 1162, 2018 WL 1600841, No. 16-317 (U.S. Apr. 3, 2018).

On May 15, 2018, the Second Circuit issued an order suspending the effectiveness of its *Tribune* safe-harbor decision "in anticipation of further panel review." The order neither vacated the underlying decision nor established a schedule for further review. In June 2018, the district court stayed the litigation trustee's request to amend his complaint pending further action by the Second Circuit in the Creditors' litigation, noting that the Second Circuit was likely to rule on the applicability of section 546(e) to the LBO in that litigation.

On April 4, 2019, the litigation trustee renewed his motion seeking permission to file an amended complaint asserting constructive fraudulent transfer claims against the selling shareholders, relying entirely on *Merit*. The shareholder defendants opposed the motion, arguing, among other things, that *Merit* was not dispositive because Tribune was itself a "financial institution" in the LBO as a "customer" of CTC.

THE DISTRICT COURT'S RULING

The district court denied the litigation trustee's motion to amend the complaint, ruling that the proposed amendment would be futile because the federal constructive fraudulent transfer claims were barred by section 546(e), and amendment would result in undue prejudice to the shareholder defendants.

Initially, the court noted that the only issue disputed by the parties was whether Tribune was a "financial institution" or a "financial participant" covered by the safe harbor. Although Tribune did not satisfy section 101(22A)(A)'s definition of "financial participant," the district court concluded that the company qualified as a "financial institution" under section 101(22) because: (i) it was undisputed that, as both a "bank" and a "trust company," CTC was a financial institution; (ii) Tribune was a "customer" of CTC; (iii) CTC acted as Tribune's "agent or custodian" in connection with the LBO; and (iv) CTC acted "in connection with a securities contract" when it acted as depositary.

The district court noted that section 101(22) (defining "financial institution") does not define the term "customer," and the provision expressly states that the term is not limited to the definition of "customer" in the definitions contained in sections 741(2) and 761(9), which apply to stockbroker and commodity broker liquidations. Therefore, the court looked to the ordinary meaning of the term, which includes purchasers of goods or services, consumers, patrons, and bank account holders. Because Tribune was a purchaser of CTC's services, the district court held that Tribune was CTC's customer. In addition, CTC acted as Tribune's "agent" because Tribune entrusted CTC with billions of dollars in cash as well as the task of making payments on Tribune's behalf to the selling shareholders—"a paradigmatic principal agent relationship." Also, the court found that Tribune's use of CTC to purchase Tribune stock from the selling shareholders was sufficient to establish that CTC's involvement in the LBO was "in connection with a securities contract."

The district court found that *Merit* was distinguishable. It wrote that "[t]he tension suggested by the [litigation trustee] between the [selling shareholders'] successful invocation of Section 546(e)'s safe harbor and [*Merit*] does not exist" because the Supreme Court specifically declined to address the scope of the definition of "financial institution" and acknowledged the possibility that an entity qualifying as a "customer" could satisfy that definition.

The court noted that its conclusion comports with section 546(e)'s goals of promoting stability and finality in securities markets and protecting investors. In doing so, it rejected the litigation trustee's argument that Tribune was not a "systemically important" institution that should benefit from the safe harbor:

> [A]t the time of the LBO, Tribune was a publicly traded, Fortune 500 company. The [litigation trustee] sued over 5,000 [selling shareholders] of Tribune—whose only involvement in this transaction was receiving payment for their shares—to unwind securities transactions. This is precisely the sort of risk that Section 546(e) was intended to minimize.

Finally, the court held that, even if the safe harbor did not apply, the court would deny the motion for leave to amend because amendment would unduly prejudice the shareholder defendants. The court explained that permitting amendment of the complaint to add new federal constructive fraudulent transfer claims in such a complex case after years of litigation would require significant additional discovery and trial preparation and would significantly delay resolution of the case.

Merit potentially opened the door for constructive fraudulent transfer claims against selling shareholders in many LBOs. Such payments typically pass through financial intermediaries that would be considered "financial institutions" and were previously considered to be protected from avoidance by the safe harbor in many circuits. *Tribune*, however, suggests that the results of *Merit* might be avoided by structuring transactions so that the LBO target is a "customer" of the financial intermediaries involved.

However, it remains to be seen whether the district court's ruling in *Tribune* will withstand scrutiny on appeal or whether the Second Circuit will weigh in on the issue in the still-pending Creditors' litigation.

Tribune is not the only recent case addressing the ramifications of *Merit* and the section 546(e) safe harbor. For example, in *In re Greektown Holdings, LLC*, 2019 WL 1770323 (6th Cir. Apr. 22, 2019), the Sixth Circuit noted that "[*Merit*] squarely addresses the dispositive issue in this case and abrogated the Sixth Circuit precedent on which both the bankruptcy court and district court relied." The court accordingly vacated and remanded lower court rulings invoking the section 546(e) safe harbor to dismiss a litigation trustee's complaint seeking to avoid under state fraudulent transfer laws redemption payments made under a note purchase agreement through a "financial institution" to members of a limited liability company.

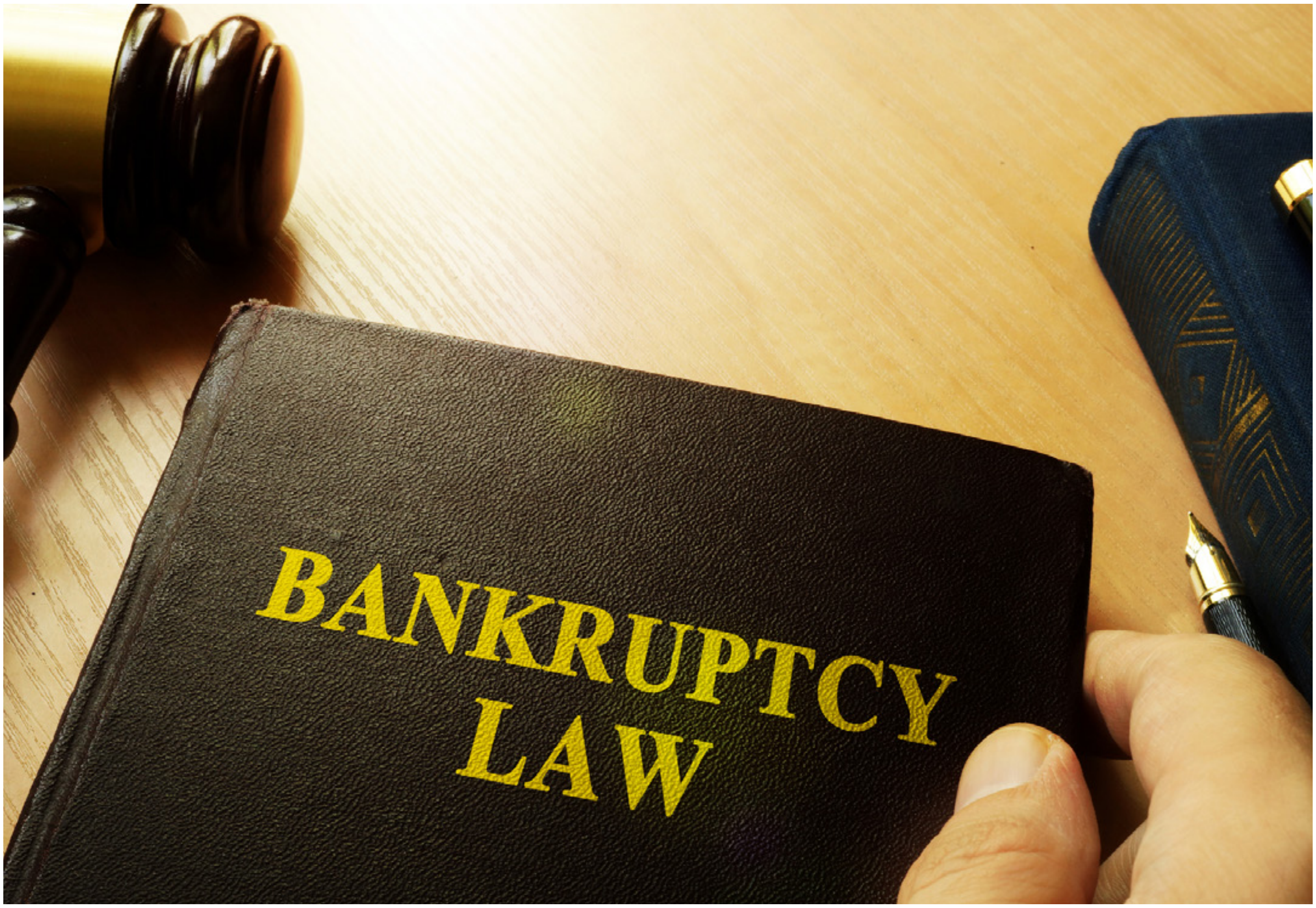
IN BRIEF: ON REMAND, *MOMENTIVE* BANKRUPTCY COURT RULES THAT CRAMDOWN NOTES SHOULD BEAR "PROCESS EFFICIENT" MARKET INTEREST RATE

In *Momentive Performance Materials Inc. v. BOKF, NA (In re MPM Silicones, L.L.C.)*, 874 F.3d 787 (2d Cir. 2017), *cert. denied*, 138 S. Ct. 2653 (2018), the U.S. Court of Appeals for the Second Circuit affirmed a number of lower court rulings on hot-button bankruptcy issues, including allowance (or, in this case, denial) of a claim for a "make-whole" premium and contractual subordination of junior notes. However, the Second Circuit disagreed with the lower courts on the appropriate interest rate for first-lien and 1.5-lien replacement notes ("cramdown notes") issued to secured creditor classes that voted to reject the debtors' chapter 11 plan. In doing so, the Second Circuit joined the Sixth Circuit in requiring cramdown notes to bear a market rate of interest if an efficient market exists; if no such market exists, the notes may bear interest at the typically below-market formula rate. *See In re American HomePatient, Inc.*, 420 F.3d 559 (6th Cir. 2005). The Second Circuit accordingly remanded the case below for additional findings on whether "an efficient market can be ascertained, and, if so, [to] apply it to the replacement notes."

The Second Circuit faulted the lower courts for applying the "formula approach" articulated by the U.S. Supreme Court in *Till v. SCS Credit Corp.*, 541 U.S. 465 (2004). In *Till*, the Court ruled that the interest rate on a cramdown loan in a chapter 13 case should follow a simple "formula approach"—a risk-free rate (in that case, the prime rate) plus a premium for the risk of the debtor's nonpayment of the replacement loan (but excluding any profits, costs, or fees). In a footnote, the Court expressly left open the possibility that the formula approach might not apply in a chapter 11 case, where there is a robust market for debtor-in-possession financing.

In its prior ruling in *Momentive*, the bankruptcy court reasoned that *Till* and related precedent establish certain "first principles" that support application of the formula approach in chapter 11 despite *Till*'s suggestion that the approach might not be appropriate in that context. According to the bankruptcy court's initial ruling, "[T]here is no meaningful difference between the chapter 11, corporate context and the chapter 13, consumer context to counter *Till*'s guidance that courts should apply the same approach wherever a present value stream of payments is required to be discounted under the Code." The bankruptcy court also rejected the *American HomePatient* approach as the kind of unworkable, expensive, and burdensome standard that *Till* sought to avoid. The district court affirmed the bankruptcy court's decision on appeal.

The Second Circuit reversed that portion of the lower court rulings regarding the appropriate interest rate for the replacement notes. Relying on the footnote in *Till*, the court adopted



the two-step *American HomePatient* approach. In doing so, the Second Circuit explained that exposure to the market is the best determinant of value.

THE BANKRUPTCY COURT'S RULING ON REMAND

On remand, the bankruptcy court issued an order on April 19, 2019, determining the appropriate rate of interest on the cramdown notes issued under the debtors' chapter 11 plan. *See In re MPM Silicones, LLC*, No. 14-22503 (RDD) (Bankr. S.D.N.Y. Apr. 19, 2019). In its order, the court noted that "the existence of an efficient market for chapter 11 exit financing with a term, size and collateral comparable to the [cramdown notes] under traditional definitions of market efficiency was not established." However, the court acknowledged that the debtors negotiated "process efficient" back-up exit financing at arm's length involving competitive offers for the first-lien cramdown notes. In addition, although there was no similar back-up exit financing negotiated for the 1.5-lien notes, a proposed bridge facility commitment letter and expert testimony employing reasonably reliable methodology enabled the court to determine a "process efficient" market for exit financing of a term, size, and collateral comparable to the 1.5-lien cramdown notes.

According to the court, the "process efficient" interest rate for the first-lien cramdown notes should be a floating rate, which "avoids a windfall for either the Debtors or the lenders based on changes to the general interest rate environment that may have occurred after confirmation of the Plan." However, on the basis of expert testimony, the court concluded that a fixed rate for the 1.5-lien cramdown notes was fair.

The court accordingly ruled that: (i) the cramdown interest rate for the first-lien cramdown notes should be LIBOR plus 4.50 percent, including 0.50 percent of the original issue discount and 0.375 percent of "market flex," with a floor of 1.00 percent; and (ii) the cramdown interest rate for the 1.5-lien cramdown notes should be 7.9 percent.

The bankruptcy court issued its order in advance of a memorandum decision on the issues presented. The reorganized debtors appealed the bankruptcy court's order on May 3, 2019.

FROM THE TOP IN BRIEF: NONJUDICIAL FORECLOSURE NOT REGULATED BY THE FDCPA

On March 20, 2019, the U.S. Supreme Court ruled unanimously in *Obduskey v. McCarthy & Holthus LLP*, 17-1307, 2019 WL 1264579 (U.S. Mar. 20, 2019), that nonjudicial foreclosure is not subject to regulation under the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692–1692p (the "FDCPA").

The FDCPA applies to a "debt collector," which is defined in section 1692a(6) as any person or entity who "regularly collects or attempts to collect, directly or indirectly, debts owed . . . or due another." Section 1692a(6) provides that the "term [debt collector] also includes any person who uses [the mail or interstate commerce] in any business the principal purpose of which is the enforcement of security interests."

Another section of the FDCPA, section 1692f(6), governs the conduct of a debt collector in repossessing property nonjudicially. Although section 1692f(6) applies to nonjudicial foreclosure, it does not impose all of the FDCPA's regulations on those who merely enforce security interests. Instead, section 1692f(6) prohibits only certain activities, such as threatening to repossess without any intention of actually doing so, or cases in which the party threatening to repossess has no right to do so.

In *Obduskey*, a lender retained a law firm to conduct a nonjudicial foreclosure on Colorado residential property after the homeowner defaulted on the mortgage secured by the property. In response to the foreclosure notice, the homeowner attempted to invoke rights under section 1692h, which obligates a debt collector to "cease collection" activities until it provides the debtor with a "verification of the debt." The law firm proceeded with the nonjudicial foreclosure and the homeowner sued in federal court, claiming that the law firm failed to comply with the FDCPA's verification procedure. The district court dismissed the complaint on the ground that the law firm was not a debt collector within the meaning of the FDCPA. The U.S. Court of Appeals for the Tenth Circuit affirmed on appeal, holding that merely enforcing a security interest through nonjudicial foreclosure is not governed by the FDCPA.

The Supreme Court agreed to hear the case to resolve a circuit split on the issue. The Fourth, Fifth, and Sixth Circuits had ruled that the FDCPA applies to nonjudicial foreclosures, while the Ninth Circuit (in addition to the Tenth Circuit) had concluded that it does not.

Writing for the unanimous Court, Justice Breyer explained that, by including the phrase "[f]or the purpose of section 1692f(6)," the express language of section 1692a(6) "strongly suggests that one who does no more than enforce security interests does *not* fall within the scope of the general definition [of 'debt collector']." He also reasoned that Congress did not intend for the FDCPA to be generally applicable to nonjudicial foreclosure "to avoid conflicts with state nonjudicial foreclosure schemes." He accordingly concluded that the prohibitions contained in section 1692f(6) cover security-interest enforcers, but the other "debt collector" provisions in the FDCPA do not.

Justice Breyer observed that the creditor's collection activities were subject to potential regulation, including possibly under section 1692f. He noted that it is "at least plausible that 'threatening' to foreclose on a consumer's home without having legal entitlement to do so is the kind of 'nonjudicial action' without 'present right to possession' prohibited by [section 1692f(6)]." He also wrote that "[t]his is not to suggest that pursuing nonjudicial foreclosure is a license to engage in abusive debt collection practices like repetitive nighttime phone calls." However, because the case involved "only steps required by state law," Justice Breyer stated that "we need not consider what *other* conduct (related to, but not required for, enforcement of a security interest) might transform a security-interest enforcer into a debt collector subject to the main coverage of the Act."

Justice Sotomayor concurred in the opinion. She called it "a close case" but stated that she agreed with Justice Breyer's interpretation of the statutory language.

On April 24, 2019, the Supreme Court heard argument in *Taggart v. Lorenzen*, No. 18-489 (petition for writ of certiorari granted on Jan. 4, 2019), in which it is considering whether, under section 524 of the Bankruptcy Code, a creditor's good-faith belief that the discharge injunction does not apply precludes a finding of civil contempt.

NEWSWORTHY

Jones Day has been selected for the *GRR 100* 2019, a guide to the world's leading restructuring and insolvency practices that is compiled, written, and researched exclusively by independent *Global Restructuring Review* editorial staff. The *GRR 100* will be published in June 2019 and launched at the 3rd Annual GRR Awards Ceremony in Barcelona.

An article written by ***Stephen J. Brogan (Washington; Business & Tort Litigation)***, entitled "The need for ASEAN to reform its insolvency and restructuring law," was published in the April 23, 2019, issue of *The Asset*.

Bruce Bennett (Los Angeles and New York), ***Mark A. Cody (Chicago)***, ***Jeffrey B. Ellman (Atlanta)***, ***Brad B. Erens (Chicago)***, ***Gregory M. Gordon (Dallas)***, ***Christopher DiPompeo (Washington; Issues & Appeals)***, ***Jeremy D. Evans (New York)***, ***Thomas A. Howley (Houston)***, ***Corinne Ball (New York)***, ***Paul M. Green (Houston)***, ***Carl E. Black (Cleveland)***, ***Heather Lennox (Cleveland and New York)***, ***Scott J. Greenberg (New York)***, ***James O. Johnston (Los Angeles)***, ***Sidney P. Levinson (New York)***, ***Todd R. Geremia (New York; Issues & Appeals)***, and ***Beth Heifetz (Washington; Issues & Appeals)*** were recognized in the field of Bankruptcy for 2019 by *Super Lawyers*.

Kevyn D. Orr (Washington) was a featured speaker at the annual Richard W. Pogue Law Leaders Panel, hosted by the University of Michigan Law School on March 20, 2019. His topic was "Predicting the Future: Game Changers Every Associate Should Know."

Heather Lennox (Cleveland and New York), ***Sidney P. Levinson (New York)***, ***Kevyn D. Orr (Washington)***, ***Carl E. Black (Cleveland)***, ***Scott J. Greenberg (New York)***, ***Robert W. Hamilton (Columbus)***, ***Thomas M. Wearsch (Cleveland)***, ***Thomas A. Howley (Houston)***, ***James O. Johnston (Los Angeles)***, ***Brad B. Erens (Chicago)***, ***Jeffrey B. Ellman (Atlanta)***, ***Corinne Ball (New York)***, ***Bruce Bennett (Los Angeles and New York***), ***Charles M. Oellermann (Columbus)***, and ***Gregory M. Gordon (Dallas)*** were recognized in the area of Bankruptcy/Restructuring in *Chambers USA 2019*.

Roger Dobson (Sydney) and ***Katie Higgins (Sydney)*** were recognized in the 2020 edition of *The Best Lawyers in Australia* in the field of Distressed Investing & Debt Trading, Insolvency & Reorganization Law as well as the field of Banking & Finance Law.

Heather Lennox (Cleveland and New York) was named a "Star Individual" in the area of Bankruptcy/Restructuring in *Chambers USA 2019*.

Corinne Ball (New York) was among the "Senior Statespeople" recognized by *Chambers USA 2019* in the field of Bankruptcy/Restructuring.

Sidney P. Levinson (New York) was named a "Recognized Practitioner" by *Chambers USA 2019* in the field of Bankruptcy/Restructuring.

An article written by ***Jonathan C. Gordon (Chicago; New Lawyers Group)***, entitled "Crossing The Line In Cross-Border Insolvencies," was posted on the March 19, 2019, *Harvard Law School Bankruptcy Law Roundtable*.

An article written by ***Mark G. Douglas (New York)***, entitled "Proposed UNCITRAL Model Law on Enterprise Group Insolvency," was published in the April 2019 edition of INSOL International's *News Update*.

BUSINESS RESTRUCTURING REVIEW

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Executive Editor: Charles M. Oellermann
Managing Editor: Mark G. Douglas

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