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HERTZ: THIRD CIRCUIT WEIGHS IN ON MAKE-WHOLE PREMIUMS AND THE "SOLVENT-DEBTOR EXCEPTION" IN CHAPTER 11 CASES

Brad B. Erens

A handful of recent high-profile court rulings have considered whether a chapter 11 debtor is obligated to pay postpetition, pre-effective date interest ("pendency interest") to unsecured creditors to render their claims "unimpaired" under a chapter 11 plan in accordance with the pre-Bankruptcy Code common law "solvent-debtor" exception. Some of these decisions have also addressed: (i) whether a claim for a "make-whole premium" payable under a debt instrument qualifies as "unmatured interest" that must be disallowed in a bankruptcy case; and (ii) the appropriate rate of pendency interest that must be paid to unsecured creditors by a solvent debtor under a chapter 11 plan.

The U.S. Court of Appeals for the Third Circuit weighed in on all of these questions in *In re Hertz Corp.,* 117 F.4th 109 (3d Cir. 2024), *as amended,* 2024 WL 4730512 (3d Cir. Nov. 6, 2024), *reh'g denied,* Nos. 23-1169 and 23-1170 (3d Cir, Nov. 6, 2024). A divided panel of the court ruled that a bankruptcy court correctly disallowed certain noteholders' claims for a make-whole premium because it was both "definitionally" and the "economic equivalent" of unmatured interest. However, because the debtors were solvent, the Third Circuit panel, concluding that the solvent-debtor exception survived enactment of the Bankruptcy Code as part of the "fair and equitable" requirement for cramdown-confirmation of a chapter 11 plan, held that the bankruptcy court erred by ruling that the debtors' plan need not pay pendency interest on the noteholders' claims at the contract rate of interest, while distributing more than $1 billion to existing shareholders in violation of the "absolute priority rule" and the Bankruptcy Code's priority scheme.

In so ruling, the Third Circuit became the sixth federal circuit court of appeals to conclude that the solvent-debtor exception is alive and well and requires a solvent debtor to pay pendency interest to unsecured creditors to render their claims unimpaired under a chapter 11 plan.

THE BANKRUPTCY CODE'S PRIORITY SCHEME

The Bankruptcy Code sets forth certain priority rules governing distributions to creditors in both chapter 7 and chapter 11 cases. Secured claims enjoy the highest priority under the Bankruptcy Code. *See generally* 11 U.S.C. § 506. The Bankruptcy Code then recognizes

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certain priority unsecured claims, including claims for administrative expenses, wages, and certain taxes. *See id.* § 507(a). General unsecured claims come next in the priority scheme, followed by any subordinated claims and the interests of equity holders.

In a chapter 7 case, the order of priority for distributions on unsecured claims is determined by section 726 of the Bankruptcy Code. The order of distribution ranges from payments on claims in the order of priority specified in section 507(a), which have the highest priority, to payment of any residual assets after satisfaction of all claims to the debtor, which has the sixth or lowest priority. Fifth priority in a chapter 7 liquidation is given to "interest *at the legal rate* from the date of the filing of the petition" on any claim with a higher liquidation priority, including various categories of unsecured claims. *See id*. § 726(a)(5) (emphasis added).

Distributions are to be made pro rata to parties of equal priority within each of the six categories specified in section 726. If claimants in a higher category of distribution do not receive full payment of their claims, no distributions can be made to parties in lower categories.

Thus, if the bankruptcy estate in a chapter 7 case is sufficient to pay claims of higher priority, creditors are entitled to post-petition interest before the debtor can recover any surplus.

In a chapter 11 case, the chapter 11 plan determines the treatment of secured and unsecured claims (as well as equity interests), subject to the requirements of the Bankruptcy Code.

IMPAIRMENT OF CLAIMS UNDER A CHAPTER 11 PLAN

Creditor claims and equity interests must be placed into classes in a chapter 11 plan and treated in accordance with the Bankruptcy Code's plan confirmation requirements. Such classes of claims or interests may be either "impaired" or "unimpaired" by a chapter 11 plan. The distinction is important because only impaired classes have the ability to vote to accept or reject a plan. Under section 1126(f) of the Bankruptcy Code, unimpaired classes of creditors and interest holders are conclusively presumed to have accepted a plan. Section 1126(g) provides that classes of creditors or interest holders that receive or retain nothing under a plan are deemed not to have accepted the plan.

Section 1124 provides that a class of creditors is impaired under a plan unless the plan: (i) "leaves unaltered the legal, equitable, and contractual rights" to which each creditor in the class is entitled; or (ii) cures any defaults (with limited exceptions), reinstates the maturity and other terms of the obligation, and compensates each creditor in the class for resulting losses.

Section 1124 originally included a third option, then section 1124(3), for rendering a claim unimpaired—by providing the claimant with cash equal to the allowed amount of its claim. In *In re New Valley Corp.,* 168 B.R. 73 (Bankr. D.N.J. 1994), the court ruled that,

LAWYER SPOTLIGHT: JOSHUA M. MESTER

Josh Mester, a partner in the Los Angeles Office, focuses his practice on complex corporate reorganization and bankruptcy matters and distressed litigation. He has represented debtors, creditors, investors, and shareholders in some of the largest restructuring cases for a range of industries including gaming and entertainment, health care, retail, media, professional sports, airlines, cryptocurrency and financial services, and utilities.

Significant creditor representations include senior creditors holding more than $7 billion in debt of iHeartCommunications, as well as second priority noteholders of Caesars Entertainment Operating Company, where Jones Day negotiated a settlement that resulted in more than $3 billion of additional value for noteholders. He also represents debtors in creatively solving financial challenges such as the out-of-court restructurings for ContextMedia Health, LLC, a health care media company; and shareholders in public company restructurings, like PG&E Corporation, the largest restructuring in California; Garrett Motion; and Silvergate Capital Corporation. Josh also advises investors looking to acquire distressed assets, including Adventist Health White Memorial's acquisition of Beverly Community Hospital.

Prior to joining Jones Day in 2012, Josh was a crucial member of the legal team that represented the Los Angeles Dodgers in its chapter 11 case resulting in a $2.15 billion sale of the team. He also represented a number of debtors in chapter 11 proceedings, including California Coastal Communities, Factory 2-U Stores, LTV Steel Company, Solidus Networks, and Weststar Cinemas.

in light of this third option, and because sections 726(a)(5) and 1129(a)(7) of the Bankruptcy Code (the latter discussed below) are applicable in a chapter 11 case only to impaired creditors, a solvent debtor's chapter 11 plan that paid unsecured claims in full in cash, but without pendency interest, did not impair the claims. The perceived unfairness of *New Valley* led Congress to remove this option from section 1124 of the Bankruptcy Code in 1994. Since then, most courts considering the issue have held that, if an unsecured claim is paid in full in cash with pendency interest at an appropriate rate, the claim is unimpaired under section 1124. *See*, *e.g., In re PPI Enterprises (U.S.), Inc.,* 324 F.3d 197, 205–07 (3d Cir. 2003).

Section 1124(1) "define[s] impairment in the broadest possible terms," so that "any change in legal, equitable or contractual rights creates impairment." *In re Taddeo*, 685 F.2d 24, 28 (2d Cir. 1982); *accord PPI*, 324 F.3d at 202 ("If the debtor's Chapter 11 reorganization plan does not leave the creditor's rights entirely 'unaltered,' the creditor's claim will be labeled as impaired under § 1124(1) of the Bankruptcy Code."); *In re L&J Anaheim Assocs.*, 995 F.2d 940, 942 (9th Cir. 1993) (adopting the *Taddeo* approach).

However, the Second, Third, Fifth, and Ninth Circuits have concluded that, because section 1124(1) expressly refers to impairment imposed by a "plan," it does not apply to modifications that occur by operation of the Bankruptcy Code. *See In re LATAM Airlines Grp. S.A.*, 55 F.4th 377, 385 (2d Cir. 2022) (noting that unsecured creditors' contractual right to post-default interest, "'as applied to postpetition debts, was superseded by the Code—specifically, by § 502(b)(2)'s prohibition on the inclusion of "unmatured interest" as part of their claim,'" meaning that the creditors' claims were not impaired by the chapter 11 plan), *cert. denied*, 143 S.Ct. 2609 (2023); PPI, 324 F.3d at 204 ("[A] creditor's claim outside of bankruptcy is not the relevant barometer for impairment; [courts] must examine whether the plan itself is a source of limitation on a creditor's legal, equitable, or contractual rights."); *In re Ultra Petroleum Corp.*, 943 F.3d 758, 763 (5th Cir. 2019) ("The plain text of § 1124(1) requires that 'the plan' do the altering. We therefore hold a creditor is impaired under § 1124(1) only if 'the plan' itself alters a claimant's 'legal, equitable, [or] contractual rights.'"), *cert. denied*, 143 S.Ct. 2495 (2023); *In re PG&E Corp.*, 46 F.4th 1047, 1063 n.11 (9th Cir. 2022) ("[A]n alteration of pre-bankruptcy rights that occurs by operation of the Code does not result in impairment."), *cert. denied*, 143 S.Ct. 2492 (2023).

CRAM-DOWN CONFIRMATION REQUIREMENTS

If a creditor class does not agree to impairment of the claims in the class under the plan and votes to reject it, the plan can be confirmed only under certain specified conditions. Among these conditions are requirements that: (i) each creditor in the impaired class receive at least as much under the plan as it would receive in a chapter 7 liquidation (11 U.S.C. § 1129(a)(7)) (commonly referred to as the "best interests" test); and (ii) the plan be "fair and equitable" (*Id.* § 1129(b)(1)).

Therefore, in the case of a chapter 11 debtor that can pay its creditors in full with interest, the best interests test in section 1129(a)(7) would arguably require that any impaired unsecured creditors be paid pendency interest on their allowed claims "at the legal rate." *See id.* § 726(a)(5). However, the meaning of "the legal rate" is unclear—it could mean the contract rate, the post-judgment rate, the federal statutory rate specified in 28 U.S.C. § 1961, or some other rate. *See In re Hicks*, 653 B.R. 562 (Bankr. N.D. Ill. 2023) (discussing the disagreement among courts on the issue).

The best interests test, however, applies only to impaired classes of claims or interests. This was not always the case. When the Bankruptcy Code was enacted in 1978, the provision applied to all classes—impaired or not. Congress amended section 1129(a)(7) in 1984 so that it now applies only to impaired classes. *See Bankruptcy Amendments and Federal Judgeship Act of 1984*, 98 Stat. 333, Pub. L. 98-353 (1984) § 512(a)(7); *In re Wonder Corp. of Am.*, 70 B.R. 1018, 1024 (Bankr. D. Conn. 1987) ("[T]he 1984 Amendments also modified § 1129(a)(7) so that its provisions now only apply to 'each impaired class of claims or interests' rather than to 'each class of claims or interests.'").

Section 1129(b)(2) of the Bankruptcy Code provides that "the condition that a plan be fair and equitable with respect to [an unsecured] class includes" the requirement that creditors in the class receive or retain property of a value equal to the allowed amount of their claims or, failing that, if no creditor or equity holder of lesser priority receives any distribution under the plan. This is commonly referred to as the "absolute priority rule," which was derived in part from common law and practice under the former Bankruptcy Act of 1898 (as amended).

DISALLOWANCE OF CLAIMS FOR UNMATURED INTEREST AND THE SOLVENT-DEBTOR EXCEPTION

Section 502(b)(2) of the Bankruptcy Code provides that a claim for interest that is "unmatured" as of the petition date shall be disallowed. *See generally* COLLIER ON BANKRUPTCY ("COLLIER") ¶ 502.03 (16th ed. 2024) ("fixing the cutoff point for the accrual of interest as of the date of the filing of the petition is a rule of

convenience providing for equity in distribution"). Charges that have been deemed to fall into this category include not only ordinary interest on a debt but items that have been deemed the equivalent of interest, such as original issue discount. *Id.* This means that, unless there is an exception stated elsewhere in the Bankruptcy Code (see below), any claim for postpetition interest will be disallowed.

The bar on recovery by creditors of interest accruing after a bankruptcy filing pre-dates the enactment of the Bankruptcy Code and is derived from English law. *Nicholas v. U.S.*, 384 U.S. 678, 682 (1966) (explaining that "[i]t is a well-settled principle of American bankruptcy law that in cases of ordinary bankruptcy, the accumulation of interest on claims against a bankruptcy estate is suspended as of the date the petition in bankruptcy is filed[, which rule is] grounded in historical considerations of equity and administrative convenience"); *Sexton v. Dreyfus*, 219 U.S. 339, 344 (1911) (recognizing the rule that interest ceases to accrue on unsecured debt upon commencement of bankruptcy cases is a fundamental principle of English bankruptcy law, which is the basis of the U.S. system). Section 63 of the Bankruptcy Act of 1898, as amended by the Chandler Act of 1938, expressly disallowed unmatured interest *as part* of a claim. Bankruptcy Act of 1938, ch. 575, § 63, 52 Stat. 840 (repealed 1978).

English law contained notable exceptions to the rule. One of those was the "solvent-debtor" exception, which provided that interest would continue to accrue on a debt after a bankruptcy filing if the creditor's contract expressly provided for it, and would be payable if the bankruptcy estate contained sufficient assets to do so after satisfying other debts. *See In re Ultra Petroleum Corp.*, 913 F.3d 533, 543-44 (5th Cir.) (citing treatises and cases), *opinion withdrawn and superseded on reh'g*, 943 F.3d 758 (5th Cir. 2019), *cert. denied*, 143 S.Ct. 2495 (2023). In such cases, the post-bankruptcy interest was treated as part of the underlying debt obligation, as distinguished from interest "on" a creditor's claim. *Id*.

The fundamental principle barring creditors from recovering postpetition interest on their claims was incorporated into U.S. bankruptcy law—as were some of the exceptions, but only in part.

In pre-Bankruptcy Code cases where the debtor possessed adequate assets to pay all claims in full with interest—meaning that the payment of interest to one creditor did not impact the recovery of other creditors—principles of equity dictated that creditors be paid interest to which they were otherwise entitled, most commonly at the rate determined by their contracts with the debtor. *See Am. Iron & Steel Mfg. Co. v. Seaboard Air Line Ry.*, 233 U.S. 261, 266–67 (1914) (concluding "in the rare instances where the assets ultimately proved sufficient for the purpose, that creditors were entitled to interest accruing after adjudication"); *Debentureholders Protective Comm. of Cont'l Inv. Corp. v. Cont'l Inv. Corp.*, 679 F.2d 264, 269 (1st Cir. 1982) (in refusing to confirm a plan under chapter X of the Bankruptcy Act because it did not pay postpetition interest on unsecured claims, noting that "[w]here the debtor is solvent, the bankruptcy rule is that where there is a contractual provision, valid under state law, providing for interest on unpaid [installments] of interest, the bankruptcy court will enforce the contractual provision with respect to both [installments] due before and [installments] due after the petition was filed"); *Ruskin v. Griffiths*, 269 F.2d 827, 832 (2d Cir. 1959) ("where there is no showing that the creditor entitled to the increased interest caused any unjust delay in the proceedings, it seems to us the opposite of equity to allow the debtor to escape the expressly bargained-for" contractual interest provision); *Sword Line, Inc. v. Indus. Comm'r of N.Y.*, 212 F.2d 865, 870 (2d Cir. 1954) (explaining that "interest ceases upon bankruptcy in the general and usual instances noted … unless the bankruptcy bar proves eventually nonexistent by reason of the actual solvency of the debtor"); *Johnson v. Norris*, 190 F. 459, 466 (5th Cir. 1911) (determining that debtors "should pay their debts in full, principal and interest to the time of payment whenever the assets of their estates are sufficient").

Even though section 502(b)(2) of the Bankruptcy Code provides that a claim for unmatured interest shall be disallowed, there are specific exceptions to the rule included elsewhere in the Bankruptcy Code. For example, section 506(b) of the Bankruptcy Code provides that an oversecured creditor is entitled to interest on its allowed secured claim.

In addition, as noted above, in a chapter 7 case, the distribution scheme set forth in section 726 of the Bankruptcy Code designates as fifth in priority of payment postpetition interest on an unsecured claim at "the legal rate."

Whether the solvent-debtor exception survived enactment of the Bankruptcy Code in 1978 is disputed. However, prior to *Hertz*, five federal circuit courts—albeit with vigorous dissents in certain cases—had ruled or suggested that the exception survived. *See, e.g., LATAM*, 55 F.4th at 385–86 (ruling as a matter of first impression that the solvent-debtor exception requiring a solvent debtor to pay pendency interest to unsecured creditors to render their claims unimpaired survived the enactment of the Bankruptcy Code); *Ultra Petroleum*, 51 F.4th at 156 (a divided Fifth Circuit panel concluded that "the solvent-debtor exception is alive and well" and ruled that a solvent chapter 11 debtor was obligated to pay a make-whole premium to unimpaired noteholders amount "even though … it is indeed otherwise disallowed unmatured interest"); *PG&E*, 46 F.4th at 1062 (a divided Ninth Circuit panel ruled that "pursuant to the solvent-debtor exception, unsecured creditors possess an 'equitable right' to postpetition interest [under section 1124(1) of the Bankruptcy Code] when a debtor is solvent"); *Gencarelli v. UPS Capital Bus. Credit*, 501 F.3d 1, 7 (1st Cir. 2007) (stating that "[t]his is a solvent debtor case and, as such, the equities strongly favor holding the debtor to his contractual obligations as long as those obligations are legally enforceable under applicable non-bankruptcy law"); *In re Dow Corning Corp.*, 456 F.3d 668, 678 (6th Cir. 2006) (noting that "[t]he legislative history of the Bankruptcy Code makes clear that equitable considerations operate differently when the debtor is solvent: '[C]ourts have held that where an estate is solvent, in order for a plan to be fair and equitable, unsecured and undersecured creditors' claims must be paid in full, including postpetition interest, before equity holders may participate in any recovery'" (quoting 140 Cong. Rec. H10,752–01, H10,768 (1994)), *cert. denied*, 127 S.Ct. 1874 (2007).

HERTZ

Citing disruption to their car rental business caused by the COVID-19 pandemic, the *Hertz* Corporation and its affiliates (collectively, the "debtors") filed for chapter 11 protection on May 22, 2020, in the District of Delaware. After an auction process, the bankruptcy court confirmed a chapter 11 plan for the debtors on June 10, 2021, under which the debtors' assets were sold to a group of private equity funds. At that time, the debtors' financial fortunes had vastly improved and they were solvent.

The plan provided for the payment of unsecured creditors in full, including the holders of two series of senior unsecured notes issued by the debtors prepetition (the "22/24 Notes" and the "26/28 Notes," and collectively, the "Notes"), together with pendency interest at the federal judgment rate, as well as a distribution to shareholders of approximately $1.1 billion in cash and new warrants or subscription rights. The plan accordingly provided that the Noteholders' claims were unimpaired, meaning that the Noteholders were deemed to accept the plan.

In accordance with the terms of the relevant indentures, the Notes were accelerated upon the debtors' bankruptcy filing. In addition, redemption of the Notes prior to the stated maturity date under certain specified conditions (including the confirmation of a plan repaying the Notes) triggered the debtors' obligation to pay the Noteholders a "redemption" or make-whole premium designed to compensate the Noteholders for the loss of future interest payments if the debt was paid off before maturity.

The plan confirmation order preserved the rights of the Noteholders to assert entitlement to make-whole premiums and additional interest as necessary to render their claims unimpaired. The plan, which expressly provided that the Noteholders would be paid whatever was necessary to render their claims unimpaired, went effective on June 30, 2021.

On July 1, 2021, the Noteholders (through their indenture trustees) filed a complaint seeking a declaratory judgment that, in addition to the principal and prepetition interest paid to the Noteholders on the effective date of the plan (in excess of $2.7 billion), the debtors were obligated to pay approximately $272 million, consisting of: (i) make-whole premiums due under the Notes totaling approximately $147 million; and (ii) pendency interest at the contract default rate (approximately $125 million), which at that time was 30 times greater than the federal judgment rate. The debtors filed a motion to dismiss the complaint.

The bankruptcy court concluded that the 26/28 Noteholders stated a plausible claim that make-whole premiums were due under the indentures because the redemption of the 26/28 Notes was at the debtor's option, rather than involuntary—i.e., a consequence of acceleration of the 26/28 Notes triggered by a bankruptcy filing that the debtors were forced to make due to the pandemic. However, due to the different language contained in the indentures, the court granted the debtors' motion to dismiss the 22/24 Noteholders' claims for make-whole premiums.

Next, the bankruptcy court considered whether, even if due under the terms of the indenture governing the 26/28 Notes, the make-whole premiums should be disallowed under section 502(b)(2) as the "economic equivalent" of unmatured interest, an issue that has been disputed by the courts. *See generally* COLLIER at ¶ 502.03[3](a) (collecting cases).

The bankruptcy court initially declined to decide the issue, but did so in a subsequent opinion (discussed below). In this initial ruling, the court noted that, based on relevant case law and other authority, it was "not prepared to conclude, as a legal matter, that make-wholes cannot be disallowed as unmatured interest," but

determined that more evidence of the economic substance of the make-whole premiums was necessary. *Hertz*, 637 B.R. at 791.

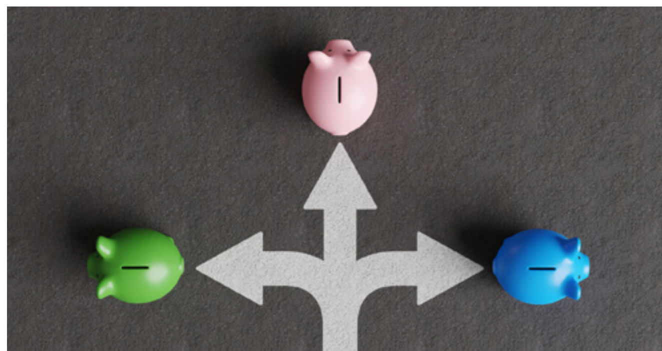
The bankruptcy court then examined whether, even if the make-whole premiums were the economic equivalent of unmatured interest, the 26/28 Noteholders' claims, in accordance with the solvent-debtor exception, would be impaired under the debtors' plan if the 26/28 Noteholders were not paid the premiums. Initially, citing *Ultra*, *PPI*, and *PG&E*, it explained that "any modification of the Noteholders' claim to unmatured interest or to the [make-whole] premium (if it is the economic equivalent of unmatured interest) is an impairment of the Noteholders' contract claims by operation of section 502(b)(2) of the Bankruptcy Code, not the Debtors' Plan." *Id*. at 794. As a consequence, the court ruled, the 26/28 Noteholders' claims "are not impaired within the meaning of section 1124(1)." *Id*.

The bankruptcy court noted that, "in essence," the Bankruptcy Code "is silent on what treatment unimpaired creditors must receive in a solvent chapter 11 debtor case." *Id.* According to their express terms, it explained, "sections 1129(a)(7) and 726(a)(5) provide what treatment impaired creditors are entitled to receive, not what treatment unimpaired claims are entitled to receive in a solvent chapter 11 debtor case."

The court rejected the debtors' argument that, by repealing section 1124(3), lawmakers intended that unimpaired creditors must be paid their contract rate of interest in a solvent-debtor chapter 11 case. Congress, it explained, could have so provided by either: (i) amending section 1124(3) to require that unimpaired creditors receive their contract rate of interest, in addition to payment in full of their allowed claims; or (ii) amending section 502(b)(2) to provide that unmatured interest is disallowed "except in the case of a solvent debtor." *Id.* at 797. Yet it did neither.

The bankruptcy court wrote that "after consideration of the cases cited by the parties, the express language of the Bankruptcy Code, and its Legislative History, the Court is convinced that the solvent debtor exception survived passage of the Bankruptcy Code *only to a limited extent*." *Id.* at 800 (emphasis added). It explained that the Bankruptcy Code expressly codified the solvent-debtor exception in section 506(b) as to oversecured creditors and in sections 1129(a)(7) and 726(a)(5) as to unsecured creditors. The court further noted that: (i) although sections 1129(a)(7) and 726(a)(5) currently apply only to unsecured creditors impaired by a chapter 11 plan, they applied to all unsecured creditors—impaired and unimpaired—when the Bankruptcy Code was originally enacted; and (ii) when Congress amended the Bankruptcy Code in 1984 to limit the scope of section 1129(a)(7) to impaired classes, "it was motivated by the desire to require voting only by impaired creditors, rather than by a desire to assure that unimpaired creditors get their contract rate of interest." *Id.*

The bankruptcy court also determined that neither the Bankruptcy Code nor its legislative history expressly states that



unimpaired creditors are entitled to their contract rate of interest "or even to more than impaired creditors in the case of a solvent debtor." *Id.* Instead, it wrote, the legislative history "provides strong evidence Congress intended that unimpaired creditors in a solvent chapter 11 debtor case should receive post-petition interest only in accordance with sections 1129(a)(7) and 726(a)(5)." *Id.* Moreover, the court reasoned, the legislative history to the repeal of section 1124(3) suggests that lawmakers believed that there was no legitimate reason in a solvent-debtor chapter 11 case to distinguish between impaired and unimpaired unsecured creditors who are receiving full payment of their claims in cash under a plan. As a consequence, it ruled, "both should receive the same treatment: payment of their allowed claim plus post-petition interest at the federal judgment rate in accordance with section 726(a)(5)." *Id.*

The bankruptcy court accordingly held that the 26/28 Noteholders failed to state a plausible claim that the debtors were obligated to pay pendency interest on the 26/28 Notes at the rate specified in the indenture rather than at the federal judgment rate.

The 26/28 Noteholders and the debtors subsequently filed summary judgment motions on the issue of whether the make-whole premium payable on the 26/28 Notes was unmatured interest, or its economic equivalent, within the meaning of section 502(b)(2). The 26/28 Noteholders, based on the intervening court decisions in *PG&E* and *Ultra Petroleum*, also moved for reconsideration of the court's ruling that the noteholders were entitled only to the federal judgment rate of interest, rather than their contract rate, for any pendency interest due on their claims. In a November 21, 2022, opinion, the bankruptcy court granted the debtors' motion for summary judgment, finding that the make-whole premium was the economic equivalent of unmatured interest and must be disallowed under section 502(b)(2). The court denied the motion for reconsideration but certified a direct appeal of its ruling to the Third Circuit. *See In re The Hertz Corp*., Adv. Proc. No. 21-50995 (MFW), 2022 BL 426983, 2022 Bankr. Lexis 3358 (Bankr. D. Del. Nov. 21, 2022), *aff'd in part and rev'd in part*, No. 23-1169 (3d Cir. Sept. 10, 2024).

THE THIRD CIRCUIT'S RULING

A divided three-judge panel of the Third Circuit affirmed the ruling in part, and denied it in part.

Writing for the majority, U.S. Circuit Judge Thomas L. Ambro agreed with the bankruptcy court that the 26/28 Noteholders' claim for make-whole premiums "must be disallowed under § 502(b)(2), for they fit both the dictionary definition of interest and are its economic equivalent." *Hertz*, 2024 WL 4730512, at *2. However, he concluded, based primarily upon the absolute priority rule, the 26/28 Noteholders had a right to receive the make-whole premiums as well as pendency interest at the contract rate because *Hertz* was solvent.

According to Judge Ambro, Hertz simply could not "use the Bankruptcy Code to force the Noteholders to give up nine figures of contractually valid interest and spend that money on a massive dividend to the Stockholders" in keeping with more than century-old Supreme Court precedent holding that stockholders are not entitled to any distribution until creditors are paid in full. *Id.* at *8 (citing *Chi., Rock Island & Pac, R.R. v. Howard*, 74 U.S. 392, 409-10 (1868)). Permitting the debtors to do so, Judge Ambro emphasized, would violate the U.S. Supreme Court's ruling in *Czyzewski v. Jevic Holding Corp.*, 580 U.S. 451, 455 (2017), prohibiting final distributions in a chapter 11 case that "deviate from the basic priority rules … the Code establishes for final distributions of estate value in business bankruptcies."

Based on relevant precedent, the Third Circuit majority concluded that "the Bankruptcy Code entitles every creditor—not just the dissenting impaired creditors who can invoke § 1129(b)—to treatment consistent with the absolute priority rule absent a clear statement to the contrary." *Id.* at *11 (citation and footnote omitted). Accordingly, Judge Ambro reasoned, "the Noteholders' right to treatment consistent with absolute priority must be honored to leave them unimpaired." *Id.* at *12. He explained that lawmakers' decision to reuse the language "fair and equitable" from pre-Bankruptcy Code law in section 1129(b)(2) and the provision's use of the word "includes" was intended to incorporate the pre-Code common law absolute priority rule into the current statute. *Id.* at *13. That common law and jurisprudence applying it, Judge Ambro wrote, "required solvent debtors to pay contract rate interest before making distributions to equity." *Id.* (citing cases).

Even so, the Third Circuit majority noted that "compelling equitable considerations" might warrant the payment of pendency interest at a rate other than the contract rate, such as where the estate was not sufficiently solvent to pay every unsecured creditor the full amount of its contractual interest. *Id.* at *14.

According to Judge Ambro, if the plan only had to pay 26/28 Noteholders pendency interest at the federal judgment rate, they would recover less than objecting impaired creditors, thereby violating the basic premise that unimpaired "creditors cannot be treated any worse than impaired creditors, who at least get a vote." *Id.* (citation and internal quotation marks omitted).

U.S. Circuit Judge David. J. Porter concurred in part and dissented in part. He agreed with the majority's conclusions, except with respect to the payment of the make-whole premium and pendency contract-rate interest. Largely echoing the dissenting opinions in *Ultra Petroleum* and *PG&E*, Judge Porter wrote that: (i) treatment consistent with the absolute priority rule is not one of the rights "protected" by section 1124(1); and (ii) even if it were a protected right, the 26/28 Noteholders' claims were nevertheless unimpaired because those rights were altered not by the debtors' chapter 11 plan but by section 502(b) of the Bankruptcy Code, which expressly disallows any claim for pendency interest. *Id.* at **16–19.

OUTLOOK

On September 25, 2024, the Third Circuit vacated its ruling. On November 6, 2024, the court filed an amended opinion that added certain footnotes but did not substantively alter its original opinion. The Third Circuit also denied the debtors' petition for rehearing en banc.

With *Hertz*, no fewer than six federal courts of appeals have now determined that the solvent-debtor exception is alive and well and requires a solvent debtor to pay pendency interest to unsecured creditors to render their claims unimpaired under a chapter 11 plan. In the absence of a circuit split on the question, and having repeatedly declined to review circuit court decisions involving the issue, the U.S. Supreme Court is unlikely to weigh in on any remaining controversy regarding it among bankruptcy and appellate courts.

The ramifications of *Hertz* and other similar recent rulings may be significant in large chapter 11 cases where the potential obligation to pay millions of dollars in pendency interest on unsecured claims may significantly impact a debtor's ability to confirm a plan. However, despite several recent high-profile bankruptcy cases involving solvent debtors, such cases remain relatively infrequent, so the impact of these rulings may be limited.

Key takeaways from the ruling include:

- If a make-whole premium payable under a debt instrument upon default is either definitionally or the economic equivalent of interest, the claim will be disallowed in the obligor's bankruptcy case as unmatured interest under section 502(b)(2) of the Bankruptcy Code.
- However, to render the claims of unsecured creditors entitled to an otherwise disallowed make-whole premium unimpaired under a chapter 11 plan, the plan must pay the creditors postpetition interest at the contract rate, unless equitable considerations warrant paying a different rate, as well as the make-whole premium amount.

The requirements expressly set forth in section 1129(b)(2) for the "fair and equitable" treatment of an impaired dissenting creditor under a cram-down chapter 11 plan are not exclusive. Other requirements, such as the pre-Bankruptcy Code common law absolute priority rule, may also apply.

NEW YORK BANKRUPTCY COURT: "DEFENSIVE" SETOFF RIGHTS OF CREDITOR THAT DID NOT FILE PROOF OF CLAIM CANNOT BE EXTINGUISHED UNDER CHAPTER 11 PLAN

Daniel J. Merrett

The ability of a creditor to offset any liability it may have to a debtor against the amount of the debtor's obligation to the creditor is an important right. The Bankruptcy Code expressly preserves that right, provided it exists by contract or under applicable non-bankruptcy law, and the debts are "mutual," arose pre-bankruptcy and do not fall into one of the specified exceptions or limitations. In *In re SVB Fin. Grp.*, 662 B.R. 53 (Bankr. S.D.N.Y. 2024), *notice of appeal filed*, No. 23-10367(MG) (Bankr. S.D.N.Y. Aug. 9, 2024) [Doc. 1389], *direct appeal certified*, 2024 WL 4345730 (S.D.N.Y. Sep. 30, 2024), the U.S. Bankruptcy Court for the Southern District of New York considered an objection to confirmation of a chapter 11 plan that purported to extinguish the setoff rights of any creditor that did not timely file a proof a claim in the bankruptcy case and obtain a final order of the bankruptcy court authorizing the setoff. The court sustained the objection, ruling that a creditor need not file a proof of claim to preserve "defensive setoff rights," and that those rights could not be discharged upon confirmation of a chapter 11 plan.

SETOFF IN BANKRUPTCY

Section 553 of the Bankruptcy Code provides that, with certain exceptions, the Bankruptcy Code "does not affect any right of a creditor to offset a mutual debt owing by such creditor to the debtor that arose before the commencement of the case under this title against a claim of such creditor against the debtor that arose before the commencement of the case." Section 553 does not create setoff rights—it merely preserves certain setoff rights that otherwise would exist under contract or applicable non-bankruptcy law. *See* COLLIER ON BANKRUPTCY ("COLLIER") ¶ 553.04 (16th ed. 2024) (citing *Citizens Bank of Maryland v. Strumpf*, 516 U.S. 16 (1995)); *Feltman v. Noor Staffing Grp., LLC* (*In re Corp. Res. Servs. Inc.*), 564 B.R. 196 (Bankr. S.D.N.Y. 2017) (section 553 does not create an independent federal right of setoff, but merely preserves any such right that exists under applicable non-bankruptcy law). As noted by the U.S. Supreme Court in *Studley v. Boylston Nat. Bank*, 229 U.S. 523 (1913), setoff avoids the "absurdity of making A pay B when B owes A." *Id.* at 528; *see also In re Lehman Brothers Holdings Inc.*, 404 B.R. 752, 756 (Bankr. S.D.N.Y. 2009) (discussing the historical underpinnings of the setoff doctrine).

The Bankruptcy Code defines a "claim," in relevant part, as a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured," and it defines a "debt" as a "liability on a claim." 11 U.S.C. § 101 (5)(A), (12).

With certain exceptions for setoffs under "safe-harbored" financial contracts, a creditor is precluded by the automatic stay from exercising setoff rights against a debtor in bankruptcy without court approval. *See* 11 U.S.C. §§ 362(a)(7), (b)(6), (b)(7), (b)(17), (b)(27), and (o). Stayed setoff rights are merely suspended, however, pending an orderly examination of the parties' obligations by the court, which will generally permit a valid setoff unless it would be inequitable to do so. *See In re Ealy*, 392 B.R. 408 (Bankr. E.D. Ark. 2008).

A creditor stayed from exercising a valid setoff right must be granted "adequate protection" (*see* 11 U.S.C. § 361) against any diminution in the value of its interest caused by the debtor's use of the creditor's property. *Ealy*, 392 B.R. at 414.

Setoff is expressly prohibited by section 553 if: (i) the creditor's claim against the debtor is disallowed; (ii) the creditor acquires its claim from an entity other than the debtor either (a) after the bankruptcy filing date or (b) after 90 days before the petition date while the debtor was insolvent (with certain exceptions); or

(iii) the debt owed to the debtor was incurred by the creditor (a) after 90 days before the petition date, (b) while the debtor was insolvent, and (c) for the purpose of asserting a right of setoff, except for setoff under "safe-harbored" financial contracts. *See* 11 U.S.C. § 553(a)(1)–(3).

Section 553(b) provides that, except for setoffs under safe-harbored financial contracts, the trustee or a chapter 11 debtor-in-possession may recover any amount offset by a non-debtor on or within 90 days before the bankruptcy petition date to the extent the non-debtor improved its position by reducing any "insufficiency."

Thus, for a creditor to be able to exercise a setoff right in bankruptcy, section 553 requires on its face that: (i) the creditor have a right of setoff under applicable non-bankruptcy law; (ii) the debt and the claim are "mutual"; (iii) both the debt and the claim arose prepetition; and (iv) the setoff does not fall within one of the three prohibited categories specified in the provision.

The Bankruptcy Code does not define the term "mutual debt." Debts are generally considered mutual when they are due to and from the same persons or entities in the same capacity, but there is some confusion among the courts on this point. *See In re Am. Home Mortg. Holdings, Inc.*, 501 B.R. 44, 56 (Bankr. D. Del. 2013); *see generally* COLLIER at ¶ 553.03[3][a] (citing cases).

Creditors typically rely on the remedy of setoff if the mutual debts arise from *separate* transactions, although the issue is murky. *See* COLLIER at ¶ 553.10. By contrast, if mutual debts arise *from the same transaction*, the creditor may have a right of "recoupment," which has been defined as "a deduction from a money claim through a process whereby cross demands arising out of the same transaction are allowed to compensate one another and the balance only to be recovered." *Westinghouse Credit Corp. v. D'Urso*, 278 F.3d 138, 146 (2d Cir. 2002); *accord Newbery Corp. v. Fireman's Fund Ins. Co.*, 95 F.3d 1392, 1399 (9th Cir. 1996); *In re Matamoros*, 605 B.R. 600, 610 (Bankr. S.D.N.Y. 2019) ("recoupment is in the nature of a defense and arises only out of cross demands that stem from the same transaction").

Unlike setoff, recoupment is not subject to the automatic stay (*see In re Ditech Holding Corp*., 606 B.R. 544, 600 (Bankr. S.D.N.Y. 2019)), and may involve both pre- and postpetition obligations. *See Sims v. U.S. Dep't of Health and Human Services (In re TLC Hosps., Inc.)*, 224 F.3d 1008, 1011 (9th Cir. 2000) (citing COLLIER at ¶ 553.10).

Even though section 553 expressly refers to prepetition mutual debts and claims, many courts have held that mutual postpetition obligations may also be offset. *See Zions First Nat'l Bank, N.A. v. Christiansen Bros., Inc. (In re Davidson Lumber Sales, Inc.)*, 66 F.3d 1560 (10th Cir. 1995); *Official Comm. of Unsecured Creditors of Quantum Foods, LLC v. Tyson Foods, Inc. (In re Quantum Foods, LLC)*, 554 B.R. 729 (Bankr. D. Del. 2016).

However, setoff is available in bankruptcy only "when the opposing obligations arise on the same side of the … bankruptcy petition date." *Pa. State Employees' Ret. Sys. v. Thomas (In re Thomas)*, 529 B.R. 628, 637 n.2 (Bankr. W.D. Pa. 2015); *accord Pereira v. Urthbox Inc. (In re Try the World, Inc.)*, 2023 WL 5537564, at *13 (Bankr. S.D.N.Y. Aug. 28, 2023) (noting that "claims are not in the same right and between the same parties, standing in the same capacity" where the claims underlying an alleged setoff right accrued prepetition and the "liability for the fraudulent-transfer claim is held by the Trustee as a postpetition obligation") (internal quotation marks and citations omitted); *In re Williams*, 2018 WL 3559098, at *3 (Bankr. D.N.M. July 23, 2018) (section 553 does not permit a creditor to collect a prepetition debt by withholding payment of a postpetition debt owed to the debtor); *In re Enright*, 2015 WL 4875483, at *3 (Bankr. D.N.J. Aug. 13, 2015) (same); *Kramer v. Sooklall (In re Singh)*, 434 B.R. 298, 308 (Bankr. E.D.N.Y. 2010) ("It is well established that a party will be unable to assert a setoff where the party is being sued for fraudulent transfers … because … there is no mutuality of obligations …"); *In re Passafiume*, 242 B.R. 630, 633 (Bankr. W.D. Ky. 1999) ("Claims which arise post-petition lack the requisite mutuality, even if they arise with regard to work performed pre-petition.").

SVB FINANCIAL

Prior to March 10, 2023, SVB Financial Group (the "debtor") owned and operated Silicon Valley Bank ("SVB"), a California-chartered bank. On March 10, 2023, the California Department of Financial Protection and Innovation closed SVB and appointed the Federal Deposit Insurance Corporation ("FDIC") as receiver. Two days later, the U.S. Department of the Treasury declared a "systemic risk exception" for SVB. At that time, the debtor had deposit accounts in Silicon Valley Bridge Bank ("Bridge Bank") with a combined balance of approximately $2.1 billion. The debtor withdrew funds from those accounts from March 13 to March 16, 2023.

On or about March 15, 2023, the FDIC, which was also acting as receiver for Bridge Bank, purported to recall the account liability from Bridge Bank to prevent the debtor from withdrawing additional funds from its accounts. It also sought reversal of the previous withdrawals by the debtor.

On March 17, 2023, the debtor filed for chapter 11 protection in the Southern District of New York. The following month, the bankruptcy court set September 14, 2023, as the bar date for the filing of proofs of claim against the debtor by governmental entities. Although aware of the bar date, the FDIC decided not to file a proof of claim based on its view that it could assert a "defensive setoff right" for the amount of its claim without filing a proof of claim.

In July 2023, the debtor commenced an adversary proceeding against the FDIC in the bankruptcy court seeking turnover under section 542 of the Bankruptcy Code of approximately $1.9 billion the debtor claimed was in the Bridge Bank deposit account as of the bankruptcy petition date. It also sought relief under the Declaratory Judgment Act, 28 U.S.C. § 2201 *et seq.*, and asked

the court to determine whether the FDIC could properly set off its claim against the debtor's claim for turnover of the funds. On December 13, 2023, a New York district court withdrew the reference of the adversary proceeding in December 2023, where it remained pending (the "SDNY Action").

In accordance with the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, the FDIC established July 10, 2023, as the claims bar date in the SVB receivership. The debtor timely filed three claims, consisting of: (i) a $1.93 billion claim based on its Bridge Bank deposit; (ii) a second claim in an unspecified amount on behalf of certain deferred compensation plan participants; and (iii) a contingent and unliquidated damages claim for the FDIC's alleged misconduct in selling SVB's assets at a discount. The FDIC denied all three claims. In its notice of disallowance, the FDIC stated that the deposit claim was not proven to its satisfaction due to the existence of the FDIC's defenses, and it was not a liability of Bridge Bank. The remaining claims it denied as being speculative, lacking support, or otherwise unproven. The notice did not identify the FDIC's defenses (including any right of setoff).

In March 2024, the debtor sued the FDIC in a California district court (the "ND Cal. Action") asserting the same causes of action alleged in the SDNY Action.

The debtor proposed an eighth iteration of its chapter 11 plan in July 2024. Among other things, the plan provided as follows:

> In no event will any Person or Entity be entitled to set off any Claim or Interest against any Claim or Interest, right, or Cause of Action and Defense of the Debtor … in any judicial or administrative proceeding, unless such Person or Entity has filed a Proof of Claim in this Chapter 11 Case preserving such setoff and a Final Order of the Bankruptcy Court has been entered, authorizing and approving such setoff.

The FDIC objected to the plan, arguing that the provision would eliminate its defensive setoff rights, which were being adjudicated in the SDNY Action and the ND Cal. Action, where the courts had exclusive jurisdiction to determine those rights. The FDIC further claimed that it had consistently provided notice of and asserted its defensive setoff rights throughout the course of the chapter 11 case (including in the SDNY Action), and was not required to file a proof of claim to preserve those rights.

The debtor countered, among other things, that: (i) the FDIC lacked standing to assert its objection; (ii) section 553 of the Bankruptcy Code did not preserve the FDIC's purported setoff rights; and (iii) the FDIC forfeited any setoff rights by failing to file a proof of claim or to seek relief from the automatic stay to assert those rights. The official unsecured creditors' committee largely echoed the debtor's arguments, adding, among other things, that the FDIC's claims were not "defensive setoff claims," but instead, "quintessential" claims against the debtor's estate.

THE BANKRUPTCY COURT'S RULING

The bankruptcy court sustained the FDIC's objection to the debtor's chapter 11 plan.

Initially, Chief U.S. Bankruptcy Judge Martin Glenn concluded that the FDIC had prudential, constitutional, and "party-in-interest" standing to object to the debtor's plan because, among other things, the plan's discharge of the FDIC's defensive setoff rights impacted the FDIC's pecuniary interest, as it foreclosed one possible way to reduce its potential liability to the debtor in the SDNY Action and the ND Cal. Action. He also held that a creditor need not file a proof of claim to obtain standing in a bankruptcy case. *See SVB Financial*, 662 B.R. at 72 (citing *In re MF Global Holdings Ltd.*, 469 B.R. 177, 188 (Bankr. S.D.N.Y. 2012)).

Next, the bankruptcy court determined that the FDIC held defensive setoff rights and that those rights were preserved by section 553 of the Bankruptcy Code. In so ruling, the court rejected the committee's argument that the FDIC's defensive setoff rights were merely claims that could be discharged under the debtor's chapter 11 plan. Judge Glenn agreed with other courts that have concluded that a defensive setoff is substantively different from a "claim," as defined in section 101(5) of the Bankruptcy Code generally as a "right to payment" or a "right to an equitable remedy for breach of performance," because the assertion of a defensive setoff does not involve any "affirmative recovery" from the estate that could be characterized as a "claim." *Id.* at 67 (discussing *Turner v. U.S. (In re G.S. Omni Corp.)*, 835 F.2d 1317, 1319 (19th Cir. 1987); *Styler v. Jean Bob Inc. (In re Concept Clubs, Inc.)*, 154 B.R. 581 (D. Utah 1993)). He acknowledged that some courts have disagreed with this approach but concluded that "there is a material difference between a defensive claims for setoff and a claim that seeks similar relief on an affirmative basis against a debtor or its estate." *Id.*

The bankruptcy court also rejected the argument that the FDIC's defensive setoff was precluded by section 553 of the Bankruptcy Code, finding that: (i) section 553(a) preserved the FDIC's setoff rights under applicable non-bankruptcy law—here, 12 U.S.C. § 1822(d), which provides in substance that the FDIC may withhold payments to any depositor in a defaulted bank as required to pay any liability of a depositor to the defaulting bank or its receiver; (ii) the debtor owed a debt to the FDIC in its capacity as receiver for, and successor in interest to, SVB and that debt arose prepetition when the debtor commenced the N.D. Cal. Action, even though the FDIC had not yet formally asserted its setoff rights in that litigation, so that the rights were contingent and unliquidated; (iii) the debtor's claims against the FDIC also arose prepetition when the FDIC, as receiver, transferred all of SVB's assets to Bridge Bank, after which they were purportedly transferred back to the FDIC; and (iv) the required mutuality existed between the debtor and the FDIC and was not defeated by the debtor's unsupported argument that section 553(a)(3) barred the FDIC's setoff rights because the FDIC incurred deposit liability to the debtor two days before its bankruptcy filing for the purpose of obtaining setoff rights.

The bankruptcy court ruled that that the FDIC was not required to file a proof of claim to preserve its defensive setoff rights, noting that "case law in this district expressly state that a defensive right to setoff can be preserved in the absence of a proof of claim." *Id.* at 71 (citing cases). According to Judge Glenn, cases in which the courts have required the party seeking to assert a setoff to file a timely proof of claim or otherwise take affirmative action to preserve its setoff rights are either unpersuasive or distinguishable.

Finally, the bankruptcy court held that the FDIC's setoff rights could not be discharged under the debtor's chapter 11 plan pursuant to section 1141 of the Bankruptcy Code, which, with certain exceptions, "discharges the debtor from any debt that arose before the date of … [plan] confirmation." According to Judge Glenn, those rights were expressly preserved in section 553(a), and the FDIC, in exercising defensive setoff rights, was not required to file a proof of claim because it was not attempting to assert a claim against the estate, but to reduce any liability it might have to the debtor in the SDNY Action and the ND Cal. Action.

OUTLOOK

SVB Financial is not groundbreaking, but it represents a significant ruling for creditors with setoff rights, especially creditors who choose for strategic purposes not to participate in a bankruptcy case (e.g., by filing a proof of claim) but want to preserve their right to reduce or eliminate any liability to a debtor by setting off that debt against the amount owed by the debtor.

Key takeaways from the decision include:

- If a creditor with setoff rights seeks no affirmative recovery from the bankruptcy estate, but merely wants to preserve its ability to exercise a "defensive" setoff, the creditor need not file a proof of claim or otherwise participate in the bankruptcy case;
- Section 553 of the Bankruptcy Code does not create a right of setoff, but merely preserves any such rights that exist under contract or applicable non-bankruptcy law;
- A defensive setoff right is not a "claim" under the Bankruptcy Code; and
- Defensive setoff rights preserved under section 553 cannot be extinguished under a chapter 11 plan.

As noted previously, not all courts agree with the approach adopted by the bankruptcy court in *SVB Financial*, so it is important to be aware of the approach to this question applied in any particular district.

The debtor and the official creditors' committee filed a notice of appeal of the bankruptcy court's ruling on August 9, 2024. On September 30, 2024, the U.S. District Court for the Southern District of New York granted the debtor's motion to certify a direct appeal of the ruling to the U.S. Court of Appeals for the Second Circuit, finding that "a decision on appeal calls for the resolution of a question of law that the Second Circuit has yet to settle." *In re SVB Financial Group*, 2024 WL 4345730, at *2 (S.D.N.Y. Sept. 30, 2024).

BOSTON GENERATING: SECOND CIRCUIT TRIPLES DOWN ON ITS HOLDING THAT TRANSFERS MADE UNDER SECURITIES CONTRACTS ARE SAFE HARBORED IN BANKRUPTCY IF THE DEBTOR-TRANSFEREE IS A CUSTOMER OF A FINANCIAL INSTITUTION

Dan T. Moss • Daniel J. Merrett • Ben Rosenblum

Section 546(e) of the Bankruptcy Code's "safe harbor" provision (which shields transactions from avoidance claims in bankruptcy of certain securities, commodity, or forward-contract payments) has long been a magnet for controversy. Several noteworthy court rulings have been issued in bankruptcy cases addressing the scope of the provision, including its limitation to transactions involving "financial institutions" as transferors or transferees, its preemption of avoidance litigation that could have been commenced by or on behalf of creditors under applicable non-bankruptcy law, and its application to non-public transactions. The U.S. Court of Appeals for the Second Circuit contributed the latest chapter in the continuing debate concerning the breadth of the safe harbor in *In re Boston Generating, LLC*, 2024 WL 4234886 (2nd Cir. Sept. 19, 2024). In an unpublished decision, the court of appeals affirmed lower court rulings that payments made as part of a pre-bankruptcy recapitalization transaction were shielded from avoidance under the safe harbor because they were made through an agent bank that qualified as a "financial institution," meaning that its customers, including the debtor-transferee, were also financial institutions.

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," except under section 548(a)(1)(A) of the Bankruptcy Code. Thus, the section 546(e) "safe harbor" bars avoidance claims challenging a qualifying transfer unless the transfer was made with actual intent to hinder, delay, or defraud creditors under section 548(a)(1)(A), as distinguished from constructively fraudulent transfers under section 548(A)(1)(B) where the debtor is insolvent at the time of the transfer (or becomes insolvent as a consequence) and receives less than reasonably equivalent value in exchange.

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

> [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). "Customer" is defined broadly in section 741(2) of the Bankruptcy Code to include any "entity with whom a person deals as principal or agent and that has a claim against such person on account of a security received, acquired, or held by such person in the ordinary course of such person's business as a stockbroker, from or for the securities account or accounts of such entity …." 11 U.S.C. § 741(2). The term "securities contract" is defined in section 741(7) of the Bankruptcy Code, and sections 101(51A) and 741(8) define the term "settlement payment."

According to the legislative history of section 546(e), the purpose of the safe harbor 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.*

NOTABLE COURT RULINGS

Many notable court rulings have addressed whether: (i) section 546(e) preempts fraudulent transfer claims that can be asserted by or on behalf of creditors by a bankruptcy trustee under state law; (ii) the section 546(e) safe harbor insulates from avoidance only transactions involving publicly traded securities; and (iii) a "financial institution" must be the transferor or ultimate transferee, as distinguished from an intermediary or conduit, for a transaction to be insulated from avoidance under the safe harbor.

Preemption. For example, in *Deutsche Bank Trust Co. Ams. v. Large Private Beneficial Owners (In re Tribune Co. Fraudulent Conveyance Litig.),* 818 F.3d 98 (2d Cir. 2016) ("*Tribune 1*"), the Second Circuit affirmed lower court decisions dismissing creditors' state law constructive fraudulent transfer claims arising from the 2007 leveraged buyout ("LBO") of Tribune Company ("Tribune"). 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 lead to the conclusion that the safe harbor was intended to preempt *constructive* fraudulent transfer claims asserted by creditors under state law.

The Second Circuit reaffirmed this approach in *In re Nine W. LBO Sec. Litig.*, 87 F.4th 130 (2d Cir. 2023), *cert. denied*, 144 S.Ct. 2551 (2024) ("*Nine West*"), where the court adopted a "transfer-by-transfer" rather than a "contract-by-contract" approach to the safe harbor in affirming in part and reversing in part a district court ruling that section 546(e) preempted a litigation trustee's fraudulent transfer and unjust enrichment claims seeking avoidance of payments made to public and non-public shareholders as part of an LBO because only the public shareholder payments involved a "financial institution."

More recently, in *Petr v. BMO Harris Bank N.A.*, 95 F.4th 1090 (7th Cir. 2024), the U.S. Court of Appeals for the Seventh Circuit affirmed a district court ruling broadly construing the section 546(e) safe harbor to bar a chapter 7 trustee from suing under state law and section 544 of the Bankruptcy Code to avoid an alleged constructively fraudulent transfer made by the debtor shortly after it had been acquired in an LBO. Among other things, the Seventh Circuit agreed with the district court's conclusions that section 546(e) preempted the trustee's claim to recover the value of the transfer under section 544 and state law.

Public v. Private Transactions. Because section 546(e) is silent as to whether it applies to both public and private transactions, some courts, finding the language of the provision to be ambiguous and looking to its legislative history for guidance, have concluded that the safe harbor is limited to transactions involving publicly traded securities. *See, e.g., Kipperman v. Circle Trust F.B.O. (In re Grafton Partners, L.P.)*, 321 B.R. 527, 539 (B.A.P. 9th Cir. 2005) (finding that section 546(e) places a "line between public transactions that involve the clearance and settlement process and nonpublic transactions that do not involve that process"); *Kapila v. Espirito Santo Bank (In re Bankest Capital Corp.)*, 374 B.R. 333, 346 (Bankr. S.D. Fla. 2007) (section 546(e) is inapplicable where the "case did not involve the utilization of public markets or publicly traded securities").

Other courts have disagreed, concluding that section 546(e) is not on its face limited to transactions involving publicly traded securities, and that resort to the provision's legislative history is therefore unwarranted. *See, e.g., BMO Harris*, 95 F.4th at 1098 (holding that the safe harbor extends to transactions involving private securities that do not implicate the national system for the clearance and settlement of publicly held securities); *In re Quebecor World (USA) Inc.*, 719 F.3d 94 (2d Cir. 2013) (ruling that the safe harbor applied to insulate from avoidance a repurchase transaction for private-placement notes that involved payments to a noteholder trustee that was a "financial institution"); *overruled in part on other grounds by Merit Mgmt. Grp., LP v. FTI Consulting, Inc.*, 583 U.S. 366 (2018) ("*Merit*"); *Brandt v. B.A. Capital Co. L.P. (In re Plassein Int'l Corp.)*, 590 F.3d 252 (3d Cir. 2009) (finding that the plain meaning of section 546(e) is clear, and holding that the provision is not limited to publicly traded securities, but also extends to transactions involving privately held securities), *cert. denied*, 559 U.S. 1093 (2010); *In re QSI Holdings, Inc.*, 571 F.3d 545, 550 (6th Cir. 2009) ("[W]e hold that nothing in the text of § 546(e) precludes its application to settlement payments involving privately held securities"), *overruled in part on other grounds by Merit Mgmt. Grp., LP v. FTI Consulting, Inc.*, 583 U.S. 366 (2018);

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 its shareholders' privately held stock during an LBO); *In re Olympic Nat. Gas Co.*, 294 F.3d 737, 742 n.5 (5th Cir. 2002) (by including references to both the commodities and securities markets, lawmakers meant to exclude from the automatic stay and avoidance as a constructively fraudulent transfer "both on-market, and the corresponding off-market, transactions"); *In re Taylor, Bean & Whitaker Mortgage Corp.*, 2017 WL 4736682, *9 (M.D. Fla. Mar. 14, 2017) ("[I]f Congress wanted § 546(e) to apply to only non-private transactions, it has the constitutional authority to rewrite the statute. The judiciary, however, does not."); *In re Lancelot Investors Fund, L.P.*, 467 B.R. 643, 655 (N.D. Ill. 2012) (section 546(e) "does not limit its protection to transactions made on public exchanges.").

Financial Institution as Transferor or Transferee. Prior to the Supreme Court's 2018 ruling in *Merit*, there was a split among the circuit courts concerning whether the section 546(e) safe harbor barred state law constructive fraud claims to avoid transactions in which the "financial institution" involved was merely a "conduit" for the transfer of funds from the debtor to the ultimate transferee. *See generally* Collier on Bankruptcy ¶ 546.06[2] n.16 (listing cases) (16th ed. 2024). The Supreme Court resolved the circuit split in *Merit*.

In *Merit*, a unanimous Supreme Court held that section 546(e) did not protect a transfer made as part of a non-public stock sale transaction through a "financial institution," 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 overall is itself a financial institution. Because the selling shareholder in the LBO transaction that was challenged in *Merit* 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 of 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 financial institutions act as agents or custodians in connection with a securities contract. *Merit*, 583 U.S. at 373 n.2. 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 selling shareholder's status on the scope of the safe harbor.

The Second Circuit quickly filled that void. In *In re Tribune Co. Fraudulent Conveyance Litig.*, 946 F.3d 66 (2d Cir. 2019), *dismissing cert*. in part, 141 S. Ct. 728 (2020), *cert. denied*, 141 S. Ct. 2552 (2021) ("*Tribune 2*"), the Second Circuit explained that, under *Merit*, the payments to Tribune's shareholders were shielded from avoidance under section 546(e) only if either Tribune, which made the payments, or the shareholders who received them, were "covered entities." It then concluded that Tribune was a "financial institution," as defined by section 101(22) of the Bankruptcy Code, and "therefore a covered entity."

According to the Second Circuit, the entity Tribune retained to act as depository in connection with the LBO was a "financial institution" for purposes of section 546(e) because it was a trust company and a bank. Therefore, the court reasoned, Tribune was likewise a financial institution because, under the ordinary meaning of the term as defined by section 101(22), Tribune was the bank's "customer" with respect to the LBO payments, and the bank was Tribune's agent according to the common law definition of "agency." *Tribune 2*, 946 F.3d at 91; *see also Kelley as Tr. of PCI Liquidating Tr. v. Safe Harbor Managed Acct. 101, Ltd.*, 31 F.4th 1058, 1065 (8th Cir. 2022) (noting that "we do not disagree" with *Tribune 2*'s "basic assumption" that the customer of a financial institution may itself qualify as a financial institution for purposes of the section 546(e) safe harbor if it meets the definition of "financial institution" set forth in section 101(22)(A) of the Bankruptcy Code).

Several bankruptcy and district courts in the Second Circuit picked up where the Second Circuit left off in *Tribune 2*, ruling that pre-bankruptcy recapitalization or LBO transactions were safe-harbored from avoidance as fraudulent transfers because they were effected through a bank or other qualifying financial institution. *See, e.g., Holliday v. K Road Power Management, LLC (In re Boston Generating LLC)*, 617 B.R. 442 (Bankr. S.D.N.Y. 2020) (payments made to the members of LLC debtors as part of a pre-bankruptcy recapitalization transaction were protected from avoidance under section 546(e) because the debtors were "financial institutions," as customers of banks that acted as their depositories and agents in connection with the transaction), *aff'd*, 2021 WL 4150523 (S.D.N.Y. Sept. 13, 2021), aff'd, 2024 WL 4234886 (2nd Cir. Sept. 19, 2024); *In re Nine W. LBO Sec. Litig.*, 482 F. Supp. 3d 187 (S.D.N.Y. 2020) (dismissing fraudulent transfer and unjust enrichment claims brought by a chapter 11 plan litigation trustee and an indenture trustee seeking to avoid payments made as part of an LBO, and ruling that the payments were protected by the safe harbor because they were made by a bank acting as the debtor's agent), *aff'd in part, rev'd in part and remanded*, 87 F.4th 130 (2d Cir. 2023), *cert. denied*, 144 S.Ct. 2551 (2024); *SunEdison Litigation Trust v. Seller Note, LLC (In re SunEdison, Inc.)*, 620 B.R. 505, 515 (Bankr. S.D.N.Y. 2020) (noting that, under

Merit, the "relevant transfer" was "the overarching transfer," and ruling that, because one step of an "integrated transaction" was effected through a qualified financial institution, section 546(e) shielded the "component steps" from avoidance as a constructive fraudulent transfer); *see also In re Tops Holding II Corp.*, 646 B.R. 617 (Bankr. S.D.N.Y. 2022) (the safe harbor did not insulate a transaction whereby, after encumbering the assets of a privately held chapter 11 debtor with privately issued debt, certain private equity investors took massive dividends, because, although the proceeds of the private notes were intended to be deposited into the bank accounts of the debtors and the private equity investors, the parties' banks were not agents or custodians (as was the case in *Tribune 2*), and therefore were not qualifying recipients for purposes of section 546(e)), *leave to appeal denied*, 2023 WL 119445 (S.D.N.Y. Jan. 6, 2023).

The Second Circuit revisited some of these issues in *Boston Generating*.

BOSTON GENERATING

Boston Generating LLC ("BosGen"), its holding company EBG Holdings LLC ("EBG"), and their subsidiaries (collectively, the "debtors") owned and operated electric power generating facilities near Boston. In November 2006, BosGen and EBG launched a leveraged recapitalization transaction whereby they borrowed approximately $2.1 billion from lenders, in part to fund a $925 million tender offer for EBG's member units and warrants, and the distribution of $35 million in dividends to EBG's members. The Bank of New York ("BNY") acted as the depository and agent for both BosGen and EBG in connection with the tender offer.

The $2.1 billion cash infusion from the credit facilities was deposited into BosGen and EBG bank accounts at U.S. Bank National Association ("US Bank"). US Bank then transferred approximately $708 million (the "BofA transfer") to EBG's account at Bank of America ("BofA") to fund the unit buyback, warrant redemption, and dividend distribution and approximately $50 million to pay fees and expenses incurred in connection with the closing of the credit facilities. Thereafter, EBG caused the funds to be transferred to its accounts at BNY (the "BNY transfer" and, together with the BofA transfer, the "BosGen transfer"). In December 2006, EBG directed BNY to pay the BosGen transfer funds as part of the $925 million unit and warrant redemption payment and the $35 million dividend payment (the "dividend transfer") to EBG's members.

The debtors filed for chapter 11 protection in the Southern District of New York in August 2010. After authorizing the sale of substantially all of the debtors' assets, the bankruptcy court confirmed a liquidating chapter 11 plan for the debtors in August 2011. The plan created a liquidating trust to pursue claims on behalf of the debtors' general unsecured creditors. The liquidating trustee commenced an adversary proceeding seeking, among other things, to avoid and recover the BofA transfer and the dividend transfer as intentional and constructive fraudulent transfers under the New York Debtor & Creditor Law. The defendants moved to dismiss, arguing that the transfers were safe-harbored under section 546(e).

The bankruptcy court granted the motion to dismiss the liquidating trustee's fraudulent transfer claims. The court ruled that: (i) section 546(e) preempted the claims; and (ii) the payments were protected by the section 546(e) safe harbor because BosGen and EBG were "financial institutions," as customers of US Bank and/or BNY. *See Boston Generating*, 617 B.R. at 480–90.

Initially, the court acknowledged that neither *Tribune 1* nor *Tribune 2* addressed whether section 546(e) preempts intentional (as distinguished from constructive) fraudulent transfer claims under state law. Nonetheless, the court saw "no reason why *Tribune*'s reasoning does not extend to intentional state law fraudulent transfer claims." Examining the plain language of section 546(e), the court declined to extend section 546(e)'s exception for federal intentional fraudulent transfer claims under section 548(a)(1)(A) to include state law intentional fraudulent transfer claims.

According to the bankruptcy court:

> Congress may have specifically excluded state law intentional fraudulent transfer claims from section 546(e)'s exception having determined the need for stability in the securities markets overrode the potential danger of creditors escaping claims for intentional fraud based on a fear that inconsistent application of fifty (50) states' fraudulent transfer statutes would result in instability in the securities markets.

Id. at 480. Looking at the BosGen transfer as an "integrated transaction," the bankruptcy court determined that the transfer satisfied the requirements for the safe harbor because: (i) "a transfer of cash to a financial institution made to repurchase and cancel securities—in other words, to complete a securities transaction—qualifies for the safe harbor as a settlement payment"; (ii) the LLC member units and warrants qualified as "securities" under the Bankruptcy Code's broad definition; (iii) the payments were made "in connection with a securities contract"—the tender offer; (iv) BosGen qualified as a "financial institution" by virtue of its relationship with US Bank, which acted as the agent of its customers BosGen and EBG in connection with the tender offer; and (v) additionally, or in the alternative, both BosGen and EBG qualified as "financial institutions" as customers of BNY, which acted as their agent in connection with the tender offers.

Finally, the court also ruled that section 546(e) preempted the liquidating trustee's constructive fraudulent transfer claims under state law—an issue that was conceded by the trustee.

The liquidating trustee appealed the decision to the district court, which affirmed.

On appeal, the liquidating trustee argued that the BofA transfer was the "relevant transfer" for the purposes of his avoidance complaint and, misapplying *Merit*, the bankruptcy court

concluded that the relevant transfer also included the BNY transfer. The avoidance defendants countered that the "'overarching transfer' was the payment by the Debtors of nearly $1 billion … to their shareholders in satisfaction of their equity interests."

The district court explained that, in accordance with *Merit*, the relevant transfer is defined by the governing substantive avoiding power—here, the N.Y. Debtor & Creditor Law—which requires that, "where a transfer is only a step in a general plan, the plan must be viewed as a whole with all its composite applications." *Boston Generating*, 2021 WL 4150523, at *3 (citation and internal quotation marks omitted). Thus, the court concluded, the liquidating trustee improperly sought to avoid only one component—the BofA transfer—of the "overarching" BosGen transfer, which was "an integral transfer" in the leveraged recapitalization transaction. Analyzing the BofA transfer in a vacuum, the district court wrote, "would permit the trustee to circumvent the safe harbor by carving up an integrated securities transaction consisting of multiple component parts … [, which] would unnecessarily restrict the safe harbor and 'seriously undermine … markets in which certainty, speed, finality, and stability are necessary to attract capital.'" *Id.* (quoting *Tribune 2*, 946 F.3d at 90).

The district court found no fault with the bankruptcy court's finding that the BosGen transfer was a settlement payment made in connection with a securities contract, as required by section 546(e). According to the district court, the bankruptcy court also properly found that BosGen was covered by the safe harbor because, as the customer of a bank or trust company—US Bank—that acted as its agent in connection with a securities contract, it was a "financial institution."

The district court rejected the liquidating trustee's argument that a customer is a financial institution only when a bank makes or receives the relevant transfer on behalf of the customer. According to the court, even if the court were to adopt this approach, BosGen would satisfy it, when the transaction was viewed as a whole, rather than piecemeal, as urged by the liquidating trustee. In addition, the district court rejected the liquidating trustee's contention that a financial institution must be specifically identified as such in a securities contract to serve as a customer's agent.

The district court also held that the bankruptcy court did not err in ruling that the $35 million dividend payment was safe harbored because it was a settlement payment made in connection with the tender offer.

Finally, the district court held that the bankruptcy court properly concluded, in accordance with *Tribune 2*, that the liquidating trustee's state law fraudulent transfer claims (both intentional and constructive) were preempted by section 546(e).

The liquidating trustee appealed the ruling to the Second Circuit.

THE SECOND CIRCUIT'S RULING

A three-judge panel of the Second Circuit affirmed on appeal in an unpublished opinion.

Initially, the Second Circuit agreed with the lower courts that the BosGen transfer was executed in connection with a securities contract because "BosGen's credit facility agreements … expressly contemplated that the proceeds from the loan would be used 'to fund the Distribution and Tender Offer of EBG' and that Bos Gen would transfer the proceeds to EBG for that express purpose." *Boston Generating*, 2024 WL 4234886, at *2 (citations omitted). In addition, consistent with Merit's directive that the section 546(e) safe harbor applies to the "overarching" transfer, rather than its individual components, the Second Circuit concluded that the bankruptcy court correctly rejected the liquidating trustee's argument that each "component part" of the recapitalization transaction should be examined independently. *Id.* The Second Circuit also found no fault with the bankruptcy court's determination that, even if section 546(e) requires that the debtor be a party to the securities contract in question, the evidence clearly established that the tender offer was a contract among BosGen, EBG, and EBG's members.

Next, the Second Circuit held that the bankruptcy court correctly concluded that both BosGen and EBG were "financial institutions," as defined by section 101(22)(A) of the Bankruptcy Code, because they were customers of their agent bank BNY. *Id.* at *3. In so ruling, the court of appeals rejected the argument that its conclusion was somehow inconsistent with its previous holding in *Nine West* that each transaction must be examined transfer-by-transfer, as distinguished from contract-by-contract, to determine whether the transaction is safe harbored under section 546(e). According to the Second Circuit, "even under Nine West's transfer-by-transfer approach, we look to the end-to-end transaction to determine whether the safe harbor applies." *Id.*

OUTLOOK

With *Tribune 2*, *Nine West*, and, most recently, *Boston Generating*, the Second Circuit has now tripled down on its broad construction of the Bankruptcy Code's safe harbor protecting payments made as part of securities contract transactions from avoidance as constructively fraudulent transfers. Consistent with the Supreme Court's decision in *Merit*, such transactions qualify for the safe harbor provided, among other things, they were made by or with the assistance of a "financial institution" acting as the agent of its transferee-customer in the context of larger, overarching transactions. Going forward, parties should carefully document the sequencing (i.e., clearly stating what the transfers are doing and how such transfers work in context) and structuring (e.g., rely on a bank as agent) of the interim transfers such that each individual transfer tracks out to the overarching transfer. In the absence of any circuit split on this important issue, the Supreme Court is unlikely to resolve any lingering disputes among the courts any time soon.

FIFTH CIRCUIT REQUIRES "COMPELLING CIRCUMSTANCES" TO AMEND PROOF OF CLAIM POST-CONFIRMATION

Genna Ghaul

Consistent with precedent in its sister circuits, the U.S. Court of Appeals for the Fifth Circuit in *CLO Holdco, Ltd. v. Kirschner (In the Matter of Highland Cap. Mgmt. LP)*, 102 F.4th 286 (5th Cir. 2024), held that to amend a proof of claim after confirmation of a chapter 11 plan, the party seeking to amend must demonstrate compelling circumstances to do so because plan confirmation is akin to a final judgment in a civil case and reopening a confirmed plan could unfairly prejudice the debtor or other parties.

PROCEDURES GOVERNING FILING OF PROOFS OF CLAIMS OR INTERESTS IN BANKRUPTCY

To determine the universe of creditor claims against, and equity interests in, a debtor, the Bankruptcy Code generally contemplates either that the creditor, interest holder, or other authorized party submits "proof" of the claim or interest to the bankruptcy court. *See* 11 U.S.C. § 501; Fed. R. Bankr. P. 3001; *see generally* COLLIER ON BANKRUPTCY ("COLLIER") ¶ 501.02 (16th ed. 2024). A creditor or equity security must file a proof of claim or interest for the claim or interest to be allowed, with certain exceptions. *See* Fed. R. Bankr. P. 3002(a).

In a chapter 11 case, the "bar date" for filing proofs of claims or interests is established by the bankruptcy court (with certain exceptions, including the 180-day deadline established for certain "governmental unit" claims set forth in Fed. R. Bankr. P. 3003(c)(1)). *See* Fed. R. Bankr. P. 3003(c)(3). The bankruptcy court can extend this deadline "for cause shown." *Id.* Holders of claims or interests that are not scheduled by a chapter 11 debtor as disputed, contingent, or unliquidated need not file a proof of claim or interest. *See* Fed. R. Bankr. P. 3003(c)(2).

If a creditor fails to timely file a proof of claim without seeking an extension of the deadline prior to its expiration, the court will disallow the claim, unless the Bankruptcy Code or the Federal Rules of Bankruptcy Procedure permit a late filing or the court authorizes a tardy filing, usually upon a showing of "excusable neglect." *See* 11 U.S.C. § 502(b)(9); Fed. R. Bankr. P. 9006(b); *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 395 (1993) (concluding that "the determination is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission").

If no party-in-interest objects to a proof of claim or interest, the claim or interest is deemed allowed. *See* 11 U.S.C. § 502(a). If an objection is filed to a claim, the bankruptcy court will, after notice and a hearing, allow or disallow the claim according to the criteria set forth in section 502(b) of the Bankruptcy Code.

A creditor may generally withdraw its claim as of right by filing a notice of withdrawal. *See* Fed. R. Bankr. P. 3006.

A creditor may also amend its claim. Many courts have recognized that a timely filed amendment should be "freely allowed." *See, e.g., Gens v. Resolution Trust Corp*., 112 F.3d 569, 575 (1st Cir.), *cert. denied*, 522 U.S. 931 (1997); *In re Unioil, Inc.*, 962 F.2d 988, 992 (10th Cir. 1992) ("Ordinarily, amendment of a proof of claim is freely permitted so long as the claim initially provided adequate notice of the existence, nature, and amount of the claim as well as the creditor's intent to hold the estate liable."); *Belser v. Nationstar Mortgage, LLC (In re Belser),* 534 B.R. 228, 243 (B.A.P. 1st Cir. 2015); *In re S-Tek 1, LLC*, No. 20-12241-J11, 2022 WL 162435, at *4 (Bankr. D.N.M. Jan. 18, 2022); see generally COLLIER at ¶ 501.02[4].

Heightened scrutiny, however, has been directed by courts at creditor attempts to amend a proof of claim after confirmation of a chapter 11 plan. For example, in *Holstein v. Brill,* 987 F.2d 1268, 1270 (7th Cir. 1993), the U.S. Court of Appeals for the Seventh Circuit held that because "[c]onfirmation of the plan of reorganization is a second milestone, equivalent to final judgment in ordinary civil litigation," "further changes [after confirmation] should be allowed only for compelling reasons." Similarly, the Eleventh Circuit ruled that "post-confirmation amendment—while not prohibited—is not favored, and only the most compelling circumstances justify it." *In re Winn-Dixie Stores, Inc.*, 639 F.3d 1053, 1056–57 (11th Cir. 2011); *accord In re Northstar Offshore Grp., LLC*, No. 16-34028, 2024 WL 2888494, at *6 (Bankr. S.D. Tex. June 7, 2024); *In re G-I Holdings, Inc.*, 514 B.R. 720, 760 (Bankr. D.N.J. 2014), *aff'd*, 654 F. App'x 571 (3d Cir. 2016).

HIGHLAND CAPITAL

During the 2008 financial crisis, certain funds managed by Highland Capital Management, L.P. (the "debtor") were overwhelmed by redemption requests from investors at the same time that the funds' assets were losing value. The debtor placed the troubled funds in wind-down proceedings in Bermuda, which culminated in the approval of a joint plan of distribution and a scheme of arrangement. The joint plan and scheme sought to achieve the orderly management, sale, and distribution of the funds' assets. The debtor remained in place as investment manager, with a committee of the funds' investors (the "committee") overseeing the debtor's management of the funds' liquidation.

Disputes eventually arose between the committee and the debtor. The committee asserted that the debtor breached its fiduciary duty and its contractual obligations under the joint plan and scheme by purchasing the redemption claims of former fund investors for itself. An arbitration panel found in favor of the committee and ordered the debtor to pay the committee approximately $3 million, and either to cancel or transfer the redemption claims to the committee. However, before the arbitration award could be confirmed by a court, the debtor filed for chapter 11 protection in the Northern District of Texas.

The bankruptcy court set April 8, 2020, as the general bar date for filing proof of claims. CLO HoldCo ("HoldCo"), an entity that had purchased interests in the redemption claims from the debtor, filed a claim on account of such interests for $11 million. The committee and the funds also filed proofs of claims for approximately $190 million and $23 million, respectively, which were primarily based on the arbitration award and disgorgement of fees paid to the debtor in its role as investment manager. The debtor ultimately reached a settlement with the committee providing that the debtor would, consistent with the arbitration award, cancel the redemption claims. The bankruptcy court approved the settlement in October 2020.

Following approval of the settlement and cancellation of the redemption claims on which HoldCo's claim was based, HoldCo amended its proof of claim to zero dollars. HoldCo's counsel asserted in a hearing before the court that "[t]here is no pending proof[] of claim" and that counsel could "withdraw it because it is a zero amount."

In February 2021, the bankruptcy court confirmed the debtor's chapter 11 plan, which went effective in August 2021.

Nearly a year after confirmation of the plan, in January 2022, HoldCo again sought to amend its proof of claim—this time from zero to $3.7 million and $5.7 million—to advance a new theory of recovery on the redemption claims. HoldCo posited that when the redemption claims were cancelled pursuant to the settlement agreement, the debtor effectively received a credit equal to the purchase price of the redemption claims and, based on the interests held by HoldCo, the debtor owed such amounts to HoldCo. HoldCo also simultaneously filed a motion seeking to "ratify" its second amended proof of claim.

A litigation trustee (the "trustee") appointed under the debtor's chapter 11 plan objected to Holdco's first amended proof of claim and its motion to ratify its second amended proof of claim.

Although finding that it had discretion to allow an amendment to a proof of claim based on the Fifth Circuit's opinion in *In re Kolstad*, 928 F.2d 171, 172 (5th Cir. 1991), the bankruptcy court found the matter before it factually distinct and denied the motion to ratify the second amended proof of claim.

Kolstad involved a requested amendment to a proof of claim after the bar date but prior to confirmation of a chapter 11 plan. Pursuant to section 501(c) of the Bankruptcy Code, the debtor in *Kolstad* timely filed a claim on behalf of the Internal Revenue Service ("IRS") based on a potential tax liability. The bankruptcy court thereafter permitted the IRS to "amend" the proof of claim filed by the debtor notwithstanding that the bar date had passed. On appeal, the Fifth Circuit found that the amendment was not at odds with the bar date's purpose of "establish[ing] the universe of participants in the debtor's case," because it did "not set forth wholly new grounds of liability." *Kolstad*, 928 F.2d at 174. Among other factors, the Fifth Circuit also considered "the degree and incidence of prejudice, if any, caused by [the] delay." *Id.* at 175 n.7.

The bankruptcy court in *Highland Capital* found that several factors weighed against an exercise of its discretion to permit HoldCo's second amendment, including: (i) the timing of the amendment, which was more than a year after the bar date and 10 months after confirmation; (ii) the fluctuating claim amounts asserted by HoldCo; (iii) potential gamesmanship and inconsistent statements made by HoldCo's counsel; and (iv) the court's conclusion that the amendment was ultimately premised on a frivolous theory that would cause the debtor prejudice to litigate.

After the district court affirmed on appeal, HoldCo appealed to the Fifth Circuit, arguing that the lower courts misapplied Kolstad. According to HoldCo, Kolstad requires a mechanical application of two factors—(1) "whether [the litigant] is attempting to stray beyond the perimeters of the original proof of claim and effectively file a 'new' claim that could not have been foreseen from the earlier claim or events; and (2) the degree and incidence of prejudice, if any, caused by [the litigant's] delay." *See Kolstad*, 928 F.2d at 175 n. 7.

THE FIFTH CIRCUIT'S RULING

A unanimous three-judge panel of the Fifth Circuit affirmed the rulings below.

The court rejected HoldCo's chief argument that, in accordance with *Kolstad*, bankruptcy courts are required to apply a two-factor test in determining whether a creditor should be permitted to amend a proof of claim. Instead, the Fifth Circuit held, bankruptcy

courts are permitted to weigh "multiple factors" and should require "compelling circumstances" to permit a post-confirmation amendment to a proof of claim. *CLO HoldCo*, 102 F.4th at 290.

According to the Fifth Circuit, *Kolstad* is still good law because, while HoldCo framed the precedent as requiring a mechanical application of the two factors (set forth above), the decision does not demand this kind of mechanical analysis from a bankruptcy court. Instead, the Fifth Circuit reasoned, the *Kolstad* court only suggested that equitable considerations as to whether a party can amend a proof of claim "seem to subsume [those] two general questions." *Highland Capital*, 102 F.4th at 291. Therefore, the Fifth Circuit concluded, it is not an abuse of discretion for a bankruptcy court to weigh several equitable factors in deciding whether to allow a post-confirmation amendment to a proof of claim.

Critically, the Fifth Circuit distinguished the case at hand from *Kolstad* in that this case involved a post-confirmation amendment, which requires "a heightened showing because a confirmed plan of reorganization is equivalent to a final judgement in civil litigation." *Id.* at 291.

In affirming the bankruptcy court's ruling, the Fifth Circuit joined the Seventh and Eleventh Circuits in applying the "compelling circumstances" standard for post-confirmation amendment of a proof of claim. Finding no such compelling circumstances existed in the case before it, the Fifth Circuit affirmed the rulings below. According to the Fifth Circuit, Holdco "did not identify any appropriate reason—let alone a compelling reason—for its nearly year-long delay in seeking a post-confirmation amendment," an "unexcused delay [that] would have been sufficient by itself for the bankruptcy court to deny the post-confirmation amendment." *Id.*

OUTLOOK

While other circuits have not ruled directly on this issue, the "compelling circumstances" standard appears to be the prevalent mode of analysis for whether a bankruptcy court should allow a post-confirmation amendment to a proof of claim. Appellate courts outside of the Fifth, Seventh, and Eleventh Circuits have all followed the principle that plan confirmation in bankruptcy is akin to a final judgment in civil litigation. *See, e.g., Gens v. Resol. Tr. Corp.*, 112 F.3d 569, 575 (1st Cir. 1997) (citing *Holstein* for the proposition that plan confirmation is a "milestone" that "makes it more likely [that a proof of claim] amendment may be prejudicial"). Creditors should therefore view plan confirmation as creating a significant hurdle for any post-confirmation attempts to amend a proof of claim.

This article was prepared with the assistance of Richard P. Bordelon, a summer associate in Jones Day's New York Office.

IMPUTATION OF AGENT'S KNOWLEDGE TO TRANSFEREE IN BANKRUPTCY AVOIDANCE LITIGATION DEFEATS GOOD-FAITH DEFENSE

Oliver S. Zeltner

In situations where a bankruptcy court avoids a fraudulent transfer or similar transaction, subsequent transferees who received proceeds of the avoided transaction from the initial transferee can avoid liability in certain circumstances. Specifically, section 550(b)(1) of the Bankruptcy Code provides that the plaintiff in an avoidance action "may not recover" from a subsequent transferee who received proceeds of an avoided transaction "for value …, in good faith, and without knowledge of the voidability of the transfer." 11 U.S.C. § 550(b)(1). What constitutes "knowledge" under the statute is sometimes murky, however, particularly where the subsequent transferee, such as an investor, relied on an agent to make investment-related decisions on the investor's behalf.

The U.S. Court of Appeals for the Fifth Circuit recently examined this question in *In re Black Elk Energy Offshore Operations, LLC*, 114 F.4th 343 (5th Cir. 2024). The court affirmed lower court rulings that certain investors who received proceeds of an avoided fraudulent transfer from the initial transferee were not protected by the good-faith defense in section 550(b)(1), because the investors' agent was aware of, and participated in, the fraud. The agent's knowledge of the fraud was imputed to the investors, the court determined, even though the agent's conduct was criminal, and even though the investors maintained they had no personal knowledge of the fraud at the time of the transaction.

GOOD-FAITH DEFENSE TO AVOIDANCE OF TRANSFERS

The Bankruptcy Code gives a bankruptcy trustee or a chapter 11 debtor-in-possession ("DIP") the power to avoid (i.e., invalidate) certain pre- and post-bankruptcy transfers of, or incumbrances on, a debtor's property and to recover such property for the benefit of the debtor's estate and creditors. For example, section 548(a)(1) of the Bankruptcy Code authorizes a trustee or DIP to avoid a "fraudulent transfer," defined as any transfer of an interest of the debtor in property or any obligation incurred by the debtor "on or within 2 years before the date of the filing of the petition" if: (i) the transfer was made, or the obligation was incurred, "with actual intent to hinder, delay, or defraud" any creditor; or (ii) the debtor received "less than a reasonably equivalent value in exchange for such transfer or obligation" and was, among other things, insolvent, undercapitalized, or unable to pay its debts as they come due. 11 U.S.C. § 548(a)(1).

Fraudulent transfers also may be avoided by a trustee or DIP under section 544(b) of the Bankruptcy Code, which provides that "the trustee may avoid any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is voidable under applicable law," i.e., under state law. 11 U.S.C.

§ 544(b)(1). Section 550(a) of the Bankruptcy Code provides that, after avoidance of a transfer, the trustee may recover the property transferred or its value from the initial transferee (or the entity for whose benefit such transfer was made) or any "immediate or mediate transferee" of the initial transferee (i.e., a subsequent transferee). 11 U.S.C. § 550(a).

However, the Bankruptcy Code includes certain statutory defenses that, in some circumstances, allow an initial or subsequent transferee who received the proceeds of an avoided transfer "in good faith" to avoid or limit the transferee's liability. Section 548(c) of the Bankruptcy Code provides a defense to avoidance of a fraudulent transfer for a "good faith" transferee or obligee who gives value in exchange for the transfer or obligation at issue:

> Except to the extent that a transfer or obligation voidable under this section is voidable under section 544, 545, or 547 of this title, a transferee or obligee of such a transfer or obligation that takes for value and in good faith has a lien on or may retain any interest transferred or may enforce any obligation incurred, as the case may be, to the extent that such transferee or obligee gave value to the debtor in exchange for such transfer or obligation.

11 U.S.C. § 548(c). Section 548(c) provides only a partial defense and is most often invoked by an *initial* transferee—i.e., one who received proceeds of an avoided transfer directly from the debtor—who cannot take advantage of the more robust defense in section 550(b) of the Bankruptcy Code applicable to subsequent transferees, discussed below.

Unlike an initial transferee, a *subsequent* transferee—i.e., one who received proceeds of an avoided transaction either from the initial transferee or thereafter from another transferee—may assert a complete, albeit narrow, statutory defense upon the avoidance of a fraudulent transfer or similar transaction. Section 550(b) of the Bankruptcy Code provides that the trustee "may not recover" from a subsequent transferee "that takes for value, including satisfaction or securing of a present or antecedent debt, in good faith, and without knowledge of the voidability of the transfer avoided." 11 U.S.C. § 550(b)(1).

"Good faith" is not defined by the Bankruptcy Code. In determining whether it exists, some courts have applied a two-part analysis, examining: (i) whether the transferee was on "inquiry notice" of suspicious facts amounting to "red flags"; and (ii) if so, whether the transferee reasonably followed up with due diligence to determine whether a transaction may not have been *bona fide*. *See, e.g., Horton v. O'Cheskey (In re Am. Hous. Found.)*, 544 F. App'x 516, 520 (5th Cir. 2013); *Christian Bros. High School Endowment v. Bayou No Leverage Fund LLC (In re Bayou Grp., LLC)*, 439 B.R. 284, 310-13 (S.D.N.Y. 2010).

In a more recent, and frequently cited, case, the U.S. Court of Appeals for the Second Circuit announced a slightly different standard for analyzing whether good faith was present. In *Picard v. Citibank, N.A. (In re Bernard L. Madoff Investment Securities LLC)*, 12 F.4th 171 (2d Cir. 2021), the Second Circuit articulated a three-step inquiry for reviewing a good-faith defense at the pleading stage under both sections 548(c) and 550(b)(1) of the Bankruptcy Code:

> First, a court must examine what facts the defendant knew; this is a subjective inquiry and not "a theory of constructive notice." … Second, a court determines whether these facts put the transferee on inquiry notice of the fraudulent purpose behind a transaction—that is, whether the facts the transferee knew would have led a reasonable person in the transferee's position to conduct further inquiry into a debtor-or-transferor's possible fraud …. Third, once the court has determined that a transferee had been put on inquiry notice, the court must inquire whether "diligent inquiry [by the transferee] would have discovered the fraudulent purpose" of the transfer.

Id. at 191–92 (citations omitted).

BLACK ELK ENERGY

Mark Nordlicht was the founder and chief investment officer of the hedge fund Platinum Partners ("Platinum"). *Black Elk*, 114 F.4th at 348. Platinum, in turn, was the controlling shareholder of Black Elk Energy Offshore Operations, LLC ("Black Elk"), a Houston-based oil and gas company. *Id.* Facing a liquidity crisis, in 2013, Black Elk issued preferred equity shares, created a special-purpose entity—Platinum Partners Black Elk Opportunities Fund LLC ("PPBEO")—to purchase them, and solicited Platinum's investors to participate. *Id.* Two of those investors were Shlomo and Tamar Rechnitz (the "Rechnitzes"), who already held significant equity interests in Platinum. *Id.* at 349. Platinum offered them a 16% return on their investment, which was more than double the usual return on Platinum funds, and promised to guarantee their principal. *Id.*

The Rechnitzes invested $10 million in PPBEO. Black Elk, 114 F.3d at 349. In accordance with PPBEO's subscription and operating agreements, another Platinum affiliate—PPBE Holdings—managed by Nordlicht acted as the Rechnitzes' agent. *Id.* In PPBEO's operating agreement, the Rechnitzes and other investors gave Nordlicht "full power and discretionary authority to act in [PPBEO's] name, place and stead, to make [PPBEO's] investments and execute any trades ancillary to such investments." *Id.*

Black Elk was insolvent by 2014, prompting Nordlicht, anticipating a Black Elk bankruptcy filing, to set in motion a plan to pay back PPBEO's investors—including the Rechnitzes—rather than paying Black Elk's creditors. *Id.* As part of that scheme, Platinum installed a new Black Elk chief financial officer, who sold the company's most valuable assets for $125 million. *Id.* The proceeds were to be used to redeem the preferred stock rather than to pay creditors, including senior bondholders and trade creditors. *Id.* Nordlicht recognized that, to do so, the bonds would first have to be subordinated to the preferred stock, which would require the

consent of a majority of Black Elk's bondholders. *Id.* To "rig the vote," Nordlicht acquired bonds through affiliates covertly controlled by Platinum, shifted PPBEO's investments from preferred stock to bonds, and convinced the Rechnitzes to do the same. *Id.* In this way, the necessary threshold for approval of subordination of the bonds to the preferred stock was satisfied. *Id.*

In August 2014, Black Elk used approximately $77 million of the asset sale proceeds to repurchase the preferred stock held by various Platinum entities. *Black Elk*, 114 F.4th at 349. Those entities then purchased the Black Elk bonds held by PPBEO, allowing PPBEO to pay its investors. *Id.* During this process, the sale proceeds were transferred between various Platinum accounts and commingled with $7.2 million of "untainted" funds. *Id.* In August and September 2014, Nordlicht began paying PPBEO's investors, including the Rechnitzes, who received more than $267,000 in interest payments as well as their $10 million principal. *Id.*

Black Elk filed for chapter 11 protection on July 25, 2016, in the Southern District of Texas. *Id.* at 350. It proposed a liquidating chapter 11 plan that established a litigation trust. *Id.* In 2019, the same year a federal jury convicted Nordlicht of securities fraud in connection with the PPBEO transactions, the litigation trustee commenced an adversary proceeding seeking avoidance and recovery of the asset sale proceeds paid to the Rechnitzes as a fraudulent transfer under sections 544, 548(a)(1), and 550(a) of the Bankruptcy Code. *Id.* Bankruptcy Judge Marvin Isgur ruled that Black Elk's transfer of approximately $77 million to various Platinum entities and, ultimately, to shareholders constituted an actual fraudulent transfer and granted summary judgment on the litigation trustee's claim to avoid the transaction as a whole. Schmidt v. Nordlicht (*In re Black Elk Energy Offshore Ops., LLC*), 649 B.R. 249, 254 (Bankr. S.D. Tex. 2023).

The bankruptcy court then considered the Rechnitzes' liability under section 550(a) of the Bankruptcy Code. It ultimately awarded the trustee partial summary judgment, ruling that the Rechnitzes could not rely on the good-faith transferee defense in section 550(b)(1) of the Bankruptcy Code because Nordlicht acted as the Rechnitzes' authorized sub-agent, and his knowledge of the fraudulent scheme was imputed to them. *Id.* at 263. Adopting its own tracing methodology, the bankruptcy court later held that the $10.3 million transferred by PPBEO to the Rechnitzes was traceable to the asset sale and related fraud, and thus was fully recoverable. *Black Elk*, 114 F.4th at 350.

The trustee and the Rechnitzes jointly sought a direct appeal of the ruling to the Fifth Circuit, which granted the request.

THE FIFTH CIRCUIT'S RULING

A three-judge panel of the Fifth Circuit affirmed the bankruptcy court's decision.

On appeal, the Rechnitzes argued, among other things, that they should not be liable for the proceeds they received as a result of fraudulent transfer, because: (i) they were good-faith subsequent transferees within the meaning of section 550(b)(1) of the Bankruptcy Code and their agent Nordlicht's knowledge of the fraud should not be imputed to them; (ii) the trustee was required to, but did not, prove that they *personally* knew about Nordlicht's wrongdoing because section 550(b)(1) uses the word "knowledge" and does not mention imputed or constructive knowledge; and (iii) even if section 550(b)(1) allows such imputation, Nordlicht acted outside the scope of his authority as agent, and the Rechnitzes should consequently not be charged with his knowledge of the fraud. *Black Elk*, 114 F.4th at 353, 355. The Fifth Circuit rejected each of these arguments.

Judge Duncan explained that the Rechnitzes' arguments were flawed because they overlooked the basic premise that the Bankruptcy Code's provisions governing the avoidance and recovery of fraudulent transfers incorporate common law principles, including the common law tradition that a principal generally is liable for fraud committed by his or her agent acting within the scope of the agent's authority. *Id.* at 353.. According to Judge Duncan, "this traditional linkage between principal and agent is not severed" merely because section 550(b)(1) of the Bankruptcy Code uses the term "knowledge," as "Congress legislates against [the] backdrop of [such] common-law adjudicatory principles, and it expects those principles to apply except when a statutory purpose to the contrary is evident," which was not the case here. *Id.* (citations and internal quotation marks omitted). He also observed that "cases—concerning both fraudulent conveyance and bankruptcy—routinely treat principal-transferees as being on inquiry notice based on their agents' knowledge." *Id.* at 354 (footnote omitted).

The Fifth Circuit panel concluded that Nordlicht acted within the scope of the authority conferred upon him in PPBEO's operating agreement. According to Judge Duncan, "Nordlicht's actions were all directly related to that authority" and, considering the circumstances, all of Nordlicht misdeeds were foreseeable. *Id.* at 355. He explained that cases relied on by the Rechnitzes in which a principal was not found liable for its agent's criminal acts were distinguishable because, unlike this case, they "involved radical detours from the agent's duties." *Id.* at 356. In this case, Judge Duncan emphasized, "Nordlicht defrauded Black Elk's creditors—to the Rechnitzes' benefit—by manipulating the very PPBEO investment the Rechnitzes had authorized him to manage." *Id.*

Finally, Fifth Circuit panel held that the bankruptcy court committed no error in employing equitable tracing principles to identify the sale proceeds among commingled funds. According to Judge Duncan, the bankruptcy court's decision not to rely on tracing reports offered by the parties' experts in favor of a "lowest intermediate balance" approach assuming that, "when tainted and untainted funds are commingled, the tainted funds are used *first*," was well within its discretion. *Id.* at 358 (emphasis in original; citation omitted).

OUTLOOK

The Fifth Circuit's ruling in *Black Elk* provides useful guidance concerning the parameters of the good-faith defense to the recovery of proceeds from an avoided transfer under section 550(b)(1) of the Bankruptcy Code. Notably, the Fifth Circuit reaffirmed the conventional understanding that an agent's knowledge and actions—even if criminal—are imputed to its principal under applicable non-bankruptcy law, unless those actions were taken beyond the scope of the agent's authority. The court also emphasized that lawmakers premised section 550(b)(1) upon that common law principle, rather than creating a different standard for holding a principal accountable for the actions of its agent.

Although it is not the focus of this article, the Fifth Circuit made some interesting observations in *Black Elk* concerning the Rechnitzes' standing under the "person aggrieved" standard, applied in the Fifth Circuit, to appeal orders the bankruptcy court entered extending the duration of the litigation trust established under Black Elk's liquidating chapter 11 plan. Under this standard, only persons "directly, adversely, and financially impacted by a bankruptcy court order may appeal it." *Furlough v. Cage (In re Technicool Sys., Inc.)*, 896 F.3d 382, 384 (5th Cir. 2018).

In *Black El*k, the Fifth Circuit observed in a footnote that the person aggrieved standard "may be incompatible with the Supreme Court's decision in [*Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014)], which cast doubt on the role of prudential standing rules in federal courts" as being incompatible with "constitutional" standing principles traditionally applied by non-bankruptcy federal courts, which is broader than standing to appeal a bankruptcy court order. *Id.* at 351 n.4 (internal quotation marks omitted). However, because the Rechnitzes never argued that the person aggrieved standard should not apply, the Fifth Circuit declined to address the issue. *Id.*

SECOND CIRCUIT: SETTLEMENT ALLOCATING VALUE TO UNSECURED CREDITORS WITHOUT PAYING DISPUTED SECURED CLAIM DID NOT VIOLATE SUPREME COURT'S *JEVIC* RULING PROHIBITING PRIORITY-SKIPPING FINAL DISTRIBUTIONS

Genna Ghaul

In *Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973 (2017), the U.S. Supreme Court held that the Bankruptcy Code does not allow bankruptcy courts to approve distributions to creditors in a "structured dismissal" of a chapter 11 case that violate the Bankruptcy Code's ordinary priority rules without the consent of creditors. However, the Court left open the possibility that "interim" distributions during a bankruptcy case (e.g., payments to "critical" vendors at the inception of a bankruptcy case or distributions pursuant to a settlement or a bankruptcy sale of assets), as distinguished from final distributions under a chapter 11 plan, might still be permissible despite not adhering to the bankruptcy priority scheme. In the aftermath of *Jevic*, many bankruptcy and appellate courts have accordingly considered whether interim non-priority conforming distributions should be approved.

The U.S. Court of Appeals for the Second Circuit weighed in on this issue in *In re Nordlicht*, 115 F.4th 90 (2d Cir. 2024). The court affirmed lower court rulings approving a settlement and related sale of estate claims that would distribute value to unsecured creditors without first paying disputed secured claims. According to the court, the settlement was reasonable and in the best interests of the estate, and the estate claims could be sold free and clear of the purported secured creditors' interest because their liens were subject to *bona fide* dispute, and any funds distributed to unsecured creditors pursuant to a conditional indemnity provision did not violate the absolute priority rule.

STRUCTURED DISMISSALS

After a bankruptcy court approves the sale of substantially all of a chapter 11 debtor's assets under section 363(b) of the Bankruptcy Code, three options are generally available to deal with the debtor's vestigial property and claims against the bankruptcy estate, and to wind up the bankruptcy case. Namely, the debtor can propose and seek confirmation of a liquidating chapter 11 plan, the case can be converted to a chapter 7 liquidation, or the case can be dismissed. The first two options commonly require significant time and administrative costs.

Because outright dismissal of a chapter 11 case may not be the best course of action, some courts have approved a "structured dismissal" of a case, which has been defined as:

> a hybrid dismissal and confirmation order in that it typically dismisses the case while, among other things, approving certain distributions to creditors, granting certain third

party-releases, enjoining certain conduct by creditors, and not necessarily vacating orders or unwinding transactions undertaken during the case. These additional provisions—often deemed "bells and whistles"—are usually the result of a negotiated and detailed settlement arrangement between the debtor and key stakeholders in the case.

Final Report and Recommendations of the American Bankruptcy Institute Commission to Study the Reform of Chapter 11 (2014), p. 270.

Even though the Bankruptcy Code does not expressly authorize or contemplate structured dismissals, many courts have relied on sections 105(a), 305(a)(1), 349(b), and 1112(b) of the Bankruptcy Code as authority for the remedy. *See, e.g., In re Johnson*, 565 B.R. 417 (Bankr. C.D. Cal. 2017); *In re Olympic 1401 Elm Assocs*., LLC, 2016 WL 4530602 (Bankr. N.D. Tex. Aug. 29, 2016); *In re Petersburg Regency LLC*, 540 B.R. 508, 536 (Bankr. D.N.J. 2015); *In re Naartjie Custom Kids, Inc.*, 534 B.R. 416 (Bankr. D. Utah 2015); *see generally* Amir Shachmurove, "Another Way Out: Structured Dismissals in *Jevic*'s Wake," NORTON BANKR. L. ADVISER (November 2015) (referencing sections 105, 305, 349, and 1112 of the Bankruptcy Code as authority for structured dismissals).

Even before the Supreme Court handed down its ruling in *Jevic*, structured dismissals were controversial because they sometimes involved distributions of estate property to creditors that did not comply with the Bankruptcy Code's distribution scheme. *See generally* COLLIER ON BANKRUPTCY ¶ 1112.09 (16th ed. 2024).

THE BANKRUPTCY CODE'S PRIORITY SCHEME

The Bankruptcy Code sets forth certain priority rules governing distributions to creditors in both chapter 7 and chapter 11 cases. Secured claims enjoy the highest priority under the Bankruptcy Code. The Bankruptcy Code then recognizes certain priority unsecured claims, including claims for administrative expenses, wages, and certain taxes. *See* 11 U.S.C. § 507(a). General unsecured claims come next in the priority scheme, followed by any subordinated claims and the interests of equity holders.

In a chapter 11 case, the chapter 11 plan usually determines the treatment of secured and unsecured claims (as well as equity interests), subject to the requirements of the Bankruptcy Code. Under section 1129(a)(7) of the Bankruptcy Code, each creditor must receive at least as much under the plan as it would receive in a chapter 7 liquidation. Additionally, if a class of creditors does not agree to "impairment" of its claim under the plan—such as by agreeing to receive less than payment in full—and votes to reject the plan, the plan can be confirmed only under certain specified conditions. Among these conditions is the requirement that the plan must be "fair and equitable" (11 U.S.C. § 1129(b)(1)).

Section 1129(b)(2) of the Bankruptcy Code provides that a plan is "fair and equitable" with respect to a dissenting impaired class of unsecured claims if the creditors in the class receive or retain property of a value equal to the allowed amount of their claims or, failing that, if no creditor or equity holder of lesser priority receives any distribution under the plan. This is known as the "absolute priority rule."

JEVIC

In *Jevic*, the U.S. Supreme Court held that bankruptcy courts may not deviate from the Bankruptcy Code's priority scheme when approving structured dismissals absent the consent of affected creditors (without, however, offering any "view about the legality of structured dismissals in general"). *Jevic*, 137 S. Ct. at 985.

The Court distinguished *Jevic* from cases in which courts have approved interim settlements resulting in distributions of estate assets in violation of the priority rules, such as *In re Iridium Operating LLC*, 478 F.3d 452 (2d Cir. 2007). The 6–2 majority found that *Iridium* "does not state or suggest that the Code authorizes nonconsensual departures from ordinary priority rules in the context of a dismissal—which is a final distribution of estate value—and in the absence of any further unresolved bankruptcy issues." *Jevic*, 137 S. Ct. at 985. In this sense, the majority explained, the situation in *Iridium* was similar to certain "first-day" orders, where courts have allowed for, among other things, payments ahead of secured and priority creditors to employees for prepetition wages or to critical vendors on account of their prepetition invoices. *Id.*

The Court further explained that "in such instances one can generally find significant Code-related objectives that the priority-violating distributions serve." *Id.* By contrast, it noted, the structured dismissal in *Jevic* served no such objectives (e.g., it did not benefit disfavored creditors by preserving the debtor as a going concern and enabling the debtor to confirm a plan of reorganization and emerge from bankruptcy). Rather, the distributions at issue "more closely resemble[d] proposed transactions that lower courts have refused to allow on the ground that they circumvent the Code's procedural safeguards" (citing, among others, certain section 363 asset sales). *Id.* at 986.

In the aftermath of *Jevic*, many courts have examined what kinds of interim payments can be authorized under the Court's rationale regarding permitted exceptions to its ruling. *See, e.g., In re Veg Liquidation, Inc.*, 931 F.3d 730, 739 (8th Cir. 2019) (unequal distribution of the proceeds from a section 363 sale to unsecured creditors with equal priority was not prohibited by *Jevic*); *In re Old Cold LLC*, 879 F.3d 376, 388 (1st Cir. 2018) (refusing to apply *Jevic* to disturb an asset sale under section 363(b) and ruling that section 363(m) rendered statutorily moot an appellate challenge to a sale to a good-faith purchaser); *In re S-Tek 1, LLC*, 2023 WL 2529729, at *11 (Bankr. D.N.M. Mar. 15, 2023) (denying a chapter 11 debtor's request to approve a structured dismissal in a subchapter V case and noting that "the Court has not found any caselaw in which a court authorized a structured dismissal through the sale of a debtor's assets, where the intended purpose of the structured dismissal is to allow the debtor to reorganize and

continue business operations."); *In re Micron Devices, LLC*, 2021 WL 2021468, *10 (Bankr. S.D. Fla. May 20, 2021) (in approving a proposed settlement agreement, noting that "the 'structured dismissals' the Debtor has asked for, first directly and then indirectly—would not pass muster" under *Jevic* because, among other things, administrative claimants would not be paid in full); *In re Goodrich Quality Theaters, Inc.*, 616 B.R. 514, 521 (Bankr. W.D. Mich. 2020) (relying on the "competing bankruptcy principles" identified in *Jevic*, namely preservation of going concern value and prospects for reorganization, to approve critical vendor payments), *as supplemented*, 2020 WL 1180534 (Bankr. W.D. Mich. Mar. 9, 2020); *In re Claar Cellars, LLC*, 2020 WL 1238924, *7 (Bankr. E.D. Wash. Mar. 13, 2020) (holding that the debtor's use of cash collateral to pay in part a prepetition, allegedly secured debt owed to an affiliated debtor did not violate *Jevic*); *In re ACI Concrete Placement of Kansas, LLC*, 604 B.R. 400, 407 (Bankr. D. Kan. 2019) (holding that enforcing a "carve out" from a secured creditor's collateral for payment of professional fees did not violate *Jevic*); *In re Daily Gazette Co.*, 584 B.R. 540, 546 (Bankr. S.D. W. Va. 2018) (a proposed disbursement following a section 363 sale that would result in an orderly payment of administrative claims, such as attorneys' fees and U.S. Trustee fees, followed by payment to an undisputed secured creditor with essentially a blanket lien covering in excess of the net sale proceeds "neither runs afoul of *Jevic* nor the Code generally"); *In re Fryar*, 570 B.R. 602, 610 (Bankr. E.D. Tenn. 2017) ("In light of the Supreme Court's recent ruling in *Jevic*, parties who seek approval of settlements that provide for a distribution in a manner contrary to the Code's priority scheme should be prepared to prove that the settlement is not only "fair and equitable" …, but also that any deviation from the priority scheme for a portion of the assets is justified because it serves a significant Code-related objective.")

NORDLICHT

Mark A. Nordlicht (the "debtor") founded and managed Platinum Management (NY) LLC, the general partner and investment advisor to a set of hedge funds named Platinum Partners Value Arbitrage Fund LLP ("PPVA"). In early 2016, two PPVA investors (the "Stadtmauers") requested that PPVA pay out their interest in the funds. Because, PPVA lacked sufficient liquidity to pay the Stadtmauers, PPVA instead issued the Stadtmauers two promissory personally guaranteed by the debtor.

PPVA later defaulted on the notes, but the debtor refused to honor the guaranty. The Stadtmauers then commenced an arbitration proceeding to enforce the guaranty, and on January 10, 2020, were awarded approximately $15 million by the arbitrator. Shortly afterward, the Stadtmauers sued the debtor in federal district court in New York to confirm the arbitral award.

While that action was still pending, the Stadtmauers filed an action on February 5, 2020, in New York state court to collect on the award. In addition to a money judgment against the debtor on the guaranty, the complaint stated causes of action under New York law against the debtor and various affiliated business entities for avoidance of actual and constructive fraudulent transfers, alter ego/veil piercing, and interim *ex parte* relief in the form of prejudgment orders of attachment against two pieces of real estate allegedly owned by the debtor in New York but held in the name of his wife, Dahlia Kalter. In their complaint, the Stadtmauers alleged that the defendants engaged in a sprawling scheme by which the debtor and his wife transferred millions of dollars in assets to various entities controlled by the debtor in an effort to make the debtor judgment proof and thereby defraud his creditors.

After the state court granted the *ex parte* relief, the Stadtmauers filed notices of attachment on the two parcels of real property, which were later confirmed by the state court over the debtor's objection that service of the attachment notices was improper.

On June 29, 2020, the debtor filed a chapter 7 petition in the Southern District of New York, whereupon the state court action was stayed. That action was later removed to the bankruptcy court as an adversary proceeding.

In October 2020, the Stadtmauers filed a proof of secured claim against the bankruptcy estate in the amount of the $15 million arbitral award. The proof of claim stated that the claim was secured because a sheriff's levy pursuant to the state court's order of attachment endowed them with judicial liens on the properties.

The chapter 7 trustee negotiated a settlement with the other defendants in the adversary proceeding (consisting of the original corporate defendants, among others), and the debtor's mother, Barbara Nordlicht, who was not a party in the lawsuit, of all claims that could be asserted on behalf of the chapter 7 estate in exchange for $1.5 million. In November 2020, the trustee sought bankruptcy court approval of the settlement.

The Stadtmauers objected to the proposed settlement and counteroffered $2 million to purchase the claims. The trustee initially agreed to the Stadtmauers' proposal and sought bankruptcy court approval of the sale of the estate's claims free and clear of any competing interests under sections 363(b) and 363(f) of the Bankruptcy Code, subject to higher and better offers.

On April 22, 2021, the defendants and Barbara Nordlicht submitted a counteroffer to purchase the claims whereby Barbara Nordlicht would: (i) pay $2.5 million to the estate to be distributed to unsecured creditors; (ii) reimburse the estate for any costs arising from defending against the Stadtmauers' claims related to their asserted liens; and (iii) fully indemnify and hold harmless the estate to the extent that Barbara Nordlicht would pay an additional $2.5 million to the estate in the event that the Stadtmauers prevailed on their causes of action and collected on any portion of the $2.5 million as higher-priority secured creditors.

At the sale hearing, the Stadtmauers declined to increase their offer and argued that the transaction could not be approved because it provided for payments to unsecured creditors without providing for full payment of the Stadtmauer's secured claims,

thereby constituting a priority-skipping distribution prohibited by *Jevic*.

The bankruptcy court overruled the Stadtmauers' objection, concluding that their liens were in *bona fide* dispute and ruling that the claims could be sold free and clear of the disputed liens under section 363(f)(4) of the Bankruptcy Code as part of the trustee's settlement with the defendants and Barbara Nordlicht. The bankruptcy court approved the settlement and sale on June 2, 2021.

The Stadtmauers appealed the order to the district court, which affirmed, ruling that: (i) the trustee had the authority to settle claims that were estate property; (ii) the settlement did not violate *Jevic* in light of the *bona fide* dispute regarding the validity of the Stadtmauers' judicial liens; (iii) in approving the settlement, the bankruptcy court properly applied the factors set forth in *In re Iridium Operating LLC*, 478 F.3d 452 (2d Cir. 2007), in determining that the proposed settlement did not fall "below the lowest point in the range of reasonableness"; and (iv) the bankruptcy court did not commit any error of law or clear error of fact in finding that the April 22, 2021, offer was better than the Stadtmauers' previous $2 million offer.

The Stadtmauers appealed the district court's ruling to the Second Circuit.

THE SECOND CIRCUIT'S RULING

A three-judge panel of the Second Circuit affirmed the district court's decision.

Writing for the panel, U.S. Circuit Judge Robert D. Sack explained that the chapter 7 trustee had the power to settle or sell the debtor's causes of action because such claims were property of the bankruptcy estate pursuant to section 541(a)(1) of the Bankruptcy Code, which defines "estate property" to include "all legal or equitable interests of the debtor in property as of the commencement of the [bankruptcy] case." Only the trustee had that power, he explained, because such causes of action—for actual and fraudulent conveyance and alter ego/veil piercing—were "general claims" belonging to the estate rather than the "personal claims" of individual creditors (here, the Stadtmauers) or, in the case of the veil piercing cause of action, a remedy that the trustee was powerless to sell under applicable non-bankruptcy law. *Nordlicht*, 2024 WL 3818696, at **7–12.

The Second Circuit panel rejected the Stadtmauers' argument that the state court attachment orders gave them valid judicial liens on the two New York properties. Judge Sack agreed with the lower courts that the estate's claims could be sold and settled by the trustee free and clear of the Stadtmauers' purported secured interest under section 363(f)(4) of the Bankruptcy Code because that interest was subject to *bona fide* dispute.

In fact, Judge Sack went further. He explained that, regardless of whether the debtor was properly served with the notices of attachment, those notices were void because applicable New York law provides that a levy is void 90 days after service unless the sheriff has taken custody of the property or collected on the debt, or the court has granted an extension of the 90-day period, none of which occurred. *Id.* at *14 (citing N.Y. C.P.L.R. 6214(e)). In addition, he reasoned, that deadline was not tolled upon the debtor's bankruptcy filing under section 108(c) of the Bankruptcy Code because the New York properties were held by non-debtor holding companies. The Second Circuit panel was not persuaded by the Stadtmauers' argument that another provision in New York law—N.Y. C.P.L.R. 6216—without any 90-day deadline should apply to their attachments on the real property, finding that the

Stadtmauers had waived the argument by failing to raise it properly in the bankruptcy court. *Id.* at *15.

The Second Circuit panel ruled that the bankruptcy court did not abuse its discretion by approving the settlement in accordance with the factors set forth in *Iridium*. Judge Sack explained that the bankruptcy court properly found, based on "numerous infirmities … in the Stadtmauers' theory that they held valid judicial liens giving them first priority in recovering on their fraudulent-conveyance and alter-ego claims," and the existence of "potential bankruptcy law defenses," that the settlement's future benefits, including greater recovery by the estate, indemnification, and reimbursement of the estate's legal fees, outweighed the possibility that the Stadtmauers might prevail in the adversary proceeding. *Id.* at **17–18. He also noted that the paramount interests of creditors were better served by the proposed settlement, evidenced by, among other things, the absence of any objections to it by any creditors other than the Stadtmauers. *Id.* at *18.

The Second Circuit also rejected the argument that the settlement violated the "basic system of priority" in bankruptcy cases, "as articulated in *Jevic*."

Judge Sack explained that the Stadtmauers appeared to be making two separate arguments in support of this contention: (i) the $2.5 million to be paid to the estate by Barbara Nordlicht for distribution to unsecured creditors impermissibly skipped over the Stadtmauers' secured claims; and (ii) the $2.5 million indemnity guaranteed by Barbara Nordlicht also violated *Jevic*'s priority scheme because those funds should first be used to satisfy the Stadtmauers' secured claims. Both arguments, he emphasized, were meritless.

Initially, Judge Sack observed that "[w]e leave aside the issue whether *Jevic*, which analyzed a structured dismissal of a bankruptcy action [sic], applies to sale hearings under sections 363(b) and (f) at all." He wrote that "[w]e assume without deciding that it does." *Id.* at *19. Even so, the Second Circuit panel agreed with the lower courts that "[u]ntil the [Stadtmauers] have established in the underlying bankruptcy proceedings that their liens are valid, their claims are not secured … [a]nd as unsecured creditors, they have no priority over other unsecured creditors." *Id.*

In *Jevic*, Judge Sack emphasized, the Supreme Court rationale was premised on the "principled view" that *final* distributions of estate assets, such as distributions made as part of a structured dismissal, must adhere to the Bankruptcy Code's priority scheme. The Court expressly noted that this limitation likely does not apply to "*interim* distribution[s] of settlement proceeds" as it would be more "difficult to employ the rule of priorities [there] because … the claims against [the estate] are *not yet fully resolved*." *Id.* (quoting *Jevic*, 580 U.S.at 467) (internal quotation marks omitted).

According to Judge Sack, that was precisely the case here. He explained that the bankruptcy court repeatedly emphasized that approval of the settlement at the sale hearing was not a final disposition of the claims against the estate. Thus, Judge Sack wrote, "[a]ny distribution of proceeds from the Settlement were … interim distributions, evading *Jevic*'s application of ordinary priority rules." *Id.* He further noted that the Stadtmauers were "free to pursue precisely the recourse that the petitioners in *Jevic* could not: assert the validity and priority of their claims at a later stage in the bankruptcy litigation." *Id.*

Finally, the Second Circuit panel ruled that the settlement's indemnity provision also did not offend *Jevic* and the Bankruptcy Code's priority scheme because, in the event the Stadtmauers succeeded in their claim that they hold valid, higher priority liens: (i) the $2.5 million paid for the claims represented the value of such claims, and the Stadtmauers' liens would therefore be satisfied upon receipt of that amount; and (ii) the bankruptcy estate had no interest in, and the Stadtmauers' lien therefore could not extend to, any payments that might be made to unsecured creditors pursuant to the indemnity provided by non-debtor, non-party Barbara Nordlicht.

OUTLOOK

The Second Circuit's ruling in *Nordlicht* is emblematic of the challenges faced by bankruptcy and appellate courts in the aftermath of the Supreme Court's ruling in *Jevic*. Most courts have found a way to steer clear of *Jevic*'s proscription by either limiting the decision to its particular facts or concluding that a proposed priority-aberrant distribution falls within one of the exceptions outlined by the Court. The principle significance of *Nordlicht* is that it illustrates the flexibility afforded to bankruptcy courts to approve negotiated settlements or asset sales (or other similar deals) that are essential either to the orderly liquidation of estate assets to maximize creditor recoveries or to create adequate support for confirmation of a chapter 11 plan.