ASPATORE THOUGHT LEADERSHIP

Bankruptcy and Financial Restructuring Law 2015

Top Lawyers on Trends and Key Strategies for the Upcoming Year

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Year 2015: A Battle for Equity Players and a War for Energy Companies Producing Fossil Fuels

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Introduction

I was asked to provide "thought leadership" as to legal trends emanating from developments over the recent year. I have more than thirty years' experience in the energy (coal, oil, gas, and solar) aviation, hospitality, telecommunications, automotive, steel, and health care industry cases, which have resulted in extensive knowledge of state and federal regulatory agencies such as the Environmental Protection Agency, Federal Aviation Administration, the Pension Benefit Guaranty Corporation, the FCC, and their state and local counterparts. Others have noted that I have been successful in spotting trends including economic downturns in many of these industries.

Recent court decisions, proposed governmental regulations, and new theories of legal liability involving a range of industries, from the private equity industry to the energy industry, have most affected the area of bankruptcy and financial restructuring strategies within the past year. These changes have spurred attempts to draft protections in the enforcement of provisions in bond indentures; increased awareness of threats to private equity sponsors for the liability of their portfolio companies; and required energy companies to address a suffocating environmental regulatory regime and evolving theories of liability against them.

The legal developments in the financial industry represent the ongoing battle to shift economic risk. Generally, these trends are contrary to economic growth (but, ironically, may be a boon for restructuring professionals). This is because parties such as bondholders may not get the benefit of their bargain due to an inability to rely on contractual obligations such as make-whole provisions if the obligor commences a bankruptcy case. Attempts to draft these provisions in bond documents to compensate for the effect of bankruptcy have failed. This is a disincentive to invest in, or at least increases the pricing of, a deal. Further, legal decisions have addressed threats to impose liability on private equity funds for liabilities of their portfolio companies. For example, parties have sought to impose WARN Act[1] liability and pension liability on private equity sponsors that have spun off subsidiaries or whose portfolio companies are in bankruptcy.

[1] Worker Adjustment and Retraining Act, Pub. L. No. 100-379, 102 Stat. 890 (1988).

The economic risk of that liability will be imposed and provisions not enforced will chill investment but also affect restructuring because additional resources will be needed such as additional due diligence and attention to legal corporate structure.

The legal developments in the energy industry are less of a battle and more of a war that also creates significant economic risk. This battleground ranges from hostile environmental regulation to increased risk of litigation against producers of fossil fuels. The "War on Coal" is a reality and has a great deal of momentum. The US Environmental Protection Agency's (EPA's) proposed regulations and other proposals to reduce carbon dioxide emissions threaten the coal industry, potentially leading to power shortages, as coal companies are forced into bankruptcy or out of business entirely—with resulting job loss—reducing the supply of reliable, inexpensive energy. It will eliminate competition to other energy sources, thereby driving up energy prices.

Creative theories of legal liability against oil and gas producers also create significant litigation risk. For example, one commentator asks, "Is Fracking the New Asbestos?" The significance of this question is that asbestos litigation in the 1990s resulted in mass, multi-jurisdictional litigation against companies, forcing them to commence bankruptcy cases to address billions of dollars of potential liability. These developments may be a boon for plaintiffs' lawyers, but are harmful to the energy industry.

With these recent developments in mind, it is important to advise investor clients to audit existing investments to measure not only investment risk, but litigation risk, as well. A similar approach is for energy companies to employ defensive strategies. This all starts with a fundamental strategy to ensure liability "firewalls" are in place. For example, private equity companies should ensure the portfolio companies they manage keep a reasonable degree of separateness so as not to impose a form of joint liability, such as pension control group liability or single employer liability. Similarly, energy companies should be especially careful to follow corporate formalities to avoid piercing the corporate veil litigation, and to contain other risks of liability to only the entities directly responsible for those liabilities.

Victories and Defeats for Equity Players and Bondholders

Make-Whole Provision Considerations

Two cases recently addressed make-whole premiums in bond documents. These provisions attempt to compensate bondholders for the loss of anticipated interest if there is an early redemption or repayment of the bonds. Low interest rates have caused debtors to seek to refinance their bonds; in turn, the bondholders in these actions seek to recover the full interest rates—which accounts for hundreds of millions of dollars—required under their contracts through "make-whole" provisions.

One such case is *In re MPM Silicones, LLC*.[2] In *MPM Silicones*, the court held that, under the language of the promissory notes, the bankruptcy filing caused an automatic acceleration of the underlying debt. Therefore, the court decided the company was not "prepaying" anything and need not pay the make-whole premium. Therefore, the bondholders were not entitled to the make-whole premium. A similar make-whole fight is occurring in the *In Re Energy Future Holding*[3] case involving $665 million in premiums.

Because of these cases, practitioners must draft bond documents to better set the amounts due upon prepayment or maturity. For example, contracts should make clear that even if there is an automatic acceleration, the make-whole premium is due. In addition to drafting considerations, parties must be sure the premium is not unreasonable in that its payment would cause the borrowing company to become insolvent. Bankruptcy courts, as courts in equity, are inclined not enforce premiums that can be construed as a penalty or that are otherwise unreasonable. Generally, these rulings are another blow to the bondholders who argue they are not getting the benefit for their contractual bargain, which in turn may chill future financings; however, if payments of the premiums would render the borrowing company insolvent, payment of the premiums is unlikely in any event. Therefore, the overall solvency of the enterprise and overall corporate group must remain a consideration in any investment or restructuring.

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[2] *In re MPM Silicones, LLC*, 518 B.R. 740 (Bankr. S.D.N.Y. 2014).

[3] *Delaware Trust Co. v. Energy Future Holdings Corp. (In re Energy Future Holdings Corp.)*, 513 B.R. 651 (Bankr. D. Del. 2014).

Threat of Liability Against Private Equity Companies

There have been repeated attempts to impose the liability of portfolio companies to private equity sponsors. However, these attempts have been unsuccessful.

Threat of ERISA Liability Against Private Equity Firm

The First Circuit recently issued an Employee Retirement Income Security Act (ERISA)[4] opinion in *Sun Capital Partners III LP v. New England Teamsters & Trucking Industry Pension Fund.*[5] The *Sun Capital* case involved Scott Brass, an employer participating in a multi-employer pension plan (MEPP). Sun Trust—a private equity company—was the owner of Scott Brass through various investment funds (70 percent ownership through one fund, and 30 percent through another). In 2008, Scott Brass was the subject of a bankruptcy case.

The MEPP was underfunded. The MEPP plan administrator demanded payment of Scott Brass's proportionate share of the MEPP's unfunded liability and the withdrawal liability from Scott Brass and the Sun Trust Funds. When Scott Brass filed for bankruptcy, it withdrew from the multi-employer pension fund. After the fund was unable to secure the withdrawal liability payment directly from Scott Brass, it attempted to obtain the money from Sun Capital, arguing the private equity fund was a trade or business in control of the debtor company and was responsible for its withdrawal payments.

The Court held that a private equity fund can be a "trade or business" for purposes of the ERISA statute, which can result in the fund being liable for the unfunded pension liabilities of its portfolio company. The decision did not directly result in liability for the private equity funds; however, the First Circuit's ruling concluded fund investors' common activities satisfied one-half of the two-prong test of determining the fund and its portfolio company are a single employer for ERISA purposes (the other test being the common control requirement).

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[4] Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829.

[5] *Sun Capital Partners III, LP v. New England Teamsters & Trucking Indus. Pension Fund*, 724 F.3d 129 (1st Cir. 2013).

Threat of WARN Act Liability Against Private Equity Firm

On September 29, 2014, the United States District Court held that a private equity sponsor was not liable for violations of the WARN Act due to its portfolio company's alleged failure to comply with the Act.[6] This case involved another portfolio company of the private equity firm, Sun Capital. Under the WARN Act, employers must provide employees with sixty days advance notice of mass layoffs or plant closings or risk liability for lost wages, benefits and other penalties. One day before commencing a Chapter 11 bankruptcy case, the portfolio company, Jevic Transportation, Inc., sent a termination notice to its employees. As a result, employees sued both the private equity firm and the portfolio company for violations of the WARN Act. The employees argued that the private equity firm and the portfolio company were "single employers" for purposes of the Act and both were therefore liable.

The court evaluated the Third Circuit's standards for determining whether the employer and a related entity such as a parent company is a "single employer" for purposes of WARN Act liability. These factors are:

(1) common ownership,
(2) common directors and/or officers,
(3) de facto exercise of control,
(4) unity of personnel policies emanating from common source, and
(5) dependency of operations.

The key issue was the exercise of control. The court found that two factors were satisfied; Sun did have common ownership and common officers and directors. The court stated that mere exercise of control pursuant to ordinary incidents of stock ownership is not enough to constitute de facto control. The question was whether one company was the decision maker responsible for the employment practice giving rise to the litigation. The decision to shut down the company was independently made by Jevic with the advice of professionals and turnaround consultants. The court also found the other two factors did not apply primarily because there was no

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[6] *Czyzewski v. Jevic Transp., Inc. (In re Jevic Holding Corp.)*, 492 B.R. 416 (Bankr. D. Del. 2013).

evidence to suggest Sun's conduct was inconsistent with mere stock ownership. As a result, Sun and its portfolio company were not a single employer liable under the WARN Act.

The recent attempts to hold private equity firms responsible for the liabilities of their portfolio companies is a reminder that significant efforts must be made to keep management of the private equity company at arm's length with the decision making of the portfolio to avoid arguments that operations of the portfolio company is controlled. As is the case with the Jevic case, the portfolio company should receive independent counsel to maintain independence. The private equity company must take care to exercise only that control that is normally exercised by virtue of its stock ownership of the portfolio company.

These decisions also affect strategies that should be employed in 2015. The strategy is really a return to the fundamental tenets of a corporation's law: that corporate formalities should be carefully adhered to. For example, even though a private equity fund will likely have representatives of the portfolio company's board of directors by virtue of its stock ownership, the decisions of the board should not be unduly influenced by the private equity firm and should be advised by independent counsel. The board should keep careful minutes of its meeting and reflect decisions that were made based upon independent counsel.

War in the Energy Industry

Recent developments have produced a many battlegrounds for the energy industry for the upcoming year. The use of hydraulic fracturing technology, known as "fracking," has created a boom in natural gas production. This has led to lower natural gas prices, making it more difficult for coal producers to compete. This combined with a regulatory environment hostile to the coal industry has led to recent bankruptcies of coal mining companies such as James River Coal Company, Trinity Coal Corporation, America West Resources Inc., Patriot Coal Corporation, and others. This creates a grave risk if natural gas prices go up, coal will no longer provide the competition necessary to keep energy prices low. Proposed regulations regarding existing coal-fired power plants will further constrain the coal industry. The next

targets will be natural gas producers now benefiting from fracking as opponents develop litigation strategies to attack the production of fossil fuels.

The Effects of the EPA's Update to Its Clean Power Plan on the Coal Industry

The EPA's Clean Power Plan[7] was first proposed on June 2, 2014, with plans to finalize the rule in June 2015. The proposed rule:

> Requires existing power plants to reduce their carbon dioxide emissions by 30 percent from 2005 levels by the year 2030; establishes new source performance standards for new and existing power sources under the Clean Air Act (CAA);[8] and tasks states with the primary role of setting up emission-reduction programs within EPA guidelines. Each state will be required to set up its own program to comply with its emissions budget.

EPA Hearings on the Clean Power Plan

The EPA held two days of public hearings on the Clean Power Plan at venues across the country. The plan had plenty of support—and plenty of opposition. Comments included declarations the EPA has "no legal foundation" to authorize the proposed rule, concerns the EPA must address issues regarding the continuing reliability of the country's electricity supply if coal is phased out as a power source, and accusations the EPA is picking winners and losers in the energy economy.

The House Energy and Power Subcommittee held further hearings on the issue. During these hearings, the Federal Energy Regulatory Commission (FERC) chairwoman stated the reliability of the US power grid could be preserved with regional cooperation, preplanning, and infrastructure developments. FERC acknowledged the proposed rule is likely to lead to increases in power costs. Over 750,000 comments were lodged. Due to this unprecedented number of comments, the period of public comment was extended.

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[7] Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 79 Fed. Reg. 34829 (proposed June 18, 2014) (to be codified at 40 C.F.R. pt. 60) (hereafter referred to as the "Clean Power Plan").

[8] Clean Air Act, Pub. L. No. 88-206, 77 Stat. 392 (1963).

Litigation Related to Proposed EPA Rulemaking

On June 18, 2014, Murray Energy Corporation filed a petition for extraordinary writ with the District of Columbia Circuit.[9] The claims included the following.

- The proposed rulemaking is an illegal *ultra vires* rulemaking. The EPA would be double regulating because emissions from existing coal-fired power plants are already regulated under Section 112 of the CAA.[10]
- Prohibiting the proposed rule at this stage is "uniquely appropriate" in this case. Although administrative rules typically cannot be challenged until they become finalized, Murray argues it is within the court's power to take action to stop a proposed rule under the "extraordinary circumstances" presented here.
- Significant harm now is being imposed on energy utilities that must make massive financial decisions based on these rules. Murray argues the court will derive no benefit from waiting until the rule is finalized to act.

On June 25, 2014, nine states, spearheaded by West Virginia, filed an amicus brief with the District of Columbia Circuit. The amicus brief argues the proposed rule violates the literal terms of the CAA; the EPA cannot use a clerical error in the 1990 CAA Amendments to manufacture statutory ambiguity where none exists; and, even if the EPA's underlying premise is correct, the agency's interpretation still is improper under the rules of statutory construction.

Given the unprecedented number of comments to its proposed regulation, the question is whether the EPA will be influenced by the comments to modify its approach or plow ahead with the regulations even if there is a negative economic impact. Litigation such as that brought by Murray Energy and joined in by various states is a valiant attempt to bring attention to the negative economic consequences of limiting and potentially eliminating coal as a power source and thereby increasing prices and

[9] *See Murray Energy Corp. v. EPA*, No. 14-1112 (D.C. Cir.).
[10] 42 U.S.C. § 7412.

potentially decreasing energy supply. However, it is difficult to predict whether efforts to rein in stifling regulation will prevail in the current political environment. The next target for those opposing the use of fossil fuels as an energy source is companies using fracking technology.

Fracking Liability in the Energy Industry

A commenter has stated, "Fracking-related litigation is underway in the Unites States with issues similar to those raised in the toxic tort litigation of the 1990 . . . [I]t is potentially one of the most complex litigation arenas given the wide range of claims and [insurance] policies that could be impacted."[11] Hence, the question asked by a commentator: "Is Fracking the new Asbestos?"

This comment should alarm anyone familiar with the toxic tort litigation of the 1990s that resulted in mass tort lawsuits across the country and caused a series of significant corporate bankruptcies. These bankruptcy cases were commenced to address billions of dollars of potential liability against companies including Johns Manville, W. R. Grace, Pittsburgh Corning, North America Refractories Company, and others. The underlying claims consisted of personal injury claims based on exposure to asbestos, property damage and other claims. These allegations often gave rise to criticism that some claims were fraudulently manufactured and based on faulty medical science. Nevertheless, to avoid litigation costs and potential liability, these claims were often channeled to settlement trusts for further determination.

Fracking is the common term for hydraulic fracturing, which is a drilling process used to extract underground oil and gas trapped in shale rock formations. The process involves well construction, acquisition of source water, the "fracturing" itself (using high water pressure and other stimulants) and wastewater disposal. Regulatory schemes parallel these steps by their focus on concerns relating to proper casings for shale gas wells to avoid contamination of underground water, the disclosure of fracking solution and larger quantities of waste water being disposed of properly. Theories of liability have evolved from every step of this process. Claims

[11] NELSON LEVINE DE LUCA & HAMILTON, THE FUSS OVER FRACKING: AN EXAMINATION OF THE INSURANCE ISSUES ASSOCIATED WITH HYDRO-FRACKING (2013). *See* BARBARA HADLEY ET AL., FRACKING: RISKS AND REWARDS (2014).

against operators relate to contamination of ground water resulting from faulty casings, improper drilling, and improper disposal giving a rise to exposure to alleged toxic chemicals. However, contamination causation claims are complicated by the fact that some alleged contaminates such as methane, iron, arsenic, barium, and manganese are often naturally found in the subsurface.[12]

The question as to "whether fracking is the new asbestos" should be answered with an emphatic, "No." Although some diagnoses of asbestosis were found to be fabricated, many cases were supported by medical evidence. Property damage resulting from asbestos removal was measureable. In fracking, the chemicals used in fracking simply have not been found to be more toxic than what is already present in the subsurface or at least are not causing personal injury. Property damages claims are from neighboring property owners and pale in comparison to property damage claims relating to asbestos removal.

However, it is reasonable to conclude that plaintiffs will continue to advocate theories of liability and attempt to impose them on those oil and gas producers using fracking technology. Companies must be aware of the theories of liability, keep abreast of the developing science relating to the process and monitor governmental regulatory enforcement actions.[13]

Trends in Litigation by Environmental Advocacy Groups

- Environmental advocacy groups such as the Sierra Club institute litigation across the country against energy companies.
- Defendants in these actions often challenge the standing of such groups to bring this litigation, but it is difficult to prevail. For example, standing before the Pennsylvania Environmental Hearing Board depends upon whether a department action has adversely affected an individual appellant.[14] To establish standing, individuals must show a "direct and substantial interest" in the subject matter of the litigation, as well as a "sufficiently close causal connection

[12] HADLEY ET AL., *supra* note 9.
[13] *Id.*
[14] *Pa. Game Comm'n v. Dep't of Envtl. Res*., 555 A.2d 812, 815 (Pa. 1989).

between the challenged action and the asserted injury to qualify the interest as "immediate" rather than "remote."[15] The Board has repeatedly held that an aesthetic appreciation or enjoyment of an environmental resource, such as using a stream for fishing, can confer standing.[16]

- A trend is developing in that in addition to alleged regulatory violations, the environmental groups allege violations of a given State's constitution. For example, Section 27 of the Pennsylvania Constitution is also known as the Environmental Rights Amendment and states that "[a]s trustee of [public natural] resources, the Commonwealth shall conserve and maintain them for the benefit of all the people." The language of the amendment applies public trust protections to all "public natural resources," which could include air, water, public lands, and extractive resources such as coal. Creative plaintiffs are, no doubt, brainstorming ways to use the constitutional provisions such as the Environmental Rights Amendment to challenge other state actions or inactions that negatively affect public trust resources.
- Environmental groups are also not adverse to recovering legal fees as a part of the resolution of the actions they bring. In the Longview Power, LLC bankruptcy case,[17] West Virginia Highlands Conservancy, Inc., an environmental conservation advocacy group, and the Sierra Club (plaintiffs) alleged certain debtor entities (debtors) discharged and continued to discharge pollutants in excess and in violation of permits issued under various environmental statutes. Despite the debtors' view that the plaintiffs' allegations were invalid, the parties entered into a consent decree in order for the debtors to avoid the expense and risk of litigation. The plaintiffs will receive $150,000 for legal costs in addition to other terms of the consent decree.

Companies must of course develop litigation defense strategies to address this litigation. In addition, companies should restructure the corporate group if necessary to isolate liability to the member of the corporate group

[15] *William Penn Parking Garage, Inc. v. City of Pittsburgh*, 346 A.2d 269, 286 (Pa. 1975).
[16] *Philip O'Reilly v. DEP and JDN Dev. Co., Inc*., 2000 E.H.B. 723 (2000).
[17] *In re Longview Power, LLC*, 516 B.R. 282 (Bankr. D. Del. 2014).

that is directly responsible for the liability. However, even if these strategies are employed, they may be subject to challenge as will be discussed below.

Legacy Liabilities: Related Restructuring and Bankruptcy Issues

A strategy to insulate companies from liability is to review the existing corporate structure and make efforts to isolate the risk of liability to members of the corporate group that is directly liable for alleged damages and consider spinning off the companies with the greatest risk of liability from the corporate group. It is important to keep in mind that these efforts will be scrutinized and challenged after the fact. For example, a highly profitable energy business spun off assets to a newly formed company in an attempt to protect the existing business from massive environmental liabilities and other tort liabilities. The primary focus of the restructuring was to separate the company's profitable oil and gas business from the rest of its assets, which were comprised of a comparatively small chemical business along with nearly all of the corporate family's legacy environmental and tort liabilities. The restructuring was challenged as a fraudulent transfer by a litigation trust established under a bankruptcy plan. In December 2013, a New York bankruptcy court, after a lengthy trial, concluded a spin-off was a fraudulent transfer with potential damages in excess of $20 billion.

This case, *Tronox Inc. et al. v. Kerr McGee et al*,[18] will have significant impact on companies with substantial liabilities that attempt to restructure outside of bankruptcy. This is partially because the bankruptcy court:

- Relied on expert testimony on solvency rather than on market evidence of solvency (including a capital raise of unsecured debt and public equity);
- Avoided asset transfers that began seven years before the bankruptcy filing, even though the applicable fraudulent transfer law provides for a four-year reach-back period, because the earlier transfers were part of a "single integrated scheme" culminating within the reach-back period; and
- Awarded damages in an amount that far exceeded the amount of unpaid creditor claims.

[18] *Tronox Inc. v. Kerr McGee Corp. (In re Tronox Inc.)*, 503 B.R. 239 (Bankr. S.D.N.Y. 2013).

Following years of litigation, a settlement resolved the litigation and provided cash funding to the direct and indirect beneficiaries of a litigation trust, established under the bankruptcy plan, on account of their bankruptcy environmental claims and tort claims. The settlement agreement provides for the litigation trust to receive $5.15 billion plus interest in cash. The net proceeds will be distributed to the litigation trust beneficiaries in accordance with the distribution scheme that will provide for the investigation, remediation, cleanup, and recovery of natural resource damages and other compensation with respect to certain environmental sites, and payment due to bankruptcy tort claims.

Conclusion

A transactional lawyer's primary role is to ensure as may risks as possible are identified and addressed. Transactional lawyers in the *In re MPM Silicones, LLC*[19] case discussed above attempted to draft "make whole" provisions to compensate bondholders for loss of interest due to early redemption of bonds. However, the bankruptcy court found that the filing of the obligor's bankruptcy case caused the acceleration of the bonds and was not a prepayment giving rise to the provision. This is an example as to how bankruptcy can ultimately frustrate a transaction. Bankruptcy utilizes concepts of equity that may re-cast the existing agreements of the parties in an effort to ensure a fair distribution of assets and the ratable treatment of creditors. Another example is the restructuring that occurred in the *Tronox* case that was met with a fraudulent transfer challenge. As discussed also above, creditors in bankruptcy cases will attempt to create theories of liability such as the pension and WARN Act Liability against parties such as private equity firms to provide a source of payment for portfolio companies in bankruptcy. Mass litigation and a hostile regulatory environment may also force companies into bankruptcy as is taking place in the coal industry and may threaten energy companies using fracking technology. You can, however, minimize the effects of the bankruptcy process on your client's rights and remedies with document drafting that does not overreach, and corporate restructuring that maintains an awareness of the solvency of the enterprise and considers "what ifs." This requires understanding and experience.

[19] *In re MPM Silicones, LLC*, 518 B.R. 740 (Bankr. S.D. N.Y. 2014).

The risk of bankruptcy and other risks must be kept in mind but should not prevent the formulation and execution of strategies of risk management. This includes both restructuring and contingency planning. During the next six months, clients should conduct a form of internal audit for risk management purposes. The audit should include consideration of insurance coverage and other mechanisms to mitigate litigation exposure; review of the corporate structure and makeup of the board of directors; review of pension liabilities; and solvency analysis. Clients should approach their audits strategically. Some or all of these steps may not be appropriate, depending on whether the company is financially distressed.

Creditors and Private Equity Sponsors will face the ongoing battle to shift economic risk especially when a portfolio company is the subject of a bankruptcy case. The producers of fossil fuels in the energy industry will face increasing litigation challenges from environmental advocacy groups and restrictive regulation. It is especially true that the War on Coal will rage on. In the case of the energy industry, what has not been faced before is the coordinated onslaught of governmental regulation, litigation, and public opinion.

Key Takeaways

- As a result of creative litigation against energy companies, such companies should be especially careful to follow corporate formalities to avoid piercing the corporate veil, and to contain other theories of liability to only the entities directly responsible for those liabilities.
- It is possible to minimize the effects of the bankruptcy process on your client's rights and remedies with document drafting that does not overreach, and corporate restructuring that maintains an awareness of the solvency of the enterprise and considers "what ifs."
- During the next six months, clients should conduct risk-management audits that include consideration of insurance coverage and other mechanisms to mitigate litigation exposure; review of the corporate structure and makeup of the board of directors; review of pension liabilities; tax considerations; and solvency analysis.
- Practitioners must begin to draft bond documents that better set the amounts due upon prepayment or maturity, and ensure the premium is not unreasonable in that its payment would cause the borrowing company to become insolvent.

Robert P. Simons is a partner in Reed Smith LLP. Mr. Simons has extensive experience in resolving commercial disputes, litigation, bankruptcies, and restructuring matters in both "old" and "new" economy industries. He has experience as well in negotiating (in workouts, mediations, and restructurings) and enforcing and defending (in litigation or bankruptcies) the rights of energy suppliers; providers of goods and services; secured creditors; unsecured creditors and creditors' committees; junior debt and equity holders; troubled companies; and boards of directors in financial restructurings and reorganization matters. He has also represented the interests of asset and fund managers, including fiduciaries, in troubled company situations. Mr. Simons has represented numerous buyers and sellers of distressed assets, debt, and equity. His national practice has included appearances in more than twenty-five jurisdictions throughout the United States and is licensed to practice law in New York, Pennsylvania, Ohio, and West Virginia. Mr. Simons has experience in the energy (coal, oil , gas and solar), aviation, hospitality, telecommunications, automotive, steel, and health care industry cases, which have resulted in extensive knowledge of state and federal regulatory agencies such as the Environmental Protection Agency, Federal Aviation Administration, the Pension Benefit Guaranty Corporation, the FCC and environmental agencies.

Recent cases include serving as bankruptcy counsel in the mass tort Chapter 11 cases of North American Refractories Company, Harbison-Walker Refractories Company, and A. P. Green Industries, Inc.—each a former producer of asbestos products. In addition, Mr. Simons has recently represented a private equity firm in the restructuring of a company, including the resolution of officer and director liability claims for the benefit of the client. He also recently represented secured creditors in the Max & Erma's Restaurants bankruptcy case (a seventy-restaurant regional chain), Shubh Hotels (a 700-room hotel), and numerous distressed aircraft loans. He routinely represents companies in commercial transactions.
Mr. Simons has written on various topics for numerous trade and legal publications, including West's Publishing, The Journal of Commercial Bank Lending*,* The American Bankruptcy Law Journal*,* Norton's Annual Survey of Bankruptcy Law*,* The Bankruptcy Strategist, *and the* Journal of Bankruptcy Law and Practice.

Mr. Simons is a frequent lecturer on such legal topics as energy, environmental, officer and director liability, telecommunications, aviation, intellectual property, health care, real estate and bankruptcy issues. In this regard, he has made presentations nationwide for trade groups, lawyers, and students, including for the National Conference of Bankruptcy Judges, the Third Circuit Judicial Conference, the International Bar

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