ReedSmith

The business of relationships.℠

CR&B Alert

Commercial Restructuring & Bankruptcy News

FEBRUARY 2015, ISSUE 1

In This Issue:

MINORITY HOLDERS GAIN LEVERAGE THROUGH RECENT INTERPRETATION OF TRUST INDENTURE ACT

Peter S. Clark, II
Firmwide Practice Group Leader
Philadelphia

Minority holders often find themselves on the periphery of out-of-court restructuring negotiations, with little influence over the ultimate outcome. Two recent decisions, however, offer minority holders new leverage in restructuring negotiations where the applicable instruments are governed by the Trust Indenture Act of 1939.

In *Marblegate Asset Mgmt. v. Educ. Mgmt. Corp.*, No. 14-cv-8584 (KPF), 2014 WL 7399041 (S.D.N.Y. Dec. 30, 2014), the United States District Court for the Southern District of New York determined that section 316(b) of the Trust Indenture Act offers broad protection to minority holders against nonconsensual out-of-court debt restructurings. Section 316(b) provides that a holder's right to receive payment cannot be impaired or affected without the holder's consent. The question in *Marblegate* was whether this section should be read narrowly, as protection of the procedural right to demand payment, or broadly, as a substantive right to obtain payment. Construing section 316(b) broadly, the court concluded that involuntarily stripping a dissenting minority's ability to obtain payment of principal and interest through a debt reorganization that was brought about by a majority vote violates the Trust Indenture Act. The court confirmed its broad construction of section 316(b) merely two weeks later. Relying in part on *Marblegate*, the court in *MeehanCombs Global Credit Opportunities Funds, LP v. Caesars Entm't Corp.*, No. 14-cv-7091 (SAS), 2015 WL 221055 (S.D.N.Y. Jan. 15, 2015), held that an out-of-court debt restructuring that stripped minority holders of valuable guarantees, leaving only an empty right to assert a payment default against an insolvent issuer, is exactly the type of action that the Trust Indenture Act was designed to prevent.

By arming minority holders with additional leverage in out-of-court debt restructurings, distressed issuers may be forced to resort to chapter 11 of the Bankruptcy Code more often to effect their proposed reorganization plans. Indeed, the court acknowledged that the Trust Indenture Act was intended to force distressed issuers into bankruptcy if unanimous consent could not be obtained for an out-of-court restructuring. Minority holders' enhanced ability to use the Trust Indenture Act as leverage also may create new demands upon or headaches for indenture trustees, particularly in the absence of holder indemnification.

For more information on the potential ramifications of these and other recent decisions interpreting the Trust Indenture Act, I encourage you to contact my colleagues, Eric A. Schaffer, Esq., by telephone at (412) 288-4202 or email at eschaffer@reedsmith.com, or Luke A. Sizemore, Esq., at (412) 288-3514 or email at lsizemore@reedsmith.com.

NEW JERSEY JOINS NUMBER OF STATES CREATING SPECIALTY BUSINESS COURTS

Derek Baker
Partner,
Philadelphia

Jennifer Knox
Associate,
Philadelphia

New Jersey's state court system can be a confusing place for creditors seeking to enforce obligations. While creditors have a variety of state law rights (collection, replevin, foreclosure, etc.) those rights often have to be exercised in ways that can be challenging for lenders. New Jersey's court system requires foreclosures to be commenced in separate courts, while traditional collection actions – regardless of amount – are treated like many other smaller disputes and are "tracked" with a mandatory mediation process, a fixed discovery period, and an often rigid pre-trial process that makes a creditor's ability to pursue its remedies difficult to fit into the proverbial box.

In late 2013, the New Jersey Supreme Court commissioned a working group to evaluate options for the judiciary to better serve the needs of the business community. The Working Group – made up of judges, court officials, legislators and practitioners – agreed that the business community's goals of certainty, finality, and cost-effective resolution of business disputes, were significant reasons to propose enhancements to judicial administration. The Working Group evaluated various options (currently in use in other jurisdictions) to assess what would be the best method for achieving these goals in New Jersey.

Ultimately, the Working Group reported its finding in early 2014, and on November 13, 2014, the Supreme Court issued an order promulgating a new Complex Business Litigation Program ("Program"). The Program will apply to cases filed after January 1, 2015, for "Complex Commercial Cases." While "Complex Commercial Cases" has a definition that includes "claims among parties that arise out of business or commercial transactions and involve parties' exposure to potentially significant damage awards," the primary determiner is a case involving business disputes in excess of $200,000 (as designated by filing counsel on the case information statement). While these reforms are geared to construction disputes and varying business disputes (non-competes, etc.), the benefits of the Program can be enjoyed by creditors. Creditors seeking to resort to the state system to enforce their remedies in commercial actions will certainly benefit from this new Program.

Under the Program, each vicinage (i.e., county) in New Jersey will designate one judge with business background or familiarity with complex business issues to handle all complex commercial cases in that vicinage. The designated "commercial" judge will be assigned the case from inception and will move the case through the system with more tailored pre-trial processes and, ultimately, will handle the case (whether jury trial or non-jury trial) through trial and post-trial matters. Further, each Complex Business Litigation judge will be expected to issue a minimum of two written opinions per year that will help further develop New Jersey's body of business law. Finally, since the mandatory mediation program is often focused on resolving consumer or "small" disputes, complex

CONTINUED ON PAGE 4

CREDIT BID RIGHTS BOLSTERED IN TENNESSEE BANKRUPTCY COURT DECISION

Christopher Rivas
Associate, Los Angeles

In re RML Dev. Inc., 2014 Bankr. LEXIS 3024 (Bankr. W.D. Tenn. July 10, 2014).

CASE SNAPSHOT

The U.S. Bankruptcy Court for the Western District of Tennessee issued a decision bolstering secured creditors' rights to credit bid their secured claims against property, finding that credit bidding rights should be modified under Bankruptcy Code section 363(k) only in "extraordinary circumstances." After the Supreme Court unanimously confirmed the importance of secured creditors' credit-bidding rights in the *RadLAX* decision, numerous lower courts have nevertheless restricted credit-bidding rights for "cause," including for the mere reason that credit bidding would "chill" competitive bidding. (See my discussion of the *Fisker* and *Free Lance-Star* cases in the June 2014 *CR&B Alert*.)

The *RML* decision expressly disapproved these rulings, finding that only extraordinary circumstances such as "competing claims, collusion, or other fraudulent or bad faith acts" warranted modification of credit-bidding rights.

FACTUAL BACKGROUND

Debtor RML Development Inc. moved to sell residential apartment complexes under Bankruptcy Code section 363. The apartments were encumbered by first-priority security interests held by creditor SPCP Group III CNI 1, LLC ("Silverpoint"), which filed a secured claim of more than $2.5 million in the bankruptcy case. RML objected to the amount of the secured claim, arguing that the amount of the claim was only $2.3 million. An individual creditor also objected, asserting a superior lien under a constructive trust theory.

During the pendency of RML's case, one of its shareholders filed bankruptcy in New York, in which the bankruptcy trustee was alleging that RML operated as a Ponzi scheme.

The court initially approved an order permitting RML to sell the apartment complexes to a single purchaser for $1.7 million, pending due diligence. However, Silverpoint moved for a modified order permitting it to credit bid its secured claim pursuant to Bankruptcy Code section 363(k) as part of a competitive auction process. RML sought to prohibit or restrict Silverpoint from credit bidding because its secured claim was not "allowed" and was subject to pending objections. Also at issue was a competing claim from a creditor that argued it had equitable lien rights to the property that trumped Silverpoint's perfected security interest. The court granted Silverpoint's motion, entering a modified order permitting it to credit bid its interests, with certain exceptions.

COURT ANALYSIS

The court held that Bankruptcy Code section 363(k) provides that, "unless the court for cause orders otherwise," the holder of an allowed secured claim may credit bid such claim in a section 363 sale. The court held that its discretion to modify credit-bidding rights "for cause" was narrow, particularly in light of the Supreme Court's 2012 decision in *RadLAX*, in which the Supreme Court unanimously held that credit-bidding rights should be protected, although "conditions" may be imposed on a secured creditor's right to credit bid. The court analyzed the recent 2014 *Fisker* (Delaware Bankruptcy Court) and *Free Lance-Star* (Virginia Bankruptcy Court) decisions, in which bankruptcy courts limited a secured creditor's credit-bidding rights for "cause," but disapproved of the decisions (particularly *Fisker*), holding that "this court is not prepared to go as far as some of these courts and hold that the mere 'chilling' of third party bids is sufficient cause to justify modifying or denying a secured creditor's rights."

CONTINUED ON PAGE 6

MAKE-WHOLE PREMIUM DENIED, AND CRAMDOWN OF BELOW-MARKET INTEREST RATE NOTES ALLOWED

Chrystal Puleo
Associate, New York

In re MPM Silicones, LLC, 2014 WL 4436335 (Bankr. S.D.N.Y. Sept. 9, 2014))

CASE SNAPSHOT

The United States Bankruptcy Court, Southern District of New York, denied noteholders' claims against the debtors and affiliates for the payment of make-whole premiums upon the automatic acceleration of debt caused by the debtors' bankruptcy filing, and allowed secured creditors to be crammed down with replacement notes at below-market interest rates.

FACTUAL BACKGROUND

The debtors, Momentive Performance Materials Inc., manufacturers of silicone and quartz products, issued $1.1 billion of first-lien notes and $250 million of 1.5-lien notes in 2012 under indentures with substantially similar terms that were governed by New York law. The notes were due in full in 2020 and each indenture included an optional redemption provision that contained language that prohibited the noteholders from voluntarily redeeming the notes before October 15, 2015, except in circumstances triggering payment of the make-whole premium.

In April 2014, the debtors filed for protection under chapter 11 of the Bankruptcy Code. Shortly after the filing, the debtors also filed declaratory judgment actions challenging the noteholders' right to more than $200 million in claims for make-whole premiums. Under the proposed plan of reorganization that the debtors put forth, the noteholders would receive (i) payment of their claims in full in cash, without a make-whole premium, if they voted in favor of the plan;

CONTINUED ON PAGE 4

New Jersey Joins Number of States Creating Specialty Business Courts—continued from page 2

commercial cases in the Program would not be subject to the court's presumptive mediation program, although all judges will likely encourage the parties to engage in mediation with the parties' consent.

Unfortunately, the program does not apply to commercial foreclosures. Yet, the centralized foreclosure process in New Jersey has made significant strides to ease the "delay" with that program. Those foreclosure reforms – coupled with this new Complex Business Litigation Program – will certainly afford creditors the opportunity to better navigate the system with an eye toward a prompt and efficient means to having claims heard and resolved.

Make-Whole Premium Denied, and Cramdown of Below-Market Interest Rate Notes Allowed—continued from page 3

or (ii) seven-year replacement notes in the face amount of their allowed claims, bearing a below-market interest rate equal to the applicable Treasury rate plus a modest risk premium, and the right to litigate their entitlement to the make-whole premiums, if they rejected the plan.

The noteholders overwhelmingly voted to reject the plan and filed objections to confirmation. The noteholders argued that they were entitled to the make-whole premiums in the indentures based on the automatic acceleration of the debt resulting from the bankruptcy filing, and the debtors' early repayment of this debt in the form of the replacement notes issued under the plan. In addition, the noteholders objected to confirmation arguing that the proposed seven-year replacement notes did not meet the "fair and equitable" standard required under section 1129(b) of the Bankruptcy Code, because market interest rates were not applied to the replacement notes under the plan.

After the confirmation hearing – but before the court issued a ruling – the noteholders sought permission from the court to change their votes to accept the plan and payment of their claims in full without a make-whole premium.

COURT ANALYSIS

Denying the noteholders' request to change their votes, the court held that (i) the noteholders were not entitled to the make-whole premiums; and (ii) the proposed replacement notes satisfied the cramdown requirements of section 1129(b) of the Bankruptcy Code even though they were below-market interest rates if the risk premiums were increased by an additional 0.5 percent for the first-lien notes and an additional 0.75 percent for the 1.5 lien notes.

In determining that the noteholders were not entitled to the make-whole premiums, the court looked at the plain language of the indentures. The court found that the indentures required the lender to forfeit its right to make-whole consideration resulting from the debtors' acceleration of the balance of the loan triggered by the bankruptcy filing. The court also rejected the noteholders' argument that in lieu of a make-whole premium, they were entitled to a claim for damages for the debtors' violation of the indentures' no-call provisions, finding that such a claim would be disallowed as unmatured interest under section 502(b)(2) of the Bankruptcy Code. The court did suggest, however, that a different result might be reached with a solvent debtor.

In addition, the court found that the automatic stay barred deceleration of the debt; therefore, the noteholders could not rescind the automatic acceleration of the notes and revive the make-whole premium. Relying on the Second Circuit's decision in *In re AMR Corp.*, 485 B.R. 279 (Bankr. S.D.N.Y. 2013); aff'd, 730 F.3d 88 (2d Cir. 2013), the court held that post-acceleration rescission in not permitted absent clear language in the indenture allowing such.

Because the noteholders rejected the plan, the court also considered whether the debtors had satisfied the cramdown requirements of section 1129(b)(2)(A)(i), which provides that a plan is "fair and equitable" to a non-accepting class of secured creditors if it provides that the creditors (i) retain the liens securing their claims, or (ii) receive deferred cash payments with a present value at least equal to the allowed amount of their claims.

In determining the appropriate method of calculating the cramdown interest rate under the proposed plan of reorganization, the court focused on two significant chapter 13 cases: the Supreme Court's opinion in *Till v. SCS Credit Corp*. 541 U.S. 465 (2004), and the Second Circuit's decision in *In re Valenti*, 105 F.3d 55, 64 (2nd Cir. 1997). Upon examination of these cases, the court refused to consider a market-based analysis of interest rate for similar loans available in the open market to establish the appropriate cramdown interest rate that the noteholders proposed. Instead, the court held that the appropriate cramdown interest rate is one that eliminates profits and fees and compensates a secured creditor as an essentially riskless base rate, to be supplemented by a risk premium between 1 percent and 3 percent which accounts for a debtor's unique risks emerging from a bankruptcy. Under the court's decision, (i) a cramdown interest rate should not include any profit or cost element, as both are inconsistent with the present value calculation required for cramdown; (ii) market testimony or evidence is only relevant to determining the proper risk premium to apply in the formula approach; and (iii) creditors should not use the risk premium as a way to obtain a market interest rate on their replacement notes.

PRACTICAL CONSIDERATIONS

Courts are now looking beyond the strict interpretation of contract language when determining whether and when make-whole premiums are allowable in bankruptcy, and are considering equitable factors that could affect how the holders of bond debt and lenders draft and litigate make-whole premiums. To ensure that there is no ambiguity regarding the application of a make-whole provision, financing agreements should not make any exception from the payment of a make-whole premium after acceleration under any circumstances, except for payment on the original stated maturity date.

In addition, the court's ruling may shift the leverage in negotiating plans in future cases in favor of the debtors, potentially allowing them to satisfy certain secured creditors with long-term replacement notes at below-market interest rates, thereby eliminating the need for some debtors to take out exit financing and possibly providing additional value to unsecured creditors.

MORE FROM *MPM SILICONES* - JUNIOR LIENHOLDERS' ACTIONS WERE CONSISTENT WITH THEIR RIGHTS UNDER AN INTERCREDITOR AGREEMENT

Sarah Kam
Associate, New York

BOKF, N.A. v. JPMorgan Chase Bank, N.A. (*In re MPM Silicones, LLC*), 518 B.R. 740 (Bankr. S.D.N.Y. 2014)

CASE SNAPSHOT

The U.S. Bankruptcy Court, Southern District of New York, dismissed senior lienholders' claims that junior lienholders breached an intercreditor agreement by, among other things, taking or supporting certain actions that were contrary to the interests of the senior lienholders. The court held that the junior lienholders' actions were consistent with their rights and remedies as unsecured creditors that were expressly preserved under the intercreditor agreement.

FACTUAL BACKGROUND

In 2012, Momentive Performance Materials and its affiliates issued first-lien notes and "1.5-lien" notes secured by their assets ("Common Collateral") to first-lien creditors ("Senior Lienholders"); and second-lien notes, secured by the Common Collateral, to second-lien creditors (the "Junior Lienholders").

The Senior Lienholders and the Junior Lienholders entered into an Intercreditor Agreement, which specified that:

(i) The Junior Lienholders will not contest or support any other person contesting any request by the Senior Lienholders for adequate protection or any objection by the Senior Lienholders to any motion based on the Senior Lienholders' claiming a lack of adequate protection (section 6.3);

(ii) The Junior Lienholders will not take any action that would hinder any exercise of remedies undertaken by the Intercreditor Agent or the Senior Lienholders with respect to the Common Collateral (section 3.1(c)); and

(iii) The Intercreditor Agent shall apply the Common Collateral or its proceeds to the Senior Lienholders' Claims until they are paid in full in cash (section 4.2).

Notably, the Intercreditor Agreement provided that, notwithstanding anything to the contrary in the Intercreditor Agreement, the Junior Lienholders may exercise rights and remedies as unsecured creditors against the debtors or any of their subsidiaries that have guaranteed the Junior Lienholders' claims in accordance with the terms of the second-lien documents and applicable law (section 5.4).

In April 2014, MPM and its affiliates commenced their bankruptcy cases. The Senior Lienholders commenced an action against the Junior Lienholders alleging that the Junior Lienholders breached the Intercreditor Agreement by:

(i) Objecting to the Senior Noteholders' requests for adequate protection of their interests in the Common Collateral by opposing the payment of fees and expenses to the first-lien trustee's financial advisors as a proposed form of adequate protection of the trustee's lien;

(ii) Supported a priming lien as a part of the debtors' DIP financing;

(iii) Supporting the debtors' objections to the Senior Noteholders' right to a make-whole payment under their indentures and notes;

(iv) Entering into a pre-petition restructuring support agreement with the debtors and then supporting the cramdown of the debtors' chapter 11 plan on the Senior Lienholders; and

(v) Agreeing to receive under the plan, in return for their secured claims against the debtors, property allegedly constituting Common Collateral, or its proceeds.

The Junior Lienholders filed a motion to dismiss all claims, arguing that they were acting consistently with their rights as unsecured creditors, as expressly preserved by section 5.4 of the Intercreditor Agreement, and that they did not violate the Intercreditor Agreement because none of their alleged conduct related to the Common Collateral.

COURT ANALYSIS

The bankruptcy court granted the Junior Lienholders' motion to dismiss. The bankruptcy court addressed the claims seriatim. First, the bankruptcy court addressed the claim stemming from the Junior Lienholders' alleged objections to the Senior Lienholders' request for adequate protection. While the Senior Lienholders alleged that the Junior Lienholders had objected to the financial advisor's fees, they failed to allege how the objection was made. Since no objection appeared on the docket, the bankruptcy court dismissed the claim without prejudice.

Second, the bankruptcy court addressed the claim based on the Junior Lienholders' alleged support of the DIP financing priming lien. The Senior Lienholders failed to: state how the Junior Lienholders supported the priming lien, indicate which section of the Intercreditor Agreement was allegedly breached, and object to the priming lien themselves during the course of the chapter 11 proceeding. Further, the Intercreditor Agreement did not prohibit the Junior Lienholders from supporting a priming lien financing and only prohibited objections to liens supported by the Senior Lienholders. Because the bankruptcy court could not discern which provision of the Intercreditor Agreement was breached or what actions the Junior Lienholders took to breach the Intercreditor Agreement, the bankruptcy court dismissed the claim.

Third, the bankruptcy court addressed the claim that the Junior Lienholders hindered the Senior Lienholders' recovery from the Common Collateral by supporting the debtors' objection to the make-whole payment, breach of the no-call provision, and breach of New York's perfect tender rule. The court noted that if a payment was not available under applicable law, any claim for such a payment would be invalid. The Senior Lienholders also conceded that supporting the debtors' objection to an invalid claim for payment would not constitute a

CONTINUED ON PAGE 6

Credit Bid Rights Bolstered in Tennessee Bankruptcy Court Decision—continued from page 3

Contrary to these decisions, the court in *RML* found that only "extraordinary circumstances" justified limiting a secured creditor's credit-bidding rights.

However, the court held that "extraordinary circumstances" did exist to modify Silverpoint's rights under the facts of the case, namely: (i) an unresolved claim objection was pending contesting the amount of Silverpoint's claims; (ii) an unresolved claim disputing the priority of Silverpoint's interest was pending; and (iii) unresolved disputes regarding fraud allegedly perpetuated by RML were pending in other courts. However, the court's limitations were narrow: (i) Silverpoint's credit-bidding rights were restricted from $2.5 million to $2.3 million, which reflected the undisputed amount of its secured claim; and (ii) if Silverpoint did not settle the lien priority dispute first, it was required to obtain a letter of credit or bond in the amount of its credit bid, pending final resolution of that dispute.

PRACTICAL CONSIDERATIONS

The *RML* decision is a "win" for secured creditors' credit-bidding rights. After the Supreme Court's 2012 decision in *RadLAX*, secured creditors were hopeful that their credit-bidding rights would be more closely guarded by bankruptcy courts. However, the decisions by the bankruptcy courts in *Fisker* and *Free Lance-Star* in early 2014 reflected a potential trend of bankruptcy courts continuing to restrict credit-bidding rights in bankruptcy, even where the only "cause" was that credit bidding would chill competitive bidding (an "exception" that could potentially swallow the rule). *RML* may be the start of a potential counter-trend of bankruptcy courts guarding credit-bidding rights more closely.

More from *MPM Silicones* - Junior Lienholders' Actions Were Consistent with Their Rights under an Intercreditor Agreement—continued from page 5

breach of the Intercreditor Agreement. Therefore, because the bankruptcy court had previously held that the Senior Lienholders were not entitled to either the make-whole or no-call payments under New York law (see *In re MPM Silicones*, LLC, No. 14-22503, 2014 WL 4436335 (Bankr. S.D.N.Y. Sept. 9, 2014)), the bankruptcy court held that the Junior Lienholders could not be liable under the Intercreditor Agreement for objecting to invalid claims, and dismissed the claim.

Next, the bankruptcy court addressed the claim that the Junior Lienholders interfered with the Senior Lienholders' remedies with respect to the Common Collateral by supporting the debtors' proposed cramdown plan. The bankruptcy court held that doing so was consistent with the Junior Lienholders' unsecured creditors' rights under section 5.4 of the Intercreditor Agreement to ensure that the debtors acted properly in the interests of unsecured creditors in not overpaying the Senior Lienholders with a higher interest rate under section 1129(b)(2)(A)(i)(II) of the Bankruptcy Code, and dismissed the claim.

Finally, the bankruptcy court addressed the claim that receipt of certain assets by the Junior Lienholders violated section 4.2 of the Intercreditor Agreement. While the bankruptcy court acknowledged that the Senior Lienholders' claims were not discharged under the proposed plan, it held that none of the alleged payments received by the Junior Lienholders were Common Collateral or proceeds of Common Collateral, and dismissed the claim.

PRACTICAL CONSIDERATIONS

This decision demonstrates the importance of carefully drafted intercreditor agreements. Intercreditor agreements allocate the rights and responsibilities of creditors in shared collateral. Courts will not look beyond the terms of the agreement when determining the scope of restrictions on junior lienholders' rights. Unclear or ambiguous terms with respect to the rights of the parties can lead to expensive litigation.

IRS OBTAINS EQUITABLE SUBORDINATION OF PIK NOTES

Brian Schenker
Associate, Philadelphia

United States v. State Street Bank and Trust Co., 520 B.R. 29 (Bankr. D. Del. 2014)

CASE SNAPSHOT

In 1996, as part of a confirmed chapter 11 plan of reorganization, Scott Cable Communications, Inc. ("Company") issued junior subordinated secured notes known as Series A Junior PIK Notes and Series B Junior PIK Notes to two classes of unsecured creditors. In the Company's later bankruptcy proceeding in 1998, the United States of America, on behalf of the Internal Revenue Service, sought to recharacterize those secured notes as preferred equity instruments. In the alternative, the IRS sought to equitably subordinate those secured notes to the IRS' allowed administrative expense claim for capital gains taxes owed as a result of the sale of substantially all of the Company's assets in such later bankruptcy proceeding. The bankruptcy court denied the IRS' request to recharacterize the secured notes and denied the IRS' request to equitably subordinate the secured Series B Junior PIK Notes, but granted the IRS' request to equitably subordinate the secured Series A Junior PIK Notes.

FACTUAL BACKGROUND

The Company was a multi-system cable operator. In 1988, the Company was the subject of a leveraged buyout structured as a stock purchase to avoid capital gains taxes. As part of the LBO, the Company obtained senior and junior secured debt, issued senior subordinated unsecured notes, and issued junior subordinated unsecured notes and debentures. After the LBO, the Company underperformed, resulting in various debt restructurings, partial asset sales, management changes, and finally attempts to sell the Company's assets. The Company was ultimately unsuccessful in its attempts to sell its assets because any such sale would result in significant capital gains taxes and, therefore, insufficient proceeds to pay all debt holders.

The Company eventually concluded that the only way to sell its assets and repay all debt holders would be to grant liens to the holders of the subordinated unsecured notes and debentures, giving such debt holders priority over the IRS to future sale proceeds. To reduce the risk of personal liability to its officers and directors, the Company determined to grant such liens under a confirmed plan in a chapter 11 bankruptcy proceeding. Thus, in the Company's first chapter 11 bankruptcy case in 1996, the Company issued, as part of its confirmed plan, the secured Series A Junior PIK Notes ("Series A Notes") to the holders of the junior subordinated unsecured notes, and the secured Series B Junior PIK Notes ("Series B Notes") to the holders of the junior subordinated unsecured debentures.

Then in the Company's second chapter 11 bankruptcy case in 1998, the Company attempted to sell substantially all of its assets under a prepackaged liquidation plan for a purchase price sufficient to pay substantially all secured debt but no capital gains taxes. After the IRS objected to confirmation of such plan, the bankruptcy court determined that (i) the proposed sale (which was scheduled to occur post-confirmation) would result in the IRS being owed capital gains taxes; (ii) the IRS' claim for such taxes was an allowed administrative expense claim of the Company's bankruptcy estate; and (iii) the principal purpose of the prepackaged plan was to attempt to avoid payment of such taxes and claim. Therefore, the bankruptcy court denied confirmation of such plan. The bankruptcy court, however, allowed the sale to proceed outside of a confirmed plan, provided that the sale proceeds intended for the holders of the Series A Notes and Series B Notes were held in escrow. The court then converted the chapter 11 bankruptcy case to a chapter 7 bankruptcy case.

The IRS filed an adversary complaint seeking to recharacterize or, in the alternative, equitably subordinate the secured claims of the holders of the Series A Notes and Series B Notes. The relief sought by the IRS, if granted by the bankruptcy court, would allow the IRS' administrative expense claim for the unpaid capital gains taxes to be paid from the escrowed sale proceeds before any payment was made to the holders of the secured notes.

In preliminary proceedings, the court determined that the IRS was barred from bringing the complaint by the *res judicata* effect of the Order confirming the Company's 1996 plan of reorganization. On appeal, the district court reversed and concluded that the IRS was not barred from bringing the complaint because, in connection with the confirmation of the Company's plan of reorganization in 1996, the IRS – who was not a creditor at the time – had not received notice reasonably calculated, under the circumstances, to inform the IRS that its rights might be affected by the confirmation of such plan. A bench trial was held, spanning approximately 34 days over the course of nine months, and a lengthy post-trial briefing and motion process followed. The bankruptcy court then permitted the chapter 7 trustee to join in the complaint as a plaintiff, and additional proceedings took place.

COURT ANALYSIS

The IRS asserted two counts: one for the recharacterization of the Series A Notes and Series B Notes, and one for the equitable subordination of the Series A Notes and Series B Notes to the IRS' allowed administrative expense claim. As a threshold matter, the holders of the secured notes continued to argue that the IRS' counts were barred under a number of legal theories, including standing, *res judicata*, waiver, estoppel, laches, unclean hands, and equitable mootness, and that they amounted to an untimely collateral attack on the Order confirming the Company's 1996 plan of reorganization. The bankruptcy court undertook a detailed analysis of each of these defenses and ultimately rejected each.

On the merits, the court noted that recharacterization and equitable subordination are similar but different causes of action, and must be treated separately. In a recharacterization action, the court must determine whether a debt actually exists, i.e., whether the "loaned" capital was actually an equity investment, by examining the transaction in light of the entire relationship of the "lender" and "borrower," with particular emphasis on their intent at the time of the initial funding. In an equitable subordination action, the court must determine whether a legitimate creditor has engaged in inequitable conduct such that the creditor should not be permitted to enjoy the full benefits of its claim.

CONTINUED ON PAGE 8

IRS Obtains Equitable Subordination of PIK Notes—continued from page 7

With respect to recharacterization, the bankruptcy court determined that the analysis must begin with the Company's and secured note holders' intent at the time of the LBO in 1988, i.e., the original transactions, and not the issuance of the Series A Junior PIK Notes and Series B Junior PIK Notes in 1996. Based on a consideration of the parties' contracts, the parties' actions, and the economic reality of the surrounding circumstances, the court concluded that the parties' true intent was to create and maintain debtor/creditor relationships, ultimately finding that the note holders' conduct throughout the parties relationship was "consistent with that of a lender – albeit a subordinated lender with no security."

With respect to equitable subordination, the court relied on the following three-factor test in its analysis: (i) whether the defendants had engaged in some type of inequitable conduct; (ii) whether the misconduct resulted in an injury to plaintiff or conferred an unfair advantage on the defendants; and (iii) whether equitable subordination of the defendants' claims is consistent with the provisions of the Bankruptcy Code. Using that test, the court separately analyzed the conduct of the holders of the Series A Notes and Series B Notes.

For the holders of the Series A Notes, the bankruptcy court made a preliminary determination that such holders were non-statutory insiders of the Company. Because of certain Management Incentive Agreements entered into during one of the Company's pre-bankruptcy restructurings, the court found that such holders had a closeness to the Company that affected that Company's dealings with such holders and prevented a true arm's-length relationship between such holders and the Company. Therefore, the court concluded that such holders were non-statutory insiders, whose conduct must be rigorously scrutinized and for whom the standard for inequitable conduct is much lower.

The court then concluded that the holders of the Series A Notes had engaged in inequitable conduct by undertaking a plan with the Company to convert their prior unsecured debt to secured debt in the 1996 chapter 11 bankruptcy proceeding, for the purpose of enabling them "to gain an unfair advantage over the IRS by preventing the collection of the capital gains tax that all parties knew would arise at a later time since it was already intended that the assets of the Company were expected to be sold." In sum, the court found that the holders of the Series A Notes had engaged in a coordinated series of actions designed to cause their claims to be paid before any capital gains taxes without fully disclosing their true intent to the IRS. To remedy this injustice, the court found it particularly appropriate to eliminate the effect of the lien granted to the holders of the Series A Notes, which restored the parties to the claim priorities set forth in the Bankruptcy Code "by preventing otherwise subordinated unsecured debt from gaining an unfair advantage of prior payment [to] administrative tax claims."

For the holders of the Series B Notes, the court made a preliminary determination that such holders were *not* non-statutory insiders of the Company. The court then went on to find that such holders had not engaged in any inequitable conduct similar to that of the holders of the Series A Notes. Thus, the bankruptcy court did not equitably subordinate the claims of the holders of the Series B Notes.

PRACTICAL CONSIDERATIONS

Whether one considers the actions of the Company and its debt holders to be careful tax planning or improper tax avoidance, what is clear from the bankruptcy court's opinion is that the bankruptcy court was particularly troubled by the inadequate disclosure made to the IRS in connection with the confirmation of the 1996 chapter 11 plan of reorganization. A fair reading of the opinion is that if the Company had included an adequate disclosure in its disclosure statement about the tax implications of its plan, the court would have either barred the subsequent complaint or not found any inequitable conduct, because the IRS would have had a fair opportunity to raise "an objection to the 1996 Plan that would have had merit." Thus, the ultimate lesson may be that if a debtor wants to enjoy the full benefits of a confirmed plan, a complete and fair disclosure statement is in its best interests.

CREDITOR ENTITLED TO FULL VALUE OF SERVICES IN 'NEW VALUE' DEFENSE TO PREFERENCE ACTION

Joseph Filloy
Associate, Pittsburgh

Miller v. JNJ Logistics LLC (*In re Proliance International, Inc.*), Case No. 09-12278 (CSS) (Bankr. D. Del., Aug. 14, 2014)

CASE SNAPSHOT

A creditor that provided freight transportation services to the debtor defended against preference claims (i.e., a payment to a non-insider made by a debtor during the 90-day period before the debtor files for bankruptcy) seeking a credit for all new value that it provided to the debtor during the preference period. The bankruptcy court, in reviewing a split in authority, held that such creditor had a valid new value defense for all freight services provided during the preference period, regardless of whether such services remained unpaid on the petition date.

FACTUAL BACKGROUND

Following conversion to chapter 7, the debtor's trustee sought a return of all payments made to the debtor's freight transportation vendor during the 90-day preference period that preceded the filing of the bankruptcy case. The trucking company asserted a new value defense, seeking a reduction in the preference exposure for all services invoiced during that same 90-day period. The chapter 7 trustee argued that the trucking company should receive a credit for new value for only those services rendered in the preference period for which the trucking company had not been paid prior to the petition date. Because the trucking company had been paid more than $200,000 for services rendered during the preference period, the chapter 7 trustee's position, if adopted, would have significantly reduced the defendant's new value defense.

CONTINUED ON PAGE 10

CONSTRUCTION LENDER'S FAILURE TO NOTIFY BUILDER OF FINANCIAL INSUFFICIENCIES DOES NOT WARRANT EQUITABLE SUBORDINATION

Alison Wickizer Toepp
Associate, Richmond

Atlantic Builders Group, Inc. v. Old Line Bank (*In re Prince Frederick Investment*), Adv. No. 13-00461 (Bankr. D. Md. Aug. 22, 2014)

CASE SNAPSHOT

In an adversary proceeding brought by a builder against a bank in connection with the debtor's construction project, the builder urged the court to find that the bank's failure to notify the builder that the original loan amount and subsequent increases would be insufficient to fund the construction project warranted equitable subordination of the bank's lien. The court held that the bank's alleged silence—in the absence of any express duty to the builder—was not sufficiently egregious to justify equitable subordination. The court also held that the builder failed to allege the existence of a fiduciary relationship between the debtor and the bank that created duties owed to the builder. Thus, the builder failed to state a claim. Because the builder had previously been granted leave to amend, the complaint was dismissed with prejudice.

FACTUAL BACKGROUND

The debtor was formed for the purpose of constructing and operating a medical center. In August 2008, the debtor and plaintiff builder entered into a $2.1 million contract to construct the center. In October 2008, the bank made an initial construction loan of nearly $3 million to an LLC formed by investors for construction of the center; by January 2010, the loan had increased to $3.326 million. The loan was secured by a first priority lien on the center and was guaranteed by the debtor.

When construction on the center began in 2008, the builder and the bank entered into a contractor's agreement that provided, among other things, that the builder could not terminate its contract with the debtor until the bank had an opportunity to remedy the default. The contractor's agreement also contained provisions regarding change orders and notices of default. Each month the builder submitted payment applications to the debtor that included all unresolved or unapproved changes orders to date; these applications were reviewed by agents for the debtor and for the bank. The bank's agent in turn prepared monthly reports tracking change orders. Ultimately, the debtor—with the bank's approval—increased the amount owed to the builder to $2.382 million. The builder was paid $2.172 million of that $2.382 million.

Design errors caused delays and resulted in delay claims in excess of $300,000. The builder did not, however, provide notice of default to the bank.

Prior to the initial loan in 2008, the bank knew that the debtor would be undercapitalized and could not fund construction. The bank also knew in 2010 when it increased the loan that the increase was insufficient to fund completion of the center, but withheld that information from the builder. In June 2012, the debtor filed its voluntary chapter 11 petition and listed the bank's total claim as $3.195 million secured by a lien on the center. The center was valued at $3.152 million.

The builder filed an adversary complaint against the bank, seeking a determination that the bank's claim and liens should be equitably subordinated under Bankruptcy Code section 510(c). Defendant bank and the debtor moved to dismiss the builder's second amended complaint on various grounds, including because the complaint failed to state a claim for equitable subordination. The court agreed and dismissed the complaint with prejudice.

COURT ANALYSIS

The court began its analysis with a discussion of equitable subordination, now codified at section 510(c). The parties agreed that the three factor test of *Benjamin v. Diamond (Mobile Steel)*, 562 F.2d 692, 699-700 (5th Cir. 1977) applied. Those factors are: (i) the claimant must have engaged in some type of inequitable conduct; (ii) the conduct must have resulted in injury to the creditors of the bankrupt or conferred an unfair advantage on the claimant; and (iii) equitable subordination must not be inconsistent with the provisions of the Bankruptcy Act.

The court noted that "inequitable conduct" for purposes of equitable subordination includes: "(1) fraud, illegality, breach of fiduciary duties; (2) undercapitalization; or (3) claimant's use of debtor as a mere instrumentality or alter ego." The parties agreed that to satisfy the undercapitalization category, the builder must establish that the debtor was undercapitalized and that the bank engaged in conduct that "shocks the conscience" of the court. The court cited cases from a variety of courts for the proposition that the severity of conduct depends on whether the claimant—here, the bank—owed a fiduciary duty to the debtor or debtor's creditors.

Thus, the court held that the builder could survive the motion to dismiss by asserting sufficient factual allegations supporting two different theories: (i) the bank and debtor had a fiduciary relationship such that the bank owed a duty to the builder and the bank's conduct breached that duty; or (ii) alternatively, the bank engaged in conduct that shocks the conscience of the court.

Although lenders do not typically owe fiduciary obligations to their customers, the court noted that a fiduciary obligation may arise if a bank exercises "operating control" over its customers' business. Turning again to opinions from courts around the country, the court considered which activities support a finding that a bank exercises operating control, and held that operating control required more than merely an arm's-length business transaction. Financial leverage, without more, does not give rise to a fiduciary obligation. Cases in which "operating control" was found to exist involved situations in which a lender exercised actual managerial control—such as the right to terminate employees or control stock.

The court held that under prevailing case law, the builder's allegations that the bank reviewed and approved payment applications were not sufficient to support a finding that the bank exercised operating control over debtor, particularly in light of the fact that the builder's contract with the bank gave the bank the right to review and approve payment applications: "There simply are no allegations that the Bank inserted itself in the construction process other than to review and approve the requests for payment."

CONTINUED ON PAGE 10

Creditor Entitled to Full Value of Services in 'New Value' Defense to Preference Action—continued from page 8

COURT ANALYSIS

Under section 547(c)(4) of the Bankruptcy Code, a recipient of a preferential transfer is provided a defense, often referred to as the "new value" defense, which limits a trustee or debtor's ability to recover on a preference claim.

To the extent that the creditor can prove that new value was provided to the debtor after it received a preference payment, that creditor may be entitled to a credit against an avoidable preferential transfer. At issue in *Miller* was the extent of the credit.

There is currently a split among the circuits and bankruptcy courts as to whether a creditor is entitled to a credit for new value it provides to a debtor if it receives payment on account of that new value. Courts that have adopted the "remains unpaid" approach hold that the new value defense only limits a creditor's exposure to the extent that the creditor was not paid for the new value. If a creditor delivers goods worth $100 after receipt of a preferential transfer (i.e., "new value"), but receives partial payment of $75 for those goods, then its new value defense is limited to $25. The other approach, known as the "subsequent advance approach," credits that creditor with the full amount of the new value regardless of whether a payment is made. Accordingly, in the prior example, the creditor would be entitled to a credit of $100 for the new value.

The Delaware Bankruptcy Court, citing a string of other decisions within that court, adopted the "subsequent advance approach," holding that the trucking company was entitled to a reduction in its preference exposure by the full amount of new value it provided during the preference period. In so holding, the bankruptcy court found controlling Congress' intent to encourage creditors to continue to serve businesses that are financially struggling and may end up in bankruptcy with the hope that, in so doing, some companies will be able to avoid bankruptcy.

PRACTICAL CONSIDERATIONS

This decision adopts a pro-creditor approach to potential preferential transactions. Although it encourages creditors to continue to conduct business with potential debtors, creditors should nevertheless consult with their counsel when dealing with struggling entities to ensure that their exposure is limited as much as possible.

Construction Lender's Failure to Notify Builder of Financial Insufficiencies Does Not Warrant Equitable Subordination—continued from page 9

The court further ruled that "it does not shock the conscience that a construction lender would want to review and approve applications for payment and change orders for the construction work on the project funded by its loan." The court also found it telling that, despite repeatedly re-pleading its claims, the builder did not allege that the bank made any affirmative misrepresentation that sufficient funds would be available to pay for all future change orders: "Rather, [the builder] alleges that the Bank engaged in egregious conduct by approving change orders while failing to inform [the builder] that there would be insufficient loan proceeds to pay it in full." Silence—in the absence of any duty to speak—was not sufficiently egregious in the eyes of the court.

The court appears to have placed a great deal of weight on the parties' contractual terms (i.e., the builder granting the bank the right to review payment applications; the procedures for payment shortfalls); the absence of terms in those agreements (i.e., the absence of any obligation or duty by the bank to update the builder on the loan); and the builder's failure to give notice of default in accordance with the terms of its contract. The court rejected the builder's invitation to impose obligations on the bank that the parties had not included in their contracts.

PRACTICAL CONSIDERATIONS

In this case, the court refused to impose equitable remedies such as equitable subordination under section 510(c) absent sufficiently egregious conduct by the claimant bank, and the court would not rewrite the parties' contracts to impose additional duties or obligations. Where a debtor and its lender engage only in typical arm's-length transactions, courts will not find operating control exists. In the absence of such control, in the absence of fiduciary obligations, and in the face of the express terms of the parties' agreements, plaintiff builder failed to state a claim for equitable subordination.

DROP-SHIPPED GOODS ARE NOT 'RECEIVED' BY THE DEBTOR AND THUS NOT ENTITLED TO ADMINISTRATIVE PRIORITY

Lauren Zabel
Associate, Philadelphia

In re World Imports, Bankr. No. 13-15929-SR (E.D. Pa., Sept. 10, 2014)

CASE SNAPSHOT

The court held that a trade creditor who drop-shipped goods to the debtor's customers was not entitled to administrative priority status under Bankruptcy Code section 503(b)(9) because the goods were not "received by the debtor." Additionally, the court held that goods shipped directly to the debtor, which were placed on the vessel for shipment more than 20 days before the debtor's bankruptcy filing, were not entitled to administrative priority.

FACTUAL BACKGROUND

A trade creditor sought administrative priority for four shipments of goods that were purchased by the debtor in the ordinary course of the debtor's business. Three of the shipments at issue were shipped directly to customers of the debtor and were received during the 20 days prior to the debtor's bankruptcy filing. One of the shipments at issue was shipped directly to the debtor. That shipment was placed onboard a cargo ship more than 20 days prior to the petition date and was received by the debtor during the 20 days prior to the petition date.

COURT ANALYSIS

Pursuant to section 503(b)(9) of the Bankruptcy Code, a creditor is entitled to administrative priority if the claimant (i) sold "goods" to the debtor, (ii) which were received by the debtor within 20 days before the debtor's bankruptcy filing, and (iii) such goods were sold to the debtor in the ordinary course of the debtor's business. The court first addressed the legal issue presented where goods are "drop-shipped" directly to customers of the debtor. The court concluded that such goods were not "received" by the debtor and, therefore, are not subject to priority under 503(b)(9) for three reasons. First, the court reasoned that reading section 503(b)(9) in this limited way is consistent with Congress' intent when enacting the amendments to the Bankruptcy Code in 2005, which was to create a priority administrative expense under 503(b)(9) as a supplemental remedy for reclamation sellers. Second, the court reasoned that enlarging the class of administrative expense claimants to include all creditors who delivered goods consistent with contractual relationships with the debtor would decrease the debtor's likelihood of being able to afford a chapter 11 reorganization that would pay all administrative claimants in full, as required by the Bankruptcy Code. Finally, the court concluded that although the phrase "received by the debtor" may be construed to include actual or constructive possession, drop-shipments to a debtor's customer do not even constitute constructive possession.

Next, the court considered the factual issue presented where goods are deposited on a cargo ship more than 20 days prior to the petition date but are received during the 20 days prior to the petition date. The court held that the parties' contract – which is governed by an international trade treaty – provides that goods are shipped "FOB," meaning that the buyer takes delivery of the goods when they are placed on board the cargo ship. Thus, the goods at issue were "received" by the debtor more than 20 days prior to the petition date and were not entitled to administrative priority.

PRACTICAL CONSIDERATIONS

This decision emphasizes that courts are apt to narrowly construe sections of the Bankruptcy Code entitling claimants to administrative priority expenses, in order to maximize the debtor's chance of reorganizing. If a contract calls for drop-shipping or delivery FOB and the contract counterparty appears to be financially troubled, it may be worthwhile to demand payment prior to shipping any goods or to ship those goods directly to the debtor.

DOES A BANK VIOLATE THE AUTOMATIC STAY BY FREEZING AN INDIVIDUAL BANKRUPT'S ACCOUNT ON THE FILING OF A CHAPTER 7 PETITION?

Amy Tonti
Partner, Pittsburgh

A set of recent cases on opposite coasts reach opposite results: *In re Weidenbenner* (Bankr. S.D.N.Y., No. 14-35443, 12/12/14) finds a violation, and *In re Mwangi*, 764 F.3d 1169 (9th Cir. 2014) finds no violation.

In each of these cases, the bank said it had a corporate policy of freezing bank accounts of individuals who file for chapter 7. The *Weidenbenner* opinion reasoned that freezing the account was a stay violation because it amounted to exercising control over estate property: the freeze "was not mandated by the Bankruptcy Code, ordered by the court or requested by the Chapter 7 trustee." The *Weidenbenner* court also rejected the bank's argument that the duty to turn over estate property under section 542 creates an exception to the automatic stay; the court held section 542(k) gives an individual a statutory claim for damages for "any willful violation of the stay."

The *Mwangi* court found no stay violation in the first 30 days following the petition filing, because the account then belonged to the estate, not to the debtors. The Appellate Panel held that the debtors could not state a claim for willful violation of the automatic stay provision of 11 U.S.C. section 362(a)(3), which proscribes "any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate." The panel concluded that before the account funds re-vested in the debtors, they remained estate property, and the debtors had no right to possess or control them. Accordingly, the operation of the administrative pledge could cause the debtors no injury before the account funds re-vested. The panel concluded that after the account funds re-vested in the debtors, they lost their status as estate property and thus were no longer subject to the automatic stay.

‘OFFICER’ INDEMNIFICATION CASE UNDER DELAWARE LAW MAY PROVIDE BANKRUPTCY CODE ‘INSIDER’ INSIGHTS

Lauren Zabel
Associate, Philadelphia

Aleynikov v. The Goldman Sachs Group Inc., 765 F.3d 350 (3d Cir. 2014)

CASE SNAPSHOT

The Third Circuit Court of Appeals evaluated whether a corporate vice president (who was not formally appointed) was an “officer” within the company’s by-laws. The lower court concluded that the VP was an “officer” within the meaning of the bylaws and granted summary judgment in favor of the VP. The Third Circuit concluded that the term “officer” used in the bylaws was ambiguous and summary judgment should not have been granted below. Although this was not a bankruptcy case, it was decided under Delaware law, and provides insight into how a court may analyze this question in determining whether someone is an “insider” within the meaning of the Bankruptcy Code.

FACTUAL BACKGROUND

A company’s former vice president sued the company seeking indemnification and advancement of attorneys’ fees in connection with criminal proceedings to which the former VP was subject. The VP sought indemnification based upon a provision of the corporate bylaws agreeing to indemnify “officers” of the corporation. The bylaws provided that the term officer “shall include in addition to any officer … any person serving in a similar capacity or as a manager.” The VP was never formally appointed as an officer, and more than one-third of the company’s 10,000 employees held the title of vice president.

COURT ANALYSIS

Applying contract interpretation principles, the court concluded that the term “officer” used in the bylaws was subject to more than one meaning because the agreement did not make apparent what characteristics make someone an officer. Thus the court considered the dictionary definition (a person who holds a position of trust, authority or command) and whether a common meaning exists for the term in the relevant industry, and concluded that the term “officer” as used in the bylaws was ambiguous. Because the term was deemed ambiguous, the court determined it appropriate to consider some extrinsic evidence for assistance interpreting the meaning of “officer,” including “trade usage” and “course of dealing” evidence. The court reviewed the evidence presented in those categories in the lower court and disagreed with the lower court’s determination that such evidence did not present a genuine issue of material fact. The court also disagreed with the district court’s determination that the bylaws – as a unilateral contract – must be interpreted against the corporate drafter, finding that concept (the doctrine of *contra proferentem*) inapplicable when interpreting bylaws. Thus, the court concluded that summary judgment was inappropriate.

PRACTICAL CONSIDERATIONS

Parties should always be as clear as possible when drafting documents, particularly when drafting the terms of indemnification and advancement provisions. In order to avoid litigation over the scope of an indemnification provision – or the potential application of such provision to unintended beneficiaries – parties should be sure to be precise with respect to the intended extent of such provisions.

'DEEMED ACCEPTANCE' DEEMED ACCEPTABLE FOR CRAMDOWN, BUT NOT FOR SECTION 1129(A)(10) 'ACTUAL ACCEPTANCE'

Alison Wickizer Toepp
Associate, Richmond

In re Akbar-Shamirzadi, Case No. 11-15351 TS (Bankr. D.N.M. Oct. 22, 2014)

CASE SNAPSHOT

In a case where only one class of impaired creditors voted on debtor's proposed chapter 11 plan, the debtor—citing 10th Circuit case *Ruti-Sweetwater*—argued that the remaining classes of impaired creditors that did not vote or object to a proposed plan are deemed to have accepted the plan. The lone voting class had voted against the debtor's proposed plan. While *Ruti-Sweetwater* may have established "deemed acceptance" for cramdown purposes (i.e., for section 1129(a)(8) and 1129(b) purposes), the court rejected the debtor's efforts to extend "deemed acceptance" for purposes of "actual acceptance" under section 1129(a)(10), and refused to confirm the plan.

FACTUAL BACKGROUND

The debtor proposed a chapter 11 plan that included several impaired classes. One class voted to reject the plan. The debtor argued that the remaining two classes of impaired creditors should be deemed to have accepted the plan in accordance with *Ruti-Sweetwater*, 836 F.2d 1263, 1267 (10th Cir. 1988). The court disagreed, holding that deemed acceptance does not apply in classes where a creditor voted, and that deemed acceptance should not carry the plan particularly in light of the fact that the only voting creditor had voted against the plan. The plan was not confirmed.

COURT ANALYSIS

The court first considered whether *Ruti-Sweetwater* was rightly decided.

Although *Ruti-Sweetwater* has been criticized by a variety of courts, Judge Gerber of the Bankruptcy Court for the Southern District of New York found that *Ruti-Sweetwater* was "rightly decided, especially in a situation like that one (and here), where dozens of classes vote, where the effect of not voting is announced in advance, and everyone else's will would be burdened by those who simply don't vote at all." *In re Adelphia Communications Corp.*, 368 B.R. 140, 261 (Bankr. S.D.N.Y. 2007).

The court agreed "with Judge Gerber that *Ruti-Sweetwater* sets out a prudent, pragmatic rule of law, consistent with § 1126(c)," but also recognized the limitations of the *Ruti-Sweetwater* holding: "The Tenth Circuit in *Ruti-Sweetwater* was careful to distinguish between a 'deemed acceptance' for § 1129(a)(8)/'cramdown' purposes and the requirement of 'actual acceptance' under § 1129(a)(10)." Under section 1129(a)(10), at least one impaired class of creditors must affirmatively accept the plan. Moreover, relying on *Ruti-Sweetwater* and other authority, the court held that deemed acceptance only applies if no members of a class vote. The court denied plan confirmation and rejected the debtor's efforts to use deemed acceptance to "outvote" the lone voting class.

PRACTICAL CONSIDERATIONS

Relying on deemed acceptance may be pragmatic and consistent with the Bankruptcy Code in situations where many classes vote; and where non-voters would burden the administration of a plan that had been accepted by those impaired classes opting to vote, courts will not extend *Ruti-Sweetwater's* deemed acceptance beyond cramdown situations—particularly where a debtor attempts to equate deemed acceptance to actual acceptance solely in an effort to overcome votes cast against plan confirmation.

TRUSTEE'S THEORY OF UNREASONABLY SMALL CAPITAL FAILS IN CONSTRUCTIVELY FRAUDULENT AVOIDANCE ACTION

Melissa Mickey
Associate, Chicago

In re SemCrude, Bank. No. 08-11525 (BLS) (D. Del., Sept. 30, 2014

CASE SNAPSHOT

The district court affirmed the bankruptcy court's denial of the trustee's avoidance action, finding that the trustee failed to demonstrate that partnership distributions by a debtor should be avoided as constructively fraudulent based on the trustee's theory that the debtor was left with unreasonably small capital after the distributions.

FACTUAL BACKGROUND

The debtor, SemGroup, L.P., was a "midstream" energy company that provided transportation, storage, and distribution of oil and gas products to oil producers and refiners. SemGroup depended on credit facilities for capital, and more than 100 lenders formed a syndicate (the "Bank Group") that provided SemGroup with a line of credit from 2005 through July 2008.

In connection with its business, SemGroup traded options on oil-based commodities, using a trading strategy that was inconsistent with both its risk management policy and its written credit agreement with the Bank Group. In addition, SemGroup made advances on an unsecured basis to fund trading losses incurred by Westback Purchasing Company, L.L.C., a company owned by SemGroup's CEO and his wife, without charging any interest, securing collateral, or executing contracts requiring repayment.

CONTINUED ON PAGE 14

Ritchie SG Holdings, L.L.C. and its two affiliates (collectively, "Ritchie") owned approximately 25 percent of the limited partnership interest in SemGroup. Based on this ownership, Ritchie received distributions of $22.9 million and $25.4 million from SemGroup in August 2007 and February 2008, respectively. Between July 2007 and February 2008, oil prices were volatile, and SemGroup was obligated to post large margin deposits on the options it sold, which forced the company to increase its borrowing under the credit agreement from about $800 million to more than $1.7 billion.

In July 2008, the Bank Group declared SemGroup in default of the credit agreement. Thereafter, SemGroup filed for chapter 11 bankruptcy on July 22, 2008, and a litigation trustee was appointed pursuant to SemGroup's chapter 11 plan. The litigation trustee sued Ritchie, seeking to avoid the $55 million in distributions as constructively fraudulent transfers. The trustee sought to avoid the distributions based on the fact that, among other things, SemGroup was left with unreasonably small capital after both distributions. The bankruptcy court denied the unreasonably small capital claim on summary judgment. The litigation trustee appealed the bankruptcy court's decision to the district court.

COURT ANALYSIS

The district court began its analysis by reviewing *Moody v. Security Pacific Business Credit, Inc.*, 971 F.2d 1056 (3d Cir. 1992), the leading case on the "unreasonably small capital" issue. In *Moody*, the Third Circuit explained that "unreasonably small capital denotes a financial condition short of equitable insolvency." The Third Circuit reasoned that unreasonably small capital refers to the inability to generate sufficient profits to sustain operations. The *Moody* analysis required the Third Circuit to consider availability of credit in determining whether the debtor was left with unreasonably small capital after a distribution. Under *Moody*, the test for unreasonably small capital is "reasonable foreseeability," and the reasonableness of the parties' projections "must be tested by an objective standard anchored in the company's actual performance."

After examining the standard set forth in *Moody*, the district court held, consistent with *Moody*, that it was proper for the bankruptcy court to consider availability of credit in determining whether SemGroup was left with unreasonably small capital after the distributions. The district court noted that there was no dispute that, at the time of the two distributions at issue, SemGroup had a substantial line of credit.

The district court rejected the trustee's argument that a genuine issue of material fact existed concerning whether it was reasonably foreseeable that SemGroup would be unable to sustain its operations because of its "massive breach" of the credit agreement and the likely termination of the credit facility. Specifically, the district court found that it was not clear from the record whether or not the Bank Group was aware of the business activities identified by appellant as being inconsistent with SemGroup's obligations under the Credit Agreement. However, the district court noted that it made no difference whether the Bank Group was aware of these activities. The district court agreed with the bankruptcy court that it would be required to engage in a "speculative exercise" by forecasting (i) the lenders' reaction to discovering the conduct, and then (ii) the consequences of that reaction, i.e., that the only option chosen by all of the lenders would have been to foreclose access to all credit, which (iii) had the reasonably foreseeable consequence of bankruptcy. Consequently, the district court affirmed the bankruptcy court's findings as to the trustee's unreasonably small capital claims.

PRACTICAL CONSIDERATIONS

This case demonstrates that a court must undertake in a fact-intensive inquiry to determine whether a transfer can be avoided as constructively fraudulent in cases where the debtor allegedly had unreasonably small capital at the time of the transaction in question. As articulated by the district court, courts will not engage in a speculative exercise to forecast the debtor's financial condition, and will base their assessment on the facts that are known to the parties at the time of the transaction.

DEEPENING INSOLVENCY NOT A CLAIM UNDER TEXAS LAW

Melissa Mickey
Associate, Chicago

In re Conex Holdings, LLC, et al., Adv. Proc. No. 13-50941 (CSS) (Bankr. D. Del. Aug. 8, 2014)

CASE SNAPSHOT

The bankruptcy court dismissed the chapter 7 trustee's claims for breach of fiduciary duty under Texas common law and the Texas Business and Commerce Code, and deepening insolvency against officers and directors of the debtors and the debtors' parent company. The bankruptcy court held that because the trustee did not plead specific facts as to each defendant's wrongdoing, the trustee failed to satisfy the *Twombly* and *Iqbal* pleading standard with respect to the breach of fiduciary duty claim under Texas common law, and dismissed this claim without prejudice. The bankruptcy court dismissed with prejudice the trustee's deepening insolvency claim because deepening insolvency is not a cause of action under Delaware or Texas law. Finally, the bankruptcy court also dismissed with prejudice the trustee's breach of fiduciary duty claim under the Texas Business and Commerce Code, because the court found that this statute did not provide a basis for the trustee's breach of fiduciary duty claim and was inapposite to the facts.

FACTUAL BACKGROUND

Conex International, LLC ("Conex") was a general mechanical contractor wholly owned by Conex Holdings, LLC ("Holdings"). Heico Holding, Inc., in turn, owned 100 percent of all interests in Holdings. In August 2008, Heico acquired Conex through a leveraged buy-out that allegedly left Conex insolvent. Just nine months after the LBO, Conex defaulted under its credit agreement and stopped paying its bank debt. On February 20, 2011, certain lenders of Holdings and Conex filed involuntary petitions for relief under chapter 11 of the Bankruptcy Code. On February 24, 2011, the court entered an order for relief under chapter 7 of the Bankruptcy Code. Shortly thereafter, the chapter 7 trustee was appointed.

On April 22, 2013, the trustee filed a complaint against certain officers and directors of Heico, who also served as officers and directors of Conex or other Heico affiliated divisions that controlled the debtors, alleging that these individual defendants caused Conex to make preferential and fraudulent payments to Heico rather than paying Conex creditors. Specifically, the trustee brought claims against the individual defendants for breach of fiduciary duties under Texas common law and section 3.307 of the Texas Business and Commerce Code. In addition, the trustee brought a claim against the individual defendants for deepening insolvency. The individual defendants moved to dismiss the trustee's claims.

COURT ANALYSIS

The court began its analysis by reviewing the applicable choice of law. Because Conex is a Texas LLC, the court held that Texas law applied to the breach of fiduciary duty claims. However, the court noted that it may look to Delaware law for guidance on matters of corporate law absent any conflicts with Texas law.

Turning to the trustee's claims, the court first reviewed the common law breach of fiduciary duty claim. Under Texas law, corporate directors owe three fiduciary duties: obedience, loyalty, and due care. The court agreed with the individual defendants that the trustee failed to state a common law breach of fiduciary duty claim because the trustee grouped the individual defendants together as "officers and directors" without identifying what each of them allegedly did wrong. Because the trustee lumped all of the individual defendants together as "officers and directors" without providing specific facts as to each defendant's wrongdoing, the court found that the trustee failed to satisfy the *Twombly* and *Iqbal* pleading standard. The court, however, dismissed the trustee's claim without prejudice, granting the trustee 30 days to file an amended complaint to include specific allegations regarding each defendant's wrongful conduct in support of the trustee's breach of fiduciary duty claim under Texas common law.

However, the court granted with prejudice the individual defendants' motion to dismiss the trustee's breach of fiduciary duty claim brought pursuant to section 3.307 of the Texas Business and Commerce Code. The court found that the statute did not provide a basis for the trustee's breach of fiduciary duty claim and was inapposite to the alleged facts.

Finally, the court summarily dismissed with prejudice the trustee's deepening insolvency claim, explaining that deepening insolvency is not a cause of action under Delaware or Texas law.

PRACTICAL CONSIDERATIONS

This case does not signal a significant departure from current jurisprudence regarding the pleadings standards for bringing breach of fiduciary duty claims against a group of officers or directors. However, parties should be mindful when drafting or responding to breach of fiduciary duty claims brought against a group of directors and officers that specific facts must be alleged as to each defendant's participation because "collective responsibility" allegations will not satisfy federal pleading standards.

ATTEMPT TO RE-LITIGATE STATE COURT DECISION BEFORE BANKRUPTCY COURT RESULTS IN DISMISSAL

Alison Wickizer Toepp
Associate, Richmond

In re DocAssist, LLC, No. 14-27625-JKO (Bankr. S.D. Fla. Aug. 12, 2014)

CASE SNAPSHOT

The majority—purporting to act on behalf of the limited liability company debtor—filed a series of emergency motions with U.S. Bankruptcy Court for the Southern District of Florida. The company's minority members filed their own series of emergency motions, including a motion to dismiss the bankruptcy case. The bankruptcy court entered an order abstaining from a would-be chapter 11 proceeding on the grounds that the "case [was] merely a two-party dispute" between the minority members and the majority members purporting to act on the company's behalf. Finding that the dispute was an improper attempt by the majority to re-litigate a state court's adverse decision, the bankruptcy court dismissed the case and held that there was "no economic need or purpose for this Debtor to be in Chapter 11."

FACTUAL BACKGROUND

Pursuant to the company's operating agreement, the company could not undertake various "Major Decisions" without "the approval of sixty-six and two-thirds percent (66.67%) of the Member Interests of the Company." The minority members of the company were two brothers who held a 33.84 percent interest, and therefore, no "Major Decision" of the company could be taken over the brothers' objection.

A governance dispute ensued between the majority members and the brothers, resulting in state court litigation. By order entered in September 2013, the state court ruled that various actions taken by the company between March 2010 and December 2011 to extinguish the brothers' interests were "invalid and void ab initio." The state court also held that the company's First Amended Operating Agreement—which required super majority approval of 66.67 percent of members for any "Major Decisions"—was the company's controlling operating agreement. The state court issued a stay of the September 2013 order pending issuance of a mandate from the state appellate court. That ruling was affirmed on appeal by order dated July 23, 2014.

Prior to the issuance of the mandate by the state appellate court, the company—without the consent of the brothers—filed its chapter 11 petition, arguing that the bankruptcy petition rendered the First Amended Operating Agreement inapplicable. The bankruptcy court rejected as "nonsense" the company's argument that a debtor is free to exercise its business judgment notwithstanding supermajority requirements of the company's operating agreement, holding that "A Chapter 11 debtor is not free to act in a manner inconsistent with its governing documents, and the filing of a Chapter 11 Petition does not operate to nullify or void regular corporate (or LLC) internal governance constraints." The bankruptcy court refused to revisit matters already decided by the state court and granted the brothers' motion to dismiss the chapter 11 case.

COURT ANALYSIS

Proposed counsel for debtor company argued that because the state court judge issued a stay of the order regarding the First Amended Operating Agreement pending issuance of a mandate by the state appellate court, which mandate had not issued as of the petition date, the decisions of the state court and the state appellate court were of no effect on the management of the debtor. Proposed counsel thus contended that the debtor was free to file its chapter 11 petition over the objection of the brothers. The bankruptcy court disagreed, finding that in order to allow the bankruptcy case to proceed over the brothers' objections, the bankruptcy court would have to revisit the proposed governance changes that were rejected by the state court.

The bankruptcy court held that it lacked jurisdiction under the *Rooker-Feldman* doctrine to revisit the state court's rulings. That doctrine—derived from *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 44 S.Ct. 149, 68 L.Ed. 362 (1923), and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983)—is a jurisdictional rule that precludes federal trial courts from reviewing state court judgments. Citing case law from the 11th Circuit and the U.S. Supreme Court, the bankruptcy court explained: "Here, the Debtor is attempting to undo the decisions of the State Courts which have invalidated LLC governance changes adopted to extinguish the Barberis Brothers' equity interests in the Debtor. Such action by the Debtor would 'effectively nullify' the State Court judgment and cannot be permitted."

The bankruptcy court further held that the debtor was collaterally estopped from re-litigating the corporate governance issues already decided by the state court. The prior judgment was entered by a Florida state court and under 11th Circuit case law, collateral estoppel law of Florida applied. To determine whether collateral estoppel applied to the case at hand, the bankruptcy court looked to the five factors recognized in Florida, i.e., whether "1) the identical issues were presented in a prior proceeding; 2) there was a full and fair opportunity to litigate the issues in the prior proceeding; 3) the issues in the prior litigation were a critical and necessary part of the prior determination; 4) the parties in the two proceedings were identical; and 5) the issues were actually litigated in the prior proceeding."

In the state court litigation, the state court held that organizational changes attempted by the majority members of the company in derogation of the brothers' interests were "invalid and void ab initio." As a result, the First Amended Operating Agreement controlled. Under that agreement, a supermajority of 66.67 percent was required for various "Major Decisions." The brothers owned a 33.84 percent interest, and therefore, Major Decisions could not be undertaken over the brothers' objections.

In seeking to obtain financing through the chapter 11 proceeding, proposed counsel for the company argued that the filing of a chapter 11 petition is not a "Major Decision." The bankruptcy court disagreed: "The notion that the filing of a Chapter 11 Petition is not a 'Major Decision' for an LLC flies in the face of reality, and can only be the result of a hyper-technical textual analysis entirely divorced from common sense." The bankruptcy court also disagreed with proposed counsel's contentions that the First Amended Operating Agreement became inapplicable post-petition. To the contrary, the bankruptcy court found

CONTINUED ON PAGE 18

STRUCTURED DISMISSAL APPROVED WHEN IN THE INTERESTS OF THE CREDITORS

Melissa Mickey
Associate, Chicago

In re Buffet Partners L.P., et al., Case No. 14-30699-HDH-11 (Bankr. N.D. Texas)

CASE SNAPSHOT

The district court granted a joint motion for a structured dismissal following a section 363(b) sale of substantially all of the debtors' assets. The court ruled that sections 105(a) and 1112(b) provide authority for a structured dismissal of a case when dismissal is what the parties want and is in the interests of creditors.

FACTUAL BACKGROUND

The debtors, Buffet Partners, L.P., and its affiliates (collectively, "Buffet"), owned and operated a buffet-style restaurant chain. Buffet filed for chapter 11 bankruptcy in the Northern District of Texas February 4, 2014, and the United States Trustee appointed a creditors' committee. Just over one month after filing for bankruptcy, Buffet sought court authority to sell substantially all of its assets under section 363(b) to stalking-horse bidder Chatham Credit Management III, LLC.

The official committee of unsecured creditors performed substantial due diligence regarding Buffet's business, the liens and claims against Buffet's assets and estate, and various restructuring alternatives. After completing due diligence, the committee and Buffet jointly filed a motion for approval of a settlement that would resolve the open issues in the case, pay allowed administrative and priority claims in full, and provide a meaningful recovery for general unsecured creditors.

In particular, under the proposed settlement: (i) Buffet's assets would be sold to Chatham or any qualified overbidder; (ii) the buyer would pay $500,000 into a trust created for the benefit of unsecured creditors; (iii) the buyer would assume all unpaid administrative expenses; (iv) the buyer would assume Buffet's unpaid professionals' fees and expenses in an amount not to exceed $600,000; (v) the aggregate amount of the creditors' committee fees would be capped at $250,000; (vi) the committee would support entry of a final cash collateral order in the case; (vii) Chatham would waive any unsecured deficiency claim; and (viii) Chatham, Buffet, and the committee would exchange releases.

The court approved the proposed settlement April 16, 2014. A public auction was held April 25, 2014, and Chatham had the winning bid. On June 19, 2014, Buffet and the committee jointly moved to dismiss the chapter 11 cases. Under the terms of the dismissal motion, the Buffet cases would be dismissed upon certification that: (i) the committee had completed the reconciliation process; (ii) all United States Trustee fees attributable to Buffet had been paid; (iii) funds had been distributed to unsecured creditors pursuant to a schedule filed with the court; and (iv) the court had entered orders for final professional fee applications.

In addition, the proposed dismissal order provided that: (i) any orders entered by the court during the case would remain in force, notwithstanding section 349; (ii) Buffet was authorized to take appropriate action to wind up and dissolve as a corporate entity without further approval by the board of directors, shareholders, or any other entities; (iii) the court retained jurisdiction to review fee applications; and (iv) the court retained jurisdiction to resolve disputes regarding the dismissal order and any other orders entered during the case.

The United States Trustee filed the only objection to the structured dismissal motion, arguing that – after approval of the sale to Chatham – the case should be converted to chapter 7 or, in the alternative, Buffet should seek confirmation and implementation of a chapter 11 plan.

COURT ANALYSIS

The court began its analysis by noting that not much law exists regarding structured dismissals. However, the court found that 11 U.S.C. section 1112(b) contemplates that a dismissal may be granted when it is in the best interests of creditors and the estate, and concluded that a structured dismissal in the current case fit these criteria.

When considering the interests of creditors, the court explained that the interests of the individual creditors are protected by the requirement that a court examine the best interests of the estate. The court further explained that the primary focus of best interests of the estate test is whether the economic value of the debtor in a converted case is greater than the economic value of the debtor after dismissal. Turning to the facts of the current case, the court reasoned that both alternatives urged by the United States Trustee, conversion, or plan confirmation, would add significant and unnecessary time and expense. The court found that "the economic value of the Debtor in this case will be served by dismissing the case, rather than converting it," and that the parties do not wish "to go through the time and expense of a plan, which will cause the pool of money left to be greatly diminished." Therefore, the court concluded that the structured dismissal should be approved.

However, the court cautioned that "parties do not have carte blanche to enter any settlement they choose." The court set forth three criteria under Fifth Circuit precedent that must be met when considering a settlement of this type: (i) senior interests must be given full priority over junior interests; (ii) the settlement must not constitute a sub rosa plan; and (iii) the settlement must not discriminate unfairly against parties that have not objected to the proposal. After considering each of these criteria in turn, the court found that each of these factors had been met. The court found that the proposed structured dismissal did not prefer junior interests over senior ones, and that the settlement did not discriminate unfairly for the reason that there were no non-consenting creditors. With regard to the second criteria, the court stated that "[a]lthough certain aspects of this dismissal are 'structured,' it does not rise to the level of a sub rosa plan."

Finally, the court emphasized that not one party with an economic stake in the case objected to the dismissal motion. The court explained that this fact was not outcome determinative, but it was worthy of consideration.

PRACTICAL CONSIDERATIONS

As the court noted, there is little authority – statutory or otherwise – with regard to whether a court can approve a structured dismissal. This decision is important because it is one of the few published rulings on the issue. Accordingly, *Buffet Partners* may provide guidance for courts considering whether and under what circumstances they may approve a structured dismissal as an exit strategy from a chapter 11 proceeding.

that voluntary petitions on behalf of corporations or LLCs require majority votes unless—as was the case with the First Amended Operating Agreement—the articles or operating agreements imposed heightened majority requirements. Under the circumstances, the bankruptcy court held that the majority members' efforts to pursue their chapter 11 plan was "exactly the kind of equity restructuring which the Majority Members of the LLC sought but failed to accomplish in the State Court litigation before Judge Bloom: the elimination of the Barberis Brothers' interests in the LLC."

Because the issue had been litigated below, the bankruptcy court abstained and dismissed the proceeding.

Although it did not rule on the debtor's motion to employ counsel, the bankruptcy court noted that it found the U.S. Trustee's objection to the motion (on the ground that proposed counsel was not disinterested) was "compelling."

PRACTICAL CONSIDERATIONS

As the bankruptcy court held: "A Chapter 11 debtor is not free to act in a manner inconsistent with its governing documents, and the filing of Chapter 11 Petition does not operate to nullify or void regular corporate (or LLC) internal governance constraints." Moreover, where a state court has already ruled on which of a debtor's governing documents control, the bankruptcy court lacks jurisdiction to revisit those rulings.

COUNSEL'S CORNER: NEWS FROM REED SMITH

Derek Baker conducted a CLE course in October 2014, for the Eastern District of Pennsylvania Bankruptcy Conference, discussing the pros and cons of structured dismissals as a means of administering a chapter 11 case.

Amy Tonti served as a co-panelist for the December 2014 Coal – New Reality Series, and addressed International Commercial Terms (INCOTERMS) and Related Reclamation Claims under the Bankruptcy Code.

Robert Simons, on December 5, 2014 in Pittsburgh, was a panelist on the topic of " Bankruptcies in the Energy Sector" at The 27th Annual Bankruptcy Symposium.

Robert also participated in a teleseminar called: "2015 Coal Industry Outlook: The Export Market," on January 14, 2015. He was a co-presenter with Ryan Russell, Senior International Trade Specialist with the U.S. Commercial Service.

Robert also will speak at "Bankruptcy Issues in the Energy Industry" on March 11, 2015.

Robert is publishing "Year 2015: A Battle for Equity Players and a War for Energy Companies Producing Fossil Fuels" in Bankruptcy and Financial Restructuring Law, 2015 edition, published by Aspatore Books, a Thomson Reuters business.

REED SMITH COMMERCIAL RESTRUCTURING & BANKRUPTCY GROUP

PRACTICE LEADER

Peter S. Clark II
+1 215 851 8142
(Philadelphia)
pclark@reedsmith.com

CHICAGO

Stephen T. Bobo
+1 312 207 6480
sbobo@reedsmith.com

Aaron B. Chapin
+1 312 207 2452
achapin@reedsmith.com

Theresa Davis
+1 312 207 2777
tdavis@reedsmith.com

Timothy S. Harris
+1 312 207 2420
tharris@reedsmith.com

Melissa A. Mickey
+1 312 207 2426
mmickey@reedsmith.com

Ann E. Pille
+1 312 207 3870
apille@reedsmith.com

Alexander Terras
+1 312 207 2448
aterras@reedsmith.com

FALLS CHURCH

Linda S. Broyhill
+1 703 641 4328
lbroyhill@reedsmith.com

Robert M. Dilling
+1 703 641 4255
rdilling@reedsmith.com

HONG KONG

Desmond Liaw
+ 852 2507 9834
desmond.liaw@rsrbhk.com

HOUSTON

Carol Burke
+1 713 469 3880
cburke@reedsmith.com

LONDON

Helena Clarke
+44 (0)20 3116 3747
hclarke@reedsmith.com

Jeffery Drew
+44 (0)20 3116 2900
jdrew@reedsmith.com

Emma J. Flacks
+44 (0)20 3116 2922
eflacks@reedsmith.com

Monika Kuzelova
+44 (0)20 3116 3428
mkuzelova@reedsmith.com

Edward Mathison
+44 (0)20 3116 2932
emathison@reedsmith.com

Elizabeth A. McGovern
+44 (0)20 3116 3151
emcgovern@reedsmith.com

Charlotte Møller
+44 (0)20 3116 3472
cmoller@reedsmith.com

Georgia M. Quenby
+44 (0)20 3116 3689
gquenby@reedsmith.com

Victoria Thompson
+44 (0)20 3116 3509
vthompson@reedsmith.com

Estelle Victory
+44 (0)20 3116 3000
evictory@reedsmith.com

LOS ANGELES

Marsha A. Houston
+1 213 457 8067
mhouston@reedsmith.com

Christopher O. Rivas
+1 213 457 8019
crivas@reedsmith.com

MUNICH

Dr. Stefan Kugler, LL.M.
+49 (0)89 20304 131
skugler@reedsmith.com

Dr. Etienne Richthammer
+49 (0)89 20304 141
erichthammer@reedsmith.com

NEW YORK

Arnold L. Bartfeld
+1 212 205 6008
abartfeld@reedsmith.com

Aaron Z. Bourke
+1 212 231 2640
abourke@reedsmith.com

Edward J. Estrada
+1 212 549 0247
eestrada@reedsmith.com

Sarah K. Kam
+1 212 549 0284
skam@reedsmith.com

Christopher A. Lynch
+1 212 549 0208
clynch@reedsmith.com

James C. McCarroll
+1 212 549 0209
jmccarroll@reedsmith.com

Andrea J. Pincus
+1 212 205 6075
apincus@reedsmith.com

Chrystal A. Puleo
+1 212 231 2651
cpuleo@reedsmith.com

John L. Scott
+1 212 205 6099
jlscott@reedsmith.com

Mark D. Silverschotz
+1 212 205 6086
msilverschotz@reedsmith.com

Michael J. Venditto
+1 212 205 6081
mvenditto@reedsmith.com

Lillian Worthley
+1 212 549 0273
lworthley@reedsmith.com

PARIS

Brice Mathieu
+33 (0)1 76 70 40 00
bmathieu@reedsmith.com

Anker Sorensen
+33 (0)1 44 34 80 88
asorensen@reedsmith.com

PHILADELPHIA

Derek J. Baker
+1 215 851 8148
dbaker@reedsmith.com

Scott M. Esterbrook
+1 215 851 8146
sesterbrook@reedsmith.com

Barbara K. Hager
+1 215 851 8864
bhager@reedsmith.com

Jennifer P. Knox
+1 215 851 8190
jknox@reedsmith.com

Brian M. Schenker
+1 215 241 7966
bschenker@reedsmith.com

Claudia Z. Springer
+1 215 241 7946
cspringer@reedsmith.com

Matthew E. Tashman
+1 215 241 7996
mtashman@reedsmith.com

Lauren Zabel
+1 215 851 8147
lzabel@reedsmith.com

PITTSBURGH

Joseph D. Filloy
+1 412 288 3842
jfilloy@reedsmith.com

Eric A. Schaffer
+1 412 288 4202
eschaffer@reedsmith.com

Robert P. Simons
+1 412 288 7294
rsimons@reedsmith.com

Paul M. Singer
+1 412 288 3114
psinger@reedsmith.com

Luke A. Sizemore
+1 412 288 3514
lsizemore@reedsmith.com

Amy M. Tonti
+1 412 288 3274
atonti@reedsmith.com

David Ziegler
+1 412 288 3026
dziegler@reedsmith.com

RICHMOND

Alison Toepp
+1 804 344 3465
atoepp@reedsmith.com

SAN FRANCISCO

Douglas G. Boven
+1 415 659 5652
dboven@reedsmith.com

Jonathan Doolittle
+1 415 659 5902
jdoolittle@reedsmith.com

WILMINGTON

J. Cory Falgowski
+1 302 778 7522
jfalgowski@reedsmith.com

Kurt F. Gwynne
+1 302 778 7550
kgwynne@reedsmith.com

Kimberly E.C. Lawson
+1 302 778 7597
klawson@reedsmith.com

Richard A. Robinson
+1 302 778 7555
rrobinson@reedsmith.com

ReedSmith

The business of relationships.SM