ReedSmith

The business of relationships.℠

CR&B Alert

Commercial Restructuring & Bankruptcy News

OCTOBER 2016, ISSUE 3

In This Issue:

- Delaware and New York at Odds over Reclamation Claims—2
- Second Circuit Sets Out Standard for Determining Scope of Free and Clear Provision in Sale Order Under Section 363(F)—2
- Good Faith Filing Requirement Alive and Well in Involuntary Bankruptcy Cases—4
- Unpaid Compensation Payable Exclusively in Stock Constitutes Equity, Not an Unsecured Claim—5
- Breach of Fiduciary Duty Claims Are Not Time-Barred Due to Lender's Knowledge—6
- Petitioning Creditors Beware: Bankruptcy Code Does Not Preempt State Law Claims of Non-Debtors—7
- Ninth Circuit Holds That Defalcation Requires More Than a Contingent Partnership Agreement—8
- Tax Upset Sale Held Not To Be Constructive Fraudulent Transfer—9
- California Bankruptcy Court Clarifies Officer and Director Duties to Creditors of Insolvent Company—9
- Texas Bankruptcy Court Holds That Structured Dismissal Is Authorized by the Bankruptcy Code When Creditor Recovery Is Maximized by Limiting Administrative Claims, and the Terms of the Dismissal Provide Fair and Equitable Treatment to Creditors—11
- Does "No-Asset" Mean No Jurisdiction? Bankruptcy Court Considers Jurisdiction in Adjudicating Claims in No-Asset Chapter 7 Case—12
- Timing Is Everything: Bankruptcy Court Considers Timing Issues Relating to When WARN Act Claims May Be Eligible for Treatment as Administrative Expense Claims—13
- Further Clarity in Analyzing "Make-Whole" Provisions (or Not). Is It Simply a Matter of Contract Interpretation?—14
- Trustee Fails to Meet Burden of Showing That Proposed Sale of Assets Complies with Section 363(F) of the Bankruptcy Code—15
- Pre-petition Bankruptcy Waivers by Another Name: Court Refuses to Dismiss Case Filed Without Vote of Creditor's Golden Share—15
- Pre-petition Restructuring Did Not Alter Senior Lenders' Rights Under an Intercreditor Agreement—16
- First Circuit Declines to Overturn Chapter 7 Conversion, Noting Lower Courts' Broad Discretion—17
- Class Certification and Proofs of Claim; a Measure of Case Efficiency—18
- Counsel's Corner: News from Reed Smith—18

DELAWARE AND NEW YORK AT ODDS OVER RECLAMATION CLAIMS

Peter S. Clark, II
Firmwide Practice Group Leader, Philadelphia

A vendor may reclaim goods sold on credit to an insolvent debtor that has filed for bankruptcy. However, New York Bankruptcy Courts have consistently held that a creditor's reclamation rights are cut off by a DIP loan that refinanced a pre-petition loan. These courts treat the two loans, and the liens securing the loans, as an "integrated transaction," with the DIP lender's rights relating back to the pre-petition loan.

A recent decision by the Delaware Bankruptcy Court concluded otherwise and held that the pre-petition loan and the DIP loan were separate transactions, and that the reclamation rights of the vendor were not affected by the repayment of the pre-petition loan. Simply put, the Delaware Bankruptcy Court found that the vendor's reclamation right arose before the DIP lender's liens attached, so such liens were subject to the prior reclamation rights of the vendor. *In re Reichhold Holdings US, Inc.,* No. 14-12237, (Bankr. D. Del. Aug. 24, 2016).

Click here to subscribe to our *Global Restructuring Watch* blog.

SECOND CIRCUIT SETS OUT STANDARD FOR DETERMINING SCOPE OF FREE AND CLEAR PROVISION IN SALE ORDER UNDER SECTION 363(F)

Christopher A. Lynch
Associate, New York

Elliott v. General Motors LLC (*In re Motors Liquidation Co.*), 829 F.3d 135, (2d Cir. 2016)

CASE SNAPSHOT

The Second Circuit Court of Appeals recently articulated a standard to determine which claims are barred as against a purchaser of assets "free and clear" of claims pursuant to section 363(f) of the Bankruptcy Code. While finding that some of the claims against the purchaser were barred by the sale order, the court also found that the free and clear provision could not be used to enjoin all claims asserted because the publication notice given to claimants did not comport with due process. Instead, where the debtor knew or should have known of the design defect giving rise to the claims, actual notice by mail should have been given.

FACTUAL BACKGROUND

On June 1, 2009, amid crushing losses, General Motors Corp. ("Old GM") filed for bankruptcy in the United States Bankruptcy Court for the Southern District of New York (the "Bankruptcy Court"). On the same date, Old GM sought authority to sell substantially all of its assets to General Motors LLC ("New GM") in a sale under section 363 of the Bankruptcy Code. The next day, the Bankruptcy Court ordered Old GM to provide actual notice of the proposed sale order to all known creditors of Old GM, and in major publications such as *The Wall Street Journal* and *The New York Times* to all unknown creditors. After addressing and dismissing some 850 objections, the Bankruptcy Court, in July 2009, approved the sale and entered an order (the "Sale Order") providing that the sale would be "free and clear of all liens, claims, encumbrances, and other interests of any kind or nature whatsoever, including rights or claims based on any successor or transferee liability," with the exception of certain liabilities that New GM had agreed to assume.

Starting in February 2014, New GM began recalling cars built between 2002 and 2009 because of an ignition switch defect that could cause the ignition to turn off and, as a result, disable power steering, brakes and air bags. Congressional testimony and numerous lawsuits soon followed. The plaintiffs fell into four categories: (i) pre-closing accident claims, (ii) economic loss claims arising from the ignition switch or other defects, (iii) independent claims relating solely to New GM's conduct, and (iv) used car purchasers' claims. New GM sought to enforce the free and clear provision in the Sale Order to enjoin all such claims against New GM. The plaintiffs in the lawsuits had received publication, but not actual, notice of the Sale Order.

The Bankruptcy Court found that, with a few exceptions, the terms of the Sale Order barred the claims asserted against New GM. The Bankruptcy Court also found that although some of the ignition switch plaintiffs had not received notice of the Sale Order consistent with procedural due process, the plaintiffs, with the exception of those persons with independent claims relating solely to New GM's conduct, had not been "prejudiced" by this insufficient notice.

COURT ANALYSIS

Addressing the Sale Order, the Second Circuit held that a Bankruptcy Court may approve a section 363(f) sale "free and clear" of successor liability claims "if those claims flow from the debtor's ownership of the sold assets" and (i) arise from "a right to payment" (ii) "that arose before the filing of the petition or resulted from pre-petition conduct fairly giving rise to the claim." In addition, "there must be some contact or relationship between the debtor and the claimant such that the claimant is identifiable."

CONTINUED ON PAGE 3

Applying this standard to the four classes of claims asserted against New GM, the Second Circuit found that pre-closing accident claims and economic loss claims arising from the ignition switch or other defects fell within the scope of the Sale Order and could be barred. These claims were found to "flow from the operation of Old GM's" business. The Second Circuit, however, found that the so-called independent claims (i.e., those based on New GM's own post-closing conduct) and claims of used car purchaser (i.e., claims held by individuals who purchased cars manufactured by Old GM after closing without knowledge of the defect) fell outside the scope of the Sale Order's "free and clear" provision.

The Second Circuit then considered the due process implications of the notice given to the claimants. The court noted that the general rule is that notice by publication is insufficient where a person's name and address are known or very easily ascertainable, and where that person's legally protected interests are directly affected. Here, the Second Circuit agreed with the Bankruptcy Court that Old GM knew or reasonably should have known about the ignition switch defect prior to closing, and therefore should have provided direct notice to the affected car owners. Moreover, because federal law requires the auto manufacturer to keep records of the initial owners of their vehicles to facilitate recalls and other communications, Old GM had within its possession the contact information for a significant number of affected owners. Accordingly, the claimants were entitled to actual notice of the proposed Sale Order. The Second Circuit also rejected the Bankruptcy Court's conclusion that these claimants were not prejudiced because the sale would have been approved anyway because the alternative, liquidation, was unacceptable. Noting that the Sale Order was the product of negotiations with many parties, including states' attorneys general, failure to give the claimants notice deprived them the opportunity to participate in those negotiations. The court therefore ruled that the claimants were not barred from asserting their claims against New GM.

On September 14, 2016, the Second Circuit denied New GM's petition for panel rehearing, or, in the alternative, for rehearing en banc.

PRACTICAL CONSIDERATIONS

The Second Circuit's decision is a cautionary tale for debtors seeking to sell, and those wishing to purchase, assets "free and clear" under section 363. Where a debtor can reasonably know of potential claimants (even if the claims are not liquidated), actual notice of the proposed sale should be provided.

GOOD FAITH FILING REQUIREMENT ALIVE AND WELL IN INVOLUNTARY BANKRUPTCY CASES

Jennifer P. Knox
Associate, Philadelphia

In re Diamondhead Casino Corporation, No. 15-11647, slip op. (Bankr. D. Del. June 7, 2016)

CASE SNAPSHOT

In this involuntary bankruptcy case, after finding that a sufficient number of the petitioning creditors' claims were not the subject of a bona fide dispute, the Delaware Bankruptcy Court concluded – based upon the totality of the circumstances – that the involuntary bankruptcy case had been filed in bad faith by the petitioning creditors when the evidence failed to support the conclusion that the debtor was insolvent. The court went on to note the evidence supported the conclusion that the primary purpose of the bankruptcy was to effect a change in the debtor's management to benefit their interests as the debtor's equity holders. A secondary purpose was to enable the petitioning creditors to collect on their pre-petition notes. Thereafter, the Bankruptcy Court entered judgment in favor of the debtor and against the petitioning creditors for fees, expenses and punitive damages incurred by the alleged debtor in connection with this matter.

PROCEDURAL HISTORY

In August 2016, three noteholders and stockholders filed an involuntary chapter 7 bankruptcy petition against Diamondhead Casino Corporation. Three additional creditors subsequently joined in the petition. The alleged debtor moved to dismiss the bankruptcy case, asserting that (i) each of the petitioning creditors' claims was the subject of bona fide dispute; (ii) the petition was filed in bad faith; and (iii) abstention was warranted. While Diamondhead's motion was pending, the petitioning creditors sought the appointment of a chapter 7 trustee. The Bankruptcy Court denied the petitioning creditors' motion to appoint a chapter 7 trustee, following an evidentiary hearing. After a further evidentiary hearing and post-hearing briefing by Diamondhead and the petitioning creditors, the Bankruptcy Court granted Diamondhead's motion to dismiss the bankruptcy case.

FACTUAL BACKGROUND

For approximately 15 years prior to the petition date, Diamondhead had no operations. As of the petition date, Diamondhead's only asset was a wholly owned subsidiary that owns certain undeveloped real property. Diamondhead's CEO testified that the appraised value of the real property was $39,350,000.

To fund the development of the real property, Diamondhead issued various promissory notes, all of which had matured and had not been paid, prior to the commencement of the bankruptcy case. The petitioning creditors held such notes and also held stock in Diamondhead. According to evidence adduced during the hearings in this case, as of December 31, 2014, Diamondhead's balance sheet reflected current assets of approximately $6.5 million, including the real property with a book value of approximately $5.3 million, and liabilities totaling approximately $9 million.

In the year leading up to the filing of the involuntary petition, petitioning creditors' frustration with Diamondhead's management grew and the petitioning creditors lost faith in management as a result of, among other things, petitioning creditors' disagreement with certain action taken by Diamondhead for the apparent benefit of insiders, and the denial of certain petitioning creditors' requests to install new board members. Additionally, Diamondhead and one of its noteholders (who purportedly assigned its interest in such note to one of the petitioning creditors) sued Diamondhead to recover amounts owed to it under the note. Furthermore, at Diamondhead's 2015 annual meeting, certain of the petitioning creditors unsuccessfully undertook a proxy contest to replace Diamondhead's incumbent board of directors.

COURT ANALYSIS

As a threshold matter, the Bankruptcy Court evaluated whether the petitioning creditors' claims were the subject of a bona fide dispute. The court concluded that, in five of the six petitioning creditors' claims, the claims were not the subject of a bona fide dispute because there was no objective basis for either a factual or legal dispute concerning the validity of the debt. In reaching its conclusion, the court analyzed whether Diamondhead's affirmative defenses to liability under the notes presented a meritorious legal argument that it would not be liable to pay the notes. The remaining petitioning creditor failed to present evidence sufficient to carry its burden that no bona fide dispute existed, with respect to its right to payment under the note, following an alleged assignment. Notwithstanding the existence of a bona fide dispute with one petitioning creditor's claim, the five remaining petitioning creditors' claims were sufficient to satisfy the three petitioning creditor and debt threshold requirements in section 303 of the Bankruptcy Code. Accordingly, the court went on to consider whether the petition had been filed in good faith.

Courts in the Third Circuit may dismiss an involuntary case that was filed in bad faith, even if the statutory requirements are satisfied. In evaluating the good faith requirement in involuntary cases, courts within the Third Circuit examine the totality of the circumstances, by considering various factors including: (i) whether the petitioning creditors are using the bankruptcy in an attempt to obtain a disproportionate advantage over other creditors; (ii) whether the filing was motivated by a proper purpose or some ill will, malice or a desire to harass or embarrass the alleged debtor; and (iii) what a reasonable person would have done in the petitioning creditors' situation. The court conducted an additional inquiry as to whether the petitioning creditors were motivated by their status as creditors, stockholders or both.

The Bankruptcy Court considered the evidence introduced and parties' arguments in connection with each of these factor. The Bankruptcy Court found that the evidence overwhelmingly proved that each of the petitioning creditors sought a change in management, believed the involuntary bankruptcy proceeding was the only means by which to accomplish such managerial change, and expressed frustration and a lack of faith in existing management.

The Bankruptcy Court found that certain factors to be considered weighed in favor of finding that the involuntary petition was filed in bad faith, while others did not. For instance, the court found that petitioning creditors' desire to replace

CONTINUED ON PAGE 5

existing management and remedy stockholder issues through an involuntary bankruptcy proceeding, is a factor warranting dismissal. The court also rejected the petitioning creditors' arguments that they commenced the involuntary bankruptcy case to preserve and protect the property and pursue chapter 5 avoidance actions, citing, among other things, "significant hurdles" to proving the alleged debtor's insolvency at the time of such transfers. The Bankruptcy Court further noted that involuntary bankruptcy cases should not be used as collection devices. On the other hand, the Bankruptcy Court concluded that several factors did not suggest a bad faith filing. These include a lack of ill will toward Diamondhead or its current management, despite the petitioning creditors' frustration with both, and a lack of evidence to support a finding that the case was commenced to obtain a tactical litigation advantage or advantage over other creditors.

After weighing all the factors, the court concluded, based upon the totality of the circumstances, that the petitioning creditors filed the bankruptcy case in bad faith because the primary purpose of the bankruptcy was to effect a change in the debtor's management to benefit their interests as the debtor's equity holders; a secondary purpose was to enable the petitioning creditors to collect on their pre-petition notes; and any motive to pursue avoidance actions was "tertiary, at best, and likely ill-conceived." Accordingly, the court dismissed the bankruptcy case. Following the dismissal of the case, Diamondhead successfully petitioned the court for an award of fees and costs that it incurred in defending the motion to appoint a chapter 7 trustee and in obtaining dismissal of the bankruptcy case.

PRACTICAL CONSIDERATIONS

The court was careful to limit its determination to the particular facts and circumstances of this case; however, petitioning creditors should be mindful of the good faith filing requirement in pursuing an involuntary bankruptcy case. In considering whether to file an involuntary petition, creditors should note that, a desire to effect a change in management and collect on pre-petition obligations, especially when the debtor's insolvency is in question, may not be sufficient to sustain a finding that the involuntary case was filed in good faith. Moreover, in evaluating whether to file an involuntary petition, creditors should consider that the dismissal of an involuntary case, which is found to have been filed in bad faith, could result in the imposition of monetary sanctions against such creditors in favor of the debtor.

UNPAID COMPENSATION PAYABLE EXCLUSIVELY IN STOCK CONSTITUTES EQUITY, NOT AN UNSECURED CLAIM

Jennifer P. Knox
Associate, Philadelphia

GSE Environmental, Inc. v. Sorentino (In re GSE Environmental, Inc.), Adv. Pro. No. 16-50377, (Bankr. D. Del. Jul. 18, 2016)

CASE SNAPSHOT

The Delaware Bankruptcy Court recently found that employee compensation, which was payable in company stock, should be characterized as equity rather than debt.

FACTUAL BACKGROUND

Prior to the commencement of the bankruptcy case, the debtors' interim president and CEO ("CEO") entered into an employment agreement with the debtors, pursuant to which the parties agreed that $100,000 of the CEO's monthly compensation would be paid in cash and the remaining $86,000 would be paid in company stock. As of the petition date, the CEO had received all of the cash compensation due under the employment agreement, but had not received the compensation that was payable in the form of company stock.

The CEO filed a proof of claim in the debtors' bankruptcy cases, asserting a general unsecured claim in the amount of $260,886.67, on account of the unpaid company stock portion of his compensation. Thereafter, the debtors commenced an adversary proceeding seeking a declaratory judgment that the stock-based compensation constituted an "equity interest," as defined by the Bankruptcy Code, not an unsecured claim; or alternatively, that such claim should be subordinated pursuant to section 510(b) of the Bankruptcy Code. After the pleadings closed, the debtors' moved the court for entry of judgment on their claims against the CEO.

COURT ANALYSIS

Judge Walrath agreed with the debtors and found that the company stock portion of the CEO's compensation "fits squarely within the Code's definition of equity security." Section 101(16) of the Bankruptcy Code defines "equity security" to include, a "share in a corporation, whether or not transferable or denominated 'stock' or similar security . . . [or a] warrant or right, other than a right to convert, to purchase, sell or subscribe to [such] a share, security or interest." The court held that the common stock given in exchange for labor constitutes a purchase and sale of a security, under the Bankruptcy Code. In so holding, the court rejected the CEO's argument that, because the value of the stock owed to him was calculated based upon a dollar amount, rather than on a certain number of shares, the claim should be treated as an unsecured claim. In rejecting this argument, the court noted that the employment agreement entitled the CEO to receive company stock only, not cash, on account of the portion of the compensation that remained unpaid.

PRACTICAL CONSIDERATIONS

The decision is the subject of an appeal that is pending before the U.S. District Court for the District of Delaware, as Case No. 16-616. Reed Smith represents the debtors in this case.

BREACH OF FIDUCIARY DUTY CLAIMS ARE NOT TIME-BARRED DUE TO LENDER'S KNOWLEDGE

Brian M. Schenker
Associate, Philadelphia

Eugenia VI Venture Holdings, Ltd. v. MapleWood Holdings LLC (In re AMC Investors, LLC), 551 B.R. 148 (D. Del. 2016)

CASE SNAPSHOT

In this chapter 7 case, the debtor's pre-petition secured lender, and sole creditor, obtained derivative standing to pursue breach of fiduciary duty claims against private investment funds that controlled the debtor. The lender alleged that the defendants had breached their fiduciary duties of good faith, due care, and loyalty by instituting, directing, and/or failing to discover and prevent massive fraud by the board and management of the debtor. The Bankruptcy Court held that such claims were time-barred under the applicable Delaware statute of limitations. The District Court reversed that decision to the extent that it was based solely on the lender's knowledge.

FACTUAL BACKGROUND

The debtor – AMC Computer Corp. – was a hardware and services company. In 2000, the defendants – private investment funds collectively referred to as MapleWood – invested in AMC in exchange for equity shares. Pursuant to a January 30, 2003, credit agreement, the lender – Eugenia – extended up to $16 million of credit to AMC secured by working capital. In May 2005, AMC became insolvent, and its board of directors voted to cease operations and to approve an assignment for the benefit of creditors.

Eugenia – AMC's sole creditor – successfully brought an involuntary chapter 7 bankruptcy case against AMC. In the bankruptcy case, Eugenia alleged that, at all relevant times, MapleWood dominated and controlled AMC. Eugenia further alleged that MapleWood's breaches of its fiduciary duties rendered Eugenia's loan unrecoverable and worthless. On these bases, Eugenia sought, and obtained, derivative standing to bring breach of fiduciary duty claims against MapleWood on behalf of AMC. However, the Bankruptcy Court dismissed such claims as being time-barred under Delaware's three-year statute of limitations.

On appeal, Eugenia argued that the Bankruptcy Court erred when it failed to toll the statute of limitations. Under Delaware's tolling doctrine, the statute of limitations begins to run upon the discovery of facts constituting the basis of the cause of action or the existence of facts sufficient to put a person of ordinary intelligence and prudence on inquiry, which, if pursued, would lead to the discovery of such facts. Eugenia contended that the Bankruptcy Court erred when it held that the statute of limitations began to run upon Eugenia's discovery of the underlying facts because Eugenia was bringing a derivative claim on behalf of AMC. According to Eugenia, the correct inquiry was whether and when AMC discovered the underlying facts, and the statute of limitations only began to run upon that date.

COURT ANALYSIS

The District Court agreed with Eugenia. The District Court reasoned that the discovery inquiry should not have turned on Eugenia's knowledge, but instead on AMC's ability to discover the claims, because it was the only entity with a direct breach of fiduciary duty claim against MapleWood. Thus, the District Court held that Delaware law required the Bankruptcy Court to evaluate when AMC had discovered facts constituting the basis for the breach of fiduciary duty claims, or the existence of facts sufficient to put AMC on inquiry notice.

PRACTICAL CONSIDERATIONS

Having reversed the Bankruptcy Court to the extent that its decision was based solely on Eugenia's knowledge, the District Court emphasized that "Eugenia's knowledge at the critical time should not be imputed to" AMC. The correct inquiry was solely AMC's knowledge. The District Court acknowledged that such inquiry was complicated by the fact that MapleWood was both controlling AMC and allegedly breaching its fiduciary duties, and suggested that this may be a basis alone to toll the statute of limitations so long as Eugenia was reasonably relying on MapleWood's competence and good faith. The District Court, however, left that issue for the Bankruptcy Court to determine.

PETITIONING CREDITORS BEWARE: BANKRUPTCY CODE DOES NOT PREEMPT STATE LAW CLAIMS OF NON-DEBTORS

Derek J. Baker
Partner,
Philadelphia and Princeton

Rosenberg v. DVI Receivables XVII, LLC,
No. 15–2622, 2016 WL 4501675
(3d Cir. Aug. 29, 2016)

CASE SNAPSHOT

In this opinion, the United States Court of Appeals for the Third Circuit was presented with the question of whether section 303(i) of the Bankruptcy Code preempted a non-debtor's state law rights of recovery for damages resulting from an improper involuntary bankruptcy petition. The court held that because the plaintiff seeking damages here were not the debtors subject to the involuntary petition and, because section 303(i) of the Bankruptcy Code did not constitute complete field preemption of all remedies, non-debtors injured by improperly filed involuntary petition still retained the right to proceed with those state law claims.

FACTUAL BACKGROUND

The case began through an involuntary petition that was commenced by certain lease creditors against various lessees and one of the principals – Maury Rosenberg – in the Eastern District of Pennsylvania. The case against Rosenberg was transferred to the Southern District of Florida and was subsequently dismissed because the lease creditors were not creditors of Rosenberg. Ultimately, the actions against the original lessees were also dismissed. Rosenberg thereafter filed an action against the petitioning creditors for the improper involuntary petition filing pursuant to section 303(i) of the Bankruptcy Code. After various procedural machinations, a final judgment was entered in favor of Rosenberg in the Florida courts for $1.1 million in compensatory damages and $5 million in punitive damages.

While the petitions were pending in the Florida courts, Sarah Rosenberg (Maury's wife) and various other affiliated entities that were not the subject of any involuntary petitions brought a separate suit against the petitioning creditors in Florida federal District Court for state law tortious interference with contractual relations. The cases were transferred to the Eastern District of Pennsylvania and were thereafter dismissed. The dismissing court held that the complaint involved state law claims that were preempted by section 303(i) of the Bankruptcy Code. The appeal followed.

COURT ANALYSIS

The court began by highlighting that section 303(i) of the Bankruptcy Code expressly provides a remedy for debtors who are the subject of an improperly commenced involuntary petition. The Bankruptcy Code allows putative debtors to recover attorneys' fees, costs and damages resulting from the improper case. The court also noted that because the plaintiffs in the current action were not debtors, they are not entitled to bring actions under section 303(i) of the Bankruptcy Code. The court then analyzed whether the enactment of section 303(i) of the Bankruptcy Code preempted any state law claims asserted by non-debtors.

The court focused on whether Congress has occupied a field that has been set for exclusive federal regulation in order to determine whether that act preempted state law claims. There is a presumption against inferring preemption so as to not eliminate existing rights unless Congress specifically attempted to do so. When analyzing the text of section 303(i) of the Bankruptcy Code, Congress specifically addressed a remedy for debtors but did not provide any remedy for non-debtors. The court held that Congressional silence should be inferred to leave intact whatever rights those non-debtor parties would have.

The court noted that its decision was contrary to the 2005 decision of the Ninth Circuit in *In re Miles*. In *In re Miles*, the Ninth Circuit held that section 303(i) of the Bankruptcy Code provided the exclusive remedy relating to the commencement of an improper bankruptcy petition. The court here noted that the *Miles* decision was inconsistent with a 1988 decision of the Third Circuit (which was precedent here) and declined to follow the *Miles* reasoning. The court further reasoned that it was hard to rationalize how the statute's express language related only to debtors – and how its silence as to the rights of non-debtors could result in preemption.

PRACTICAL CONSIDERATIONS

Involuntary bankruptcy cases are generally cautionary tales. Creditors commencing involuntary petitions must engage in significant pre-filing diligence just to ensure that they are not exposed to liability to the putative debtor under the Bankruptcy Code. This case raises the bar even further – creditors improperly commencing an involuntary case could also be liable to non-debtor parties for their actions if separate state law claims can be established.

NINTH CIRCUIT HOLDS THAT DEFALCATION REQUIRES MORE THAN A CONTINGENT PARTNERSHIP AGREEMENT

Christopher O. Rivas
Associate, Los Angeles

Crull v. Utnehmer (In re Utnehmer), No. 13-60113 (9th Cir. June 06, 2016)

CASE SNAPSHOT

The Ninth Circuit held that a loan agreement with a contingent promise to enter into an operating agreement for a partnership at some point in the future did not, on its own, form a partnership under California law.

FACTUAL BACKGROUND

Creditors loaned $100,000 to the debtors for purposes of developing a parcel of real property. The loan agreement granted the debtors the right to use the funds in their discretion and set forth the terms of repayment of the loan. Although the parties discussed the loan being secured by the real property, no deed of trust was ever recorded. Importantly, the loan agreement also stated that the parties intended that $50,000 of the loan be recharacterized as equity pursuant to an operating agreement not yet drafted or agreed upon. However, no such operating agreement was ever finalized between the parties.

After creditors made the $100,000 loan, the debtors obtained additional financing from other sources that were secured by the real property without informing the creditors, and after fully developing the real property, the debtors repaid all of their lenders except for creditors. Creditors sued the debtors and obtained default judgment. The debtors filed a chapter 11 case, at which time creditors filed an adversary case against the debtors seeking to have their judgment deemed nondischargeable under 11 U.S.C. section 523.

The Bankruptcy Court found no fraud in the inception of the loan, but found that the loan agreement created a partnership between creditors and the debtors, and found that the debtors' failure to account for missing funds owed to creditors constituted "defalcation" to a partner under 11 U.S.C. section 523(a)(4). On appeal to the Bankruptcy Appellate Panel (BAP) for the Ninth Circuit, the BAP reversed the Bankruptcy Court's ruling, finding that a contingent promise in a loan agreement to form a partnership in the future was not enough to form a current partnership. The BAP did not remand the case for any further findings of fact on the partnership issues. Creditors appealed to the Ninth Circuit.

COURT ANALYSIS

The Ninth Circuit agreed with the BAP's analysis that, finding that the loan agreement required that the parties enter into an operating agreement before any partnership was formed, and the failure to satisfy that contingency resulted in no partnership being formed under the operating agreement. On that basis, the Ninth Circuit reversed the Bankruptcy Court's ruling that the loan agreement formed a partnership. Without such a partnership being formed, there could be no "defalcation" under 11 U.S.C. section 523(a)(4).

However, the Ninth Circuit also held that the BAP erred by not remanding the case for further findings of fact regarding whether a partnership was formed outside of the context of the loan agreement, and whether there was any defalcation under that partnership arrangement. If the Bankruptcy Court were to determine

that a partnership was formed outside the loan agreement, the Ninth Circuit also remanded on the issue whether debtors had the requisite culpable state of mind to commit defalcation, as required by the Supreme Court's decision in *Bullock v. BankChampaign, N.A.*, 569 U.S. ___, 133 S. Ct. 1754 (2013), which was issued after the Bankruptcy Court's ruling.

PRACTICAL CONSIDERATIONS

Sloppy drafting in a loan agreement can wreak havoc on a creditor's ability to collect on its loan obligations, and both lenders and borrowers should be very clear about whether their lending relationship is a true lending relationship or a partnership. The creditors in *Utnehmer* apparently rushed into the loan agreement without finalizing an operating agreement or considering their enforcement mechanisms. Creditors had numerous options available to them at the time they negotiated the loan agreement that would have avoided the difficulties they found themselves in, including: properly securing their loan obligations by recording a deed of trust; negotiating an operating agreement before entering into the loan agreement; and, if drafting the operating agreement was unfeasible at the time, at least providing immediate enforcement mechanisms for creditors upon the failure to timely enter into an operating agreement.

TAX UPSET SALE HELD NOT TO BE CONSTRUCTIVE FRAUDULENT TRANSFER

Brian M. Schenker
Associate, Philadelphia

Crespo v. Immanuel (In re Crespo), Adv. No. 14-326, Case No. 14-11629-REF, (Bankr. E.D. Pa. May 18, 2016)

CASE SNAPSHOT

In this chapter 13 case, the debtor sought to avoid a tax upset sale of his personal residence on the basis that the tax upset sale was a constructive fraudulent transfer under section 548(a)(1)(B)(i) of the Bankruptcy Code. The Bankruptcy Court held that, as a matter of law, a tax upset sale cannot be a constructive fraudulent transfer because the value paid by the purchaser at any such sale must be deemed to be reasonably equivalent value. Thus, a debtor cannot state any claim for constructive fraudulent transfer in a tax upset sale.

FACTUAL BACKGROUND

The facts of the case are simple. The debtor purchased a personal residence for $175,000. The debtor became delinquent in paying property taxes on his personal residence located in Lehigh County, Pennsylvania. Ultimately, the Lehigh County Tax Claim Bureau sold the property at tax upset sale. A third party bid $27,000 for the property at the sale, was the successful bidder, and purchased the property. The debtor then filed a chapter 13 bankruptcy petition seeking to undo the tax upset sale as a constructive fraudulent transfer.

Section 548(a)(1)(B)(i) of the Bankruptcy Code provides that a transfer of property of a debtor may be avoided if the debtor was insolvent at the time of, and did not receive reasonably equivalent value in exchange for, the transfer of such property. Here, the debtor argued that he was insolvent at the time of the tax upset sale and the $27,000 received for his personal residence did not constitute reasonably equivalent value.

COURT ANALYSIS

The Bankruptcy Court began its analysis with the United States Supreme Court's decision in *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 545 (1994). In *BFP*, the U.S. Supreme Court held that the reasonably equivalent value for foreclosed real property is the price received at a foreclosure sale if the foreclosure sale was conducted in accordance with state law requirements. The Bankruptcy Court disagreed with the debtor's argument that the holding in *BFP* should not be extended to tax upset sales. Instead, the Bankruptcy Court extended the holding in *BFP* to tax upset sales and noted that it joined many other courts in doing so.

The Bankruptcy Court then concluded that it was bound by a state court's finding that the tax upset sale had been conducted in accordance with all Pennsylvania state law requirements. Consequently, the $27,000 paid for the home constituted reasonably equivalent value as a matter of law. Thus, the debtor's claim for constructive fraudulent transfer failed as a matter of law.

PRACTICAL CONSIDERATIONS

The Bankruptcy Court's decision confirms the applicability of the U.S. Supreme Court's decision in *BFP* to Pennsylvania tax upset sales. Thus, provided that all Pennsylvania state law requirements are complied with, tax upset sales will not be able to be challenged as constructive fraudulent transfers in subsequent bankruptcy cases.

CALIFORNIA BANKRUPTCY COURT CLARIFIES OFFICER AND DIRECTOR DUTIES TO CREDITORS OF INSOLVENT COMPANY

Christopher O. Rivas
Associate, Los Angeles

AWTR Liquidation Trust v. 2100 Grand LLC (In re AWTR Liquidation Inc.), 548 B.R. 300 (Bankr. C.D. Cal. 2016)

CASE SNAPSHOT

The Bankruptcy Court held that, although California law was not fully settled on the issue, directors' and officers' fiduciary duties did not change when a company became insolvent. Rather, the same duties owed by directors and officers to stockholders pre-insolvency are owed to all creditors post-insolvency.

FACTUAL BACKGROUND

The liquidating trustee for debtor Rhythm & Hues, Inc., sued the debtor's former directors on behalf of the debtor's creditors, alleging that the directors breached their fiduciary duties to creditors at a time when the debtor was insolvent, and that the transfers were subject to avoidance as fraudulent transfers under 11 U.S.C. section 548. The debtor was a well-known visual effects and computer-generated animation producer (known most recently for the film "Life of Pi"). The trustee alleged that the debtor's directors diverted nearly $2 million of the debtor's capital to a business founded by one of the director's parents, transferred away certain of the debtor's important software rights without consideration, advanced millions of dollars to the directors, and entered into unfavorable studio contracts.

CONTINUED ON PAGE 10

The directors moved to dismiss the trustee's complaint, alleging that the directors owed no duties to creditors, even during the debtor's insolvency, and that the directors' decisions were shielded by the business judgment rule.

COURT ANALYSIS

The Bankruptcy Court observed that, without a California Supreme Court decision and with sparse opinions by California courts of appeal, that California law was largely unsettled on issues of officers' and directors' fiduciary duties when a company is insolvent, and the protections afforded to them under the business judgment rule. The Bankruptcy Court found that California law was well settled that directors (and likely officers) owed fiduciary duties of care, loyalty and good faith to their investors.

First addressing the business judgment rule, the Bankruptcy Court held that under California law, the rule operated to shield a company's directors for breach of fiduciary duty based on mere negligence. In other words, upon application of the rule, a director could only be held liable for his or her gross negligence. Critically, the Bankruptcy Court held, in dicta, that California Corporations Code section 309 and unpublished California decisions did not extend the business judgment rule to a company's officers – only to its directors.

Relying primarily on Delaware decisions, most notable *In re Caremark Int'l Derivative Lit.*, 698 A.2d 959 (Del. Ch. 1996), the Bankruptcy Court held that the a director could invoke the business judgment rule if the director could establish that he or she worked under a system reasonably designed to provide timely, accurate and sufficient information to the director; that the director actually used the system; and that the director exercised his or her business judgment in using the system. For example, a director cannot just assume others on the board are handling their responsibilities, but should set up a system, such as subcommittees with regular reporting requirements, to confirm such matters, and must properly monitor and oversee the system. California law, like Delaware law, is clear, that conflicts of interest and self-dealing are not protected by the business judgment rule.

The Bankruptcy Court then turned to the issue of insolvency. A director ordinarily owes fiduciary duties only to the company's stockholders. But where the company becomes insolvent, certain duties extend to creditors as well. The scope of duties owed to creditors has not been settled by the California Supreme Court, but the Bankruptcy Court relied principally on the "trust fund doctrine" set forth in *Berg & Berg Enterprises, LLC v. Boyle*, 178 Cal. App. 4th 1020 (2009), which requires that directors and officers avoid actions that "divert, dissipate, or unduly risk corporate assets that might otherwise be used to pay creditors['] claims." The Bankruptcy Court reasoned that these duties were "essentially, if not exactly" the same as the duties owed by directors and officers to their stockholders in a solvent corporation. The only change between solvency and insolvency is that a creditor joins the company's stockholders in their standing to sue directors and officers for breach of fiduciary duty.

Analyzing the complaint filed by the liquidating trustee, the Bankruptcy Court held that it adequately pleaded insolvency under all three applicable tests (balance sheet, cash flow, and inadequate capitalization). The Bankruptcy Court further determined that the complaint alleged not only ordinary negligence (which could be shielded by the business judgment rule), but also alleged gross negligence (which could not). Likewise, the complaint alleged self-dealing transactions, which could also not be shielded by the business judgment rule.

PRACTICAL CONSIDERATIONS

California law on fiduciary duties, particularly for insolvent corporations, remains unsettled. However, the AWTR decision provides valuable persuasive guidance to officers and directors in terms of how to exercise their powers, particularly when a company may be insolvent. Critically, the AWTR decision should provide some comfort (although non-binding), that the duties themselves do not change when a company becomes insolvent; the duties merely extend from stockholders to creditors. Nevertheless, given the additional exposure to directors and officers when a company is insolvent, they ought to err on the side of exercising their business judgment cautiously since it is far more likely that their decisions will be scrutinized by a court if and when creditors do sue.

TEXAS BANKRUPTCY COURT HOLDS THAT STRUCTURED DISMISSAL IS AUTHORIZED BY THE BANKRUPTCY CODE WHEN CREDITOR RECOVERY IS MAXIMIZED BY LIMITING ADMINISTRATIVE CLAIMS, AND THE TERMS OF THE DISMISSAL PROVIDE FAIR AND EQUITABLE TREATMENT TO CREDITORS

Lloyd A. Lim
Counsel, Houston

In re Olympic 1401 Elm Associates, LLC, No. 16-30130-hdh, slip op. (Bankr. N.D. Tex., Dallas Div., Aug. 26, 2016)

CASE SNAPSHOT

The United States Bankruptcy Court for the Northern District of Texas, Dallas Division (the "Court"), held that structured dismissals are authorized by the Bankruptcy Code if the proposed structured dismissal: (i) provides fair and equitable treatment to creditors; (ii) does not constitute a sub rosa plan; and (iii) does not violated the absolute priority rule. Accordingly, the Court granted the Debtor's Motion to Dismiss.

FACTUAL BACKGROUND

Olympic 1401 Elm Associates, LLC (the "Debtor"), a single assets real estate entity whose sole purpose was to own and manage a commercial building in Dallas (the "Property"), filed a motion to sell the Property (the "Motion to Sell") for $65 million. The proposed sales price was sufficient to pay all of the Debtor's non-insider creditors in full, and provide a pro rata distribution to the Debtor's two insider claims. The Court entered an order (the "Sales Order") approving the Motion to Sell, and the Property was subsequently sold for $65 million (the "Sales Proceeds") pursuant to the terms of the Sales Order.

The Debtor subsequently filed a motion to dismiss (the "Motion to Dismiss") its chapter 11 bankruptcy case (the "Case"). The Motion to Dismiss provided, among other things, that: (i) the Case would by dismissed; and (ii) the Sales Proceeds would be used to (a) pay the Debtor's administrative creditors and non-insider unsecured creditors in full, and (b) make a pro rata distribution to the Debtor's insider claims. The Motion to Dismiss also sought to waive the requirement that the estate's professionals file fee applications to obtain payment of their claims.

The Debtor's creditors did not file an objection to the Motion to Dismiss; however, the United States Trustee filed an objection asserting, among other things, that the proposed structure of the dismissal was improper because: (i) estate professionals were not required to file fee applications to obtain payment of their fees; (ii) creditors' state law rights were not being restored; and (iii) no time frame or certification requirement related to the payment of creditors was imposed. Prior to the hearing on the Motion to Dismiss, the Debtor agreed to both a time frame and certification requirements applicable to the payment of creditor claims, and that the state law rights of creditors would be preserved if creditors were not paid in full from the Sales Proceeds. In light of these pre-hearing concessions, the Court proceeded to analyze whether the Debtor's proposed structured dismissal is authorized by the Bankruptcy Code.

COURT ANALYSIS

In determining whether the Bankruptcy Code authorizes a structured dismissal, the Court noted that section 305(a) of the Bankruptcy Code allows it to "dismiss a case … if the interest of creditors and the debtor would be better served" by dismissal. Moreover, with regard to cases proceeding under chapter 11, the Court noted that section 1112(b) of the Bankruptcy Code allows it to dismiss a case "whenever [dismissal] is in the best interest of the estate." Finally, the Court cited section 105(a) of the Bankruptcy Code as authorizing it to issue any order or judgment necessary or appropriate to carry out the provisions of the Bankruptcy Code.

Relying on this statutory authority, the Court held that structured dismissals are authorized by the Bankruptcy Code if the terms of the dismissal: (i) are fair and equitable to all creditors generally; (ii) do not rise to the level of a sub rosa plan; and (iii) do not violate the absolute priority rule. The key requirement, however, is that the terms of structured dismissal provide fair and equitable treatment to creditors. In fact, the Court noted that the above three elements collapse into the fair and equitable analysis because if a sub rosa plan has not been proposed and the absolute priority rule is not violated, a structured dismissal will generally be found to be fair and equitable.

In this Case, the terms of the structured dismissal provided creditors with fair and equitable treatment because: (i) non-insider claims were being paid in full from the Sales Proceeds; (ii) the debtor has agreed to a time frame and certification requirements related to the payment of creditor claims; and (iii) creditors retained their state law rights to the extent that their claims were not paid in full. Furthermore, the proposed structured dismissal did not constitute a sub rosa plan because: (i) the Property had been sold prior to the filing on the Motion to Dismiss; (ii) the Sales Order was entered after creditors were given an opportunity to object to the Sales Motion; and (iii) the Debtor had no intent to circumvent the plan confirmation process. With regard to the Debtor's intent, the Court specifically noted that the Debtor's intent was to benefit creditors by avoiding the incurrence of unnecessary administrative claims, and that the avoidance of such unnecessary costs serves a "legitimate purpose." Finally, because all non-insider claims were being paid in full and insider claims were only getting paid after the payment of non-insider claims, the absolute priority rule was not violated. The Court, therefore, granted the Motion to Dismiss and approved the terms of the structured dismissal.

PRACTICAL CONSIDERATIONS

Structured dismissals can serve a valuable purpose by increasing distributions to creditors through the minimization of administrative claims. To achieve this legitimate purpose, parties seeking a structured dismissal should be mindful that the proposed dismissal structure does not violate the absolute priority rule by providing a recovery to a junior creditor class at the expense of a senior class. Parties should also not seek to deliberatively subvert the protections provided to creditors by the Bankruptcy Code, or attempt to implement a course of action through a structured dismissal that would not be approved through the plan confirmation process. If these guidelines are followed, parties are likely to find courts receptive to proposed structure dismissals. As the Court stated in this Case – "what's not to like?"

DOES "NO-ASSET" MEAN NO JURISDICTION? BANKRUPTCY COURT CONSIDERS JURISDICTION IN ADJUDICATING CLAIMS IN NO-ASSET CHAPTER 7 CASE

Lauren S. Zabel
Associate, Philadelphia

Doctor's Associates Inc. v. Desai a/k/a Patwari (In re: Patwari), Adv. Pro. No. 09-1022, slip op. (Bankr. D.N.J. June 10, 2016)

CASE SNAPSHOT

The Bankruptcy Court for the District of New Jersey considered whether certain claims asserted by a creditor in a chapter 7 "no-asset" case presented a "true case or controversy" over which the Bankruptcy Court could exercise jurisdiction. The court concluded that no purpose would be served by determining the creditor's outstanding requests for relief in light of the fact that the various debtors had no assets available for distribution to creditors. In declining to adjudicate the issues presented by the creditor, however, the court made clear that "if the resolution of the[] claims becomes meaningful," the creditor will have a full and fair opportunity to present the claims.

FACTUAL BACKGROUND

Prior to the debtor's bankruptcy, the debtor entered into several franchise agreements for operating quick serve sandwich shops and (as permitted by the franchise agreements) created operating entities to operate the sandwich shops. The franchisor obtained arbitration awards against the debtor pre-petition based upon various alleged breaches of the franchise agreements. Separate litigation was thereafter initiated, wherein the debtor asserted various claims against the franchisor and obtained a preliminary injunction enjoining enforcement of the arbitration awards, and the franchisor asserted various additional claims against the debtor and its operating entities arising from the alleged non-compliance with the arbitration awards. The debtor and the operating entities then filed chapter 11 bankruptcy petitions, and the pending litigation was transferred to the Bankruptcy Court.

The franchisor filed proofs of claim in bankruptcy cases of the debtor and the operating entities, which asserted claims based upon the arbitration awards and the claims asserted in the subsequent litigation. The bankruptcy cases were thereafter converted to chapter 7, and the chapter 7 trustee filed reports indicating that the debtor's estates had no assets available for distribution to creditors.

COURT ANALYSIS

The court began its analysis by noting that the franchisor's properly filed proofs of claim would be deemed allowed unless and until the respective debtors object to the proofs of claim. In light of that fact and the lack of assets available for distribution, the court concluded that no purpose would be served by adjudicating the franchisor's outstanding requests for relief. In the event that assets were brought into any of the bankruptcy estates, the court noted that the franchisor would either receive a distribution on the full amount of its filed claims, or the court would determine the validity and/or amount of its claims in the context of a claims objection filed at that time. The court further noted that the franchisor would have the full and fair opportunity to present its claims in other proceedings in the court if and when resolution of those claims became meaningful.

PRACTICAL CONSIDERATIONS

This decision emphasizes that Bankruptcy Courts should consider whether issues brought before the court present a "true case or controversy" over which the Bankruptcy Court could exercise jurisdiction. As a result, in chapter 7 no-asset cases, where no assets are available for distribution to creditors, creditors attempting to adjudicate claims-related issues in the Bankruptcy Court should be aware that the court may decline to exercise jurisdiction because no practical purpose would be served by adjudicating those issues.

TIMING IS EVERYTHING: BANKRUPTCY COURT CONSIDERS TIMING ISSUES RELATING TO WHEN WARN ACT CLAIMS MAY BE ELIGIBLE FOR TREATMENT AS ADMINISTRATIVE EXPENSE CLAIMS

Lauren S. Zabel
Associate, Philadelphia

In re: Calumet Photographic, Inc., No. 14-08893, 2016 WL 3035468 (Bankr. N.D. Ill. May 19, 2016)

CASE SNAPSHOT

The Bankruptcy Court for the Northern District of Illinois considered whether an alleged WARN Act claim arising as a result of a pre-petition termination is entitled to administrative expense priority. The court concluded that under section 503(b)(1)(A), only claims relating to a post-petition period could be entitled to administrative priority, and, therefore, claims arising as a result of a pre-petition termination would not be entitled to administrative priority.

FACTUAL BACKGROUND

The debtor was a specialty retailer of photography and video equipment. Earlier in the day that the debtor filed its bankruptcy petition, the debtor laid off many employees. A particular terminated employee (the "Claimant") argued that, among other things, a WARN Act claim arose out of her termination.

COURT ANALYSIS

The primary issue before the court was whether the Claimant's alleged WARN Act claim was entitled to administrative expense priority under the bankruptcy code. The WARN Act provides that, with certain exceptions, certain "affected employees" are entitled to at least 60 days' notice of a business closing or a "covered mass layoff." When appropriate notice is not given under the WARN Act, "affected employees" are entitled to back pay and benefits for up to 60 days. The Claimant argued that her WARN Act claim should be considered an administrative expense under section 503(b)(1)(A). Section 503(b)(1)(A) authorizes administrative expense priority for payments made for the actual, necessary costs and expenses of preserving the estate, including post-petition wages and certain back pay "attributable to any period of time occurring after commencement of the case under this title." The court determined that the plain meaning of section 503(b)(1)(A) required the court to determine whether the claim at issue relates to a post-petition time period. The court concluded that because the date of termination was before filing, the Claimant's WARN Act claim was not entitled to administrative expense entitlement. This conclusion, the court reasoned, was also consistent with the requirement that section 501(b)(1)(A) claims be "actual, necessary costs of preserving the estate." Importantly, the court did not determine whether, in fact, the Claimant and the fellow terminated employees had valid WARN Act claims.

The court also declined to accept the Claimant's invitation to consider whether her alleged WARN Act claim should be entitled to priority under section 507(a)(4). In so concluding, the court stated that such determination would not be ripe for adjudication until the debtor objected to the Claimant's proof of claim.

PRACTICAL CONSIDERATIONS

Like the Bankruptcy Court's decision in *Doctor's Associates*, this decision emphasizes that Bankruptcy Courts should consider whether a controversy is ripe for adjudication. In addition, this decision emphasizes that the 2005 amendments to section 503(b)(1)(A) did not change the priority of WARN claims that accrue by virtue of a pre-petition termination.

FURTHER CLARITY IN ANALYZING "MAKE-WHOLE" PROVISIONS (OR NOT). IS IT SIMPLY A MATTER OF CONTRACT INTERPRETATION?

Jared S. Roach
Associate, Pittsburgh

Delaware Trust Company v. Computershare Trust Company, et al. (In re Energy Future Holdings, Corp.), 551 B.R. 550 (Bankr. D. Del. 2016)

CASE SNAPSHOT

The first lien noteholders filed a declaratory judgment action against the second lien noteholders seeking a determination that the second lien noteholders were not entitled to a distribution from the bankruptcy estate until the first lien noteholders were paid in full.

FACTUAL BACKGROUND

The debtors' corporate structure was such that it entered into a collateral trust agreement governing the relationship of all indenture trustees. The collateral trust agreement governs the rights and obligations of the indenture trustees for the first lien noteholders and the second lien noteholders.

The Bankruptcy Court approved a distribution to the trustee for the second lien noteholders, and the first lien noteholders brought suit alleging that the trustee for the second lien noteholders should hold the funds it received in trust for the benefit of the first lien noteholders until they were paid in full.

COURT ANALYSIS

In a prior proceeding in the bankruptcy case, the court held that the first lien indenture did not provide for payment of a make-whole premium upon the filing of the debtors' bankruptcy cases. The court's ruling was grounded in its determination that the debtors' filing of the bankruptcy cases triggered a default under the first lien indenture, which in turn caused an automatic acceleration of the first lien notes. Accordingly, repayment after acceleration was not considered voluntary, and the first lien noteholders could not rescind the automatic acceleration without relief from the automatic stay, but stay relief was not warranted.

In the declaratory judgment action against the second lien noteholders, the first lien noteholders sought a determination that, while they could not enforce the make-whole premium against the debtors, they could enforce the provision against the second lien noteholders under the collateral trust agreement. The second lien noteholders filed a motion to dismiss, arguing that the court had already decided that the first lien obligations were automatically accelerated, so the make-whole premium was not payable (either by the debtors or otherwise).

The court therefore analyzed the terms of the collateral trust agreement. The court noted that the collateral trust agreement contained the full agreement of the parties, and neither party was challenging the completeness of the collateral trustee agreement. In following established contract interpretation canons that ambiguity will not be read into a contract, the court refused to "read into the 'Obligations' provision that any premium would be owed…regardless of whether it is allowed or is allowable" in a bankruptcy proceeding. Restated, the court refused to read additional language into the definition of "Obligations" in the collateral trust agreement that would have supported the first lien noteholders' argument that the second lien noteholders could be responsible for the make-whole premium even if the debtors were not.

The court went on to note that sophisticated parties are capable of drafting the language they want into contracts. The strict reading of the collateral trust agreement did not support the first lien noteholders' position.

PRACTICAL CONSIDERATIONS

Courts are unwilling to look beyond the four corners of a clear and unambiguous contract. During drafting, a party that may later rely on a make-whole premium provision should ensure the circumstances under which the premium is to be paid are clearly enumerated.

TRUSTEE FAILS TO MEET BURDEN OF SHOWING THAT PROPOSED SALE OF ASSETS COMPLIES WITH SECTION 363(F) OF THE BANKRUPTCY CODE

Sarah K. Kam
Associate, New York

In re Southern Mfg. Grp., LLC, No. 15-931, 2016 Bankr. LEXIS 2306 (Bankr. D.S.C. June 8, 2016)

CASE SNAPSHOT

The United States Bankruptcy Court for the District of South Carolina held that the trustee did not meet his burden of showing that the proposed sale of assets free and clear of any interests complies with section 363(f) of the Bankruptcy Code. Therefore, the Bankruptcy Court denied the trustee's sale motion.

FACTUAL BACKGROUND

The trustee filed a motion to sell substantially all of the assets of a chapter 7 debtor free and clear of all liens in exchange for $635,000 and other consideration pursuant to section 363 of the Bankruptcy Code. The trustee proposed that upon the closing of the sale, the purchaser would remit directly to the secured creditor the amount of $605,000 in exchange for satisfaction of the secured creditor's allowed secured claim in the amount of $890,691.87. The trustee further proposed a payment at closing of $30,000 from the purchase price to be remitted to the debtor's estate free and clear of liens, along with the debtor's accounts receivable, estimated to be worth $40,000. Therefore, the projected value to the debtor's estate was $70,000. The sale motion stated that despite substantial efforts to locate an alternate buyer, the sale was the highest offer the estate received.

The secured creditor and one of several junior lienholders were present at the hearing on the sale motion and consented to the proposed sale. The other junior lienholders were served with the sale motion via mail but did not appear at the hearing on the sale motion.

COURT ANALYSIS

Section 363(b)(1) of the Bankruptcy Code provides that "[t]he trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate[.]" The trustee's decision to sell a debtor's property outside the ordinary course of business is reviewed by the court for compliance with the business judgment rule. Although the trustee appeared to satisfy the business judgment rule, the trustee's ability to consummate the sale and generate a benefit for the estate depended on the Bankruptcy Court's entry of an order approving the sale free and clear of any liens or interests under section 363(f) of the Bankruptcy Code.

The trustee argued that the sale of the assets should be made free and clear of any interests held by an entity other than the estate pursuant to section 363(f) of the Bankruptcy Code because: (i) applicable non-bankruptcy South Carolina law permits the sale of the assets free and clear of such interests, 11 U.S.C. § 363(f)(1); (ii) all parties with an interest in the assets have consented to the sale, 11 U.S.C. § 363(f)(2); and/or (iii) the parties with an interest in the assets could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest, 11 U.S.C. § 363(f)(5).

The Bankruptcy Court rejected the trustee's arguments. First, the trustee did not demonstrate how South Carolina permitted the sale structure and distribution presented in the sale motion. Second, because the junior lienholders perfected their liens, their silence did not imply their consent to the proposed sale. Finally, the trustee did not point to any legal or equitable proceeding that would permit the sale proceeds to be redirected away from the junior lienholders and to the estate. Accordingly, the Bankruptcy Court denied the trustee's sale motion.

PRACTICAL CONSIDERATIONS

A Bankruptcy Court's ability to clear title is both granted and constrained by the Bankruptcy Code Therefore, a trustee must meet its burden of showing that a proposed sale of assets free and clear of any interests complies with section 363(f) of the Bankruptcy Code.

PRE-PETITION BANKRUPTCY WAIVERS BY ANOTHER NAME: COURT REFUSES TO DISMISS CASE FILED WITHOUT VOTE OF CREDITOR'S GOLDEN SHARE

Derek J. Baker
Partner,
Philadelphia and Princeton

In re Intervention Energy Holdings, LLC, 553 B.R. 258 (Bankr. D. Del. 2016)

CASE SNAPSHOT

In *In re Intervention Energy Holdings, LLC*, the Bankruptcy Court was faced with a motion to dismiss by the lender, who argued that the debtor did not have proper corporate authority to file the case.

FACTUAL BACKGROUND

The case essentially involved a two-party dispute between the debtor and the lender. As a result of various defaults, the lender entered into a pre-petition forbearance agreement with the debtor. As part of that forbearance arrangement, the creditor required that the debtor amend its operating agreement to (i) issue a single LCC unit in favor of the lender, (ii) require a unanimous vote of all LCC unit holders in order to commence a bankruptcy case, and (iii) eliminate any fiduciary duties that would ordinarily need to be exercised by that single unit holder in the voting process.

CONTINUED ON PAGE 16

PRE-PETITION RESTRUCTURING DID NOT ALTER SENIOR LENDERS' RIGHTS UNDER AN INTERCREDITOR AGREEMENT

Sarah K. Kam
Associate, New York

Salus Capital Partners, LLC v. Standard Wireless Inc. (In re RadioShack Corp.), 550 B.R. 700 (Bankr. D. Del. 2016)

CASE SNAPSHOT

The United States Bankruptcy Court for the District of Delaware held that a pre-petition restructuring did not alter the senior lenders' rights under an intercreditor agreement, which required the senior lender to be paid first from the proceeds of certain collateral.

FACTUAL BACKGROUND

In December 2013, 14 months prior to the commencement of the debtors' chapter 11 bankruptcy cases, the debtors entered into a new $835 million financing arrangement with two distinct sets of lenders, namely (i) a $250 million term loan from the "SCP Lenders," and (ii) a $585 million facility from the "ABL Lenders" consisting of a $50 million term loan and $535 million in revolving loan commitments. All of these obligations were secured by substantially all of the debtors' assets. Under an intercreditor agreement, the parties agreed that the ABL Lenders held a first lien on "liquid collateral" and a second lien on "fixed assets." In turn, the parties agreed that the SCP Lenders held a first lien on "fixed assets" and a second lien on "liquid collateral." In early October 2014, the credit agreement with the ABL Lenders was restructured.

During the debtors' chapter 11 cases, a portion of the debtors' business was sold as a going concern and the remainder was liquidated. Proceeds from the sale and liquidation were distributed in accordance with the provisions and the priorities established in the intercreditor agreement. Accordingly, the ABL Lenders received approximately $232 million because of the disposition of the liquid collateral in which they claimed a first lien position.

In March 2015, the SCP Lenders commenced an adversary proceeding raising nine causes of action. The SCP Lenders contended that the October 2014 restructuring altered the ABL Lenders' rights to be paid first from the proceeds of the liquid collateral. According to the SCP Lenders, the proceeds from the disposition of the liquid collateral that were paid to the ABL Lenders must be paid over to the SCP Lenders. The ABL Lenders filed motions to dismiss the SCP Lenders' complaint.

COURT ANALYSIS

The Bankruptcy Court interpreted and construed the intercreditor agreement and the amended ABL credit agreement under New York law. The Bankruptcy Court observed that its role in contract interpretation is to give effect to the intent of the parties as defined by the provisions of their agreements. The Bankruptcy Court concluded that the unambiguous provisions of the intercreditor agreement permitted the ABL Lenders to enter into the amended ABL credit agreement. The ABL Lenders did not breach the intercreditor agreement and were not unjustly enriched by receiving the proceeds of the liquid collateral. Furthermore, the ABL Lenders did not tortuously interfere with the SCP Lenders' contractual rights or convert the SCP Lenders' collateral. The SCP Lenders only held junior rights in the liquid collateral that were not affected by the restructuring. Accordingly, the Bankruptcy Court granted the ABL Lenders' motions to dismiss the SCP Lenders' complaint.

PRACTICAL CONSIDERATIONS

As courts will give effect to the intent of the parties as defined by the provisions of their agreements, careful consideration must be given to drafting clear and unambiguous provisions in intercreditor agreements.

Pre-petition Bankruptcy Waivers by Another Name: Court Refuses to Dismiss Case Filed Without Vote of Creditor's Golden Share— continued from page 15

After further defaults, the debtor commenced a bankruptcy case without the affirmative vote of the one unit issued in favor of the lender. The lender quickly filed a motion to dismiss, arguing that the case was not properly commenced and should be dismissed as a "bad faith filing." The debtor opposed the dismissal, arguing that the amended provisions of its operating agreement effectively constituted a pre-petition waiver of its right to commence a bankruptcy case. Since such waivers are against public policy, the debtor argued the court should deny the motion to dismiss.

COURT ANALYSIS

The Bankruptcy Court began by noting that, absent the amended provisions of the operating agreement in favor of the lender, the debtor would have been authorized to file the bankruptcy case. The court noted that it was dealing with the intersection of state law freedom of contract in operating agreements, and a federal policy that generally prohibits pre-petition waivers of bankruptcy rights.

Citing substantial case law for the proposition that debtors are prohibited from contracting away their Bankruptcy Code rights, the court cited additional case law noting that transaction structures created that have the effect of waving bankruptcy rights should be viewed similarly. The court noted specifically that the "golden share" provision of the operating agreement here was specifically negotiated as part of a forbearance agreement as a means to prohibit the commencement of the bankruptcy case, which would be adverse to the creditor's interest. Because the impact of that provision was to waive a debtor's bankruptcy right, the court refused to give effect to that provision as void against federal public policy. Therefore, since the provision was void, the court held that the bankruptcy filing was proper.

PRACTICAL CONSIDERATIONS

This decision is in line with a number of other bankruptcy and federal court decisions that hold that provisions included in corporate "bankruptcy remote" structures with a waiver of fiduciary duties associated with traditional ownership cannot trump the rights of the entity to seek relief under federal bankruptcy law.

FIRST CIRCUIT DECLINES TO OVERTURN CHAPTER 7 CONVERSION, NOTING LOWER COURTS' BROAD DISCRETION

Alison Wickizer Toepp
Associate, Richmond

In re Hoover, 828 F.3d 5 (1st Cir. 2016)

CASE SNAPSHOT

The U.S. Court of Appeals for the First Circuit affirmed the U.S. District Court for the District of Massachusetts' holding that the Bankruptcy Court did not err in converting debtor's chapter 11 case to a chapter 7 proceeding. In so holding, the First Circuit emphasized that debtor's own records and testimony – which showed a floundering business – fell far short of what is required to overcome the broad discretion conferred on the lower courts.

FACTUAL BACKGROUND

Debtor, as an individual and doing business as "Halloween Costume World," filed a voluntary chapter 11 petition. Debtor continued to operate the business by selling inventory without replacing the items sold. His monthly operating reports showed insufficient profits to enable debtor to replace inventory and insufficient cash flow to pay costs and debts. The U.S. trustee moved to convert the case to a chapter 7 liquidation, contending that cause existed under three separate provisions of section 1112(b)(4) of the Bankruptcy Code.

Specifically, the trustee contended that the case should be converted: (1) because of the "substantial or continuing loss to or diminution of the estate and the absence of a reasonable likelihood of rehabilitation" under section 1112(b)(4)(A); (2) because debtor's "unauthorized use of cash collateral [was] substantially harmful to 1 or more creditors" under section 1112(b)(4)(D); and (3) because of debtor's "unexcused failure to satisfy timely any [pertinent] filing or reporting requirement" under section 1112(b)(4)(F).

At the hearing on the trustee's motion, debtor was the sole witness. He conceded he was selling inventory without replacing it. Further, his records and monthly operating reports showed insufficient profit to replace that inventory, and that he was only continuing operations by selling inventory and failing to pay creditors.

COURT ANALYSIS

The Bankruptcy Court held that the case should be converted on all three bases cited by the trustee. The District Court affirmed on the ground that the Bankruptcy Court did not err in its finding that there was a "substantial or continuing loss to or diminution of the estate and the absence of a reasonable likelihood of rehabilitation" under section 1112(b)(4)(A), and did not consider the two alternative bases for conversion, "because one cause is enough."

On appeal to the First Circuit, debtor argued that conversion was inappropriate because he did not receive adequate notice as required by Fed. R. Bankr. P. 9014(a). The court held that debtor's procedural argument lacked merit, finding that the trustee's filings made clear the basis on which the trustee was moving for conversion, and further, the Bankruptcy Court twice continued the hearing on the trustee's motion to allow debtor and his counsel time to gather evidence to rebut the trustee's arguments.

After it dismissed debtor's procedural argument, the First Circuit's analysis focused on whether cause existed under section 1112(b)(4)(A), and if so, whether conversion or dismissal was in the best interests of the creditors and the estate. Debtor argued that the Bankruptcy Court erred in converting his case on the grounds that his proposed plan of reorganization was not "patently unconfirmable," and that tax authorities might write off a portion of the debts he owed. The First Circuit noted that while "rehabilitation under § 1112(b)(4)(A) is not synonymous with reorganization,…the debtor still must have sufficient 'business prospects'…to 'justify continuance of [a] reorganization effort."

Relying on debtor's own records and his testimony, the First Circuit agreed with the District Court that the Bankruptcy Court did not abuse its "broad discretion" when it found cause existed. Nor did the Bankruptcy Court err when it concluded conversion was in the best interests of the creditors. The First Circuit did not consider debtor's argument – raised for the first time on appeal – that liquidation would result in little to nothing being paid to the estate's creditors; however, the First Circuit held that the untimely argument nonetheless would fail because the District Court "had ample discretion to conclude that a prompt conversion rather than further diminution was in the best interests of creditors, especially where no creditor opposed conversion as hostile to its interests."

PRACTICAL CONSIDERATIONS

"Cause" for conversion from chapter 11 to chapter 7 exists when any one of the factors under section 1112(b)(4) is shown. On review, the District Court for the District of Massachusetts affirmed conversion under 1112(b)(4)(A) ("substantial or continuing loss to or diminution of the state and the absence of a reasonable likelihood of rehabilitation"), and did not delve into the two alternative bases for finding cause to convert. If the record supports the Bankruptcy Court's findings that cause exists, appellate courts in the First Circuit defer to the Bankruptcy Court's "broad discretion" in finding that conversion or dismissal is in the best interests of the creditors and the estate. This is particularly true where creditors do not object to conversion or dismissal.

CLASS CERTIFICATION AND PROOFS OF CLAIM; A MEASURE OF CASE EFFICIENCY

Jared S. Roach
Associate, Pittsburgh

In re Pacific Sunwear of California, Inc., No. 16-10882, slip op. (Bankr. D. Del. June 22, 2016)

CASE SNAPSHOT

The court first held that any claims filed under the California Labor Code Private Attorneys General Act of 2004 (PAGA) can be filed in a representative capacity without court approval. The court then certified a class of claimants for purposes of the claims process.

FACTUAL BACKGROUND

In 2011, two separate lawsuits were filed against PacSun alleging violations of the California labor laws relating to wages and hours. Prior to the petition date, one of the lawsuits was granted class certification. On the date the debtors filed for bankruptcy protection, they also filed their plan of reorganization and disclosure statement. The debtors additionally filed a motion to establish a bar date, but they did not serve members of the certified class.

The class representatives sought court approval to file proofs of claim in their respective representative capacities.

COURT ANALYSIS

The court first held that a representative seeking to file his claim only under PAGA could file the claim on behalf of all similarly aggrieved employees, because PAGA expressly allowed representatives to make claims on behalf of other similarly situated individuals without first seeking class certification. Restated, the bankruptcy code defers to state law with regard to who may be an authorized representative of a creditor. Because PAGA grants agency rights to claimants, Bankruptcy Court approval was not required to file a proof of claim on behalf of other similarly situated individuals.

The court then analyzed whether it should apply Fed. R. Bankr. P. 7023 to certify the previously certified class for purposes of filing a proof of claim. The court's analysis included a review of the following factors: "(1) whether the class was certified pre-petition; (2) whether the members of the putative class received notice of the bar date; and (3) whether class certification will adversely affect the administration of the estate." The court concluded that the first two factors weighed in favor of certifying the class because: (i) the class was certified pre-petition, and (ii) the debtors admittedly limited notice of the bar date, which notice was potentially not sent to potential class members.

The third factor also supported class certification because a single claim would be filed in place of potentially thousands of claims. The debtors, rather than objecting to thousands of individual claims, could focus on one claim filed on behalf of the class.

Having determined that it should apply Fed. R. Bankr. P. 7023 to the potential class, the court undertook a review of relevant factors. The court determined that the potential class met the numerosity, commonality, and typicality thresholds. Because the debtors did not challenge the experience and performance of class counsel, the adequacy of representation threshold was also met.

Finally, the court determined that the potential class satisfied Fed. R. Bankr. P. 7023(b) because common questions of law and fact were pervasive in the class. While touching the relevant provisions of Fed. R. Bankr. P. 7023, the tenor of the court's opinion sounded very much in judicial efficiency. It was more efficient for all parties involved to address one claim, rather than each claim that may be filed by class members.

PRACTICAL CONSIDERATIONS

It is not a common occurrence to see a putative class certified in a bankruptcy case. In addition to addressing the requirements of Fed. R. Bankr. P. 7023, a party opposing certification should be prepared to explain why judicial economy does not favor class certification. Conversely, parties supporting class certification would be well served to demonstrate how class certification will benefit all parties (including the court) from an administrative prospective.

COUNSEL'S CORNER: NEWS FROM REED SMITH

Matt Tashman was a panelist on The Knowledge Group's June 22, 2016, webcast, "Bankruptcy & Restructuring in the Oil & Gas Industries in 2016 & Beyond."

On August 22, 2016, **Derek Baker** and **Jennifer Knox** made a presentation for a major bank client that focused on First Day Pleadings and judicial practices in the Bankruptcy Courts for the Eastern and Middle Districts of Pennsylvania.

Colin Cochrane and **Elizabeth McGovern** co-authored an article published September 5, 2016, by *Credit Strategy*, "Judge takes unusual step on turnaround case," which dealt with a recent case on the English courts' discretion to grant administration orders (*Rowntree Ventures v Oak Property Partners*).

On September 8, 2016, at the ABA Business Law Section Meeting in Boston, **Eric Schaffer** presented, "Caught in the Crossfire: Recent Litigation Issues Confronting Indenture Trustees."

Bob Simons was the chairperson for the 39th Annual Platts Coal Marketing Days Conference. The conference, held in Pittsburgh September 20-21, 2016, featured experts who discussed topics critically important to the future of the coal industry – many of which are equally important to oil and gas producers.

Andrea Pincus and **Matt Tashman** were among the co-presenters of "Navigating Choppy Waters in the Energy Sector" at Reed Smith's U.S. Energy and Commodities Conference September 27, 2016, in Houston.

On September 27, 2016, **Mike Venditto** presented "First Day Motions" at the annual bankruptcy conference of the National Association of Attorneys General in Santa Fe.

Mike Venditto, **Andrea Pincus**, and **Sarah Kam** were among the Reed Smith co-authors of "Troubled Waters: The Raging Storm over Safe Harbors," published in the October 2016 edition of *Pratt's Journal of Bankruptcy Law*.

Derek Baker will present on "Top Commercial Cases of the Year" at Pennsylvania Bar Institute's 21st Annual Bankruptcy Institute, October 20, 2016.

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

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

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

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

FRANKFURT
Dr. Volker Kammel
+49 (0)69 222289 825
vkammel@reedsmith.com

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

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

Lloyd A. Lim
+1 713 469 3671
llim@reedsmith.com

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

Jeffery Drew
+44 (0)20 3116 2900
jdrew@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 Mauro
+1 212 231 2651
cmauro@reedsmith.com

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

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

Lillian Worthley
+1 212 549 0273
lworthley@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 S. Zabel
+1 215 851 8147
lzabel@reedsmith.com

PITTSBURGH
Jared S. Roach
+1 412 288 3277
jroach@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

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

PRINCETON
Derek J. Baker
+1 609 520 6390
dbaker@reedsmith.com

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

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

SINGAPORE
Troy Doyle
+65 6320 5359
tdoyle@reedsmith.com

Estelle Victory
+65 6320 5319
evictory@reedsmith.com

WILMINGTON
Emily K. Devan
+1 302 778 7570
edevan@reedsmith.com

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

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

Commercial Restructuring & Bankruptcy Alert is published by Reed Smith to keep others informed of developments in the law. It is not intended to provide legal advice to be used in a specific fact situation; the contents are for informational purposes only.

"Reed Smith" refers to Reed Smith LLP and related entities. ©Reed Smith LLP 2016.

ReedSmith

The business of relationships.℠