Preface

This Herzog's release will summarize the monumental changes COVID-19 and major political and economic developments and events caused the world and their effects from 2021–2025 on bankruptcy law and restructuring practice. Important U.S. appellate cases will be covered, including the 2024 decision by the U.S. Supreme Court in Purdue Pharma blocking some non-consensual third party releases in bankruptcy and in chapter 11 plans, as well as a few subsequent decisions distinguishing Purdue. Attention will be given to new or modified Official Bankruptcy Forms, and a few Rules changes, and the many changes necessitated by the April 1, 2025 increase in dollar amounts throughout the Code based on 28 U.S.C. § 1930.

The 2024 election of Donald Trump as President and the success of the Republican Party to control the U.S. Senate and the House of Representatives has led to changes in U.S. domestic and foreign policy. Major changes in foreign, tariff and immigration policies have contributed to some economic instability and uncertainty, although the overall effects will take time to fully be understood.

Fortunately, the severe effects of COVID-19 have substantially diminished from 2022 to 2024, the United States economy rebounded and unemployment has been substantially reduced to about 4.2%. However, China also felt significant effects of COVID19 in 2022, thereby slowing its economy and disrupting parts of the supply chain for a while. In addition, the war between Russia and Ukraine, as well as in Israel, Gaza, Lebanon Iran and Yemen are also causing major geopolitical and economic changes in the world. These include the roiling of oil and gas markets, grain shortages, and the return of higher inflation and interest rates in 2022–2023.

The United States inflation rate for over a year in 2022 was about 10%, the highest in about 40 years. It has since been reduced to about 3% as of August 2025. Not since the Great Depression of 1929 and the recession of 2008-2009 has the United States faced an economic crisis of the magnitude presented by the COVID-19 pandemic. Starting in China in late 2019, and spreading to Europe and almost every country, the virus hit the United States by February 2020. Within a matter of weeks, the pandemic turned a relatively healthy and vibrant U.S. economy

into a deeply struggling one with a recession and high unemployment. The new norm quickly became "social distancing" to "flatten the curve" of the spread of the virus, quarantines, lockdowns, face masks, and a more frequent and longer time to wash hands to avoid becoming ill. Businesses were shuttered and each state issued recommendations and/or mandates to prevent illness and deaths arising from COVID-19. Hardest hit in the United States, for a few months, was New York City and its suburbs, a main financial hub of the country. Thereafter, millions of COVID-19 cases spread to southern and western states. Courts nationwide had to materially modify their practices and procedures in response to the pandemic.

With tens of millions of people hunkered down at home for extended periods, and all but essential services and outdoor activities forbidden or restricted, life as we knew it was significantly upended. Many employees had to work remotely, if indeed they were fortunate enough to keep their jobs. Tens of millions of employees were furloughed or fired. The job losses were the greatest since the Great Depression and occurred much more quickly than had ever been experienced in this country. Unemployment rose from about 3.8 percent to close to 15 percent in about three months. It is since been reduced to about 4.2 percent in August 2025, although some sectors of the economy cannot find and hire enough employees. Most major stock market indices fell by a third in 2020 before rebounding sharply to register large gains through 2021. However, stock markets sagged by 15-20% in 2022 on troubling geopolitical and inflationary trends, before rebounding in large part through July 2025. The worst hit industries due to COVID were lodging, airline, cruise ship, restaurant, retail, real estate, oil and gas and entertainment and sports. The brick and mortar retail industry had been struggling to compete with online retailers even before the pandemic surfaced. The COVID-19 crisis accelerated the downward spiral and adversely affected the precarious financial position of some of the largest retailers. For example, the chapter 11 filings of J. Crew, Neiman Marcus, and J.C. Penny in early 2020 were among the first post-pandemic major retail chapter 11 filings. Hertz Car Rentals, the number one car rental company also filed for chapter 11. Neiman Marcus has since restructured and emerged from chapter 11, as has Hertz.

Representative large or table cases filed in 2023, 2024 and 2025 include Steward Healthcare System, Vyaire Medical, Envira, Big Lots, Spirit Airlines, Forever 21, 23andMe, Wolfspeed, Auto Plus, Valley Sports, Bed Bath & Beyond, Invicta Watch, Party City, Serta Simmons Bedding, Universal Entertainment, and

Vice Media. Turmoil has also occurred in the last two years among cryptocurrency companies and some small and medium sized banks in the United States. The banks themselves are not eligible for relief under the Bankruptcy Code, but can get relief under other state or federal statutes. The holding companies may be eligible for Bankruptcy Code relief.

The federal government and Federal Reserve Board have enacted significant laws and taken financial action to support businesses and the unemployed, as described below. This contributed to the slowing down of Chapter 11 filings by about 40% overall and by about 80% for public company Chapter 11's in 2021-2022. This reduction took place despite major supply chain problems, and rising interest and lending rates. The Federal Reserve's actions in raising, and then lowering, its lending rates have helped cool off inflation to about 3% by August 2025 and the overall economy has remained strong. Nevertheless, the overall bankruptcy filing rate increased in 2023-24. Commercial Chapter 11 filings increased 72% in 2023 to 6,569 filings. Chapter 11 fillings were significantly up by 31% in the first half of 2024. That upward trend has continued in 2025. In the last several years, local legislation has been enacted in many areas to temporarily place a hold on an eviction due to a tenant's failure to timely pay its rent, and to prohibit the shut off of utility services for nonpayment of same. Some of these holds have been removed.

Local legislation has been enacted in many areas to temporarily place a hold on an eviction due to a tenant's failure to timely pay its rent, and to prohibit the shut off of utility services for nonpayment of same. The federal government has also taken steps to temporarily defer payment of some student loans, and to forgive some portions of the loans. The latter has been blocked, at least in part, by the courts.

In June 2023, President Biden and the House and Senate concluded a debt ceiling and budget plan that further stabilized markets for a while. . While trading markets were lower in early months of the second Trump administration, markets have rebounded to exceed earlier levels. These have been extended from time to time. Fortunately, the development of effective and widely distributed vaccines have become available. In the United States, effective vaccines have been received by approximately 70% of the adult population through mid 2024 with children increasingly receiving vaccines too. Vaccines are have been delivered on a world wide basis. This helped the world wide economy to improve, with expanding travel and other activity.

Cares Act and Other Relief Packages

COVID-19 has also caused significant changes in aspects of bankruptcy practice, particularly for small businesses and individuals. On March 27, 2020, President Trump signed into law the Corona virus Aid, Relief and Economic Security Act (the "CARES Act"), which provides in excess of two trillion dollars of economic stimulus to support U.S. businesses and individuals. It was the largest stimulus package in U.S. history at the time, and dwarfs those enacted as a result of the 2008 Recession. Other relief packages have been enacted. Fortunately the government and the Federal Reserve have taken significant actions to help support the economy, stabilize the markets and provide liquidity. A massive infrastructure package aided the recovery. The Federal Reserve also intervened in 2022-23 to raise lending rates, which contributed to lowering inflation and cooling the economy somewhat. Interest rates were lowered by the Federal Reserve from time to time in 2024-25 and have held steady in recent months.

The CARES Act includes revisions to certain provisions of the U.S. Bankruptcy Code. It amended the Small Business Reorganization Act of 2019 (the "SBRA"), which is discussed in more detail below, to temporarily increase the debt threshold for filing for relief under the new Subchapter V of chapter 11 from $2,725,625 to $7,500,000 of debt for a one year period, thereby temporarily expanding its coverage for struggling small businesses. That time had been further extended for another year by the COVID-19 Bankruptcy Relief Extension Act of 2021, and again for two years (through June 21, 2024) by the Bankruptcy Threshold Adjustment and Technical Corrections Act However, the Act has not been further extended, and as of April 1, 2025 the applicable debt limit is $3,424,000. Additionally, the CARES Act amends certain provisions of chapter 7 and 13 of the Bankruptcy Code to help consumers. Those changes permit chapter 13 debtors with existing confirmed plans, who have suffered a "material financial hardship" due "directly or indirectly" to COVID-19, to seek plan modifications. This includes extending their payments for up to seven years after their first payment was due, thus reducing their monthly payment obligations. Chapter 13 debtors with plans confirmed prior to the enactment of the CARES Act will be able to seek plan modification during its one-year effective date, as further extended for a year. Notably, the CARES Act does not define the terms "material financial hardship" or "indirectly", and it remains to be seen how broadly bankruptcy courts will interpret such provisions. Additionally, payments received by families and individuals due to the Corona virus from the federal government as a result of the CARES Act will not be included in

the definition of "income" for eligibility purposes, nor included in the calculation of "disposable income" for chapter 13 plan confirmation purposes. This allows consumer debtors to potentially obtain the full benefit of the stimulus payments that they receive. Unfortunately, some portion of unemployment benefits and stimulus payments have not reached their intended beneficiaries.

In addition to Bankruptcy Code amendments, the COVID-19 pandemic has resulted in bankruptcy and appellate courts following recommended guidelines and orders issued by the Centers for Disease Control and Prevention, the Administrative Office of the U.S. Courts, and public health officials, temporarily altering bankruptcy and often legal practices. Some of these procedures have been modified in the last few years to take into account the improving state of COVID19 spread. Examples of such changes include: (i)hearings and conferences may be held telephonically or by video, absent an order or permission otherwise, (ii) such hearings and conferences are to be recorded, which recording will be the official records of same, (iii) court closures and/or restrictions on the types of people who are permitted access to the courthouse, (iv) all permitted visitors to the courthouse may have to wear a mask or face covering when in public areas and when interacting with court staff, (v) no in-person public access to the clerk's office, (vi) no acceptance of hand deliveries of documents or packages, (vii) under certain circumstances, an original signature is no longer necessary to electronically file a document bearing that signature, (viii) cash will no longer be accepted for purposes of filing fees, and (ix) 341 meetings are continued to a later date to be determined. It is vital for all bankruptcy attorneys and others interacting with a bankruptcy court or an appellate court to review and become familiar with that particular court's changes due to COVID-19, which may vary widely from court to court. This may be found on (i) the applicable court's website, (ii) a particular judge's rules and guidelines, and (iii) by calling the court or the applicable judge's chambers in advance of any scheduled hearing, meeting or conference, or the filing of any motion, brief or any other papers with the court. Practitioners should also check on any changes to the guidelines of the office of the U.S. Trustee program.

Small Business Reorganization Act of 2019

Prior to the Corona virus pandemic hitting America, the SBRA was enacted and became effective on February 19, 2020, as amended in 2021.

This law is basically covered by 11 U.S.C § 1181 to 1194. Interim bankruptcy rules were promulgated and subsequently approved as permanent, with limited modifications, effective December 1, 2022.

Court decisions, primarily at the bankruptcy court level, are now interpreting the law. This legislation addresses problems that small businesses would otherwise face in traditional chapter 11 cases. Such cases are often complex, lengthy and expensive, with administrative fees and costs affecting unsecured creditor recoveries, or too overwhelming to permit a successful reorganization of the debtor's business. To address these, and other problems, key features of the SBRA are as follows:

(i) As of June 21, 2024, Subchapter V is available to debtors with at least 50% of their income derived from commercial or business revenue and total debts not exceeding $3,424,000 (It had been temporarily increased by the CARES Act and subsequent legislation to $7,500,000 through June 21, 2024, which has expired.), (ii) a plan must normally be filed within 90 days (instead of the traditional 120 days) of the commencement of the case, subject to the court's ability to extend that deadline "if the need for the extension is attributable to circumstances for which the debtor should not justly be held accountable", (iii) Subchapter V debtors are not responsible to pay U.S. Trustee fees, (iv) creditors' committees generally are not appointed, (v) a standing trustee will be appointed in a supervisory role to assist the debtor with open issues in the case and to move the case along, rather than to operate the debtor's business, as is possible in a traditional chapter 11 case, (vi) only the debtor may file a plan, thereby eliminating competing plans, (vii) the preparation and filing of a disclosure statement is not required, unless the court so orders, (viii) unlike in a traditional chapter 11 case, a plan can be confirmed even if all impaired classes vote to reject it, (ix) a debtor may stretch payment of administrative expense claims over the term of the plan, (x) equity holders may be able to retain their equity interests in the debtor's business without the need to contribute "new value" because there is no "absolute priority rule" in Subchapter V, (xi) Section 547(b) of the Bankruptcy Code was amended to include a due diligence requirement upon the filing of a preference action, which applies to all chapter 11 cases, not only those filed under Subchapter V, (xii) Section 1409(b) of 28 U.S.C.A. was amended to increase the minimum limit for a trustee to commence a proceeding against a non-insider in a district other than where the defendant resides from $27,500 to $31,425, and (xiii) if a debtor's principal used his or her primary residence as security to obtain a loan to fund the small business,

the plan may modify that loan.

With the tremendous financial headwinds faced by many small businesses in America due in part to COVID-19, the timing of enactment of the SBRA was fortunate, and it can be expected to be widely used in the aftermath in part, of the pandemic. In further expanding the availability of the SBRA, a bankruptcy court has recently held that SBRA may be applied retroactively to cases filed before its effective date and, subject to a party's right to object, the debtor may simply amend its petition in due course at any time before the case is closed, without having to file a motion or seek leave of court. *In re Progressive Solutions, Inc.,* 615 B.R. 894 (Bankr. C.D. Cal. 2020). Effective December 1, 2021, official form 122B has been amended so that there is no need for an individual debtor in a subchapter V case to file a statement of current monthly income.

See also Rules Changes effective December 1, 2022 that relate to Subchapter V. They supersede prior Interim Rules.

In a 9th Circuit case dealing with Subchapter V, the Court concluded that the appointment of a trustee, for cause, in Subchapter V was permissible, and that it was not a receiver. The trustee had successfully moved to convert the case to chapter 7 liquidation. In re Coeptis Equity Fund LLC, 2024 WL 1133580 (9th Cir. Mar. 15, 2024).

In a Fifth Circuit decision, the Court held that section 523(a) nondischargablility applies to corporate debtors' proceedings under Subchapter V. Matter of GFS Indus., L.L.C., 99 F.4th 223 (5th Cir. 2024).

The USTP published a summary of statistical results from Subchapter V cases. They are contained below.

Chapter 11 Subchapter V Statistical Summary Through December 31, 2024[1]

Subchapter V Filing Summary

Time Period	Subchapter V Cases
Fiscal Year 2020	1,118
Fiscal Year 2021	1,717
Fiscal Year 2022	1,592
Fiscal Year 2023	1,985
Fiscal Year 2024	2,647
Fiscal Year 2025	614

Chapter 11 Small Business Case Outcomes Summary

Disposition	Chapter 11 Small Business (Non-Subchapter V)		Subchapter V
	FY 2017 – FY 2019	FY 2020 – FY 2023	FY 2020 – FY 2023
Pending Without Confirmed Plan	1%	2%	3%
Plan Confirmed	31%	23%	52%
Converted	15%	22%	13%
Dismissed	54%	53%	32%
Total	100%	100%	100%
Median Months to Confirmation	10.8	10.4	6.6
Median Months to Dismissal	6.0	4.2	4.9

- Compared to other (non-subchapter V) chapter 11 small business cases, subchapter V cases have had approximately double the confirmed plan percentage and a 20 percent lower dismissal percentage, as well as a shorter time to confirmation.
- Of subchapter V cases with confirmed plans, 68 percent of the confirmed plans have been consensual plans.

[1] All totals are for cases filed in United States Trustee Program (USTP) districts (excluding Alabama and North Carolina) and include cases that opted into subchapter V during the time period, either during or after filing. Totals may change over time due to subsequent case status updates. Subchapter V disposition percentages reflect results through December 31, 2024, and exclude cases that amended out of subchapter V, either at the debtor's request or after having been deemed ineligible to proceed under subchapter V, as well as cases that were administratively closed upon transferring to another division or district. Median disposition times are based on the date that cases entered into subchapter V and may change for each group as remaining pending cases reach their dispositions. Fiscal Year 2024 and 2025 disposition percentages are not yet included because many cases have not yet reached a disposition. Percentages may not add up to 100 percent due to rounding.

Haven Act

Previously, Congress enacted the Honoring American Veterans Extreme Need Act ("HAVEN") on August 23, 2019, which immediately became effective. HAVEN excludes from the chapter 7 trustee the "means test" compensation received in connection with a disability, combat-related injury or disability, or death, of a member of the uniformed services. On the same date Congress also enacted the National Guard and Reservists Debt Relief Amendment and the Family Farmer Relief Act, which were also immediately effective. The former legislation ensures that certain members of the National Guard and Reservists who face economic difficulty after their military service will continue to obtain bankruptcy relief without having to complete the substantial paperwork required by the "means test" under chapter 7. The Family Farmer Law increased the debt limit for chapter 12 eligibility to $10,000,000 (adjusted on April 1, 2025 pursuant to 11 U.S.C.A. § 104 to $12,562,250). That increases the pool of farmers who can now utilize the chapter's protections. A family fisherman, as defined, is also eligible for chapter 12 relief with lesser debt amounts.

Bankruptcy Administration Act of 2020 and the U.S. Trustee fund

In January 2021, the Bankruptcy Administration Act of 2020 was signed to more effectively deal with fees in the bankruptcy system and related to the U.S. Trustee fund. It also dealt with judgeships. The U.S. Trustee program also has a final Rule relating to the preparation and submission of financial reports, other than in small business cases.

The subject of U.S. Trustee fees generated controversy in 2017 in large Chapter 11 cases when the U.S. Trustee attempted to raise its fees. This lasted from early 2018 to early 2021. They were knocked down by the U.S. Supreme Court in Siegel v. Fitzgerald 142 S.Ct. 1770 (2022). No remedy was imposed however. After the case was remanded, and upon further appeal from the Tenth Circuit, the Supreme Court fashioned a remedy in Office of the United States v. John Q. Hammons Fall, LLC 144 S. Ct. 1588. It provided for future parity of fees and did not require refunds to be given to aggrieved debtors. There is also a split of authority in lower courts on whether, and to what extent, trustees of liquidating trusts have to pay fees after confirmation of a plan.

Means Test Numbers Adjustment

For consumer cases, annual adjustments are made based on the Consumer Price Index for Urban Consumers. See also Official forms 122A-1 and B122C.

China Relations and Trade War

The U.S.'s trade war with China and other political controversies, have embroiled the world's two largest economies in a years' long struggle. Supply chain issues with China have also contributed to economic issues in the U.S. China's partial support of Russia in the war in Ukraine and the wars in the Middle East have also fostered tensions and economic uncertainty. Collectively, this has adversely affected some businesses, causing some to restructure and/or file petitions under the Bankruptcy Code or otherwise liquidate. While a "phase one" deal to partially resolve that simmering dispute with China was signed in 2019, the origins and ramifications of the Coronavirus and other political issues have upset that limited truce. The world's reliance on China for critical supplies during the pandemic, including PPE, and China's dominance of important supply chains, has highlighted a vulnerability of Western nations, and most prominently, the United States and its businesses. This reality has led to a belief that there will be some decoupling of the economies of U.S. and its allies from China's economy, and possibly the economies of those countries that are working with China with respect to its "Belt and Road" initiative.

Recent Chapter 11 Case Filings

Chapter 11 filing rates have been up materially in 2024–2025. Previously Chapter 11 filings in 2021 and 2022 dropped significantly from prior levels. An improving United States economy, market liquidity, moderate interest rates, and government relief and stimulus programs have steadied the U.S. economy. In 2021 commercial bankruptcy case filings were down about 40% from 2020 and about 33% from 2019. Public company filings dropped by about 80%. The industries with the most filings were in commercial real estate, consumer areas, healthcare, energy, industrials and financials. One of the largest cases filed was In re FTX Trading, Ltd., 91 F.4th 148 (3d Cir. 2024) where the Third Circuit ruled that appointment of an examiner was mandatory.

The largest chapter 11 case of 2019 was filed by the California electric utility PG&E when it sought protection for a second time due to liabilities arising out of its alleged role in causing the deadliest wildfires in that state's history. Its chapter 11 case is the sixth largest of all time with assets listed in excess of $71 billion. On June 11th, 2020 it pleaded guilty to the deaths of 84

people in a wildfire, the deadliest corporate crime ever prosecuted. Opioid manufacturers and sellers Insys Therapeutics and Purdue Pharma L.P. filed for chapter 11 protection in 2019 to resolve the massive claims against them, arising from the opioid pandemic in the United States. The Purdue plan of reorganization was confirmed by the Bankruptcy Court in September 2021. However, provisions for non-consensual third party releases in Chapter 11 plans were struck down by the U.S. Supreme Court on June 27, 2024 in Purdue.

Thereafter, negotiations and mediation helped develop an enhanced plan for creditors and there are signs that the plan may overcome confirmation hurdles. A few subsequent lower court decisions cited hereafter have distinguished Purdue.

Bumble Bee Tuna filed a chapter 11 case to resolve claims against it from antitrust lawsuits related to its admitted role in a price-fixing scheme with its competitors. Also, Windstream Holdings, Inc., an internet service provider, sought chapter 11 protection in response to a $310 million judgment entered against it. In all, there was a very slight increase in the number of commercial chapter 11 cases filed in 2019 compared to 2018, making 2019 one of the busiest years for chapter 11 cases in the last decade. The late 2020 and first half of 2021 cases have slowed as the U.S. economy has improved. Of those 2019 filings, 400 cases listed liabilities that exceeded $10 million, a 20% increase over 2018's totals. The sectors that generated the most reorganization cases for private companies were oil and gas and chemicals. The total asset values listed for the public filing companies in 2019 were nearly three times the values listed for 2018. Individual entity 2020 filings exceeded 2019's total number of entity and individual bankruptcy cases due in large part to the Corona virus. In a sign of trouble for U.S. oil, gas, and fracking companies, in the first quarter of 2020, eight oil-field service companies, seven oil companies, and two pipeline operators, filed for chapter 11 relief. The material drop in the price of oil, caused in part by Saudi and Russian controversies, principally over world demand and levels of oil production, have contributed to energy company distress. So has a hurricane that tore through Louisiana and Texas. However, the 2021 and 2022 crude oil prices materially increased over 2020 to about $90 a barrel and profits in the oil and gas industries have substantially increased in recent years. Since then, after the Israeli-Iran war the price is down to about $66 dollars a barrel in late-July 2025.

Electronic Filing

Courts are now permitting, and many are providing guidelines for, electronic filing of petitions and other pleadings and

documents. Local rules and practices need to be reviewed on this and other aspects of practice. Official Forms B309A through B309I should be reviewed to update the links to the PACER website. Several districts, such as the Southern District of New York and the Eastern District of Virginia have entered orders establishing Judge Assignment Protocols for mega Chapter 11 cases in 2022. Districts within Texas also have their own assignment practices.

Bankruptcy Forms Changes

As described below, many forms have changed since 2015 through December 2025. On December 1, 2015, a very comprehensive revision of the Official Bankruptcy Forms, which replaces most of the bankruptcy forms that existed as of that date, became effective. This was a part of the Forms Modernization Project that was started several years ago. Among other things, the new forms require assumed names, "doing business as" names and company URL addresses. Revised and new Forms are provided herein, as well as a conversion table that sets forth the change in form numbers from the old forms to the new forms. Three new forms (Forms 410S2, 420A and 420B) were added, effective December 2016.

New Bankruptcy Form 113 became effective on December 1, 2017. Under this form, individuals filing for Chapter 13 protection must present their payment plan in a more uniform and transparent manner, and creditors will have less time to submit a proof of claim against the estate. Prior to the form's effective date, bankruptcy courts relied on local forms, which varied from district to district.

Given the dollar adjustments effective April 1, 2025, as discussed through these two volumes, at least the following forms changed to reflect these adjustments—*i.e.* 106C, 107, 122A-2, 122C-2, 201, 207, and 410, as well as Director's Forms 2000, 2800E, and 2830 and instructions for individual and non-individual debtors. See also forms being adopted on December 1, 2025. Additionally, a few other bankruptcy forms have changed, effective as of December 1, 2018 (i.e. 417A, 417C, 411A and 411B).

The CARES Act modifications to the Bankruptcy Code require a one-year amendment to five of the official forms to account for the newly defined term "debtor" applicable to Subchapter V of chapter 11 and a new exclusion from the definitions of "current monthly income" and "disposable income." Those five forms are Official Forms 101, 122A-1, 122B, 122C-1 and 201, which are included herein. On April 3, 2020, the Advisory Committee on Bankruptcy Rules recommended that three new director's forms

be adopted, that are now available to courts as model discharge orders in Subchapter V cases. Those Forms are Director's Form 3180RV1, 3180RV2 and 3180RV3. Effective October 1, 2020, Forms B309A through B309I were enacted. This relates to notice of a bankruptcy filing and links with the PACER website.

On December 1, 2022 changes were made to Official Form 101 at lines 2 and 4, and to Official Forms 309 E1 and E2 in lines 7 and 8 respectively.

On December 1, 2023 Official Forms 410A, 417A, and 1340 were amended.

Effective June 22, 2024, Official Forms 101 and 201 were amended due to the expiration of certain temporary provisions of the Bankruptcy Threshold and Technical Corrections Act (BTATC Act), Pub. L. 117-151.

Effective December 1, 2025, there are changes to the following forms: 410, 410 C13-M1, 410 C13-M1R, 410 C13-N, 410 C13-NR, 410 C13-M2, and 410 C13-M2R.

Bankruptcy Rules Changes

Incorporated herein are significant changes to the Bankruptcy Rules, effective December 1, 2025, 2024, 2023, 2022, 2021, 2019, 2018, 2017, 2015, 2014, 2014, 2012, 2011, and 2009. On December 1, 2023 amendments were made to rules 3011, 8203 and 9006, with a new rule 9038 enacted. That relates to conditions for a Bankruptcy Rules Emergency, Declaring an Emergency and Tolling and Extending Time Limits. Further rules changes are expected to be enacted on or about December 1, 2025. Interim rules amendments were also adopted in 2020 but were superseded in 2022, relating to Subchapter V practice. The overall changed rules are 1007, 1020, 2009, 2012, 2015, 3002, 3010, 3011, 3014, 3016, 3017.2, 3018, 3019, 5005, 7004, 8006 and 8023. Effective December 1, 2021, changes were made to Rules 2005, 3007, 7007.1 and 9036. Effective December 1, 2019, (i) Rule 4001(c) governing obtaining of credit, was amended to clarify that it does not apply in chapter 13 cases; (ii) Rule 6007 was amended to specify who needs to be served with a motion to abandon property, to provide that the objection deadline is within 14 days of service of the motion, unless otherwise fixed by the court, and to clarify that a court's order granting the motion itself effects the abandonment without needs for further notice; (iii) Rule 9036 was revised to confirm that both notice and service to a registered electronic filing system user can be done by filing the pleading with the applicable court's electronic filing system. That service may be made to any person who has consented to service electronically, at least to the extent of the consent, and to provide

that service or notice is complete upon filing or sending unless the filer or sender gets notice that it did not reach the intended person; (iv) Rule 9037 was amended to add a new subsection (h), which sets forth procedures for motions seeking to redact previously filed documents otherwise protected under Rule 9037(a) and that Rule 9037(a)'s protections cover social security numbers, birth dates, names of minors, and financial account numbers. Additionally, Rule 26.1 of the Federal Rules of Appellate Procedure was revised to require certain disclosures in bankruptcy appeals. Each debtor, including any debtors not named in the caption, must be identified. For each debtor that is a corporation, the Federal Rule of Appellate Procedure 26.1(a) disclosures must be provided, regardless of whether the corporate debtor is named in the caption. New Bankruptcy Rule 8018.1 was added, effective December 1, 2018. This new rule prevents a district court from having to remand an appeal whenever it determines that the bankruptcy court lacked constitutional authority to enter the judgment, order or decree appealed from. Rather, the district court may treat the bankruptcy court's judgment as proposed findings of fact and conclusions of law. In addition, Bankruptcy Rule 5005 was amended to make electronic filing mandatory in all districts for all parties represented by an attorney. Paper filings may be allowed for good cause, and individual courts by local rule could permit paper filings for other reasons. The 2017 Amendments impact the administration of consumer bankruptcy cases, particularly in Chapter 13. The 2015 Amendments address Rule 1007(a)(1) and (a)(2). The 2014 Amendments address Rules 1014, 7004, 7008, 7054, 8001-8028, 9023 and 9024. The 2013 Amendments address changes to Rules 1007, 4004, 5009, 9006, 9013 and 9014. The 2012 Amendments address technical and conforming changes to eliminate inconsistencies with the existing Bankruptcy Rules and to make them consistent with the Federal Rules of Civil Procedure and the Federal Rules of Appellate Procedure. The 2011 Amendments, most significantly, change Rule 2019, and compliance with it may continue to generate litigation.

Many districts have had local rules for decades. Some of the rules prescribe detailed case filings requirements and disclosures, particularly in business cases. Some of these involve disclosures for debtor in possession financing, use of cash collateral, sales of assets, and details for a mediation process. One of the latest additions in the Southern District of New York and Eastern District of Virginia is an order establishing Judge Assignment Protocols for Mega Chapter 11 Cases. Some courts in Texas have their own Chapter 11 assignment rules too.

Dollar and Time Changes to the Code

We note the increase of certain dollar amounts in the Bankruptcy Code.They occur every three years, to the extent provided in 11 U.S.C.A. § 104. The last was April 1, 2025 and the next increase will be on April 1, 2028. These increases do not apply to cases commenced before the effective date of the adjustments, *i.e.,* April 1, 2025. Practitioners should also be alert for periodic changes, including miscellaneous fees. See the December 2023 inflationary increases (28 U.S.C.A. § 1930) and the means test numbers adjustments. Seven Official Bankruptcy Forms (106C, 107, 122A-2, 122C-2, 201, 207 and 410) and two Director's Forms (2000 and 2830) were also amended to reflect these modified amounts. The following charts from the Judicial conference of the United States reflect the dollar changes and code sections affected:

Affected sections of Title 28 U.S.C. and the Bankruptcy Code	**Dollar amount to be adjusted**	**New (adjusted) dollar amount**
28 U.S.C.		
Section 1409(b)—a trustee may commence a proceeding arising in or related to a case to recover:		
(1)—money judgment of or property worth less than	$1,525	$1,725.
(2)—a consumer debt less than	$22,700	$25,700.
(3)—a non-consumer debt against a non-insider less than	$27,750	$31,425.
11 U.S.C.		
Section 101(3)—definition of assisted person	$226,850	$256,800.
Section 101(18)—definition of family farmer	$11,097,350 (each time it appears)	$12,562,250 (each time it appears).
Section 101(19A)—definition of family fisherman	$2,268,550 (each time it appears)	$2,568,000 (each time it appears).
Section 101(51D)—definition of small business debtor	$3,024,725 (each time it appears)	$3,424,000 (each time it appears).

Section 109(e)—debt limits for individual filing bankruptcy under chapter 13	$465,275 (each time it appears)	$526,700 (each time it appears).
	$1,395,875 (each time it appears)	$1,580,125 (each time it appears).
Section 303(b)—minimum aggregate claims needed for the commencement of an involuntary chapter 7 or 11 petition	$18,600 (each time it appears)	$21,050 (each time it appears).
Section 507(a)—priority expenses and claims:		
(1)—in paragraph (4)	$15,150	$17,150.
(2)—in paragraph (5)(B)(i)	$15,150	$17,150.
(3)—in paragraph (6)	$7,475	$8,450.
(4)—in paragraph (7)	$3,350	$3,800.
Section 522(d)—value of property exemptions allowed to the debtor:		
(1)—in paragraph (1)	$27,900	$31,575.
(2)—in paragraph (2)	$4,450	$5,025.
(3)—in paragraph (3)	$700	$800.
	$14,875	$16,850.
(4)—in paragraph (4)	$1,875	$2,125.
(5)—in paragraph (5)	$1,475	$1,675.
	$13,950	$15,800.
(6)—in paragraph (6)	$2,800	$3,175.
(7)—in paragraph (8)	$14,875	$16,850.
(8)—in paragraph (11)(D)	$27,900	$31,575.
Section 522(f)(3)—exception to lien avoidance under certain state laws	$7,575	$8,575.
Section 522(f)(4)—items excluded from definition of household goods for lien avoidance purposes	$800 (each time it appears)	$900 (each time it appears).
Section 522(n)—maximum aggregate value of assets in individual retirement accounts exempted	$1,512,350	$1,717,975.
Section 522(p)—state homestead exemption, limit for interest acquired 1215 days before filing	$189,050	$189,050.

Section 522(q)—state homestead exemption, limit under particular circumstances	$189,050	$214,00.
Section 523(a)(2)(C)—exceptions to discharge—presumption of nondischargeability:		
(1)—in paragraph (i)(I)—consumer debts for luxury goods or services incurred <=90 days before filing owed to a single creditor in the aggregate	$800	$900.
(2)—in paragraph (i)(II)—certain cash advances obtained <=70 days before filing, in the aggregate	$1,100	$1,250.
Section 541(b)—certain property of the estate exclusion limits	$7,575 (each time it appears)	$8,575 (each time it appears).
Section 547(c)(9)—minimum preference avoidance value in cases with primarily non-consumer debts	$7,575	$8,575.
Section 707(b)—dismissal of a chapter 7 case or conversion to chapter 11 or 13 (means test):		
(1)—in paragraph (2)(A)(i)(I)	$9,075	$10,275.
(2)—in paragraph (2)(A)(i)(II)	$15,150	$17,150.
(3)—in paragraph (2)(A)(ii)(IV)	$2,275	$2,575.
(4)—in paragraph (2)(B)(iv)(I)	$9,075	$10,275.
(5)—in paragraph (2)(B)(iv)(II)	$15,150	$17,150.
(6)—in paragraph (5)(B)	$1,525	$1,725.
(7)—in paragraph (6)(C)	$825	$925.
(8)—in paragraph (7)(A)(iii)	$825	$925.
Section 1322(d)—length of chapter 13 plan, current monthly income, 4+ household	$825 (each time it appears)	$925 (each time it appears).
Section 1325(b)—confirmation of chapter 13 plan, current monthly income, 4+ household	$825 (each time it appears)	$925 (each time it appears).
Section 1326(b)(3)—payments to former chapter 7 trustee	$25	$25.

SIGNIFICANT CASE LAW OF THE LAST DECADE

Third Party Plan Releases, Injunctions, and Non-Debtors

On June 27, 2024, the Supreme Court ruled in a 5-4 decision, with a strong dissent, that the Purdue Pharma Chapter 11 plan impermissibly granted releases and an injunction to non-debtor related parties ("the Sacklers"). They had not placed their assets within the jurisdiction of the bankruptcy courts to be administered. The Court noted that the Sacklers were contributing only approximately $6 billion to the plan when they withdrew approximately $11 billion under a "milking program" lasting a decade. Over a 20 year span, approximately 247,000 people had died from prescription-opioid overdoses. Purdue was left in a financially weakened position by the withdrawals to deal with its creditor victims. The Court held that releases of non-debtors were not permitted under provisions of the Code without consent of affected claimants. While almost all of the claimants had consented to the plan, some didn't, and the office of the U.S. Trustee objected to the plan and its release provisions. Had the Sacklers filed petitions under the Code, they may have been faced with objections to the dischargeability of debts under section 523 or otherwise.

After the Supreme Court reversed and blocked confirmation of the Purdue Plan, with the assistance of mediation and the Bankruptcy Court, the parties negotiated a revised plan providing for a larger contribution from the Sacklers and Purdue totalling approximately $7.4 billion.

Essentially all creditors have voted for the plan providing for releases, or had an opportunity to opt out and pursue litigation against the families. The amended plan and disclosure statement are pending before the Bankruptcy Court for its consideration and approval.

This process was aided by the Bankruptcy court issuing a temporary restraining order blocking litigation against the Sackler parties while the negotiations continued. State of Maryland v. Purdue Pharma 2024 U.S. Dist. LEXIS 216421 (S.D. NY. Nov 26, 2024).

Other lower court cases permitting releases or providing creditors to opt out are Spirit Airlines, Inc. _B.R._2025 LEXIS 553 (Bankr. S.D. NY. March 7, 2025); Mercy Health Network v. Mercy Hospital, Iowa City _B.R._2025 LEXIS (N.D. Iowa March 3, 2025).

The Court states this is a narrow decision which does not block consensual releases under a plan. The Court does not say

what is a consensual release. The case has been remanded for further proceedings. The release provisions did not propose to limit the rights of prosecutors to pursue criminal proceedings, if warranted.

In Off. Comm. of Asbestos Claimants v. Bestwall LLC, 2024 WL 2116275 (U.S. May 13, 2024), the Supreme Court denied certiorari where parties sought to overturn an injunction staying suits against non-debtors. In some Chapter 11 cases involving potential liability of non debtor parties to the debtor's creditors, debtors may seek stays. Many courts have at least temporarily issued injunctions, particularly in asbestos and other mass tort type cases. The length of the stay may be controversial, and may depend on the prepetition conduct of the debtor and later treatment under a proposed plan of reorganization. The appellants were objecting to the "Texas-Two-Step" (divisional merger) engaged in by the company leading up to the Chapter 11 filing, and its ramifications. Unlike the Purdue Supreme Court June decision above blocking releases under a plan, an effect of the denial of certiorari is not to overturn early injunctions in some cases. The subject of releases may be considered later in a plan, subject to limitations in Purdue.

Structured Dismissals that Permit Distributions Not in Accordance with the Priority Scheme of the Bankruptcy Code, without the Consent of Affected Creditors, are Impermissible

Section 507 of the Bankruptcy Code grants priority to claims for certain wages and employee benefits earned before the date of the bankruptcy and such claims are required to be paid in full before other unsecured claims may be paid from assets of the bankruptcy estate. In *Czyzewski v. Jevic Holding Corp.,* 137 S. Ct. 973, 197 L. Ed. 2d 398 (2017), the debtor agreed to settle a cause of action belonging to the estate. Rather than distributing the settlement proceeds under a confirmed plan of reorganization, the debtor sought a "structured dismissal" of the bankruptcy case. The dismissal order provided that the settlement proceeds would be paid to general unsecured creditors, rather than to petitioners. In a case of "apparent first impression," the Third Circuit held, among other things, that absent a showing that structured dismissal of the Chapter 11 case has been contrived to evade procedural protections and safeguards of the plan confirmation or conversion processes, the bankruptcy court has discretion to order such a disposition.

However, Justice Breyer, writing for the 6 to 2 majority in the Supreme Court, disagreed with the Third Circuit. The Court held

that structured dismissals may not be used to circumvent the Bankruptcy Code's priority rules, absent consent of the affected creditors. In so doing, the Court distinguished the Second Circuit's decision in *Iridium Operating L.L.C.,* 478 F.3d 452 (2d Cir. 2007), where the Second Circuit approved a distribution of settlement proceeds to fund a litigation trust to pursue claims on the estate's behalf. There the payments were made earlier in the bankruptcy case before the nature and extent of the estate and claims against it were fully resolved, as opposed to *Jevic*, where the payments were to be made at the final stages of the case as part of a dismissal thereof. The Court noted that in cases permitting interim distributions, such as *Iridium,* there were "significant Code-related objectives" that were served, such as preserving the debtor as a going concern, making the passed over class of creditors better off, and promoting the possibility of a confirmable plan and protecting reliance interests, none of which the Court found were present in *Jevic.* In its ruling, the Court also rejected the Third Circuit's use of a "rare case" exception that would permit a court the discretion to up end the usual priority scheme of the Bankruptcy Code for "sufficient reasons."

The Court also distinguished payments to certain pre-petition creditors early in the bankruptcy case, including as part of "first day" motions, including critical vendor payments, pre-petition wages, and "roll ups" to prepetition lenders. Less clear, *post-Jevic*, is the survivability of "gifting" plans or settlements, where a senior creditor gifts a portion of its recovery to a junior class and passes over an intervening class that ranks higher than the class to which the "gift" is made. *See infra, The "Gifting Doctrine" Revisited.*

Ultimately, while *Jevic* provides bankruptcy courts and district courts less discretion to approve of a compromise that would end the bankruptcy case, it remains true to the priority rules of the Bankruptcy Code. They are designed to protect intermediate creditors from being squeezed out by a deal between the senior and the junior creditors that is not acceptable to the intermediate creditors.

In re Old Cold LLC, 879 F.3d 376 (1st Cir. 2018), the First Circuit ruled that Jevic does not apply to an asset sale under Section 363 (b) of the Bankruptcy Code where the sale approval order is moot under Section 363 (m).

Jurisdiction and Power of Bankruptcy Courts – *Stern v. Marshall* (2011) and Progeny; *Bellingham* (2014); *Wellness* (2015)

In an important ruling on the scope of the jurisdiction of bankruptcy courts, on May 26, 2015 the U.S. Supreme Court decided

in the *Wellness International Network Ltd., v. Sharif* case that bankruptcy courts have the authority to decide *Stern v. Marshall* claims with the parties' knowing and voluntary consent and that such consent may be implied. This does not violate Article III of the Constitution. The vote was 6-3 to reverse the Seventh Circuit, and to remand on the question of the existence of a knowing and voluntary consent.

The United States Supreme Court's decision in *Stern v. Marshall*, 131 S. Ct. 2594, 180 L. Ed. 2d 475 (2011), continues to generate rulings as to the power, scope and limitations of jurisdiction of the bankruptcy court. As a result, there have been many more requests for, and some withdrawals of the reference by some District Courts, particularly in the *BLMIS (Madoff)* case and related proceedings in the Southern District of New York. In some instances, the withdrawal has been followed by references back to the bankruptcy court.

The majority decision in *Stern v. Marshall* ruled that although 28 U.S.C.A. § 157(b) gave bankruptcy courts core jurisdiction over counterclaims by the estate against persons filing claims against the estate, and that there was a form of consent by Pierce to the resolution of the estate's defamation claim, this raised a constitutional question relating to powers of bankruptcy courts. The Supreme Court ruled that non-tenured bankruptcy judges had no jurisdiction and could not hear and determine a state law counterclaim in the context of ruling on a creditor's proof of claim. While the Court states that its majority decision was a "narrow one," the decision and Justice Breyer's dissent raise questions about this. Courts have since been struggling with the scope of the *Stern v. Marshall* decision.

Thereafter, the Supreme Court heard and ruled on June 9, 2014, in the *Bellingham Insurance Agency, Inc.* case, involving jurisdictional issues on appeal from 702 F.3d 553 (9th Cir. 2012). The court addressed whether a bankruptcy court has authority to (i) submit proposed findings of fact and conclusions of law to the district court in "core" matters; and (ii) enter a final order based on the parties' express or implied consent. The Ninth Circuit ruled in favor of both these points.

The Sixth Circuit's ruling in *Waldman v. Stone*, which decided that regardless of the consent or waiver of the parties, the bankruptcy court nevertheless had no authority in that case to issue a final decision, 698 F.3d 910 (6th Cir. 2012), and the Seventh Circuit's and Fifth Circuit's similar rulings respectively in *Wellness International* (discussed above), and *In re Frazin*, 732 F.3d 313 (5th Cir. 2013), *cert. denied,* 134 S. Ct. 1770, 188 L. Ed. 2d 595 (2014), created a split with the Ninth Circuit's ruling in

Bellingham.

The *Stern v. Marshall* decision has been causing practitioners to reevaluate the scope of the Bankruptcy Court's jurisdiction under 28 U.S.C.A. Sections 1334 and 157, and to consider major changes in litigation strategy for the administration of cases and proceedings. Bankruptcy courts and district courts on appeal, are also raising potential jurisdictional issues on their own and seeking guidance and briefing by parties. In some instances, the bankruptcy courts may no longer be able to hear and determine certain matters, but will instead hear and make findings and proposed conclusions of law which would be transmitted to the district court for its consideration. In other instances, bankruptcy courts may consider abstaining, and possibly sending some matters, including those involving state law issues, to state courts if the matters may be timely adjudicated there. Practitioners should read *Stern v. Marshall, Bellingham and Wellness*, and monitor developments in bankruptcy courts and other federal courts in order to appropriately strategize on jurisdictionally related matters. The potential high costs of litigating some of these issues should be taken into account.

Since *Stern v. Marshall*, some bankruptcy courts have been interpreting that decision narrowly and finding that their jurisdiction is affected in only limited ways. However, some district courts, including in the Southern District of New York, in multiple proceedings in the *BLMIS (Madoff)* case have withdrawn the reference, at least in part, or temporarily. At least once the district court also treated a decision of the bankruptcy court on appeal, as proposed findings and conclusions of law to be reviewed accordingly by the district court. *See In re Coudert*, 2011 WL 5593147 (S.D.N.Y. Sept. 23, 2011), but compare *Heller Ehrman LLP v. Arnold & Porter LLP*, 464 B.R. 348 (N.D. Cal. 2011), where the District Court disagreed with the bankruptcy court and found that since the state law counterclaims at issue were not "public rights", and that their final adjudication could not be assigned to an Article I bankruptcy judge. Nevertheless, the District Court, found that mandatory withdrawal of the reference was not appropriate since the bankruptcy court had authority to enter proposed findings of facts and conclusions of law on the fraudulent conveyance claims.

Some bankruptcy courts have promulgated local rules in light of the *Stern v. Marshall* decision. For example, the Bankruptcy Court for the Southern District of New York has established five new local bankruptcy rules (*i.e.,* 7008-1, 7012-1, 9072-1, 9027-2 and 9033-1) effective April 16, 2012. These local rules require that the pleader or party state in their pleadings whether it does

or does not consent to entry of final orders or judgment by the bankruptcy judge if it is determined that the bankruptcy judge, absent consent of the parties, cannot enter final orders or judgment consistent with Article III of the United States Constitution.

The District Court for the Southern District of New York entered a standing order dated January 31, 2012, which attempts to clarify and provide a road map with respect to a bankruptcy court's jurisdiction over state law counterclaims. It provides that "[p]ursuant to 28 U.S.C.A. Section 157(a) any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 are referred to the bankruptcy judges for this district." It continues, "[i]f a bankruptcy judge or district court judge determines that entry of a final order or judgment by a bankruptcy judge would not be consistent with Article III of the United States Constitution in a particular proceeding referred under this order and determined to be a core matter, the bankruptcy judge shall, unless otherwise ordered by the district court, hear the proceeding and submit proposed findings of fact and conclusions of law to the district court. The district court may treat any order of the bankruptcy court as proposed findings of fact and conclusions of law in the event the district court concludes that the bankruptcy judge could not have entered a final order or judgment consistent with Article III of the United States Constitution." The District Court for the District of Delaware similarly amended its standing order of reference on February 29, 2012.

Other Circuit Court decisions are weighing in on the jurisdictional issues arising out of *Stern v. Marshall* as well. For example, in *Technical Automation Services Corp. v. Liberty Surplus Ins. Corp.*, 673 F.3d 399 (5th Cir. 2012), the Fifth Circuit ruled that a magistrate's ruling on an insurance coverage dispute did not violate *Stern v. Marshall*. In *In re Ortiz,* 665 F.3d 906 (7th Cir. 2011), the Seventh Circuit granted a direct appeal and then concluded that it did not have a final decision to review, in light of *Stern v. Marshall*. A decision from the First Circuit, *In re Divittonio*, 2012 U.S. App. LEXIS 248 (1st Cir. Jan. 6, 2012), appears to reach the opposite conclusion. In *Onkyo Electronics v. Global Technovations Inc.,* 694 F.3d 705 (6th Cir. 2012), the Sixth Circuit held that the bankruptcy court did have authority to enter a final judgment in an action seeking to avoid a fraudulent transfer because the creditor had filed a proof of claim, which could not be resolved without addressing the fraudulent transfer issue.

As previously mentioned, in *Waldman v. Stone*, the Sixth Circuit held that limitations imposed on bankruptcy courts by Article III of the Constitution cannot be waived by a party's fail-

ure to object at the trial court level. In the *Bellingham Ins. Agency* case, to the contrary, the Ninth Circuit held that a bankruptcy court cannot enter a final judgment in a fraudulent transfer action against a defendant that has not filed a proof of claim, but that the defendant's right to an Article III court may be waived. Certiorari was granted by the U.S. Supreme Court in this case which decided the case in June 2014.

In *Bellingham, supra*, the Supreme Court held that where a bankruptcy court does not have the constitutional authority (Article III) to enter a final judgment on a fraudulent conveyance claim, even though it is labeled "core" under 157(b), it should move forward as if the claim were "non-core" under § 157(c). The bankruptcy court should transmit its findings of fact and conclusions of law to the district court for de novo review. The Supreme Court left unanswered the question of whether a party could consent to jurisdiction, and what constitutes consent relating to *Stern v. Marshal* type claims.

Since *Bellingham*, the U.S. District Court for the District of Delaware rejected an argument by a group of creditors that a plan provision releasing racketeering claims against the debtor's former shareholders was prohibited under *Stern*. It held that the "operative proceeding" was a Chapter 11 plan confirmation proceeding, over which the court clearly had jurisdiction, and not a litigation of the racketeering claims. In re Millennium Lab Holdings II, LLC, 591 B.R. 559 (D. Del. 2018). *See also* Lynch v. Lapidem Ltd. (In re Kirwan Offices S.a.r.l., 592 B.R. 489 (S.D. N.Y. 2018).

In 2019 the Third Circuit became the first circuit court to hold that a bankruptcy court may confirm a plan containing third-party releases without violating Stern. *In re Millennium Lab Holdings 11, LLC* 945 F.3d 126 (3d Cir. Dec, 2019). The Court found that Article III of the U.S. Constitution did not bar the bankruptcy court from granting such relief because the releases at issue are "integral to the restructuring of the debtor-creditor relationship." This decision needs to be reviewed in light of the Purdue decision by the U.S. Supreme Court barring nonconsensual releases under a plan. Harrington v. Purdue Pharma L. P., 144 S. Ct. 2071 (2024).

"Good Faith" or "Financial Distress" Filing Requirement

Although there is no explicit requirement in the Bankruptcy Code, including section 109 on eligibility, that debtors be insolvent or in financial distress to file Chapter 11 petitions, the Third Circuit ruled financial distress is a requisite part of good faith in the filing of a Chapter 11 petition in In re LTL Mgmt., LLC, 64

F.4th 84 (3d Cir. 2023). Shortly thereafter, LTL filed a second petition and the bankruptcy court, and thereafter the Third Circuit, dismissed the case again. In re LTL Management LLC 2024 WL 35404671 (3d Cir. 2024). A minority of courts under the Code have previously required good faith in filing. In so ruling, the Third Circuit dismissed the LTL petition twice, which was filed after J&J Consumer, a Johnson and Johnson subsidiary, sought to stay thousands of tort actions and enforcement of actions arising from the use of Johnson talc-based products.

The Third Circuit's test for good faith in the 2023 decision looks to whether the Chapter 11 case filing "serves a valid bankruptcy purpose" and "whether it was filed merely to obtain a tactical litigation advantage." See also the 2024 Circuit opinion.

J&J had previously spun off the troubled assets through the "Texas Two Step" in a divisional merger under Texas law that left standing profitable J&J. The Third Circuit found LTL was not left sufficiently suffering financial distress sufficient to file a Chapter 11 petition. Thus the court found a lack of good faith in filing because, in part, LTL still had the ability to pay its debts outside of the Bankruptcy Code process.

Other circuits have their own standards. The Fifth Circuit will examine the "totality of the circumstances" under which to evaluate the debtor's financial condition, motives, and the local financial realities. See Honx, Inc. 2022 WL 17984313 (Bankr. S.D. Tex. Dec. 28, 2022). See also the 9th and 11th Circuit decisions which say that it "depends on an amalgamation of factors and not upon any specific facts." A court "may consider any factors which evidence an intent to abuse the judicial process and the purposes of the reorganization provisions." In re Marshall 721 F.3d 1032 1048 (9th Cir. 2023), citing In re Phoenix Picadilly Ltd., 849 F.2d 1393, 1394 (11th Cir. 1988).

Professional Fees

On June 15, 2015 the U.S. Supreme Court held, by a 6-3 vote, in *Baker Botts L.L.P. v. ASARCO, L.L.C.*, that under Section 330(a)(1) of the Bankruptcy Code, bankruptcy estate professionals are not entitled to fees for defending attacks on their fee applications. This should not affect payment for reasonable time spent in preparing the fee application under Section 330(a)(6) of the Code. In *In re Boomerang Tube, Inc.*, the Bankruptcy Court for the District of Delaware held that a provision in the engagement letter for counsel to the unsecured creditors' committee requiring that the debtor's bankruptcy estate indemnify them for their expenses incurred in any successful defense of their fees in that case was not permissible under the Supreme Court's ruling

in the *Baker Botts* decision. Subsequent decisions from the Delaware Bankruptcy Court made it clear that the *Boomerang Tube* decision likewise applies to professionals being retained by the debtor in possession, although supplementing a fee application may fall within the Code's provision permitting reasonable compensation for preparing fee applications.

Recently, the 5th Circuit decided that a court cannot award attorney's fees for performing the duties required to be performed by the trustee. This ruling was made despite the fact that there was a surplus in the debtor's estate. Matter of Sylvester, 23 F.4th 543, 71 Bankr. Ct. Dec. (CRR) 47 (5th Cir. 2022).

The Supreme Court Confirms Lenders' Rights to Credit Bid in Chapter 11 Cramdown Plans

In 2012, the United States Supreme Court held that sales of assets pursuant to Chapter 11 plans must permit credit bidding by their secured lenders in order to satisfy the requirements for confirmation of a Chapter 11 "cramdown" plan. *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 132 S. Ct. 2065 (2012). The Court unanimously (8-0) affirmed a decision by the Seventh Circuit Court of Appeals that was in conflict with previous decisions by the Third and Fifth Circuits. In a strong endorsement of rights of secured creditors, the Court stated that "the ability to credit-bid helps to protect a creditor against the risk that its collateral will be sold at a depressed price. It enables the creditor to purchase the collateral for what it considers the fair market price (up to the amount of its security interest) without committing additional cash to protect the loan". *Id.* at *4, note 2.

This decision also protects investors in the distressed debt market, who are now assured of the right to credit-bid in the event of a Chapter 11 plan proposing to sell collateral secured by loans purchased in the secondary market. It thus adds a measure of certainty for the exit strategy of distressed investors that seek to acquire the collateral or negotiate for an acceptable debt to equity conversion. Lenders within the Third Circuit (Delaware, Pennsylvania and New Jersey) or Fifth Circuit (Texas, Louisiana, and Mississippi) Courts of Appeals may benefit from *RadLAX* since courts in these jurisdictions had issued conflicting decisions allowing debtors to sell encumbered assets without providing for credit bidding.

The debtors in *RadLAX* which were hotel owners, borrowed $142 million to finance their purchase and renovation of the hotels. The loan was secured by a blanket lien on all of the debtors' assets. By August 2009, the debtors owed more than $120 million on the loan, were unable to complete renovation and ac-

crued more than $1 million interest per month. Without any prospects for obtaining additional funding, the debtors filed Chapter 11 petitions.

The debtors' Chapter 11 plan sought to sell all of their assets at an auction that did not permit credit-bidding by the lender. The lenders objected on the basis that the plan did not permit credit-bidding and was therefore not confirmable under Section 1129(b)(2)(A)(ii) of the Bankruptcy Code that expressly required credit-bidding in connection with assets to be sold pursuant to a plan. The debtors argued that their plan satisfied Section 1129(b)(2)(A)(iii), that allows debtors to "cramdown" a plan on lenders by providing them with the "indubitable equivalent" of their claim.

The bankruptcy court agreed with the lenders, ruling that the plan could not be confirmed. The Seventh Circuit Court of Appeals affirmed, and the debtors appealed to the Supreme Court, which took the case, presumably to resolve the conflict between this case and contrary decisions of the Courts of Appeal from the Third and Fifth Circuits. The Supreme Court affirmed the Seventh Circuit, and thus *RadLAX* is now binding precedent throughout the country.

In a decision from the Bankruptcy Court for the District of Delaware, the Court found "cause" under Section 363(k) of the Bankruptcy Code to limit a secured creditor's right to credit bid at the amount the second creditor paid for the debt in the secondary market. *In re Fisker Automotive Holdings, Inc.*, 510 B.R. 55 (Bankr. D. Del. 2014)). This case serves as a reminder that despite *RadLAX*, a secured creditor's right to credit bid can be limited in appropriate circumstances. However, the courts have not yet developed a consistent standard for such limitations. In *Fisker* an auction resulted in increased bidding and substantial distributions to creditors, including the unsuccessful stalking horse bidder. The District Court for the District of Delaware denied the secured creditor's motion for leave to appeal the bankruptcy court's decision. For differing analyses, including what constitutes "cause," to limit credit bidding, see also *Freelance-Star Publishing,* 512 B.R. (Bankr. E.D. Va. 2014), *RML Development* (Bankr. W.D. Tenn. 2014). In re: Aeropostale, Inc., 555 B.R. 369 (Bankr. S.D. N.Y. 2016) and In re Empire Generating Co, LLC, 2020 WL 1330285 (S.D. N.Y. 2020).

Finality of Plan Confirmation Orders – *Bullard v. Blue Hills Bank*

On May 4, 2015, the United States Supreme Court, in a unanimous decision, held that an order that denied confirmation of a

Chapter 13 plan was not a "final" order from which the debtor could appeal. While the case was decided under Chapter 13, the reasoning of the case should likewise be applicable to Chapter 11 plans.

The Court stated that only plan confirmation, or a dismissal of the case, alters the status quo and fixes rights and obligations of the parties, since confirmation has a preclusive effect, forecloses relitigation and alters substantive rights. The same cannot be said with respect to denial of plan confirmation. The Court was concerned that endless appeals of plan confirmation could add significant time and expense to cases and that a contrary ruling would provide the debtor with undue leverage. Rather, the debtor should be encouraged to work with its creditors to reach a confirmable plan as promptly as possible.

Finality of Order Denying Relief from the Automatic Stay

In a unanimous decision, the Supreme Court ruled that a bankruptcy court's order denying relief from the automatic stay in a bankruptcy case constitutes a final, immediately appealable order under 28 U.S.C.A. § 158(a). *Ritzen Group, Inc. v Jackson Masonry, LLC,* Sup. Ct. No. 18-938 (2020). Relying on its prior decision in *Bullard v. Blue Hills*, 575 U.S. 496 (2015), the Court found that such an order constitutes a final order because it "dispose[s] of discrete disputes within the larger [bankruptcy] case." It also reasoned that a creditor that lost the relief from stay motion, absent immediate appealability of the resulting order, would need to litigate its claim in the bankruptcy court and then, if it successfully appealed the resulting order, litigate again in the original forum.

Return to Chapter 7 Debtor of Post-Petition Wages Prior to Distribution by Chapter 13 Trustee in Case Converted to Chapter 7

In *Harris v. Viegelahn* the Supreme Court held unanimously in May 2015 that a debtor, who in good faith converts a Chapter 13 case to a Chapter 7 case, is entitled to return of any post-petition wages not yet distributed by the Chapter 13 trustee to creditors at the time of such conversion. This ruling resolved a conflict between the Fifth Circuit, which held that the wages need not be returned, and the Third Circuit, which held that such wages must be returned.

"Actual Fraud" Does Not Require a False Representation

In 2016 the Supreme Court resolved a split between the First and Seventh Circuits and the Fifth Circuit regarding the issue of

whether the discharge exception in Section 523(a)(2)(A) for "actual fraud" applies only to false representations made by the debtor to its creditors, or whether it also applies to other frauds without specific representations. In *Husky International Electronics, Inc. v. Ritz*, the Court held that the term "actual fraud" in Section 523(a)(2)(A) encompasses fraudulent conveyance schemes, even when those schemes do not involve a false representation, siding with the First and Seventh Circuits.

Partner/Spouse § 523(a)(2)(A) Fraud and Dischargeability--Bartenwerfer v. Buckley

In a unanimous ruling, the U.S. Supreme Court held, that a partner/spouse debtor could be blocked from discharging a debt contained in a state court judgment, where the non-debtor judgment debtor only, knowingly concealed or misrepresented defects in the sale of a house. The debtor appeared to have little or no knowledge of the fraud or misrepresentation. However, the knowledge seems to have been imputed. The court suggested that this adverse result to a debtor could be remedied in the future by a Congressional amendment to § 523(a)(2)(A).

The Supreme Court Applies the Civil Contempt Standard to a Creditor Violation of a Discharge Order

In Taggart v. Lorenzen, 139 S. Ct. 1795, 67 Bankr. Ct. Dec. (CRR) 69 (2019), the Supreme Court unanimously held that creditors that violated a debtor's discharge order (by attempting to collect a debt that had been discharged) could face civil liability if there is no fair ground of doubt as to whether the discharge order barred the creditor's conduct. In rejecting the subjective standard applied by the Ninth Circuit, the Court held that sanctions are appropriate "when the creditor violates a discharge order based on an objectively reasonable understanding of the discharge order or the statutes that govern its scope."

The Supreme Court Resolves a Split in the Circuits Regarding the Turnover Obligation

The Supreme Court has resolved a split in the circuits in *City of Chicago, Illinois v. Fulton*. Potentially it may resolve a split in the Circuits regarding whether an entity that is passively retaining possession of property in which the bankruptcy estate has an interest, has an affirmative obligation to turn over that property to the debtor or trustee immediately upon the filing of the bankruptcy petition, without the need for a motion to compel. The court held there is no obligation. City of Chicago, Illinois v. Fulton, 141 S. Ct. 585, 208 L. Ed. 2d 384, 69 Bankr. Ct. Dec. (CRR) 160, Bankr. L. Rep. (CCH) P 83578 (2021).

The Supreme Court Upheld the Federal Response to Puerto Rico's Debt Crisis

On June 20, 2020 The Court ruled that members of a government board created by Congress in 2016 had been properly appointed.

Trust Indenture Act Does Not Prohibit an Out-of-Court Restructuring That Involved the Elimination of Parent Guarantee and a Significant Asset Transfer as Impairing The Nonconsenting Noteholders' Right to Receive Payment

On January 17, 2017, the Second Circuit in *Marblegate Asset Management, et al. v. Education Management Corp., et al.* ((No. 15-2124-cv(L) (2d Cir. 2017)) reversed the lower court and held that Section 316(b) of the Trust Indenture Act of 1939, as amended, prohibits only non-consensual amendments to an indenture's core payment terms (*i.e.,* the amount of principal and interest owed and the date of maturity) but does not prohibit other unrelated changes that included an elimination of the parent guarantee and a significant asset transfer. The Second Circuit expressed concern in the opinion that a broad holding, as contained in the lower court decision, would effectively hinder consensual workouts by "transform[ing] a single provision of the Trust Indenture Act into a broad prohibition on any conduct that could influence the value of a note or a bondholder's practical ability to collect payment." For a different approach and result compared to Marblegate, see also CNH Diversified Opportunities Master Account, L.P. v. Cleveland Unlimited, Inc., 36 N.Y.3d 1, 136 N.Y.S.3d 199, 160 N.E.3d 667 (2020). The New York Court of Appeals held that Section 6.07 of the Indenture gave each individual lienholder the absolute right to bring suit on its own without dissenting consent violated the Indenture. The case was remanded to the lower court.

Use of "Till" Interest Rate For Senior Bondholders in Chapter 11 Plan; And Other Cases

In *In re MPM Silicones, L.L.C.,* 874 F.3d 787 (2d Cir. 2017), the Second Circuit disagreed with the district court regarding the appropriate interest rate under the cramdown notes issued to secured creditor classes. It held that such notes bear a market rate of interest if an efficient market exists, and if not, the notes may bear interest at the typical below-market formula rate. The Second Circuit remanded for the lower court to determine such a risk.

In April 2019, after remand, Bankruptcy Judge Drain issued an order determining the appropriate cramdown interest rate applicable to replacement notes issued by Momentive. The court could not find a "traditional market efficiency" rate, but instead established a "process efficiency" rate, which was higher than that in the original plan previously not upheld by the Second Circuit decision.

Previously in 2015, the District Court for the Southern District of New York, upheld a hotly contested ruling by the lower court which confirmed a Chapter 11 plan whereby the senior bondholder would be paid off with new debt at below-market interest rates. *In re MPM Silicones, L.L.C. ("MPM Silicones")*. This ruling was the first to apply the United States Supreme Court's so-called "Till Rate" of a below market interest rate of an individual debtor to a Chapter 11 plan, thereby slashing approximately $3 billion from the debtor's balance sheet in MPM Silicones. As stated by the District Court, "... the Court finds much of *Till*'s reasoning applicable in the Chapter 11 context. In *Till*, the Supreme Court rejected the efficient market approach because it 'imposes significant evidentiary costs, and aims to make each individual creditor whole rather than to ensure the debtor's payments have the required present value.' *Till v. SCS Credit Corp.*, 541 U.S. at 477. Additionally, the Court noted the efficient market approach "overcompensates creditors because the market lending rate must be high enough to cover factors, like lenders' transaction costs and overall profits, that are no longer relevant in the context of court-administered and court-supervised cramdown loans. *Id*." It also found that the senior bondholders provided no good reason why they should be placed in the same position under the plan that they would have been if they were making a new loan, or why the cramdown interest rate should allow Chapter 11 creditors, but not Chapter 13 creditors, to receive more than the present value of their allowed claim.

The Court also affirmed a ruling that the senior subordinated noteholders in this case could be completely wiped out under the plan. Notably, the District Court did not dismiss the appeal as moot in light of the plan's prior consummation.

For additional analysis of the post "Till" interest rates, see In re Topp, 75 F.4th 959 (8th Cir. 2023). The Court held proper in a Chapter 12 case, the use of a risk free rate, based on Treasury notes, plus an appropriate premium.

Make-Whole Premiums

This subject has generated hotly contested litigation in recent years in a number of circuits. It often involves large sums of

money which may have to be paid under a Chapter 11 plan if the premium is allowed. In some instances, that may limit the ability of the debtor to have a plan confirmed or require material modification, which diminishes distributions to creditors with lower or even equal priority than the creditor with rights to a make-whole premium.

In November, 2016, the Third Circuit ruled in *In re Energy Future Holdings Corp.,* 842 F.3d 247, 63 Bankr. Ct. Dec. (CRR) 95 (3d Cir. 2016), that the repayment in full of certain senior secured notes triggered an obligation by the debtors to pay a make-whole premium. The make-whole premium, which are extra fees for early loan repayment, resulted in additional estate liabilities of approximately $660 million. The Court rejected the view that the make-whole provision did not apply once the debt was accelerated and concluded that the optional redemption "applies no less following acceleration of the Notes' maturity than it would to a pre-acceleration redemption." This opinion is at odds with some recent case law and will provide secured lenders, in cases pending in the Third Circuit, with greater leverage and make it may more difficult and expensive for a debtor with such obligations to confirm a plan of reorganization.

Thereafter, in 2024 the Third Circuit approved a make-whole premium in a solvent debtor case. In re Hertz Corporation, 2024 WL 4132132 (3d Cir. 2024).

In *Matter of MPM Silicones, L.L.C.,* 874 F.3d 787, Bankr. L. Rep. (CCH) P 83176 (2d Cir. 2017), the Second Circuit upheld the district court's ruling that a default on prepetition notes triggered by the bankruptcy filing and automatic acceleration did not equate to prepayment of the notes and, accordingly, by the express terms of the indentures, the noteholders were not entitled to make-whole premiums of approximately $200 million. While the Court recognized that the parties could have clearly provided for a make-whole premium, it ruled that they had not done so in this case. Further, the Court upheld the denial of the request of the noteholders to rescind the acceleration so as to resurrect the payment of make-whole premiums. It found that the automatic stay precluded such deacceleration. *See also* the 2019 decision in 1141 Realty by Bankruptcy Judge Bernstein, S.D.N.Y, distinguishing the *AMR* and *Momentive* decisions based on a loan documentation. *See also* Judge Drain's *Momentive* decision in April 2019, Supra.

In AMR, the Second Circuit also disallowed a make-whole provision based on the language of the indenture. AMR, 730 F.3d at 98-100, 112.

However, The Second Circuit disagreed with the district court in *Momentive* regarding the appropriate interest rate under the cramdown notes issued to the secured creditor classes. It held that such notes bear a market rate of interest if an efficient market exists and, if no such market exists, the notes may bear interest at the typical below-market formula rate. See also Judge Drain decision in April 2019, supra.

Similarly, in *In re Denver Merchandise Mart, Inc.,* 740 F.3d 1052 (5th Cir. 2014), the Fifth Circuit held that the secured lender was not entitled to a make-whole premium because the plain language of the contract at issue did not require the payment.

In January 2019, the Fifth Circuit held (i) a make-whole premium owed on unsecured notes constituted unmatured interest that was disallowed under Section 502(b)(2) of the Bankruptcy Code and; (ii) that because the noteholders' claim for a make-whole premium and post-petition interest at the contract default rate was disallowed under the Bankruptcy Code, rather than the debtor's plan, such claim was not "impaired" for purposes of plan confirmation. *In re Ultra Petroleum Corp.,* 913 F.3d 533 (5th Cir. 2019). Upon rehearing, the Fifth Circuit vacated its prior ruling on claim disallowance of a make-whole premium finding that the bankruptcy court was best able to make the determination, including whether the claim might be allowed under the pre-code "solvent debtor exception" *In re Ultra Petroleum Corporation,* 943 F.3d 758, Bankr. L. Rep. (CCH) P 83466 (5th Cir. 2019). . See also In re Hertz Corp., 637 B.R. 781 (Bankr. D. Del. 2021) for a discussion on a make-whole in the context of a solvent debtor case.

Subsequently in In re Ultra Petroleum Corp., 51 F.4th 138 (5th Cir. 2022), cert. denied sub nom. Ultra Petroleum Corp. v. Ad Hoc Comm. of OpCo Unsecured Creditors, 143 S. Ct. 2495 (2023), the Court held that make-whole unmatured interest is not allowable under § 502(b)(2), unless the debtor is solvent.

In Cramdown, Creditor's Collateral Must Be Valued in Accordance with Debtor's Intended Use of the Property

In *In re Sunnyslope Housing LP*, 859 F.3d 637 (9th Cir. 2017), the Ninth Circuit held that in a cramdown, the secured creditor's collateral must be valued in accordance with the debtor's intended use of such collateral, even if it could be sold for more in a foreclosure sale, because of the existence of restrictive covenants relating to use as low-income housing, which depressed its value.

Unintended UCC Termination

An accidental UCC termination proved to be extremely costly to the secured creditor in *In re Motors Liquidation Co.,* 777 F.3d 100, 60 Bankr. Ct. Dec. (CRR) 136, 85 U.C.C. Rep. Serv. 2d 592 (2d Cir. 2015). In that case, the Second Circuit held that JP Morgan had released its security interest on a $1.5 billion loan to General Motors by the inadvertent filing of a UCC-3 termination statement. While the Court clearly recognized that neither of the parties intended that the security interest at issue be terminated, the termination was effective because JP Morgan authorized the filing of the termination statement.

Vendor Administrative Priority Not Available With Respect to Constructive Possession of Goods

A vendor is given an administrative priority under Section 503(b)(9) of the Bankruptcy Code for the value of goods received by the debtor during a 20-day period before the date of the bankruptcy petition. In In re World Imports, Ltd., 862 F.3d 338 (3d Cir. 2017), the Third Circuit reversed the lower court and found that the phrase "received by the debtor" in Section 503(b)(9) does not include the debtor's constructive possession of the goods at issue.

Preference Actions – Ordinary Course Exception

In *Jubber v. SMC Electrical Products, Inc.*, 798 F.3d 983 (10th Cir. 2015), the Tenth Circuit affirmed the judgment of the bankruptcy court that the ordinary course exception for a preference action applied to a two day installment payment made with respect to a first time equipment purchase between the seller and the debtor. Accordingly, their decision expands the scope of the Section 547(c)(2) ordinary course exception and will make preference actions more difficult for trustees or debtors-in-possession by rejecting the argument that the exception cannot apply to a first time transfer.

Preference Actions – No Insider Preference Liability

In a split decision, the Ninth Circuit affirmed the judgment of the district court and held that a corporate insider who personally guaranteed his corporation's loan was not liable in a preference attack where he had previously waived his indemnification rights, he had a bona fide basis for doing so, and he took no subsequent actions to negate the economic impact of such waiver. The court characterized this as an "unresolved issue." *Stahl v. Simon*, 785 F.3d 1285 (9th Cir. 2015).

Preference Actions – Subsequent New Value

Exception in Three Party Relationships

In *Stoebner v. San Diego Gas & Electric Co.,* 746 F.3 350 (8th Cir. 2014), in a matter of first impression, the Eighth Circuit held that the "new value" exception to a preferential transfer attack could be satisfied where the new value was provided by an entity other than the transferee. In this case the debtors were bill-paying middlemen for customers of utilities and made the payments to the utilities from the funds received by the debtors. Payments made by the debtors for the benefit of the customers within the 90 days prior to the debtors' Chapter 7 filings were attacked by the Chapter 7 trustee as being preferential transfers. The utility customers continued to make utility bill payments to the debtors after the preferential transfers, which served as the subsequent new value at issue. The Court held "in three-party relationships where the debtor's preferential transfer to a third party benefits the debtor's primary creditor, new value (either contemporaneous or subsequent) can come from the primary creditor, even if the third party is a creditor in its own right and is the only defendant against whom the debtor has asserted a claim of preference liability. As § 547(b) makes avoidable a transfer 'for the benefit of a creditor,' it both serves the purposes of § 547 and honors the statute's text to construe 'such creditor' in the § 547(c)(4) exception as including a creditor who benefitted from the preferential transfer and subsequently replenished the bankruptcy estate with new value."

Preference Actions–Subsequent New Value Exception Broadly Applied

In *Kaye v. Blue Bell Creameries, Inc. (In re BFW Liquidation, LLC)*, 899 F.3d 1178 (11th Cir. 2018), the Eleventh Circuit broadly applied the Section 547 (c) (4) "subsequent new value" defense against preference actions in holding that it applies to all new value supplied to the creditor during the preference period, and not merely to new value that remained unpaid at the date of the filing of the bankruptcy petition. In so ruling, the Eleventh Circuit has now joined the Fourth, Fifth, Eighth, and Ninth Circuits.

See also Auriga Polymers Inc. v. PMCM2, LLC 40 F.4th 1273 (11th Cir. 2022). Post-petition transfers which are entitled to priority under § 503(b)(9) can be considered new value as a defense in a preference suit.

Preference Actions-Are They Saleable?

In Matter of S. Coast Supply Co., 91 F.4th 376 (5th Cir. 2024), cert. denied sub nom. Remmert v. Briar Cap. Working Fund Cap.,

L.L.C., 2024 WL 2883772 (U.S. June 10, 2024), the Fifth Circuit held that because preference claims are property of the estate under section 541(a) of the Code, they may be sold under section 363(b)(1) of the Code.

Fraudulent Transfers–Forbearance as Reasonably Equivalent Value

In *In re 1756 W. Lake St. L.L.C.*, 787 F.3d 383 (7th Cir. 2015), the Seventh Circuit held that a lender which granted several forbearances to the debtor prior to bankruptcy provided reasonably equivalent value to the debtor's bankruptcy estate, thereby precluding a fraudulent transfer recovery against it. In this case the lender entered into eleven forbearance agreements which staved off a bankruptcy filing for the single asset real estate debtor for a period of approximately four years. As held by the Seventh Circuit, these forbearances provided reasonably equivalent value in exchange for the debtor's ultimately transferring the deed to the lender.

***In re Tousa, Inc.* and Fraudulent Conveyance Actions**

The *Tousa* case was back in the news in 2012, when the Eleventh Circuit Court of Appeals affirmed the controversial ruling of the Bankruptcy Court and reinstated a $480 million fraudulent conveyance judgment against certain prepetition lenders of the Debtors in *In re Transeastern Lenders v. Official Committee of Unsecured Creditors,* 2012 WL 1673910 (11th Cir. May 15, 2012). The Eleventh Circuit found that the conveying subsidiaries did not receive reasonably equivalent value by their receipt of indirect economic benefits, and certain lenders known as the "Transeastern Lenders" were entities for whose benefit the fraudulent transfers had been made. The Eleventh Circuit held that the factual record was sufficient to support a finding that the costs imposed by the refinancing far outweighed any benefit received by the conveying subsidiaries, and therefore they did not receive reasonably equivalent value. Accordingly, the new liens constituted a fraudulent conveyance. The Eleventh Circuit also agreed with the bankruptcy court that the Transeastern Lenders (i) were entities for whose benefit the fraudulent transfers were made, and rejected the argument that the Transeastern Lenders were merely subsequent transferees because the proceeds first went to a Tousa subsidiary and then to the Transeastern Lenders, and (ii) acted in bad faith by accepting the settlement payment. The Eleventh Circuit also upheld the bankruptcy court's imposition of a duty on the Transeastern Lenders to investigate the internal refinancing structure of the Debtors and determine that the

refinancing would not result in a fraudulent conveyance before they could receive any payment on account of their antecedent debts. The Eleventh's Circuit ruling will likely remain a significant source of concern to potential lenders of troubled companies, at least in that Circuit, and may increase loan costs given the heightened due diligence requirements imposed upon them and the risks of payments to them being found to constitute fraudulent transfers. However, the Eleventh Circuit did not rule that indirect economic benefits, such as enterprise preservation, cannot be considered, or even in appropriate circumstances, constitute reasonably equivalent value. It remains to be seen whether *Tousa* will be narrowly interpreted and limited to its particular (and somewhat unusual) set of facts. The liability to the Transeastern Lenders was not decided by the Eleventh Circuit but, rather, was remanded to the District Court.

Defense to Fraudulent Transfer Claim–The Safe Harbor Under Section 546(e)

Section 546(e) provides that unless a transfer is made with actual intent to hinder, delay or defraud creditors, it may not be avoided by a bankruptcy trustee (or estate representative) if it is: (i) a margin payment, (ii) a settlement payment, or (iii) a transfer made in connection with a securities contract, a commodity contract, or a forward contract. In addition, the transfer must have been made by, or to, or for the benefit of, a commodity broker forward contract merchant, stockbroker, financial institution, financial participant or securities clearing agency. Among the issues being actively litigated is which payments qualify as "settlement payments" within the scope of Section 546(e). As described hereafter, the U.S. Supreme Court recently limited the scope of Section 546(e) of the Code in *Merit Management Group, LP v. FTI Consulting, Inc.*, 138 S. Ct. 883, 200 L. Ed. 2d 183 (2018).

On June 22, 2015, the Supreme Court decided not to grant a writ of certiorari sought by the Madoff Trustee, and thereby denied his ability to appeal. Previously, the Second Circuit ruled that the Madoff SIPA trustee could not recover certain prepetition withdrawal payments made to Madoff's customers, finding that Section 546(e) of the Code shields these payments from recovery even though no securities were actually purchased or sold. *Picard v. Ida Fishman Revocable Trust (In re Bernard L. Madoff Investment Securities LLC),* No. 12-2557-bk(L) (2d Cir. Dec. 8, 2014).

In 2016, both the Second Circuit and the Seventh Circuit issued rulings regarding Section 546(e)'s safe harbor. In March, 2016, the Second Circuit ruled in *In re Tribune Co. Fraudulent*

Conveyance Litig., Case 13-3992, Doc. 356-1 (2d Cir. Mar. 29, 2016), that the safe harbor provision applied to transactions not only from fraudulent transfer claims brought by a Chapter 11 estate but also by claims brought by individual creditors post-bankruptcy under state fraudulent conveyance laws: As such, the safe harbor provisions protected payment received by the former shareholders of the debtor from a leveraged buyout of the debtor pre-bankruptcy from a constructive fraudulent conveyance attack under applicable state law brought by former employees of the debtor with retirement benefit claims and the successor indenture trustees for the pre-leveraged buyout notes and subordinated debentures. This case is consistent with other Second Circuit precedent, which takes a broad view of the safe harbor's reach, and resolves a previous split on this issue by the District Court in the Southern District of New York.

In December 2019, the Second Circuit reaffirmed, *In re Tribune Company Fraudulent Conveyance Litigation*, 946 F.3d 66 (2d Cir. 2019), in light of the superseding ruling by the U.S. Supreme Court in *Merit*. In that decision, the court held that a debtor may qualify as a "financial institution" covered by the Safe Harbor Provision and, accordingly, avoid the implications of *Merit* by retaining a bank or trust company as an agent to handle LBO payments, redemptions and cancellations. The Supreme Court denied cert. in part, 141 S.Ct. 728 and cert. denied 141 S.Ct. 2552. In re Indianapolis Downs, LLC., 486 B.R. 286 (Bankr. D. Del. 2013)

In July, 2016, the Seventh Circuit held in *FTI Consulting, Inc. v. Merit Management Group, LP,* No. 15-3388 (7th Cir. July 28, 2016), that the 546(e) safe harbor protection does not apply where a financial institution or other named entity acts merely as a conduit for the transferred funds. This decision is consistent with the Eleventh Circuit ruling in *Munford v. Valuation Research Corp. (In re Munford, Inc.)* 98 F.3d 604 (11th Cir. 1996), but is at odds with several other Circuit Court rulings regarding the applicability of the safe harbor protection to a conduit situation. As such, unlike the Second Circuit's Tribune ruling, the Seventh Circuit has taken a restrictive view of the reach of Section 546(e)'s safe harbor provision.

The Seventh Circuit took an expansive view of Section 546(e)'s safe harbor protections by overruling a lower court's "equitable" approach to creditor distributions. *Grede v. FC Stone*, 746 F.3d 244 (7th Cir. 2014). It held that a trustee could not avoid a prepetition transfer as a fraudulent conveyance because the transferred funds came from the debtor's sale of securities and was protected by Section 546(e). In so ruling, it found that the

distribution to the customer from its investment account, like the payment made by the purchaser to the debtor for securities the proceeds of which were deposited into such account, qualified as a "settlement payment" and was made "in connection with a securities contract." As such, *Grede* continued the long line of cases which took an expansive view of Section 546(e).

The U.S. Supreme Court granted certiorari on May 1, 2017, and on February 2018 affirmed and remanded the case in a unanimous decision issued by Justice Sotomayor. The Court found that the language of Section 546(e), and the context in which it is used, support the conclusion that the relevant transfer for purposes of the safe harbor provision is the end-to-end transfer between Valley of View and Merit, which the trustee sought to avoid, and not the component parts of that transfer.

The U.S. Supreme Court resolved a long-standing split among the Circuit Courts in holding that the safe harbor provision of Section 546(e) does not protect transfers made through a financial institution to a third party, regardless of whether the financial institution had a beneficial interest in the transferred property. *In re Merit Management Group, LP v. FTI Consulting, Inc.*, 138 S. Ct. 883, 200 L. Ed. 2d 183 (2018). Accordingly, a critical inquiry is whether the transferee or transferor in the avoidance action is a financial institution (*i.e*. a bank, broker, or "financial participant").

In *AP Services LLP v. Silva,* 483 B.R. 63 (S.D.N.Y. 2012), the Court dismissed claims brought under New York fraudulent conveyance law, holding that the payments to shareholders were "settlement payments" protected by Section 546(e). Similarly, the Court ruled that the trustee's alternative state law unjust enrichment theory was preempted by Section 546(e). It held that if Section 546(e) shielded the defendants from liability under fraudulent conveyance litigation, then the same underlying transaction could not be attacked on an alternative theory, as that would "implicate the same concerns regarding the unraveling of settled securities transactions ... which is precisely the result that Section 546(e) precludes." *Id.* at 71. This case has been appealed to the Second Circuit. Also continuing the broad interpretation of the Section 546(e) safe harbor, another case from the same Court ruled that payments made to redeem outstanding notes by a company on the verge of bankruptcy qualified as a settlement payment under Section 546(e), and thus could not be avoided. *In re Quebecor World (USA) Inc.,* 480 B.R. 468 (S.D.N.Y. 2012).

In *Fairfield Sentry Ltd v. Amsterdam*, 2018 WL 6431741 (Bankr. S.D.N.Y. Dec 6, 2018), the bankruptcy court found that the safe harbor provision of Section 546(e) applies extraterritori-

ally, even though (1) the plaintiffs were foreign liquidators suing in a Chapter 15 case of a British Virgin Islands Company to avoid, under foreign law, redemption payments made abroad to funds of Madoff's defunct brokerage firm and (2) the district court ruled that the Bankruptcy Code's avoidance provisions do not apply extraterritorially. *In re CIL Ltd*., 582 B.R. 46 (Bankr. S.D.N.Y. 2018).

In Petr Tr. for BWGS, LLC v. BMO Harris Bank N.A., 95 F.4th 1090 (7th Cir. 2024), the Seventh Circuit held that section 546(e) shields transfers to a financial institution to pay off a bridge loan. The trustee also could not use state law to circumvent the safe harbor of section 546(e) of the Code. It is preempted by federal law. We note the Second Circuit held in In Re: Nine W. LBO Sec. Litig., 87 F.4th 130 (2d Cir. 2023), cert. denied sub nom. Stafiniak v. Kirschner as Tr. of NWHI Litig. Tr., 2024 WL 2116507 (U.S. May 13, 2024) that the securities contracts safe harbor is an affirmative defense on a transfer by transfer basis.

Bankruptcy Trustee May Seek Recovery of a Post-Petition Transfer Under Section 549 from Multiple Sources Until Full Recovery is Obtained

The Second Circuit held that a chapter 11 trustee exercising avoidance powers under Section 549 of the Bankruptcy Code to recover a post-petition transfer may seek recovery from all available sources until the full amount of the transferred property is realized. *Jones v. Brand Law Firm, P.A. (In re Belmonte)*, 931 F3d 147 (2d Cir. 2019). The fact that the trustee received a partial recovery by way of settlement from his first target of recovery did not preclude his seeking recovery from an additional target for the balance. Section 550(d) limits a trustee to only a single recovery.

The trustee may recover "either the transferred property, or the value of the transferred property." If there is a recovery significant to pay all creditors in full, where does the remainder go under the language "for the benefit of the Estate." For a thoughtful article surveying the arguments see "Does § 550 Cap Recoveries in Fraudulent Transfer Proceedings. ABI Journal. April 2024. P22, by Anthony P. Cali.

Denial of Lien Stripping

On June 1, 2015, the U.S. Supreme Court unanimously held in *Bank of America, N.A. v. Caulkett* that a Chapter 7 debtor may not void a junior mortgage lien under Section 506(d) of the Code when there is no equity value for the junior lienor. The Court relied on *Dewsnup v. Timm,* 502 U.S. 410 (1992).

Detroit Eligible for Chapter 9 Relief, and a Plan was Subsequently Confirmed

On December 3, 2013, after a nine day trial, Judge Rhodes ruled that the City of Detroit was eligible to be a debtor under Chapter 9 of the Bankruptcy Code. The Judge held that the City had met most of the criteria for Chapter 9 relief including that the City is insolvent by being unable to pay its debts and owing more than it can collect, the bankruptcy filing was constitutional, the City is in "service delivery insolvency" in that it cannot afford to provide for the health and welfare of its residents and Detroit officials desire to adjust the City's debts and effect a plan of adjustment. Although the Judge found that the City did not negotiate in good faith prior to its Chapter 9 filing, he also found that the sheer number of creditors and complexity rendered the negotiations "impractical, impossible really." Judge Rhodes also ruled that despite the Michigan State Constitution's guarantee of public pensions, Detroit pensioners cannot legally be treated differently than its other creditors and thus cuts for retirees and City employees could be part of the City's plan of adjustment. Detroit obtained confirmation of a sweeping "grand bargain" Chapter 9 plan on November 7, 2014, which eliminated more than $7 billion in debt owed by the City, while rehabilitating city services and leaving retiree pensions and health-care benefits largely unchanged.

Bankruptcy Court Cannot Retroactively Extend the Deadline to File a Nondischargeability Complaint

The Ninth Circuit affirmed a District Court ruling that the bankruptcy court lacked jurisdiction under Rule 4007(c) to retroactively extend the deadline to file a nondischargeability complaint. *Anwar v. Johnson*, 720 F.3d 1183 (9th Cir. 2013). Bankruptcy Rule 4007(c) provides a 60-day deadline for filing a complaint seeking to deny dischargeability of debts pursuant to Section 523(c) of the Bankruptcy Code. In this case, the attorney attempting to file the complaint experienced technical problems while attempting to file the complaint electronically, which was required under local bankruptcy rule. As a result, the filing was made approximately a half hour after the deadline had expired. The Ninth Circuit held that neither Bankruptcy Rule 4004, equitable powers, local rules or a model rule of bankruptcy procedure gave the bankruptcy court the authority to retroactively extend the strict filing deadline. This ruling serves as a warning to practitioners that deadlines are deadlines and enough time should always be allowed for possible filing problems.

Secured Creditor's Lien "Rides Through" Bankruptcy Case Where it Did Not Participate in Case—Receipt of Actual Notice Does Not Constitute Participation

The Fifth Circuit has held in *In re S. White Transp., Inc.*, 725 F.3d 494 (5th Cir. 2013), that a secured creditor which received actual notice of the Chapter 11 case but took no action to participate in that case to preserve its lien could nevertheless still enforce its lien post-bankruptcy. Here, the secured creditor did not file a proof of claim in the case or otherwise take any action in the case. The bankruptcy court previously confirmed the debtor's plan of reorganization of the debtor that provided for no recovery to the secured creditor. After the debtor's emergence from Chapter 11, the secured creditor filed a declaratory judgment motion with the bankruptcy court that it's lien survived the bankruptcy case and for an amendment to the plan of reorganization to so provide. The bankruptcy court denied that motion on the basis that the secured creditor participated in the Chapter 11 case as a result of its having received actual notice of the case but deliberately declining to take action in the case. The Fifth Circuit ultimately disagreed with the bankruptcy court and held that receipt of notice alone does not constitute participation and that the secured creditor's lien "rode through" the bankruptcy case unaffected.

To the contrary, the Second Circuit held in *In re Northern New England Telephone Operations L.L.C.,* 795 F.3d 343 (2d Cir. 2015), that a lien is extinguished by a Chapter 11 plan where (1) the plan does not preserve the lien, (2) the plan is confirmed, (3) the plan deals with the property encumbered by the lien and (4) the secured creditor participated in the Chapter 11 case.

KEIP and KERP Decisions and Practice

In 2012, the Bankruptcy Court for the Southern District of New York denied the debtor's motion to approve proposed Key Employee Incentive Plans ("KEIPs"), even though they were supported by the major creditor constituencies, in each of the Chapter 11 cases of *ResCap, supra,* and *Hawker, supra*. The Court found that a proposed incentive plan that awards insiders simply for meeting case-specific milestone targets (such as the consummation of a Chapter 11 plan or sale of assets) that is already near completion, rather than for incentivizing them to meet specific financial performance goals, is a disguised insider retention plan that should not be approved as a KEIP. A Key Employee Retention Plan ("KERP") is generally governed by the stricter standard under Section 503(c)(l) of the Bankruptcy Code, rather than the

more lenient Section 503(c)(3) of the Bankruptcy Code. In *ResCap*, however, the Court ultimately approved the KElP after it was modified by the Debtors to provide more incentives to insiders. See also KEIP-ing Key Employees Motivated In A Covid-19 World, 40-JUN Am. Bankr. Inst. J. 36 (June 2021); Compensating Key Employees Following a Restructuring, 42-Oct. Am. Bankr. Inst. J 30 (October 2023).

Sovereign Immunity

The Fourth Circuit held in In re Yahweh Center, Inc., 27 F.4th 960, 2022-1 U.S. Tax Cas. (CCH) P 50126, 129 A.F.T.R.2d 2022-960 (4th Cir. 2022) that the trustee is not barred from suing the United States under section 544(b) of the Code relying on state fraudulent transfer law. The trustee was seeking to recover tax penalty payments. This ruling was based on section 106(a) of the Code.

Thereafter in 2025, the U.S. Supreme Court held that section 106(a) of the Code only permits bankruptcy courts to hear actions against the United States, not as modifying the substantive rules governing the action. The trustee may not use 106(a) to prosecute a claim against the U.S. under 544(b) and 106(a) because the creditor holding an unsecured claim could not do so. U.S. v. Miller 604 U.S. _145 S. Ct. 839 (2025).

The Unfinished Business Doctrine—Controversy Resolved?

This doctrine has been very controversial in bankruptcy cases, as trustees have sought to recover profits from law firms which were later retained and carried on the work of failed law firms. These claims have been hotly contested. Many of the disputes have involved interpretation of partnership and property laws in New York and California and the rights, if any, of trustees in property under state law and the Bankruptcy Code. In both states, their highest courts, on referral from the Second and Ninth Circuits after extensive litigation, have held that bankruptcy trustees do not have property rights to profits derived from unfinished business in hourly matters which have been transferred to a new law firm at the request of clients. See the decisions of the New York State Court of Appeals in *Geron v. Seyfarth Shaw* (In re Thelen) 24 N.Y.3d 16 (2014); and the California Supreme Court decision in *Heller Ehrman LLP v. Davis Wright Tremaine LLP*, 4 Cal 5th 467 (2018). It remains to be seen how courts outside California and New York, interpreting their laws, rule on this type of matter.

Previously in 2014, the U.S. District Court for the Northern District of California reversed the bankruptcy court in the *Heller*

bankruptcy case, and distinguished and declined to follow the 1984 California Court of Appeal decision in *Jewel v. Boxer* 156 Cal. App. 3d 171. That *Heller* decision dismissed claims by the bankruptcy trustee seeking certain profits from "Unfinished Business" in existing matters which were transferred to new law firms as a result of the forced liquidation of Heller. The Heller plan of dissolution had incorporated a "Jewel Waiver", which was upheld by the district court. The court found that Heller had no property interest in the "Unfinished Business", and thus there was no transfer for fraudulent conveyance analysis purposes. The court noted that Heller was a partnership governed under the Revised Uniform Partnership Act which permits partners to obtain "reasonable compensation" for winding up a partnership, unlike the Uniform Partnership Act interpreted by *Jewel*. The District Court also took into account the equities and policy considerations in reversing and dismissing the trustee's unfinished business claims.

On July 1, 2014, the New York State Court of Appeals, the state's highest court, dismissed claims by a bankruptcy trustee and plan administrator in the *Thelen* and *Coudert* bankruptcy cases, holding that New York State law does not treat a dissolved law firm's pending fee matters as its "property" or "unfinished business" under New York partnership law. The court issued its rulings after referral from the Second Circuit Court of Appeals for an interpretation of New York law. The ruling is contrary to the 1984 holding of the California Court of Appeal in *Jewel v. Boxer*, but consistent with the district court decision and reversal in the *Heller* bankruptcy case, as upheld in 2018 by the California Supreme Court.

By ruling as it did, the New York Court of Appeals did not reach the second certified question of defining a "client matter" for purposes of the unfinished business doctrine, and what part of the profit could be kept by the new firm and what would go to the Trustee and Plan Administrator. The court concluded that a client's legal matter belongs to the client and not to the law firm, and that the client has the right to choose counsel. The resulting penalties of allocating payment to the Trustee would impermissibly interfere with the client's choice of counsel.

Previously in 2012, two District Courts in the Southern District of New York considered the so-called "*Jewel v. Boxer* Rule", which arose within the Ninth Circuit and came to opposite conclusions. *Jewel* generally stands for the proposition that, absent a contrary provision in a partnership agreement, the net profits of "unfinished business" of a defunct firm remain as an asset of that firm. Thus accordingly, when a partner leaves his dis-

solving firm to join a new firm, and finishes the work there, the net profits of the fees received to complete the work at the new firm belong to the dissolving firm. In *Dev. Specialists, Inc. v. Akin Gump Strauss Hauer & Feld LLP,* No. 1:11-CV-05995 (S.D.N.Y. May 24, 2012), the Court upheld the *Jewel v. Boxer* Rule with respect to services performed on an hourly basis, and granted a motion that the open client matters were partnership assets on the dissolution date. It denied the defendants' motions to dismiss. (Prior cases have generally recognized the rule with respect to contingent fees, as contrasted to an hourly fee arrangement.) To the contrary, another Southern District judge held in *Geron v. Seyfarth Shaw, LLP,* (476 B.R. 732 S.D.N.Y. 2012), that hourly matters are not partnership property under New York law and are not subject to the unfinished business doctrine. The court did find, however, that hourly matters may constitute unfinished business under California law, but only to the extent that the former partners received remuneration beyond "reasonable compensation" as set forth in the Revised Uniform Partnership Act. Recognizing the importance of the issue, the District Judge in *Geron* certified the decision for interlocutory appeal to the Second Circuit, but the matter was then transferred to the New York Court of Appeals for a ruling on what is New York law on the unfinished business doctrine. As stated above, the Court of Appeals held that bankruptcy trustees do not have property rights to profits derived from unfinished business in hourly matters which have been transferred to a new law firm at the request of clients.

Artificial Impairment of Classes and Equal Treatment Under a Chapter 11 Plan

"Artificial impairment" is the alleged improper manipulation of classes of claims under a Chapter 11 plan in order to artificially create an accepting class of impaired claims, so as to meet a hurdle to plan confirmation. Several artificial impairment cases were handed down in 2012. They include the following: (i) a decision that an unsecured deficiency claim of an undersecured creditor should be classified separately from other general unsecured claims because it had recourse to a guarantee for payment of its deficiency claim, unlike holders of other general unsecured claims (*In re Loop 76, LLC,* 465 B.R. 525 (B.A.P. 9th Cir. 2012); (ii) a ruling that the lower court improperly rejected outright the doctrine of artificial impairment and holding that the determinant factor should be whether the impairment was without justification, not whether the impairment was artificial (*Federal Nat. Mortg. Ass'n v. Village Green I, GP,* 2012 WL 6045896 (W.D. Tenn. Dec. 5,

2012); and (iii) rejecting *Loop*, a holding that the existence of a non-debtor guarantee is an insufficient basis to separately classify unsecured claims (*In re 18 RVC, LLC,* (485 B.R. 492 E.D.N.Y. 2012).

In a case involving a complicated secured credit agreement requiring pro rata treatment for all payments to the lenders, with two exceptions, the Fifth Circuit held that some of the lenders were not treated equally under the plan. The indemnities granted under the plan were not to all the lenders and the value of the distributions for some lenders were lower. In re Serta Simmons Bedding 125 F. 4th 555 (Fifth Cir. 2024).

Anti-Assignment Clauses

Finding that Section 1123 of the Bankruptcy Code trumps anti-assignment clauses, the Third Circuit held that a debtor could assign its insurance policies to an asbestos trust established under the Bankruptcy Code, notwithstanding an anti-assignment provision contained in the insurance policy and applicable state law to the contrary. See *In re Federal-Mogul Global Inc.,* 684 F.3d 355 (3d Cir. 2012).

More recently, a bankruptcy court has held that because an anti-assignment clause in a promissory note was enforceable under state law, the claim asserted by the purchaser of the note was disallowed. In so doing, the Court rejected the purchaser's argument that enforcing the anti-assignment clause would "disrupt" the market. *In re Woodbridge Group of Companies, LLC*, 590 B.R. 99 (Bankr. D. Del. 2018). See also *In re Caesar's Entertainment Operation Co., Inc.,* (Bank. N.D. Ill. 2018) (Tort and contract claims that are unassignable under applicable non-bankruptcy law were disallowed in bankruptcy.)

Claims Trading

The Third Circuit affirmed the District Court's decision in the KB Toys, Inc. case, which had affirmed the Bankruptcy Court's decision. *In re KB Toys, Inc.*, 736 F.3d 247 (3d Cir. Nov. 15, 2013). The Bankruptcy Court for the District of Delaware issued a decision in 2012 that has been closely followed in the bankruptcy claims trading industry. As described below, the Third Circuit later affirmed the decision. The bankruptcy court originally held that a purchaser of a trade claim purchases such claim subject to the same rights and disabilities as the original holder of the claim, including the need to defend a voidable transfer challenge under Section 502(d) of the Bankruptcy Code. *In re KB Toys, Inc.,* 470 B.R. 331 (Bankr. D. Del. 2012). For a contrasting decision from the District Court in New York see *In re Enron Corp.,* by

District Judge Sheindlin, 379 B.R. 425 (S.D.N.Y. 2007). In that decision the court held that if a claimant purchases its claim, as opposed to taking it by assignment, operation of law, or subrogation, the purchaser may be insulated from liability on the avoidance claim and may have their claims allowed, despite Section 502(h) of the Code.

The *KB Toys* decision appears to require that a potential purchaser of a bankruptcy claim perform additional due diligence to better understand the potential need to defend avoidance litigation, and pay back an avoidance claim, as a condition to claims allowance. It may also mean that claims traders will price lower than they might otherwise pay, in order to hedge against the potential litigation and recovery costs associated with defending a potential avoidance action.

Starting on May 1, 2013, anyone filing a claims transfer notice pursuant to Bankruptcy Rule 3001(e) will have to pay a $25 fee for each claim that is transferred. The fee was approved by the Judicial Conference of the United States at its September 2012 session.

Rejection of Trademark Licenses in Bankruptcy

In *Mission Product Holdings, Inc. v. Tempnology, LLC,* 139 S. Ct. 1652, 67 Bankr. Ct. Dec. (CRR) 51, Bankr. L. Rep. (CCH) P 83378 (2019), the United States Supreme Court held, in a unanimous decision, that a debtor's rejection of a trademark license agreement, as an executory contract under the Bankruptcy Code, has the same effect as a breach of that contract outside of bankruptcy. Accordingly, such rejection does not rescind the rights granted under that agreement, does not revoke the trademark license, and permits the licensee to continue using the mark. For further commentary, see also American Bankruptcy Law Journal June 2021 at p.12.

Previously in a ruling of first impression, the Seventh Circuit held that trademark licensees can continue using licensed trademarks after their licenses are rejected in bankruptcy by a debtor licensor. *Sunbeam Products, Inc. v. Chicago American Manufacturing, LLC,* 686 F.3d 372 (7th Cir. 2012). The Court's ruling repudiates and is contrary to the controversial *Lubrizol* decision of the Fourth Circuit back in 1988, which held that rejection by a debtor licensor of a license effectively terminates that license. The *Lubrizol* decision contributed to the enactment of Section 365(n) of the Bankruptcy Code, which applies to certain "intellectual property." However, the Code's definition of "intellectual property" omits trademarks. Therefore, many bankruptcy

courts have inferred from the Code's omission of trademarks that, because trademark licensees are not entitled to Section 365(n) protection, *Lubrizol* still applied to trademarks. The Seventh Circuit flatly rejected that argument. *See also In re XMH Corp.*, 647 F.3d 690, 695 (7th Cir. 2011) ("universal rule is that trademarks are not assignable in the absence of a clause expressly authorizing arrangement."); *In re Trump Entertainment Resorts, Inc.*, Case No. 14-12103 (Feb. 20, 2015 Bankr. D. Del) (Court protected trademark owners right to prohibit a debtor from either assuming or rejecting a trademark without the trademark owner's consent). *See also In re Old Cold LLC,* 879 F.3d 376 (1st Cir. 2018) holding that Section 365(n) of the Code does not override 365's general applicability to trademark, and rejection of the contract determines the licensee's right to use it. Section 365(n) does not protect exclusive distributor's rights and the Section 101(35A) definition of IP does not include trademarks.

Post-Petition Lock-Up or Plan Support Agreements

A lock-up agreement (also known as a plan support agreement), is an agreement between a creditor and debtor wherein the creditor becomes bound to vote in favor of a Chapter 11 plan in exchange for the debtor's achieving certain agreed key plan provisions. The lock up agreement binds both parties to the negotiated deal even though the plan and disclosure statement may not yet be drafted or executed. In *In re Indianapolis Downs, LLC,* 486 B.R. 286 (Bankr. D. Del. 2013), certain parties opposed plan confirmation and filed a motion to designate the claims of the non-debtor parties to the lock up agreement, such that their claims would not be counted for purposes of confirmation, which in that case would have prevented plan confirmation. The objecting parties argued that the lock up agreement constituted an impermissible post-petition solicitation of votes prior to court approval of a disclosure statement in violation of Section 1125 of the Bankruptcy Code. The Court denied such objection and the motion to designate the claims, and confirmed the plan. It found that the legislative intent–that the debtor and creditors have a full opportunity for negotiation–was met, and it would be inconsistent with the goals of the Bankruptcy Code to deny creditors the right to vote absent some showing of bad faith or wrongful conduct. Moreover, the creditor parties to the lock up agreement were sophisticated financial entities that were well represented by counsel and other professionals. As such, the disclosure requirements of Section 1125 were not compromised in this case. This case may provide some comfort to sophisticated parties in some courts that a lock up agreement entered into in good faith

should not create an obstacle to plan confirmation. See also In re Texaco Inc., 81 B.R. 813, 16 Bankr. Ct. Dec. (CRR) 1346, 18 Collier Bankr. Cas. 2d (MB) 166, Bankr. L. Rep. (CCH) P 72141 (Bankr. S.D. N.Y. 1988) ; In re NII Holdings, Inc., 288 B.R. 356 (Bankr. D. Del. 2002)

See Luke A. Barefoot et. al., Plan-Support Agreements: Uncertainty Abounds, Am. Bankr. Inst. J., February 2023, at 12; In re Heritage Org., L.L.C., 376 B.R. 783 (Bankr. N.D. Tex. 2007); In re Residential Cap., LLC, 2013 WL 3286198 (Bankr. S.D.N.Y. June 27, 2013). cf. In re SAS AB, 2023 WL 1825709 (Bankr. S.D.N.Y. Feb. 8, 2023), where the bankruptcy court denied a motion to approve an RSA with labor unions despite no filed objections. Unlike the prior cases, there was a lack of key basic plan terms in the RSA.

The "Gifting Doctrine" Revisited

In the case of *In re DBSD North America, Inc.,* the Second Circuit rejected the "gifting doctrine" under which some courts permitted senior creditors to shift value to junior creditors or equity holders, over the objection of a dissenting class of creditors, without regard to the absolute priority rule. This decision is consistent with the Third Circuit ruling in *In re Armstrong World Indus., Inc. In re DBSD North America, Inc.,* 2011 WL 350480 (2d. Cir.); *In re Armstrong World Indus., Inc.,* 432 F. 507 (3d Cir. 2005). This is a significant departure from some prior practice and other decisions which permitted that type of gifting, and could have profound implications in Chapter 11 cases. Strict adherence to the absolute priority rule may make plan confirmation more difficult and expensive than it had been under some cases permitting the "gifting doctrine". In light of the Supreme Court's recent decision in Czyzewski v. Jevic Holding Corp., 137 S. Ct. 973, 197 L. Ed. 2d 398, 63 Bankr. Ct. Dec. (CRR) 242, 77 Collier Bankr. Cas. 2d (MB) 596, 41 I.E.R. Cas. (BNA) 1613, Bankr. L. Rep. (CCH) P 83082 (2017), in structured dismissals, which required compliance with the absolute priority rule, it is not clear whether gifting will be permitted in a plan confirmation hearing over the objections of a minority creditors, even if the classes in which the objectors are properly classified, voted and approved the plan by the requisite majorities over the dissent of the objectors.

Stamp Tax Exemption Upon Plan Confirmation

In the case of *Florida Department of Revenue v. Piccadilly Cafeterias, Inc.,* 128 S.Ct. 2326, 5544 S.33, 171 L.Ed. 2d 203 (2008), the United States Supreme Court held that Section

1146(a) of the Bankruptcy Code requires that a plan of reorganization must be confirmed in order for the debtor to obtain the benefit of a stamp tax, or similar tax exemption. In a limited number of situations, this decision may chill pre-confirmation sales of assets, with debtors delaying the sales process until confirmation so as to receive the benefit of potentially significant tax savings by exemption granted under Section 1146(a). In those cases where the debtor might not be able to delay the sale under *Piccadilly,* it will not obtain the benefit of the exemption.

Lien-Stripping in Asset Sales – Clear Channel and Other Decisions

Contrary to most decisions and practice on lien stripping in Section 363 sales of assets in a bankruptcy case, in *Clear Channel Outdoor, Inc. v. Knupfer, (Clear Channel Outdoor Inc. v. Knupfer)*, 391 B.R. 25 (B.A.P. 9th Cir. 2008), the United States Bankruptcy Appellate Panel for the Ninth Circuit held that a debtor couldn't sell property free and clear of a junior lien under Section 363(f) of the Bankruptcy Code where the senior lender purchased the asset by way of making a credit bid. The Court excluded the lien-stripping aspect of a bankruptcy sale from the protection granted under Section 363(m) of the Bankruptcy Code. The Court did not disturb the sale, but instead reinstated the junior lien on the property that was sold. This decision has been controversial and not widely followed but perhaps in some courts in the Ninth Circuit, it may chill purchases of assets by senior lenders through a credit bid. However, recent decisions even within the Ninth Circuit have not followed *Clear Channel*. (*See Thorpe Institution Co.,* 2011 WL 1378537, *1 (CD. Cal. April 11, 2011); and *NAMCO and Capital Group, Inc.,* 2011 WL 2312090 (CD. Cal. June 7, 2011).

Option to Retain Rights Under a Lease or Sublease Under Section 363(h)(i) are Extinguished if the Property Subject to the Lease is Sold Free and Clear

Section 363(h)(i) permits the tenant or subtenant of real property the option to retain its rights under the lease or the sublease that is rejected under the Bankruptcy Code for the duration of the term of the lease or sublease. In *In re Spanish Peaks Holding II, LLC*, 862 F.3d 1148 (9th Cir. 2017), the Ninth Circuit joined the Seventh Circuit in holding that the underlying lease or sublease can be extinguished in a sale free and clear and hence the option under 363(h)(i) to retain its rights under the lease or sublease are also extinguished.

Asset Sales, Including Expanded Right to Appeal and

Mootness Issues; Moac

In the context of an asset sale, a majority of courts have adopted a per se rule that automatically moots an appeal of the order issued in connection with such sale where there is no stay pending appeal granted. However, In *In re Brown*, F.3d 619 (6th Cir. 2017), the Sixth Circuit joined the Third Circuit and the Tenth Circuit in expanding the ability of parties to appeal a sale order, notwithstanding 363(m)'s statutory mootness rule, where they can show that the reviewing court is unable to "grant effective relief without impacting the validity of the sale." In the context of an asset sale, the Second Circuit held that a buyer which had constructive and actual knowledge of an adverse interest is not entitled to protections as a good faith purchaser under section 363(m). Archer-Daniels-Midland Company v. Country Visions Cooperative, 29 F.4th 956 (7th Cir. 2022).

In MOAC Mall Holdings LLC v. Transform Holdco LLC, 215 L.Ed.2d 262, 143 S.Ct. 927 (2023), the Court unanimously held that an appeal is not automatically moot where a dispute exists over whether the court can grant substantive relief on appeal despite no stay in place. That goes to the merits and may not run counter to § 363(m). Thus an appellate court under certain circumstances is not deprived of jurisdiction to hear an appeal over a sale order. This appears to be a decision on statutory mootness and not equitable mootness, which is analyzed in a prior section.

Equitable Mootness

This doctrine provides that once a plan of reorganization has been "substantially consummated," and various parties have taken steps to implement it, the court should assure that the parties receive the benefit of their bargain[1]. The issue received significant attention in 2012 and thereafter. In *In re Thorpe Insulation Co.,* 671 F. 3d 980 (9th Cir. 2012), the court ruled in a matter of first impression that an appeal of an order confirming a Chapter 11 plan was not equitably moot where, among other things, the appellants used due diligence in seeking a stay, the plan has not been substantially consummated and there were options available other than a complete plan reversal. *In Philadelphia Newspapers,* LLC, 690 F.3d 161 (3d Cir. 2012), the court found that the most important consideration in making a decision on a challenge to plan confirmation based on equitable moot-

[1] Contrast equitable mootness with statutory mootness under § 363(m) of the Code where the court on appeal has jurisdiction to hear the dispute. See MOAC Mall Holdings LLC v. Transform Holdco LLC, 215 L.Ed.2d 262, 143 S.Ct. 927 (2023). See also Matter of Fieldwood Energy LLC, 93 F.4th 817 (5th Cir. 2024).

ness is whether the appeal would undermine the plan, not whether the plan has been substantially consummated. In *In re Charter Communications, Inc.,* 691 F. 3d 476 (2d Cir. 2012), the court held that once a Chapter 11 plan is substantially consummated, an appeal is presumed to be equitably moot, unless the appellant meets all five criteria set forth in *Frito-Lay, Inc. v. LTV Steel Co.,* 10 F.3d 944 (2d. Cir. 1993). By this decision, the Court abandoned the balancing test used by other Circuit Courts in addressing this issue, and appears to be the only Circuit having a presumption of equitable mootness upon substantial consummation. More recently, the Ninth Circuit decided to apply the equitable mootness doctrine where the appellant diligently sought to stay consummation of a confirmed Chapter 11 plan and such plan was not so complex that its involved third parties would be harmed, and rejected imposing a presumption of mootness upon substantial consummation of a plan. I*n re Transwest Resort Props., Inc.,* 801 F.3d 1161 (9th Cir. 2015).

In *Beem v. Ferguson*, 2017 WL 1173664 (11th Cir. March 30, 2017), the Eleventh Circuit considered the difference between equitable mootness and constitutional mootness and, in what appeared to be a case of first impression, held that an appeal from an order confirming a Chapter 11 plan was not constitutionally moot because an "actual case or controversy" existed, and then declined to dismiss the appeal under the principle of equitable mootness. *See also Mission Prod. Holdings v. Old Cold*, 879 F.3d 376 (1st Cir. 2018), where the court dismissed the appeal as moot where it was made clear that the debtor in possession intended to close immediately after notice was provided. *See also In re Pursuit Capital Management, LLC*, 874 F.3d 124, 64 Bankr. Ct. Dec. (CRR) 226, Bankr. L. Rep. (CCH) P 83174 (3d Cir. 2017).

In *In matter of Davis*, 746 Fed. Appx. 392 (5th Cir. 2018), the Fifth Circuit ruled that, absent evidence that the purchaser did not acquire property in good faith, the challenger's failure to obtain a stay pending appeal moots any appeal of a sales order, reaffirming the majority rule on the issue.

In Bennet v. Jefferson County, Alabama, 899 F.3d 1240 (11th Cir. 2018), the Eleventh Circuit ruled that the doctrine of equitable mootness applies to Chapter 9 cases. This case followed *In re City of Stockton, California,* 909 F.3d 1256 (9th Cir. 2018).

In *Drivetrain, LLC. v. Kozel,* 958 F.3d 949, 68 Bankr. Ct. Dec. (CRR) 177 (10th Cir. 2020) the court held that a chapter 11 plan objection was barred under the doctrine of equitable mootness even though the plan was one of liquidation rather than reorganization.

Under Mission Product Holdings, Inc. v. Tempnology, LLC, 139 S. Ct. 1652, 203 L. Ed. 2d 876, 67 Bankr. Ct. Dec. (CRR) 51,

Bankr. L. Rep. (CCH) P 83378 (2019), an appeal is moot under Article III only when it is "impossible for a court to grant any effective relief whatsoever." See also In re Financial Oversight and Management Board for Puerto Rico, 987 F.3d 173 (1st Cir. 2021).

Plan Confirmation Requirements for Debtors in Jointly Administered Cases

In the case of *Tribune, Inc.,* 2011 WL 5142420 (Bankr. D. Del. Oct. 31, 2011) the bankruptcy court held that jointly administered Chapter 11 plans (where there had been no substantive consolidation of the debtor estates) cannot be crammed down under Section 1129(b) without being accepted by at least one impaired class at each debtor entity under the plan under Section 1129(a)(10). This can be a significant hurdle, particularly in mega cases where there are many related debtor entities. In *Tribune,* for example, there are more than one hundred debtor entities with each independently required to meet this confirmation standard. The *Tribune* ruling will require that plan proponents obtain broad support for their Chapter 11 plan across the creditor universe for all debtor entities, regardless how insignificant a particular debtor, or its creditors, may be to the broader restructuring effort.

Plan Confirmation–Non impairment Under § 1124 and § 1129 "Fair and Equitable" Requirement May or May Not Require that Unsecured Creditors be Paid Post-Petition Interest from a Solvent Debtor

In recent years, several court decisions have held that solvent debtors should pay post-petition interest to unsecured creditors based on equitable principles. There are also questions about what the rate of interest should be. Is it a legal rate, and what does that mean? Is it a contract rate, or a federal statutory rate contained in 28 U.S.C. 1961? See In re PG&E Corp., 46 F.4th 1047 (9th Cir. 2022), cert. denied sub nom. Pac. Gas & Elec. Co. v. Ad Hoc Comm. of Holders of Trade Claims, 143 S. Ct. 2492 (2023); and In re Ultra Petroleum Corp., 51 F.4th 138 (5th Cir. 2022), cert. denied sub nom. Ultra Petroleum Corp. v. Ad Hoc Comm. of OpCo Unsecured Creditors, 143 S. Ct. 2495 (2023). They both hold, citing certain cases, that the contract rate is the appropriate rate. See Shane G. Ramsey & John T. Baxter, Should Solvent Debtors Pay Post-Petition Interest at the Contract Rate? Recent Decisions Say "Yes", Am. Bankr. Inst. J., May 2023, at 12. See also In re Hertz Corporation, 2024 WL 4132132 (3d Cir. 2024) holding that a solvent debtor needs to pay the applicable Premiums and the contract rate of interest.

Subordination of Contribution Claims Arising From the

Securities of Debtor Affiliates

In *ANZ Securities, Inc. v. Giddens*, 808 F.3d 942 (2d Cir. 2015), the Second Circuit ruled that contribution claims arising from the purchase and sale of a security of an affiliate of the debtor should be subordinated under Section 510(b) of the Bankruptcy Code. This case arises out of the liquidation of Lehman Brothers, Inc. As stated by the Court, "Claims arising from securities of a debtor's affiliate should be subordinated in the debtor's bankruptcy proceeding that are of the same type as the underlying securities (generally, secured debt, unsecured debt, commons stock, etc.; and in some circumstances potentially a narrower subcategory)." In support of its ruling, among other things, the Court relied on the legislative history of Section 510(b) and the broad interpretation of that Section by the Second Circuit and other courts.

Subordination of Breach of Contract Claims Asserted by Employees

Two years later, the Second Circuit again recognized the broad scope of Section 510(b) of the Bankruptcy Code in deciding that the breach of contract claims, asserted by the debtor's employees who were awarded restrictive stock units entitling them to common stock, were properly subordinated under Section 510(b). In re Lehman Brothers Holdings Inc., 855 F.3d 459 (2d Cir. 2017).

Subordination of Claims Arising Under Guarantees of Securities Issued by an Affiliate

In *In re American Housing Foundation*, 785 F. 3d 143 (5th Cir. 2015), the Fifth Circuit held that claims arising under a guarantee of a security issued by an affiliate can be subordinated under Section 510(b) of the Bankruptcy Code. In so holding, it found that the limited partnerships at issue were affiliates of the debtor. It recognized that such ruling was at odds with bankruptcy court decisions from the District of Delaware and elsewhere, including *In re SemCrude, L.P.*, 436 B.R. 317 (Bankr. D. Del. 2010). The Fifth Circuit rejected the reasoning of those cases.

A Claims Purchaser Can Have its Plan Vote Disallowed as Being in Bad Faith, Depending on its Motives and Actions

In *DBSD North America, Inc.,* 634 F.3d 79 (2d Cir. 2011), the Second Circuit issued a ruling which could affect the claims purchasing business. The Court disallowed a creditor's (DISH) vote on a Chapter 11 plan because it found that such vote was in furtherance of an "ulterior motive" unrelated to being a creditor

of the debtor. DISH purchased a first lien revolver debt at par and then proceeded to vote to reject the debtor's proposed Chapter 11 plan. In designating or disallowing DISH's vote, the Second Circuit held that merely purchasing claims in order to block a plan of reorganization, or acting selfishly in purchasing and voting the claims, does not constitute lack of good faith under Section 1126(e). However, lack of good faith may exist, such as found in this case, where a creditor acted to obtain some benefit to which it was not entitled. DISH: (a) admitted that it voted against the debtor's plan to capture a strategic asset of the debtor; (b) overpaid on the claim that it purchased; (c) attempted to propose its own competing plan; and (d) had internal communications that showed that it intended to take control of the debtor's bankruptcy case. Accordingly, this ruling may dissuade some "buy-to-own" strategies in egregious circumstances, where a blocking position is obtained to gain control over the bankruptcy case.

More recently, the Ninth Circuit ruled that a plan vote should not be disallowed or "designated" under Section 1126 (e) merely because (1) the secured creditor offered to purchase only a portion of the available claims so that it could block plan confirmation and/or (2) such a blocking position would adversely impact the other creditors. In re Fagerdala USA-Lompoc, Inc., 891 F.3d 848 (9th Cir. 2018). Clearly, this case did not present facts as egregious as those present in DBSD North America, Inc., Supra.

The Parents of an Adult Student Who Paid for Her Tuition Did Not Receive "Reasonably Equivalent Value" in a Constructive Fraudulent Transfer Action Commenced Against the College That Received the Tuition Payment

In *In re Palladino*, No. 17-1334 (1st Cir. Nov. 12, 2019), the First Circuit held that parents who paid college tuition on behalf of their adult daughter had not received "reasonably equivalent value" in a constructive fraudulent transfer proceeding. In finding the issues "straightforward", the Court found that none of the five classes of transactions that confer value, as set forth in Section 548(d)(2)(A) of the Bankruptcy Code, were present in that case, and that the parents were under no legal obligation to pay the college tuition. Accordingly, in reversing and remanding the lower court decision, the First Circuit found that the chapter 7 bankruptcy trustee was entitled to avoid the tuition payment under Section 548(a)(1)(B)(i) of the Bankruptcy Code for the benefit of the estate.

A Bankruptcy Court Does Not Have Jurisdiction to Enjoin the Federal Energy Regulatory Commission with Respect

to a Filed Energy Contract Under its Regulation

The Sixth Circuit held that in a chapter 11 case where the debtor sought to reject a filed energy contract regulated by the Federal Energy Regulatory Commission ("FERC"), the bankruptcy court must invite FERC to participate and provide its opinion with respect thereto. *FirstEnergy Solutions Corp. v FERC*, 945 F.3d 431 (6th Cir. 2019). While Congress intended for bankruptcy courts to have comprehensive jurisdiction over a debtor's estate, it didn't authorize such courts to invade FERC's regulatory authority by modifying or abrogating filed rates, and therefore they did not have jurisdiction to enjoin FERC from initiating proceedings with respect to modifying or abrogating filed rates.

Creditors of a Non-Debtor Must be Given Advance Notice of a Substantive Consolidation Motion

In an apparent case of its first impression, the Ninth Circuit held that creditors of a non-debtor must be given advance notice of a motion to substantively consolidate the assets and liabilities of the non-debtor with the estate of the debtor. *Leslie v. Mihranian*, 937 F.3d 1214 (9th Cir. 2019).

Time-of-Filing" Rule Applies to the Bankruptcy Court's "Related-To" Jurisdiction

A debtor that commenced a breach of contract action in bankruptcy court thereafter assigned its rights in that action to a third party. The defendants then moved to dismiss the action asserting that due to the assignment the bankruptcy court lost its subject matter jurisdiction under Section 1334(b). The Fifth Circuit held that the "time-of-filing rule" (which provides that "the jurisdiction of the court depends on the state of things at the time of the action brought") applies to bankruptcy actions, as it historically has to diversity or federal question jurisdiction. *Double Eagle Energy Services, L.L.C. v Markwest Utica EMG, L.L.C.*, No. 19-30207, 2019 U.S. App. LEXIS 26548 (5th Cir. Aug. 26, 2019). Accordingly, the "related-to" jurisdiction that the bankruptcy court had at the time of the commencement of the action was not defeated by the subsequent assignment of the cause of action by the debtor.

Recognition or Non/Recognition of Foreign Proceedings Under Chapter 15

In a case of first impression, the Second Circuit held that Section 109(a) of the Bankruptcy Code applies to a Chapter 15 case. Commentators and other courts have differed on the ruling. The

court found that a showing of (i) a domicile, (ii) a place of business or (iii) property, in the United States was required for the bankruptcy court to grant recognition under Chapter 15 of the debtor's Australian liquidation proceeding and vacated and remanded the lower court's decision. *Drawbridge Special Opportunities Fund LP v. Barnet*, 737 F.3d 238 (2d. Cir. 2013). On remand, the bankruptcy court found that the Australian debtor's causes of action that were against U.S. parties and governed by U.S. law, and its undrawn retainer maintained in the U.S., constituted adequate property in the U.S. to satisfy Section 109(a). Therefore, it recognized the Australian liquidation under Chapter 15. *In re Octaviar Administration Pty Ltd.*, 511 B.R. 361 (Bankr. S.D.N.Y. 2014).

Abstention From Chapter 11 Filing by a Cross-Border Debtor

In *In re Northshore Mainland Services, Inc.*, 537 B.R. 192 (Bankr. D. Del. 2015), the Court held that a bankruptcy court may abstain under Section 305 of the US Bankruptcy Code from presiding over a Chapter 11 case of a foreign entity that otherwise was eligible to file a petition under that Chapter. In that case the debtor had strong ties with the Bahamas, where it owned and operated a resort, and few ties to the US, where it had opened US bank accounts just shortly before its US bankruptcy filing to establish US eligibility. According to the bankruptcy court, allowing the Chapter 11 case to proceed would not promote a negotiated resolution, but rather would invite further litigation in multiple forums. Notwithstanding the Chapter 11 abstention, the foreign entity still had access to the US court system through a Chapter 15 filing, where its remedies would be more limited than they are under Chapter 11.

Chapter 15 Eligibility – What Qualifies as US Property?

In *In re Berau Capital Resources Pte Ltd.*, 540 B.R. 80 (Bankr. S.D. N.Y. 2015), the court considered whether a foreign debtor was eligible for Chapter 15 relief by meeting the requirement that it have a place of business or property in the US, as required under Section 109(a) of the Bankruptcy Code and the Second Circuit's decision in *Drawbridge, supra.* As stated by the Court in *Berau,* "No other federal circuit appears to have addressed the 'property in the United States' issue in chapter 15 cases so far." Since the debtor in *Berau,* which was headquartered in Singapore, had no place of business in the United States, the focus was on whether the debtor had property located in this country. The Court held that this requirement of eligibility and venue was met

by (1) the attorney retainer held by the foreign representative's New York counsel and (2) the fact that with respect to more than $450 million of US dollar denominated debt, New York law governed the indenture and the parties to the indenture selected New York in the choice of forum clause. The Court noted that contract rights are intangible property of the debtor and concluded that Chapter 15 eligibility and venue in New York were established.

The 11th Circuit has now followed the Second Circuit Drawbridge decision in In re Al Zawawi, 97 F.4th 1244 (11th Cir. 2024). It concluded that section 109(a) applies to Chapter 15 cases, and that because there was property in the United States the Chapter 15 Petition for Recognition of a Foreign Proceeding filed by Foreign Representatives would be honored.

In *In re Millennium Global Emerging Credit Master Fund Ltd.,* 458 B.R. 63 (Bankr. S.D. N.Y. 2011), *decision aff'd,* 474 B.R. 88 (S.D. N.Y. 2012), the Court recognized a liquidation pending in Bermuda as a foreign main proceeding under Chapter 15, having determined that the center of main interest ("COMI") is measured on the date that the foreign proceeding commenced. The Court was concerned that had it not granted such recognition, U.S. creditors would have been left without a centralized forum for recovering on their claims.

In *In re Toft,* 453 B.R. 186 (Bankr. S.D. N.Y. 2011), Chapter 15 recognition was denied on public policy grounds. Section 1506 provides that "[n]othing in this chapter prevents the court from refusing to take an action governed by this chapter if the action would be manifestly contrary to the public policy of the United States." In *Toft* the Court found that the discovery request in the nature of mail interception orders violated fundamental privacy protection in the United States, even though the Court recognized that such discovery was common in Germany where *Toft's* restructuring proceeding was pending. Accordingly, where fundamental U.S. policies are at stake and potentially being compromised, creditors may have a basis to challenge Chapter 15 relief sought by a foreign representative.

On June 28, 2012, the U.S. District Court in the Southern District of New York affirmed the order by the Bankruptcy Court granting appellee Ashapura Minechem Ltd.'s ("Ashapura") petition for recognition, as a foreign main proceeding, of the insolvency proceeding that Ashapura had voluntarily commenced in India. In so doing, the District Court dismissed the appeal of Armada (Singapore) Pte Ltd. ("Armada"), rejecting its contentions that the foreign representative of Ashapura had not carried

his burden of proving several of the requirements of Section 101(23) of the Bankruptcy Code regarding foreign proceedings, namely that: (1) the Indian proceeding was collective in nature; (2) its assets and affairs were subject to the control or supervision of the Indian insolvency tribunal; and (3) that the Indian filing is a proceeding under a law related to insolvency. The District Court also rejected Armada's further contention that recognition of the Ashapura Indian proceeding was manifestly contrary to U.S. public policy under Section 1506 of the Bankruptcy Code.

Code Amendments Historical Changes

In March 2024 a minor amendment was passed to section 507(d) of the Code to insert "excluding subparagraph (f) after" (a)(8). See (b)(1) and 2 for the timing of the effect of the change.

In January 2023 § 523(a)(1),(2)(3),(20) was amended by Title II Compensation of Victims of Human Trafficking. It limits the dischargeability of the type of debt covered in § 523(a)20.

In August 2019, four bankruptcy bills were passed by Congress and signed into law by the President. They are the Small Business Reorganization Act of 2019, the Family Farmer Relief Act, the National Guard and Reservists Debt Relief Amendment and the Honoring American Veterans in Extreme Need Act (Haven Act).

Minor technical or other amendments to the Code were passed or took effect in 2024, 2023, 2022, 2021, 2020, 2019, 2012 and 2010 after Congress enacted very significant amendments in 2005, as discussed in Section 1:36.50 hereafter. Prior thereto important amendments were enacted in 1990 and 1994. A summary of the 1994 Reform Act is contained in Section 1:34 hereafter. A number of significant amendments resulting from the "Thrift" crisis were enacted in 1990 and these changes are found in a number of bills, *i.e.,* the Bankruptcy Reform Act of 1994-H.R.5116, Pub. L. No. 103-394, Pub. L. No. 101-650 (Judicial Improvements Act of 1990); Pub. L. No. 101-508 (Omnibus Budget Reconciliation Act of 1990; Pub. L. No. 101-647 (Crime Control Act of 1990; Pub. L. No. 101-647 (Criminal Victims Protection Act of 1990); and Pub. L. No. 101-509 (Treasury, Postal Service and General Government Appropriations Act of 1990).

The Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986 was enacted on October 27, 1986 (Pub. L. No. 99-554). That Act makes numerous amendments to the Bankruptcy Code and to Title 28 U.S.C.A. of great importance was the expansion of the United States trustee system nationwide to enhance the powers of such trustee to include, monitoring compensation applications, appointing interim trustees and com-

mittees, and providing that such trustee may raise and may appear and be heard on any issue in any case or proceeding under the Bankruptcy Code (except to file a Chapter 11 plan).

The Bankruptcy Amendments and Federal Judgeship Act of 1984 (Pub. L. No. 98-353) (the "1984 Amendments"), enacted in response to the Supreme Court's decision in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.,* 458 U.S. 50, 102 S. Ct. 2858 (1982), made numerous changes in Title 28 of the United States Code and in the Bankruptcy Code. These changes required conforming changes in a number of the 1983 Bankruptcy Rules. These amended rules became effective August 1, 1987.

Additionally, the 1986 Amendments to the Code, making the United States trustee system permanent and nationwide, required widespread rules and forms revisions to reflect those changes.

Bankruptcy Rules and Forms—Historical Changes

The Bankruptcy Rules and the Official Forms were largely revised effective in 1991, and to an extent modified in 1993, 1995, 1996, 1997, 1999, 2008, 2009, 2012, 2013, 2014, 2015, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024 and 2025. As previously mentioned, and as provided throughout, the Official Forms were substantially revised, affecting virtually every Bankruptcy Form effective starting in December 1, 2015, with some promulgated after that date, through 2025. In 2020, Interim Rules amendments were enacted principally to cover Small Business Debtor Reorganizations under Subchapter V. These interim rules were made permanent in modified form as of December 1, 2022.

We provide this historical evolution so that practitioners can understand the changes periodically made, and can utilize, or, as appropriate, discard court decisions that were made under prior versions of the Rules. Some of the Rule changes in recent years simplified and reduced inconsistencies in the computation of time periods under the procedural rules. Practitioners should review these changes with respect to any required time periods to perform a specified act. Conforming changes in time periods have also been made to certain Official Forms. Because of the foregoing, and the need to add additional Forms, significant revisions of the Forms, and particularly the related footnotes, were undertaken. Some Rules changes were made to deal with small business cases and in response to COVID related issues.

The 2008 amendments to the Rules generally reflect interim rules already in place to implement the 2005 amendments to the Bankruptcy Code. The interim rules were adopted by most of the

bankruptcy courts in August 2005, and were effective until the 2008 rules became effective to implement the 2005 amendments. Subsequent revisions are discussed in Sections 1:42.3, 1:42.4, 1:42.5, 1:42.6 and 1:42.7 or in the Preface hereafter.

The Bankruptcy Rules that became effective August 1, 1983 superseded the former Rules, the Interim Rules, and any local rules inconsistent with the new rules. They were applicable to all proceedings pending on August 1, 1983, except to the extent that in the opinion of the court their application would not be feasible or would work an injustice, in which event the former procedure applies.

The Bankruptcy Code, for the most part, leaves procedural matters to the Bankruptcy Rules. Section 405(d) of the Bankruptcy Reform Act of 1978 (Public Law 95-598) provides that the Rules in effect on September 30, 1979 shall apply to cases under the Code, to the extent not inconsistent therewith until such Rules are repealed or superseded.

In August, 1979, the Advisory Committee on Bankruptcy Rules of the Judicial Conference of the United States distributed guidelines, prepared by its Reporters, in the form of Interim Rules to assist the bankruptcy courts. The Interim Rules were adopted by every district either in toto, or with minor variations. They provided guidance in applying the existing Bankruptcy Rules where appropriate under the Code, and filling gaps in those Rules created by the Code.

We trust that these revised manuals will assist mainstream creditors' rights, distressed debt, bankruptcy and restructuring practitioners and in-house counsel. It will also aid litigation practitioners with at least limited bankruptcy related experience.

Both business and consumer bankruptcy practitioners will also find these volumes useful.

Asa S. Herzog (1903–1996)
Joseph Samet