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BUSINESS RESTRUCTURING REVIEW

U.S. SUPREME COURT RULES THAT BANKRUPTCY CODE'S PROTECTION OF UNSTAYED ASSET SALE ORDERS TO GOOD-FAITH PURCHASERS IS NOT JURISDICTIONAL

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Section 363(m) of the Bankruptcy Code provides that the reversal or modification of an order approving a sale or lease of assets in bankruptcy does not affect the validity of the sale or lease to a good-faith purchaser or lessee unless the party challenging the sale or lease obtains a stay pending its appeal of the order. Bankruptcy and appellate courts, however, have long disagreed as to whether this provision is jurisdictional—meaning that it can never be waived and an appellate court lacks jurisdiction to hear any appeal of an unstayed sale or lease authorization order—or instead a defense that can be invoked by the proponents of the sale (e.g., the debtor, the bankruptcy trustee, or the purchaser) on appeal subject to waiver, forfeiture, and similar doctrines.

The U.S. Supreme Court settled this question on April 19, 2023. A unanimous Court ruled in *MOAC Mall Holdings LLC v. Transform Holdco LLC*, 143 S. Ct. 927, 2023 WL 2992693 (2023) ("*Transform Holdco*"), that section 363(m) is not jurisdictional, and that an appeal of a 2019 bankruptcy court order approving the assignment of a lease between Sears, Roebuck & Co. ("Sears") and MOAC Mall Holdings LLC ("MOAC") as part of Sears's sale of substantially all of its assets was not moot.

SECTION 363(M) OF THE BANKRUPTCY CODE AND STATUTORY MOOTNESS

In general, "mootness" is a doctrine that precludes a reviewing court from reaching the underlying merits of a controversy. An appeal can be either constitutionally, equitably, or statutorily moot. Constitutional mootness is derived from Article III of the U.S. Constitution, which limits the jurisdiction of federal courts to actual cases or controversies and, in furtherance of the goal of conserving judicial resources, precludes adjudication of cases that are hypothetical or merely advisory.

The court-fashioned remedy of "equitable mootness" bars adjudication of an appeal when a comprehensive change of circumstances has occurred such that it would be inequitable for a reviewing court to address the merits of the appeal. In bankruptcy cases, appellees often invoke equitable mootness as a basis for precluding appellate review of an order confirming a chapter 11 plan that has been "substantially consummated."

IN THIS ISSUE

As relevant here, an appeal can also be rendered moot (or otherwise foreclosed) by statute. Section 363(m) of the Bankruptcy Code provides as follows:

> The reversal or modification on appeal of an authorization [of a sale or lease of property in bankruptcy] does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.

11 U.S.C. § 363(m). Section 363(m) is a powerful protection for good-faith purchasers and lessees because it limits appellate review of an approved sale or lease irrespective of the legal merits of the appeal.

The federal circuit courts of appeals disagree over whether section 363(m) is jurisdictional, such that the failure to obtain a stay pending appeal of a sale order deprives an appellate court of jurisdiction to hear the appeal at all, except regarding the limited issue of whether the sale was made to a good-faith purchaser. *Compare Su v. C Whale Corp. (In re C Whale Corp.)*, 2022 WL 135125, *4 (5th Cir. Jan. 13, 2022) (section 363(m) is jurisdictional and precludes an appeal of an unstayed order approving a bankruptcy sale); *MOAC Mall Holdings LLC v. Transform Holdco LLC (In re Sears Holdings Corp.)*, 2021 WL 5986997, *3 (2d Cir. Dec. 17, 2021) (stating that "[w]e have held in no ambiguous terms that section 363(m) is a limit on our jurisdiction and that, absent an entry of a stay of the Sale Order, we only retain authority to review challenges to the 'good faith' aspect of the sale") (internal quotation marks and citations omitted), *vacated and remanded*, 143 S. Ct. 927 (2023); *and Sears v. U.S. Trustee (In re AFY)*, 734 F.3d 810, 816 (8th Cir. 2013) (mootness under section 363(m) deprives an appellate court from hearing an appeal of an unstayed sale order) *with Reynolds v. ServisFirst Bank (In re Stanford)*, 17 F.4th 116, 122 (11th Cir. 2021) ("Statutory mootness under 363(m) … is not jurisdictional. Though it provides a defense against appeals from bankruptcy court orders, 'even an ironclad defense, does not defeat jurisdiction.'") (citation omitted); *In re Energy Future*

LAWYER SPOTLIGHT: MEET CORINNE BALL

With 40 years' restructuring and distressed investing experience, Corinne Ball co-leads the New York Office's Business Restructuring & Reorganization Practice and leads the Firm's European Distress Investing and Alternative Capital Initiatives. Her practice focuses on complex corporate reorganizations and distressed acquisitions, including matters involving multijurisdictional and cross-border enterprises.

Corinne worked extensively on the City of Detroit restructuring, and she led a team of lawyers representing Chrysler in its successful chapter 11 reorganization. She also led a team of attorneys in the restructuring of FGIC and the sale of its portfolio to MBIA; represented PAG in its equity investment, enabling Key Safety System to acquire Takata out of Chapter 11; and led the successful restructuring of Dana Corp., which emerged from bankruptcy in 2008. She has orchestrated many other reorganizations. She also leads the Firm's distressed M&A efforts and is the featured "Distress M&A" columnist for the *New York Law Journal*.

Corinne has been recognized annually as a leader in the restructuring field by *Chambers Global* and *Chambers USA* (band one), *K&A Restructuring Register*, *Legal 500*, and others. She was named a "Global Elite" Thought Leader for 2023 by *Who's Who Legal*. She won *The National Law Journal's* "Most Influential Lawyer of the Decade in Bankruptcy & Restructuring" and Turnaround Management Association's "International Turnaround Company of the Year" award, and she was named "Dealmaker of the Year" by *American Lawyer*. In 2020, Corinne received the Lifetime Achievement Award from the *New York Law Journal*.

A trustee of Catholic Charities of New York, Corinne also leads many of the diocesan representations. She is a former director of both the American Bankruptcy Institute and the American College of Bankruptcy and a member of the International Insolvency Institute. She also serves on the magistrate judge selection panel for the Southern District of New York, and the Business Advisory Committee for the Bankruptcy Court of the Southern District of New York.

Holdings Corp., 949 F.3d 806, 820 (3d Cir. 2020) ("In our Circuit, 'mootness' is a bit of a misnomer because we have construed § 363(m) as a constraint not on our jurisdiction, but on our capacity to fashion relief."); *Trinity 83 Dev., LLC v. ColFin Midwest Funding, LLC*, 917 F.3d 599, 602 (7th Cir. 2019) (section 363(m) is not jurisdictional, but instead provides the purchaser with a defense in litigation challenging the sale).

The Supreme Court addressed this question in *Transform Holdco* to resolve the circuit split.

TRANSFORM HOLDCO

Iconic retailer Sears filed for chapter 11 protection in the Southern District of New York in October 2018. In February 2019, the bankruptcy court approved the sale of substantially all of Sears's assets for $5.2 billion to Transform Holdco LLC and an affiliate (together, "Transform"), which companies were created and are controlled by former Sears CEO Eddie Lampert and several other former Sears executives.

The sale transaction, which the bankruptcy court authorized under section 363 of the Bankruptcy Code, included the assumption and assignment of 660 Sears store leases, including a lease with MOAC for premises located in the Mall of America (the "Lease"). MOAC objected to the proposed assignment of the Lease to Transform, arguing that Sears failed to provide adequate assurance of Transform's future performance, as required by section 365(f) of the Bankruptcy Code.

The bankruptcy court overruled MOAC's objection and entered an order approving assignment of the Lease as part of the sale transaction. MOAC appealed to the district court and sought a stay of the bankruptcy court's assignment order. The bankruptcy court denied MOAC's request for a stay pending appeal, reasoning that a lease assignment authorization did not fall within the scope of section 363(m) of the Bankruptcy Code.

The district court agreed with MOAC on the adequate assurance issue and initially vacated the bankruptcy court's assignment order on appeal. However, in what the district court characterized as an "appall[ing]" gambit after losing on the merits of its appeal, Transform argued for the first time in its motion for a rehearing that the appeal was mooted by section 363(m). Constrained by applicable precedent, the district court ultimately ruled that the assignment of the Lease to Transform qualified as a "sale" and, because MOAC never obtained a stay pending its appeal, MOAC's appeal must be dismissed as moot on jurisdictional grounds under section 363(m).

MOAC appealed to the Second Circuit, which affirmed in a summary order. In its ruling, the Second Circuit explained that because MOAC's appeal was moot under section 363(m), the district court lacked jurisdiction to hear it.

The Supreme Court agreed to review the Second Circuit's ruling on June 27, 2022.

THE SUPREME COURT'S RULING

The Supreme Court vacated the Second Circuit's ruling and remanded the case below.

Writing for a unanimous Court, Justice Ketanji Brown Jackson, in her first opinion since being elevated to the Court in June 2022, first rejected Transform's argument that the appeal was moot because it was not possible to undo the lease assignment, and that MOAC could not "possibly obtain any effectual relief," regardless of the Court's decision. "Our cases," Justice Jackson wrote, "disfavor these kinds of mootness arguments." *Transform Holdco*, 143 S. Ct. at 935.

Next, the Court concluded that section 363(m) of the Bankruptcy Code is not a jurisdictional "precondition to relief." Jurisdictional rules, Justice Jackson explained, relate to "the power of the court rather than the rights or obligations of the parties," and the Court treats a provision as jurisdictional only if Congress "clearly states" as much. *Id.* at 936 (citations and internal quotation marks omitted).

The Court determined that section 363(m) fails the "clear-statement rule" because the text of the provision does not refer in any way to the jurisdiction of district courts and plainly contemplates that orders authorizing a bankruptcy sale of assets may be reversed or modified on appeal, but "with a proviso"—namely, that "the reversal or modification of a covered authorization may not 'affect the validity of a sale or lease under such authorization' to a good-faith purchaser or a lessee under certain prescribed circumstances." *Id.* at 937.

Moreover, Justice Jackson noted, that proviso is itself caveated because "§ 363(m)'s constraints are simply inapplicable" if the sale or lease was made to a bad-faith purchaser or lessee, if the transaction is stayed pending appeal, or if the appellate court does something other than reverse or modify the sale or lease authorization. *Id.* According to the Court, "[t]his is not the stuff of which clear statements are made." *Id.* Instead, Justice Jackson wrote, section 363(m) reads more like a "statutory limitation" that can plausibly be read "as merely cloaking certain good-faith purchasers or lessees with a targeted protection of their newly-acquired property interest, applicable even when an appellate court properly exercises jurisdiction." *Id.*

Next, Justice Jackson explained that section 363(m)'s context in the statutory scheme also supports the conclusion that it is not jurisdictional because it is separate from, and, unlike certain other provisions of the Bankruptcy Code (*e.g.,* section 305(c), dealing with dismissal or suspension of a bankruptcy case), does not contain any "clear tie" to, other statutory provisions that govern the jurisdiction of bankruptcy and district courts, such as 28 U.S.C §§ 157, 158, and 1334. *Id.* at 938 and n.6.

The Court also rejected Transform's "creative retort" that courts can only exercise *in rem* jurisdiction with respect to property over which they have actual or constructive control, which was not the case here because the Lease was removed from the bankruptcy estate when it was assigned to a good-faith purchaser. This argument, Justice Jackson wrote, is a "red herring" because it "teeters on a contorted framing of contested general background principles rather than § 363(m)'s text and context (which, as we have said, lack any clear jurisdictional hue)." *Id.* at 938.

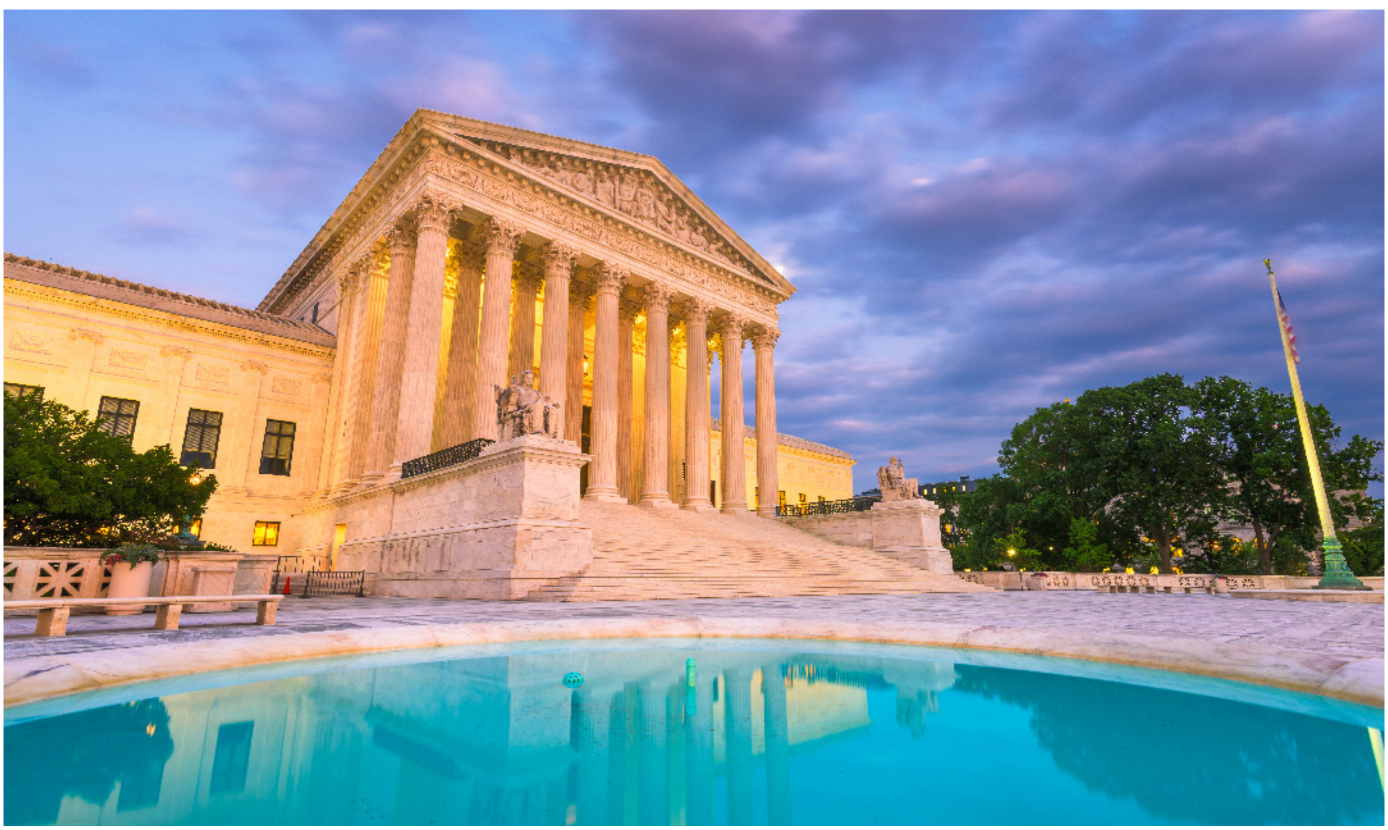
Finally, the Court rejected Transform's argument that section 363(m) was derived and should be applied in accordance with a rule of bankruptcy procedure under the former Bankruptcy Act (Rule 805), which some pre-Bankruptcy Code courts construed to provide a jurisdictional barrier to appellate review of unstayed sale or lease authorizations involving good-faith buyers or lessees. Pre-Bankruptcy Code court decisions interpreting Rule 805, Justice Jackson explained, do not indicate that Congress intended to make section 363(m) jurisdictional and, in any event, "long predate[d] our modern efforts on jurisdictional nomenclature." *Id.* at 940.

OUTLOOK

Transform Holdco resolves a circuit split on an important issue that arises in many bankruptcy cases concerning whether courts have jurisdiction to hear appeals of unstayed orders authorizing the sale or lease of estate property to good-faith purchasers or lessees. Some observers likely will contend that the ruling will erode the finality of bankruptcy sale or lease authorization orders. As a matter of bankruptcy appellate practice, because the Supreme Court ruled that section 363(m) is not jurisdictional, the provision must be timely invoked by the appellee, as otherwise it may be waived.

More generally, the Court expressed skepticism of the general proposition that section 363(m) automatically moots an appeal of an unstayed bankruptcy sale order. Among other things, as noted above, the Court observed that "[o]ur cases disfavor these kinds of mootness arguments." It remains to be seen how the lower courts will apply this aspect of *Transform Holdco* to bankruptcy appeals involving statutory mootness and other types of mootness arguments.

Having addressed statutory mootness under section 363(m) of the Bankruptcy Code, the Court may now have an opportunity to weigh in on the doctrine of equitable mootness. In a petition for *certiorari* filed on March 24, 2023, the indenture trustee for unsecured noteholders of Windstream Holdings, Inc. ("Windstream") asked the Court to review an October 2022 decision by the U.S. Court of Appeals for the Second Circuit dismissing on equitable mootness grounds the indenture trustee's appeal of an order confirming Windstream's chapter 11 plan and a related settlement. *See U.S. Bank. Nat'l Assoc. v. Windstream Holdings, Inc.*, No. 22-926 (U.S. Mar. 24, 2023). According to the indenture trustee, the doctrine is a "scourge on the proper functioning of the constitutionally mandated court system in bankruptcy cases," it "wrongfully and unevenly deprives bankruptcy litigants of their constitutional and statutory rights to Article III court review," and lacks a basis in the Bankruptcy Code or the U.S. Constitution.



NEW YORK BANKRUPTCY COURT BREAKS FROM PRECEDENT IN RULING THAT "TIME APPROACH" SHOULD BE USED TO CALCULATE LANDLORD'S CLAIM FOR LEASE TERMINATION DAMAGES

Daniel J. Merrett • Mark G. Douglas

To prevent landlords under long-term real property leases from reaping a windfall for future rent claims at the expense of other creditors, the Bankruptcy Code caps the amount of a landlord's claim against a debtor-tenant for damages "resulting from the termination" of a real property lease. Unfortunately, the language of the provision of the Bankruptcy Code—section 502(b)(6)—that specifies the maximum allowed amount of a landlord's claim for lease termination damages is confusing and has led to a disagreement among bankruptcy courts regarding the proper way to calculate the amount of the statutory cap.

Two approaches on this issue generally have been employed by the courts—the "Time Approach" (the majority view) and the "Rent Approach"—the latter of which is more favorable to landlords under long-term leases containing rent escalation clauses because it takes the rent escalations into account when calculating the capped amount of a landlord's claim. The Time Approach, by contrast, calculates the capped amount based on the rent reserved for the time period beginning at lease termination.

The U.S. Bankruptcy Court for the Southern District of New York recently considered which of these approaches should apply in *In re Cortlandt Liquidating LLC*, 648 B.R. 137 (Bankr. S.D.N.Y. 2023). The court held that, based on the plain language of section 502(b)(6), its legislative history, and other recent rulings considering the question, the Time Approach represented "the correct view." In so ruling, the bankruptcy court departed from previous bankruptcy court rulings in the Southern District of New York applying the Rent Approach.

STATUTORY CAP ON LANDLORD FUTURE RENT CLAIMS

Section 502(b)(6) of the Bankruptcy Code provides that the maximum allowable amount of the claim of a lessor for damages resulting from the termination of a lease of real property is limited to:

(A) the rent reserved by such lease, without acceleration, *for the greater of one year, or 15 percent, not to exceed three years, of the remaining term of such lease*, following the earlier of—
  (i) the date of the filing of the petition; and
  (ii) the date on whiqch such lessor repossessed, or the lessee surrendered, the leaseqd property; plus

(B) any unpaid rent due under such lease, without acceleration, on the earlier of such dates.

11 U.S.C. § 502(b)(6) (emphasis added). The purpose of this rent cap is to balance the interests of landlords and other unsecured creditors by allowing a landlord "to receive compensation for losses suffered from a lease termination while not permitting a claim so large as to prevent general unsecured creditors from recovering from the estate." *Solow v. PPI Enterprises, Inc. (In re PPI Enterprises (U.S.), Inc.),* 324 F.3d 197 (3d Cir. 2003); *see generally* Collier on Bankruptcy ("Collier") ¶ 502.03[7][a] (16th ed. 2023). The scope of section 502(b)(6) is limited to lease terminations. Lease damages claims for items such as physical damages to the premises are not subject to the cap. *See Kupfer v. Salma (In re Kupfer)*, 852 F.3d 853 (9th Cir. 2016); *Saddleback Valley Cmty. Church v. El Toro Materials Co. (In re El Toro Materials Co.)*, 504 F.3d 978 (9th Cir. 2007).

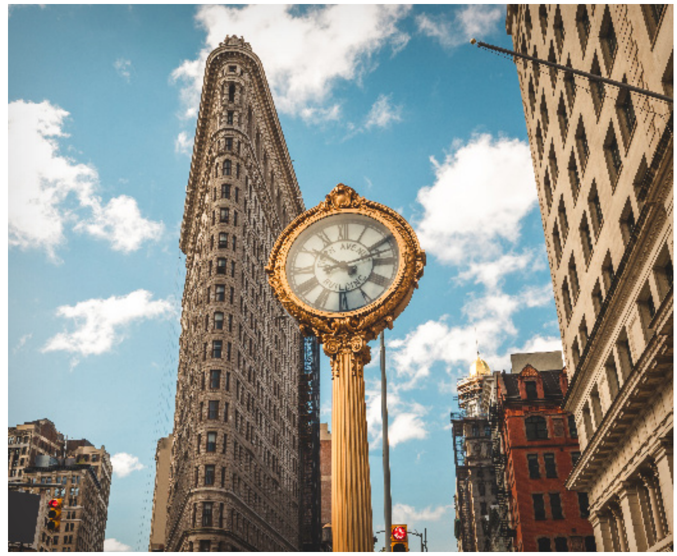
The language of section 502(b)(6)(A) that is italicized above has long been a source of consternation among the courts, largely because its perceived ambiguity has created confusion over how it should be applied. *See* "Final Report and Recommendations of the American Bankruptcy Institute Commission to Study the Reform of Chapter 11" (2014) V.A.6, p. 135 (noting that "many courts have confused or misapplied the formula and that, simply stated, the cap should be the rent reserved under the lease for the greater of (i) one year and (ii) the shorter of 15 percent of the remaining term and three years, plus unpaid rents").

Courts have applied two competing approaches to determining the maximum allowable amount of a landlord's lease termination claim—the Rent Approach and the Time Approach.

The focus of the Rent Approach is on the dollar amount of rent payable for the entire remaining lease term. According to the Rent Approach, section 502(b)(6) imposes a cap equal to 15% of that amount, provided that it is at least equal to the rent reserved under the lease for one year and does not exceed the rent reserved for the next three years of the lease term. *See In re Financial News Network, Inc.*, 149 B.R. 348, 351 (Bankr. S.D.N.Y. 1993) (applying the Rent Approach without any discussion of the Time Approach); *In re Andover Togs, Inc.*, 231 B.R. 521, 547 (Bankr. S.D.N.Y. 1999) (holding that the Rent Approach is the "logically sounder" approach); *In re Rock & Republic Enterprises*, 2011 WL 2471000, *20 (Bankr. S.D.N.Y. 2011) (declining to depart from the precedents set in *Financial News* and *Andover* and ruling that the Rent Approach should govern).

The Time Approach, by contrast, is anchored to the remaining term of the lease, not the remaining rent payable. According to this approach, section 502(b)(6) imposes a cap equal to the rent reserved under the lease for the time period beginning at lease termination equal to 15% of the remaining lease term, provided that time period is at least one year and no more than three years. *See In re Keane*, 2020 WL 612296, *2 (Bankr. E.D.N.C. Oct. 14, 2020); *In re Filene's Basement, LLC*, 2015 WL 1806347, *7 (Bankr. D. Del. Apr. 16, 2015); *In re Denali Family Servs.*, 506 B.R. 73, 83 (Bankr. D. Alaska 2014); *In re Shane Co.*, 464 B.R. 32, 39 (Bankr. D. Col. 2012). The Time Approach would appear to be the majority view among courts that have recently considered the question. *See* Collier at ¶ 502.03[7][c] (citing cases and noting that the Rent Approach “does not appear to be in accord with the language of the statute”).

Because many real property leases contain rent-escalation clauses during the latter stages of the lease, the Time Approach does not take such escalations into account when computing the maximum amount of the landlord’s claim, whereas the Rent Approach does, thereby resulting in a higher cap on the landlord’s leasetermination claim. *See* COLLIER at ¶ 502.06[7][c] (“The choice of methodology will make a difference only where the remaining rent under the lease is not constant. If the rent is increasing over the remaining term, the latter methodology will impose a lower limit, favoring the estate. If the rent is decreasing, the latter methodology will favor the landlord. If the rent is variable, it will depend on when in the lease the termination occurs.”).



CORTLANDT LIQUIDATING

On September 10, 2020, Century 21 Department Stores LLC (“Century 21”) and certain affiliates filed for chapter 11 protection in the Southern District of New York. The bankruptcy court confirmed a liquidating chapter 11 plan for Century 21 and its affiliates—thereafter known as Cortlandt Liquidating, LLC (the “debtors”)—on April 26, 2021. Pursuant to the liquidating plan, many of the real property leases for the debtors’ stores were rejected under section 365 of the Bankruptcy Code.

The court-appointed administrator of the debtors’ liquidating chapter 11 plan objected to the claims of various real property landlords with respect to Century 21 store locations, including Lincoln Triangle Commercial Holding Co. LLC (“Lincoln”) and AAC Cross County Mall, LLC (together with Lincoln, the “landlords”), for damages arising from the termination of their leases. Even after extensive discussions, the plan administrator and the landlords could not agree on the proper calculation of the lease termination claims under section 502(b)(6). The plan administrator argued that the damages should be calculated under the Time Approach, whereas the landlords claimed that the Rent Approach should be used.

The parties also disagreed over: (i) whether certain maintenance and repair claims arose from the lease terminations and were therefore subject to the section 506(b)(6) cap; and (ii) the manner in which projected future rent assumptions for real estate taxes and operating expense escalations should be calculated to determine the “rent reserved” under the leases.

THE BANKRUPTCY COURT’S RULING

The bankruptcy court ruled in favor of the plan administrator on the question of the proper approach for calculating the statutory cap. U.S. Bankruptcy Judge Michael E. Wiles wrote that he did not “lightly depart” from precedent to the contrary in *Financial News*, *Andover*, and *Rock & Republic*, but that “I am convinced that the Time Approach represents the correct view.” *Cortlandt Liquidating*, 648 B.R. at 141.

“First and most importantly,” he explained, the plain language of section 502(b)(6) “makes clear that the Time Approach is the correct one” because the entire phrase “for the greater of one year, or 15 percent, not to exceed three years, of the remaining term of such lease” is “worded in periods of time” rather than the dollar amount of rent. If lawmakers had intended the Rent Approach to apply, Judge Wiles noted, section 502(b)(6) “would have stated that the allowable rejection damages would not exceed ‘15 percent of the rent reserved for the remaining term of such lease, *provided* that such amount will not be less than the rent reserved for the next year of the lease term, and shall not be more than the rent reserved for the next three years of the lease term.’” *Id.* According to Judge Wiles, those are not the words of section 502(b)(6), “and they cannot reasonably be derived from the language that does appear.” *Id.*

Next, Judge Wiles explained that the Time Approach is supported by the legislative history of section 502(b)(6), which indicates that, in enacting the provision in 1978 (then designated as section 502(b)(7)), lawmakers did not clearly express the intention to change from the Time Approach employed in cases under the former Bankruptcy Act to a “total rent”-based formula. *Id.* at 142-43 (citing *Filene’s*, 2015 WL 1806347, at *6; *In re Connectix Corp.*, 372 B.R. 488, 493-94 (Bankr. N.D. Cal. 2007)).

Judge Wiles disagreed with courts that have ruled that: (i) considerations of equity or fairness favor the Rent Approach over the Time Approach; and (ii) the former better implements lawmakers’ intent or the purposes of section 502(b)(6). According to the judge, the plain intent of section 502(b)(6) was to limit landlords’ claims and to “strike a balance between the interests of landlords and the interests of other creditors.” However, he emphasized,”[i]dentifying that general intent is of no help in deciding whether Congress intended that the Rent Approach or the Time Approach would be used." *Id.* at 143. Judge Wiles further noted that considerations of fairness and equity are not instructive in determining which approach should be employed.

The bankruptcy court accordingly ruled that, in accordance with the Time Approach, the section 502(b)(6) cap with respect to the landlords should be "calculated by reference to the rents reserved under the relevant leases for the first 15% of the remaining lease terms, *provided*, that such amounts shall not be less than the rents reserved for the first remaining year of the relevant lease terms, and shall not be greater than the rents reserved for the first three remaining years of the relevant lease terms." *Id.* at 144.

Finally, addressing the remaining disputes before him, Judge Wiles held that: (i) because "the statutory cap applies only to damages that are attributable to the fact that the term of the lease has come to an end," the store cleanup costs incurred by Lincoln were subject to the cap because they arose from the termination of its lease; (ii) Lincoln's claim for mechanic's liens placed on the leased premises by unpaid contractors engaged by Century 21 was not subject to the cap because "any damages associated with mechanic's liens plainly would have existed regardless of whether the lease was terminated"; (iii) Lincoln's claim for repairs required under the terms of its lease did not arise from the termination of the lease and was not subject to the cap; and (iv) although real estate taxes and certain operating expenses were properly included in calculating the "rent reserved" under Lincoln's lease as well as the amount of the section 502(b)(6) cap, the absence of certain facts regarding projected future rent assumptions precluded the court from ruling on that issue.

OUTLOOK

In *Cortlandt Liquidating*, the bankruptcy court determined that the plain language of section 502(b)(6) dictated the use of the Time Approach in calculating the cap on a landlord's lease termination claim. Court rulings to the contrary in the Southern District of New York and elsewhere, however, suggest that the approach required by the provision may be less clear cut. Despite the pendulum swing toward the Time Approach in recent decisions, the debate likely will continue until appellate guidance or legislative action clarifies the issue.

Until then, the key takeaway from *Cortlandt Liquidating* is that parties to real property leases should know which approach has been adopted by the bankruptcy courts in a district where the debtor-tenant files (or is likely to file) for bankruptcy—but even then, a particular judge may not follow the prior precedent in the district. In cases where the contractual rent increases over the life of a long-term lease, the Time Approach is less favorable to landlords because it results in a lower cap on lease termination damage claims.

MASSACHUSETTS BANKRUPTCY COURT ADOPTS "PER PLAN" APPROACH TO IMPAIRED CLASS ACCEPTANCE REQUIREMENT FOR CONFIRMATION OF JOINT CHAPTER 11 PLAN

Brad B. Erens • Mark G. Douglas

If any class of creditors under a chapter 11 plan is "impaired," the Bankruptcy Code provides that the plan can be confirmed by the bankruptcy court only if at least one impaired class of non-insider creditors votes to accept the plan. This "impaired class acceptance" requirement—stated in section 1129(a)(10) of the Bankruptcy Code—is straightforward in cases involving a single debtor, or in cases where the bankruptcy estates of several debtors are "substantively consolidated" so that the assets and liabilities of each debtor are deemed to belong to a single consolidated entity.

However, the requirement is more difficult to apply in cases involving multiple affiliated debtors that propose a joint chapter 11 plan, but whose estates are not substantively consolidated, or are consolidated only for purposes of plan confirmation (sometimes referred to as "deemed substantive consolidation"). In such cases, the question is whether an impaired class of each debtor must accept the plan (the "per debtor" approach) or whether the acceptance of the joint plan by an impaired class of a single debtor, or fewer than all of the debtors, is sufficient (the "per plan" approach). This question is disputed among the courts.

The U.S. Bankruptcy Court for the District of Massachusetts recently weighed in on this issue in *In re NESV ICE, LLC*, 2023 WL 2278603 (Bankr. D. Mass. Feb. 28, 2023). In a case where a chapter 11 plan provided that related debtors were deemed to be substantively consolidated, but would remain separate after confirmation of a joint chapter 11 plan, the court adopted the "per plan" approach. It also held that a junior secured creditor would not be deprived of its right to vote on the plan in accordance with a chapter 11 plan voting rights assignment in a prepetition subordination agreement.

"PER DEBTOR" VERSUS "PER PLAN" IMPAIRED CREDITOR ACCEPTANCE

Section 1129(a)(10) of the Bankruptcy Code provides that, if any creditor class is impaired under a chapter 11 plan, at least one impaired class must vote in favor of the plan, excluding any acceptance of the plan by an insider. This provision, which has been called the "statutory gatekeeper" to cramdown, must be satisfied for a chapter 11 plan to be confirmed either consensually or under the nonconsensual plan confirmation requirements set forth in section 1129(b). *See In re 266 Washington Assocs.*, 141 B.R. 275, 287 (Bankr. E.D.N.Y.), *aff'd*, 147 B.R. 827 (E.D.N.Y. 1992).

Thus, any chapter 11 plan, including a cramdown plan, cannot be confirmed in the absence of an accepting impaired class.

Determining whether a plan satisfies section 1129(a)(10) is relatively easy in cases involving a single debtor and its classes of creditors (although even simple cases sometimes present the prospect of "artificial impairment" or "gerrymandering" to create an accepting impaired class). Making such a determination is more difficult, however, in complex chapter 11 cases, which commonly involve multiple debtors and joint chapter 11 plans.

In such cases, courts have been divided as to whether section 1129(a)(10) applies on a "per debtor" or "per plan" basis. If the requirement applies on a "per debtor" basis, at least one impaired class of creditors for each debtor would have to accept the plan for it to be confirmed. By contrast, the "per plan" approach requires only that at least one impaired class of creditors votes to accept the plan, irrespective of whether the creditors in the class hold claims against one, some, or all of the debtors.

Another common aspect of chapter 11 cases involving multiple affiliated debtors is "substantive consolidation." Under this remedy, all assets and liabilities of multiple debtors are grouped together or consolidated to form a single estate to satisfy the claims of all creditors and interests of interest holders. Substantive consolidation is typically granted under circumstances where creditors dealt with affiliated debtors as a "single economic unit" or when the debtors' affairs "are so entangled that consolidation will benefit all creditors." *In re Bonham*, 229 F.3d 750 (9th Cir. 2000). When multiple debtors in a complex chapter 11 case have been substantively consolidated, the section 1129(a)(10) voting requirement is straightforward because the substantively consolidated entities are treated as a single debtor.

In multiple-debtor chapter 11 cases, the bankruptcy judges in the District of Delaware and the Middle District of Florida have adopted the "per debtor" approach when applying section 1129(a)(10). *See In re Tribune Co.*, 464 B.R. 126, 182–83 (Bankr. D. Del. 2011), *on reconsideration in part*, 464 B.R. 208 (Bankr. D. Del. 2011), *aff'd*, 587 B.R. 606 (D. Del. 2018), *aff'd*, 972 F.3d 228 (3d Cir. 2020); *In re Consol. Land Holdings, LLC*, 2021 WL 3701799, *6 (Bankr. M.D. Fla. 2021); *In re JER/Jameson Mezz Borrower II, LLC*, 461 B.R. 293, 303 (Bankr. D. Del. 2011). In these cases, the courts reasoned that if the debtors' estates have not been substantively consolidated, the joint plan is effectively a separate plan for each debtor.

The U.S. Court of Appeals for the Third Circuit affirmed a Delaware bankruptcy court's adoption of this approach in *Tribune*. In *Tribune*, the bankruptcy court reasoned that, in multiple-debtor cases, the reference to "plan" in section 1129(a)(10) was an inadequate basis to "conclude that only one debtor—or any number fewer than all debtors—must satisfy [the] standard" under the provision because rules of construction under section 102(7) of the Bankruptcy Code state that "the singular includes the plural." *See Tribune*, 464 B.R. at 182. The court concluded that "plan" should be construed to consist of "plans" in conjunction with other subsections of section 1129 where the term "plan" is also used in the singular, but is understood to apply to all debtors in a multiple-debtor case. *Id.* at 183 (citing 11 U.S.C. § 1129(a)(1) (compliance with applicable provisions of the Bankruptcy Code); 11 U.S.C. § 1129(a)(3) (good faith requirement)). In addition, the bankruptcy court noted that the "best interest of creditors" test in section 1129(a)(7), which applies to every impaired class of creditors for each joint debtor, is compatible with the "per debtor" approach. *Id.*

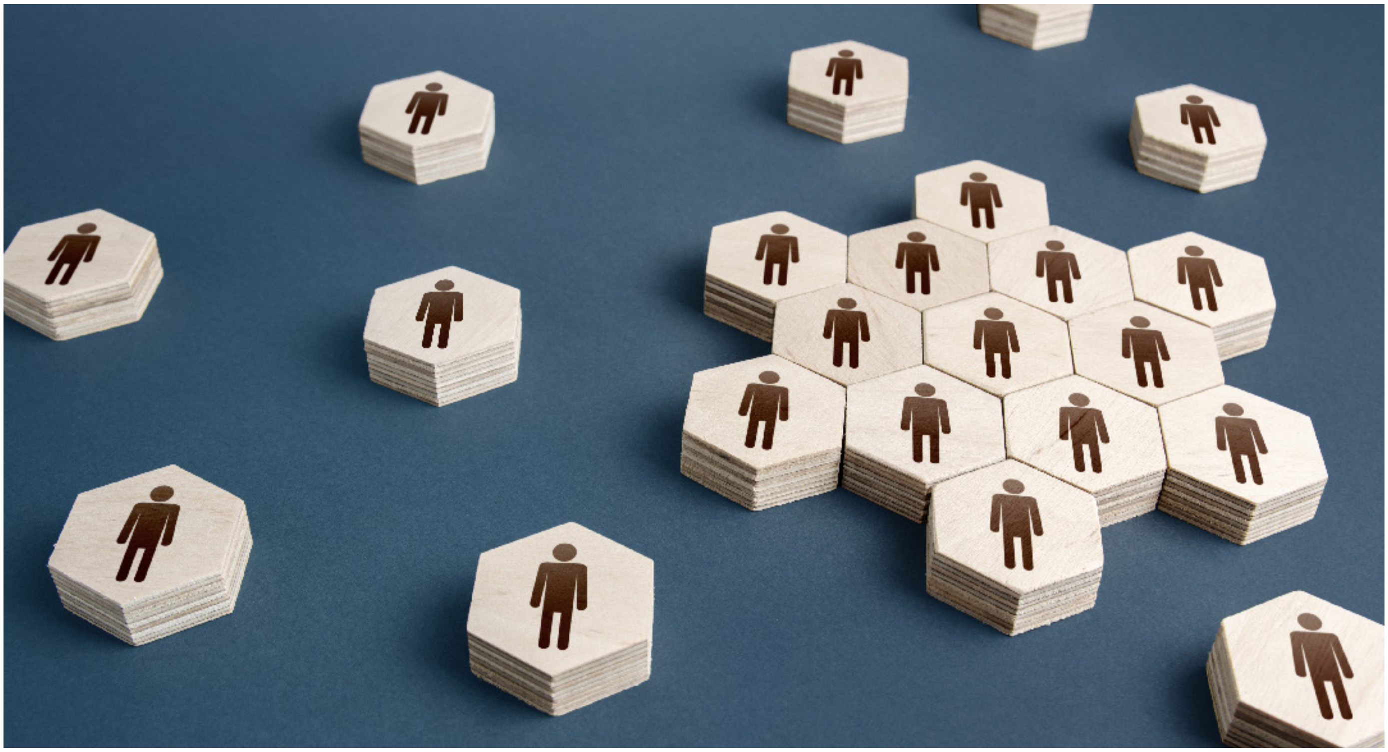
The *Tribune* bankruptcy court also emphasized that "[i]n the absence of substantive consolidation, entity separateness is fundamental." *Id.* at 182 (citation omitted). The court acknowledged that large multiple-debtor cases are commonly jointly administered for convenience and that joint plans may be proposed for convenience because the plans propose a single distribution. Even so, the court explained, in cases involving nonconsensual chapter 11 plans, "convenience alone is not sufficient reason to disturb the rights of impaired classes of creditors of a debtor not meeting confirmation standards." *Id.* at 183.

By contrast, the U.S. Court of Appeals for the Ninth Circuit and a handful of bankruptcy courts have embraced the opposite view, ruling that the plain meaning of section 1129(a)(10) requires a "per plan" approach. *See Grasslawn Lodging, LLC v. Transwest Resort Properties Inc. (In re Transwest Resort Properties, Inc.)*, 881 F.3d 724, 730 (9th Cir. 2018); *In re Pacific Links U.S. Holdings, Inc.*, 2022 Bankr. LEXIS 5380, *19 (Bankr. D. Haw. May 13, 2022); *In re Station Casinos, Inc.*, 2010 Bankr. LEXIS 5380, **82-83 (Bankr. D. Nev. Aug. 27, 2010); *JPMorgan Chase Bank, N.A. v. Charter Commc'ns Operating, LLC (In re Charter Commc'ns)*, 419 B.R. 221, 266 (Bankr. S.D.N.Y. 2009); *In re Enron Corp.*, 2004 Bankr. LEXIS 2549, **235-36 (Bankr. S.D.N.Y. July 15, 2004).

In *Transwest*, the Ninth Circuit ruled, as a matter of first impression among the circuits courts of appeals, that section 1129(a)(10) applies on a "per plan" basis.

The Ninth Circuit examined the plain language of section 1129(a)(10) to determine whether the provision should apply on a "per plan" basis. The court reasoned that the provision "makes no distinction concerning or reference to the creditors of different debtors under 'the plan,' nor does it distinguish between single-debtor and multi-debtor plans." *Transwest*, 881 F.3d at 729. Rather, the court concluded, the section 1129(a)(10) cramdown threshold for a joint plan is satisfied where "a single impaired class accepts a plan." *Id.*

The Ninth Circuit panel rejected the lender's argument that the "per plan" approach had the effect of substantively consolidating the debtors and therefore would wreak havoc on mezzanine lenders who rely on debtors' separate existences for purposes of preserving their collateral. According to the court, "[S]uch hypothetical concerns are policy considerations best left for Congress to resolve." *Id.* at 730.



In a concurring opinion, Circuit Judge Friedland wrote that because the chapter 11 plan effectively merged the debtors without any assessment of whether substantive consolidation was appropriate, the lender's argument that it was unfairly deprived of the ability to object effectively to confirmation had some foundation. Even so, he noted, the lender failed to raise that objection in the bankruptcy court, choosing instead to rely on its objections under section 1129(a)(10). *Id.* at 731-33.

ASSIGNMENT OF VOTING RIGHTS IN INTERCREDITOR AND SUBORDINATION AGREEMENTS

Generally, holders of allowed claims and interests have the right to vote to accept or reject a chapter 11 plan. *See* 11 U.S.C. § 1126(a). Claimants or interest holders whose claims or interests are not "impaired" under the plan (as defined in 11 U.S.C. § 1124), however, are deemed conclusively to accept the plan, and stakeholders who would receive nothing under the plan are deemed to reject it. *See* 11 U.S.C. §§ 1126(f) and (g). In addition, any holder of a claim or interest to which an objection has been filed does not have the right to vote the portion of the claim or interest objected to, unless the holder obtains an order temporarily allowing the claim or interest for voting purposes pending resolution of the merits of the objection. Unliquidated or contingent claims may be estimated for purposes of voting on a plan. *See* 11 U.S.C. § 502(c).

Subordination agreements among creditors specifying in advance how their competing claims against the borrower will be dealt with in terms of priority, receipt of payment, recourse to assets, and other related rights commonly include provisions that restrict or transfer the junior creditors' right to vote on a chapter 11 plan. Such assignments of plan voting rights are often included to maximize senior creditors' control over the plan process and enhance their ability to obtain confirmation of a plan they support.

A subordination agreement providing for subordination of debt or security generally is enforceable in a bankruptcy case pursuant to section 510(a) of the Bankruptcy Code, which provides that a subordination agreement is enforceable in a bankruptcy case "to the same extent that such agreement is enforceable under applicable nonbankruptcy law."

Courts disagree over whether an assignment of plan voting rights in a subordination agreement is enforceable. Some courts have concluded that they are not. *See, e.g., In re Fencepost Productions Inc.*, 629 B.R. 289, 295 (Bankr. D. Kan. 2021) (a provision in a pre-bankruptcy subordination agreement under which a subordinated creditor assigned to a senior creditor its right to vote on any chapter 11 plan proposed for the borrower was not enforceable because it conflicted with section 1126(a)); *In re SW Bos. Hotel Venture, LLC*, 460 B.R. 38, 52 (Bankr. D. Mass. 2011) (ruling that an assignment of plan voting rights was not enforceable and stating that "[a]lthough 11 U.S.C. § 510[(a)] provides for the enforceability of subordination agreements, such agreements cannot nullify provisions of the Bankruptcy Code [such as section 1126(a)]"), *aff'd in part, rev'd in part*, 479 B.R. 210 (B.A.P. 1st Cir. 2012), *vacated on other grounds*, 748 F. 3d 393 (1st Cir. 2014); *In re Croatan Surf Club, LLC*, 2011 WL 5909199, *2 (Bankr. E.D.N.C. Oct. 25, 2011) ("EFP is the holder of its claim, and therefore EFP is entitled to vote its claim. There is no reason to deviate from the plain language of § 1126(a)."); *In re 203 N. LaSalle St. P'ship*, 246

B.R. 325, 331 (Bankr. N.D. Ill. 2000) ("Subordination … affects the order of priority of payment of claims in bankruptcy, but not the transfer of voting rights."); *In re Hart Ski Mfg. Co.*, 5 B.R. 734, 736 (Bankr. D. Minn. 1980) (noting that the right to participate in voting on a chapter 11 plan and "other rights related to contract priority of distribution pursuant to Section 510(a) cannot be affected by the actions of the parties prior to the commencement of a bankruptcy case when such rights did not even exist.").

Other courts have enforced such assignments of voting rights. *See, e.g., In re Coastal Broad. Sys., Inc.*, 2013 WL 3285936, at *5–6 (D.N.J. June 28, 2013), *aff'd*, 570 Fed. App'x 188 (3d Cir. 2014); *In re Avondale Gateway Ctr. Entitlement, LLC*, 2011 WL 1376997, *4 (D. Ariz. Apr. 12, 2011); *In re Erickson Ret. Cmtys., LLC*, 425 B.R. 309, 316 (Bankr. N.D. Tex. 2010); *In re Aerosol Packaging, LLC*, 362 B.R. 43, 47 (Bankr. N.D. Ga. 2006).

NESV ICE

Attleboro, Massachusetts, ice rink operator NESV Ice, LLC (d/b/a New England Sports Village) and affiliates created to operate other sports-related venues (collectively, the "debtors") filed for chapter 11 protection on August 26, 2021, in the District of Massachusetts.

In 2016, HarborOne Bank ("HarborOne") provided approximately $11.5 million in construction and term loan financing to certain of the debtors secured by liens on substantially all of their assets. In 2019, Ashcroft Sullivan Sports Village Lender, LLC ("Ashcroft") loaned approximately $8 million to the debtors' (non-debtor) parent company, Ajax 5Cap NESV, LLC ("Ajax"), to be used in part to finance the debtors' construction projects. The loan was secured by junior liens on substantially all of the assets of all of the debtors except NESV Land East, LLC ("Land East").

In connection with the financing, Ashcroft and HarborOne entered into a subordination agreement providing in relevant part that Ashcroft authorized HarborOne:

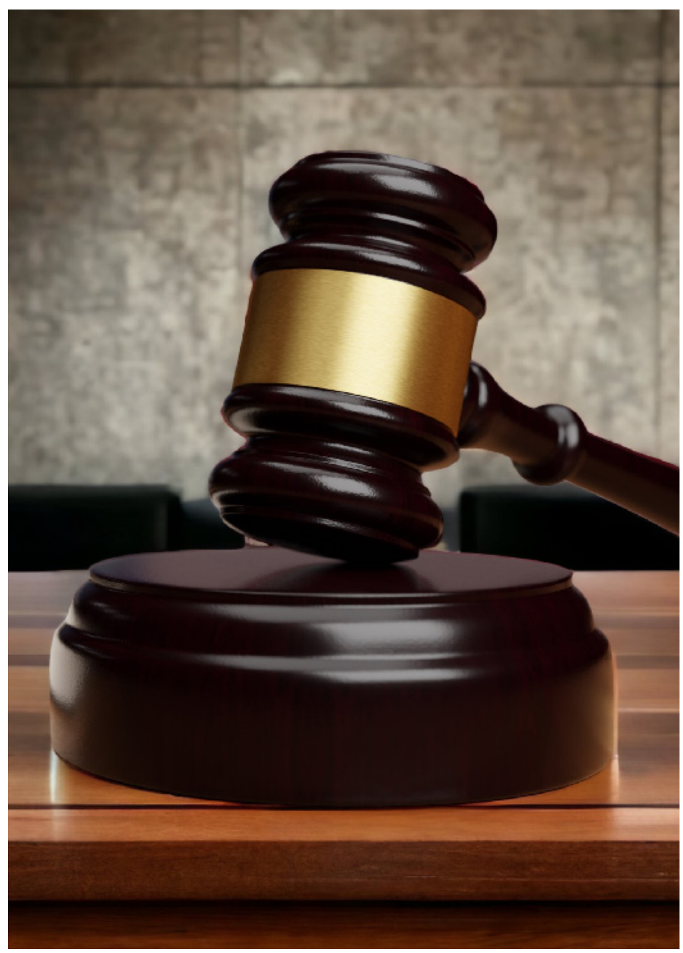
> [T]o take such action as may be reasonably necessary or appropriate to effect the subordination provisions and other rights and/or remedies granted to [HarborOne] in the Agreement (including, without limitation, in the case of [HarborOne], to file a proof of claim and to vote upon matters with respect to which [Ashcroft] may be able to vote in connection with any bankruptcy proceedings related to any of the Borrowers or Ajax).

In December 2020, HarborOne assigned its loans and the related subordination agreement to SHS ACK, LLC ("SHS").

The debtors, whose chapter 11 cases were jointly administered, and certain other plan proponents, including Ashcroft, proposed a joint plan of reorganization. The plan would restructure the SHS debt and resolve disputed contractor claims, including claims asserted by general contractor Construction Source Management, LLC ("CSM" and, together with SHS, the "objecting creditors") arising from the construction of the debtors' sports facilities beginning in 2016. The plan included a compromise and settlement of Ashcroft's junior secured claims against all debtors except for Land East, by which settlement Ashcroft's claims would be subordinated and converted to equity in the reorganized debtors.

The proposed plan included a "deemed substantive consolidation" provision stating that "the Reorganized Debtors shall continue to maintain their separate corporate existences for all purposes other than the payment of Claims as expressly provided for in the Plan." It further provided that the assets and liabilities of each debtor would be "merged" with the assets and liabilities of the other debtors "for the purposes of implementing the Plan and satisfying Allowed Claims as provided for in the Plan."

In advance of the plan confirmation hearing, the objecting creditors argued that the proposed joint chapter 11 plan could not be confirmed because: (i) it did not comply with section 1129(a)(10), as Land East had no impaired accepting class of creditors,



even though Ashcroft held impaired secured claims against the remaining debtors and had voted to accept the plan; (ii) the requirements for substantive consolidation of the debtors had not been met; and (iii) SHS was entitled to vote Ashcroft's claim in accordance with the terms of the subordination agreement.

THE BANKRUPTCY COURT'S RULING

As an initial matter, the bankruptcy court issued a "tentative ruling" on whether acceptance of a plan by an impaired class under section 1129(a)(10) should be considered on a "per debtor" or "per plan" basis.

U.S. Bankruptcy Judge Christopher J. Panos noted the split of authority among the courts regarding this issue and acknowledged that there is no controlling precedent in the First Circuit. He explained that if the plan proponents could demonstrate that substantive consolidation of the debtors was appropriate, the joint plan would pass muster under either view of the requirements of section 1129(a)(10). If not, Judge Panos concluded, the court would apply the "per plan" approach:

> While I have carefully considered the reasoning of the *Tribune* line of cases, I interpret § 1129(a)(10) to permit confirmation of a joint plan of reorganization *where at least one class of impaired creditors of one debtor has accepted the plan under certain discrete circumstances where limited consolidation is proposed as a good faith means of implementing the plan*…. I am cognizant that applying the "per plan" approach may allow for greater attempts at chicanery by plan proponents, but creditors are protected by judicial scrutiny of the business reasons for proposing a joint plan, the relationship of the debtors, and the importance of "entity separateness," the benefit to creditors of each estate, and whether any objecting party is prejudiced by the proposed limited consolidation other than a claim of prejudice because one or more of the debtors failed to obtain acceptance from a class of impaired creditors. In this case, it appears unlikely that it would be found that SHS or CSM are materially prejudiced by limited consolidation and application of the "per plan" rule as it relates to Land East.

NESV Ice, 2023 WL 2278603, at *19 (emphasis added).

Next, Judge Panos rejected the objecting creditors' argument that SHS was entitled to vote Ashcroft's claims under the parties' subordination agreement. He explained that, because the plan provided that Ashcroft would receive no distribution other than equity in exchange for its junior secured claim before payment in full of SHS's claims, it appeared, without deciding whether the distribution of equity interests might be subject to the provisions of the subordination agreement, that permitting SHS to vote Ashcroft's claim was not "reasonably necessary or appropriate" to effectuate the provisions of the subordination agreement.

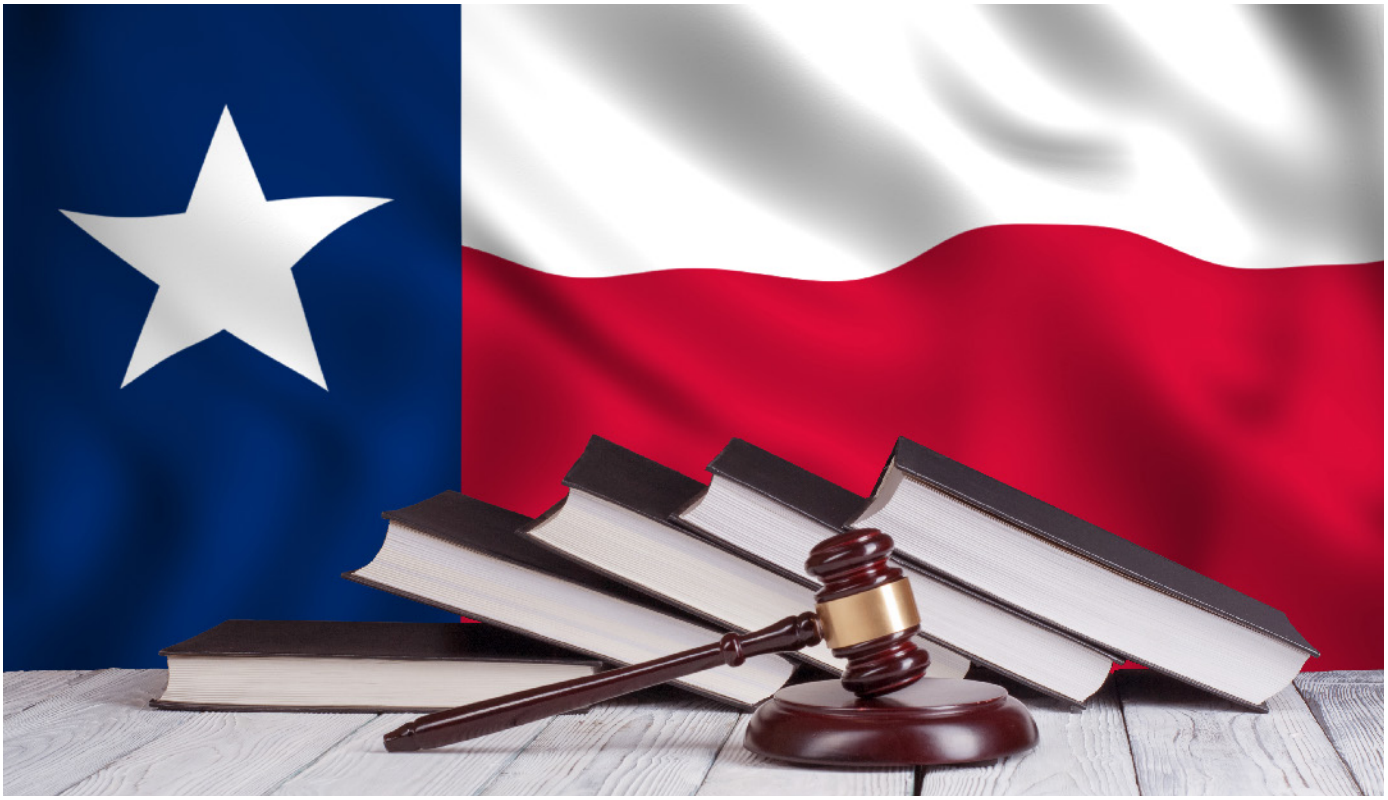
In addition, Judge Panos determined that he need not enforce the intercreditor voting agreement included in the subordination agreement. He wrote that "provisions in such an agreement cannot invalidate applicable provisions of the Bankruptcy Code [*i.e.*, section 1126(a)], and I would likely find the voting provision to be unenforceable" in accordance with the rulings in *SW Boston*, *LaSalle*, and other similar decisions. *Id.*

OUTLOOK

Although the bankruptcy court's rulings in *NESV Ice* were "tentative" and intended to provide guidance regarding the parties' preparation for the confirmation hearing on the debtors' joint chapter 11 plan, the decision is instructive for two reasons. First, the bankruptcy court adopted the "per plan" approach to section 1129(a)(10) even though the debtors' estates were deemed to be substantively consolidated only for purposes of plan confirmation. This approach gives debtors in multidebtor chapter 11 cases an easier road to cramdown confirmation of a joint chapter 11 plan, regardless of whether the debtors actually have been substantively consolidated. Although this is welcome news for debtors, it reignites the debate on the issue and creates additional uncertainty for debtors and creditors in jurisdictions where the courts have not addressed it.

Second, the bankruptcy court in *NESV Ice* signaled that it would not enforce a senior secured creditor's right to vote the claim of a junior creditor in accordance with the terms of a prepetition subordination agreement. In so ruling, the bankruptcy court joined with many other courts in concluding that a prepetition voting rights assignment cannot skirt the chapter 11 plan enfranchisement mandate in section 1126(a).

Section 1129(a)(10) has long been a source of confusion and disagreement among bankruptcy courts presiding over multidebtor chapter 11 cases. So much so that the American Bankruptcy Institute Commission to Study the Reform of Chapter 11 recommended that the requirement for an accepting impaired class be eliminated. *See* ABI Commission to Study the Reform of Chapter 11: 2012-2014 Final Report and Recommendations, 23 Am. Bankr. Inst. L. Rev. 1, 280-84 (2015). Nearly 10 years after the commission's final report, however, Congress has not been inclined to act on this recommendation.



TEXAS DISTRICT COURT: EQUITABLE MOOTNESS DOCTRINE DOES NOT PRECLUDE APPELLATE REVIEW OF CHAPTER 11 PLAN EXCULPATION CLAUSE

Dan B. Prieto • Mark G. Douglas

Exculpation clauses limiting the liability of certain entities for actions taken in connection with a bankruptcy case are a common feature of chapter 11 plans. However, courts disagree over the permitted scope of such clauses. They also disagree as to whether an order confirming a chapter 11 plan that includes exculpation and third-party release provisions is insulated from appellate review under the doctrine of "equitable mootness."

The U.S. District Court for the Southern District of Texas addressed both of these questions in *Bouchard v. Bouchard Transportation Co. (In re Bouchard Transportation Co.)*, 2023 WL 1797907 (S.D. Tex. Feb. 7, 2023). The district court reversed and remanded a bankruptcy court order confirming a chapter 11 plan that included an overbroad exculpation provision, even though the order was not stayed pending appeal, the plan had been substantially consummated, and the plan included a nonseverability provision precluding removal or modification of the exculpation provision. Based on Fifth Circuit precedent, the district court held that, to safeguard the integrity of the chapter 11 process, the doctrine of equitable mootness cannot bar appellate review of an order confirming a plan that contains an impermissibly broad exculpation provision.

VALIDITY OF THIRD-PARTY RELEASES AND EXCULPATION CLAUSES

Section 524(e) of the Bankruptcy Code provides that, "[e]xcept as provided in subsection (a)(3) of this section [making the discharge injunction applicable to actions to collect against community property], discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt." Even so, chapter 11 plans confirmed by bankruptcy courts in certain circuits commonly include provisions that either release or exculpate various non-debtors from certain liabilities.

Such releases can provide for the relinquishment of both prepetition and postpetition claims belonging to the debtor or non-debtor third parties (e.g., creditors or shareholders) against various non-debtors.

Exculpation clauses, by contrast, typically specify the scope of, or the standard of care (e.g., ordinary negligence, gross negligence, or willful misconduct) governing, an exculpated party's liability for conduct during the course of the bankruptcy case. *See In re Aegean Marine Petroleum Network Inc.,* 599 B.R. 717, 721 (Bankr. S.D.N.Y. 2019) (noting that "an appropriate exculpation provision should say that it bars claims against the exculpated parties based on the negotiation, execution, and implementation of agreements and transactions that were approved by the Court"); *In re Murray Metallurgical Coal Holdings, LLC*, 623 B.R. 444, 501 (Bankr. S.D. Ohio 2021); *see also Blixseth v. Credit Suisse*, 961 F.3d 1074, 1084 (9th Cir. 2020) (distinguishing releases and exculpation clauses), *cert. denied*, 141 S.Ct. 1394 (2021). Exculpation clauses typically insulate estate fiduciaries, including officers, directors, and employees of the debtors and the reorganized debtors, as well as advisers and professionals retained by the estate, from most claims arising from their conduct during the chapter 11 case. *See, e.g., In re PWS Holding Corp.*, 228 F.3d 224, 246 (3d Cir. 2000).

Although it is generally accepted that a chapter 11 plan can release non-debtors from claims of other non-debtor third parties if the release is consensual, courts disagree over whether a bankruptcy court has the authority—either constitutionally or under the Bankruptcy Code—to approve such releases over the objections of creditors or other stakeholders as part of a chapter 11 plan in a non-asbestos bankruptcy case. *See* 11 U.S.C. § 524(g) (providing for the creation of a trust to fund the payment of claims and the issuance of a channeling injunction in asbestos chapter 11 cases); *see generally* Collier on Bankruptcy ¶ 524.05 (16th ed. 2023) (discussing cases and noting that "Courts have disagreed over whether section 524(e) prohibits a provision of a confirmed plan under chapter 11 or under any of the other rehabilitation chapters that provides for releases for third parties (that is, parties other than the debtor)").

The circuit courts of appeals disagree over whether nonconsensual third-party releases and exculpation provisions are barred by section 524(e). The minority view, held by the Fifth and Tenth Circuits, is that such provisions are categorically precluded by section 524(e) absent express authority in another provision of the Bankruptcy Code (e.g., 11 U.S.C. § 1103(c), which has been interpreted to limit the liability of members of official committees to liability for willful misconduct or *ultra vires* acts). *See Bank of N.Y. Trust Co. v. Official Unsecured Creditors' Comm. (In re Pacific Lumber Co.),* 584 F.3d 229 (5th Cir. 2009); *Landsing Diversified Props. v. First Nat'l Bank & Tr. Co. of Tulsa (In re W. Real Estate Fund, Inc.)*, 922 F.2d 592 (10th Cir. 1990). By contrast, the Second, Third, Fourth, Sixth, Seventh, Ninth, and Eleventh Circuits read section 524(e) to allow varying degrees of limited third-party releases and exculpations. *See In re Metromedia Fiber Network, Inc.,* 416 F.3d 136, 143 (2d Cir. 2005); *PWS Holding*, 228 F.3d at 245–46; *In re A.H. Robins Co.*, 880 F.2d 694, 702 (4th Cir. 1989); *In re Dow Corning Corp.*, 280 F.3d 648, 658 (6th Cir. 2002); *In re Airadigm Commc'ns., Inc.,* 519 F.3d 640, 657 (7th Cir. 2008); *Blixseth*, 961 F.3d at 1084; *In re Seaside Eng'g & Surveying, Inc.,* 780 F.3d 1070, 1078 (11th Cir. 2015).

In *Blixseth*, the Ninth Circuit held that nothing in the Bankruptcy Code—including section 524(e)—precludes plan exculpation clauses, and that such clauses may be approved under sections 105(a), which gives a bankruptcy court the power to "issue any order, process, or judgment necessary or appropriate to carry out the provisions of [the Bankruptcy Code]," and 1123(b)(6), which provides that a chapter 11 plan may "include any other appropriate provision not inconsistent with the applicable provisions of [the Bankruptcy Code]."

In so ruling, the court wrote:

> Section 524(e) establishes that "discharge of a debt of the debtor does not affect the liability of any other entity on … such debt." … In other words, "the discharge in no way affects the liability of any other entity … for the discharged debt."… By its terms, § 524(e) prevents a bankruptcy court from extinguishing claims of creditors against non-debtors over the very debt discharged through the bankruptcy proceedings.
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> A bankruptcy discharge thus protects the debtor from efforts to collect the debtor's discharged debt indirectly and outside of the bankruptcy proceedings; it does not, however, absolve a non-debtor's liabilities for that same "such" debt.

Blixseth, 961 F.3d at 1082–83 (citations omitted); *accord PWS Holding*, 228 F.3d at 245–46.

EQUITABLE MOOTNESS

"Mootness" is a doctrine that precludes a reviewing court from reaching the underlying merits of a controversy. An appeal can be either constitutionally, statutorily, or equitably moot. Constitutional mootness is derived from Article III of the U.S. Constitution, which limits the jurisdiction of federal courts to actual cases or controversies and, in furtherance of the goal of conserving judicial resources, precludes adjudication of cases that are hypothetical or merely advisory.

An appeal can also be rendered moot (or otherwise foreclosed) by statute. For example, section 363(m) of the Bankruptcy Code provides that, absent a stay pending appeal, "[t]he reversal or modification on appeal of an authorization … of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith."

The court-fashioned remedy of "equitable mootness" bars adjudication of an appeal when a comprehensive change of circumstances has occurred such that it would be inequitable for a reviewing court to address the merits of the appeal. In bankruptcy cases, appellees often invoke equitable mootness as a basis for precluding appellate review of an order confirming a chapter 11 plan.

The doctrine of equitable mootness is sometimes criticized as an abrogation of federal courts' "virtually unflagging obligation" to hear appeals within their jurisdiction. *See In re One2One Commc'ns, LLC*, 805 F.3d 428, 433 (3d Cir. 2015); *In re Charter Commc'ns, Inc.*, 691 F.3d 476, 481 (2d Cir. 2012). According to this view, dismissing an appeal on equitable mootness grounds "should be the rare exception." *In re Tribune Media Co.*, 799 F.3d 272, 288 (3d Cir. 2015); *accord Pacific Lumber*, 584 F.3d at 240 (equitable mootness should be applied "with a scalpel rather than an axe").

Substantially similar tests have been applied by most circuit courts in assessing whether an appeal of a chapter 11 confirmation order should be dismissed under equitable mootness. Those tests generally focus on whether the appellate court can fashion effective and equitable relief. *See, e.g., PPUC Pa. Pub. Util. Comm'n v. Gangi*, 874 F.3d 33, 37 (1st Cir. 2017) (considering whether: (i) the appellant diligently pursued all available remedies to obtain a stay of the confirmation order; (ii) the challenged chapter 11 plan had progressed "to a point well beyond any practicable appellate annulment"; and (iii) providing relief would harm innocent third parties); *JPMCC 2007-C1 Grasslawn Lodging, LLC v. Transwest Resort Props., Inc. (In re Transwest Resort Props., Inc.)*, 801 F.3d 1161, 1167–68 (9th Cir. 2015) (applying a four-factor test, including whether the court "can fashion effective and equitable relief without completely knocking the props out from under the plan and thereby creating an uncontrollable situation for the bankruptcy court"); *In re Tribune Media Co.,* 799 F.3d 272, 278 (3d Cir. 2015) (considering: "(1) whether a confirmed plan has been substantially consummated; and (2) if so, whether granting the relief requested in the appeal will (a) fatally scramble the plan and/or (b) significantly harm third parties who have justifiably relied on plan confirmation"); *Search Market Direct, Inc. v. Jubber (In re Paige)*, 584 F.3d 1327, 1339 (10th Cir. 2009) (applying a six-factor test, including the likely impact upon a successful reorganization of the debtor if the appellant's challenge is successful); *In re United Producers, Inc.*, 526 F.3d 942, 947–48 (6th Cir. 2008) (three-factor test); *TNB Fin., Inc. v. James F. Parker Interests (In re Grimland, Inc.)*, 243 F.3d 228, 231 (5th Cir. 2001) (same); *see also In re Fin. Oversight & Mgmt. Bd. for Puerto Rico*, 2021 WL 438891, **6-7 (1st Cir. Feb. 8, 2021) (holding that the doctrine of equitable mootness was not abrogated by the U.S. Supreme Court's ruling in *Mission Product Holdings, Inc. v. Tempnology, LLC*, 139 S. Ct. 1652 (2019), and that the doctrine applied to dismiss an appeal of an order approving a plan in a proceeding under the Puerto Rico Oversight, Management, and Economic Stability Act).

A common element of almost all of these tests is whether the chapter 11 plan has been substantially consummated. Section 1101(2) of the Bankruptcy Code provides that "substantial consummation" of a chapter 11 plan occurs when substantially all property transfers proposed by the plan have been completed, the debtor or its successor has assumed control of the debtor's business and property, and plan distributions have commenced.

EQUITABLE MOOTNESS AS A BAR TO APPELLATE REVIEW OF EXCULPATION PROVISIONS?

In *Pacific Lumber*, the Fifth Circuit held that the doctrine of equitable mootness did not preclude appellate review of an unstayed order confirming a substantially consummated chapter 11 plan that contained third-party releases and exculpation clauses. In so ruling, the Fifth Circuit stated as follows:

> In short, the goal of finality sought in equitable mootness analysis does not outweigh a court's duty to protect the integrity of the process. We see little equitable about protecting the released non-debtors from negligence suits arising out of the reorganization. In a variety of contexts, this court has held that Section 524(e) only releases the debtor, not co-liable third parties…. These cases seem broadly to foreclose non-consensual non-debtor releases and permanent injunctions.
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> There are no allegations in this record that [the third parties] were jointly liable for any of [the debtors'] pre-petition debt. They are not guarantors or sureties, nor are they insurers. Instead, the essential function of the exculpation clause proposed here is to absolve the released parties from any negligent conduct that occurred during the course of the bankruptcy. The fresh start § 524(e) provides to debtors is not intended to serve this purpose.

Pacific Lumber, 584 F.3d at 252–53 (citations and footnote omitted).

The Fifth Circuit revisited the issue in *NexPoint Advisors L.P. v. Highland Capital Management*, 48 F.4th 419 (5th Cir. 2022), *petition for cert. filed*, No. 22-631 (U.S. Jan. 5, 2023), *on remand*, 2023 WL 2250145 (Bankr. N.D. Tex. Feb. 27, 2023). The court of appeals held that: (i) although the Fifth Circuit categorically bars non-debtor releases, a chapter 11 plan may give the bankruptcy court a "gatekeeper" function to approve or disapprove litigation against entities that would be protected by exculpations in other circuits; and (ii) overbroad exculpations and non-debtor releases cannot escape appellate review under the doctrine of equitable mootness even if the chapter 11 plan containing such releases and exculpations has been substantially consummated and the party challenging the provisions failed to obtain a stay pending appeal of the plan confirmation order. *Id.* at 439-40.

In so ruling, the Fifth Circuit wrote that "equity strongly supports appellate review of issues consequential to the integrity and transparency of the Chapter 11 process" and "the goal of finality sought in equitable mootness analysis does not outweigh a court's duty to protect the integrity of the process." *Id.* at 431 (quoting *Pacific Lumber*, 584 F.3d at 252).

The Fifth Circuit rejected arguments that exculpations could be authorized under sections 105(a) and 1123(b)(6) of the Bankruptcy Code. According to the court, "in this circuit, § 105(a) provides no statutory basis for a nondebtor exculpation … [a]nd the same logic extends to § 1123(b)(6)." *Id.* at 437.

The Fifth Circuit acknowledged the circuit split as to whether third parties may be exculpated, but emphasized that "[the Fifth Circuit] along with the Tenth Circuit hold § 524(e) categorically bars third-party exculpations absent express authority in another provision of the Bankruptcy Code." The Fifth Circuit then ruled that the exculpation provision before it could extend only to the debtor and related entities, the unsecured creditors' committee and its members, and the debtor's independent directors "for conduct within the scope of their duties." *Id.* at 438.

On remand, the bankruptcy court granted the debtor's motion to alter the exculpation provisions in its chapter 11 plan in accordance with the Fifth Circuit's decision.

Other courts have similarly concluded that the doctrine of equitable mootness should not prevent appellate review of chapter 11 plan release or exculpation provisions under certain circumstances. *See, e.g., PWS Holding*, 228 F.3d at 236 (ruling that an appeal of an order confirming a substantially consummated chapter 11 plan was not equitably moot because at least some of the plan's release and exculpation provisions could be removed without threatening the success of the reorganization). *But see In re Millennium Lab Holdings II, LLC.*, 945 F.3d 126, 144 (3d Cir. 2019) (equitable mootness barred appellate review of plan confirmation order where removal of challenged releases would "fatally scramble the plan and/or harm third parties").

BOUCHARD

Bouchard Transportation Co., Inc. ("BTC") and its affiliates (collectively, the "debtors") provided oil and petroleum transportation services in the United States. In September 2020, the financial impact of the pandemic forced the debtors to file for chapter 11 protection in the Southern District of Texas.

BTC's CEO, Morton Bouchard, had loaned the company more than $40 million before the bankruptcy filing. He continued to serve as CEO and sole officer of BTC during the first five months of the chapter 11 case but was supplanted in that role by a chief restructuring officer in February 2021 after the bankruptcy court found that Bouchard had impeded the chapter 11 process.

The debtors filed a proposed chapter 11 plan in August 2021. The plan provided that the debtors, the plan administrator, the post-effective date debtor, the creditors' committee, each member of the creditor's committee, and various related entities (including certain unnamed trustees) were:

> released and exculpated from any Cause of Action for any claim related to any act or omission in connection with, relating to, or arising out of, the formulation, preparation, dissemination, negotiation, entry into, or filing of, as applicable, the Chapter 11 Cases, the Disclosure Statement, the Plan … or any Plan Transaction, contract, instrument, release, or other agreement or document created or entered into in connection with the Disclosure Statement or the Plan, the filing of the Chapter 11 Cases, the pursuit of Confirmation, the pursuit of Consummation, the administration and implementation of the Plan, including the distribution of property under the Plan or any other related act or omission, transaction, agreement, event, or other occurrence taking place on or before the Case Effective Date … , except for claims related to any act or omission that is determined in a Final Order of a court of competent jurisdiction to have constituted actual fraud, willful misconduct, or gross negligence, but in all respects such Entities shall be entitled to reasonably rely upon the advice of counsel with respect to their duties and responsibilities pursuant to the Plan.

The plan also included an injunction to enforce the exculpation provision by prohibiting litigation against the exculpated parties.

Finally, the plan included a nonseverability clause, which provided in relevant part as follows:

> Except as set forth in Article X of the Plan, the provisions of the Plan, including its release, injunction, exculpation and compromise provisions, are mutually dependent and non-severable. The Confirmation Order shall constitute a judicial determination and shall provide that each term and provision of the Plan is: (1) valid and enforceable pursuant to its terms; (2) integral to the Plan and may not be deleted or modified without the consent of the Debtors; and (3) non-severable and mutually dependent ….

Bouchard objected to the plan's exculpation provision and related injunction, arguing that the exculpation clause was too broad and should be limited to the debtors, the creditors' committee and its members, and the unnamed trustees, for conduct within the scope of their duties in the bankruptcy, rather than including non-debtors and other third parties and entities.

The bankruptcy court confirmed the debtors' plan over Bouchard's objections. Bouchard appealed the confirmation order to the U.S. District Court for the Northern District of Texas. He did not seek a stay of the plan confirmation order, and the debtors' plan was substantially consummated before the district court could rule on the appeal.

On appeal, the debtors argued that the appeal was equitably moot due to substantial consummation of the plan and the plan's nonseverability provision. Bouchard argued to the contrary, claiming that, notwithstanding the plan's nonseverability provision, the overbroad exculpation clause should be modified.

THE DISTRICT COURT'S RULING

The district court ruled that: (i) the doctrine of equitable mootness did not preclude appellate review and modification of the exculpation clause; and (ii) the exculpation clause was overbroad under governing Fifth Circuit law.

Initially, U.S. District Court Judge Lee H. Rosenthal explained that Bouchard's failure to obtain a stay pending appeal and substantial consummation of the plan favored the debtors' argument that the appeal was equitably moot.

However, Judge Rosenthal noted, the Fifth Circuit's decisions in both *Pacific Lumber* and *Highland*—which was handed down after Bouchard filed his appeal—strongly supported Bouchard's argument that the order confirming the debtors' plan was not insulated under the doctrine of equitable mootness from an appellate challenge to the allegedly overbroad scope of the plan's exculpation provision.

Evaluating the exculpation provision on the merits, Judge Rosenthal noted that the Fifth Circuit in *Highland* rejected the same arguments that the debtors made in this case regarding sections 105(a) and 1123(b)(6) as authority for the plan's exculpation provisions.

Judge Rosenthal also rejected the debtor's contention that "this appeal remains equitably moot in light of the Non-Severability Provision in the Plan here, which distinguishes this case from both *Highland* and *Pacific Lumber*." First, the judge explained, although neither decision noted the existence of a nonseverability provision in the plans under consideration, the publicly available record in *Highland* revealed that the plan confirmed in that case contained such a provision. Second, Judge Rosenthal emphasized, despite disagreement among other circuits on this point, "*Highland* drew a bright-line rule: 'In sum, [Fifth Circuit precedent and § 524(e) require an exculpation in a Chapter 11 reorganization plan be limited to the debtor, the creditors› committee and its members for conduct within the scope of their duties and the trustees within the scope of their duties.'" *Bouchard*, 2023 WL 1797907, at *3 (quoting *Highland*, 48 F.4th at 438).

The district court accordingly reversed the plan confirmation order to the extent that it approved the overly broad exculpation and injunction provisions and remanded the case to the bankruptcy court with instructions to modify the plan.

OUTLOOK

In accordance with *Highland* and *Pacific Lumbe*r, the district court in *Bouchard* reaffirmed that an order confirming a chapter 11 plan that includes an allegedly overbroad exculpation provision cannot escape appellate review under the doctrine of equitable mootness, even if the plan includes a nonseverability clause prohibiting removal or modification of the provision. According to the district court, Fifth Circuit precedent dictates that the finality sought by applying equitable mootness to bar appellate review of substantially consummated plans does not trump a court's obligation to safeguard the integrity of the process. In addition, although it did not state as much in its opinion, the bankruptcy court appeared to take the view that modification of the exculpation provision would unravel neither the debtors' plan nor their prospects for a successful reorganization.

The U.S. Supreme Court may weigh in on this issue later this year in *Highland*. Until then, *Bouchard* illustrates that the particular approach on equitable mootness adopted by the bankruptcy and appellate courts in every circuit may significantly affect the outcome of plan confirmation appeals.

CHAPTER 15 RECOGNITION ORDER AND RELIEF COULD BE MODIFIED AFTER CONVERSION OF FOREIGN DEBTOR'S REORGANIZATION TO LIQUIDATION

Corinne Ball • Dan T. Moss • Michael C. Schneidereit • Isel M. Perez • Mark G. Douglas

Corporate restructurings are not always successful for many reasons. As a consequence, the bankruptcy and restructuring laws of the United States and many other countries recognize that a failed restructuring may be followed by a liquidation or winding-up of the company, either through the commencement of a separate liquidation or winding-up proceeding, or by the conversion of the restructuring to a liquidation. Chapter 15 of the Bankruptcy Code expressly contemplates that the status of a recognized foreign proceeding may change, and that a U.S. bankruptcy court presiding over a chapter 15 case has the power and flexibility to modify relief granted to a foreign representative as part of a chapter 15 case to account for such changed circumstances.

This concept was central to an unpublished ruling recently handed down by the U.S. Bankruptcy Court for the Southern District of New York. In *In re Comair Ltd.*, 2023 WL 1971618 (Bankr. S.D.N.Y. Feb. 12, 2023), a debtor's South African "rescue proceeding" was converted to a liquidation, and the debtor's "rescue practitioners" were replaced with provisional liquidators. The liquidators then petitioned a U.S. bankruptcy court that had previously recognized the rescue proceeding under chapter 15 to amend the recognition order to recognize the liquidation, and to substitute them as the debtor's foreign representatives. The bankruptcy court granted the motion, ruling that: (i) no new chapter 15 case was necessary because the liquidation and the terminated rescue proceeding were "parts of one foreign proceeding" for purposes of chapter 15; and (ii) the provisional liquidators could be substituted for the rescue practitioners as the debtor's foreign representatives in the chapter 15 case.

RECOGNITION OF FOREIGN BANKRUPTCY CASES UNDER CHAPTER 15

Chapter 15 was enacted in 2005 to govern cross-border bankruptcy and insolvency proceedings. It is patterned on the 1997 UNCITRAL Model Law on Cross-Border Insolvency (the "Model Law"), which has been enacted in some form by more than 50 countries.

Both chapter 15 and the Model Law are premised upon the principle of international comity, or "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens

or of other persons who are under the protection of its laws." *Hilton v. Guyot*, 159 U.S. 113, 164 (1895). Chapter 15's stated purpose is "to provide effective mechanisms for dealing with cases of cross-border insolvency" with the objective of, among other things, cooperation between U.S. and non-U.S. courts.

Under section 1515 of the Bankruptcy Code, the representative of a foreign debtor may file a petition in a U.S. bankruptcy court seeking "recognition" of a "foreign proceeding." Section 101(24) of the Bankruptcy Code defines "foreign representative" as "a person or body, including a person or body appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of such foreign proceeding."

The basic requirements for recognition under chapter 15 are outlined in section 1517(a), namely: (i) the proceeding must be "a foreign main proceeding or foreign nonmain proceeding" within the meaning of section 1502; (ii) the "foreign representative" applying for recognition must be a "person or body"; and (iii) the petition must satisfy the requirements of section 1515, including that it be supported by the documentary evidence specified in section 1515(b).

"Foreign proceeding" is defined in section 101(23) of the Bankruptcy Code as:

> [A] collective judicial or administrative proceeding in a foreign country, including an interim proceeding, under a law relating to insolvency or adjustment of debt in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation.

A "collective proceeding" is a proceeding that considers the rights and obligations of creditors generally, rather than a proceeding instituted for the benefit of a single creditor or class of creditors. *See Armada (Singapore) Pte Ltd. (In re Ashapura Minechem Ltd.)*, 480 B.R. 129, 136 (S.D.N.Y. 2012); *In re British Am. Ins. Co.*, 425 B.R. 884, 902 (Bankr. S.D. Fla. 2010); *In re Betcorp Ltd.*, 400 B.R. 266, 281 (Bankr. D. Nev. 2009).

Such a proceeding "contemplates the consideration and eventual treatment of claims of various types of creditors, as well as the possibility that creditors may take part in the foreign action." *British American*, 425 B.R. at 902. A collective proceeding is "designed to provide equitable treatment to creditors, by treating similarly situated creditors in the same way, and to maximize the value of the debtor's assets for the benefit of all creditors." *Ashapura*, 480 B.R. at 136-37 (citation omitted). Other hallmarks of a collective proceeding include adequate notice to creditors, provisions for the distribution of assets in accordance with statutory priorities, and a mechanism for creditors to seek court review of developments. *Id.* at 137; *In re ABC Learning Centers Ltd.*, 445 B.R. 318, 328-29 (Bankr. D. Del. 2010); *British American*, 425 B.R. at 902.

More than one bankruptcy or insolvency proceeding may be pending with respect to the same foreign debtor in different countries. Chapter 15 therefore contemplates recognition in the United States of both a foreign "main" proceeding—a case pending in the country where the debtor's center of main interests ("COMI") is located (*see* 11 U.S.C. § 1502(4))—and foreign "nonmain" proceedings, which may be pending in countries where the debtor merely has an "establishment" (*see* 11 U.S.C. § 1502(5)). A debtor's COMI is presumed to be the location of the debtor's registered office, or habitual residence in the case of an individual. *See* 11 U.S.C. § 1516(c).

An "establishment" is defined by section 1502(2) as "any place of operations where the debtor carries out a nontransitory economic activity." Unlike with the determination of COMI, there is no statutory presumption regarding the determination of whether a foreign debtor has an establishment in any particular location. *See British American*, 425 B.R. at 91.

Pending its decision to grant or withhold recognition, the bankruptcy court, upon the request of a foreign representative, is authorized by section 1519 of the Bankruptcy Code to grant certain forms of provisional relief.

After recognition of a foreign proceeding, section 1521(a) authorizes the bankruptcy court, upon the request of the foreign representative, to grant a broad range of relief designed to preserve the foreign debtor's assets or otherwise to assist the court or other entity presiding over the debtor's foreign proceeding.

MODIFICATION OR TERMINATION OF CHAPTER 15 RECOGNITION OR OTHER RELIEF

Section 1522(a) of the Bankruptcy Code provides that the bankruptcy court may grant relief under section 1519 or 1521, *or may modify or terminate relief*, but "only if the interests of the creditors and other interested entities, including the debtor, are sufficiently protected."

Under section 1522(c), "[t]he court may, at the request of a foreign representative or an entity affected by relief granted under section 1519 or 1521, or at its own motion, modify or terminate such relief."

Section 1506 of the Bankruptcy Code sets forth a public policy exception to the relief otherwise authorized in chapter 15, providing 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."

Section 1517(d) provides that "[t]he provisions of this chapter do not prevent modification or termination of recognition if it is shown that the grounds for granting it were fully or partially lacking or have ceased to exist," but before doing so, the court must "give due weight to possible prejudice to parties that have relied upon the order granting recognition." Section 1517(d) further provides that a chapter 15 case may be closed in the manner specified in section 350. Rule 5009(c) of the Federal Rules of Bankruptcy Procedure sets forth the requirements for closing a chapter 15 case after the foreign representative has filed a report detailing the results of his or her activities and stating that the case has been fully administered.

Relief under section 1517(d) is discretionary. *See In re Loy*, 448 B.R. 420, 438 (Bankr. E.D. Va. 2011) ("The actual language dictates that the subchapter's provisions 'do not prevent modification or termination,' which indicates that, although revisiting a recognition determination is not mandatory, it is within the Court's discretion to do so."). However, the provision limits the court's exercise of such discretion to cases where either: (i) the basis for recognition was flawed in some way; or (ii) the grounds for recognition have ceased to exist. *See In re Cozumel Caribe, S.A. de C.V.*, 482 B.R. 96, 107 (Bankr. S.D.N.Y. 2012).

Section 1517(d) was patterned on Article 17(4) of the Model Law, which provides that "[t]he provisions of articles 15, 16, 17 and 18 [governing recognition of a foreign proceeding] do not prevent modification or termination of recognition if it is shown that the grounds for granting it were fully or partially lacking or have ceased to exist." Model Law Art. 17(4); *see also In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.*, 389 B.R. 325, 332 (S.,D.N.Y. 2008) (noting that the legislative history of section 1517(d) confirms that the provision "closely tracks article 17 of the Model Law, with a few exceptions").

Additional guidance regarding the meaning and application of section 1517(d) can be found in UNCITRAL's Guide to the Enactment and Interpretation of the Model Law, which provides that:

> Modification or termination of the recognition decision may be a consequence of a change of circumstances after the decision on recognition, for instance, if the recognized foreign proceeding has been terminated or its nature has changed (*e.g.* a reorganization proceeding might be converted into a liquidation proceeding) or if the status of the foreign representative's appointment has changed or the appointment has been terminated.

See U.N. Comm'n on Int'l Trade. L., UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation (2014) § 165 (the "UNCITRAL Guide").

As noted by the bankruptcy court in *In re Oi Brasil Holdings Coöperatief U.A.*, 578 B.R. 169 (Bankr. S.D.N.Y. 2017), *appeal dismissed*, 2020 WL 605930 (S.D.N.Y. Feb. 7, 2018), "[s]ection 1517(d) allow[s] courts to adjust their rulings based on changed circumstances, which exhibit[s] 'a policy that the recognition process remain flexible, taking into account the actual facts relevant to the court's decision rather than setting an arbitrary determination point.'" *Id.* at 203 (quoting *British American,* 425 B.R. at 910); *accord Loy*, 448 B.R. at 440 (stating that "recognition determinations are malleable, and, as facts warrant in a specific case, the court may revisit recognition"); *In re Ernst & Young, Inc.*, 383 B.R. 773, 781 (Bankr. D. Colo. 2008) ("Chapter 15 allows the recognition determination to be modified or terminated in the future.").

To determine whether the grounds for granting chapter 15 recognition "have ceased to exist," the court "must examine what has changed since entry of the [recognition order]." *Oi Brasil*, 578 B.R. at 222. In doing so, the court "may consider new evidence and it

is not limited to considering only the evidence that was or ought to have been available at the time the court granted recognition." *Loy*, 448 B.R. at 439.

Following chapter 15 recognition of a foreign proceeding, the court may dismiss or suspend all proceedings in the case if the interests of all stakeholders would be best served by such relief or "the purposes of chapter 15 … would be best served by such dismissal or suspension." 11 U.S.C. § 305(a); *see also* 11 U.S.C. § 1529(4) (authorizing a bankruptcy court, in attempting to coordinate a chapter 15 case or a foreign proceeding with a case filed under another chapter of the Bankruptcy Code, to "grant any of the relief authorized under section 305").

COMAIR

In May 2020, South African air carrier Comair Limited (the "debtor") commenced a Business Rescue Proceeding (the "Rescue Proceeding") to reorganize its operations in the High Court of South Africa (the "High Court") under the South African Companies Act of 2008. In connection with the filing, the debtor appointed two business rescue practitioners (the "BRPs"). In September 2020, the debtor's creditors approved a Rescue Plan for the debtor.

As the debtor's foreign representatives, the BRPs filed a petition in the U.S. Bankruptcy Court for the Southern District of New York (the "Bankruptcy Court") seeking recognition of the Rescue Proceeding under chapter 15 as a foreign main proceeding. The Bankruptcy Court granted the petition in April 2021. In November 2021, after being informed that the High Court had authorized the BRPs, among other things, to bring litigation on the debtor's behalf, the Bankruptcy Court authorized the BRPs to obtain discovery from an airplane manufacturer (the "Manufacturer") pursuant to section 1521(a)(4) of the Bankruptcy Code in connection with anticipated litigation over allegedly defective aircraft that were promised or delivered to the debtor.

In June 2022, upon being informed by the BRPs that there was no reasonable prospect for the debtor to be rescued, the High Court effectively ended the Rescue Proceeding and placed the debtor into provisional liquidation (the "Liquidation") under the Companies Act No. 61 of 1973 (the "1973 CA") and the Insolvency Act of 1936 (the "Insolvency Act"). Shortly afterward, the High Court appointed joint provisional liquidators for the debtor (the "JPLs").

Under South African law, a provisional liquidation proceeding is an interim proceeding that becomes a final liquidation upon the High Court's entry of a final liquidation order. Until the entry of such an order, the provisional liquidator may propose a "scheme of arrangement" for the debtor (i.e., a court-approved restructuring agreement between the debtor and its creditors).

If the High Court enters a final liquidation order, the court convenes a meeting of creditors, during which creditors can file their claims against the debtor and nominate final liquidators for the debtor. The final liquidators are entrusted with liquidating the debtor's assets and distributing the proceeds to creditors in accordance with statutory priorities. The 1973 CA and the Insolvency Act also give liquidators the power to commence and defend litigation and to take certain other actions on the debtor's behalf.

In July 2022, the JPLs filed a motion with the Bankruptcy Court for an order: (i) modifying the order recognizing the Rescue Proceeding to recognize the Liquidation under chapter 15 as a foreign main proceeding, and recognizing the JPLs as the debtor's foreign representatives; and (ii) substituting the JPLs for the BRPs in all matters pending before the Bankruptcy Court pursuant to Fed. R. Civ. P. 25(c) (made applicable to chapter 15 cases and "contested matters" by Fed. R. Bankr. P. 7025 and 9014(c)).

The Manufacturer objected to the motion. It argued that: (i) the JPLs were attempting to commence a new chapter 15 proceeding "under the guise of a purported 'amendment' to the [recognition order] without even attempting to satisfy the requirements [for recognition] under the Bankruptcy Code or the Bankruptcy Rules"; (ii) because the Rescue Proceeding recognized by the Bankruptcy Court was terminated long before the JPLs filed their motion and the BRPs no longer had any authority to act on the debtor's behalf, the relief that the BRPs had pursued on behalf of the debtor (including obtaining discovery) was also terminated; and (iii) the JPLs failed to demonstrate that the debtor needed chapter 15 relief to protect its business or assets, or to preserve the causes of action in the litigation filed by the JPLs against the Manufacturer on the debtor's behalf in the U.S. District Court for the Western District of Washington in February 2023 (the "Washington Litigation").

The Liquidation was still pending at the time the Bankruptcy Court ruled on the JPLs' motion.

THE BANKRUPTCY COURT'S RULING

The Bankruptcy Court granted the motion.

U.S. Bankruptcy Judge James L. Garrity, Jr. explained that, even though the High Court had entered an order terminating the Rescue Proceeding, the High Court still had jurisdiction over the debtor during the pendency of the Insolvency Proceeding, and "the only change affecting this Chapter 15 Case is that the High Court has authorized a new party to represent [the debtor] in the South African liquidation, thus effecting a change in the foreign representative." He accordingly concluded that there had "been no change in the identity of the foreign proceeding … [because the debtor] is still in an insolvency proceeding in South Africa under the Companies Act." *Comair*, 2023 WL 1971618, at *9. Judge Garrity further noted that the debtor remained under the control of court-appointed fiduciaries, a common practice in the United States and globally, "as insolvency regimes that allow for reorganization must (as a practical matter) include a mechanism for liquidating debtor companies that unsuccessfully attempt such a reorganization." *Id.*

Looking for guidance to the Model Law and the UNCITRAL Guide—which U.S. lawmakers relied on in enacting chapter 15, including section 1517(d) of the Bankruptcy Code—as well as U.S. court decisions interpreting sections 1517(d) and 1522(c), Judge Garrity agreed with the JPLs that there was only a "semantic difference" between the "termination" of a reorganization in favor of a liquidation and the "conversion" of a reorganization into a liquidation. "In either case," he wrote, "the two forms of the insolvency are coterminous—the reorganization ends where the liquidation begins." *Id.* at *11.

According to Judge Garrity, the UNCITRAL Guide specifically contemplates modification or termination of a recognition order "where 'a reorganization might be converted into a liquidation proceeding,' or where 'the status of the foreign representative's appointment has changed.'" *Id.* (quoting UNCITRAL Guide § 165). Moreover, he noted, two other bankruptcy judges in the Southern District of New York had previously modified chapter 15 recognition orders under section 1522(c) due to changes in circumstances, including the conversion of the debtors' "moratorium proceedings" to liquidations and an amendment to applicable foreign law requiring a change in the debtors' foreign representatives. *Id.* at *12 (citing *In re Glitnir Banki HF*, No. 08-14757 (SMB) (Bankr. S.D.N.Y.); *In re Landsbanki Islands HF*, No. 08-14921 (RDD) (Bankr. S.D.N.Y.)).

Judge Garrity accordingly found that the Rescue Proceeding and the Liquidation "are parts of one foreign proceeding" for purposes of chapter 15. *Id.* at *12. He further explained that "[f]undamentally, this case involves a functional transfer of controlling interest in [the debtor] from the BRPs to the JPLs," and even though South African law, unlike U.S. law, administratively creates a new proceeding when the High Court appoints a liquidator, "[t]he deliberately flexible nature of chapter 15 is designed to accommodate exactly this kind of minor administrative difference among international insolvency proceedings." *Id.* at *14 (citing *Oi Brasil,* 578 B.R. at 203).

Judge Garrity also concluded that, as the successors to the BRPs, the JPLs "are equally entitled to engage in discovery for the furtherance of [the debtor's] economic interests." *Id.* (citing *Advanced Mktg. Grp., Inc. v. Bus. Payment Sys.*, LLC, 269 F.R.D. 355, 359 (S.D.N.Y. 2010)).

Next, despite finding that the Rescue Proceeding and the Liquidation were parts of one proceeding, Judge Garrity ruled that the Liquidation itself was entitled to chapter 15 recognition as a foreign main proceeding. Among other things, he found that: (i) the Liquidation was a collective judicial proceeding governed by the 1973 CA and the Insolvency Act, which are laws relating to the adjustment of debt; (ii) the Liquidation was a collective proceeding because all creditor claims would be resolved in accordance with those laws; (iii) the Liquidation was a foreign proceeding for the purpose of reorganization or liquidation within the meaning of section 101(23) of the Bankruptcy Code; (iv) the debtor's COMI was in South Africa, where the Liquidation was pending; (v) the JPLs qualified as the debtor's foreign representatives within the meaning of section 101(24) of the Bankruptcy Code; and (vi) the JPLs had submitted all the necessary documentation regarding the Liquidation and their appointment as the debtor's foreign representatives.

In addition, Judge Garrity concluded that the Manufacturer did not identify any public policy considerations that would warrant denial of recognition of the Liquidation in accordance with section 1506 of the Bankruptcy Code. He also ruled that the JPLs, as the BRPs' successors-in-interest, should be substituted for the BRPs as parties in the debtor's chapter 15 case, including for purposes of seeking discovery from the Manufacturer in the Washington Litigation, pursuant to Fed. R. Civ. P. 25. *Id.* at *19 (citing *In re Stanford Int'l Bank Ltd.*, 2012 WL 13093940 (N.D. Tex. July 30, 2012) (applying Rule 25(c) to substitute a successor foreign representative for the debtor's original foreign representative)).

Finally, Judge Garrity rejected the Manufacturer's argument that, because Fed. R. Bankr. P. 5009(c) obligates a foreign representative to file a final report with the bankruptcy court when the "purpose of the representative's appearance in the court is completed," the BRPs, whose roles were "indisputably complete," were required to file such a report, after which the chapter 15 case should be dismissed. Judge Garrity declined to direct that the BRPs file such a report, finding that "the undisputed facts in the record do not support a conclusion that the Debtor's Chapter 15 Case is fully administered." *Id.* at *22.

OUTLOOK

The bankruptcy and restructuring laws of the United States and many other countries contemplate that a debtor's reorganization or restructuring proceeding may be converted to a winding-up or liquidation proceeding if the debtor cannot be restructured due to, among other things, changes in business circumstances or the debtor's inability to propose a restructuring plan that can be approved by creditors and the court. The key takeaway from *Comair* is that chapter 15, like the Model Law, was specifically designed so that courts have the power to tailor or modify relief granted in recognizing a foreign proceeding or in providing assistance to a foreign representative in response to such changed circumstances.

Fundamentally, the bankruptcy court in *Comair* deemed the Manufacturer's argument that a new chapter 15 petition was required to obtain recognition of what amounted to a converted restructuring case a waste of resources—for both the debtors and the courts—that would have been inconsistent with chapter 15's purpose in facilitating cross-border bankruptcy cases. The court also appeared to be skeptical of the Manufacturer's efforts to ward off or delay the foreign representatives' efforts to obtain discovery in the pending Washington litigation.

FIFTH CIRCUIT: *BARTON* DOCTRINE PRECLUDED LITIGATION BY CHAPTER 7 DEBTOR AGAINST BANKRUPTCY TRUSTEE AND COUNSEL

T. Daniel Reynolds • Nick Buchta • Mark G. Douglas

To shield bankruptcy trustees and certain other entities from litigation arising from actions taken in their official capacity, the "*Barton* doctrine"—now more than a century old—provides that such litigation may be commenced only with the authority of the appointing court. The doctrine has certain exceptions, one of which—the "*ultra vires* exception"—was recently examined by the U.S. Court of Appeals for the Fifth Circuit as an apparent matter of first impression.

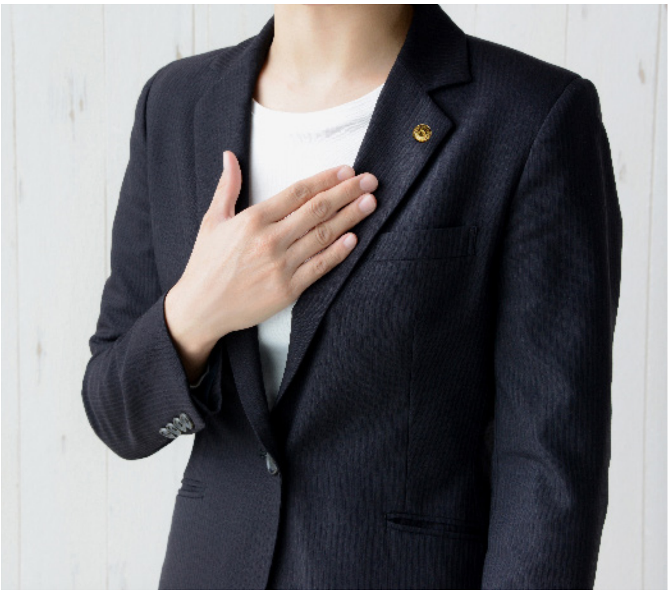
In *Matter of Foster*, 2023 WL 20872 (5th Cir. Jan. 3, 2023), the Fifth Circuit, in a nonprecedential opinion, affirmed lower court rulings dismissing litigation brought by an individual debtor after her chapter 7 case was closed against her chapter 7 trustee and her lawyers without the bankruptcy court's permission. According to the Fifth Circuit (and the lower courts), all of the actions about which the debtor complained were performed in furtherance of the defendants' statutory or court-approved duties. In so ruling, the Fifth Circuit distanced itself from certain other courts that have concluded that the *Barton* doctrine's qualified immunity from suit expires when a bankruptcy case has been closed.

THE *BARTON* DOCTRINE

Named for the decision in *Barton v. Barbour*, 104 U.S. 126 (1881), the *Barton* doctrine requires that "leave of the appointing forum must be obtained by any party wishing to institute an action in a non-appointing forum against a trustee for the acts done in the trustee's official capacity and within the trustee's authority as an officer of the court." *ACE Insurance Co., Ltd. v. Smith (In re BCE West, L.P.)*, 2006 WL 8422206, *2 (D. Ariz. Sept. 20, 2006) (quoting *In re DeLorean Motor Co.*, 991 F.2d 1236, 1240 (6th Cir. 1993)).

Although originally applicable to litigation against receivers, the doctrine has long been applied to bankruptcy trustees as well. *See Lebovits v. Scheffel (In re Lehal Realty Assocs.)*, 101 F.3d 272, 276 (2d Cir. 1996)) (describing the "well-recognized line of cases" extending the *Barton* doctrine to bankruptcy trustees, and its application in the post-receivership context); *accord In re VistaCare Grp.*, LLC, 678 F.3d 218, 224 (3d Cir. 2012) (citing cases).

"In addition to protecting a court-appointed receiver from personal liability, the *Barton* doctrine is intended to protect the receivership court's 'overriding interest in [the] administration of the estate.'" *McIntire v. China MediaExpress Holdings, Inc.*, 113 F.Supp.3d 769, 773 (S.D.N.Y. 2015) (citation omitted); *see also In re Qimonda AG*, 482 B.R. 879, 896 (Bankr. E.D. Va. 2012) ("[T]he Court serves as a gatekeeper under the *Barton* doctrine, protecting its appointed professionals from frivolous lawsuits that would interfere with the administration of the estate."). The doctrine can also



serve to "centralize bankruptcy litigation" and "keep a watchful eye" on court-appointed officers. *In re Yellowstone Mountain Club, LLC*, 841 F.3d 1090, 1094 (9th Cir. 2016) (citation omitted).

The *Barton* doctrine has been applied to bar litigation against not only receivers and bankruptcy trustees but also lawsuits against other persons or entities acting as the "functional equivalent," including members of an official unsecured creditor's committee, trustee's counsel, officers appointed by a trustee and approved by the bankruptcy court to sell estate assets, other professionals retained by a trustee to assist in discharging the trustee's duties and creditors who financed the trustee's efforts, and trustees of litigation or other trusts established pursuant to a chapter 11 plan. *See*, *e.g.*, *In re Cir. City Stores, Inc.*, 557 B.R. 443, 447 (Bankr. E.D. Va. 2016) (observing that the *Barton* doctrine has long applied to other types of court-appointed parties in bankruptcy, including liquidating trusts, trustees, and counsel for trustees, with the purpose being to "prevent trustees from being subject to legal proceedings that interfere with their ability to administer the estate"); *see generally* Collier on Bankruptcy ¶ 10.01 (16th ed. 2023) (citing and discussing cases).

There are two recognized exceptions to the *Barton* doctrine—the "business exception" and the "*ultra vires* exception." The first is based on 28 U.S.C. § 959(a), which provides in relevant part that "[t]rustees, receivers or managers of any property, including debtors in possession, may be sued, without leave of the court appointing them, with respect to any of their acts or transactions in carrying on business connected with such property."

The *ultra vires* exception applies when a trustee's actions exceed the bounds of his or her official duties. *See In re Ondova Ltd. Co.*, 914 F.3d 990, 993 (5th Cir. 2019); *In re Christensen*, 598 B.R. 658, 665 (Bankr. D. Utah 2019); *Phoenician Mediterranean Villa, LLC v. Swope (In re J & S Props., LLC)*, 545 B.R. 91, 105 (Bankr. W.D. Pa. 2015). A typical example is litigation against a receiver who seizes or otherwise attempts to administer property that is not receivership property, but actually belongs to a third party. *See In re DMW Marine, LLC*, 509 B.R. 497, 506 (Bankr. E.D. Pa. 2014) (citations omitted).

Generally, the *ultra vires* exception is narrowly applied. For example, the Sixth Circuit has held that the exception applies only "to the actual wrongful seizure of property by a trustee." *In re McKenzie*, 716 F.3d 404, 415 (6th Cir. 2013). Similarly, the Tenth Circuit has ruled that the *ultra vires* exception can be invoked only by independent third parties. *See Teton Millwork Sales v. Schlossberg*, 311 F. App'x 145, 148-49 (10th Cir. 2009) (unpublished opinion). In another case, the Tenth Circuit noted that "claims based on acts that are related to the official duties of the trustee are barred by the *Barton* doctrine even if the debtor alleges such acts were taken with improper motives." *Satterfield v. Malloy*, 700 F.3d 1231, 1236 (10th Cir. 2012).

Some courts, including the Eleventh Circuit, have concluded that, because a bankruptcy court's jurisdiction is solely *in rem*, immunity from suit under the *Barton* doctrine terminates once a bankruptcy case is closed and there are no remaining estate assets to administer. *See Tufts v. Hay*, 977 F.3d 1204, 1209-10 (11th Cir. 2020) (stating that "the *Barton* doctrine has no application when jurisdiction over a matter no longer exists in the bankruptcy court" and that, although there is "no categorical rule that the *Barton* doctrine can never apply once a bankruptcy case ends," in cases where any decision by a district court would have "no conceivable effect" on a bankruptcy estate, the *Barton* doctrine does not deprive the district court of subject matter jurisdiction); *accord Chua v. Ekonomou*, 1 F.4th 948, 953-54 (11th Cir. 2021); *In re Keitel*, 636 B.R. 845, 850 (Bankr. S.D. Fla. 2022).

FOSTER

Regina Foster (the "debtor") filed a chapter 7 petition in 2012 in the Northern District of Texas. She listed three parcels of real property (the "properties") in her schedule of assets.

The debtor filed for divorce four days after filing for bankruptcy. In the subsequent Texas family court divorce proceeding, she asserted that the properties belonged to her. Her husband, however, claimed that the properties belonged solely to him, leading the chapter 7 trustee to sue the husband and his company, seeking a determination by the bankruptcy court of who owned the properties. The chapter 7 trustee also intervened in the divorce proceeding to protect the estate's purported ownership. In connection with the dispute, the trustee was assisted by special counsel retained with court approval.

The chapter 7 trustee and the debtor's husband reached a settlement whereby the husband agreed to relinquish any ownership interest in the properties. However, the bankruptcy court declined to approve the settlement. Instead, the court abstained from resolving the ownership dispute and modified the automatic stay so that the Texas family court could adjudicate it.

In 2014, the debtor filed a motion in the bankruptcy court to remove the trustee. She alleged that the trustee and her husband were conspiring, among other things, to deprive her of the revenues generated by the properties. The bankruptcy court denied the motion as being meritless.

In March 2017, after the divorce proceeding was dismissed for lack of prosecution, the trustee asked the bankruptcy court to vacate its earlier abstention order and to adjudicate the ownership dispute. In June 2017, the court issued a judgment that the properties were part of the debtor's bankruptcy estate.

In August and December 2017, the trustee filed motions to sell the properties free and clear of all liens, claims, and encumbrances. The debtor objected, claiming that the properties were not part of her bankruptcy estate and, consequently, the bankruptcy court lacked subject matter jurisdiction to approve the sales. The bankruptcy court overruled the debtor's objection and approved the sales.

In 2018, the chapter 7 trustee and her counsel filed separate applications for compensation and reimbursement of expenses. The debtor objected to counsel's application, arguing, among other things, that the lawyers had engaged in wrongdoing in connection with the property ownership dispute. The debtor did not object to the trustee's application. The bankruptcy court approved both applications, and after the trustee issued her final report, the court entered an order approving the report, closing the case, and discharging the trustee.

Ten months later, the debtor sought to reopen the chapter 7 case so that she could sue the trustee and ask the court, due to its lack of subject matter jurisdiction, to vacate the judgment determining that the properties were part of the estate, and to vacate the orders approving the fees of the trustee and her special counsel. The bankruptcy court denied the motion.

In November 2019, the debtor sued the trustee, her counsel, the debtor's husband, and certain other defendants in Texas state court, seeking to invalidate the sale of the properties and to impose liability upon the defendants under Texas law for various misdeeds allegedly committed in connection with the property ownership dispute and the bankruptcy sales. The debtor did not seek bankruptcy court approval to bring the litigation.

The trustee filed a motion with the bankruptcy court to reopen the debtor's chapter 7 case and remove the state court litigation to the bankruptcy court. The bankruptcy court granted that motion in December 2019.

In the removed litigation—now an adversary proceeding—the bankruptcy court ruled that: (i) it had either "core" or "related to" subject matter jurisdiction over all but one of the claims asserted by the debtor because the claims represented challenges to the sale of the properties, the compensation orders, and the conduct of an estate fiduciary and her court-approved counsel; (ii) it would not abstain from adjudicating the claims or remand the litigation to the state court because, among other things, the *Barton* doctrine barred the debtor from suing the trustee and her counsel without bankruptcy court permission; and (iii) it would dismiss the adversary proceeding for the same reason.

The district court affirmed, and the debtor appealed to the Fifth Circuit.

THE FIFTH CIRCUIT'S RULING

A three-judge panel of the Fifth Circuit affirmed the rulings below in a *per curiam* unpublished opinion.

Initially, the Fifth Circuit explained, in rejecting the debtor's argument that the bankruptcy court could not have jurisdiction over purely state-law claims, the bankruptcy court had subject matter jurisdiction to resolve the dispute as a "core" or "related to" proceeding because the claims stated in the debtor's complaint against the trustee and her counsel "all arise from their roles as trustee and counsel for the trustee in the underlying bankruptcy case and involve claims [the debtor] raised during the underlying bankruptcy case." *Foster*, 2023 WL 20872, at *3.

The Fifth Circuit found no error in the lower courts' determination that the adversary proceeding should be dismissed under the *Barton* doctrine. In so ruling, the Fifth Circuit rejected the debtor's argument that the doctrine should not apply because the trustee and her counsel acted *ultra vires*. The Fifth Circuit acknowledged that "this court has not yet addressed the breadth of the ultra vires exception to the *Barton* doctrine." *Id.* at *5. However, the Fifth Circuit agreed with other circuits that have applied the exception narrowly:

> The Trustee and her counsel did not plausibly act "outside the scope of their duties" in seeking compensation for their work from assets that [the debtor] claimed were part of her bankruptcy estate. Similarly, they did not plausibly wrongfully take property belonging to another by pursuing and selling assets with permission from the bankruptcy court, especially given that [the debtor] claimed the Properties as part of her bankruptcy estate. While this may have been a closer case had the claim been brought by an independent third party or had the Trustee not acted pursuant to court orders, we need not address such a scenario here. [The debtor's] complaint falls short of plausibly demonstrating that the [trustee and her counsel] acted ultra vires.

Id. at *6.

OUTLOOK

There are a number of key takeaways from the Fifth Circuit's ruling in *Foster*.

First, although the Fifth Circuit previously held that the *Barton* doctrine precludes litigation against a bankruptcy trustee or other bankruptcy court-appointed officers without the permission of the appointing court (*see Villegas v. Schmidt*, 788 F.3d 156, 158-59 (5th Cir. 2015)), *Foster* is significant because the Fifth Circuit, albeit it in a nonprecedential opinion, held as a matter of first impression that the *ultra vires* exception to the *Barton* doctrine should be construed narrowly to permit litigation against a bankruptcy trustee and its counsel only in cases where they acted outside the scope of their statutory or court-approved duties.

Second, in applying the *Barton* doctrine to dismiss litigation against the trustee and her counsel even after the bankruptcy case had been closed, the Fifth Circuit did not appear to be troubled by the post-case closing jurisdictional limitations imposed on the doctrine by the Eleventh Circuit in *Tufts* and *Chua*. In fact, in its opinion, the Fifth Circuit did not even mention the Eleventh Circuit's rulings on this point or the bankruptcy court's ruling in *Keitel*, which was arguably factually similar.

NEWSWORTHY

Jones Day received the JD Supra Reader's Choice Award in the practice area of Bankruptcy for 2023.

Bruce Bennett ***(Los Angeles and New York)*** received a Band 1 Ranking in the field of Bankruptcy/Restructuring in the 2023 edition of Chambers Global: The World's Leading Lawyers for Business.

Lawyers of Color named ***Kevyn D. Orr*** ***(Washington)***, Partner-in-Charge of Jones Day's U.S. Offices, to its 2023 Power List. The annual Power List recognizes the most influential minority attorneys and allies in the United States.

Fabienne Beuzit ***(Paris)*** was designated a "Leading Individual" in the practice area of Insolvency in the 2023 edition of The Legal 500 EMEA.

Roger Dobson ***(Sydney)*** and Katie Higgins (Sydney) were recognized in the practice area of Insolvency and Reorganisation Law in the 2024 edition of Best Lawyers in Australia.

Juan Ferré ***(Madrid)*** was designated a "Leading Individual" in the practice area of Restructuring and Insolvency in the 2023 edition of The Legal 500 EMEA.

Amanda P. Johnson ***(Chicago)*** was one of three Jones Day associates selected for two different Leadership Council on Legal Diversity programs. The Leadership Council on Legal Diversity is an organization of more than 400 corporate chief legal officers and law firm managing partners who have pledged themselves to creating a truly diverse U.S. legal profession.

Roger Dobson ***(Sydney)*** was named to the Hall of Fame in the 2023 edition of The Legal 500 Asia Pacific guide in the practice area "Australia Restructuring and Insolvency."

Fabienne Beuzit ***(Paris)*** was recognized in the field of Restructuring/Insolvency in Chambers Europe 2023.

An article written by ***Corinne Ball*** ***(New York)***, ***Dan T. Moss*** ***(Washington)***, ***Michael C. Schneidereit*** ***(New York)***, ***Isel M. Perez*** ***(Miami)***, and ***Mark G. Douglas*** ***(New York)*** titled "Chapter 15 Recognition Limited to Foreign Insolvency, Liquidation or Restructuring Proceedings" was published on March 15, 2023, in Lexis Practical Guidance.

An article written by ***Dan B. Prieto*** ***(Dallas)*** and ***Mark G. Douglas*** ***(New York)*** titled "Second Circuit Weighs in on Bankruptcy Code v. Chapter 11 Plan Impairment and the Solvent-Debtor Exception" was published on March 15, 2023, in Lexis Practical Guidance.

On March 24, 2023, the American Bar Association published its "Inaugural Survey of Chapter 15 of the Bankruptcy Code" written by ***Dan T. Moss*** ***(Washington)***, ***Corinne Ball*** ***(New York)***, ***Ben Rosenblum*** ***(New York)***, ***Jasper Berkenbosch*** ***(Amsterdam)***, ***Erik Schuurs*** ***(Amsterdam)***, ***Sushma Jobanputra*** ***(Singapore)***, ***Vinay Kurien*** ***(Singapore)***, and ***Zachary Sharpe*** ***(Singapore)***.

An article written by ***Corinne Ball*** ***(New York)*** titled "Fifth Circuit Recognizes Finality of Bankruptcy Sale Orders" was published in the April 25, 2023, edition of the New York Law Journal.

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