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CHAPTER 15 UPDATE: U.S. BANKRUPTCY COURT REFUSES TO ENFORCE ORDER APPROVING INDONESIAN DEBT RESTRUCTURING PLAN DUE TO THIRD-PARTY RELEASES

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

Cross-border bankruptcy cases filed in the U.S. under chapter 15 of the Bankruptcy Code on behalf of foreign businesses doubled during 2020 and are on pace to set another record-breaking year in 2021 (with more than 123 filings in the first half of the year alone). Foreign debtors are increasingly looking to chapter 15 as a vehicle for enjoining creditor actions against their U.S. assets pending completion of foreign bankruptcy proceedings, enforcing foreign court orders issued or plans approved in such proceedings, avoiding preferential and fraudulent transfers involving U.S. transferees, and seeking discovery from U.S.-based parties in connection with pending or anticipated litigation.

As an application of international comity, "recognition" under chapter 15 of foreign restructuring proceedings and enforcement of foreign court orders issued in connection with such proceedings have become almost routine during the more than 15 years that chapter 15 has been in force. Even so, a recent ruling handed down by the U.S. Bankruptcy Court for the Southern District of New York illustrates that recognition and enforcement is not assured in every case. In *In re PT Bakrie Telecom TBK*, 2021 WL 1439953 (Bankr. S.D.N.Y. Apr. 15, 2021), the bankruptcy court entered an order recognizing an Indonesian "suspension of payments proceeding" under chapter 15. However, the court refused to grant a foreign representative's request for "additional relief" in the form of enforcement of an Indonesian court order approving a restructuring plan because the order included third-party releases (a non-standard practice under Indonesian law). According to the court, there was "nothing in the record about the justification for any third-party release" or any indication "the foreign court considered the rights of creditors when considering this third-party release."

PROCEDURES, RECOGNITION, AND RELIEF 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 ("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

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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."

"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.

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."

Upon recognition of a foreign "main" proceeding, section 1520(a) of the Bankruptcy Code provides that certain provisions of the Bankruptcy Code automatically come into force, including: (i) the automatic stay preventing creditor collection efforts with respect to the debtor or its U.S. assets (section 362, subject to certain enumerated exceptions); (ii) the right of any entity asserting an interest in the debtor's U.S. assets to "adequate protection" of that interest (section 361); and (iii) restrictions on use, sale, lease, transfer, or encumbrance of the debtor's U.S. assets (sections 363, 549, and 552).

Following recognition of a main or nonmain proceeding, section 1521(a) provides that, to the extent not already in effect, and "where necessary to effectuate the purpose of [chapter 15] and to protect the assets of the debtor or the interests of the creditors," the bankruptcy court may grant "any appropriate relief," including a stay of any action against the debtor or its U.S. assets not covered by the automatic stay, an order suspending the debtor's right to transfer or encumber its U.S. assets, and "any additional relief that may be available to a trustee," with certain exceptions. Under section 1521(b), the court may entrust the distribution of the debtor's U.S. assets t o the foreign representative or another person, provided the court is satisfied that the interests of U.S. creditors are "sufficiently protected."

Section 1507 of the Bankruptcy Code provides that, upon recognition of a main or nonmain proceeding, the bankruptcy court may provide "additional assistance" to a foreign representative "under [the Bankruptcy Code] or under other laws of the United States." However, any such assistance must, "consistent with principles of comity," reasonably ensure that: (i) all stakeholders are treated fairly; (ii) U.S. creditors are not prejudiced or inconvenienced by asserting their claims in the foreign proceeding; (iii) the debtor's assets are not preferentially or fraudulently transferred; (iv) proceeds of the debtor's assets are distributed substantially in accordance with the order prescribed by the Bankruptcy Code; and (v) if appropriate, an individual foreign debtor is given the opportunity for a fresh start. *See* 11 U.S.C. § 1507(b).

Section 1522(a) provides that the bankruptcy court may exercise its discretion to order any of the relief authorized by chapter 15 upon the commencement of a case or recognition of a foreign proceeding "only if the interests of the creditors and other interested entities, including the debtor, are sufficiently protected."

Finally, section 1506 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." However, section 1506 requires a "narrow reading" and "does not create an exception for *any* action under Chapter 15 that may conflict with public policy, but only an action that is '*manifestly* contrary.'" *In re Fairfield Sentry Ltd.*, 714 F.3d 127, 139 (2d Cir. 2013) (emphasis in original).

VALIDITY OF NONCONSENSUAL THIRD-PARTY RELEASES IN CHAPTER 11 PLANS UNDER U.S. LAW

The circuit courts of appeals are split as to whether a bankruptcy court has the authority to approve chapter 11 plan provisions in a non-asbestos case that, over the objection of creditors or other stakeholders, release specified non-debtors from liability or enjoin dissenting stakeholders from asserting claims against such non-debtors. The minority view, held by the Fifth and Tenth Circuits—and until 2020, arguably the Ninth Circuit (see below)—bans such nonconsensual releases on the basis that they are prohibited by section 524(e) of the Bankruptcy Code, which provides generally that "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." *See In re Pac. Lumber Co.*, 584 F.3d 229 (5th Cir. 2009); *In re Lowenschuss*, 67 F.3d 1394 (9th Cir. 1995); *In re W. Real Estate Fund, Inc.*, 922 F.2d 592 (10th Cir. 1990). *But see Blixseth v. Credit Suisse*, 961 F.3d 1074, 1083-84 (9th Cir. 2020) (suggesting, contrary to *Lowenschuss* and other previous rulings, that section 524(e) does not preclude certain non-debtor plan releases of claims that are not based on the debt discharged by the plan).

By contrast, the majority of the circuits that have considered the issue have found such releases and injunctions permissible under certain circumstances. *See In re Seaside Eng'g & Surveying, Inc.*, 780 F.3d 1070 (11th Cir. 2015); *In re Airadigm Commc'ns, Inc.*, 519 F.3d 640 (7th Cir. 2008); *In re Dow Corning Corp.*, 280 F.3d 648 (6th Cir. 2002); *In re Drexel Burnham Lambert Grp., Inc.*, 960 F.2d 285 (2d Cir. 1992); *In re A.H. Robins Co., Inc.*, 880 F.2d 694 (4th Cir. 1989). For authority, these courts generally rely on section 105(a) of the Bankruptcy Code, which authorizes courts to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code]." Moreover, as the Seventh Circuit held in *Airadigm*, the majority view is that section 524(e) does not limit a bankruptcy court's authority to grant such releases. *Airadigm*, 519 F.3d at 656 ("If Congress meant to include such a limit, it would have used the mandatory terms 'shall' or 'will' rather than the definitional term 'does.' And it would have omitted the prepositional phrase 'on, or . . . for, such debt,' ensuring that the 'discharge of a debt of the debtor shall not affect the liability of another entity'—whether related to a debt or not.").

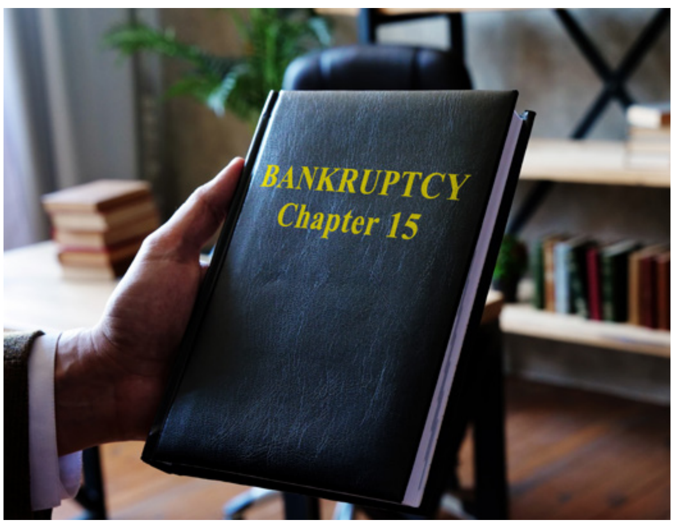
Some courts have also relied, as authority for involuntary releases, on section 1123(b)(6) of the Bankruptcy Code, which provides that a chapter 11 plan may "include any other appropriate provision not inconsistent with the applicable provisions of [the Bankruptcy Code]." *See Airadigm*, 519 F.3d at 657; *In re Scrub Island Dev. Grp. Ltd.*, 523 B.R. 862, 875 (Bankr. M.D. Fla. 2015).

The First and D.C. Circuits have suggested that they agree with the "pro-release" majority. *See In re Monarch Life Ins. Co.*, 65 F.3d 973 (1st Cir. 1995) (a debtor's subsidiary was collaterally estopped by a plan confirmation order from belatedly challenging the jurisdiction of the bankruptcy court to permanently enjoin lawsuits against the debtor's attorneys and other non-debtors not contributing to the debtor's reorganization); *In re AOV Indus.*, 792 F.2d 1140 (D.C. Cir. 1986) (a plan provision releasing liabilities of non-debtors was unfair because the plan did not provide additional compensation to a creditor whose claim against the non-debtor was being released; adequate consideration must be provided to a creditor forced to release claims against non-debtors).

In *In re Millennium Lab Holdings II, LLC*, 945 F.3d 126, 129 (3d Cir. 2019), the Third Circuit refrained from "broadly sanctioning the permissibility of nonconsensual third-party releases in bankruptcy reorganization plans" but, based on the "specific, exceptional facts of this case," upheld a lower court decision confirming a chapter 11 plan containing nonconsensual third-party releases, finding that the order confirming the plan did not violate Article III of the U.S. Constitution.

Majority-view courts employ various tests to determine whether such releases are appropriate. Factors generally considered by courts evaluating third-party plan releases or injunctions include whether they are essential to the reorganization, whether the parties being released have made or are making a substantial financial contribution to the reorganization, and whether affected creditors overwhelmingly support the plan. *See Dow Corning*, 280 F.3d at 658 (listing factors).

Even courts in the majority camp acknowledge that nonconsensual plan releases should be approved only in rare or usual cases. *See Seaside Eng'g*, 780 F.3d at 1078; *Nat'l Heritage Found., Inc. v. Highbourne Found.*, 760 F.3d 344, 347-50 (4th Cir. 2014); *Behrmann v. Nat'l Heritage Found.*, 663 F.3d 704, 712 (4th Cir. 2011); *In re Metromedia Fiber Network, Inc.*, 416 F.3d 136, 141-43 (2d Cir. 2005).



RECOGNITION AND ENFORCEMENT OF NON-DEBTOR RELEASES IN CHAPTER 15 CASES

In a chapter 15 case, unlike in a chapter 11 case, a U.S. bankruptcy court is not asked to confirm a plan of reorganization or liquidation. However, the court may be asked to recognize and enforce a plan, composition with creditors, scheme of arrangement, or court order sanctioned or issued by a foreign court presiding over a foreign debtor's main proceeding. Such a plan or order may enjoin creditors from suing or otherwise proceeding against parties other than the foreign debtor. In such a case, whether a release or injunction should be enforced by a U.S. bankruptcy court is a more nuanced issue.

For example, in *In re Metcalfe & Mansfield Alternative Investments*, 421 B.R. 685 (Bankr. S.D.N.Y. 2010), U.S. Bankruptcy Judge Martin Glenn, to provide "additional assistance" in a chapter 15 case involving a Canadian debtor, enforced a Canadian court's order confirming a restructuring plan that contained non-debtor releases and injunctions, even though it was uncertain whether a U.S. court would have approved the releases and injunctions in a case under chapter 11 of the Bankruptcy Code. Judge Glenn reasoned that such uncertainty was of little consequence in the case before him, which involved not the propriety of non-debtor injunctions and releases in a plenary bankruptcy case but, rather, a request to enforce a foreign judgment in a chapter 15 case. The court concluded that "principles of enforcement of foreign judgments and comity in chapter 15 cases strongly counsel approval of enforcement in the United States of the third-party non-debtor release and injunction provisions included in the Canadian Orders, even if those provisions could not be entered in a plenary chapter 11 case." *Id.* at 696.

By contrast, in *Vitro S.A.B. de C.V. v. ACP Master, Ltd. (In re Vitro S.A.B. de C.V.)*, 473 B.R. 117 (Bankr. N.D. Tex.), *aff'd*, 701 F.3d 1031 (5th Cir. 2012), the bankruptcy court ruled that releases of non-debtor affiliates included in a Mexican debtor's reorganization plan were unenforceable as contrary to U.S. public policy. On appeal, the U.S. Court of Appeals for the Fifth Circuit ruled that the prohibition of such releases under Fifth Circuit precedent (citing *Pac. Lumber*) did not necessarily mean that a U.S. bankruptcy court could not enforce them under section 1507 as a permissible form of "additional assistance" not otherwise available under the Bankruptcy Code or U.S. law.

However, the Fifth Circuit concluded that the bankruptcy court did not abuse its discretion in refusing to enforce the nonconsensual releases where affected creditors were not given any alternative means to recover and would receive only a tiny fraction of what was owed to them, and where the votes in favor of the Mexican debtor's reorganization plan comprised largely insider votes (which are not counted as acceptances under chapter 11 pursuant to section 1129(a)(10) of the Bankruptcy Code). Because it concluded that relief was not warranted under section 1507 and would not be available under section 1521, the Fifth Circuit did "not reach whether the [Mexican reorganization] plan would be manifestly contrary to a fundamental public policy of the United States" within the meaning of section 1506. *Id.* at 1070.

In *In re Sino-Forest Corp.*, 501 B.R. 655 (Bankr. S.D.N.Y. 2013), Judge Glenn employed a similar rationale as in *Metcalfe* in recognizing and enforcing as a form of "additional assistance" under section 1507 a Canadian court-approved settlement containing a global release provision. In addition, he noted that, in the Second Circuit, "where the third-party releases are not categorically prohibited, it cannot be argued that the issuance of such releases is manifestly contrary to public policy" within the meaning of section 1506. *Id.* at 655 (*citing In re Metromedia Fiber Network, Inc.*, 416 F.3d 136, 141 (2d Cir. 2005)).

In *In re Avanti Commc'ns Grp. PLC*, 582 B.R. 603 (Bankr. S.D.N.Y. 2018), Judge Glenn entered an order under chapter 15 of the Bankruptcy Code enforcing a scheme of arrangement sanctioned by a court in England that included nonconsensual third-party releases. Judge Glenn determined that such releases should be recognized and enforced consistent with principles of "comity" and cooperation with foreign courts inherent under chapter 15.

After examining the requirements of sections 1507 and 1521 of the Bankruptcy Code, Judge Glenn concluded, among other things, that: (i) affected creditors were afforded due process consistent with U.S. standards; (ii) third-party non-debtor releases, particularly for affiliate guarantors of debt adjusted by a scheme of arrangement, are common under English law (and are often enforced in the Second Circuit in chapter 15 proceedings); and (iii) if the scheme were not recognized and enforced in the chapter 15 case, creditors could be prejudiced and the ruling could "prevent the fair and efficient administration of the [r]estructuring."

Judge Glenn distinguished *Vitro*. In particular, he pointed out that the Mexican reorganization plan in *Vitro* was supported by a significant number of insider votes, in contrast to *Avanti*, where the scheme received essentially unanimous consent from all impaired creditors.

In *In re Agrokor d.d.*, 591 B.R. 163 (Bankr. S.D.N.Y. 2018), Judge Glenn enforced a settlement agreement containing a third-party release approved by creditors in a Croatian restructuring proceeding even though it restructured English-law debt in violation of the "Gibbs Rule." Unlike in *Vitro*, Judge Glenn reasoned, the settlement agreement (and release) in *Agrokor* was approved by substantially more than the two-third threshold required under Croatian law, excluding "insider" affiliate votes.

PT BAKRIE

PT Bakrie Telecom Tbk ("BTEL") is an Indonesian telecommunications company. Prior to 2013, BTEL guaranteed $380 million of senior unsecured notes issued by a wholly owned subsidiary ("issuer"), which loaned the proceeds of the note offering to BTEL. The issuer then assigned its rights against BTEL to the trustee under a note indenture ("indenture trustee") governed by New York law with a New York forum selection clause.

BTEL and the issuer subsidiary defaulted on the notes beginning in 2013. Three noteholders sued BTEL and certain other defendants in a New York state court in September 2014, seeking to collect on the notes and the guarantee.

In September 2014, the noteholders filed a second lawsuit in New York state court against BTEL and certain other defendants alleging fraud and other tortious conduct in connection with the note offering. The state court consolidated the two suits and ruled in favor of the noteholders on the breach of contract and fraud claims, but it dismissed certain other claims. That ruling was affirmed in part on appeal, and the case was remanded to the lower court for additional discovery.

In October 2014, another BTEL creditor commenced a suspension of payments proceeding on BTEL's behalf in Indonesia's Central Jakarta Commercial Court ("Jakarta court"). After the Jakarta court appointed administrators in the proceeding, the requisite majority of BTEL's creditors (a majority in number and two-thirds in value) voted in favor of BTEL's restructuring plan. However, of the creditors approving the plan, the issuer held 56% of the unsecured debt restructured by the plan, and the remaining 324 accepting unsecured creditors held 38.6% of the debt.

The noteholders' claims were not recognized in the proceeding because BTEL, in its statutorily required "record and report," listed the issuer, rather than the noteholders or the indenture trustee, as its creditor with respect to the $380 million debt. BTEL claimed that it did so because the noteholders were not the registered "holders" of the notes until February 2015. At a meeting of creditors, the administrators disallowed the indenture trustee's filed claim on that basis.

After considering the parties' arguments on the issue and reviewing BTEL's record and report, the Jakarta court verified the administrators' decision and granted the issuer the right to vote. The Jakarta court approved BTEL's restructuring plan in December 2014. Neither the indenture trustee nor the noteholders appealed or otherwise challenged the confirmation order. The Supreme Court of Indonesia denied an appeal of the order filed by a government ministry, after which the Jakarta proceeding concluded. Like the Jakarta court, the Supreme Court relied on the claims register set forth in the record and report in denying the appeal.

In December 2017—three years after confirmation of BTEL's restructuring plan—BTEL executed a declaration appointing Jastiro Abi ("Abi"), a director of BTEL and the issuer subsidiary at the time of the note offering, as its foreign representative for the purpose of seeking recognition of the Jakarta proceeding under chapter 15. Abi filed a chapter 15 petition in the Southern District of New York in January 2018. Shortly afterward, BTEL and the other defendants in the state court litigation stipulated to the entry of a judgment in favor of the noteholders in the amount of approximately $160 million. However, the noteholders agreed not to enforce the judgment pending resolution of BTEL's chapter 15 case.

The noteholders moved for summary judgment denying recognition of the Jakarta proceeding under chapter 15. Among other things, they argued that: (i) the appointment of Abi as BTEL's foreign representative was invalid; and (ii) BTEL's chapter 15 petition must be denied because the Jakarta proceeding was not collective, and recognition would be manifestly contrary to U.S. public policy.

In 2019, the bankruptcy court denied the noteholders' motion for summary judgment, citing unresolved questions of fact regarding a number of issues. Among other things, the court concluded that: (i) although the delay in seeking chapter 15 relief after a foreign proceeding has been closed alone did not preclude a finding that a foreign representative was properly appointed, the significance of the delay in this case was a matter for trial; (ii) whether Abi's appointment complied with sections 101(24), 1515, and 1517 of the Bankruptcy Code, rather than Indonesian law, had to be decided at trial; (iii) there were questions of fact involving the administrators' consideration of the noteholders' claims, the independence of the administrators and the Jakarta court, and whether BTEL's restructuring plan would have been rejected if the indenture trustee had been permitted to vote; and (iv) factual questions precluded summary judgment under the "narrowly construed" public policy exception stated in section 1506. *See In re PT Bakrie Telecom Tbk*, 601 B.R. 707 (Bankr. S.D.N.Y. 2019).

After trial at the end of 2019, the bankruptcy court issued its ruling on these issues.

THE BANKRUPTCY COURT'S RULING

Initially, U.S. Bankruptcy Judge Sean Lane reiterated his conclusion that Abi's appointment as BTEL's foreign representative for the purpose of filing a chapter 15 petition was not invalid even though it occurred three years after the Jakarta proceeding had been closed. The record, he explained, reflected that the timing of Abi's appointment was based on "practical considerations," including BTEL's hope that it might prevail in the state court litigation, in which case a chapter 15 filing would have been unnecessary.

Next, Judge Lane ruled that the Jakarta proceeding qualified as a "collective" proceeding, as required by section 101(23) of the Bankruptcy Code, substantially for the reasons previously articulated in his order denying the noteholders' summary judgment motion. According to Judge Lane, the Jakarta proceeding was collective because "'the rights and obligations of *all* creditors'

were considered by the foreign court" (quoting *In re Ashapura Minechem Ltd.*, 480 B.R. 129, 136 and 140 (S.D.N.Y. 2012)).

Judge Lane accordingly held that the Jakarta proceeding should be recognized under chapter 15 as a foreign main proceeding.

However, he denied Abi's request for an order enforcing the order approving BTEL's restructuring plan in the United States because it included a provision that was tantamount to a third-party release of claims relating to the notes.

Judge Lane explained that relief under section 1521(a) may be granted only if the "interests of the creditors and other interested entities, including the debtor, are sufficiently protected." Similarly, he noted section 1507(b) conditions "additional assistance" on a showing that such relief "will reasonably assure . . . just treatment of all holders of claims against or interests in the debtor's property" and the protection of U.S. creditors against prejudice and inconvenience in asserting their claims in a foreign proceeding. Finally, Judge Lane emphasized that a bankruptcy court should defer to a foreign bankruptcy proceeding on international comity grounds only if that proceeding does not violate the laws or public policy of the U.S. and abides by "fundamental standards of procedural fairness."

According to Judge Lane, "there is no clear and formal record that sets forth whether or how the foreign court considered the rights of creditors when considering this third party release," as required in evaluating comity by the Supreme Court's decision in *Hilton*. Nor, he wrote, was there anything "in the record about the justification for any third-party release." In the absence of any evidence by Abi on these points—which Judge Lane invited the parties to develop after returning to the Jakarta court—Judge Lane ruled that any relief under sections 1507 and 1521 must be denied.

Judge Lane emphasized that his decision on this point "is not a ruling on the permissible scope of third-party releases under Indonesian law," noting, moreover, that releases in a foreign proceeding need not be identical to those that a U.S. court would approve in a chapter 11 case.

In light of his ruling, Judge Lane declined to decide whether, as an insider, the issuer's decisive role in accepting the BTIF's restructuring plan should bar the additional relief of enforcing the plan. He noted, however, that Abi failed to submit any evidence, including the record and report, of the basis for the foreign courts' decisions on the legitimacy of the issuer's disputed voting right—an issue that might be revisited if Abi remedied the other deficiencies in his request for additional relief.

Finally, Judge Lane noted that the noteholders failed to provide any evidence that the Jakarta proceeding was tainted by corruption or of anything else that would satisfy the "high standard" applied to the "public policy" exception in section 1506.

OUTLOOK

As Judge Lane was careful to note, his ruling in *PT Bakrie* is in no way a criticism of Indonesian restructuring proceedings or Indonesian law in the context of recognition under chapter 15 as an exercise of international comity. In fact, the court concluded that chapter 15 recognition was justified in this case, observing that many other courts have also recognized Indonesian proceedings. In so ruling, the court reaffirmed the role that U.S. bankruptcy courts, guided by chapter 15, play in cross-border bankruptcy cases. Relief under chapter 15 is not contingent upon a finding that any given foreign bankruptcy law or proceeding provides the same rights and protections to stakeholders that they are afforded under U.S. law. Instead, the inquiry is directed toward the "procedural fairness" of the foreign proceeding. Once that is established, a wide variety of relief is available under chapter 15 by way of assistance to the foreign representative and the foreign court.

PT Bakrie is a cautionary tale regarding the necessity of building an evidentiary record to support any relief requested in a chapter 15 case. In this instance, the foreign representative failed to do so but can likely renew his request with additional evidence regarding the need for non-debtor releases. Whether the focus will then shift to the unresolved voting rights dispute remains to be seen.

PT Bakrie also illustrates that the standard for approving nonconsensual third-party releases depends in many cases upon whether the debtor is in chapter 11 or chapter 15. Despite the outcome, the ruling suggests that the Southern District of New York is a preferred venue for foreign debtors wishing to grant such releases in their non-U.S. insolvency proceedings.

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SETOFFS UNDER SHARI'A-COMPLIANT INVESTMENT CONTRACTS NOT SAFE HARBORED IN BANKRUPTCY

Daniel J. Merrett ■ Mark G. Douglas

In *In re Arcapita Bank B.S.C.*, 2021 WL 1603608 (Bankr. S.D.N.Y. Apr. 23, 2021), the U.S. Bankruptcy Court for the Southern District of New York addressed the interaction between purported setoff rights arising under investment agreements governed by Islamic law and the Bankruptcy Code's safe harbors protecting the exercise of non-debtors' rights under financial contracts. The court granted summary judgment to a creditors' committee on its claims that two foreign banks invalidly, and in violation of the automatic stay, exercised setoffs under Islamic Shari'a-compliant investment contracts with a Bahrain-headquartered chapter 11 debtor. In so ruling, the court concluded that the investment contracts were more akin to loans than the kinds of financial contracts that are protected by the Bankruptcy Code's safe harbors.

ENFORCEMENT OF SETOFF RIGHTS IN BANKRUPTCY

Section 553 of the Bankruptcy Code provides, subject to certain exceptions, that the Bankruptcy Code "does not affect any right of a creditor to offset a mutual debt owing by such creditor to the debtor that arose before the commencement of the case under this title against a claim of such creditor against the debtor that arose before the commencement of the case." Section 553 does not create setoff rights—it merely preserves certain setoff rights that otherwise would exist under contract or applicable nonbankruptcy law. *See* COLLIER ON BANKRUPTCY ("COLLIER") ¶ 553.04 (16th ed. 2021) (citing *Citizens Bank of Maryland v. Strumpf*, 516 U.S. 16 (1995)). As noted by the U.S. Supreme Court in *Studley v. Boylston Nat. Bank*, 229 U.S. 523 (1913), setoff avoids the "absurdity of making A pay B when B owes A."

With certain exceptions for setoffs under "safe-harbored" financial contracts, a creditor is precluded by the automatic stay from exercising setoff rights against a debtor in bankruptcy without court approval. *See* 11 U.S.C. §§ 362(a)(7), (b)(6), (b)(7), (b)(17), (b)(27), and (o). Stayed setoff rights are merely suspended, however, pending an orderly examination of the parties' obligations by the court, which will generally permit a valid setoff unless it would be inequitable to do so. *See In re Ealy*, 392 B.R. 408 (Bankr. E.D. Ark. 2008).

A creditor stayed from exercising a valid setoff right must be granted "adequate protection" (*see* 11 U.S.C. § 361) against any diminution in the value of its interest caused by the debtor's use of the creditor's property. *Ealy*, 392 B.R. at 414.

Setoff is expressly prohibited by section 553 if: (i) the creditor's claim against the debtor is disallowed; (ii) the creditor acquires its claim from an entity other than the debtor either (a) after the bankruptcy filing date or (b) after 90 days before the petition date while the debtor was insolvent (with certain exceptions); or (iii) the debt owed to the debtor was incurred by the creditor (a) after 90 days before the petition date, (b) while the debtor was insolvent, and (c) for the purpose of asserting a right of setoff, except for setoff under "safe-harbored" financial contracts (discussed below). *See* 11 U.S.C. § 553(a)(1)-(3).

Section 553(b) provides that, except for setoffs under safe-harbored financial contracts, the trustee or a chapter 11 debtor-in-possession ("DIP") may recover any amount offset by a non-debtor on or within 90 days before the bankruptcy petition date to the extent the non-debtor improved its position by reducing any "insufficiency."

Thus, for a creditor to be able to exercise a setoff right in bankruptcy, section 553 requires on its face that: (i) the creditor has a right of setoff under applicable non-bankruptcy law; (ii) the debt and the claim are "mutual"; (iii) both the debt and the claim arose *prepetition*; and (iv) the setoff does not fall within one of the three prohibited categories specified in the provision. Although some courts have permitted the setoff of mutual *postpetition* debts (*see, e.g.*, *Official Comm. of Unsecured Creditors of Quantum Foods, LLC v. Tyson Foods, Inc. (In re Quantum Foods, LLC)*, 554 B.R. 729 (Bankr. D. Del. 2016)), the remedy is available in bankruptcy only "when the opposing obligations arise on the same side of the . . . bankruptcy petition date." *Pa. State Employees' Ret. Sys. v. Thomas (In re Thomas)*, 529 B.R. 628, 637 n.2 (Bankr. W.D. Pa. 2015).

The Bankruptcy Code does not define the term "mutual debt." Debts are generally considered mutual when they are due to and from the same persons or entities in the same capacity, but there is some confusion among the courts on this point. *See generally* COLLIER at ¶ 553.03[3][a] (citing cases).

Creditors typically rely on the remedy of setoff if the mutual debts arise from *separate transactions*, although the issue is murky. *See* COLLIER at ¶ 553.10. By contrast, if mutual debts arise from the *same transaction*, the creditor may have a right of "recoupment," which has been defined as "a deduction from a money claim through a process whereby cross demands arising out of the same transaction are allowed to compensate one another and the balance only to be recovered." *Westinghouse Credit Corp. v. D'Urso*, 278 F.3d 138, 146 (2d Cir. 2002); *accord Newbery Corp. v. Fireman's Fund Ins. Co.*, 95 F.3d 1392, 1399 (9th Cir. 1996); *In re Matamoros*, 605 B.R. 600, 610 (Bankr. S.D.N.Y. 2019) ("recoupment is in the nature of a defense and arises only out of cross demands that stem from the same transaction").

Unlike setoff, recoupment is not subject to the automatic stay (*see In re Ditech Holding Corp.*, 606 B.R. 544, 600 (Bankr. S.D.N.Y. 2019)) and may involve both pre- and postpetition obligations. *See Sims v. U.S. Dep't of Health and Human Services (In re TLC Hosps., Inc.)*, 224 F.3d 1008, 1011 (9th Cir. 2000) (citing COLLIER at ¶ 553.10).

SETOFFS PERMITTED UNDER SAFE-HARBORED FINANCIAL CONTRACTS

As noted, setoffs under safe-harbored financial contracts are permitted without court permission by the Bankruptcy Code. Specifically, section 362(b)(6) provides that, notwithstanding the general prohibition of postpetition setoffs without court authority, a commodity broker, forward contract merchant, stockbroker, financial institution, financial participant, or securities clearing agency may exercise any contractual right under any commodity contract, forward contract, or securities contract "to offset or net out any termination value, payment amount, or other transfer obligation" arising under the contract. Subsections 362(b)(7), (b)(17), and (b)(27) give the same setoff rights to participants under repurchase agreements, swap agreements, and master netting agreements, respectively.

Unless a pre-bankruptcy transfer under these types of agreements was made with the intent to defraud creditors, a trustee or DIP may not avoid such a transfer under the safe harbors set forth in sections 546(e), 546(f), 546(g), and 546(j) of the Bankruptcy Code. The rights of participants under these financial contracts to liquidate, terminate, accelerate or offset obligations under such contracts unfettered by the automatic stay or a trustee's avoidance powers are reiterated in sections 555, 556, and 559 through 561. Those provisions also protect the exercise under such contracts of "a right, whether or not in writing, arising under common law, under law merchant, or by reason of normal business practice."

Finally, section 362(o) provides that the exercise of rights not subject to the automatic stay (such as offset rights under safe-harbored financial contracts) "shall not be stayed by any order of a court or administrative agency" in a bankruptcy case.

ARCAPITA

In 2012, Arcapita Bank B.S.C.(C) ("Arcapita"), a Bahrain-headquartered investment bank and global manager of Shari'a-compliant alternative investments, entered into short-term investment agreements with two commercial banks—Bahrain Islamic Bank ("BisB") and Tadhamon Capital B.S.C. ("Tadhamon") ("defendants")—headquartered in Bahrain and Yemen, respectively. The agreements were negotiated and signed in Bahrain and provided that Bahraini law would govern any disputes, except to the extent that such laws conflicted with the principles of Islamic Shari'a, in which case Shari'a law would prevail.

In accordance with Islamic banking and finance practice, the transactions were structured as investments rather than traditional lending transactions.

In "*murabaha*" investments, the defendants invested approximately $28 million ($9.8 million from BisB and $18 million from Tadhamon) with Arcapita for the purchase of commodities from a third party in the defendants' names, with Arcapita then repurchasing those same commodities from the defendants for the original investment amount plus an agreed-upon return to be paid on an agreed-upon maturity date.

Arcapita then made $30 million in reciprocal *murabaha* investments with BisB. Arcapita funded the investments by transferring $30 million on or about March 15, 2012, from its U.S. bank account to a U.S. bank account maintained by BisB.

Arcapita also made $20 million in "*wakala*" investments with Tadhamon. Under these transactions, instead of offering to sell commodities, Tadhamon invested on Arcapita's behalf in Shari'a-compliant investment products such as debt instruments, *murabaha* and *wakala* placements, and bridge financing products, which provided an expected (but not guaranteed) investment return to be paid on a specified date.

Arcapita filed for chapter 11 protection in the Southern District of New York on March 19, 2012.

On March 26 and 27, 2012, BisB repaid $20 million of Arcapita's matured *murabaha* investments but withheld approximately $10 million in investment proceeds on the March 29, 2012, maturity date. On March 28 and April 15, 2012, Arcapita agreed to "roll over" its $20 million in *wakala* investments with Tadhamon to later maturity dates. The new rollover contracts matured on April 30, 2012, and May 16, 2012, after which Tadhamon was obligated to remit in excess of $20 million in investment proceeds to Arcapita.

The defendants' $28 million in investments with Arcapita matured (either originally or via rollover) after Arcapita filed for bankruptcy.

Both defendants claimed that they were entitled under Bahraini law to retain the withheld proceeds ("transaction proceeds") as a valid setoff against Arcapita's obligations to them. However, the Central Bank of Bahrain ("CBB"), which oversees all banks doing business in the country, directed both BisB and Tadhamon either immediately to return the transaction proceeds to Arcapita or to seek permission from the bankruptcy court to effect the offset, failing which they should remit the funds to Arcapita. The defendants did not comply with the CBB directive.

The bankruptcy court authorized Arcapita's official committee of unsecured creditors to commence adversary proceedings against the defendants, seeking, among other things, turnover of the transaction proceeds under section 542 of the Bankruptcy Code, avoidance and recovery of the $30 million paid by Arcapita to BisB as a preferential transfer under sections 547 and 550, disallowance of the defendants' claims under section 502(d) (because the defendants retained voidable transfers), and a determination that the defendants' purported setoff transactions violated the automatic stay under section 362.

After unsuccessfully challenging the lawsuits on the basis of lack of personal jurisdiction, the defendants moved to dismiss the complaints. They contended that the turnover, avoidance, and

automatic stay violation claims were precluded by the "presumption against extraterritoriality" and that the court should dismiss the litigation under the principle of international comity.

In 2017, Bankruptcy Judge Sean H. Lane denied the motions to dismiss. Among other things, he rejected the defendants' extraterritoriality defense because the committee's claims were either based on domestic conduct—the U.S. bank transfers were at the "heart" of the transactions—or based on statutes that apply extraterritorially. *See In re Arcapita Bank B.S.C.(C))*, 575 B.R. 229 (Bankr. S.D.N.Y. 2017). On the latter point, he ruled that the committee's claims under sections 362 (the automatic stay) and 542 (turnover of property to the estate) were independent of the avoidance claims, and that those provisions applied extraterritorially because it was clear from their language that Congress intended for them to apply outside of the United States.

The committee and the defendants then cross-moved for summary judgment.

THE BANKRUPTCY COURT'S RULING

Judge Lane granted summary judgment in favor of the committee.

First, he held that Tadhamon could not offset its obligations against Arcapita's obligations because the obligations were not "mutual"—Arcapita's debt arose prepetition, whereas Tadhamon's rollover debt arose and matured postpetition. In so ruling, Judge Lane rejected Tadhamon's argument that the Bankruptcy Code's safe harbors eliminate section 553's mutuality requirement for financial contracts.

This argument, Judge Lane noted, was expressly rejected by Bankruptcy Judge James M. Peck in *In re Lehman Bros. Holdings Inc.*, 433 B.R. 101, 109 (Bankr. S.D.N.Y. 2010). In *Lehman*, Judge Lane explained, the court wrote that "[f]or purposes of any right to setoff permitted under section 553, mutuality is baked into the very definition of setoff," reasoning that technical amendments to the language of the safe harbors as part of the Financial Netting Improvements Act of 2006 did not alter this principle.

Judge Lane also ruled that setoff was not permitted under Bahraini law because the applicable contracts with Arcapita did not expressly provide for setoff and the defendants did not comply with the directive of the CBB before effecting a setoff.

According to Judge Lane, setoff was also precluded by section 553(a)(3)(C) because the evidence established as a matter of law that the defendants incurred their debt to Arcapita for the purpose of obtaining a setoff right against it.

Among other things, he noted that: (i) the investments made by Arcapita with the defendants were outside the regular course of business for the parties; (ii) the defendants were aware of Arcapita's financial difficulties in the months prior to its bankruptcy filing; and (iii) extensive correspondence between the defendants and Arcapita immediately before and after the bankruptcy filing reflected that Arcapita and the defendants were trying to find a way for the defendants' investments, unlike the claims of Arcapita's other unsecured creditors, to be fully protected.

Judge Lane rejected the defendants' argument that the transactions were protected by the safe harbors for "securities contracts" set forth in sections 362(b)(6), 546(e), 555, and 561(a) of the Bankruptcy Code. According to Judge Lane, the agreements between the defendants and Arcapita "are like loans as they explicitly provide for a creditor to recoup its investment with a specific rate of return." Moreover, the parties consistently referred to the prepetition debts owed by Arcapita as "loans," and the agreements did "not bear the hallmarks of debt securities such as bonds, debentures, notes, or other instruments that are considered securities under Section 101(49) of the Bankruptcy Code."

Guided by the Second Circuit's decision in *In re Lehman Brothers Holdings Inc.*, 855 F.3d 459, 474-75 (2d Cir. 2017), Judge Lane explained that, of most significance in this context, neither the defendants nor Arcapita assumed "the same risk and benefit expectations as shareholders" as a result of their investments. Instead, he wrote, "The only risk the investing party assumed was the risk of non-payment by its counterparty; its only expectation was timely payment of a fixed amount." Judge Lane acknowledged that, in a *wakala* transaction, the return to the investor is expected but not guaranteed, but he emphasized that "the expected return is paid to the depositor in 99% of cases."

Judge Lane concluded that the *murabaha* agreements did not qualify as safe-harbored "forward contracts" because: (i) the primary purpose of the agreements was not risk-shifting; and (ii) the agreements specified maturity dates less than two days after the contracting date, rather than the date of delivery of the underlying commodity. He also determined that the agreements were not "swap agreements" because, among other things, the "transactions do not provide for the 'swap' of financial instruments and are therefore not similar to any of the examples specified in Section 101(53B) [of the Bankruptcy Code]."

In addition, Judge Lane rejected the defendants' contention that the setoffs constituted rights under "law merchant" and "normal business practice" in Bahrain and within Islamic finance generally, and therefore qualified as "contractual rights" under the "rarely invoked" safe harbor provisions in sections 555, 556, 559, and 560. According to Judge Lane, the defendants cited no authority for the proposition that a setoff right "is a recognized practice of law merchant" or that setoff under Shari'a law and Islamic finance is a "long standing custom among merchants." Moreover, he noted, the CBB's directive to the defendants to seek court authority for the setoffs indicated that they were not a "normal course of action in these circumstances."

Having rejected the defendants' various defenses, the bankruptcy court addressed the merits of the committee's claims. Because the setoffs were invalid, Judge Lane granted summary judgment to the committee on its claims for breach of contract arising from the defendants' failure to remit the investment proceeds to Arcapita. He also ruled that the proceeds were subject to turnover under section 542 of the Bankruptcy Code and that, by withholding the proceeds, the defendants violated the automatic stay. However, he denied the committee's request for sanction under section 362(k) for the defendants' willful violation of the stay, noting that "under established Second Circuit law, the requested relief is limited to natural persons and is not available to corporate debtors."

In light of its turnover ruling, the court did not address the committee's request that the defendants' claims be disallowed under section 502(d).

OUTLOOK

The court's meticulous analysis of the agreements in *Arcapita* and the mechanics of the Bankruptcy Code's safe harbors for financial contracts are emblematic of the exacting scrutiny that many courts have directed recently toward transactions that purportedly qualify for protection. The scope of the safe harbors has been litigated extensively in the last few years, and that trend will likely continue.

Arcapita is unusual because it involved principles of foreign contract law and practice that were not readily susceptible to analysis under U.S. law. Nevertheless, the decision is instructive regarding setoff rights in bankruptcy and, most notably, the circumstances under which a purported setoff right will be denied because it either does not exist or is invalid under applicable non-bankruptcy law, or the non-debtor party seeking to exercise a setoff was motivated by a desire to obtain an unfair advantage over other creditors.

U.S. BANKRUPTCY CODE TOLLING PROVISION APPLIES IN CHAPTER 15 CASE TO EXTEND DEADLINES UNDER FOREIGN BANKRUPTCY LAW

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

In *In re Bankr. Est. of Norske Skogindustrier ASA*, 2021 WL 1687903 (Bankr. S.D.N.Y. Apr. 29, 2021), the U.S. Bankruptcy Court for the Southern District of New York held that a foreign representative in a case under chapter 15 of the Bankruptcy Code can rely on the Bankruptcy Code's statute of limitations tolling provision to extend the deadline under foreign bankruptcy law to commence avoidance litigation. The decision illustrates the increasing extent to which (now 15-year-old) chapter 15 has become an invaluable resource for the representatives of foreign debtors in cross-border bankruptcy cases.

TOLLING OF DEADLINES IN BANKRUPTCY

Section 108(a) of the Bankruptcy Code essentially establishes a two-year deadline from entry of the bankruptcy "order for relief" for a bankruptcy trustee (or a chapter 11 debtor-in-possession ("DIP")) to commence actions on behalf of the estate, provided that the applicable time period did not expire before the filing of the bankruptcy petition. Section 108(a) provides:

> If applicable nonbankruptcy law, an order entered in a nonbankruptcy proceeding, or an agreement fixes a period within which the debtor may commence an action, and such period has not expired before the date of the filing of the petition, the trustee may commence such action only before the later of—(1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or (2) two years after the order for relief.

11 U.S.C. § 108(a). Limitation periods for causes of action arising under the Bankruptcy Code are not governed by section 108(a) but rather by sections 546(a), 549(d), and 550(e). In addition, section 108(a) does not apply if a statute of limitations has expired prior to entry of the order for relief. *See generally* COLLIER ON BANKRUPTCY ¶ 108.02 (16th ed. 2021).

Section 108(b) gives the trustee or DIP 60 days to take actions not covered under section 108(a), such as filing pleadings, demands, notices, or proofs of claim or loss, unless the period for doing the relevant act expires later than 60 days after the date of the order for relief. Finally, section 108(c) extends time periods for commencing or continuing actions in nonbankruptcy courts that are stayed by the automatic stay or certain other complementary provisions of the Bankruptcy Code.

Section 108 was enacted as part of the Bankruptcy Code in 1978. However, when chapter 15 was enacted in 2005 to govern cross-border bankruptcy cases, section 108 was made applicable to chapter 15 cases by section 103(a) of the Bankruptcy Code, which, as amended, provides in relevant part that "chapters 1, 3, and 5 of this title apply in a case under chapter 7, 11, 12, or 13 of this title, and this chapter, sections 307, 362(n), 555 through 557, and 559 through 562 apply in a case under chapter 15."

AVAILABILITY OF SECTION 108(A) TO FOREIGN REPRESENTATIVES IN CHAPTER 15 CASES

Section 108(a) expressly refers to a "trustee," which, by operation of section 1107(a), is extended to include a DIP, but does not explicitly include a foreign representative in a chapter 15 case.

However, in *In re Fairfield Sentry Ltd.*, 452 B.R. 52 (Bankr. S.D.N.Y. 2011), the bankruptcy court ruled as a matter of first impression that the tolling provisions of the Bankruptcy Code apply in chapter 15, such that a foreign representative would receive an extension of deadlines in connection with pending and anticipated litigation.

The *Fairfield* court acknowledged that "there is no dispositive case law addressing whether section 108 is automatically applicable in these chapter 15 cases." Even so, it concluded that the question is "squarely addressed" by section 103(a), which "unambiguously" states that "'this chapter'—chapter one—applies in its entirety." *Id.* at 57. Moreover, the court wrote, section 108 is a "general provision, which is not restricted to, or excluded from, cases under any specific chapter of the Code."

The court rejected the argument that section 1520(a)(3) of the Bankruptcy Code "provides the exclusive relief that can be transferred from 'trustees' to foreign representatives, without including Section 108." Section 1520(a)(3) gives a foreign representative in a recognized chapter 15 case the power to operate the debtor's business and to exercise the rights and powers of a bankruptcy trustee under sections 363 (governing the use, sale, or lease of estate property) and 552 (governing the enforceability of prepetition liens on property acquired by the estate or the debtor postpetition). "Simply put," the court wrote, "inclusion of Section 108 relief in section 1520 would have been superfluous in light of the plain language of section 103(a) of the Code." *Id.* at 59.

The court also rejected the argument that the term "trustee" in a chapter 15 case does not include a foreign representative. Section 1502(6) of the Bankruptcy Code provides that "trustee" for the purposes of chapter 15 "includes a trustee, a debtor in possession in a case under any chapter of this title, or a debtor under chapter 9 of this title." The word "includes," the court explained, indicates that the definition is not meant to be exclusive, and foreign representatives "are indistinguishable from trustees with respect to the purpose of Section 108 to provide the entity stepping into the shoes of the debtor additional time to evaluate and preserve a debtor's rights." *Id.* at 60.

Moreover, the court also held that the chapter 15 recognition date is the date of the "order of relief" for purposes of section 108 and other provisions in or made applicable to chapter 15. Finally, it ruled that even if section 108 were not "a self-executing statute" with respect to chapter 15 cases, a bankruptcy court has the power to grant such relief under sections 1507(a) and 1521(a)(7). *Id.* at 63. Section 1507(a) authorizes the court, upon recognition of a foreign proceeding and subject to the specific limitations elsewhere in chapter 15, to "provide additional assistance to a foreign representative under this title or under other laws of the United States." Section 1521(a)(7) provides that the relief that may be granted by the court upon recognition of a foreign proceeding under chapter 15 may include "granting any additional relief that may be available to a trustee," with certain exceptions.

NORSKE SKOGINDUSTRIER

In a 2015 restructuring, Norwegian newsprint and paper-products company Norske Skogindustrier ASA ("NSA") exchanged certain of its unsecured notes for cash and exchange notes. NSA also issued €290 million in senior secured notes. NSA subsidiary Norske Skog AS ("Skog") was created as part of a 2015 restructuring to acquire NSA's ownership interests in its operating subsidiaries. Thus, after the 2015 restructuring, NSA's capital structure included the unsecured notes, the exchange notes, and the secured notes (in ascending order of seniority).

NSA restructured again in 2016. The 2016 restructuring involved an exchange of unsecured notes maturing in 2017 for unsecured notes maturing in 2026, "perpetual notes" maturing in 2115, and certain par value write-offs. In addition, NSA refinanced the unsecured notes maturing in 2016 by having Skog issue a €110 million secured facility bond to various entities holding unsecured notes, exchange notes, senior notes, and NSA equity interests (collectively, "defendants"). Skog then upstreamed the proceeds (approximately €100 million) to NSA. The bond was senior to the unsecured notes, the exchange notes, and the secured notes.

After attempts at a third restructuring failed, NSA filed a bankruptcy proceeding in Norway on December 19, 2017. The secured noteholders then enforced their security interests, and all NSA equity was sold in a forced sale. The purchase price in the forced sale failed to provide full recovery for the secured noteholders and left no recovery for exchange noteholders and unsecured noteholders.

On November 16, 2018, the bankruptcy trustee appointed by the Norwegian court ("Norwegian court"), in his capacity as NSA's "foreign representative," filed a petition in the U.S. Bankruptcy Court for the Southern District of New York ("bankruptcy court") seeking recognition of NSA's Norwegian bankruptcy under chapter 15 as a "foreign main proceeding." The bankruptcy court granted recognition of NSA's Norwegian bankruptcy as a foreign main proceeding on December 18, 2018.

On September 6, 2019, NSA's bankruptcy estate (also referred to herein as "NSA") commenced an adversary proceeding in the bankruptcy court seeking to avoid as fraudulent transfers more than €30 million in payments made by NSA to the defendants as part of the 2016 restructuring. According to NSA, the defendants pressured NSA into repurchasing notes held by them, and as a result, NSA and other NSA creditors were harmed. The complaint included causes of action for avoidance of the alleged fraudulent transfers under the Norwegian Recovery Act ("Recovery Act"), for damages under the Norwegian Public Limited Liability Companies Act and Norwegian common law, and for unjust enrichment.

The defendants moved to dismiss. Among other things, they argued that NSA's claims were not timely. Certain of the claims were governed by the Norwegian Limitations Act of 1979, which imposed a three-year limitations period. Other claims under the Recovery Act had to be asserted within either: (i) one year after the commencement of a Norwegian bankruptcy proceeding; or (ii) six months from the time the trustee became aware or should have become aware of the existence of a claim.

NSA argued that section 108(a) of the Bankruptcy Code tolled the relevant limitations period for its avoidance claims because the claims would have been timely when the bankruptcy court first granted recognition in NSA's chapter 15 case. The defendants countered that section 108(a) did not toll the limitation period because the Recovery Act "is part of Norway's bankruptcy regime" and section 108(a) applies only if "applicable *nonbankruptcy* law . . . fixes a period within which the debtor must commence an action" (emphasis added).

THE BANKRUPTCY COURT'S RULING

The bankruptcy court ruled that section 108(a) applied to NSA's claims against the defendants and rendered them timely. It also held that the defendants' motion to dismiss would be denied at "this stage of the proceeding on timeliness grounds even if section 108(a) [did] not apply."

Initially, U.S. Bankruptcy Judge Martin Glenn explained, in accordance with the express language of section 103, *Fairfield*, and an extensive catalog of subsequent cases agreeing with it, section 108 applies in a chapter 15 case, and a foreign representative is afforded the benefits of the provision.

However, he wrote, although state law avoidance claims and unjust enrichment claims under New York law are entitled to tolling under section 108(a), "the question remains whether it applies to claims arising under the Recovery Act."

At least one court, Judge Glenn noted, has applied section 108(a) to toll the limitations period for claims arising under foreign bankruptcy law. *See Laspro Consultores LTDA v. Alinia Corp. (In re Massa Falida Do Banco Cruzeiro Do Sul S.A.)*, 567 B.R. 212, 227–29 (Bankr. S.D. Fla. 2017) (holding that section 108(a) applied to toll Brazilian "[c]laims arising under Article 130 of the Bankruptcy and Judicial Reorganization Law").

He agreed with the *Laspro* court's reasoning, writing:

> While the claims arise under the Recovery Act, they do not derive their limitations period from the Bankruptcy Code. The goal of section 108(a) is to allow a trustee to step into the shoes of a debtor and have access to the remedies available to the debtor at the time of filing the petition. The tolling was triggered by the filing of the Chapter 15 Petition. And the chapter 15 proceeding should be considered as distinct from the Norwegian Bankruptcy, such that the Trustee should be afforded an opportunity to file a petition and have the foreign bankruptcy recognized, and not risk losing its non-Bankruptcy Code claims to a foreign limitations period that would have expired after the chapter 15 case was filed.

Norske Skogindustrier, 2021 WL 1687903, at *17.

According to Judge Glenn, the avoidance claims against the defendants arose upon the Norwegian bankruptcy filing date and had not yet expired prior to the chapter 15 petition date. Such claims, he reasoned, would have been timely less than a year later on the date of entry of the recognition order. Thus, because section 108(a) would have extended the limitations period to December 18, 2020, Judge Glenn ruled that NSA's complaint was timely filed. He accordingly denied the defendants' motion to dismiss the avoidance claims as untimely.

Even if section 108(a) did not apply, Judge Glenn noted, dismissal of the claims would not be appropriate because there were material issues of disputed fact, including when the trustee was, or should have been, aware of the existence of the claims.

Notwithstanding his conclusion that NSA's claims were timely under section 108(a), Judge Glenn dismissed two of the complaint's three fraudulent transfer causes of action (with leave to replead) because the complaint failed to plead with particularity the circumstances constituting fraud under the Recovery Act, as required by Rule 9(b) of the Federal Rules of Civil Procedure (as incorporated by Bankruptcy Rule 7009).

Due to the existence of disputed issues of fact, Judge Glenn refused to decide whether the payments made to the defendants were protected from avoidance by the Bankruptcy Code's safe harbor in section 546(e) for certain prepetition transfers made in connection with securities contracts, commodity contracts, or forward contracts. In this regard, he explained that: (i) the safe harbor applies in chapter 15 cases (*see* 11 U.S.C. § 561(d)); (ii) only intentional fraudulent transfer claims under section 548(a)(1)(A) are excepted from the scope of section 546(e); and (iii) section 1521(a)(7) provides that a foreign representative cannot assert a claim under section 548 (among other provisions).

NSA argued that, because its avoidance claims under the Recovery Act were "sufficiently analogous" to a claim under section 548(a)(1)(A), the claims should fall within the exception to the safe harbor. According to Judge Glenn, a different bankruptcy judge in the Fairfield Sentry chapter 15 case rejected this argument with respect to intentional fraudulent transfer claims under the law of the British Virgin Islands. *See Fairfield Sentry Limited v. Theodoor GGC Amsterdam (In re Fairfield Sentry Limited)*, 2020 WL 7345988 (Bankr. S.D.N.Y. Dec. 14, 2020), *reconsideration denied*, 2021 WL 771677 (Bankr. S.D.N.Y. Feb. 23, 2021). In that case, the court ruled that foreign law claims, like state law claims that a U.S. bankruptcy trustee could assert through section 544(b)(1), were barred by the safe harbor.

Without deciding the issue in the case before him, Judge Glenn disagreed with the recent *Fairfield* ruling. "Barring foreign law avoidance claims or imposing an impossibly high standard for the exception to the safe harbor to apply in chapter 15 cases," he wrote, "would mean that there is effectively no exception to the safe harbor in such cases." According to Judge Glenn, this is contrary to the language of section 561(d), which makes section 546(e) applicable "to limit avoidance powers to the same extent as"—that is, not to a broader extent than—"in a proceeding under chapter 7 or 11." Judge Glenn accordingly "decline[ed] to adopt a rigid rule barring foreign law avoidance claims or requiring the foreign statute to use language virtually identical to section 548(a)(1)(A) to except the challenged transaction from the section 546(e) safe harbor."

Judge Glenn denied the motion to dismiss NSA's remaining claims, except for the unjust enrichment claim, which the court concluded did not exist under Norwegian law.

OUTLOOK

Because Judge Glenn permitted NSA to replead certain of its claims, his decision in *Norske Skogindustrier* is not the end of the story concerning NSA's efforts to avoid alleged fraudulent transfers to the defendants as part of the company's 2016 restructuring. Nonetheless, the ruling is significant for a number of reasons.

First, it was not too long ago in chapter 15's relatively brief history that U.S. bankruptcy courts were not certain (for a number of reasons) that they even had the power to adjudicate causes of action under foreign bankruptcy laws in a chapter 15 case. *Norske Skogindustrier* indicates that this is no longer the case, and this is consistent with a bankruptcy court's general powers to adjudicate foreign law claims. Indeed, bankruptcy courts have applied foreign law in a number of contexts. *See, e.g.*, *In re Lehman Bros. Holdings Inc.*, 602 B.R. 564, 592 (Bankr. S.D.N.Y. 2019) (applying English law to interpret an exclusion/exculpatory provision); *In re Fah Liquidating Corp.*, 2019 WL 4034007, at *5–6 (Bankr. D. Del. Aug. 26, 2019) (applying German law to dismiss an unjust-enrichment claim but noting the same result would have occurred under Delaware law); *In re B.C.I. Finances Pty Ltd.*, 583 B.R. 288, 300 (Bankr. S.D.N.Y. 2018) (applying Australian law to determine the "location" of fiduciary duty claims); *In re Express One Int'l, Inc.*, 243 B.R. 290, 294–95 (Bankr. E.D. Tex. 1999) (analyzing whether French law recognizes the parol evidence rule and how it applies).

Judge Glenn's conclusion that tolling under section 108 is available to a foreign representative in a chapter 15 case is not groundbreaking. However, his determination that the provision can be used to extend deadlines for bringing suit under foreign bankruptcy law (as distinguished from nonbankruptcy law) highlights a problem in the wording of section 108 that may not have been anticipated by lawmakers when they enacted chapter 15. This problem should be remedied in keeping with the purpose of the tolling provision.

Finally, and more broadly speaking, *Norske Skogindustrier* is emblematic of the increasing utilization of chapter 15 by foreign debtors as a valuable tool, among other things, to protect U.S. assets, enforce foreign restructuring plans or related court orders, avoid transfers, seek discovery in pending or anticipated litigation, or preserve causes of action that may otherwise have expired under foreign law.

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VOTING RIGHT ASSIGNMENT UNENFORCEABLE, BUT SUBORDINATED CREDITOR LACKED STANDING TO PARTICIPATE IN CHAPTER 11 PLAN CONFIRMATION PROCESS

Dan B. Prieto ■ Mark G. Douglas

In *In re Fencepost Productions Inc.*, 2021 WL 1259691 (Bankr. D. Kan. Mar. 31, 2021), the U.S. Bankruptcy Court for the District of Kansas recently addressed the enforceability of 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. The bankruptcy court ruled that such a provision is not enforceable because it conflicts with the Bankruptcy Code. In a twist, however, the court concluded that the subordinated creditor lacked "prudential standing" to participate in the confirmation process because it was extremely out-of-the-money and therefore had no stake in the outcome of the case, but was attempting to assert the rights of third parties.

STANDING

"Standing" is the legal capacity to commence litigation in a court of law. It is a threshold issue—a court must determine whether a litigant has the legal capacity to pursue claims before the court can adjudicate the dispute. In order to establish "constitutional" or "Article III" standing, a plaintiff must have a personal stake in litigation sufficient to make out a concrete "case" or "controversy" to which the federal judicial power may extend under Article III, section 2, of the U.S. Constitution. *See Pershing Park Villas Homeowners Ass'n v. United Pac. Ins. Co.*, 219 F.3d 895, 899 (9th Cir. 2000).

In bankruptcy cases, various provisions of the Bankruptcy Code confer another type of standing on various entities (e.g., the debtor, the debtor-in-possession ("DIP"), a bankruptcy trustee, creditors, equity interest holders, official committees, or indenture trustees) to, among other things, participate generally in a bankruptcy case or commence litigation involving causes of action or claims that either belonged to the debtor prior to filing for bankruptcy or are created by the Bankruptcy Code. For example, in a chapter 11 case, section 1109 of the Bankruptcy Code provides that any "party in interest," including the debtor, the trustee, a committee of creditors or equity interest holders, a creditor, an equity security holder, or an indenture trustee "may raise and may appear and be heard on any issue" in a chapter 11 case.

This "bankruptcy" or "statutory" standing is distinct from constitutional standing, which is jurisdictional—if a potential litigant lacks constitutional standing, the court lacks jurisdiction to adjudicate the dispute. The distinction between constitutional and bankruptcy standing was recently examined by the U.S. Court of Appeals for the Third Circuit in *In re Wilton Armetale, Inc.*, 968 F.3d 273 (3d Cir. 2020), in which the court of appeals held that the ability of a creditor to sue in bankruptcy is not a question of constitutional standing (because the risk of loss creates standing) but, rather, an issue of statutory authority because creditors may lose authority to pursue claims under the Bankruptcy Code. The Third Circuit explained that, in accordance with the U.S. Supreme Court's decision in *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 125 (2014), constitutional standing has only three elements: (i) there must be "a concrete and particularized injury in fact"; (ii) the injury must be "fairly traceable" to the defendant's conduct; and (iii) "a favorable judicial decision" would likely redress the injury. 572 U.S. at 125. Once a plaintiff satisfies those elements, the action "presents a case or controversy that is properly within federal courts' Article III jurisdiction." *Id.*

Finally, the judicially created concept of "prudential" or "zone of interests" standing examines whether: (i) the plaintiff's grievance falls within the zone of interests protected by a statute; (ii) the complaint raises abstract questions or a generalized grievance more properly addressed by the legislature; and (iii) the plaintiff is asserting his legal rights and interests or those of third parties. However, Congress can modify or even abrogate prudential standing requirements by statute. *St. Paul Fire & Marine Ins. Co. v. Labuzan*, 579 F.3d 533, 539 (5th Cir. 2009) (considering whether lawmakers intended to abrogate prudential standing requirements in section 362(k) of the Bankruptcy Code, which authorizes the recovery of damages for a willful violation of the automatic stay).

VOTING ON A CHAPTER 11 PLAN

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). 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).

Voting rights can have a significant impact on the ultimate fate of a chapter 11 plan. If a creditor holds a significant bloc of claims in a single class under a plan, it may be able to prevent confirmation of the plan or force the plan proponent to comply with the Bankruptcy Code's "cram down" requirements to achieve confirmation. Creditors holding a blocking position or having sufficient influence to create one through dealmaking with other creditors commonly use the resulting leverage to maximize their recoveries under the plan, sometimes at the expense of creditors who lack the same negotiating power. In some cases, the accumulation of claims and voting power can even be an effective means of gaining control of a company through chapter 11, since many chapter 11 plans involve debt-for-equity swaps.

For this reason, creditors sometimes bargain to obtain greater bankruptcy voting rights by means of pre-bankruptcy intercreditor or subordination agreements.

INTERCREDITOR AND SUBORDINATION AGREEMENTS

An intercreditor agreement is an agreement between or 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. Such agreements typically include a "waterfall" provision specifying the order in which the parties will receive payments from a pool of the borrower's assets upon the occurrence of default or another specified event, and subordinating the liens or rights to payment of junior creditors to the liens or payment rights of senior creditors.

In the event of the borrower's bankruptcy, an intercreditor agreement may include, among other things, provisions that: (i) restrict the junior creditors' right to vote on a chapter 11 plan to maximize senior creditors' control over the plan process and enhance their ability to obtain confirmation of a plan they support; (ii) waive the junior creditors' right to challenge the validity, priority, perfection, and enforceability of the senior creditors' liens or the validity of their debt (and vice versa); (iii) give junior creditors advance consent to any DIP financing to be provided by senior creditors or any use of cash collateral approved by the senior creditors; (iv) waive junior creditors' right to seek relief from the automatic stay without the prior written consent of senior creditors and provide that junior creditors will not oppose any stay relief requested by senior creditors; and (v) waive junior creditors' right to object to any sale of the debtor's assets or to any credit bid submitted in connection with the sale by senior creditors.

To the extent that an intercreditor agreement provides for subordination of debt or security, the agreement will generally be enforced 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."

In construing the validity, enforceability, and application of a subordination agreement, section 510(a) directs the bankruptcy court to look to applicable nonbankruptcy law—generally state law—as well as the terms of the agreement itself. See COLLIER ON BANKRUPTCY ("COLLIER") ¶ 510.03[3] (16th ed. 2021). If there is ambiguity in the agreement concerning the terms or extent of the subordination, a bankruptcy court may refuse to enforce it. *See In re Bank of New England Corp.*, 364 F.3d 355, 367 (1st Cir. 2004) (remanding case to bankruptcy court to determine under New York law whether subordination agreement actually provided for payment of postpetition interest on senior debt prior to any payment on junior debt), *on remand*, 404 B.R. 17 (Bankr. D. Mass. 2009) (finding that parties did not intend to subordinate claims for postpetition interest), *aff'd*, 426 B.R. 1 (D. Mass. 2010), *aff'd*, 646 F.3d 90 (1st Cir. 2011).

Moreover, a chapter 11 plan need not necessarily give effect to the explicit terms of a subordination agreement in providing for the treatment of creditor claims. *See In re Tribune Media Co.*, 587 B.R. 606, 614 (D. Del. 2018) (because section 510(a) is expressly excepted from section 1129(b)(1) of the Bankruptcy Code, a non-consensual chapter 11 plan that does not fully enforce a subordination agreement may be confirmed as long as "the plan does not discriminate unfairly, and is fair and equitable"); *see generally* COLLIER at ¶ 510.03[3].

ENFORCEMENT OF CHAPTER 11 VOTING RIGHT ASSIGNMENTS

As noted, section 1126(a) gives the holder of a claim or interest the right to vote on a chapter 11 plan. Courts disagree over whether an assignment of plan voting rights in an intercreditor or subordination agreement is enforceable. Some courts have concluded that they are not. *See, e.g., 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 SW Hotel Venture LLC*, 460 B.R. 4 (Bankr. D. Mass. 2011) (assignment of voting rights in a subordination agreement was unenforceable), *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); *In re Hart Ski Mfg. Co.*, 5 B.R. 734, 736 (Bankr. D. Minn. 1980).

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. Appx. 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).

For example, in *LaSalle*, an intercreditor agreement provided that the debtor's senior secured creditor had the right to vote the subordinated secured creditor's claim in any bankruptcy. The bankruptcy court refused to enforce the assignment, ruling that sections 510(a) and 1126(a) of the Bankruptcy Code, rather than the provisions of the intercreditor agreement, controlled voting rights.

In particular, the court reasoned that: (i) the subordinated creditor's agreement that the senior creditor could vote on its behalf was not controlling because "prebankruptcy agreements do not override contrary provisions of the Bankruptcy Code"; (ii) section 510(a) does not permit a waiver of voting rights under section 1126(a) because subordination affects the priority of payment of claims in bankruptcy rather than voting rights; (iii) Rule 3018(c) of the Federal Rules of Bankruptcy Procedure ("Bankruptcy Rules"), which provides that acceptance or rejection of a plan must be signed by "the creditor or equity security holder or an authorized agent," does not provide a mechanism for enforcing vote relinquishment; and (iv) the conclusion that section 1126(a) controls is "completely consistent with reasonable bankruptcy policy," which "assures that the holder of a subordinated claim has a potential role in negotiation and confirmation of a plan, a role that would be eliminated by enforcing contractual transfers of Chapter 11 voting rights." *LaSalle*, 246 B.R. at 331.

By contrast, in *Aerosol Packaging*, a junior lender and the borrower signed a subordination agreement under which the junior lender agreed to refrain from taking any action to collect on its debt until the senior lender was paid in full, and to permit the senior lender, among other things, to vote on any chapter 11 plan proposed for the borrower in bankruptcy. After the borrower filed for bankruptcy, the junior lender voted to reject the debtor's plan even though the senior lender voted to accept the plan on the junior lender's behalf. The bankruptcy court, rejecting *LaSalle*, ruled that the subordination agreement appeared to be enforceable under state law and unequivocally provided that the junior lender assigned its right to vote on the plan. It also reasoned that section 1126(a) "does not expressly or implicitly prevent that right from being delegated or bargained away" and that Bankruptcy Rules 3018 and 9010 (the latter of which governs representation, appearances, and powers of attorney in bankruptcy cases) "explicitly permit agents and other representatives to take actions, including voting, on behalf of parties." *Aerosol Packaging*, 362 B.R. at 47.

Regardless of the particular approach adopted by a court on this issue, the growing consensus is that agreements that seek to limit or waive junior creditors' voting rights must contain express language to that effect. *See In re MPM Silicones, L.L.C.*, 596 B.R. 416 , 430 (S.D.N.Y. 2019) (junior lienholders did not breach an intercreditor agreement by voting in favor of a chapter 11 plan to which senior lienholders objected and which ultimately provided the senior lienholders with replacement notes allegedly worth less than their oversecured claims, absent an express voting rights waiver).

FENCEPOST

Fencepost Production, Inc. and its affiliates (collectively, "debtors") filed for chapter 11 protection on December 18, 2019, in Kansas. Prior to the bankruptcy filing, Associated Bank, N.A. ("Associated") agreed to loan the debtors up to $14 million on a secured basis. In 2018, Associated and another lender, BMS Management, Inc. (together with related individuals, "BMS Group"), entered into a subordination agreement providing that payment of the debtors' liability to BMS Group would be subordinated to payment in full of the debtors' obligations to Associated. It also provided that, in any bankruptcy: (i) Associated would file a claim on behalf of both lenders; (ii) Associated, at its sole discretion, had the right "to vote or consent to any ... proceeding with respect to, any claims of [BMS Group] relating to [the debtors' obligations to BMS Group]"; and (iii) BMS Group would not take any position contrary to the terms of the agreement.

Associated filed a proof of claim in the debtors' bankruptcy for approximately $7.7 million, of which approximately $5.3 million (representing BMS Group's portion of the total debt) was unsecured. BMS Group separately filed a proof of claim for approximately $5.3 million. The debtors proposed a chapter 11 plan under which: (i) the secured claim of Associated would be paid from the proceeds of the liquidation of its collateral; (ii) holders of general unsecured claims (including any deficiency claim held by Associated) would recover 15% of their claims; (iii) BMS Group would be allocated $120,000 in respect of its separately classified, subordinated claim, but the funds would be distributed to Associated; and (iv) equity holders would retain their interests. The disclosure statement accompanying the plan stated that, if the debtors were liquidated in chapter 7, unsecured creditors would receive nothing and all assets would be distributed to secured and priority creditors.

Associated voted to accept the plan on behalf of itself and BMS Group. BMS Group separately voted to reject the plan. It also objected to approval of the debtors' disclosure statement and opposed confirmation of the plan.

The debtors objected to BMS Group's claim, arguing that it was barred by the subordination agreement. In addition, they filed a motion, also based on the express terms of the agreement, to disqualify BMS Group's vote and to strike its objection to the disclosure statement. BMS Group countered that although the other provisions of the subordination agreement were valid, assignment of its voting rights under the agreement was unenforceable.

THE BANKRUPTCY COURT'S RULING

Initially, Chief U.S. Bankruptcy Judge Dale L. Somers noted that, as exemplified by *LaSalle* and *Aerosol Packaging*, bankruptcy courts have reached different conclusions regarding the enforceability of chapter 11 plan voting right assignments in subordination agreements. He also explained that the issue has been commented upon extensively, and the ABI Commission to Study the Reform of Chapter 11 recommended in its 2014 final report that "[t]he contractual assignment of voting rights in favor of senior creditors under an intercreditor agreement, subordination, or similar agreement should not be enforced." *See* Final Report and Recommendations of the ABI Commission to Study the Reform of Chapter 11 (2014) p. 261.

According to Judge Somers, the reasoning of *LaSalle* is more persuasive. He accordingly held that BMS Group's assignment of its right to vote on the debtors' chapter 11 plan was unenforceable. In so ruling, he found that BMS Group did not appoint Associated as its agent under the subordination agreement.

Next, Judge Somers overruled the debtors' objection to BMS Group's claim. He reasoned that, notwithstanding the express terms of the subordination agreement, "subordination does not involve transfer of the subordinated creditor's legal interest." That interest, Judge Somers explained, is protected under the Bankruptcy Code's cramdown confirmation requirements in section 1129(b)(1) of the Bankruptcy Code, which provides that a nonconsensual plan may be confirmed "[n]otwithstanding section 510(a)." In other words, he wrote, "[t]his means that § 1129(b)(1) overrides § 510(a)."

However, Judge Somers concluded that BMS Group lacked standing to participate in the plan confirmation process.

He explained that BMS Group had statutory authority to participate under section 1109(b), section 1126(a) and section 1128(b) (providing that "[a] party in interest may object to confirmation of a plan."). Judge Somers declined to decide whether BMS Group had constitutional standing, "since it is not necessary in the present circumstances."

However, Judge Somers concluded that BMS Group lacked prudential standing to participate in the confirmation process because BMS Group was an out-of-the-money subordinated creditor with no financial stake in the outcome of the case. According to the judge, if permitted to participate, BMS Group "would be litigating issues affecting the rights of third parties, not itself," such as whether the plan violated the "absolute priority rule" by preserving equity interests without paying creditors in full.

OUTLOOK

The ruling in *Fencepost* regarding the unenforceability of chapter 11 voting rights assignments in subordination agreements adds yet another chapter to the ongoing debate on this issue. That aspect of the court's decision is unremarkable and emblematic of the exacting scrutiny recently directed by many bankruptcy courts toward bankruptcy-related rights assignments and waivers in such agreements.

The *Fencepost* court's conclusion that BMS Group lacked prudential standing is more complicated. In part, it would appear to be driven by the facts of the case, which involved a subordinated, clearly out-of-the-money creditor intent upon impeding an otherwise consensual reorganization.

The Bankruptcy Code, however, expressly provides to the contrary by, among other things, giving every party in interest (including creditors and interest holders, without making an exception in cases where there is no value available for distribution to them), the right to appear and be heard "on any issue" in a chapter 11 case (section 1109(b)), the right to vote on a chapter 11 plan (section 1126(a)), and the right to object to confirmation of a plan (section 1128(b)). These provisions arguably indicate that Congress intended to modify or abrogate prudential standing requirements when it enacted the Bankruptcy Code. Moreover, the "rights" any out-of-the-money creditor or shareholder would be seeking to enforce by participating in the confirmation process are arguably their own, rather than the rights of third parties.

A logical extension of the rationale articulated in *Fencepost* is that clearly out-of-the-money creditors or shareholders of an insolvent corporation would never have prudential standing to participate in the chapter 11 plan confirmation process. That approach would be contrary to court rulings and general practice in many chapter 11 cases.

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ILLINOIS BANKRUPTCY COURT EXAMINES STATUTORY AUTHORITY FOR ENFORCING FOREIGN BANKRUPTCY COURT ORDERS IN CHAPTER 15 CASES

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

In cases under both chapter 15 of the Bankruptcy Code and its repealed predecessor, section 304, U.S. bankruptcy courts have routinely recognized and enforced orders of foreign bankruptcy and insolvency courts as a matter of international comity. However, U.S. bankruptcy courts sometimes disagree over the precise statutory authority for granting such relief, because the provisions of chapter 15 are not particularly clear on this point in all cases.

This question was recently examined by the U.S. Bankruptcy Court for the Northern District of Illinois in *In re Condor Flugdienst GMBH*, 2021 WL 1166016 (Bankr. N.D. Ill. Mar. 26, 2021). The court ruled that, if requested relief is not specifically authorized under chapter 15, a U.S. bankruptcy court still has the discretion to grant such relief provided it would have been authorized in a cross-border "ancillary" bankruptcy proceeding under section 304. In this case, the court held that it was expressly authorized under section 1521 of the Bankruptcy Code, as guided by section 1522, to recognize and enforce a foreign court order confirming a German debtor's liquidation plan. The court also permanently enjoined prepetition litigation commenced by certain creditors because such relief was necessary to effectuate the liquidation plan.

COMITY AND CROSS-BORDER BANKRUPTCY CASES

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 ("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.

Chapter 15 replaced section 304 of the Bankruptcy Code. Section 304 allowed an accredited representative of a debtor in a foreign insolvency proceeding to commence a limited "ancillary" bankruptcy case in the United States for the purpose of enjoining actions against the foreign debtor or its assets located in the United States or, in some cases, repatriating such assets or their proceeds abroad for administration in the debtor's foreign bankruptcy.

The policy behind section 304 was to provide any assistance necessary to ensure the economic and expeditious administration of foreign insolvency proceedings. In deciding whether to grant injunctive, turnover, or other appropriate relief under former section 304, a U.S. bankruptcy court had to consider "what will best assure an economical and expeditious administration" of the foreign debtor's estate, consistent with a number of factors, including comity. *See* 11 U.S.C. § 304(c) (repealed 2005) (listing factors that are now included in section 1507(b) as a condition to the court's decision to grant "additional assistance, consistent with the principles of comity," under chapter 15 or other U.S. law); *In re Treco*, 240 F.3d 148, 156 (2d Cir. 2001) (noting that "comity [was] the ultimate consideration in determining whether to provide relief under § 304").

To promote comity and cooperation among courts presiding over cross-border bankruptcies, chapter 15 of the Bankruptcy Code provides that "the court shall cooperate to the maximum extent possible with a foreign court or a foreign representative." 11 U.S.C. § 1525(a). Section 1527 specifies "Forms of cooperation," including, but not limited to: (i) the appointment of a person or entity to act at the court's direction; (ii) the communication of information by any appropriate means; (iii) coordination of the administration of the debtor's assets and affairs; (iv) implementation of agreements concerning the coordination of proceedings; and (v) coordination of concurrent proceedings involving the same debtor.

PROCEDURES, RECOGNITION, AND RELIEF UNDER CHAPTER 15

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."

"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.

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."

Pending its decision on a petition for recognition, the bankruptcy court is empowered to grant certain kinds of provisional relief. Section 1519(a) authorizes the court, "where relief is urgently needed to protect the assets of the debtor or the interests of the creditors," to stay any execution against the debtor's assets, entrust the administration of the debtor's assets to a foreign representative, or suspend the right to transfer, encumber, or otherwise dispose of any of the debtor's assets. Any provisional relief granted pending approval of a request for recognition terminates at such time that the bankruptcy court rules on the request, unless the court expressly orders otherwise.

Upon recognition of a foreign "main" proceeding, section 1520 of the Bankruptcy Code provides that certain provisions of the Bankruptcy Code automatically come into force, including: (i) the automatic stay preventing creditor collection efforts with respect to the debtor or its U.S. assets (section 362, subject to certain enumerated exceptions); (ii) the right of any entity asserting an interest in the debtor's U.S. assets to "adequate protection" of that interest (section 361); and (iii) restrictions on use, sale, lease, transfer, or encumbrance of the debtor's U.S. assets (sections 363, 549, and 552).

Following recognition of a main or nonmain proceeding, section 1521(a) provides that, to the extent not already in effect, and "where necessary to effectuate the purpose of [chapter 15] and to protect the assets of the debtor or the interests of the creditors," the bankruptcy court may grant "any appropriate relief," including a stay of any action against the debtor or its U.S. assets; an order suspending the debtor's right to transfer or encumber its U.S. assets; and "any additional relief that may be available to a trustee," with certain exceptions. Under section 1521(b), the court may entrust the distribution of the debtor's U.S. assets to the foreign representative or another person, provided the court is satisfied that the interests of U.S. creditors are "sufficiently protected."

Moreover, section 1507 of the Bankruptcy Code provides that, upon recognition of a main or nonmain proceeding, the bankruptcy court may provide "additional assistance" to a foreign representative "under [the Bankruptcy Code] or under other laws of the United States." However, any such assistance must, "consistent with the principles of comity," reasonably ensure that: (i) all stakeholders are treated fairly; (ii) U.S. creditors are not prejudiced by asserting their claims in the foreign proceeding; (iii) the debtor's assets are not preferentially or fraudulently transferred; (iv) proceeds of the debtor's assets are distributed substantially in accordance with the order prescribed by the Bankruptcy Code; and (v) if appropriate, an individual foreign debtor is given the opportunity for a fresh start. *See* 11 U.S.C. § 1507(b) (listing factors, that, together with comity, were previously included in repealed section 304(c)).

Section 1522(a) provides that the bankruptcy court may exercise its discretion to order any of the relief authorized by section 1519 (upon the filing of a petition for recognition) or 1521 (upon recognition of a foreign proceeding) "only if the interests of the creditors and other interested entities, including the debtor, are sufficiently protected."

Finally, section 1506 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 1506, however, requires a "narrow reading" and "does not create an exception for *any* action under Chapter 15 that may conflict with public policy, but only an action that is '*manifestly* contrary.'" *In re Fairfield Sentry Ltd.*, 714 F.3d 127, 139 (2d Cir. 2013).

CONDOR

A German court entered an order commencing a liquidation proceeding ("liquidation") for Germany-based commercial airline Condor Flugdienst GMBH ("CF") in 2019. In October 2020, CF's foreign representatives filed a petition in the U.S. Bankruptcy Court for the Northern District of Illinois ("bankruptcy court") seeking recognition of the liquidation under chapter 15 as a foreign main proceeding. They also sought provisional relief enjoining actions against CF's U.S. assets under sections 105(a) and 1519 of the Bankruptcy Code. The bankruptcy court granted such provisional relief until a scheduled November 2020 recognition hearing.

On October 22, 2020, the German court entered an order ("confirmation order") confirming a liquidating plan for CF.

In November 2020, the bankruptcy court entered an order recognizing the liquidation under chapter 15 as a foreign main proceeding. Because such recognition automatically terminated the provisional relief, the bankruptcy court also entered an order pursuant to section 1521(a)(1) staying collection efforts against CF's U.S. assets to augment the automatic stay that became effective upon recognition under section 1520.

The foreign representatives then asked the bankruptcy court to recognize and implement the confirmation order in the United States pursuant to sections 105(a), 1521(a), 1525(a), and 1527 of the Bankruptcy Code. Several of CF's U.S. creditors objected to the requested relief. They argued that, among other things, CF's liquidation did not provide a fair recovery to all creditors and U.S. creditors did not receive adequate notice of the liquidation.

THE BANKRUPTCY COURT'S RULING

The bankruptcy court granted the foreign representatives' motion for an order recognizing and implementing the confirmation order. Also, due to concerns raised by CF's foreign representatives regarding possible attempts by CF's U.S. creditors to recommence litigation in the United States, the bankruptcy court permanently enjoined CF's U.S. creditors from continuing any litigation against CF in the United States in contravention of the confirmation order.

At the outset of his ruling, Bankruptcy Judge Timothy A. Barnes noted that "[t]he Motion before the court is both routine and complex at the same time." He explained that requests for recognition of foreign plans in chapter 15 cases have routinely been approved, although courts have sometimes disagreed on which provisions of chapter 15 provide authority for doing so.

According to Judge Barnes, in addition to the automatic relief upon recognition specified in section 1520, the Bankruptcy Code (including chapter 15) includes "a variety of sources of authority for nonautomatic, discretionary relief," including section 1507(a) ("additional assistance"), section 1521 (authorizing the court to "grant any appropriate relief"), and section 105(a), which authorizes the bankruptcy court to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code]." Each of these provisions, he wrote, "has its own, unique constraints."

If a form of discretionary relief is specifically listed among the examples set forth in section 1521(a), Judge Barnes explained, the source of court authority for the requested relief is clear, subject to the constraints of section 1522 (requiring sufficient protection of all stakeholders). In other cases, chapter 15 provides no guidance—thereby creating complexity.

In *In re Vitro, S.A.B. de C.V.*, 701 F.3d 1031 (5th Cir. 2012), the Fifth Circuit considered the source of authority for chapter 15 relief not specifically mentioned in the provisions of the chapter:

> We conclude that a court confronted by this situation should first consider the specific relief enumerated under § 1521(a) and (b). If the relief is not explicitly provided for there, a court should then consider whether the requested relief falls more generally under § 1521's grant of any appropriate relief. We understand "appropriate relief" to be relief previously available under Chapter 15's predecessor, § 304. Only if a court determines that the requested relief was not formerly available under § 304 should a court consider whether relief would be appropriate as "additional assistance" under § 1507.

Id. at 1054. According to Judge Barnes in *Condor*, this rationale is likely inconsistent with the intentions of the drafters of the Model Law.

He explained that the Model Law drafters "likely anticipated that a court would consider virtually all requested relief under the authority" of the Model Law counterpart of section 1521 (Article 21), rather than the broader authority contained in the Model Law equivalent of section 1507 (Article 7). The latter, Judge Barnes noted, was designed to alleviate concerns that presiding courts might restrictively interpret Article 21 to limit relief to a country's *bankruptcy* laws by providing that a court may grant relief under the *non-bankruptcy* laws of the enacting country if relief under the country's bankruptcy laws was inadequate.

Unfortunately, U.S. lawmakers complicated this analysis by providing in section 1507 that the bankruptcy court may provide additional assistance to a foreign representative "*under this title or* under other laws of the United States" (emphasis added). By adding the emphasized language, Judge Barnes noted, "Congress created an overlap" without providing guidance as to why the change was made and leaving courts "to their own devices in determining how to choose between the overlapping statutes." According to Judge Barnes, "the *Vitro* court stepped in to fill the gap," and although its approach is not based on the language of chapter 15, "it is the only cogent one available to address the overlap created by Congress."

Because the recognition of a foreign bankruptcy or restructuring plan is authorized under section 1521 (within the strictures of section 1522) and had been commonly authorized under repealed section 304, Judge Barnes concluded that he need not look to either section 1507 or 105 for authority to recognize and enforce the German court's confirmation order. In so ruling, he found that the interests of stakeholders were sufficiently protected (as required by section 1522) because, among other things:

- The foreign proceeding, the liquidating plan, and the confirmation order "afford relief that is akin to," albeit not necessarily identical to, that available in U.S. bankruptcy cases;
- U.S. and non-U.S. creditors were treated no differently in the foreign proceeding, the process of all creditors submitting claims in the proceeding was ongoing, and it would not be unduly burdensome for U.S. creditors to participate in the claims process in Germany; and
- All creditors were afforded the notice required under German law, even if Germany's due process requirements were not identical to those under U.S. law. Further, U.S. creditors were afforded a second opportunity to be heard given the notice requirements attendant to the commencement of the chapter 15 case.

Finally, addressing the prospect of continued litigation by CF's U.S. creditors, Judge Barnes noted that the "point behind chapter 15 proceedings is to 'facilitate the consolidation of multinational bankruptcies into one single proceeding'" (citation omitted), which "includes recognizing and enforcing the terms of a foreign plan." As with a discharge injunction under section 524(g) of the Bankruptcy Code, Judge Barnes determined that a U.S. creditor "may be enjoined through [a] foreign plan" in a chapter 15 case. Indeed, Judge Barnes emphasized, absent the court's recognition and enforcement of the German court's confirmation order in the United States, "the aims of the Foreign Proceeding and the Debtor's efforts to consummate the Plan could be impeded, a result that would be contrary to the purposes of chapter 15."

OUTLOOK

Condor does not break any new ground on the power of U.S. bankruptcy courts to enforce the orders of foreign bankruptcy courts in cross-border bankruptcy cases as a matter of comity under appropriate circumstances. However, the ruling is instructive in parsing the statutory authority for granting such relief and in illuminating the confusion that U.S. lawmakers created on this point when enacting chapter 15 in 2005. It also reinforces the importance of comity as the foundation for chapter 15 and other laws patterned on the Model Law designed to facilitate cross-border bankruptcy cases. Lastly, *Condor* establishes that a U.S. bankruptcy court may permanently enjoin U.S. creditors from pursuing a foreign debtor's U.S. assets by recognizing and giving effect to the discharge provided in a foreign plan confirmation order.

Given the relatively low cost of chapter 15 (e.g., no official committee of unsecured creditors and related professionals, shorter time periods, and narrower scope of court oversight), the use of chapter 15 by foreign debtors with U.S. assets and creditors may lead to more creative cross-border restructuring cases. Recent chapter 15 cases, for example, have already demonstrated a trend of foreign debtors utilizing chapter 15 to achieve results previously thought available only under chapter 11—*see, e.g., In re Perforadora Oro Negro*, No. 18-11094 (Bankr. S.D.N.Y.) (authorizing extensive discovery under chapter 15); *In re Just Energy Grp. Inc.*, No. 21-30823 (Bankr. S.D. Tex.) (authorizing relief under chapter 15 for transactions with U.S. affiliates that are part of a foreign proceeding)—or results that are controversial under chapter 11. *See In re Avanti Commc'ns Grp. PLC*, No. 18-10458 (Bankr. S.D.N.Y.) (authorizing nonconsensual non-debtor third-party releases); *In re Syncreon Automotive (UK) Ltd.*, No. 19-11702 (Bankr. D. Del.) (same). In light of these developments, U.S. creditors may be well-advised to assert their rights more forcefully in foreign restructuring proceedings in addition to litigating the contours of chapter 15 relief in the United States.

IN BRIEF: U.S. SUPREME COURT DECLINES REVIEW OF HIGH-PROFILE BANKRUPTCY RULINGS

Brad B. Erens ▪ Mark G. Douglas

MADOFF

In what may be the beginning of the final chapter of more than a decade of litigation involving efforts to recover $41 million of the fictitious profits paid to certain investors in Bernard Madoff's defunct brokerage firm as part of the largest Ponzi scheme in history, the U.S. Supreme Court on May 3, 2021, denied a petition to review a 2020 decision by a three-judge panel of the U.S. Court of Appeals for the Second Circuit. The decision held that the investors did not have a defense to avoidance and recovery on the basis that they received the payments "for value." *See Picard v. Gettinger (In re Bernard L. Madoff Investment Securities LLC)*, 976 F.3d 184 (2d Cir. 2020), *cert. denied sub nom. Gettinger v. Picard*, No. 20-1382, 2021 WL 1725218 (U.S. May 3, 2021).

In particular, the Second Circuit panel ruled that the investors could not rely on a Bankruptcy Code provision insulating good-faith transferees from avoidance liability because that provision conflicts with the Securities Investor Protection Act ("SIPA"), which prioritizes customers over general creditors and only selectively incorporates the Bankruptcy Code to the extent not inconsistent with SIPA's provisions. The Second Circuit also ruled that the trustee overseeing the brokerage firm's liquidation properly figured the amount subject to recovery despite calculating the defendants' liability by netting the amounts they received since the firm's inception against the amounts each defendant invested in the firm since its inception.

The Supreme Court's refusal to review the decision is the most recent claw-back victory for the Securities Investor Protection Corp. and the Madoff firm's liquidation trustee, who has recovered more than $13.3 billion and distributed $12.4 billion to investors defrauded by the $65 billion Ponzi scheme.

A more detailed discussion of the Second Circuit's decision can be accessed here.

WESTMORELAND COAL

On May 24, 2021, the Supreme Court denied a petition to review a 2020 ruling by the U.S. Court of Appeals for the Fifth Circuit that the Coal Act of 1992 did not prevent chapter 11 debtor Westmoreland Coal Co. ("Westmoreland") from modifying its retired employees' health care benefits under section 1114 of the Bankruptcy Code. *See Holland v. Westmoreland Coal Co.*, No. 20-880, 2021 WL 2044552 (U.S. May 24, 2021). The Coal Act was enacted to ensure that retired miners retained access to company-provided health care during a time when many coal companies were repudiating lifetime benefit promises.

Enacted in 1988, section 1114 governs the circumstances under which a chapter 11 debtor or bankruptcy trustee may modify or stop paying "retiree benefits." The provision defines "retiree benefits" as:

> payments to any entity or person for the purpose of providing or reimbursing payments for retired employees and their spouses and dependents, for medical, surgical, or hospital care benefits, or benefits in the event of sickness, accident, disability, or death under any plan, fund, or program (through the purchase of insurance or otherwise) maintained or established in whole or in part by the debtor prior to filing a petition commencing a case under this title.

11 U.S.C. § 1114(a).

After Westmoreland filed for chapter 11 protection in 2018, its miners' benefit plans asked the bankruptcy court for a declaration that the company's Coal Act obligations could not be modified or eliminated in bankruptcy because, among other things, they did not qualify as "retiree benefits." The bankruptcy court ruled against the plans, holding that those obligations met the definition and could therefore be wiped out. The plans appealed to the Fifth Circuit, which upheld the bankruptcy court's decision. *See Matter of Westmoreland Coal Co.*, 968 F.3d 526 (5th Cir. 2020), *cert. denied sub nom. Holland v. Westmoreland Coal Co.*, No. 20-880, 2021 WL 2044552 (U.S. May 24, 2021). The plans filed a petition for a writ of *certiorari* with the Supreme Court, which denied the petition without opinion, leaving the Fifth Circuit's decision undisturbed.

NEWSWORTHY

Heather Lennox ***(Cleveland and New York)*** and ***Corinne Ball*** ***(New York)*** were named "Leading Lawyers" in the field of "Finance—Restructuring (including bankruptcy): corporate" in *The Legal 500 United States* 2021.

Bruce Bennett ***(Los Angeles and New York)*** was named a "Hall of Fame" lawyer in the fields "Finance—Restructuring (including bankruptcy): corporate" and "Finance—Restructuring (including bankruptcy): municipal" in *The Legal 500 United States* 2021.

Ben Larkin ***(London)*** and ***Sion Richards*** ***(London)*** were recognized in the area of Insolvency & Restructuring Law in the 2022 edition of *The Best Lawyers in the United Kingdom*.

Bruce Bennett ***(Los Angeles and New York)*** and ***Gregory M. Gordon*** ***(Dallas)*** received a "Band 1 Lawyer" ranking in the area of Bankruptcy/Restructuring in *Chambers USA* 2021.

Corinne Ball ***(New York)*** was among the "Senior Statespeople" named in *Chambers USA* 2021 and *Chambers Global* 2021 in the field of Bankruptcy/Restructuring.

Fabienne Beuzit ***(Paris)*** was named a "Next Generation Partner" in the field of Insolvency in the 2021 edition of *The Legal 500 EMEA*.

Dr. Olaf Benning ***(Frankfurt)*** was recognized in the field of Restructuring and Insolvency Law in the 2022 edition of *The Best Lawyers in Germany*.

Heather Lennox ***(Cleveland and New York)***, ***Kevyn D. Orr*** ***(Washington)***, ***Carl E. Black*** ***(Cleveland)***, ***Daniel J. Merrett*** ***(Atlanta)***, ***Robert W. Hamilton*** ***(Columbus)***, ***Thomas M. Wearsch*** ***(Cleveland)***, ***James O. Johnston*** ***(Los Angeles)***, ***Brad B. Erens*** ***(Chicago)***, ***Jeffrey B. Ellman*** ***(Atlanta)***, ***Dan T. Moss*** ***(Washington)***, and ***Charles M. Oellermann*** ***(Columbus)*** were recognized in the area of Bankruptcy/Restructuring in *Chambers USA* 2021.

Jones Day received a 2021 Australasian Law Award for the "Insolvency & Restructuring Deal of the Year" in advising the Queensland Investment Corporation on its A$200 million combined debt and equity investment and participation in the A$3.5 billion recapitalization and acquisition out of administration of Virgin Australia, Australia's second-largest airline, by Bain Capital. The Jones Day team included ***Mark Crean*** ***(Sydney)***, ***Isaac West*** ***(Brisbane)***, ***Lucas Wilk*** ***(Perth)***, ***Max O. Rose*** ***(Brisbane)***, ***Dale Atkinson*** ***(Perth)***, ***Karthik Kumar*** ***(Singapore)***, and ***Lynette Lim*** ***(Singapore)***.

Caitlin K. Cahow ***(Chicago)*** is included in the National LGBT Bar Association's "40 Best LGBTQ+ Lawyers Under 40—Class of 2021." The LGBT Bar's 40 Under 40 Class of 2021 is composed of LGBTQ+ legal professionals who have distinguished themselves in their field and demonstrated a profound commitment to LGBTQ+ equality. They are noted for playing an important part in building a pipeline for the future success of LGBTQ+ lawyers.

Heather Lennox ***(Cleveland and New York)***, ***Carl E. Black*** ***(Cleveland)***, ***Robert W. Hamilton*** ***(Columbus)***, ***T. Daniel Reynolds*** ***(Cleveland)***, ***Marissa Alfano*** ***(Cleveland)***, and ***Nick Buchta*** ***(Cleveland)*** are part of a team of Jones Day lawyers representing Nine Point Energy Holdings, Inc. ("Nine Point"), an oil and gas exploration and production company that filed for chapter 11 protection in the U.S. Bankruptcy Court for the District of Delaware on March 15, 2021. With Jones Day's assistance, Nine Point recently prevailed in a pair of adversary proceedings seeking judgments that: (i) Nine Point's contracts with its former midstream services provider, Caliber Midstream ("Caliber"), did not contain covenants running with the land, and thus Nine Point could reject the contracts and sell its assets free and clear of any interest that Caliber may have in the assets of the estate; and (ii) $150 million of Caliber's asserted liens on Nine Point's oil and gas assets under North Dakota law were invalid. On May 4, 2021, the bankruptcy court granted summary judgment for Nine Point in the first proceeding on four of the five counts in the complaint, clearing the path for a bankruptcy sales process to move forward. On June 28, the bankruptcy court ruled that at least $150 million of the $157 million in liens asserted by Caliber were invalid, thus clearing the path for the successful reorganization of Nine Point through a sale of its assets.

An article written by ***Corinne Ball*** ***(New York)*** titled "Bankruptcy Court May Be Effective Forum to Address Aggressive Action by State or State Agencies Given Recent Ruling on Waiver of Sovereign Immunity" was published in the June 23, 2021, edition of *The New York Law Journal*.

An article written by ***Daniel J. Merrett*** ***(Atlanta)*** and ***Mark G. Douglas*** ***(New York)*** titled "Another Court Adopts Majority View in Approving Bankruptcy Trustee's Use of Tax Code Look-Back Period in Avoidance Actions" was posted on the June 15, 2021, *Harvard Law School Bankruptcy Roundtable*.

An article written by ***Daniel J. Merrett*** ***(Atlanta)*** and ***Mark G. Douglas*** ***(New York)*** titled "Illinois Ruling Clarifies Ch. 7 Substantial Contribution Claims" was published in the May 21, 2021, edition of *Law360*.

An article written by ***Dan B. Prieto* (Dallas)** and ***Mark G. Douglas* (New York)** titled "Should Equitable Mootness Bar Appeals Only of Chapter 11 Plan Confirmation Orders?" was published by *Lexis Practical Guidance* on May 5, 2021.

An article written by ***Charles M. Oellermann* (Columbus)** and ***Mark G. Douglas* (New York)** titled "First Impressions: Third Circuit Scuttles Triangular Setoff in Bankruptcy" was published by *Lexis Practical Guidance* on April 27, 2021.

An article written by ***Daniel J. Merrett* (Atlanta)** and ***Mark G. Douglas* (New York)** titled "Debate Intensifies on Substantial Contribution Claims in Chapter 7 Cases" was published by *Lexis Practical Guidance* on May 6, 2021.

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Executive Editor: Charles M. Oellermann
Managing Editor: Mark G. Douglas

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