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FIFTH CIRCUIT WEIGHS IN ON BANKRUPTCY ASSET SALES FREE AND CLEAR OF LEASEHOLD INTERESTS

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The ability of a trustee or chapter 11 debtor-in-possession ("DIP") to sell bankruptcy estate assets "free and clear" of competing interests in the property has long been recognized as one of the most important advantages of a bankruptcy filing as a vehicle for restructuring a debtor's balance sheet and generating value. Still, section 363(f) of the Bankruptcy Code, which delineates the circumstances under which an asset can be sold free and clear of "any interest in such property," has generated a fair amount of controversy. This is so in part because the statute itself does not define "interest."

Although section 363(f) is generally acknowledged to encompass liens and security interests, some courts, taking into account both the language of the provision and its underlying purpose, have interpreted it much more broadly to also include leasehold interests, among other things. Broadly applied, however, section 363(f) arguably conflicts with certain other provisions of the Bankruptcy Code.

One of those provisions is section 365(h)(1) of the Bankruptcy Code. That section provides that, if the trustee or DIP rejects an unexpired real property lease under which the debtor is the lessor, the nondebtor lessee (and any permitted successor or assign, pursuant to subsection (h)(1)(D)) has the option of retaining its rights under the lease for the balance of the lease term "to the extent that such rights are enforceable under applicable nonbankruptcy law."

Courts disagree as to whether the rights of a lessee (or sublessee) under section 365(h)(1) are effectively extinguished where the debtor does not reject the lease and the leased real property is sold free and clear under section 363(f). Until 2022, only two federal courts of appeals had weighed in on this question, both staking out what was previously considered to be the minority view. In *Precision Industries, Inc. v. Qualitech Steel SBQ*, 327 F.3d 537 (7th Cir. 2003), the U.S. Court of Appeals for the Seventh Circuit disagreed with several lower courts and held that a real property lease can be extinguished in a free-and-clear sale of the property under section 363(f), at least where the lease has not been formally rejected. In *Pinnacle Rest. at Big Sky, LLC v. CH SP Acquisitions, LLC (In re Spanish Peaks Holding II, LLC)*, 872 F.3d 892 (9th Cir. 2017), the Ninth Circuit essentially endorsed this position, with certain caveats.

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The Fifth Circuit is the latest circuit court to examine this issue, but in an oblique way. In *In re Royal Street Bistro, L.L.C.*, 26 F.4th 326 (5th Cir. 2022), the court denied certain tenants' motion for a writ of mandamus directing a district court to issue a stay pending appeal of a bankruptcy court order approving the sale of leased real property free and clear of the tenants' leasehold interests. However, instead of issuing a summary order without explanation, the Fifth Circuit issued a brief *per curiam* opinion in which it agreed with the result reached by the lower courts, but signaled disagreement with *Qualitech*'s holding and cautioned courts against "blithely accepting *Qualitech*'s reasoning and textual exegesis."

FREE-AND-CLEAR SALES

Section 363(f) of the Bankruptcy Code authorizes a trustee or DIP to sell property "free and clear of any interest in such property of an entity other than the estate" under any one of five specified conditions. These include, among other things, if applicable nonbankruptcy law permits a sale free and clear, if the sale price exceeds the aggregate value of all liens encumbering the property, or if the interest is in bona fide dispute.

A bankruptcy court's power to order sales free and clear of competing interests without the consent of the party asserting the interest has been recognized for more than a century. *See Ray v. Norseworthy*, 90 U.S. 128, 131–32 (1875); *Van Huffel v. Harkelrode*, 284 U.S. 225, 227 (1931). A court-ordered free-and-clear sale promotes the expeditious liquidation of estate assets by avoiding delay attendant to sorting out disputes concerning the validity and extent of competing interests, which can later be resolved in a centralized forum. It also facilitates the estate's realization of the maximum value possible from an asset. A prospective buyer would discount its offer significantly if it faced the prospect of protracted litigation to obtain clear title to an asset.

Section 363(e) of the Bankruptcy Code provides that, upon the request of an entity that has an "interest" in property proposed to be sold by the trustee or DIP, the court "shall prohibit or condition" the sale "as is necessary to provide adequate protection of such interest." Section 361 provides that "adequate protection may be provided" by periodic cash payments to protect against any decrease in value of the interest; an additional or replacement lien (if the interest is a lien); or other relief, such as an administrative expense claim, "as will result in the realization by such entity of the indubitable equivalent of such entity's interest in such property."

"ANY INTEREST" BROADLY CONSTRUED

Section 363(f) has been applied to a wide range of interests. Courts, however, disagree regarding the precise scope of the term "interest," which is not defined in the Bankruptcy Code or its accompanying legislative history. Most courts reject the narrow approach adopted in a minority of cases under which section 363(f) is limited to *in rem* property interests or only those claims that have already been asserted at the time the property is sold. Instead, the majority have construed the term broadly to encompass other obligations that may flow from ownership of property, including, for example, successor liability claims. *See, e.g.*, *Indiana State Police Pension Tr. v. Chrysler LLC (In re Chrysler LLC)*, 576 F.3d 108 (2d Cir. 2009), *judgment vacated on other grounds*, 558 U.S. 1087 (2009); *In re Trans World Airlines, Inc.*, 322 F.3d 283 (3d Cir. 2003); *UMWA 1992 Benefit Plan v. Leckie Smokeless Coal Co. (In re Leckie Smokeless Coal Co.)*, 99 F.3d 573 (4th Cir. 1996); *In re PBBPC, Inc.*, 484 B.R. 860 (B.A.P. 1st Cir. 2013); *In re ARSN Liquidating Corp.*, 2017 WL 279472 (Bankr. D.N.H. Jan. 20, 2017).

The scope of section 363(f) becomes an issue if a debtor-lessor seeks to sell property free and clear of the possessory interests of tenants or subtenants. This is so because section 365(h)(1) specifically protects such interests. As noted previously, section 365(h)(1) provides that, if the trustee or DIP rejects an unexpired real property lease under which the debtor is the lessor, the nondebtor lessee (and any permitted successor or assign) has the option to either: (i) treat the lease as terminated and file a claim for breach; or (ii) retain its rights under the lease for the balance of the lease term (including any renewal or extension periods) "to the extent that such rights are enforceable under applicable nonbankruptcy law."

In enacting section 365(h)(1), lawmakers sought to "codify a delicate balance between the rights of a debtor-lessor and the rights of its tenants" by preserving the parties' expectations in a real estate transaction. *In re Lee Road Partners, Ltd.*, 155 B.R. 55, 60 (Bankr. E.D.N.Y. 1993). The provision's legislative history indicates that lawmakers intended that rejection of a lease by a debtor-lessor should not deprive the tenant of its estate for the term for which it bargained. *See* H.R. Rep. No. 95-595, 349–50 (1977); S. Rep. No. 95-989, 60 (1978).

QUALITECH

The apparent conflict between sections 363(f) and 365(h)(1) was considered as a matter of first impression at the court of appeals level by the Seventh Circuit in *Qualitech*. In that case, a chapter 11 debtor sold substantially all of its assets (including a steel mill with a warehouse leased to Precision Industries, Inc. ("Precision") for 10 years) to the mortgagee of the property. At the time of the sale, the debtor had neither assumed nor rejected the Precision lease. The order approving the sale provided that the assets were to be conveyed "free and clear of all liens, claims, encumbrances, and interests," other than those specifically excepted. The Precision lease, which was unrecorded, was not among the exceptions. Precision was notified of the sale but chose not to object. Instead, it negotiated with the ultimate buyer of the property regarding the assumption of its lease. Those negotiations proved futile, and Precision's lease agreement ultimately was deemed rejected in accordance with the terms of the debtor's chapter 11 plan.

Precision commenced litigation seeking a determination that, pursuant to section 365(h) of the Bankruptcy Code, it retained a

possessory interest in the warehouse notwithstanding the sale of the property. The bankruptcy court ruled that, under the terms of both section 363(f) and the sale order, the new owner had obtained title to the property free and clear of Precision's leasehold interest. According to the court, that interest clearly qualified as "any interest" under the statute and was unequivocally "extinguished" by the terms of the sale order. The court also implicitly rejected the idea that section 365(h) somehow preserved Precision's rights.

Precision appealed to the district court, which reversed. Reasoning that sections 363(f) and 365(h) are incongruous, the district court held that "the terms of section 365(h) prevail over those of section 363(f) as applied to the rights of lessees." It concluded that the more specific terms of section 365(h) must override the more general scope of section 363(f), observing that "[t]here is no statutory basis for allowing the debtor-lessor to terminate the lessee's position by selling the property out from under the lessee, and thus limiting a lessee's post-rejection rights solely to cases where the debtor-lessor remains in possession of its property." The new owner of the property appealed to the Seventh Circuit.

The Seventh Circuit reversed. Given the U.S. Supreme Court's observations in other contexts that "interest" is a broad term, the Seventh Circuit concluded that the right conferred by a leasehold upon the lessee "readily may be understood as an 'interest' in the property" within the meaning of section 363(f).

The Seventh Circuit faulted the district court's reliance upon an apparent contradiction between the two provisions as a basis for reversing the bankruptcy court. First, the Seventh Circuit noted, the provisions themselves do not suggest that one supersedes or limits the other, whereas other subsections of both sections 363 and 365 contain specific cross-references to other provisions that have a limiting effect on their scope. The court then observed that the plain language of section 365(h) suggests that it is limited in scope. In particular, section 365(h) expressly applies only to situations where the trustee rejects a lease but retains ownership of the property. By contrast, if the trustee does not reject the lease but sells the underlying property under section 363(f), as occurred in *Qualitech*, the sale will be free and clear of the tenant's possessory interest (provided it meets one of the five conditions in section 363(f)).

According to the Seventh Circuit, a lessee is not without recourse if its leasehold rights are extinguished in this way. Section 363(e) gives the lessee the right to demand adequate protection of its interest in the property. This would most likely take the form of compensation for the value of its forfeited leasehold interest.

A number of lower courts have reached the same conclusion as the Seventh Circuit for some or all of the same reasons. *See, e.g.*, *In re Downtown Athletic Club of N. Y. City, Inc.*, 2000 WL 744126 (S.D.N.Y. June 9, 2000); *South Motor Co. v. Carter-Pritchett-Hodges, Inc. (In re MMH Auto. Grp., LLC)*, 385 B.R. 347 (Bankr. S.D. Fla. 2008).

Other courts have ruled to the contrary, reasoning that section 363(f) and section 365(h) conflict when they overlap, but that the more specific section 365(h) trumps section 363(f), and the legislative history of the former clearly indicates that lawmakers intended to protect a tenant's leasehold estate when the landlord files for bankruptcy. *See, e.g.*, *Dishi & Sons v. Bay Condos LLC*, 510 B.R. 696 (S.D.N.Y. 2014) (criticizing *Qualitech* and adopting a third reading of the interplay between sections 363 and 365(h)); *In re Zota Petroleums, LLC*, 482 B.R. 154 (Bankr. E.D. Va. 2012); *In re Samaritan Alliance, LLC*, 2007 WL 4162918 (Bankr. E.D. Ky. Nov. 21, 2007); *In re Haskell, L.P.*, 321 B.R. 1 (Bankr. D. Mass. 2005); *In re Churchill Props. III, Ltd. P'ship*, 197 B.R. 283 (Bankr. N.D. Ill. 1996). Those decisions represented what was considered to be the majority view on this issue.

Some commentators have also criticized *Qualitech*, which, according to one commentator, had "the potential to profoundly impact the bankruptcy world." Michael St. Patrick Baxter, *Section 363 Sales Free and Clear of Interests: Why the Seventh Circuit Erred in* Precision Industries v. Qualitech Steel, 59 Bus. Law. 475, 475 (2004); *see also* Robert M. Zinman, *Precision in Statutory Drafting: The Qualitech Quagmire and the Sad History of § 365(h) of the Bankruptcy Code*, 38 John Marshall L. Rev. (2004) (acknowledging the turmoil created by *Qualitech* and suggesting an alternative statutory reading).

SPANISH PEAKS

In *Spanish Peaks*, the Ninth Circuit affirmed lower court rulings that, under appropriate circumstances, real property could be sold pursuant to section 363(f) free and clear of tenants' leasehold interests notwithstanding section 365(h) because the sale did not amount to rejection of the lease. The court explained that, on the basis of a "proper understanding of the concept of 'rejection,'" sections 363(f) and 365(h) can "easily" be read to give effect to each while preserving their respective purposes. *Spanish Peaks*, 872 F.3d at 899. Although a sale free and clear of a lease may be considered an effective rejection of the lease "in some everyday sense," the Ninth Circuit wrote, "it is not the same thing as the 'rejection' contemplated by section 365," which requires an "affirmative declaration by the trustee that the estate will not take on the obligations of a lease or contract made by the debtor." *Id.*

Because the leases at issue were not formally rejected by the chapter 7 trustee, and the leases were not deemed rejected under section 365(d)(1) or 365(d)(4)(A), the Ninth Circuit concluded that section 365(h) simply did not apply.

Citing the reasoning in *Qualitech* with approval, the Ninth Circuit panel explained that section 363(e) makes mandatory the adequate protection of an interest to be terminated in a freeand-clear sale if requested by the holder of the interest. Adequate protection could take the form of a lessee's continued possession of its leasehold interest. The broad definition of "adequate protection," the Ninth Circuit panel wrote, "makes it a powerful check on potential abuses of free-and-clear sales." *Id.* at 900.

Next, the court emphasized that section 363(f) authorizes free-and-clear sales only under certain circumstances, including when "applicable nonbankruptcy law permits sale of such property free and clear of such interest." Under applicable state law, the Ninth Circuit explained, a foreclosure sale to satisfy a mortgage terminates a subsequent lease on the mortgaged property. According to the court, "[the debtor's] bankruptcy proceeded, practically speaking, like a foreclosure sale . . . [and] had [the debtor] not declared bankruptcy, we can confidently say that there would have been an actual foreclosure sale," which would have terminated the leases.

The Ninth Circuit found it significant that section 365(h) recognizes appurtenant rights conferred by a lease "to the extent that such rights are enforceable under applicable nonbankruptcy law," and it saw "no reason to exclude the law governing foreclosure sales from the analogous language in section 363(f)(1)." *Id.*

Finally, the Ninth Circuit panel explained that its analysis "highlights a limitation inherent in the 'majority' approach"—namely, although section 365(h) embodies lawmakers' intent to protect lessees, "that intent is not absolute" and coexists with competing purposes, such as the goal of maximizing creditor recoveries. According to the court, its reading of sections 363(f) and 365(h) most faithfully balances those competing purposes in the way Congress intended. *Id.*

Other courts have adopted the *Spanish Peaks* rationale in authorizing sales free and clear of leasehold interests. *See, e.g., In re Giga Watt, Inc.*, 2021 WL 321890 (B.A.P. 9th Cir. Jan. 29, 2021); *In re Royal Alice Props., LLC*, 637 B.R. 465 (Bankr. E.D. La. 2021), *stay pending appeal denied*, 2022 WL 326636, *mandamus denied*, 26 F.4th 326 (5th Cir. 2022).

ROYAL STREET

Royal Alice Properties, LLC ("RAP") owned three properties in New Orleans. RAP's sole equity holder was Susan Hoffman ("Hoffman"). The properties were leased to Hoffman as her personal residence and to commercial tenants Royal Street Bistro, L.L.C. ("RSB") and Picture Pro, LLC ("Picture Pro" and, collectively with RSB and Hoffman, the "Tenants").

In August 2019, RAP filed for chapter 11 protection in the Eastern District of Louisiana. Shortly afterward, it commenced an adversary proceeding against AMAG Inc. ("AMAG"), the mortgagee of the properties, seeking a determination of the validity, extent, and priority of disputed liens AMAG had asserted against the properties.

While the adversary proceeding was pending, the court appointed a chapter 11 trustee. The court then granted summary judgment in favor of AMAG in the adversary proceeding. In July 2021, the trustee sought court approval of a settlement with AMAG and a sale of the properties free and clear of AMAG's liens and the Tenants' leasehold interests.

The Tenants responded by filing a motion for adequate protection of their leasehold interests under section 363(e) in the form of retained possession of the leased premises through the end of their purported 20-year leases. They also asked the court to require the trustee to assume or reject the leases, arguing that rejection would trigger the protections set forth in section 365(h).

The bankruptcy court approved the settlement and the sale, but denied the Tenants' motion for adequate protection and an order compelling the trustee to assume or reject the leases. According

to the bankruptcy court: (i) because AMAG could have foreclosed on its mortgages under state law and thereby extinguished the Tenants' leasehold interests, the properties could be sold free and clear of those interests under section 363(f)(1), which permits a sale free and clear if "applicable bankruptcy law permits sale of such property free and clear of such interest"; and (ii) because Picture Pro had not paid any rent for several months and was therefore in default of its lease, that property could be sold free and clear of the lease under section 363(f)(4), which permits a sale free and clear if "such interest is in bona fide dispute."

The Tenants appealed the ruling to the district court and simultaneously sought an emergency stay of the bankruptcy court's order pending the appeal. The district court denied the motion for a stay. Both the bankruptcy court and the district court relied on *Qualitech* and *Spanish Peaks* in denying the Tenants' requested relief.

The Tenants then filed a petition with the Fifth Circuit for a writ of mandamus compelling the district court to issue a stay pending appeal.

THE FIFTH CIRCUIT'S RULING

A three-judge panel of the Fifth Circuit issued a *per curiam* (summary) opinion denying the Tenants' petition for a writ of mandamus. Such opinions generally provide no explanation for the court's ruling.

However, in this case, the court explained that "A brief explanation of our conclusion is necessary because both the bankruptcy court and the district court premised their denials of relief to the [Tenants], in part, on unnecessary and likely incorrect interpretations of the relationship between Sections 363 and 365 of the Bankruptcy Code." *Royal Street*, 26 F.4th at 327.

According to the Fifth Circuit, the bankruptcy court's first reason for authorizing the sale free and clear of the Tenants' leasehold interests—because AMAG could have foreclosed on the properties outside of bankruptcy and "wiped out the junior interests"—was "well grounded on state law." Moreover, Picture Pro's failure to pay any rent and default under its lease "provided another nonbankruptcy law basis for declining to allow that tenant to stop the sale free and clear." *Id.* at 328.

However, the Fifth Circuit wrote, both lower courts "made the mistake of relying on [*Qualitech*] for the excessively broad proposition that sales free and clear under Section 363 override, and essentially render nugatory, the critical lessee protections against a debtor-lessor under Section 365(h)." *Id.* In addition, the Fifth Circuit noted that both lower courts also relied on *Spanish Peaks*, "which essentially adopted *Qualitech*, but noted, importantly, that the leases there (as in this case) were legally subordinated to a senior mortgagee's interest in the real property." As a result, according to the Fifth Circuit, "*Spanish Peaks*, like the case before us, is susceptible of a narrower reading." *Id.*

The Fifth Circuit acknowledged that the arguments on either side regarding the interplay between sections 363(f) and 365(h) are "textually sophisticated, fact-laden, and deeply rooted in commercial law far beyond the scope of the mandamus petition before us." Even so, it explained, "the essential state law rights of the tenants in this case are limited by the senior mortgagee's prior lien" on the properties. As such, "neither Section 363(e) nor 365(h)(1)(A)(ii) offers protection." *Id.* at 329.

The Fifth Circuit concluded that, even though the lower courts' reasoning was flawed, their rationale did not create "the kind of serious misinterpretation of law or facts that would support one of the criteria for mandamus relief." However, the Fifth Circuit cautioned, courts must not "blithely accept[] *Qualitech*'s reasoning and textual exegesis."

OUTLOOK

In *Royal Street*, the Fifth Circuit denied the petition for mandamus because it agreed with the result reached by the lower courts, but took issue with the lower courts' rationale. For this reason, instead of issuing a summary opinion, the court of appeals elected to offer an explanation in which it clearly distanced itself from *Qualitech*'s broad pronouncements regarding the primacy of section 363(f) sales when it comes to leasehold interests that would otherwise be protected by section 365(h). The Fifth Circuit was also careful to note that *Spanish Peaks* does not speak as broadly on this point as the lower courts assumed in authorizing the *Royal Street* sale free and clear of the Tenants' leasehold interests, principally because, as in *Royal Street*, the leases in *Spanish Peaks* were never rejected (meaning that the protections of section 365(h) were not triggered) and the leasehold interests were legally subordinated to a mortgage under applicable state law.

In so ruling, the Fifth Circuit provided some rare appellate guidance on a question that has reached the federal courts of appeals only in a handful of cases, especially in connection with bankruptcy asset sales, where appeals are frequently foreclosed by the Bankruptcy Code's statutory mootness provisions.

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BRIGHT-LINE RULE: NO MODIFICATION OF SUBSTANTIALLY CONSUMMATED CHAPTER 11 PLAN

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To promote the finality and binding effect of confirmed chapter 11 plans, the Bankruptcy Code categorically prohibits any modification of a confirmed plan after it has been "substantially consummated." Stakeholders, however, sometimes attempt to skirt this prohibition by characterizing proposed changes to a substantially consummated chapter 11 plan as some other form of relief, such as modification of the confirmation order or a plan document, or reconsideration of the allowed amount of a claim. The U.S. Bankruptcy Court for the District of Delaware recently addressed one such request in *In re Northeast Gas Generation, LLC*, 2022 WL 828263 (Bankr. D. Del. Mar. 18, 2022). Long after substantial consummation of a chapter 11 plan that gave an impaired secured creditor 100% of the reorganized debtor's equity and reinstated a portion of its secured debt, the secured creditor sought to reopen the bankruptcy case and obtain an order increasing the amount of its reinstated debt in the guise of "reconsideration" of the amount of its allowed claim. The bankruptcy court denied the request, ruling that the Bankruptcy Code bars modification of a confirmed chapter 11 plan after it has been substantially consummated, even if the proposed changes would not "materially and adversely" impact other stakeholders.

MODIFICATION OF A CHAPTER 11 PLAN

Section 1127(a) of the Bankruptcy Code states that the proponent of a chapter 11 plan on which votes have been solicited from creditors or interest holders "may modify such plan at any time *before confirmation*," unless the proposed modification violates the Bankruptcy Code's requirements regarding the classification of claims and interests or the contents of a plan. 11 U.S.C. § 1127(a) (emphasis added).

Section 1127(b) provides that the proponent of a plan or the reorganized debtor "may modify such plan at any time *after confirmation* of such plan and before substantial consummation of such plan," again unless the proposed modification violates the Bankruptcy Code's requirements regarding the classification of claims and interests or the contents of a plan. 11 U.S.C. § 1127(b) (emphasis added). It further states that "[s]uch plan as modified . . . becomes the plan only if circumstances warrant such modification and the court, after notice and a hearing, confirms such plan as modified, under section 1129 of [the Bankruptcy Code]."

Under section 1127(d), a creditor or interest holder who accepts or rejects a chapter 11 plan prior to its modification is deemed to accept or reject, "as the case may be, such plan as modified, unless within the time frame fixed by the court, such holder changes such holder's previous acceptance or rejection."

Section 1141(a) of the Bankruptcy Code provides that the terms of a confirmed chapter 11 plan are binding on all parties.

Under section 1101(2), "substantial consummation" of a chapter 11 plan occurs when: (i) substantially all of the property to be transferred under the plan has been transferred; (ii) the debtor or its successor has assumed the business or management of substantially all of the property dealt with by the plan; and (iii) distributions under the plan have commenced.

Special rules regarding post-confirmation plan modifications apply to individual chapter 11 debtors under section 1127(e).

Rule 3019(a) of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules") provides that, in a chapter 9 or chapter 11 case, the plan proponent may file with the court a modification of a chapter 11 plan after it has been accepted but prior to confirmation. It further states that:

> If the court finds after hearing on notice to the trustee, any committee appointed under the Code, and any other entity designated by the court that the proposed modification does not adversely change the treatment of the claim of any creditor or the interest of any equity security holder who has not accepted in writing the modification, it shall be deemed accepted by all creditors and equity security holders who have previously accepted the plan.

Bankruptcy Rule 3019(b) establishes the procedure for post-confirmation modifications to a plan in an individual chapter 11 case.

Sections 1127 and 1141, when taken together with other related provisions of the Bankruptcy Code, impose an important element

of finality in chapter 11 cases that allows stakeholders to rely on the provisions of a confirmed chapter 11 plan. *See generally* COLLIER ON BANKRUPTCY ("COLLIER") ¶ 1127.03[2][a] (16th ed. 2022) ("In enacting section 1127(b), Congress intended to 'safeguard the finality of plan confirmation.'").

As quoted above, section 1127(b) on its face bars modification of a chapter 11 plan after it has been substantially consummated. Moreover, "[c]ourts have routinely rejected attempts by plan proponents to circumvent section 1127(b) and change the plan merely by calling the requests a motion to modify the confirmation order, or a motion for reconsideration or to modify a plan-related document, or any application that nonetheless affects rights under the plan, such as a motion to clarify or a motion to classify claims." COLLIER at ¶ 1127.03[2][a] (citations omitted). Some courts have even ruled that "serial" (successive) chapter 11 filings are not permitted and that a second plan may not modify the first plan in the absence of "unanticipated changed circumstances" that were unknown at the time the prior plan was substantially consummated and substantially affected the debtor's ability to implement the prior plan. *See, e.g., Elmwood Dev. Co. v. General Elec. Pension Trust (In re Elmwood Dev. Co.)*, 964 F.2d 508, 512 (5th Cir. 1992); *Fruehauf Corp. v. Jartran, Inc. (In re Jartran, Inc.)*, 886 F.2d 859, 867 (7th Cir. 1989); *In re Triumph Christian Ctr., Inc.*, 493 B.R. 479, 489-90 (Bankr. S.D. Tex. 2013); *In re Woodson*, 213 B.R. 404, 405 (Bankr. M.D. Fla. 1997); *In re Northampton Corp.*, 39 B.R. 955, 956 (Bankr. E.D. Pa. 1984), *aff'd*, 59 B.R. 963 (E.D. Pa. 1984); *see also In re Garsal Realty, Inc.*, 98 B.R. 140, 150 (Bankr. N.D.N.Y. 1990) (a second chapter 11 case was not an attempt to modify the previous plan contrary to section 1127(b) because the new debt did not exist until after substantial consummation of the earlier plan)).

Absent modification of a chapter 11 plan or an order revoking confirmation (*see* 11 U.S.C. § 1144, which authorizes the court to revoke a confirmation order "only if such order was procured by fraud" within 180 days of confirmation), appeal of an order confirming a chapter 11 plan is the only recourse. However, such an appeal may be deemed moot absent a stay pending appeal if the plan has been substantially consummated before the appeal can be heard. *See generally* COLLIER at ¶ 1129.09 (discussing the doctrine of "equitable mootness").

Section 1127 is derived from sections 222 and 229 of Chapter X of the former Bankruptcy Act. 11 U.S.C. § 622 (repealed 1978). Section 222 provided, in relevant part, that "[a] plan may be altered or modified, with the approval of the judge, after its submission for acceptance and before or after its confirmation if, in the opinion of the judge, the alteration or modification does not materially and adversely affect the interests of creditors or stockholders." Section 229(c) imposed the additional prerequisite that a plan could not be modified if it had been substantially consummated. 11 U.S.C. § 629(c) (repealed 1978). It provided that "[w]hen a plan has been substantially consummated as defined in subdivision (a) of this section . . . the plan may not thereafter be altered or modified if the proposed alteration or modification materially and adversely affects the participation provided for any class of creditors . . . by the plan." *Id.*

NORTHEAST GAS

In June 2020, Northeast Gas Generation, LLC and its affiliates (collectively, "NEG") filed for chapter 11 protection in the District of Delaware. The bankruptcy court confirmed NEG's chapter 11 plan on December 18, 2020, and the plan became effective four days later.

Under the plan, the claims of NEG's first-lien secured creditors were allowed in the amount of $539 million, and the first-lien creditors received: (i) 100% of the equity in the reorganized company; and (ii) $200 million in reinstated first-lien debt. The first-lien creditor class was therefore impaired. The other impaired classes consisted of equity interest holders, who received no distribution; second-lien creditors, who received no distribution; and general unsecured creditors, who shared pro rata in a $2 million fund. The first-lien, second-lien, and general unsecured classes of creditors all voted to accept the plan.

On October 7, 2021—long after NEG's chapter 11 plan was substantially consummated and the bankruptcy case was closed—NEG (now owned by the first-lien creditors) filed a motion to reopen the case (as permitted under section 350 of the Bankruptcy Code and Bankruptcy Rule 5010) for the purpose of "reconsidering" the allowed amount of the first-lien claims under section 502(j) of the Bankruptcy Code, which provides in part that "[a] claim that has been allowed or disallowed may be reconsidered for cause." Specifically, NEG sought an order: (i) bifurcating the first-lien claims into secured claims in the amount of $475 million and deficiency claims for the balance of the allowed $539 million amount; and (ii) increasing the amount of the reinstated first-lien debt from $200 million to $475 million.

According to NEG, the "only impact of the relief . . . would be to reallocate how the proceeds from a disposition of the assets are allocated as between the bank's reinstated secured debt and its 100 percent equity stake." It also argued that the court had the power to grant this relief under section 105(a) of the Bankruptcy Code, which provides that "[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code]." By simply reconsidering the allowed amount of its first-lien claim, NEG asserted, the court was not bound by the requirements of section 1127 for modification of a plan.

THE BANKRUPTCY COURT'S RULING

The bankruptcy court denied NEG's motion.

Initially, U.S. Bankruptcy Judge Mary F. Walrath rejected NEG's argument that section 1127 did not bar the requested relief. Cases relied upon by NEG for the proposition that reconsideration of a claim under section 502(j) is distinct from modifying a

plan under section 1127, she noted, were distinguishable because two of them involved chapter 13 cases, where different rules apply to modification of confirmed plans, and the courts in the two chapter 11 cases cited by NEG were not asked to modify the treatment of the claims under confirmed plans. *Northeast Gas*, 2022 WL 828263, at *2 (discussing *U.S. Dep't of the Treasury—Internal Revenue Serv. v. EB Holdings II, Inc.*, 2021 WL 535467 (D. Nev. Feb. 11, 2021); *In re Davis*, 404 B.R. 183 (Bankr. S.D. Tex. 2009); *In re Disney*, 386 B.R. 292, 303 (Bankr. D. Colo. 2008); *In re Van Dyke*, 286 B.R. 858 (Bankr. C.D. Ill. 2001)).

Moreover, Judge Walrath explained, NEG was not really seeking reconsideration of its claims, which were deemed allowed under the plan in the amount of $539 million, but instead to modify the plan to give NEG 100% of the equity of the reorganized company *plus* 100% of the reinstated first-lien debt in the increased amount of $475 million. This relief, she ruled, was barred by section 1127(b).

Judge Walrath rejected NEG's argument that the proposed change was not a modification of the plan and that, because the Bankruptcy Code does not define the term "modification," the court should be guided by section 229 of the former Bankruptcy Act. As noted, section 229 allowed "alteration or modification" of a plan after substantial consummation as long as it did not "materially and adversely affect[] the participation provided for any class of creditors . . . by the plan." According to NEG, its proposed modification of the plan in this case should be permitted because it would not alter the treatment of any other class of creditors or shareholders.

Judge Walrath determined that NEG's reliance on section 229 was "inappropriate" because, in enacting section 1127(b), lawmakers "deleted the very provisions in section 229 of the Act on which NEG relies: allowing modification of a plan after substantial consummation if it does not 'materially and adversely' affect any other creditor or shareholder." *Northeast Gas*, 2022 WL 828263, at *4. This deletion, she wrote, is "a clear indication of Congress's intent to change pre-Code law and not permit modification of a plan after it has been substantially consummated, even if the change would have no materially adverse effect on any party." *Id.*

Cases cited by NEG for the proposition that section 1127(b) continues pre-Bankruptcy Code practice on this point Judge Walrath characterized as "unpersuasive" or inapposite because, among other things, the proposed changes to the plans in those cases were either expressly contemplated by the plans or were clarifications of ambiguous plans. In this case, Judge Walrath explained, NEG's chapter 11 plan did not expressly contemplate the proposed changes, nor were those changes merely a clarification of an ambiguity. Instead, she wrote, NEG "is seeking to change the unambiguous terms of the Plan," a modification that is barred by section 1127(b). *Id.* at **6–7.

Finally, Judge Walrath rejected NEG's argument that the court had the power to grant the relief requested under section 105(a) of the Bankruptcy Code. She noted that section 105(a) cannot be used to contravene another provision of the Bankruptcy Code—here, section 1127(b)—and that, even if it could, "the equities in this case do not favor doing so." *Id.* at *8. According to Judge Walrath: (i) the first-lien creditors were sophisticated parties that accepted the terms of the plan after extensive negotiations; and (ii) any plan that provided the first-lien creditors with additional reinstated first-lien debt might not have been confirmable because it might not have received the approval of other impaired creditors or satisfied the Bankruptcy Code's feasibility requirements.

OUTLOOK

The finality of confirmed and substantially consummated chapter 11 plans is an indispensable element of chapter 11. Without it, there would be no way to enforce the expectations of all stakeholders involved in the chapter 11 process, which produces essentially a binding contract governing stakeholders' relationships with the reorganized debtor or their allocation of the proceeds of the debtor's estate. Absent fraud on the court in connection with confirmation (and a timely request to revoke the order confirming it), the ability to unravel the terms of a court-approved plan that has been substantially consummated would undermine the entire process.

This reality is reflected in Judge Walrath's conclusion in *Northeast Gas*. The court recognized that the secured creditors' belated request for "reconsideration" of their claims was in fact an assault on the finality of a substantially consummated chapter 11 plan. The court accordingly ruled that section 1127(b) barred the relief requested and that, given the provision's clear application and the facts of the case, the court neither could (nor would) exercise its broad equitable powers to countermand that outcome.

DELAWARE BANKRUPTCY COURT REJECTS USE OF TAX CODE LOOK-BACK PERIOD IN AVOIDANCE ACTION

Daniel J. Merrett • Mark G. Douglas

The ability of a bankruptcy trustee or chapter 11 debtor-in-possession ("DIP") to avoid fraudulent transfers is an important tool to promote the bankruptcy policies of equality of distribution among creditors and maximizing the property included in the estate. One limitation on this avoidance power is the statutory "look-back" period during which an allegedly fraudulent transfer can be avoided—two years for fraudulent transfer avoidance actions under section 548 of the Bankruptcy Code and, as generally understood, three to six years if the trustee or DIP seeks to avoid a fraudulent transfer under section 544(b) and applicable state law by stepping into the shoes of a "triggering" or "predicate" creditor plaintiff.

Thus, the longer look-back periods governing avoidance actions under various state laws significantly expand the universe of transactions that may be subject to fraudulent transfer avoidance. Moreover, a majority of courts have concluded that a trustee or DIP can expand the look-back period even more if the trustee or DIP can use section 544(b) to step into the shoes of the Internal Revenue Service ("IRS"), which is bound not by state law but by the 10-year statute of limitations for collecting taxes specified in the Internal Revenue Code ("IRC"), or other government entities subject to laws providing for longer look-back periods.

The U.S. Bankruptcy Court for the District of Delaware recently weighed in on this issue in *In re J&M Sales Inc.*, 2022 WL 532721 (Bankr. D. Del. Feb. 22, 2022). The court denied a chapter 7 trustee's motion to amend his complaint in an avoidance action to use the IRS as a "predicate" or "triggering" creditor because the IRS had not filed a proof of claim in the bankruptcy case and the existence of a prepetition payroll tax debt, which was paid pursuant to a "first day motion," was insufficient to treat the IRS as a creditor.

DERIVATIVE AVOIDANCE POWERS UNDER SECTION 544(B) OF THE BANKRUPTCY CODE

Section 544(b)(1) of the Bankruptcy Code provides in relevant part as follows:

> [T]he trustee may avoid any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is voidable under applicable law by a creditor holding an unsecured claim that is allowable under section 502 of this title or that is not allowable only under section 502(e) of this title.

11 U.S.C. § 544(b)(1). Thus, a trustee (or DIP pursuant to section 1107(a)) may seek to avoid transfers or obligations that are "voidable under applicable law," which is generally interpreted to mean state law. *See Ebner v. Kaiser (In re Kaiser)*, 525 B.R. 697, 709 (Bankr. N.D. Ill. 2014); *Wagner v. Ultima Holmes (In re Vaughan)*, 498 B.R. 297, 302 (Bankr. D.N.M. 2013).

The fraudulent transfer statutes of almost every state are versions of the Uniform Fraudulent Transfer Act ("UFTA"), which was recently amended and renamed the "Uniform Voidable Transactions Act" ("UVTA"). States that have adopted the UFTA or UVTA most commonly provide that avoidance actions are time-barred unless brought within four years of the time the transfer was made or the obligation was incurred. Notably, New York adopted the UVTA effective as of December 2019, reducing its look-back period to four years, from six under longstanding prior law.

LONGER LOOK-BACK PERIOD FOR CERTAIN GOVERNMENTAL ENTITIES

The federal government is generally not bound by state statutes of limitations, including those set forth in state fraudulent transfer laws. *Vaughan*, 498 B.R. at 304. Instead, various federal statutes or regulations specify the statute of limitations for enforcement actions. For example, the IRC provides that, with certain exceptions, an action to collect a tax must be commenced by the IRS no later than 10 years after the tax is assessed. *See* 26 U.S.C. § 6502(a). The rationale behind a longer federal statute of limitations is that public rights and interests that the federal government is charged with defending should not be forfeited due to public officials' negligence. *Vaughan*, 498 B.R. at 304.

On the basis of the plain meaning of section 544(b), nearly all of the courts that have considered the issue have concluded that a trustee or DIP bringing an avoidance action under that section may step into the shoes of the IRS (if it is a creditor in the case) to utilize the IRC's 10-year statute of limitations. *See, e.g., In re Musselwhite,* 2021 WL 4342902 (Bankr. E.D.N.C. Sept. 23, 2021); *In re Webster*, 629 B.R. 654 (Bankr. N.D. Ga. 2021); *Mitchell v. Zagaroli (In re Zagaroli),* 2020 WL 6495156 (Bankr. W.D.N.C. Nov. 3, 2020); *Murphy v. ACAS, LLC (In re New Eng. Confectionary*

Co.), 2019 Bankr. LEXIS 2281 (Bankr. D. Mass. July 19, 2019); *Viera v. Gaither (In re Gaither)*, 595 B.R. 201 (Bankr. D.S.C. 2018); *Hillen v. City of Many Trees, LLC (In re CVAH, Inc.)*, 570 B.R. 816 (Bankr. D. Idaho 2017); *Mukhamal v. Citibank, N.A. (In re Kipnis)*, 555 B.R. 877 (Bankr. S.D. Fla. 2016); *Kaiser*, 525 B.R. at 711–12.

The court in *Vaughan*, however, ruled to the contrary. The *Vaughan* court reached its conclusion after considering policy and legislative intent. It noted that the IRS is not bound by state law statutes of limitations because it exercises sovereign powers and is therefore protected by the doctrine of *nullum tempus occurrit regi* ("no time runs against the king"). According to the court in *Vaughan*, Congress did not intend for section 544(b) to vest sovereign power in a bankruptcy trustee, and allowing a trustee to take advantage of the IRC's 10-year statute of limitations would be an overly broad interpretation.

In *MC Asset Recovery LLC v. Commerzbank A.G. (In re Mirant Corp.)*, 675 F.3d 530, 535 (5th Cir. 2012), the U.S. Court of Appeals for the Fifth Circuit rejected a line of cases holding that the Federal Debt Collection Practices Act ("FDCPA") can be "applicable law" for purposes of section 544(b), thereby affording the trustee use of the FDCPA statute of limitations, because the FDCPA expressly provides that "[t]his chapter shall not be construed to supersede or modify the operation of . . . title 11." *Id.* at 535 (quoting 28 U.S.C. § 3003(c)); *accord MC Asset Recovery, LLC v. Southern Co.*, 2008 WL 8832805 (N.D. Ga. July 7, 2008) ("[T]he FDCPA cannot be the 'applicable law' within the meaning of Section 544(b) of the Bankruptcy Code."). However, the IRC does not include comparable language.

The *Vaughan* minority approach has been rejected by almost all other courts. For example, in *Kipnis*, the court concluded that the meaning of section 544(b) is clear and does not limit the type of creditor from which a trustee can choose to derive rights. Moreover, because the court determined that its interpretation of the statute was not "absurd," the court did not deem it necessary to expand its inquiry beyond the express language of section 544(b) to consider legislative intent or policy concerns. *Kipnis*, 555 B.R. at 882 (citing *Lamie v. United States Trustee*, 540 U.S. 526, 534 (2004) ("It is well established that 'when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.'")).

The court concluded that *Vaughan*'s *nullum tempus* argument was misplaced. Because section 544(b) is a derivative statute, the *Kipnis* court wrote, "the focus is not on whether the trustee is performing a public or private function, but rather, the focus is on whether the IRS, the creditor from whom the trustee is deriving her rights, would have been performing that public function if the IRS had pursued the avoidance actions." *Id.* at 883.

However, the *Kipnis* court agreed with *Vaughan* on one point—if applied in other cases, the court's ruling could result in a 10-year look-back period in many cases. According to the *Kipnis* court, because the IRS is a creditor in a significant number of cases, the paucity of decisions addressing the issue can more likely be attributed to the fact that trustees and DIPs have not realized that this "weapon is in their arsenal." *Id.*

TRIGGERING CREDITOR MUST HAVE AN "ALLOWABLE CLAIM"

Avoidance under section 544(b) is permitted only if a transfer could be avoided under applicable law by a creditor holding an "allowable" unsecured claim. The term "allowable" is not defined in the Bankruptcy Code. However, section 502(a) provides that a claim for which the creditor files a proof of claim is deemed "allowed" unless a party in interest objects. Moreover, Rule 3003(b) of the Federal Rules of Bankruptcy Procedure provides that, in a chapter 9 or chapter 11 case, a creditor need not file a proof of claim if the claim is listed on the debtor's schedules in the proper amount and is not designated as disputed, contingent, or unliquidated. Finally, section 1111(a) provides that, in a chapter 11 case, "[a] proof of claim or interest is deemed filed under section 501 of this title . . ., except a claim or interest that is scheduled as disputed, contingent, or unliquidated."

Thus, if an unsecured creditor has not filed a proof of claim and if, in a chapter 9 or chapter 11 case, its claim either is not scheduled in any amount or is scheduled as disputed, contingent, or unliquidated, a handful of courts have concluded that the claim is not "allowable" and the trustee or DIP may not step into the creditor's shoes to bring an avoidance action under section 544(b). *See J.R. Deans Co., Inc.*, 249 B.R. 121, 131 (Bankr. D.S.C. 2000) (a chapter 7 trustee could not step into the shoes of asbestos claimants for purposes of avoidance litigation because no asbestos claimant filed a proof of claim and had an allowable claim under section 544(b)); *In re Republic Windows & Doors*, 2011 WL 5975256, *11 (Bankr. N.D. Ill. Oct. 17, 2011) (a chapter 7 trustee could not take advantage of the IRC's 10-year statute of limitations because the IRS had not filed a proof of claim in the case); *Campbell v. Wellman (In re Wellman)*, 1998 WL 2016787, *3 (Bankr. D.S.C. June 2, 1998) ("[A]s Robert McKittrick was the only creditor of these three [creditors] to file a proof of claim, he is the only one with an allowable claim into whose shoes the [chapter 7] Trustee may step pursuant to § 544(b).").

In the same vein, other courts have concluded that an entity qualifies as a triggering creditor under section 544(b) because it has filed a proof of claim (formal or informal), no objection was filed to the claim, or the objection was withdrawn. *See, e.g., In re Davis*, 2016 WL 11696269, *4 (Bankr. W.D. Tenn. June 15, 2016) ("creditors who have filed proofs of unsecured claims satisfy the requirements of section 544(b)" in order to give the chapter 7 trustee standing to pursue those claims); *In re Rosenblum*, 545 B.R. 846, 859-60 (Bankr. E.D. Pa. 2016) (finding that because a creditor filed an informal proof of claim in a chapter 13 case, it met the requirement for an allowable claim under 544(b)); *In re All-Type Printing*, 274 B.R. 316, 323 (Bankr. D. Conn. 2002) ("Because the only objection to the [applicable] Proof of Claim was withdrawn prior to trial of this [chapter 7] adversary proceeding, that Proof of Claim is deemed allowed, and is therefore 'allowable' under Code Section 502, as is required by

Section 544(b)."); *In re Richardson*, 268 B.R. 331, 334 (Bankr. D. Conn. 2001) ("Because no objections to the qualifying claims have yet been filed [in the chapter 7 case], they are deemed allowed, and therefore are 'allowable' under Code Section 502, as required by Section 544(b).").

However, the majority approach is that the allowability of a claim for purposes of section 544(b) should be determined as of the petition date and, therefore, the failure to file a proof of claim does not disqualify a creditor from being the triggering creditor. *See, e.g., In re Tabor*, 2016 WL 3462100, at *2 (Bankr. S.D. Fla. June 17, 2016); *Whittaker v. Groves Venture, LLC (In re Bolon)*, 538 B.R. 391, 408 n.8 (Bankr. S.D. Ohio 2015); *Finkel v. Polichuk (In re Polichuk)*, 506 B.R. 405, 432 (Bankr. E.D. Pa. 2014); *In re Kopp*, 374 B.R. 842, 846 (Bankr. D. Kan. 2007).

In *J&M Sales*, the bankruptcy court considered whether a chapter 7 trustee could step into the shoes of the IRS for purposes of section 544(b).

J&M SALES

California-based discount retailer J&M Sales Inc. and various affiliates (collectively, the "debtors") filed for chapter 11 protection on August 6, 2018, in the District of Delaware. The IRS did not file a proof of claim in the chapter 11 cases, nor did the debtors schedule a claim on behalf of the IRS. However, the debtors did owe certain payroll taxes as of the petition date, which they obtained court authority to pay under a "first day" order.

After the bankruptcy court authorized the debtors to sell substantially all of their assets, the court converted the chapter 11 cases to chapter 7 liquidations. Beginning in July 2020, the chapter 7 trustee filed complaints against hundreds of individuals and entities seeking, among other things, to avoid and recover allegedly fraudulent transfers under Delaware law and sections 544(b) and 550 of the Bankruptcy Code.

In his complaints, the trustee alleged that the debtors had at least one general unsecured creditor holding an allowable claim who, but for the bankruptcy filing, would have standing to bring claims to avoid and recover the fraudulent transfers. He also alleged that, in addition to those predicate creditors, various state and local government creditors (including taxing authorities) qualified as predicate creditors and were not subject to state-law statutes of limitations.

Certain transferees (collectively, the "defendants") moved to dismiss, claiming that the four-year look-back period under Delaware fraudulent transfer law expired before the trustee filed his complaint against them (the "complaint"). The bankruptcy court agreed and dismissed with prejudice as time-barred all fraudulent transfer claims stated in the complaint for transfers made prior to August 6, 2014 (four years before the petition date). In so ruling, the court rejected the trustee's argument that, because there were state and local government triggering creditors that could invoke the doctrine of *nullum tempus*, he could step into their shoes to avoid application of the Delaware statute of limitations. The court reasoned that, "because [Delaware fraudulent transfer law] specifically applies to government entities, *nullum tempus* did not apply and the claims were time barred." However, the court did not address whether *federal* governmental entities could act as predicate creditors because the trustee did not allege that any existed in his complaint.

The trustee then moved for leave to amend his complaint to add the IRS as a triggering creditor. The trustee acknowledged that the IRS had not filed a proof of claim and that the debtors had not scheduled any claim by the IRS. Nevertheless, the trustee relied on the first-day order authorizing the payment of prepetition payroll taxes, arguing that he could utilize that (now paid) prepetition claim to step into the shoes of the IRS and avoid the Delaware four-year statutory look-back period.

The defendants opposed the motion, arguing that, because section 544(b) expressly refers to section 502, a creditor must either file a proof of claim or be excused from doing so under section 1111(a) to have an "allowable" claim. As the IRS did not satisfy either of these conditions, they contended, the IRS could not act as a predicate creditor.

THE BANKRUPTCY COURT'S RULING

The bankruptcy court denied the motion for leave to amend, ruling that amendment of the complaint would be futile because the IRS could not act as a triggering creditor under section 544(b). U.S. Bankruptcy Judge John T. Dorsey agreed with the defendants that a creditor must have filed a proof of claim to qualify as a predicate creditor for the purpose of avoidance litigation under section 544(b).

Examining the language of sections 544(b) and 502, Judge Dorsey wrote, "[i]t is not difficult to conclude that . . . Congress intended that for a trustee to pursue potential fraudulent transfers under Section 544(b) an allowable claim only includes those claims for which a proof of claim has been filed." *J&M Sales*, 2022 WL 532721, at *3. Significantly, he explained, section 502(b)(9) of the Bankruptcy Code prohibits a bankruptcy court from determining the validity and amount of a claim where "proof of such claim is not timely filed, except to the extent tardily filed as permitted under paragraph (1), (2), or (3) of section 726(a)." Thus, Judge Dorsey reasoned, "if no proof of claim is filed, it is not an allowable claim under Section 502." *Id.*

Judge Dorsey rejected the trustee's argument that requiring the filing of a proof of claim would interfere with a trustee's ability to gather and administer the bankruptcy estate for the benefit of all creditors "because of potential manipulation of the claims process by parties in interest." *Id.* According to Judge Dorsey, this argument is based on the misconception that only the creditor asserting a claim can file a proof of claim. Section 501(c), he explained, provides that the debtor or the trustee may file a proof of claim if a creditor fails to timely do so.

Finally, Judge Dorsey noted that he was troubled by the trustee's argument that he could rely on unpaid payroll taxes, which accrue as wages are paid, but are not due to the IRS until sometime later depending on the employer's filing status, as a basis to use the IRC's 10-year look-back period for avoidance actions. If this were permitted, he wrote, because virtually every business will have accrued but unpaid payroll taxes when it files for bankruptcy, "every business bankruptcy case would automatically have a ten-year lookback period for fraudulent transfers under Section 544(b) . . . [which] cannot be what Congress had in mind." *Id.* at *3 n.7.

OUTLOOK

The *J&M Sales* court's endorsement of the minority approach on the availability of a longer look-back period in cases in which the IRS is a creditor is notable. Even so, limiting predicate creditors for purposes of avoidance litigation to those who have either filed a proof of claim or had one filed for them may not drastically undermine a bankruptcy trustee's ability to bring avoidance actions under section 544(b) with the benefit of longer look-back periods than those provided for under state fraudulent transfer laws. It does place the burden on trustees to ensure that a proof of claim has been timely filed by or on behalf of a potential triggering creditor.

It should be noted that the IRS is not the only potential triggering creditor under section 544(b) with a longer look-back period. Other federal and state governmental entities may also provide that additional tool to a trustee or DIP. *See, e.g., In re 160 Royal Palm*, LLC, 2020 WL 4805478 (Bankr. S.D. Fla. July 1, 2020) (permitting a debtor under section 544(b) to take advantage of the Securities and Exchange Commission's six-year statute of limitations for fraudulent transfer claims under 28 U.S.C. §§ 2415(a) and 2416); *Alberts v. HCA Inc. (In re Greater Southeast Cmty. Hosp. Corp. I)*, 365 B.R. 293, 304 (Bankr. D.D.C. 2006) (the trustee of a liquidating trust created by a chapter 11 plan could step into the shoes of the IRS as well as the U.S. Department of Health and Human Services (six-year statute of limitations for actions to collect Medicare overpayments under 28 U.S.C. § 2415) for the purpose of bringing an avoidance action under § 544(b) and the Illinois UFTA); *In re G-I Holdings, Inc.*, 313 B.R. 612, 636 (Bankr. D.N.J. 2004) (the asbestos claimants' committee in a chapter 11 case could step into the shoes of the New Jersey Department of Environmental Protection (10-year statute of limitations for enforcement action) for purposes of § 544(b)). In addition, despite the Fifth Circuit's rejection of the FDCPA as "applicable law" for purposes of § 544(b), other courts have ruled to the contrary. *See, e.g., Gaither*, 595 B.R. at 214; *In re Alpha Protective Servs., Inc.*, 531 B.R. 889, 905 (Bankr. M.D. Ga. 2015) (citing cases). Thus, understanding the approach adopted in a particular jurisdiction is paramount for this purpose.

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FLORIDA DISTRICT COURT: FOREIGN DEBTOR NEED NOT HAVE U.S. RESIDENCE, ASSETS, OR PLACE OF BUSINESS TO BE ELIGIBLE FOR CHAPTER 15 RECOGNITION

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Courts disagree over whether a foreign bankruptcy case can be recognized under chapter 15 of the Bankruptcy Code if the foreign debtor does not reside or have assets or a place of business in the United States. In 2013, the U.S. Court of Appeals for the Second Circuit staked out its position on this issue in *Drawbridge Special Opportunities Fund LP v. Barnet (In re Barnet)*, 737 F.3d 238 (2d Cir. 2013), ruling that the provision of the Bankruptcy Code requiring U.S. residency, assets, or a place of business applies in chapter 15 cases as well as cases filed under other chapters.

The U.S. District Court for the Middle District of Florida recently weighed in on this controversial issue in *In re Talal Qais Abdulmunem al Zawawi*, 2022 WL 596836 (M.D. Fla. Feb. 28, 2022), *appeal filed*, No 6:21-cv-00894-GAP (M.D. Fl. Mar. 30, 2022). Distancing itself from *Barnet* as nonbinding precedent and widely criticized, the district court affirmed a bankruptcy court ruling that chapter 15 has its own eligibility requirements, and that the eligibility requirements for debtors in cases under other chapters of the Bankruptcy Code do not apply in chapter 15 cases.

PROCEDURES, RECOGNITION, RELIEF, AND ELIGIBILITY UNDER CHAPTER 15

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

Both chapter 15 and the Model Law are premised upon the principle of international comity, or "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws." *Hilton v. Guyot*, 159 U.S. 113, 164 (1895). Chapter 15's stated purpose is "to provide effective mechanisms for dealing with cases of cross-border insolvency" with the objective of, among other things, cooperation between U.S. and non-U.S. courts.

Chapter 15 replaced section 304 of the Bankruptcy Code. Section 304 allowed an accredited representative of a debtor in a foreign bankruptcy 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 bankruptcy 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).

Section 1501(a) of the Bankruptcy Code similarly states that the purpose of chapter 15 is to "incorporate the [Model Law] so as to provide effective mechanisms for dealing with cases of cross-border insolvency with the objectives of," among other things, cooperation between U.S. and foreign courts, greater legal certainty for trade and investment, fair and efficient administration of cross-border cases to protect the interests of all stakeholders, protection and maximization of the value of a debtor's assets, and the rehabilitation of financially troubled businesses.

Section 1508 requires U.S. courts interpreting chapter 15 to "consider its international origin, and the need to promote an application of this chapter that is consistent with the application of similar statutes adopted by foreign jurisdictions."

Under section 1515, the "foreign representative" of a foreign "debtor" may file a petition in a U.S. bankruptcy court seeking "recognition" of a "foreign proceeding."

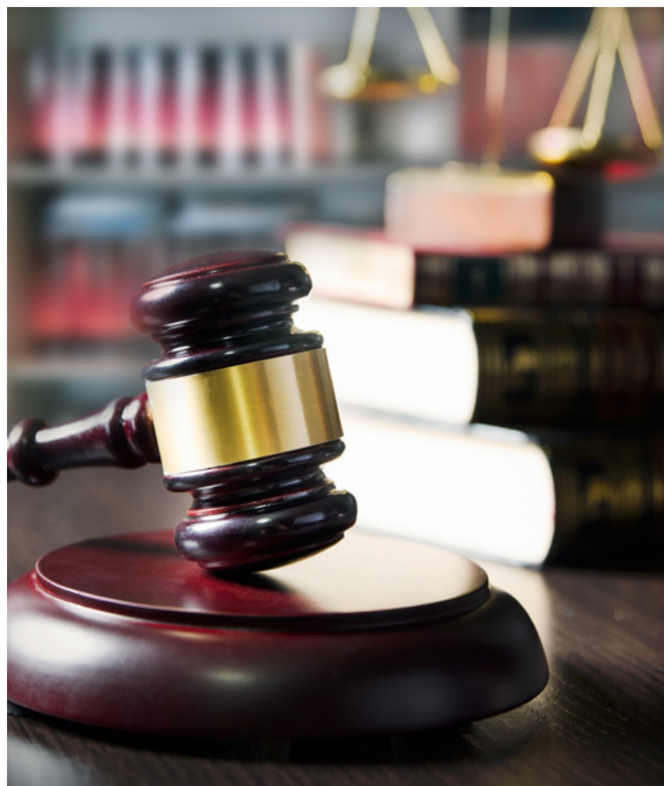
Section 1502 provides that "for the purposes of [chapter 15] . . . 'debtor' means an entity that is the subject of a foreign proceeding."

However, section 101 of the Bankruptcy Code also includes a definition of the term "debtor," and section 109 limits the entities that can qualify as a debtor. Section 101(13) provides that "debtor" means "person or municipality concerning which a case under this title has been commenced." Section 109(a) states that, "[n]otwithstanding any other provision of this section, only a person that resides or has a domicile, a place of business, or property in the United States, or a municipality, may be a debtor under this title." Section 103(a) provides that "this chapter"—i.e., chapter 1, including section 109(a)—"appl[ies] in a case under chapter 15."

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

Section 1506 sets forth a public policy exception to any of 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 101(24) 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 1517(b)

(1))—and foreign "nonmain" proceedings, which may be pending in countries where the debtor merely has an "establishment" (*see* 11 U.S.C. §§ 1502(5) and 1517(b)(2)). 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."

DISPUTE OVER ELIGIBILITY FOR CHAPTER 15 RELIEF

Despite the express language of section 103(a), courts disagree over whether a foreign debtor must satisfy both sections 109(a) and 1502 to be eligible for chapter 15 relief.

In *Barnet*, liquidation proceedings were commenced against the debtor, Octaviar Administration Pty Ltd. ("OA"), in Australia in 2009. As part of an investigation into OA's affairs, various Australian affiliates of Drawbridge Special Opportunities Fund LP ("Drawbridge") were sued in Australia. Drawbridge itself refused to consent to the jurisdiction of the Australian courts.

In August 2012, the OA liquidators, as foreign representatives, sought recognition of the Australian liquidation proceeding as a foreign main proceeding under chapter 15 in a New York bankruptcy court. Drawbridge objected on the basis that OA did not meet the requirements to be a debtor under section 109(a) of the Bankruptcy Code.

The bankruptcy court entered an order recognizing OA's Australian liquidation proceeding on September 6, 2012. It overruled Drawbridge's objection, holding that the definition of "debtor" in section 1502(1) determines whether a foreign debtor can be granted relief under chapter 15 and that the debtor need not have a domicile, a place of business, or property in the United States. In response to a joint request by Drawbridge and OA's foreign representatives, the bankruptcy court certified a direct appeal of the recognition order to the Second Circuit, which agreed to review the case.

The Second Circuit ruled that section 109(a) applies in a chapter 15 case on the basis of a "straightforward" interpretation of the statutory provisions.

The Second Circuit rejected the foreign representatives' argument that section 109(a) does not apply because the Australian company in the case was a "debtor" under the Australian Corporations Act (rather than under the Bankruptcy Code) and the foreign representatives (rather than the debtor) were seeking recognition of the foreign proceeding. According to the court:

> [T]he presence of a debtor is inextricably intertwined with the very nature of a Chapter 15 proceeding . . . [and] [i]t stretches credulity to argue that the ubiquitous references to a debtor in both Chapter 15 and the relevant definitions of Chapter 1 do not refer to a debtor under the title [title 11] that contains both chapters.

Barnet, 737 F.3d at 248. In addition to the statutory definitions of "foreign representative," "foreign main proceeding," "debtor," and "foreign proceeding," the court noted, the automatic and discretionary relief provisions that accompany recognition of a foreign main proceeding (*see* sections 1520 and 1521) are similarly "directed towards debtors." *Barnet*, 737 F.3d at 248.

The Second Circuit flatly rejected the foreign representatives' argument that a foreign debtor need satisfy only the chapter 15-specific definition of "debtor" in section 1502(1), and not the section 109 requirements. "This argument also fails," the court wrote, "as we cannot see how such a preclusive reading of Section 1502 is reconcilable with the explicit instruction in Section 103(a) to apply Chapter 1 to Chapter 15." *Id.* at 249.

According to the Second Circuit, not only a "plain meaning" analysis but also the context and purpose of chapter 15 support the application of section 109(a) to chapter 15. The court explained that Congress amended section 103 to state that chapter 1 applies in cases under chapter 15 at the same time it enacted chapter 15, which strongly supports the conclusion that lawmakers intended section 103(a) to mean what it says—namely, that chapter 1 applies in cases under chapter 15.

The court acknowledged that the strongest support for the foreign representatives' arguments lies in 28 U.S.C. § 1410, which provides a U.S. venue for chapter 15 cases even when "the debtor does not have a place of business or assets in the United States." However, the Second Circuit explained that this venue statute "is purely procedural" and that, "[g]iven the unambiguous nature of the substantive and restrictive language used in Sections 103 and 109 of Chapter 15, to allow the venue statute to control the outcome would be to allow the tail to wag the dog." *Id.* at 250.

Finally, the Second Circuit found that the purpose of chapter 15 would not be undermined by making section 109(a) applicable in chapter 15 cases. As noted above, section 1501(a) of the Bankruptcy Code provides that the purpose of chapter 15 "is to incorporate the Model Law . . . so as to provide effective mechanisms for dealing with cases of cross-border insolvency." Although section 109(a), or its equivalent, is not included in the Model Law, the Second Circuit emphasized, the Model Law allows a country enacting it to "modify or leave out some of its provisions." In any case, the court concluded, the omission of a provision similar to section 109(a) from the Model Law does not suffice to outweigh the express language Congress used in adopting sections 103(a) and 109(a). *Id.* at 251.

The Second Circuit accordingly vacated the recognition order and remanded the case to the bankruptcy court for further proceedings consistent with its ruling.

The Second Circuit did not provide any guidance as to how extensive a foreign debtor's property holdings in the United States must be to qualify for chapter 15 relief. On remand, the bankruptcy court answered that question in *In re Octaviar Administration Pty Ltd.*, 511 B.R. 361 (Bankr. S.D.N.Y. 2014), ruling that, consistent with case law analyzing the scope of section 109 for the purpose of determining who is eligible to commence a case under chapter 11, the requirement of property in the United States should be interpreted broadly. Because the Australian debtor had causes of action governed under U.S. law against parties in the United States and also had an undrawn retainer maintained in the United States, the bankruptcy court held that the requirement for the debtor to have property located in the United States was satisfied.

Other bankruptcy courts within the Second Circuit have similarly concluded that it takes little to satisfy section 109(a) in chapter 15 cases. *See, e.g., In re Olinda Star Ltd.*, 614 B.R. 28 (Bankr. S.D.N.Y. 2020) (small retainer and rights under New York law-governed debt instruments); *In re Serviços de Petróleo Constellation*, 613 B.R. 497 (Bankr. S.D.N.Y. 2019) (rights under New York law-governed debt and retainer); *In re Ascot Fund Ltd.*, 603 B.R. 271 (Bankr. S.D.N.Y. 2019) (retainer, interest in a New York partnership and contract rights); *In re P.T. Bakrie Telecom TBK*, 601 B.R. 707 (Bankr. S.D.N.Y. 2019) (rights under a New York law indenture and New York law-governed notes); *In re B.C.I. Fins. Pty Ltd.*, 583 B.R. 288 (Bankr. S.D.N.Y. 2018) (attorney retainers deposited by foreign debtors in the United States for the sole purpose of satisfying section 109(a) and obtaining discovery adequate).

Barnet has received a considerable amount of criticism. For example, a leading commentator noted that the decision:

> clearly misconstrues the intent of the statute to focus on eligibility of the foreign proceeding, not of the debtor, never mentions the direction of section 1508 to consider the international origin of chapter 15 and does not follow the suggestion of the legislative history of section 1508 to consult the Guide to Enactment . . . [which] makes clear that "the Model Law was formulated to apply to any proceeding that meets the requirements of article 2, subparagraph (a) [definition of foreign proceeding], independently of the nature of the debtor or its particular status under national law."

Collier on Bankruptcy ¶ 1517.01 (16th ed. 2021) (citing H.R. Rep. No. 109-31, p. 109 (2005); Guide to Enactment and Interpretation of the Model Law ("Guide to Enactment"), ¶ 47); *see also* Glosband and Westbrook, "Chapter 15 Recognition in the U.S.: Is a Debtor 'Presence' Required?," 24 Int. Insolv. Rev. 28–56 (2015) (noting that the Second Circuit "confuse[d] the foreign debtor with the foreign insolvency representative" and explaining that section 109(a) does apply in chapter 15 cases, but only in limited circumstances, including: (i) the requirement that a foreign debtor have a presence in the United States when a foreign representative uses its power under section 1511 to file a "full" case under another chapter; and (ii) when a foreign debtor files a bankruptcy case in the United States to enforce a foreign discharge); *In re Avanti Commc'ns Grp. PLC*, 582 B.R. 603, 612 (Bankr. S.D.N.Y. 2018) (describing *Barnet* as a "controversial ruling").

Several bankruptcy courts outside of the Second Circuit have disagreed with *Barnet*. For example, in *In re Bemarmara Consulting A.S.*, No. 13-13037(KG) (Bankr. D. Del. Dec. 17, 2013), the U.S. Bankruptcy Court for the District of Delaware ruled that section 109(a) does not apply in chapter 15 because it is the foreign representative, and not the debtor in the foreign proceeding, who petitions the court. Moreover, the court stated, "there is nothing in [the] definition [of 'debtor'] in Section 1502 which reflects upon a requirement that [a] Debtor have assets." *See* Transcript of Hearing at p. 9, l. 11 18, *In re Bemarmara Consulting A.S.*, No. 13-13037(KG) (Bankr. D. Del. Dec. 17, 2013) [Document No. 39]. "A Debtor," the court noted, "is an entity that is involved in a foreign proceeding."

The U.S. Bankruptcy Court for the Southern District of Florida similarly refused to apply section 109(a) in a chapter 15 case in *In re MMX Sudeste Mineração S.A.*, No. 17-16113-RAM (Bankr. S.D.

Fla. 2017) (Order Granting Recognition, Docket No. 9, June 12, 2017; Transcript of Nov. 1, 2017, Hearing Denying Motion to Dismiss Ch. 15 Case at pp. 5 6, Docket No. 51). An attempted appeal of the recognition order was dismissed for lack of jurisdiction. *See Batista v. Alvarenga Mendes (In re MMX Sudeste Mineração S.A.)*, No. 17-24038-RNS (S.D. Fla. Apr. 20, 2018).

Apparently, only one court outside of the Second Circuit has relied on the *Barnet* ruling in a published opinion in finding that section 109(a) applies in a chapter 15 case. *See In re Forge Grp. Power Pty Ltd.*, 2018 WL 827913, at *13 (N.D. Cal. Feb. 12, 2018) (vacating a bankruptcy court order denying chapter 15 recognition on the basis of *Barnet*, but noting that "the debtor eligibility requirements of 11 U.S.C. § 109(a) apply in Chapter 15 cases" and "the requirement of 'property in the United States' is satisfied by a security retainer that remains the property of the debtor until the funds are applied by the attorney for services actually rendered").

It should be noted that chapter 15's predecessor—section 304 of the Bankruptcy Code—did not require a foreign debtor to qualify as a "debtor" under section 109(a) as a condition to relief. *See, e.g., Goerg v. Parungao (In re Goerg)*, 844 F.2d 1562 (11th Cir. 1988); *Saleh v. Triton Container Intl., Ltd. (In re Saleh)*, 175 B.R. 422 (Bankr. S.D. Fla. 1994). In *Barnet*, the Second Circuit suggested that the enactment of chapter 15 changed this, but that view that was rejected by the court in *Bemarmara*.

AL ZAWAWI

Talal Qais Abdulmunem Al Zawawi (the "debtor") was a debtor in a bankruptcy case filed in a UK court in March 2020. He did not reside in the United States, but he had indirect ownership interests in several Florida-based companies that owned residential and office buildings in Florida and was listed as a director of each of the companies. Prior to 2020, the debtor also had a 60% ownership interest in a Florida corporation that owned real estate leased to a chain of restaurants. In February 2020, the debtor sold his ownership interest in the corporation to his brother, the only other shareholder, but continued to be listed as a director.

In March 2021, the UK court-appointed trustees of the debtor's bankruptcy estate filed a petition with the U.S. Bankruptcy Court for the Middle District of Florida seeking recognition of the UK bankruptcy case under chapter 15 as a foreign main proceeding for the purpose of investigating the debtor's affairs, recovering U.S.-based assets, and potentially asserting claims against third parties for the benefit of creditors, including the debtor's former spouse, who held a judgment claim for more than £24 million.

The debtor opposed recognition. He conceded that the foreign representatives met all the requirements for recognition set forth in section 1517 but argued, relying on *Barnet*, that he did not satisfy the definition of "debtor" in section 109(a). The foreign representatives countered that *Barnet* has been discredited and that the court should instead follow the Eleventh Circuit's rationale in *Goerg*, even though it involved an ancillary case filed under repealed section 304 of the Bankruptcy Code. Alternatively, the foreign representatives argued that, if section 109(a) did apply, the court should grant recognition because the debtor was a director and beneficial owner of the Florida-based companies, and the foreign representatives' U.S. counsel held a retainer provided on the debtor's behalf and had possession of the debtor's wallet.

The bankruptcy court granted the petition for recognition. Section 1517(a), it explained, is "unambiguous," and subject to the public policy exception stated in section 1506, "'chapter 15 recognition must be ordered when a court finds the requisite criteria are met.'" *In re Talas Qais Abdulmunem Al Zawawi*, 634 B.R. 11, 18 (Bankr. S.D. Fla. 2021) (quoting *In re ABC Learning Centres, Ltd.*, 728 F.3d 301, 308 (3d Cir. 2013)).

According to the bankruptcy court, a "debtor" under chapter 15 is not the same as a "debtor" under chapter 1 of the Bankruptcy Code. "If the § 101 definition included the subject of a foreign proceeding," it wrote, "then this special definition [in section 1502(1)] would be unnecessary—§ 1502(1) would be superfluous." *Id.*

The bankruptcy court explained that, although section 103 makes chapter 1 applicable in chapter 15, "it does not graft those provisions into chapter 15—meaning the limited definition would not apply when interpreting § 109." *Id.* at 19. Any other interpretation, it noted, would not give effect to the other provisions of chapter 15 and the purpose of the chapter, which is international uniformity and cooperation in cross-border bankruptcy cases.

The bankruptcy court further explained that several statutory provisions indicate that lawmakers did not intend section 109 to apply in chapter 15 cases, including:

(i) Section 1528, which provides that "[a]fter recognition of a foreign main proceeding, a case under another chapter of this title may be commenced only if the debtor has assets in the United States" (emphasis added) and would be superfluous if section 109 applied to recognition.

(ii) 28 U.S.C. § 1410, governing venue of chapter 15 cases, which provides that "if the debtor does not have a place of business or assets in the United States, [venue is proper in the district] in which there is pending against the debtor an action or proceeding in a Federal or State court . . . or . . . in which venue will be consistent with the interests of justice and the convenience of the parties, having regard to the relief sought by the foreign representative."

(iii) Section 109, which in subsections (b) through (g) specifies the persons or entities that may be debtors in every chapter of the Bankruptcy Code other than chapter 15, and in subsection (h) requires an individual debtor, absent a court waiver or a specified exception, to obtain credit counseling 180 days to a bankruptcy filing—a requirement that could not be satisfied without a waiver in every case because a foreign bankruptcy case has already been filed by or against a foreign debtor.

Id. at 19–20.

Finally, the court noted that *Barnet* is neither controlling precedent nor persuasive. Moreover, it stated that the Eleventh Circuit would likely disagree with the ruling based upon its previous decision in *Goerg*, where the court "examined the purposes behind § 304 and concluded that a foreign debtor does not have to qualify as a 'debtor' under the Bankruptcy Code" because "the focus is on making the United States processes available in aid of foreign proceedings, not actual bankruptcy administration, [and] it would make little sense to require . . . the subject of the foreign proceeding [to] qualify as a 'debtor' under United States bankruptcy law." *Id.* at 20 (quoting *Goerg*, 844 F.2d at 1568). Even though section 304 has been repealed, the court wrote, "chapter 15 has a similar purpose and given this similar issue—whether a foreign debtor must qualify as a debtor under the Bankruptcy Code—this court finds *Goerg* persuasive, and declines to follow [*Barnet*]." *Id.*

Even so, the bankruptcy court found that the debtor satisfied the eligibility requirements of section 109(a) because he had interests in the Florida companies, he was listed as a director of those companies, and the foreign representatives had potential claims against third parties with respect to the debtor's transfer of its interest in one of the companies prior to the commencement of his UK bankruptcy case. The debtor appealed the recognition order to the district court.

THE DISTRICT COURT'S RULING

The U.S. District Court for the Middle District of Florida affirmed the bankruptcy court's ruling. The debtor raised two issues on appeal: (i) whether the debtors' foreign representatives were required to show that he qualified as a "debtor" under section 109(a) to obtain chapter 15 recognition; and (ii) to the extent section 109(a) applied, whether he satisfied its requirements.

Senior U.S. District Judge Gregory Presnell ruled that "compliance with Section 109(a) is not a prerequisite to obtaining recognition under Chapter 15," and that the second issue raised on appeal was therefore moot.

Judge Presnell agreed with the bankruptcy court that section 1517(a) sets forth just three conditions for recognition, "none of which involve an assessment of the foreign debtor's contacts with the United States." *Al Zawawi*, 2022 WL 596836, at *2. He also noted that, although section 101(13) contains a definition of "debtor," chapter 15 "provides its own, alternate definition" of the term, and "[t]hat definition controls and is plainly consistent with the purposes of Chapter 15." *Id.* at *3 (footnote omitted).

Like the bankruptcy court, Judge Presnell determined that he need not look beyond section 1517 to answer the questions posed in the case before him. Even so, he agreed with the bankruptcy court's analysis that other provisions of the Bankruptcy Code—section 109 itself, as well as section 1528—and the chapter 15 venue provision in 28 U.S.C. § 1410, support the conclusion that chapter 15 recognition is not predicated on section 109(a). In addition, Judge Presnell concluded that both the legislative history of chapter 15 and the Guide to Enactment of the Model Law on which chapter 15 was patterned indicate that, provided the requirements for recognition set forth in section 1517(a) have been met, "recognition is not tethered to Section 109(a)." *Id.* at *4.

Barnet did not alter Judge Presnell's conclusion. He noted that courts outside of the Second Circuit have rejected the reasoning in *Barnet*, and courts in the Second Circuit obligated to follow it "do not require much to satisfy Section 109(a)." *Id*. at *5.

Finally, like the bankruptcy court, Judge Presnell concluded that, based on its reasoning in *Goerg*, the Eleventh Circuit would decline to follow *Barnet*. "Limiting recognition to proceedings involving foreign debtors that qualify as 'debtors' under the Bankruptcy Code," Judge Presnell wrote, "is simply inconsistent with the express language and fundamental purpose of Chapter 15." *Id.* at *6.

OUTLOOK

The debate continues over chapter 15 eligibility. As applied by many bankruptcy courts, the Second Circuit's approach to the issue in *Barnet* does not act as a serious impediment to chapter 15 recognition in many cases. This is particularly true given that the requisite property in the United States could be as limited as a law firm retainer, potential causes of action against a U.S. entity or person, or possibly recoverable property situated in the United States. Nonetheless, the conflict in the courts and uncertainty regarding the proper interpretation of the statutory framework is unsettling and should be resolved—ideally by Congress. On March 30, 2022, the debtor appealed the district court's ruling in *Al Zawawi* to the Eleventh Circuit, which will now have an opportunity to revisit the issue under the current statute.

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FIFTH CIRCUIT RULES THAT CHAPTER 11 DEBTORS MAY REJECT FILED-RATE CONTRACTS WITHOUT FERC PERMISSION

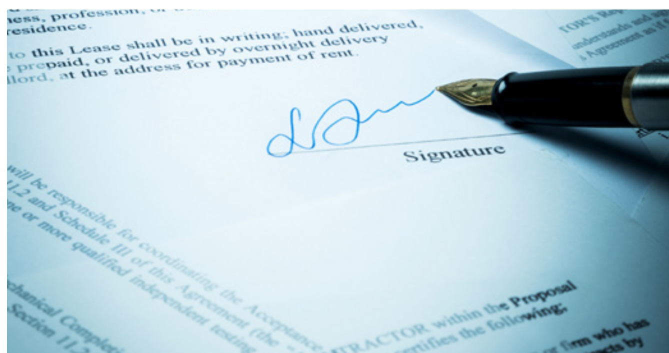
Paul M. Green • Mark G. Douglas

In *FERC v. Ultra Resources, Inc. (In re Ultra Petroleum Corp.)*, 2022 WL 763836 (5th Cir. Mar. 14, 2022), the U.S. Court of Appeals for the Fifth Circuit issued a long-awaited ruling on an appeal from a bankruptcy court order authorizing chapter 11 debtor Ultra Resources, Inc. ("Ultra") to reject a filed-rate gas transportation contract as part of its chapter 11 plan. The Fifth Circuit held that, under the circumstances and in accordance with Fifth Circuit precedent, the bankruptcy court properly authorized Ultra to reject the contract without obtaining the approval of the Federal Energy Regulatory Commission ("FERC"), that Ultra was not subject to a separate public-law obligation to continue performance under the rejected contract, and that section 1129(a)(6) of the Bankruptcy Code does not require a bankruptcy court to seek FERC approval before confirming a chapter 11 plan providing for rejection of the contract.

Court rulings to date on the jurisdictional turf war between FERC and the bankruptcy courts have been a mixed bag, although two federal circuits courts of appeals now have concluded that a bankruptcy court has the power to authorize the rejection of a filed-rate contract. Here, we offer a brief discussion of the most notable court decisions addressing this issue to date.

BANKRUPTCY JURISDICTION AND REJECTION OF EXECUTORY CONTRACTS

By statute, U.S. district courts are given "original and exclusive" jurisdiction over every bankruptcy "case." 28 U.S.C. § 1334(a). In addition, they are conferred with nonexclusive jurisdiction over all "civil proceedings arising under" the Bankruptcy Code as well as civil proceedings "arising in or related to cases under" the Bankruptcy Code. 28 U.S.C. § 1334(b). Finally, district courts are granted exclusive jurisdiction over all property of a debtor's bankruptcy estate, including, as relevant here, contracts, leases, and other agreements that are still in force when a debtor files for bankruptcy protection. 28 U.S.C. § 1334(e). That jurisdiction typically devolves automatically upon the bankruptcy courts, each of which is a unit of a district court, by standing court order. 28 U.S.C. § 157(a).



A bankruptcy court's exclusive jurisdiction over "executory" contracts or unexpired leases empowers it to authorize a bankruptcy trustee or chapter 11 debtor-in-possession ("DIP") to either "assume" (reaffirm) or "reject" (breach) almost any executory contract or unexpired lease during the course of a bankruptcy case in accordance with the provisions of section 365 of the Bankruptcy Code. Assumption generally allows the debtor, after curing outstanding defaults, to continue performing under the agreement or to assign the agreement to a third party for consideration as a means of generating value for the bankruptcy estate. Rejection frees the debtor from rendering performance under unfavorable contracts. Rejection constitutes a breach of the contract, and the resulting claim for damages is deemed to be a prepetition claim against the estate on a par with other general unsecured claims.

Accordingly, the power granted to debtors by Congress under section 365 is viewed as vital to the reorganization process. Rejection of a contract "can release the debtor's estate from burdensome obligations that can impede a successful reorganization." *N.L.R.B. v. Bildisco & Bildisco*, 465 U.S. 513, 528 (1984) (holding that rejection is allowed for "all executory contracts except those expressly exempted"). Typically, bankruptcy courts authorize the proposed assumption or rejection of a contract or lease if it is demonstrated that the proposed course of action represents an exercise of sound business judgment. This is a highly deferential standard akin in many respects to the business judgment rule applied to corporate fiduciaries.

THE FEDERAL POWER ACT, THE FILED-RATE DOCTRINE, THE NATURAL GAS ACT, AND THE MOBILE-SIERRA DOCTRINE

Public and privately operated utilities providing interstate utility service within the United States are regulated by the Federal Power Act, 16 U.S.C. §§ 791a *et seq.* ("FPA"), under FERC's supervision. Although contract rates for electricity are privately negotiated, those rates must be filed with FERC and certified as "just and reasonable" in order to be lawful. 16 U.S.C. § 824d(a). FERC has the "exclusive authority" to determine the reasonableness of the rates. *See In re Calpine Corp.*, 337 B.R. 27, 32 (S.D.N.Y. 2006). The FPA authorizes FERC, after a hearing, to alter filed rates if it determines that they are unjust or unreasonable. 16 U.S.C. § 824e.

On the basis of this statutory mandate, courts have developed the "filed-rate doctrine," which provides that "a utility's right to a reasonable rate under the FPA is the right to the rate which the FERC files or fixes and, except for review of FERC orders, a court cannot provide a right to a different rate." *Calpine*, 337 B.R. at 32. Moreover, the doctrine prohibits any collateral attack in the courts on the reasonableness of rates—the sole forum for such a challenge is FERC. *Id.* Applying the doctrine, some courts have concluded that, once filed with FERC, a wholesale power contract is tantamount to a federal regulation, and the duty to perform

under the contract comes not only from the agreement itself but also from FERC. *Id.* at 33 (citing *Pa. Water & Power Comm'n v. Fed. Power Comm'n*, 343 U.S. 414 (1952); *Cal. ex rel. Lockyer v. Dynergy Inc.*, 375 F.3d 831 (9th Cir. 2004)).

The National Gas Act, 15 U.S.C. §§ 717 *et seq.* ("NGA"), regulates interstate sales of natural gas for resale in much the same way the FPA regulates interstate sales of power. The language in the NGA regarding the requirement to file rates and FERC's power to fix unjust and unreasonable rates is nearly identical to the language in the FPA. *Compare* 16 U.S.C. § 824(e) (FPA) *with* 15 U.S.C. § 717c (NGA).

In a series of cases (*see United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956); *Fed. Power Comm'n v. Sierra Pac. Power Co.*, 350 U.S. 348 (1956)), the U.S. Supreme Court articulated what is referred to as the "Mobile-Sierra doctrine." Under this doctrine, FERC must presume that a rate set by a freely negotiated wholesale-energy contract meets the "just and reasonable" requirement of the NGA and the FPA. That presumption may be overcome only if FERC concludes that the contract seriously harms the public interest. *See NRG Power Mktg., LLC v. Maine Pub. Utilities Comm'n*, 558 U.S. 165 (2010).

If a regulated utility files for bankruptcy, FERC's exclusive discretion in this realm could be interpreted to conflict with the bankruptcy court's exclusive jurisdiction to authorize the rejection of an electricity supply or natural gas agreement. FERC has taken the position that it shares jurisdiction with the bankruptcy courts to determine whether contracts subject to FERC regulation under the FPA can be rejected in bankruptcy. *See NextEra Energy, Inc. v. Pac. Gas & Elec. Co.*, 166 FERC ¶ 61,049 (2019); *Exelon Corp. v. Pac. Gas & Elec. Co.*, 166 FERC ¶ 61,053 (2019), *on reh'g*, 167 FERC ¶ 61,096 (2019). In addition, in *ETC Tiger Pipeline, LLC*, 171 FERC ¶ 61,248 (2020), *reh'g denied*, 172 FERC ¶ 61,155 (2020), FERC determined that a party to a natural gas transportation agreement regulated under the NGA must obtain FERC's approval as well as the approval of the bankruptcy court prior to modifying the filed rate and rejecting the agreement in bankruptcy.

The apparent conflict between the Bankruptcy Code, on the one hand, and the NGA and the FPA, on the other, has been addressed to date by only a handful of courts, including two federal courts of appeals—one of them twice.

NOTABLE COURT DECISIONS

***In re Mirant Corp.,* 378 F.3d 511 (5th Cir. 2004).** In *Mirant*, the U.S. Court of Appeals for the Fifth Circuit ruled that the FPA does not prevent a bankruptcy court from ruling on a motion to reject a FERC-regulated rate-setting agreement as long as the proposed rejection does not represent a challenge to the agreement's filed rate.

The Fifth Circuit noted that, although the Bankruptcy Code places numerous limitations on a debtor's right to reject contracts, "including exceptions prohibiting rejection of certain obligations imposed by regulatory authorities," there is no exception that prohibits a debtor's rejection of wholesale electricity contracts that are subject to FERC's jurisdiction. Concluding that "Congress intended § 365(a) to apply to contracts subject to FERC regulation," the Fifth Circuit held that the bankruptcy court's power to authorize rejection of the agreement did not conflict with the authority conferred upon FERC to regulate rates for the interstate sale of electricity.

The Fifth Circuit, however, imposed a higher standard for rejection of such agreements. It concluded that, in determining whether a debtor should be permitted to reject a wholesale power contract, "the business-judgment standard would be inappropriate . . . because it would not account for the public interest inherent on the transmission and sale of electricity." Instead, a "more rigorous standard" might be appropriate, including consideration of not only whether the contract burdens the estate, but also whether the equities balance in favor of rejection, rejection would promote a successful reorganization, and rejection would serve the public interest. Such a balancing exercise, the Fifth Circuit noted, could be undertaken with FERC's input.

Finally, the Fifth Circuit held that the bankruptcy court exceeded its authority under section 105(a) of the Bankruptcy Code by prohibiting FERC from taking *any* action against the debtor instead of limiting the scope of its injunction to FERC's attempts to compel the debtor to perform under the particular contract that the court authorized the debtor to reject.

***In re Calpine Corp.,* 337 B.R. 27 (S.D.N.Y. 2006).** In *Calpine*, the U.S. District Court for the Southern District of New York (having withdrawn the reference to the bankruptcy court) denied a chapter 11 debtor's motion to reject certain FPA-governed power agreements because the court concluded that FERC had exclusive jurisdiction over the modification or termination of such agreements.

According to the court, the requirement that FERC approval be obtained for any alteration of the "rates, terms, conditions, or duration" of a power agreement is not eliminated merely because the power provider files for bankruptcy. The district court found "little evidence" in the Bankruptcy Code of congressional intent to limit FERC's regulatory authority, remarking that "[a]bsent overriding language, the Bankruptcy Code should not be read to interfere with FERC jurisdiction."

***In re Boston Generating, LLC,* 2010 WL 4616243 (S.D.N.Y. Nov. 12, 2010).** In *Boston Generating*, the U.S. District Court for the Southern District of New York (having withdrawn the reference to the bankruptcy court) ruled that, in order to reject an NGA-governed contract for the transportation of natural gas to one of the chapter 11 debtors' power plants, the debtors "must also obtain a ruling from FERC that abrogation of the contract does not contravene the public interest." "If either the bankruptcy court or FERC does not approve the Debtors' rejection of the [gas transportation agreement]," the court wrote, "the Debtors may not reject the contract."

***PG&E Corp. v. FERC (In re PG&E Corp.),* 603 B.R. 471 (Bankr. N.D. Cal. June 7, 2019)*, amended and direct appeal certified,* 2019 WL 2477433 (Bankr. N.D. Cal. June 12, 2019), *vacated*, 829 Fed. App'x 751 (9th Cir. 2020).** In *PG&E*, the U.S. Bankruptcy Court for the Northern District of California ruled that the lack of any exception for FERC in section 365 of the Bankruptcy Code "simply means that FERC has no jurisdiction over the rejection of contracts."

The bankruptcy court concluded that FERC exceeded its authority by declaring that it shares jurisdiction with the bankruptcy court over the question of whether PG&E Corp. and its Pacific Gas & Electric Co. utility subsidiary (collectively, the "PG&E debtors") could reject FPA-governed power purchase agreements. The court rejected FERC's argument that, because wholesale power contracts are not "simple run-of-the-mill contracts," but implicate the public interest in the orderly production of electricity at just and reasonable rates, the modification or abrogation of such contracts by means of rejection should not be subject to a bankruptcy court's exclusive jurisdiction.

According to the court, this argument "is completely contrary to the congressionally created authority of the bankruptcy court to approve rejection of nearly every kind of executory contract," including "run-of-the-mill types" as well as power purchase agreements and other contracts that implicate the public's interest, with certain exceptions not relevant in this case (e.g., sections 365(h) (certain leasehold interests), 365(i) (timeshare interests), 365(n) (intellectual property licenses), 365(o) (commitments to federal depository institutions), and 1113 (collective bargaining agreements). Those provisions, the court reasoned, demonstrate that Congress knows "how to craft special rules for special circumstances." The court added that lawmakers also knew how to condition confirmation of a chapter 11 plan on the approval by a governmental regulatory commission of any proposed rate change, but they failed to condition rejection of a contract on FERC's approval. *See* 11 U.S.C. § 1129(a)(6).

The bankruptcy court certified a direct appeal of its ruling to the U.S. Court of Appeals for the Ninth Circuit. However, after the bankruptcy court confirmed PG&E's chapter 11 plan on June 20, 2020, the Ninth Circuit vacated the appeal as moot.

***FERC v. FirstEnergy Solutions Corp. (In re FirstEnergy Solutions Corp.),* 945 F.3d 431 (6th Cir. 2019), *reh'g denied*, No. 18-3787 (6th Cir. Mar. 13, 2020).** In *FirstEnergy*, a divided panel of the U.S. Court of Appeals for the Sixth Circuit ruled that the bankruptcy court had jurisdiction to decide whether a chapter 11 debtor could reject its FPA-regulated electricity-purchase contracts because, even though filed-rate contracts may have the force of regulation or statute outside of bankruptcy, they are ordinary contracts susceptible to rejection in bankruptcy. The Sixth Circuit also held that, although the bankruptcy court had "concurrent" jurisdiction with FERC to decide whether a debtor could reject the power contracts, the bankruptcy court exceeded its jurisdiction by enjoining FERC from requiring the debtors to continue performing under the contracts or from taking any other actions in connection with them.

In addition, the Sixth Circuit determined that the bankruptcy court incorrectly applied the "business-judgment" standard to the debtors' request to reject the contracts. Instead, the court wrote, "the bankruptcy court must consider the public interest and ensure that the equities balance in favor of rejecting the contract, and it must invite FERC to participate and provide an opinion in accordance with the ordinary FPA approach . . . within a reasonable time." *FirstEnergy*, 945 F.3d at 944. One judge on the panel dissented in part, stating that the majority's holding "conflicts with Congress's decision to deny federal-court jurisdiction over the abrogation or modification of a filed rate." *Id.* at 945.

ULTRA PETROLEUM

The Fifth Circuit revisited a bankruptcy court's power to authorize the rejection of filed-rate contracts in *Ultra Petroleum*.

Ultra filed for chapter 11 protection for the second time in four years on May 14, 2020, in the Southern District of Texas. It immediately sought court authority to reject an NGA-governed natural gas transportation agreement with Rockies Express Pipeline LLC ("REX"), which transports natural gas through a natural gas pipeline stretching from eastern Ohio to southwestern Wyoming.

REX objected to the motion, arguing that the public interest would be harmed by rejection and that the motion could not be considered until FERC was permitted to "meaningfully participate" on whether rejection would harm the public interest. Otherwise, REX contended, any order approving the rejection motion would contravene the Fifth Circuit's *Mirant* decision and the "primary jurisdiction doctrine," which applies when a claim is originally cognizable in the courts but involves issues that fall within the special competence of an administrative agency. According to REX:

> A rejection standard that does not take into account the importance of stable FERC-regulated agreements, which the U.S. Supreme Court has held to be in the public interest, and the harmful [e]ffect that free-rider activity would have on [Rockies] and the interstate pipeline system as a whole, would create a dangerous discontinuity between the Bankruptcy Code and the NGA, and would be inconsistent with *Mirant*.

The bankruptcy court denied REX's request to defer consideration of the rejection motion until FERC could weigh in on the question in a formal proceeding. However, the court invited FERC to participate in the bankruptcy case and make its views known. FERC declined to do so outside the context of a FERC proceeding.

On August 6, 2020, the bankruptcy court granted Ultra's motion to reject the REX gas transportation agreement. *See In re Ultra Petroleum Corp.*, 621 B.R. 188 (Bankr. S.D. Tex. 2020), *aff'd*, 2022 WL 763838 (5th Cir. Mar. 14, 2022). Addressing the standard for rejection, the court noted that *Mirant* is binding authority in the

Southern District of Texas. As a consequence, a bankruptcy court must engage in a fact-intensive analysis of whether the rejection of a transportation agreement would lead to direct harm to the public interest through an "interruption of supply to consumers" or a "readily identifiable threat to health and welfare." According to the court, the evidence submitted by REX had "little to do with the contract at issue," and any identified harm was grounded in market-chilling effects that would stem from a "general ability to reject" FERC-regulated contracts.

Although the general business-judgment standard applicable to contract rejection may be elevated in certain circumstances, the court explained, imposing what would amount to a general bar to rejection (e.g., by requiring that a debtor's reorganization would fail absent rejection) would be a statutory-type exception that only Congress could create (as it has done with respect to certain other kinds of contracts).

The court found that the record overwhelmingly supported rejection. The evidence showed that there would be no interruption to the supply of gas to consumers, there would be no negative macroeconomic consequences, and Ultra would "marginal[ly]" benefit by rejecting the transportation agreement.

The court wrote that "[t]he Court is not authorized to graft a wholesale exception to § 365(a) of the Bankruptcy Code . . . preventing rejection of FERC approved contracts." It further noted that "[p]ublic policy may, in certain circumstances, be considered when determining whether to authorize the rejection of a FERC approved pipeline contract." According to the court, whether the rejection of an executory FERC contract is "good or bad public policy" must be decided by Congress and not by the court or FERC.

Finally, the court ruled that the rejection of the contract did not violate section 1129(a)(6) of the Bankruptcy Code, which provides that a plan cannot be confirmed unless "[a]ny governmental regulatory commission with jurisdiction . . . over the rates of the debtor has approved any rate change provided for in the plan, or such rate change is expressly conditioned on such approval," because "FERC's rate setting authority will remain intact following rejection and potential confirmation of the plan."

On August 21, 2020, shortly after the rejection approval, the bankruptcy court confirmed a chapter 11 plan for Ultra. FERC appealed the confirmation order to the extent it provided that the bankruptcy court retained "exclusive jurisdiction" over orders authorizing Ultra's rejection of FERC-regulated contracts.

THE FIFTH CIRCUIT'S RULING

A three-judge panel of the Fifth Circuit affirmed the confirmation order.

Writing for the panel, U.S. Circuit Judge Carolyn Dineen King noted that "[i]n light of *Mirant*, what FERC casts as a pitched battle is actually a settled truce." *Ultra Petroleum*, 2022 WL 763838, at *4. She explained that *Mirant*, which is binding precedent, "balances the interests of the bankruptcy courts (which are ultimately in charge of the rejection decision) and FERC (by requiring that rejection of a filed-rate contract is considered under a higher standard that considers the public interest and by allowing FERC to participate in the bankruptcy proceedings)." *Id.*

Judge King emphasized that FERC was not arguing that *Mirant* allows a bankruptcy court to approve the rejection of a filed-rate contract. Instead, she explained, FERC claimed that any statements in *Mirant* concerning the consequences of rejection—including the statement that FERC could not enforce post-rejection performance and payment—were non-binding dicta.

Judge King rejected this argument, stating that the language in *Mirant* regarding the effects of rejection "was necessary to our holding in *Mirant*." *Id.* According to Judge King, "The consequences of rejection of a filed-rate contract are central to the decision to allow rejection of said contracts, and the governing rules of law related to those consequences required explication; that discussion was not dicta." *Id.* at *5. Otherwise, she wrote, after authorizing rejection, the bankruptcy court "would have been left adrift when considering how to enforce rejection."

Moreover, Judge King explained, the court's determination in *Mirant* that rejection has only "'an indirect effect upon the filed rate'" and "'is not a collateral attack upon [the filed rate]'" was "a necessary prerequisite" to its ruling that a debtor can reject a filed-rate contract in bankruptcy. *Id.* (quoting *Mirant*, 378 F.3d at 519-20, 522).

Noting that the Sixth Circuit came to the same conclusion in *FirstEnergy*, Judge King ruled that the bankruptcy court properly authorized rejection of the contract with REX under the *Mirant* standard, based on the bankruptcy court's findings that: (i) rejection did not collaterally attack the rate filed with FERC because that rate was used to calculate the damage award after rejection and Ultra did not seek to reject the contract because the rate was excessive, but because it did not need the capacity; and (ii) the bankruptcy court did not apply the normal business judgment standard in deciding whether to authorize rejection, but the higher standard ("*Mirant* Scrutiny") that involves consideration of the public interest. *Id.* at *6-7.

Judge King rejected FERC's argument that it must be permitted to comment on the public-interest ramifications of a proposed rejection in a formal proceeding before rejection can be authorized. *Mirant*, she noted, does not "include such a requirement," and the bankruptcy court, which was obligated to weigh the public interest in deciding whether to authorize rejection of a filed-rate contract, specifically sought FERC's input on the impact of rejection.

Finally, Judge King rejected FERC's argument that the bankruptcy court erred because rejection of the REX contract amounted to a rate change and the inclusion of a

provision in Ultra's chapter 11 plan authorizing rejection violated section 1129(a)(6) of the Bankruptcy Code. According to Judge King, "[s]ince the bankruptcy court did not change the actual rate and used it to calculate the damages claim that would result from rejection of the contract, the confirmation of the plan did not violate [section 1129(a)(6)]." *Id.* at *8.

OUTLOOK

In *Ultra Petroleum*, the Fifth Circuit reaffirmed the vitality of its ruling in *Mirant* regarding the power of a bankruptcy court to authorize under certain circumstances the rejection of an executory filed-rate contract. The Fifth and Sixth Circuits are aligned on this issue, although they disagree over whether it creates a jurisdictional conflict. The Fifth and Sixth Circuits also agree that, to assist the bankruptcy court in assessing the public interest, FERC should play some role in determining whether such contracts should be rejected. We can only speculate as to whether the Ninth Circuit would also have endorsed this view or taken a different approach in *PG&E* had it not vacated the appeal as being moot.

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NEWSWORTHY

***Corinne Ball* (New York)**, ***Bruce Bennett* (Los Angeles and New York)**, ***Carl E. Black* (Cleveland)**, ***Jeffrey B. Ellman* (Atlanta)**, ***Brad B. Erens* (Chicago)**, ***Gregory M. Gordon* (Dallas)**, ***Heather Lennox* (Cleveland and New York)**, ***Joshua M. Mester* (Los Angeles)**, ***Charles M. Oellermann* (Columbus)**, and ***Kevyn D. Orr* (Washington)** were among the 2022 *Lawdragon 500 Leading U.S. Bankruptcy & Restructuring Lawyers*.

***Bruce Bennett* (Los Angeles and New York)**, ***Heather Lennox* (Cleveland and New York)**, ***Corinne Ball* (New York)**, and ***Ben Larkin* (London)** were ranked in the practice areas of Bankruptcy/Restructuring or Restructuring/Insolvency in *Chambers Global* 2022.

***Roger Dobson* (Sydney)** was ranked in the practice area of Restructuring/Insolvency in the 2022 edition of *Chambers Asia Pacific*.

On April 29, 2022, ***Gregory M. Gordon* (Dallas)** was on a panel discussing the "Texas Two-Step of Tort Liability (J&J)" at the 2022 Annual Spring Meeting of the American Bankruptcy Institute in Washington, D.C.

***Oliver S. Zeltner* (Cleveland)** guest lectured at Harvard Business School in a class on the Chapter 9 Bankruptcy Case of the City of Detroit on April 8, 2022.

On April 27, 2022, ***Kevyn Orr* (Washington)** spoke on a panel after the public premiere of the award-winning documentary "Gradually, Then Suddenly: The Bankruptcy of Detroit." The film opened the Freep Film Festival and was shown to a sold-out audience at the Detroit Institute of Arts. The documentary won the 2021 Library of Congress Lavine/Ken Burns Prize for film.

***Fabienne Beuzit* (Paris)** was designated a "Next Generation Partner" in the practice area of Insolvency in the 2022 edition of *The Legal 500 EMEA*.

***Olaf Benning* (Frankfurt)** attended the Handelsblatt Annual Conference on Restructuring, which was held from May 11 to May 13, 2022, in Frankfurt, Germany.

On May 23, 2022, ***Carl E. Black* (Cleveland)** and ***T. Daniel Reynolds* (Cleveland)** were part of a panel discussion at the William J. O'Neill Great Lakes Regional Bankruptcy Institute sponsored by the Bankruptcy and Commercial Law Section of the Cleveland Metropolitan Bar Association. ***Marissa Alfano* (Cleveland)** was a member of the planning committee for the event.

An article written by ***Corinne Ball* (New York)** titled "Seventh Circuit Permits Prior Interest Holder To Challenge 'Free and Clear' Sale After the Fact" was published in the April 27, 2022, edition of the *New York Law Journal*.

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