



AMERICAN
BANKRUPTCY
INSTITUTE

2017 Winter Leadership Conference

ABI Talks

Douglas E. Deutsch, Moderator

Clifford Chance US LLP; New York

David Dunn

Cross Sound Management LLC; Wilton, Conn.

Robert C. Furr

Furr & Cohen, PA; Boca Raton, Fla.

Robert J. Keach

Bernstein Shur; Portland, Maine

M. Natasha Labovitz

Debevoise & Plimpton LLP; New York

Kelly Beaudin Stapleton

Alvarez & Marsal; New York



The 10 Best Pieces of Career Advice and Teaching Moments...Ever.

M. Natasha Labovitz
December 2017

#10

Debevoise
&Plimpton

“Well, Natasha, sometimes you’ve just got to let them wear the sweatshirt.”

- D.J. (Jan) Baker, Latham & Watkins LLP

#9

Debevoise
& Plimpton

Falling on your sword can be an art form. You're just as smart, powerful, successful, and well-respected after letting the client be right and apologizing.

- Richard (Rick) Cieri, Kirkland & Ellis LLP

#8

Debevoise
& Plimpton

"It would really be a mistake for you not to go to that dinner."

- Todd Snyder, Rothschild Inc.

#7

Debevoise
& Plimpton



“Life is long. Careers are long. Things happen.”

- James H. M. Sprayregen, Kirkland & Ellis LLP

#6

Debevoise
& Plimpton

In a restructuring, you always need to have a plan partner.

- Daniel H. Golden, Akin Gump Strauss Hauer & Feld LLP

#5

Debevoise
& Plimpton

**Network with the people
you want to know, not the
ones you think you should
know.**

- Margaret Cannella, JPMorgan Chase & Co.

#4

Debevoise
& Plimpton

**“Be the guy who does his
job...even when no one is
looking and no one will
know the good ideas came
from you.**

**If you do that, not only the
next job, but your career,
will take care of itself.”**

- Preet Bharara, Former U.S. Attorney
for the Southern District of New York

#3

Debevoise
& Plimpton

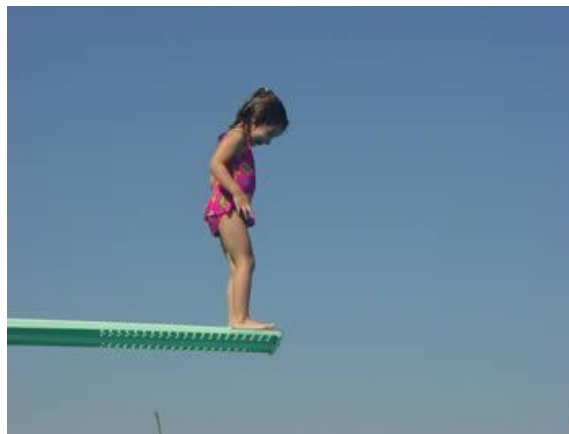


“Sometimes partners just have to trust each other. It’s that simple.”

- Steven R. Gross, Debevoise & Plimpton LLP

#2

Debevoise
& Plimpton



If you don’t do something that makes you sick to your stomach with fear at least once a month, you’re not learning.

- Leslie Moore, Deloitte Australia

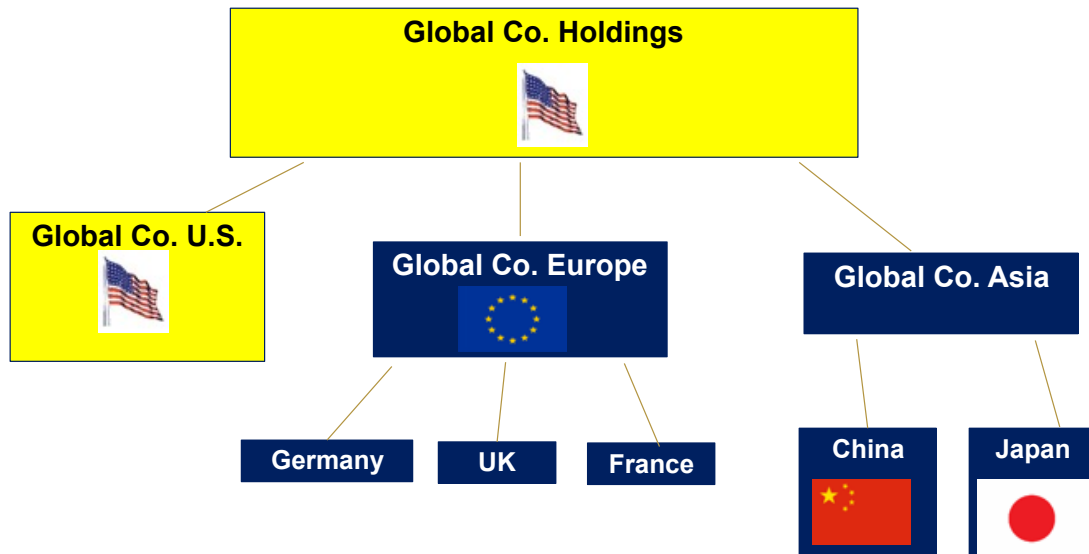
#1

Debevoise
& Plimpton

**“You just have to #\$\$@&*!-ing
work harder than anybody else.”**

- Daniel M. Aronson, Evercore Partners

The Comedy of Comity



Yellow = U.S. Corp with U.S. Assets
Blue = Non U.S. Corp with Non U.S. Assets

Hilton v Guyot

Seminal US Supreme Court case
recognizing the doctrine of comity

Comity in Global Restructuring

Federal Mogul and the Cross Border Protocol

Chapter 15 - the “junior partner”

HARBINGERS OF DISTRESS OR CHICKEN LITTLE?

DECEMBER 2017



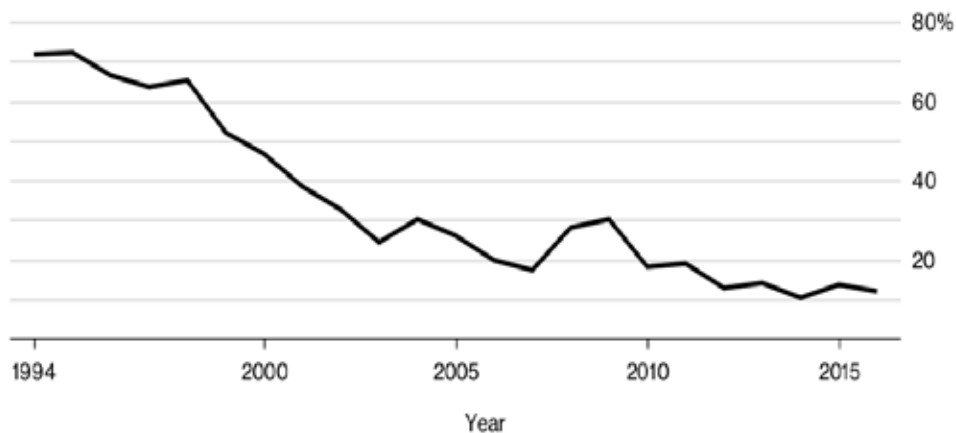
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DIRECT LENDING

Don't Bank on It

Banks have steadily reduced their holdings of loans made to companies

■ % of U.S. leveraged loans held by banks



Source: Adam Street Partners and S&P Capital IQ

Bloomberg



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DIRECT LENDING

“Non-correlated risk”

“Illiquidity is the new leverage”
Goldman Sachs

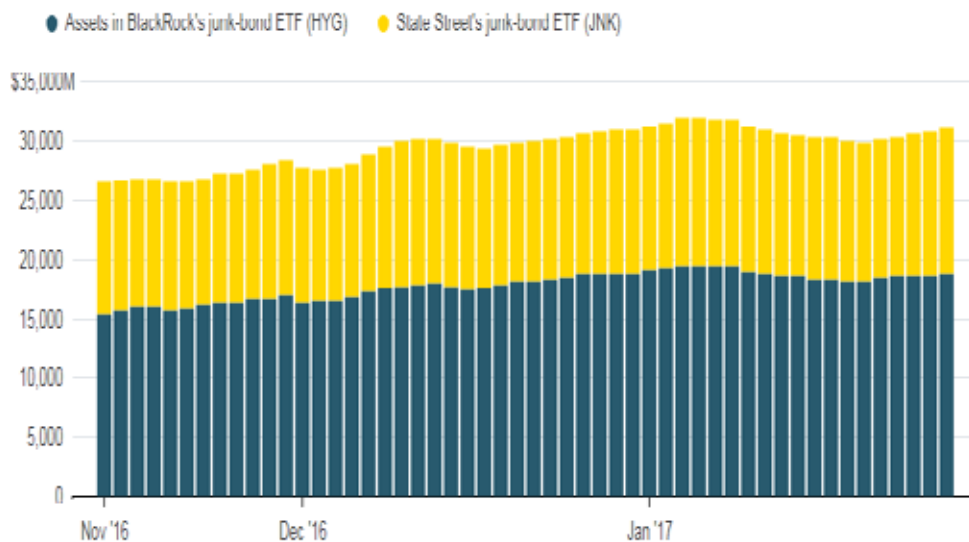
“Asset-based loans to collateral-rich,
private companies”

“Returns compression”



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HIGH YIELD EXCHANGE TRADED FUNDS



Source: Bloomberg



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HARBINGERS OF DISTRESS – DIRECT LENDING

- New product attracting flood of \$\$ without being tested in broad-based distressed cycle
- Non-traditional market participants
- Perception of liquidity
- Crowding/competition forcing fee pressure, loosening of due diligence standards and automation
- Returns on investment compressing while underlying risks increasing
- Disguised risks to underlying price/valuation



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JEVIC: Embrace it!

ABI Winter Leadership Conference
2017

Robert J. Keach

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SHUR**

Jevic's Narrow Holding: A bankruptcy court cannot approve a structured dismissal that provides for distributions that violate priority rules without the affected creditors' consent.

Supreme Court distinguished orders approving final distributions in violation of the priority rules from orders approving priority skipping interim distributions, such as:

- First-day wage orders
- Critical vendor orders
- DIP financing orders, blessing “roll-ups”

Such interim orders (may be) authorized when they “enable a successful reorganization and make even the disfavored creditors better off.”

3

BERNSTEIN SHUR

Disfavored, priority-violating final dispositions (1) do not preserve debtor as a going concern; (2) do not make the disfavored creditors better off; (3) do not promote the possibility of a confirmable plan; (4) do not help restore the status quo ante; and (5) do not protect reliance interests.

4

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Court analogized the disfavored structured dismissal to similar “proposed transactions that lower courts have refused to allow on the ground that they circumvent the Code’s procedural safeguards:

- *Braniff Airways* (Sale)
- *Lionel Corp.* (Sale)
- SCOTUS contrasted *Chrysler* – a “sale that in no way upset that priority”.

5

BERNSTEIN SHUR

Jevic should apply, therefore, to sales and settlements, and combinations thereof. *Fryar, Hansen; Constellation*.

That the purchaser designates the distribution – or that the purchaser’s (or secured/settling party’s) money is used – is irrelevant. (*Jevic, Constellation*)

6

BERNSTEIN SHUR

Cannot end-run *Jevic* by tucking the blue print for a final distribution into an otherwise permissible interim order (i.e. DIP financing).

Nor should we try (or the courts allow). Applying *Jevic* broadly, consistent with its reasoning, will benefit the cause of Chapter 11. We should embrace it, not try to end run it.

7

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Allowing priority-skipping deals distorts the market for bankruptcy benefits. The ability to sell free and clear and to confer “global” releases are powerful, unique bankruptcy tools; extraordinary remedies. Sellers want “free and clear” sales; settling parties want global releases. Allowing priority-skipping deals risks selling those benefits at a discount. No one will pay more if they can avoid the cost.

8

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- Given that such remedies are, in fact, extraordinary (and even if we are not underselling those remedies) the price of bankruptcy benefits should nonetheless be playing by all of the rules that apply “inside” of bankruptcy, i.e. in the plan process; absolute priority and absence of intra-class discrimination, as well as procedural fairness – or at least the price must be equal to the cost of purchasing waivers of those rights from affected parties (just like plan negotiations).
- The Second Circuit has said that the scope of the “free and clear” remedy should be the same for sales and plans; the same should be true of the applicable procedural protections and the cost of acquiring the remedy.

9

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- Broadly (or fairly) applying *Jevic*, in accordance with the reasoning of the Supreme Court, will lead to more plans, as the advantage of quick sales and settlements goes away. As noted years ago by Judge Steen, plans, with their protections, can often be as fast. Or sales will have plan protections.
- Where it doesn’t, appropriate “sorting” will occur: some cases should be Chapter 7’s or simply dismissed; we do not need a fourth or fifth option.
- Unsecured Creditors – and their committees – should not have a favored place when unsecured debt is not the “fulcrum security”. Causes of action should be able to be “purchased” by each level of priority; “descending option” model (with shared final distributions).

10

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STEIN
SHUR**

Critically, *Jevic* is the license to say “No” many courts have sought. We can certainly be creative – and there is short-term benefit to the case from creativity. But the system will be better if we realize that just because we can think of something does not mean we get to do it. The price of bankruptcy benefits is “funding” the procedural and substantive protections the Code provides, including absolute priority and barring intra-priority discrimination.



To Tell or Not to Tell

ROBERT C. FURR, ESQ

Past Experiences

- Client's husband hung himself
- Long-term marriage
- Debt he couldn't reveal because of shame



Tom's Story

- Banker
- Lost Job at 72
- Only Social Security
- 3 Life Insurance Policies
- Desperate



Suicide Threat – A Cry for Help

- Confidentiality to Lawyer
- Ethical Dilemma – Ask Permission to Reveal Suicidal Thoughts to a Therapist
- Understanding
- Hotline
- See Therapist or a Doctor



Second Visit

- Look at Insurance Policies
- Go Over Debt



Suicide and Debt Bankruptcy

- 3,000 Indian farmers in 2015
- Student Loan Suicides
- Unemployed, 35, Graduate in 2007
- Young lawyer's Thoughts



Higher Social Status

- Higher Education
- Greater Income
- Higher Occupational Prestige
- Higher Self-Identified Class
- Makes Suicide More Acceptable



Make Contract with Client

- Got Tom to agree to tell his wife and tell me before doing anything
- Reinforce that Contract



Florida 765.309

- Assisted Self-Murder 782.08 is Manslaughter
- No Mercy Killing
- Don't Want to Commit Crime



Disabled?

- Lawyer is supposed to treat a client with respect and maintain a normal relationship
- Maintain Confidences
- Advisor and Use Independent and Professional Judgement
- Recommended Therapy
- Keep any disclosure as nameless as possible
- Could cause client to become institutionalized
 - BE CAREFUL
- Some States Have No Rule



I Had to Live With Myself. Would I Break Confidences?

- Client called after talking with wife

