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Business Bankruptcy Legal Update

Lisa G. Beckerman
Akin Gump Strauss Hauer & Feld LLP; New York

Terri L. Gardner
Nelson Mullins Riley & Scarborough LLP; Raleigh, N.C.

Kristine G. Manoukian
Clifford Chance US LLP; New York

Gregory W. Werkheiser
Morris, Nichols, Arsht & Tunnell LLP; Wilmington, Del.

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BUSINESS LEGAL UPDATE WRITTEN MATERIALS FOR THE ABI ANNUAL SPRING MEETING, APRIL 20-23, 2017

Moderator:
Lisa G. Beckerman,
Akin Gump Strauss Hauer & Feld LLP

Panelists:
Gregory W. Werkheiser,
Morris Nichols Arsht & Tunnell LLP
Kristine G. Manoukian,
Clifford Chance US LLP
Daniel F. Blanks,
Nelson Mullins Riley & Scarborough LLP

Make-Whole Premiums

By Lisa G. Beckerman, Partner, Akin Gump Strauss Hauer & Feld LLP, New York

The recent decision by the Third Circuit Court of Appeals (the "Third Circuit") regarding make-whole premiums in *Del. Trust Co. v. Energy Future Intermediate Holding Co. LLC (In re Energy Future Holdings Corp.*), 842 F.3d 247 (3d Cir. 2016), resulted in revisions to the plan of reorganization (and ultimately a settlement of the make-whole premium dispute). It has also put more focus on the pending appeal before the Second Circuit Court of Appeals (the "Second Circuit") in *Wilmington Trust, N.A. v. Momentive Performance Materials Inc. et al*. (*In Re MPM Silicones, LLC*), Case No. 15-1824 (2d Cir. filed May 26, 2015).[1]

In *In re Energy Future Holdings Corp., et al.* ("EFIH"), the Bankruptcy Court held that a make-whole premium was not owed to the first lien secured noteholders.[2] *Del. Trust Co. v. Energy Future Intermediate Holding Co. LLC (In re Energy Future Holdings Corp.*), 527 B.R. 178 (Bankr. D. Del. 2015). Post-petition, the EFIH debtors decided to refinance the first lien secured notes and the second lien secured notes with more cost effective financing. The EFIH debtors paid the principal and interest due on account of the first lien secured notes and the second lien secured notes but not any make-whole premium. Litigation was brought by the indenture trustees for the first lien secured notes and the second lien secured notes seeking to be paid the make-whole premium.

The first lien indenture provided for optional redemption of the first lien secured notes at any time prior to December 1, 2015 and if the notes issued under the first lien indenture were redeemed as an optional redemption, principal, accrued and unpaid interest and the Applicable Premium[3] would have to be paid. *Id*. at 186. The first lien indenture also provided that, in the event of an event of default due to a bankruptcy filing by the issuer of the notes, all outstanding notes "shall be due and payable without further action or notice." *Id*. In the event of a non-bankruptcy default, the indenture trustee or holders of at least 30% of the first lien secured notes had the optional right to accelerate. *Id*. The Bankruptcy Court held that this optional right to

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[1] The appeal is from the District Court's decision. *U.S. Bank N.A. v. Wilmington Sav. Fund Soc'y (In re MP Silicones, LLC)*, 531 B.R. 321 (S.D.N.Y. 2015). Oral argument occurred on November 9, 2016 before the Second Circuit.

[2] The second lien indenture contained similar language as the first lien indenture. Thus, the Bankruptcy Court also held that a make-whole premium was not owed to the second lien secured noteholders. *Computershare Trust Co. N.A. v. Energy Future Intermediate Holding Co., LLC (Energy Future Holdings Corp.*), 539 B.R. 723 (Bankr. D. Del. 2015). This decision was also affirmed by the District Court and appealed to the Third Circuit. *Computershare Trust Co. N.A. v. Energy Future Intermediate Holding Co., LLC (Energy Future Holdings Corp.*), Case No. 15-1011–RGA, 2016 U.S. Dist. LEXIS 48671 (D. Del. Apr. 12, 2016).

[3] "Applicable Premium" is defined in the first lien indenture as "the greater of: (1) 1.0% of the principal amount of such Note and (2) the excess, if any, of (a) the present value at such Redemption Date of (1) the redemption price of such Note at December 1, 2015 (such redemption price as set forth in the table appearing under Section 3.07(d) hereof) plus (ii) all required interest payments due on such Note through December 1, 2015 (excluding accrued but unpaid interest to the Redemption Date), computed using a discount rate equal to the Treasury Rate as of such Redemption Date plus 50 basis points; over (b) the principal amount of such Note." *Id*.

accelerate such notes does not apply to a bankruptcy default and that acceleration upon a bankruptcy default is automatic. *Id*.

The Bankruptcy Court ruled that the first lien indenture did not contain any express language requiring the payment of the Applicable Premium upon an automatic acceleration, only in the case of an optional redemption. *Id*. at 192. The Bankruptcy Court held that, under New York law, a borrower's repayment after acceleration is not considered voluntary because acceleration moves the maturity date from the original maturity date to the date of the acceleration. *Id*. at 195. The Bankruptcy Court held that optional redemption of the notes cannot occur under the first lien indenture after a Chapter 11 filing and the automatic acceleration of the debt.[4]

On appeal, the District Court affirmed the Bankruptcy Court's findings. *Del. Trust Co. v. Energy Future Intermediate Holding Co. LLC* (*In re Energy Future Holdings Corp.*), Case No. 15-620-RGA, 2016 U.S. Dist. LEXIS 18201 (D. Del. Feb. 16, 2016)). The indenture trustee appealed the decision to the Third Circuit.[5]

The Third Circuit held that the repayments of the first lien secured notes and the second lien secured notes were each "redemptions" even though such payments were made after the date of the automatic accelerations, the new maturity dates. *Del. Trust Co. v. Energy Future Intermediate Holding Co. LLC.,* 842 F. 3d at 255. The Third Circuit also held that the redemptions were not mandatory, despite the language in the two indentures which made the debt "due and payable immediately without further action or notice."[6] *Id*. The Court held that EFIH had voluntarily chosen post-petition to refinance the first lien secured notes and the second lien secured notes and that such repayments had occurred before December 1, 2015. *Id*. The Court held that the two sections of the first lien indenture should be read as addressing different things: "§ 6.02 causes the maturity of EFIH's debt to accelerate on its bankruptcy, and § 3.07 causes a make-whole to become due when there is an optional redemption before December 1, 2015. Rather than 'different pathways,' together they form the map to guide the parties through a post-acceleration redemption. In any event, § 3.07 is the only provision that specifically addresses redemptions." *Id*. at 256.

In its ruling, the Third Circuit made a distinction between a prepayment premium and a make-whole premium not styled as a prepayment premium in an indenture. The Court rejected EFIH's argument that, even though § 3.07 of the first lien indenture does not use the word "prepayment," the make-whole is in substance a prepayment premium. *Id*. at 260. The Court criticized the *Momentive* decision which disallowed the lenders' claim for a make-whole, despite similar optional redemption language, on the grounds that it is "'well-settled law in New York' that a make-whole, like a prepayment premium, will only be due on a default and acceleration

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[4] The Bankruptcy Court also held that the *EFIH* debtors did not file bankruptcy intentionally in order to default and avoid payment of the Applicable Premium. *Id*. at 196. The Bankruptcy Court further held that indenture trustee had not met its burden with respect to its request for relief from the automatic stay to deaccelerate the debt. *Id*. at 198. The Bankruptcy Court ruled that the indenture trustee was not entitled to either rescission or damages for breach of contract relating to its inability to rescind the acceleration of the notes. *Id*. at 199-200.

[5] The two appeals were consolidated at the Third Circuit so the opinion addresses both the first lien secured notes and the second lien secured notes.

[6] The second lien indenture contained similar language.

'when a clear and unambiguous clause calls' for it." *Id*. (citing to *In re MPM Silicones,* LLC, Case No. 14-22503-RDD, 2014 Bankr. LEXIS 3926 (Bankr. S.D.N.Y. Sept. 9, 2014) ("Momentive"), *affirmed by* 531 B.R. 321 (S.D.N.Y. 2015)). The *Momentive* Court criticized the Bankruptcy Courts for having "stretched *Northwestern* beyond its language and applied its clear-statement rule to yield protection payments not styled as prepayment premiums." *Id*. at 259. The Third Circuit disagreed with the premise, announced in *Momentive* and accepted in *EFIH*, that acceleration negates the make-whole premium as long as the make-whole premium is not called a "prepayment premium" in the indenture, the indenture contains an applicable optional redemption provision, and the indenture does not expressly provide that the make-whole premium is not payable upon an automatic acceleration due to a bankruptcy filing.

In *Momentive*, the indenture in question provided for automatic acceleration of the debt upon a bankruptcy filing of the issuer and for the payment of an Applicable Premium in the event of an optional redemption, similar to the language of the indentures in *EFIH*. The Bankruptcy Court held that the secured noteholders bargained for prepayment of the notes upon the event of the debtors' bankruptcy and therefore forfeited their right to the Applicable Premium. *Momentive*, 2014 Bankr. LEXIS 3926, at *39.

The Bankruptcy Court noted that New York law requires that an indenture contain explicit language that a prepayment premium or make-whole premium is due in the event of acceleration of, or the establishment of a new maturity date for, the debt. *Id*. at *42-43.[7] The Court held the automatic acceleration provision supersedes the optional redemption provision in the indenture because the indenture did not include clear language that the redemption date "would artificially jump ahead of the prior acceleration or ignore the acceleration and entitle the holders to a make-whole under New York law." *Id*. at *46.

It will be interesting to see if the Second Circuit affirms or reverses the decision in *Momentive* with respect to the make-whole premium or instead certifies the question of whether an optional redemption of notes is possible after an automatic acceleration of the debt absent specific language to that effect in the indenture to the New York Court of Appeals prior to issuing a ruling.

[7] The Bankruptcy Court cited to various New York cases in support of its position, including *U.S. Bank Nat'l Ass'n v. S. Side House LLC*, Case No. 11-cv-4135-ARR, 2012 Dist. LEXIS 10824 (E.D.N.Y. Jan. 30, 2012) and *Northwestern Mut. Life Ins. Co. v. Uniondale Realty Assoc.*, 816 N.Y.S.2d 831, 11 Misc. 3d 980 (N.Y. Sup. Ct. 2006).

RECENT CASE LAW ADDRESSING BANKRUPTCY REMOTE STRUCTURES

By Gregory W. Werkheiser, Partner, and Matthew O. Talmo, Associate
Morris, Nichols, Arsht & Tunnell LLP, Wilmington, DE

In 2016, bankruptcy courts issued two decisions that may have structured finance counsel taking a critical look at their play books next time they are asked to prepare governance documents for a special purpose entity or opine on bankruptcy remoteness. Both decisions arose out of attempts by a lender in the context of restructuring negotiations to avail themselves of the generally malleable nature of alternative entity law to achieve maximum leverage with their borrowers by restricting the circumstances under which their debtors could commence bankruptcy cases without the lender's consent. And, in both instances, the bankruptcy courts asked to address whether these bankruptcy remote structures had been properly deployed held that the lenders had overstepped. In *In re Lake Michigan Beach Pottawattamie Resort LLC,* 547 B.R. 899 (Bankr. N.D. Ill. 2016), the bankruptcy court invalidated a "blocking director" type provision added to an LLC operating agreement as a condition to the lender's forbearance on the basis that it disclaimed fiduciary duties to the entity and other members, primarily in violation of applicable Michigan law. In the second decision, *In re Intervention Energy Holdings, LLC,* 553 B.R. 258 (Bankr. D. Del. 2016), issued just two months later, the bankruptcy court also invalidated a "golden share" type provision added to an LLC operating agreement as part of a forbearance arrangement on the basis that it amounted to a *de facto* absolute waiver of the entity's right to seek federal bankruptcy, contrary to federal public policy.

***In re Lake Michigan Beach Pottawattamie Resort LLC,* 547 B.R. 899 (Bankr. N.D. Ill. 2016)**

<u>Background</u>

Lake Michigan Beach Pottawattamie Resort LLC (the "Debtor"), a limited liability company formed under Michigan law, owned and operated a vacation resort, which included several rental properties and undeveloped land (collectively, the "Property"). 547 B.R. at 903. In December 2014, the Debtor had obtained a $1.3 million term loan and $500,000 line of credit from BCL-Bridge Funding LLC ("BCL"), repayment of which was secured by a mortgage of the Property and assignment of rents generated therefrom. *Id.* By July 2015, the Debtor defaulted on its monetary obligations to BCL. *Id.* In August 2015, the parties entered into a forbearance agreement pursuant to which the Debtor stipulated a monetary default in the approximate amount of $2.6 million and committed to repay all indebtedness by October 2015. *Id.*

In connection with the forbearance agreement, the Debtor also promised to amend its operating agreement (the "Third Amendment") to admit BCL as a "Special Member" with certain approval rights over any "Material Action" by the Debtor. *Id.* at 903-04. The definition of "Material Action" included the Debtor's commencement or consent to bankruptcy or insolvency proceedings. *Id.* at 904. The Third Amendment left no doubt that that it was adopted for the benefit of BCL in its capacity as the Debtor's lender, stating:

> 1. This Article XII has been adopted in order to comply with certain provisions of the Loan Documents (as defined herein). This Section is written for

> the express benefit of the Lender (as defined herein) and shall supersede any conflicting or inconsistent provision of this Agreement. This Section shall apply until such time as no Obligations remain outstanding (including, without limitation, until such time as the Debt shall be paid in full), after which it will no longer have any fore [sic] or effect.

Id. at 910 (quoting Third Amend., Art. 12.1, p.1). Further, BCL was separate from the Debtor in all ways but for its authority to prevent the Debtor from filing for bankruptcy. *Id.* Significantly, the Third Amendment provided that BCL was "not obligated to consider any interests or desires other than its own and ha[d] no duty or obligation to give any consideration to any interest of or factors affecting the Company or the Members" in determining whether to approve or disapprove a bankruptcy petition. *Id.* at 904 (internal quotation marks omitted).

Despite the limited relief afforded by the forbearance agreement, the Debtor again defaulted by failing to repay the stipulated default amount by the October 2015 deadline. *Id.* When the deadline passed, BCL filed a complaint against the Debtor to foreclose on the Property. *Id.* Without obtaining BCL's consent, the Debtor petitioned for bankruptcy relief on December 16, 2015, one day prior to a scheduled foreclosure sale. *Id.* Seeking to dismiss the case, BCL argued, in part, that the Debtor's petition was not properly authorized under the terms of its operating agreement as modified by the Third Amendment.[8] *Id.* at 909.

<u>Discussion</u>

Initially, the bankruptcy court reviewed the Third Amendment in reference to what it characterized as "the well-established commercial practice of using 'blocking directors.'" *Id.* at 911. The bankruptcy court described the "blocking director" mechanism as follows:

> 2. blocking director is the lynchpin that holds together a bankruptcy remote special purpose entity, formed to ring fence assets from creditors other than a secured creditor who is unwilling to lend otherwise and for whom the structure is made. In such instances, a business enterprise creates an entity that has assets but limited or no operations and may not, but for unanimous consent of its directors, file for bankruptcy, … and that entity acts as the borrower and often the guarantor of the loan. Actions of a similar nature to bankruptcy are likewise prohibited. The organizational documents of the entity provide that the prohibited actions may not be taken if a specific director's seat is vacant, and that director is nominated by the secured creditor. Last, the organizational documents of the entity provide that these prohibitions may not be altered but for unanimous consent of the directors (again, with an inability to act if the secured creditor's nominee's seat is vacant).

Id. at 9011. Such a scheme is necessary, according to the bankruptcy court, for "one crucial reason: a simpler, absolute prohibition against filing for bankruptcy will likely be deemed void

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8 BCL also argued that the Debtor's bankruptcy petition was a "bad faith litigation tactic" to stall BCL from foreclosing on the property. 547 B.R. at 905. BCL relied on a list of factors provided in *In re Tekena USA, LLC*, 419 B.R. 341 (Bankr. N.D. Ill. 2009), to support its claim of a bad faith filing. *Id.* After considering the facts of the case in light of the *Tekena* factors, the Court concluded that "some factors were distorted by BCL so as to fit within the facts of this case. Some factors are simply inapplicable. Those that remain, even when taken together, are not enough to establish bad faith." *Id* at 909. Notably, it was undisputed by BCL that the Debtor had substantial equity in the Property. *Id.* at 908.

as against public policy." *Id.* Like individuals, a corporation "may not contract away [its] bankruptcy rights." *Id.*

Against this backdrop, the bankruptcy court examined whether the Third Amendment's take on the "blocking director" scheme had run afoul of the federal policy that constrains individuals and corporations from contracting away their bankruptcy rights. *Id.* at 912. Importantly, the Third Amendment was no mere contractual obligation purporting to waive the Debtor's right to commence a bankruptcy case; rather, it was part of the Debtor's operating agreement, which was in the nature of "a corporate control document …." *Id.*

The bankruptcy court next examined whether the Third Amendment could pass muster under Michigan law, and this is where BCL's bid to dismiss the bankruptcy petition as unauthorized fell apart. The Third Amendment attempted to cabin BCL's fiduciary duties to those expressly identified in the operating agreement, as amended. With respect to BCL's rights and duties as a "Special Member," the Third Amendment then provided:

> 3. Notwithstanding anything provided in the Agreement (or other provision of law or equity) to the contrary, in exercising its rights under this Section, the Special Member shall be entitled to consider *only* such interests and factors as it desires, including its own interests, and shall to the fullest extent permitted by applicable law, have no duty or obligation to give any consideration to any interests of or factors affecting the Company or the Members.

Id. at 914 (quoting Third Amend., Art. 12.4(iv), p. 2–3). Notably, while the Special Member's obligation to "consider any interests of or factors affecting the Company or the Members" was qualified only to the "extent permitted by applicable law," no similar qualifier appears in the prior sentence. Read literally, it permits the Special Member *carte blanche* "to consider only such interests and factors as it desires, including its own interests …." *Id.*

In giving itself absolute discretion "to consider only such interests and factors as it desires, including its own interests," BCL ignored a fundamental constraint contained in Michigan law: "[M]embers of a limited liability company have a duty to consider the interests of the entity and not only their own interests." *Id.* (citing Mich. Comp. Laws Ann. § 450.4404). The bankruptcy court apparently accepted the proposition that this duty was nonwaivable. Because this aspect of the Third Amendment was void under Michigan law, the bankruptcy court held that BCL's consent was not required to authorize the bankruptcy petition.

Arguably, the bankruptcy court could have stopped with declaring the Special Member consent requirement void under Michigan law and still denied BCL's motion to dismiss the bankruptcy case. The bankruptcy court, however, apparently was concerned that the savings clause in Article 12.4(iv), which qualified the duty waiver "to the fullest extent permitted by applicable law," might be sufficient to reconcile the provision with Michigan law's requirements. The bankruptcy court, therefore, construed this savings clause as effective to cure the defect under Michigan law only if read so broadly as to render meaningless the duty waiver contained in the Third Amendment. *Id.* According to the bankruptcy court, this somehow would cause the provision to violate federal bankruptcy policy.

Commentary

It is debatable whether the only way to read the savings clause in a manner consistent with Michigan law and federal bankruptcy policy was to construe it so broadly as to effectively read the duty waiver provision of the Third Amendment out of existence. Conceivably, even assuming Michigan law required BCL in its capacity as a member of the LLC to consider the interests of the LLC and its other members, those duties presumably would co-exist with BLC's right to consider its own interests in the equation. Otherwise stated, one might envision a scenario in which BCL as a member of the LLC, consistent with its nonwaivable duties under Michigan law, could still withhold its consent to the Debtor's filing of a bankruptcy petition. While the bankruptcy court did hold that the Debtor's petition was not filed in bad faith, it does not necessarily follow from that conclusion that BCL certainly would have violated duties owed to the entity and the other members under Michigan law by withholding its consent to the filing. Yet, the bankruptcy court's ruling appears to permit only this result.

The elephant in the room appears to be the bankruptcy court's discomfort with BCL having absolute consent rights under these circumstances. Certainly, there is a substantial likelihood that BCL, in withholding its consent to the bankruptcy filing, did so exclusively on the basis of BCL's interests as a secured creditor of the Debtor. But, the bankruptcy court did not expressly find as fact that BCL had violated its duties to the entity and other members. Arguably, the bankruptcy court should have reviewed BCL's actions in withholding its consent to the bankruptcy filing with something akin to an entire fairness standard of review as is commonly applied to self-interested transactions under corporate fiduciary law (BCL was undoubtedly self-interested in a way that seemingly put its interests at odds with those of the Debtor and its other members). It, hence, is quite likely that an entire fairness review would have produced the same outcome, but would have done so by a path that resulted in less uncertainty in future cases.

***In re Intervention Energy Holdings, LLC,* 553 B.R. 258 (Bankr. D. Del. 2016)**

1. Background

Intervention Energy Holding, LLC ("IE Holding") and its wholly owned subsidiary Intervention Energy, LLC ("IE LLC," and together with IE Holding, the "Debtors") were each limited liability companies organized under Delaware law. 533 B.R. at 261. The Debtors held, but did not themselves operate, fractional interests through oil and gas leases in approximately 600 wells across large portions of the Williston Basin in North Dakota, known as the "Bakken".[9] In January 2012, the Debtors issued senior secured notes (the "Senior Notes") and certain funds managed and advised by EIG Management Company LLC (collectively, "EIG") committed to purchase up to $200 million of the Senior Notes. 533 B.R. at 261. Repayment of the Senior Notes was secured by, among other things, liens on the Debtors' cash and cash equivalents, accounts receivable, inventory, equipment and certain other assets, as well as a pledge of the membership interests in IE LLC. *Id.*

[9] Declaration of John R Zimmerman in Support of Chapter 11 Petitions and First Day Motions, dated May 20, 2016 [D.I. 11], ¶¶ 9-11, *In re Intervention Energy Holdings, et al.,* Case No. 16-11247 (KJC) (Bankr. D. Del.).

In October 2015, EIG declared a covenant default under the Senior Notes. *Id.* Restructuring negotiations ensued, and on December 28, 2015, the parties entered into a forbearance agreement (the "Forbearance Agreement). *Id.* Under the Forbearance Agreement, EIG agreed to waive all existing defaults if the Debtors paid down the Secured Note obligations by $30 million on or before June 1, 2016. *Id.* The Forbearance Agreement contained two conditions precedent to its effectiveness: (1) IE Holding must issue one common membership unit to EIG; and (2) IE Holding's operating agreement must be amended to require unanimous approval of the members to file for bankruptcy. *Id.* The conditions would effectively give EIG a "golden share" whereby it could prevent the Debtors from filing for bankruptcy without EIG's consent. Also on December 28, 2015, the Debtors fulfilled both conditions by executing *Amendment No. 1* (the "Amendment") to *Intervention Energy Holdings, LLC Second Amended and Restated Limited Liability Company Agreement,* dated January 2014 (the "Operating Agreement"). *Id.*

Importantly, the Operating Agreement already contained the following provision broadly waiving fiduciary duties owed by IE Holding's current and former officers, managers and members collectively, "Covered Persons"):

> 4. *To the fullest extent permitted by applicable law (including Section 18-1101 of the Act),* notwithstanding any other provision of this Agreement or applicable law, including any in equity or at law, *no Covered Person shall have any fiduciary duty to the Company, the Members or the Board (or any other person or entity bound by this Agreement)* by reason of this Agreement or in its capacity as a Covered Person, *except that a Covered Person shall be subject to the implied covenant of good faith and fair dealing and to the express terms in this Agreement. . . .* Notwithstanding anything to the contrary contained in this Agreement, *each of the Members hereby acknowledges and agrees that each Manager, in determining whether or not to vote in support of or against a particular decision for which the Board's consent is required, may act in and consider the best interest of the Member or Members who designated such Manager and shall not be required to act in or consider the best interests of the Company, any Subsidiary of the Company, any other Members or any other Person.*

Op. Agree., § 6.4(g) (emphasis added).[10] This provision was unaltered by the Amendment.[11]

Despite the Forbearance Agreement and Amendment, the Debtors later filed voluntary chapter 11 bankruptcy petitions. *Id.* at 260. EIG's consent for IE Holding to commence a bankruptcy case was not obtained by the other members (nor was it even sought). On May 20, 2016, EIG moved to dismiss the Debtors' bankruptcy cases, arguing, among other things, that IE Holding's bankruptcy petition was unauthorized. *Id.*

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10 *See* Declaration of Domenic E. Pacitti in Support of EIE Energy Fund XV-A, L.P.'s Motion to Dismiss the Chapter 11 Cases of Intervention Energy Holdings, LLC and Intervention Energy, LLC, dated May 24, 2016 [D.I. 27-1], Ex. H ("Pacetti Decl."), *In re Intervention Energy Holdings, et al.,* Case No. 16-11247 (KJC) (Bankr. D. Del.).

11 *See* Pacetti Decl., Ex. L.

Discussion

Initially, although, as in *Lake Michigan Beach,* the parties briefed and argued whether the abrogation of the Covered Persons' fiduciary duties was valid under Delaware law, the court declined to reach this question, noting it "may well be a question of first impression of state law …." 553 B.R. at 262. The bankruptcy court's unwillingness to tackle this question should come as little surprise.

Unlike the Michigan statute at issue in *Lake Michigan Beach,* Delaware's *Limited Liability Company Act*, 6 Del. C. § 18-101, *et seq.* (the "Delaware LLC Act"), broadly embraces freedom of contract, including with respect to the abrogation of default fiduciary obligations. Section 18-1101 of the Delaware LLC Act declares: "It is the policy of this chapter to give the maximum effect to the principle of freedom of contract and to the enforceability of limited liability company agreements." 6 Del. C. § 18-1101(b). Further, subsection (e) of Section 18-1101 of the Delaware LLC Act states expressly that:

> 5. A limited liability company agreement may provide for the limitation or elimination of any and all liabilities for breach of contract and breach of duties (including fiduciary duties) of a member, manager or other person to a limited liability company or to another member or manager or to another person that is a party to or is otherwise bound by a limited liability company agreement; provided, that a limited liability company agreement may not limit or eliminate liability for any act or omission that constitutes a bad faith violation of the implied contractual covenant of good faith and fair dealing.

6 Del. C. § 18-1101(e).[12]

Accordingly, the bankruptcy court examined the validity of the Amendment solely in terms of whether it violated federal bankruptcy policy. The court framed "the federal public policy to be guarded" as one "to assure access to the right of a person, including a business entity, to seek federal bankruptcy relief as authorized by the Constitution and enacted by Congress." 553 B.R. at 265. Brushing aside EIG's arguments that the court must respect the parties' express contractual commitments embodied in the Amendment, observing that "[b]ecause § 7(b) of the Forbearance Agreement requires, as a condition to the effectiveness of the agreement, that IE both amend its LLC Agreement to institute the unanimous Consent Provision and grant the blocking share, the intent of the parties is unmistakable." *Id.*

Ultimately, the bankruptcy court declared the Consent Provision embodied in the Amendment to be an absolute waiver by IE Holding of its right to seek federal bankruptcy relief

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[12] Indeed, until recently, it was far from clear that fiduciary duties and other equitable principles had any role to play in connection with Delaware LLCs. It had been argued by none other than the eventual Chief Justice of the Delaware Supreme Court that in view of the Delaware LLC Act's emphasis on freedom contract, courts should not imply common law fiduciary duties. *See* Myron T. Steele, *Judicial Scrutiny of Fiduciary Duties in Delaware Limited Partnerships and Limited Liability Companies,* 32 Del. J. Corp. L. 1, 4 (2007). Effective August 1, 2013, the Delaware General Assembly amended Section 18-1104 to expressly recognize that common law fiduciary duties at least would have a gap-filling role to play when not properly disclaimed in an LLC agreement. *See* 6 Del. C. § 18-1104 ("In any case not provided for in this chapter, the rules of law and equity, including *the rules of law and equity relating to fiduciary duties and* the law merchant, shall govern.") (as amended by 79 Del. Laws, c. 74) (emphasis added to show language inserted via the amendment).

and voided it on that basis. Several facts – albeit ones not particularly unique to this case – appear to have swayed the court to this conclusion. First, the purpose and intent of the Consent Provision to give EIG absolute veto rights over whether a voluntary bankruptcy case to be filed was undisputed in the record. *Id.* Second, EIG had acquired only a small minority interest (*i.e.,* just one common unit). *Id.* Third, "the nature and substance of [EIG's] primary relationship with the debtor [was] that of creditor—not equity holder …." *Id.* Fourth, because of the Operating Agreement's provisions broadly disclaiming all fiduciary duties, EIG would owe "no duty to anyone but itself in connection with [the] decision to seek federal bankruptcy relief …."

In so holding, the court acknowledged *In re DB Capital Holdings, LLC v. Aspen HH Ventures, LLC (In re DB Capital Holdings, LLC),* No. 10–046, 463 B.R. 142, 2010 WL 4925811 (10th Cir. BAP Dec. 6, 2010) (Unpub.), as arguably contrary authority. With limited analysis, the court expressly rejected *DB Capital's* holding that "absent coercion" an agreement by an LLC entity to give a creditor veto rights over whether to file bankruptcy was "not void against public policy."[13] *Intervention Energy,* 553 B.R. at 265 n.25.

Commentary

As noted above, *Intervention Energy* was decided exclusively on the basis that the Consent Provision was void because it violated federal bankruptcy policy by operating as an absolute bar to the Debtors' ability to seek bankruptcy relief. The *Intervention Energy* opinion aligns itself with the holdings issued by most courts confronted with the creative structuring of corporate governance requirements in a way that appears calculated to function as an absolute bar on an entity's ability to file bankruptcy without the consent of a creditor (*DB Capital,* as discussed above, being the notable exception to this trend). *See, e.g., In re Lake Michigan Beach Pottawattamie Resort LLC,* 547 B.R. 899, 912 (Bankr. N.D. Ill. 2016) ("In the same way that individuals may not contract away their bankruptcy rights, corporations should be similarly constrained."); *In re Bay Club Partners-472, LLC,* Case No. 14-30394, 2014 WL 1796688, at *5 (Bankr. D. Or. May 6, 2014) (characterizing provision inserted in LLC operating agreement that functioned as an absolute bar to the entity's ability to file for bankruptcy so long as lender's debt remained outstanding as a "cleverly insidious … maneuver of an 'astute creditor'" and declining to enforce such provision). *Cf. In re General Growth Prop., Inc.,* 409 B.R. 43, 64 (Bankr. S.D.N.Y. 2009) ("[I]f Movants believed that an 'independent' manager can serve on a board solely for the purpose of voting 'no' to a bankruptcy filing because of the desires of a secured creditor, they were mistaken.").

Decisions like *Intervention Energy*, therefore, require us to reflect upon to what extent is such a right embodied in the U.S. Constitution and in federal bankruptcy law enacted by Congress? It is often repeated, as it was in *Intervention Energy,* that "[i]t is a well settled principal that an advance agreement to waive the benefits conferred by the bankruptcy laws is

[13] *DB Capital* itself contains only limited analysis of the implications of the federal public policy of assuring access to individual and corporate debtors to the bankruptcy courts. The BAP seems, without having closely examined the issue, to have accepted the proposition that the contractarian view of alternative entity law would override a contrary federal bankruptcy policy so long as agreement restricting access to the bankruptcy courts is embodied in the entity's governance documents. *Id.* at *3 ("Debtor has not cited any cases standing for the proposition that members of an LLC cannot agree among themselves not to file bankruptcy, and that if they do, such agreement is void as against public policy, nor has the court located any.").

wholly void as against public policy." 553 B.R. at 262 & n.16 (quoting *In re Tru Block Concrete Prods., Inc.,* 27 B.R. 486, 492 (Bankr. S.D. Cal. 1982) (internal quotations omitted)). But just what is the Constitutional or statutory authority to support such a statement?

Nothing in the text of the U.S. Constitution expressly guarantees an individual or corporation the right to relief in bankruptcy. The only explicit mention of bankruptcy in the Constitution is the "Bankruptcy Clause," which grants Congress the power "to establish … uniform Laws on the subject of Bankruptcies throughout the United States." U.S. Constitution, Art. I, § 8, cl. 4. Indeed, the Supreme Court has expressly held that "[t]here is no constitutional right to obtain a discharge of one's debts in bankruptcy," observing that "voluntary bankruptcy was not known in this country at the adoption of the Constitution." *United States v. Kras,* 409 U.S. 434, 447 (1973). The ability of a debtor to obtain a discharge through bankruptcy, the Court pointed out, "is a legislatively created benefit, not a constitutional one …." *Id.* at 448. *See also Grogan v. Garner,* 498 U.S. 279, 286 (1991) (citing *Kras* and rejecting argument that there exists a Constitutional basis to impose a heightened standard of proof for certain discharge exceptions).

Perhaps a Constitutional right for an individual or corporation to have access to bankruptcy relief might be derived from the uniformity requirement contained in the Bankruptcy Clause? But, here too Supreme Court precedent seems to undermine such an argument. The Court has ruled in reference to the Bankruptcy Clause's uniformity requirement that such "uniformity is geographical, and not personal," such that there was no constitutional infirmity in importing different state law exemptions into federal bankruptcy law. *Hanover Nat'l Bank v. Moyses,* 186 U.S. 181, 186 (1902). *See also Ry. Labor Executives' Ass'n v. Gibbons,* 455 U.S. 457, 471 n.11 (1982) ("The uniformity requirement of the Bankruptcy Clause is not an Equal protection Clause for bankrupts.").

All of this suggests that the basis for declining to enforce contractual and other non-bankruptcy law restrictions on a debtor's ability to obtain bankruptcy relief implicates the Constitution only to the extent that it puts at issue the Supremacy Clause. Otherwise stated, it involves a Constitutional question only to the extent federalism concerns are implicated. Accordingly, it would seem that in order to reject, among other things, contractual and corporate governance based restrictions on an entity's ability to obtain bankruptcy relief traditional concepts of express and implied federal preemption must be invoked.

A comprehensive examination of federal preemption doctrines is far beyond the scope of this material. But, we observe that surprisingly few of the decisions addressing the enforceability of non-bankruptcy law restrictions on a debtor's ability to avail itself of bankruptcy relief pay more than lip service to federal preemption doctrines. Indeed, the word "preemption" (or any variant thereof) never appears in either the *Intervention Energy* opinion or the *Lake Michigan Beach* opinion.

There is certainly reason doubt whether the Supreme Court would deem federal bankruptcy policy to preempt voluntary and knowingly agreed to contractual and governance restrictions on access to bankruptcy courts. The Bankruptcy Code, of course, determines who may be a debtor. *See* 11 U.S.C. § 109(a). But, it is well accepted that federal bankruptcy law defers to state law on such matters as the legal capacity of a person or entity to file for bankruptcy[14] and, in the instance of a non-individual debtor, whether its bankruptcy petition was executed with the requisite authority.[15] Both *Intervention Energy* and *Lake Michigan Beach* glide over this difficult question, leaving it to be tackled by another court on another day.

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[14] *See, e.g., Chicago Title & Trust Co. v. Forty-One Thirty-Six Wilcox Bldg. Corp.,* 302 U.S. 120 (1937) (holding that corporation that had been irretrievably dissolved and had ceased to exist under state law could not be a debtor).

[15] *See, e.g., Price v. Gurney,* 324 U.S. 100 (1945) (holding that dissenting shareholder could not file bankruptcy petition on behalf of a corporation with a validly constituted board of directors).

Preemption of State Law Fraudulent Transfer Claims by Section 546 Safe Harbor

By Kristine G. Manoukian, Counsel, Clifford Chance US LLP, New York

In a unanimous decision issued on March 29, 2016, the Second Circuit Court of Appeals held that the state law constructive fraudulent conveyance claims of individual creditors of chapter 11 debtor Tribune Co. against the company's former shareholders to recover more than $8 billion in payments that the shareholders received in the company's leveraged buyout ("LBO") were preempted by Bankruptcy Code section 546(e). *See In re Tribune Co. Fraudulent Conveyance Lit.*, 818 F.3d 98, 105 (2d Cir. 2016). That section precludes a trustee from using its avoidance powers under Bankruptcy Code sections 544 and 548 to avoid a transfer that is a settlement payment made by or to financial intermediaries in securities transactions or made in connection with a securities contract unless there was intentional fraud. *See* 11 U.S.C. § 546(e). The Court rejected the argument that this section only preempted constructive fraud claims (whether under state law or federal law) brought by a trustee or another estate representative, holding that the doctrine of implied preemption protected settlement payments from constructive fraudulent conveyance claims brought by any party, including individual creditors.

Background

The *Tribune* decision stemmed from a dispute related to the company's LBO in 2007 in connection with which the company borrowed over $11 billion secured by its assets to refinance certain of its debt and cash out its shareholders for over $8 billion. *Id*. at 106. Shortly after the LBO, the company filed for chapter 11. *Id.* In November 2010, the unsecured creditors' committee brought an action against, among others, the cashed-out Tribune shareholders seeking to avoid the payments to the shareholders as intentional fraudulent conveyances Bankruptcy Code section 548(a)(1)(A). *Id*. The creditors' committee's action was transferred to a litigation trust following the confirmation of Tribune's chapter 11 plan. After obtaining relief from the automatic stay, various unsecured creditors separately brought state law constructive fraudulent transfer claims against the shareholders in numerous state and federal courts. *Id*. In granting the creditors' motion for relief from stay, the Bankruptcy Court left unresolved the issues of whether the individual creditors had standing to bring such claims or whether their claims were preempted by section 546(e). *Id*. at 107. The creditors' actions were subsequently consolidated in the U.S. District Court for the Southern District of New York. *Id*. Following consolidation, the shareholders moved to dismiss the creditors' claims. *Id*. The district court granted the motion to dismiss, concluding that the automatic stay prevented the individual creditors from pursuing the state law claims because the litigation trust was seeking to avoid the same transfers under a different legal theory. *Id*. The district court rejected the shareholders' arguments that the creditors' state law claims were preempted by section 546(e), holding that this section only barred state law fraudulent conveyance claims brought by a trustee and not individual creditors. *Id*. at 108. Both the individual creditors and the shareholders appealed the district court's decision, the former on lack of standing grounds and the latter on preemption grounds.

Decision

On appeal, the Second Circuit considered (1) whether the individual creditors were barred by the automatic stay from brining the state law constructive fraudulent conveyance claims while a party exercising the trustee's avoidance powers was pursuing the same transfers as the individual creditors on the intentional fraud theory and (2) if not, whether section 546(e) preempted the individual creditors' state law claims. *Id*. at 105. The Second Circuit ultimately affirmed the district court's decision and dismissed the individual creditors' claims but on different grounds.

The Second Circuit concluded that, while the individual creditors had standing to pursue their claims, the claims were preempted by section 546(e). *Id*. Specifically, on the standing issue, the Second Circuit concluded that under both the bankruptcy court's orders granting individual creditors relief from stay and the confirmed chapter 11 plan, which allowed the creditors to pursue these state law fraudulent conveyance claims, the individual creditors were not subject to the automatic stay and had standing to pursue those claims. *Id*. at 109.

Turning to the preemption issue, the Second Circuit reasoned that, upon the filing of Tribune's bankruptcy, the individual creditors' state law fraudulent conveyance claims were preempted and vested in the in the bankruptcy trustee and were, therefore, subject to limitations imposed by section 546(e). The Court rejected the creditors' argument that the presumption against preemption applied because fraudulent conveyance claims fall squarely within the police powers and the domain of state law. The Court was highly skeptical that fraudulent transfer claims automatically reverted to creditors if not brought within the two year statute of limitations by the bankruptcy estate representative. The Second Circuit also rejected the creditors' argument that the state law fraudulent conveyance claims automatically reverted to creditors if not brought within the two-year statute of limitations period by the bankruptcy trustee/estate representative, noting that there was no statutory basis to support this argument. *Id*. at 113-14. Recognizing that there was ambiguity in the text of section 546(e) as to whether claims brought by someone other than a trustee et al. are precluded, the Second Circuit next examined the legislative history and concluded that the purpose of the statute is at odd with the creditors' position. *Id*. at 119. The Second Circuit noted that the purpose of section 546(e) was to promote certainty, speed, finality and stability in the securities market. *Id*. It therefore reasoned "[a]llowing creditors to bring claims barred by Section 546(e) to the trustee *et al*. only after the trustee *et al*. fails to exercise powers it does not have would increase the disruptive effect of an unwinding by lengthening the period of uncertainty for intermediaries and investors. Indeed, the idea of preventing a trustee from unwinding specified transactions while allowing creditors to do so, but only later, is a policy in a fruitless search of a logical rationale." *Id*. The Second Circuit ultimately determined that the creditors' "theory hangs on the ambiguous use of the word "trustee", has no basis in the language of the Code, leads to substantial anomalies, ambiguities and conflicts with the Code's procedures, and, most importantly, is in irreconcilable conflict with the purposes of Section 546(e)." *Id*. at 123. The Second Circuit, however, limited its holding to situations where the trustee et al. was barred from bringing the claims that the individual creditors' sought to assert, and refrained from determining any issues regarding the creditor's right to bring state law fraudulent conveyance claims that are not limited in the hands of the trustee by section 546(e). *Id*. at 124.

On the same day that it rendered its *Tribune* decision, and using its rationale in *Tribune*, the Second Circuit issued a one-page ruling in *Whyte v. Barclays Bank Plc*, No. 13-2653, 2016 WL 1138642 (2d Cir. Mar. 24, 2016) where it concluded that section 546(e) preempted the trustee's action against Barclays, which sought to avoid $143 million that Barclays had received when it assumed SemGroup's commodities positions at the New York Mercantile Exchange one week prior to the company's bankruptcy filing. The Second Circuit's *Tribune* and *White* decisions finally resolve a split on the issue within the Second Circuit.

Shortly after the *Tribune* decision, the Delaware bankruptcy court in *PAH Litigation Trust v. Water Street Healthcare Partners, L.P. (In re Physiotherapy Holdings, Inc.)*, 2016 WL 251441 (Bankr. D. Del. June 20, 2016), declined to follow the Second Circuit's decision in *Tribune* and held that the state law constructive fraudulent conveyance claims assigned to a litigation trust in that case were not preempted by in Bankruptcy Code section 546(e) because the transaction at issue did not pose ripple effects in the relevant markets, the securities were nonpublic, and the transferees were corporate insiders that allegedly acted in bad faith.

Background

In *Physiotherapy*, the litigation trust, which was established pursuant to a confirmed plan of reorganization, sought to avoid and recover $248.6 million in prepetition payments made to certain shareholders in exchange for their equity in the company through an LBO. *Id*. at *1. To finance the sale of the company, the purchaser's merger subsidiary issued $210 million in senior secured notes, which notes were knowingly and fraudulently marketed with overstated revenue streams and enterprise values. After defaulting on the notes, the company filed for chapter 11. *Id*. at *4. Acting as the estate representative and assignee of defrauded noteholders' claims, the litigation trust asserted federal and state law fraudulent transfer claims against, among others, the controlling shareholders who allegedly participated in the accounting fraud. *Id*. Relying on Bankruptcy Code section 546(e)'s safe harbor and case law from the Second Circuit that prevented post-confirmation trustees as creditor assignees from pursuing state law constructive fraudulent conveyance claims, the defendant shareholders moved to dismiss the litigation trust's claims on the grounds that the (1) transaction at issue was protected by the safe harbor of Bankruptcy Code section 546(e), (2) claims were barred because the selling shareholders had received releases from the purchaser of the company and the secured noteholders and (3) trustee failed to meet the standard for the actual fraudulent transfer claims. *Id*. at *1.

Decision

On the issue of preemption, the bankruptcy court concluded that section 546(e) did not preempt the litigation trustee's state law fraudulent conveyance claims. In reaching this conclusion, the bankruptcy court rejected the holding in *Tribune* and instead relied on the reasoning of *Weisfelner v. Fund 1 (In re Lyondell Chem. Co.)*, 503 B.R. 348 (Bankr. S.D.N.Y. 2014), adopting its holding. *Id.* at *7. The bankruptcy court agreed with the *Lyondell* court that "States have traditionally occupied the field of fraudulent transfer law" and, accordingly, preemption is appropriate only if state law thwarts the purpose behind section 546(e). *Id.*. The bankruptcy court examined whether the purpose of section 546(e) would be thwarted by allowing the litigation trust to pursue its state fraudulent transfer claims against the defendants, and concluded that "the answer is clearly no". *Id*. at *9. The bankruptcy court noted that, given that the trust's claims targeted the two controlling shareholders that owned virtually all of a non-public company, it was difficult to envision how requiring those entities to disgorge their payments "would pose any sort of "ripple effect" to the broader secondary market". *Id*. (citing *Lyondell*, 503 B.R. at 373, holding "where the stockholders are the ultimate beneficiaries of the constructively fraudulent transfers, [they] can give the money back to injured creditors with no damage to anyone but themselves"). The bankruptcy court also noted that its conclusion was further supported by the plain meaning of section 546(e), which only limits a trustee's ability to bring fraudulent transfer claims and is otherwise silent with respect to an individual creditor's ability to do so. *Id*. The bankruptcy court also took note of the alleged bad faith of the defendant shareholders, holding that dismissal of the trust's state law claims would undermine the policy objectives of the Bankruptcy Code targeted at ensuring a fair distribution of assets and protecting creditors from shareholder wrongdoing. *Id*. The bankruptcy court therefore concluded that the litigation trust can bring state law fraudulent transfer claims as creditor-assignee when the transaction being avoided would not have a "ripple effect" on the applicable securities market, the securities at issue are not publicly held and where the transferees may have acted in bad faith. *Id.* at *10. The bankruptcy court also rejected the defendant-shareholders' argument that the noteholders should be stopped from avoiding the transfers because they ratified the sale o the company. *Id*. at *13. On the issue of the release by the purchaser, the bankruptcy court concluded that since the litigation trustee was not a party to the release its terms were not binding on the trustee. *Id*. at *14. Finally, the court concluded that the litigation trust had met the standard for establishing actual fraudulent transfer because the trust had alleged sufficient "badges of fraud" "which supported a plausible inference that [the selling shareholders] intentionally manipulated the Debtors' earnings in order to maximize the proceeds for their share." *Id*. at *15. Accordingly, the court denied the defendants' motion to dismiss the actual fraudulent transfer claims. *Id*. The court similarly denied the defendants' motion with respect to the state law constructive fraudulent transfer claims that the trust had asserted in the capacity of the noteholders. The court, however, granted the motion to dismiss with respect to the federal constructive fraudulent transfer claims brought under Bankruptcy Code section 548(a)(1)(B) and section 544. *Id*.

The *Tribune* and *Physiotherapy* decisions reflect differing views on the breadth and applicability of section 546(e)'s safe harbor. While the *Tribune* decision has settled the law within the Second Circuit on the applicability of section 546(e) to state law constructive fraudulent transfer claims, the Delaware bankruptcy court's decision in *Physiotherapy* demonstrates that courts in other jurisdictions may decline to follow the *Tribune* decision. Moreover, if the appellants request for certification and direct appeal to the Third Circuit of the *Physiotherapy* decision is granted, such an appeal could lead to a potential circuit split between the Second Circuit and the Third Circuit.

Successor Liability

By Daniel F. Blanks, Partner, Nelson Mullins Riley & Scarborough LLP, Jacksonville, Florida

In September 2016, the U.S. Court of Appeals for the Second Circuit (the "Second Circuit") held that there may be successor liability to 363 purchasers if known creditors do not receive actual notice by mail. *In re Motors Liquidation Co.*, 829 F.3d 135 (2d Cir. 2016).

Old GM sold substantially all of its assets to New GM free and clear of liens, claims, and interests, pursuant to a sale order entered in 2009. In 2014, New GM issued a recall of cars manufactured since 2002 that included a defective ignition switch that caused the cars to turn off unexpectedly during operations. The evidence presented showed that Old GM had known about the defective ignition switches since 2002.

Pursuant to the asset purchase agreement, New GM agreed to assume the following liabilities: (i) repair of defective ignition switches; (ii) warranty service on vehicles purchased from Old GM; and (iii) damages arising from any post-sale accidents causing injury, death, or property damage. After the recall, several categories of class actions were filed against New GM seeking to impose successor liabilities: (a) personal injury and property damages for pre-closing accidents; (b) economic losses (such as decreased resale value and time and expenses associated with replacement of the defective switch); (c) claims based upon post-closing conduct by New GM; and (d) claims by post-sale purchasers of used cars that were manufactured pre-sale. New GM sought the entry of an order of the Bankruptcy Court enforcing the "free and clear" provision of the sale order.

The Bankruptcy Court held that all claims arising from Old GM's conduct fell within the scope of the sale order's injunction language concerning enjoined claims. *See In re Motors Liquidation Co.,* 529 B.R. 510, 598 (Bankr. S.D.N.Y. 2015). The Bankruptcy Court further held that while pre-363 owners of GM vehicles should have been provided actual notice, they were not prejudiced because actual notice to them would not have affected the outcome of the sale. *Id.* at 560-62. By contrast, the Bankruptcy Court held that claims by purchasers post-363 vehicles could not be enjoined, nor could claims arising from independent post-363 conduct of New GM. *Id.* at 571.

The Second Circuit held that the claims in categories (c) and (d) were not "Claims" covered by the free and clear provisions of the sale order either because they did not result from pre-petition conduct of Old GM (category (c) claims) or because there was not a contact or relationship between Old GM and the claimant (category (d) claims). The Second Circuit further affirmed the Bankruptcy Court's holding that although the claims in categories (a) and (b) were "Claims" that could be eliminated by a "free and clear" sale order, the sale order was ineffective as to such Claims because "Old GM knew or with reasonable diligence should have known of the ignition switch claims, plaintiffs were entitled to actual or direct mail notice, but received only publication notice." *Motors Liquidation*, 829 F.3d at 158. Due process requires that know claimants receive mail notification of a proposed sale free and clear; notice by publication does not suffice. The Second Circuit assumed that plaintiffs had a burden to prove prejudice without deciding if such proof was required, but concluded that the claimants were, in fact, prejudiced by the lack of notice. Although the defective ignition switch claimants may not have any legal objections to the sale that were different than those raised by other claimants and overruled by the Bankruptcy Court, the ignition switch claimants were prejudiced by the lack of actual notice because they were deprived of the opportunity to negotiate specifically for their claims during the sale process.

The Second Circuit further noted that "[o]pportunities to negotiate are difficult if not impossible recreate. We do not know what would have happened in 2009 if counsel representing plaintiffs with billions of dollars in claims had sat across the table from Old GM, New GM, and Treasury." *Motors Liquidation*, 829 F.3d at 164. The opinion indicates that even where certain arguments may lack merit, procedural due process must be provided.

It is also worth noting the uniqueness of these facts. Among other things, the Second Circuit observed that "New GM was not a truly private corporation. Instead, the President and Treasury oversaw its affairs during the bailout and Treasury owned a majority stake following the bankruptcy. While private shareholders expect their investments to be profitable, the government does not necessarily share the same profit motive." *Id.* at 165.[16]

The Second Circuit has denied rehearing. New GM filed a petition for writ of certiorari in late December, which is not yet available online.

Practical Implications:

1. The Chamber of Commerce of the United States of America in its amicus brief in support of rehearing expressed concerns that "the Panel's requirement that debtors catalogue all speculative theories of liability against them and provide direct-mail notice of those hypothetical liabilities to any potential plaintiff would place an enormous and unworkable burden on Chamber members." The cost of mail notice to the ignition switch claimants would have been in the millions of dollars.

2. From the standpoint of a prospective purchaser, the potential for post-sale liability to undisclosed potential claimants who do not receive mail notice will undoubtedly depress the purchase offers for sales of substantially all of a Debtor's assets.

3. Do "known" claimants that do not receive actual notice of the sale receive a windfall, especially in cases such as GM where they have publication notice of the widely publicized sale? *See In re Transworld Airlines, Inc.*, 322 F.3d 283, 292 (3d Cir. 2003) (permitting a tort claimant to proceed against a bona fide purchaser in an asset sale, while restricting other creditors to the proceeds of sale, is contrary to the Bankruptcy Code's priority scheme). The facts in GM were particularly egregious with respect to Old GM's awareness of the ignition switch defect since 2002.

[16] The Bankruptcy Court held that any claims against the trust established for general unsecured claims of Old GM were equitably moot. *Id.* at 166. The Second Circuit vacated that portion of the decision as it was entirely advisory. The Second Circuit held that no claimants were asserting claims against the trust, but rather against New GM. Accordingly, Old GM and the trust were not litigants before the Bankruptcy Court. *Id.* at 167.