AMERICAN BANKRUPTCY INSTITUTE

2022 Alexander L. Paskay Memorial Bankruptcy Seminar

Business Session

Chapter 11 Workshop and Practice Update

CONCURRENT SESSION

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2022

Chapter 11 Workshop and Practice Update

This panel will focus on issues arising in larger chapter 11 cases, including Plan Support Agreements, the "Texas Two Step", and "Make Whole" Claims.

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David Gay - Carlton Fields, Miami office

The Hon. Tiffany Geyer – U.S. Bankruptcy Court, M.D. Fla (Orlando)

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Topics

I. Employment of general counsel, special counsel and conflicts counsel

A. Statutes and Rules

1. 11 U.S.C. 327

(a) Except as otherwise provided in this section, the trustee, with the court's approval, may employ one or more attorneys, accountants, appraisers, auctioneers, or other professional persons, that do *not hold or represent an interest adverse* to the estate, and that are *disinterested persons*, to represent or assist the trustee in carrying out the trustee's duties under this title.

(b) If the trustee is authorized to operate the business of the debtor under section 721, 1202, or 1108 of this title, and if the debtor has regularly employed attorneys, accountants, or other professional persons on salary, the trustee may retain or replace such professional persons if necessary in the operation of such business.

(c) In a case under chapter 7, 12, or 11 of this title, a *person is not disqualified* for employment under this section *solely because of such person's employment by or representation of a creditor*, unless there is objection by another creditor or the United States trustee, in which case the court shall disapprove such employment if there is an actual conflict of interest.

(d) The court may authorize the trustee to act as attorney or accountant for the estate if such authorization is in the best interest of the estate.

(e) The trustee, with the court's approval, *may employ*, for a *specified special purpose*, other than to represent the trustee in conducting the case, an attorney that has represented the debtor, *if in the best interest of the estate*, <u>and</u> if such *attorney does not represent or hold any interest adverse to the debtor or to the estate with respect to the matter* on which such attorney is to be employed.

(f) The trustee may not employ a person that has served as an examiner in the case.

NOTE "Disinterested Person" is a person who "does not have an interest materially adverse to the interest of the estate or of any class of creditors or equity security holders, by reason of any direct or interect relationship to, connection with, or interest in, the debtor, or for any other reason". 11U.S.C. 101(14)(C)

NOTE Professional holds an interest adverse to the estate when he: "posess(es), or serv(es) as an attorney for a person possessing, either an economic interest that would tend to lessen the value of the bankruptcy estate or that would create either an actual or potential dispute in which the estate is a rival claimant…or…a predisposition under the circumstances that render such a bias against the estate." *New River Dry Dock* (11^{th} Cir. 2012)

2. Bankruptcy Rule 2014 - Employment of Professional Persons (implements disinterestedness provisions of 327(a))

   (a) APPLICATION FOR AND ORDER OF EMPLOYMENT.

An order approving the employment of attorneys, accountants, appraisers, auctioneers, agents, or other professionals pursuant to §327, §1103, or §1114 of the Code shall be made only on application of the trustee or committee. The application shall be filed and, unless the case is a chapter 9 municipality case, a copy of the application shall be transmitted by the applicant to the United States trustee. The application *shall state* the specific facts showing:

the *necessity for the employment*,

the name of *the person to be employed, the reasons for the selection*,

the professional *services to be rendered*,

any proposed arrangement for *compensation*, and, to the best of the applicant's knowledge,

all of the person's connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee.

The application shall be accompanied by a verified statement of the person to be employed setting forth the person's connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee.

(b) SERVICES RENDERED BY MEMBER OR ASSOCIATE OF FIRM OF ATTORNEYS OR ACCOUNTANTS.

If, under the Code and this rule, a law partnership or corporation

corporation is employed as an accountant, or if a named attorney or accountant is employed, any partner, member, or regular associate of the partnership, corporation, or individual may act as attorney or accountant so employed, without further order of the court.

NOTE: All connections to parties in interest must be disclosed "that are not so remote as to be *de minimus*" *Fullenkamp* (Bankr. M.D. Fla 2011)

3. 11 U.S.C. 328(c)

Except as provided in section 327(c), 327(e), or 1107(b) of this title, the court *may deny allowance of compensation* for services and reimbursement of expenses of a professional person employed under section 327 or 1103 of this title if, at any time during such professional person's employment under section 327 or 1103 of this title, *such professional person is not a disinterested person, or represents or holds an interest adverse to the interest of the estate* with respect to the matter on which such professional person is employed.

B. In Re: Fundamental, 605 B.R. 249 (Bankr. M.D. Fla. 2019)

1. The law firm's representation of a current client was not adverse to the creditors or the bankruptcy estate and the firm's omission of the representation from the initial disclosures did not violate Rule 2014.

2. The Bankruptcy estate did not have a claim against the law firm's client that was overlooked or not diligently pursued because of client's attorney-client relationship with the law firm.

3. The law firm's client was never identified as a potential target of litigation.

4. The law firm's representation of the client did not lessen the value of the bankruptcy estate, create a potential dispute between the bankruptcy estate and the client, or create a circumstance that would generate a bias against the bankruptcy estate and there was no disqualifying interest.

5. Not a situation where the law firm knew of the alleged connections and deliberately chose not to disclose them or in which the law firm's conflict system was wholly inadequate.

6. Concluded that the law firm did not violate Rule 2014 by omitting its representation of the client in its initial disclosures.

C. In Re: Fundamental, 2020 WL 954982, (M.D. Fla. February 27, 2020)

1. Affirmed Bankruptcy Court Order denying disqualification, except to the extent the Bankruptcy Court found no violation of Rule 2014. The Bankruptcy Court's finding of no violation of Rule 2014 was vacated and the case was remanded back to the Bankruptcy Court for further proceedings.

2. The District Court held the issue of a professional holding interests adverse to the estate and in failing to disclose certain connections are separate issues.

3. Circuit authority is such that the obligation to disclose connections is far broader than the look at actual adversity to the estate.

4. The District Court found no error in the Bankruptcy Court finding that the law firm did not have a disqualifying interest regarding its current client.

5. The Bankruptcy Court did not err in determining the law firm's connections with other entities who were not clients at all.

6. The interests adverse to an estate, for purposes of determining Section 327 disinterestedness, only considers present interests adverse to the estate.

7. However, the Rule 2014 disclosures required are broader than the analysis governing disqualification.

8. The District Court affirmed the Bankruptcy Court in all respects except, and vacated in part, as to the ruling that there was no Rule 2014 violation and the case was remanded for Bankruptcy Court to first consider whether an unintentional, inadvertent or negligent nondisclosure occurred and, if a Rule 2014 violation occurred, whether and what type of sanction was warranted.

D. **In Re: Fundamental, 614 B.R. 753 (Bankr. M.D. Fla. 2020)**

1. The District Court ruled that, with respect to the law firm's disclosures, the Bankruptcy Court, "as fact finder, did not err in concluding that there was no knowing violation of Rule 2014" and that there was not a knowing or intentional failure to disclose a potential conflict.

2. The District Court ruled however that a failure to disclose a connection may violate Rule 2014, even if the failure is inadvertent, unintentional or negligent.

3. On remand, the Bankruptcy Court found the record did not reflect the law firm knowingly omitted its connections to the entities in question.

4. The record also did not support that the law firm omitted the connections under circumstances in which it should have known of the requirement to disclose.

5. The record did not reflect that the law firm did anything other than perform customary conflicts checks and there was no evidence that the firm "disregarded red flags or that its conflicts check was

inherently flawed" or that the firm "maintains the system in a manner that reflects poor intra-firm communications or data output".

6. Courts have an independent duty to fashion an appropriate remedy for a Rule 2014 violation on a case-by-case basis.

7. The Bankruptcy Court found the firm "inadvertently and non-negligently omitted connections with the Debtor, creditors and other interested parties from its initial disclosures" but that "no sanctions are warranted for the omission because:

    - the connections did not create a disqualifying conflict,
    - the omission was inadvertent,
    - the omission was not material to the bankruptcy estate,
    - (the law firm) corrected the omissions and
    - (the law firm) representation provided a substantial benefit to the estate."

In Re: Fundamental, Case No. 8:20-cv-956-T-33 (M.D. Fla. Jan. 22, 2021)

1. The two issues on appeal were whether the Bankruptcy Court failed to follow proper procedures by denying discovery and declining to hold an evidentiary hearing and whether the Bankruptcy Court applied the wrong standard in concluding the omission was non-negligent.

2. The Bankruptcy Court used a Florida negligent misrepresentation standard, meaning the representer "should have known the representation was false" as the appropriate standard for a negligent omission under Rule 2014.

3. The District Court found that "[b]ased on the (law firm's) purported knowledge at the time of the omissions and these surrounding circumstances, the Bankruptcy Court held that the omissions were not made under circumstances in which (the law firm) should have known of the requirement to disclose. The Bankruptcy Court considered the circumstances, in which the omission was made, and concluded that,

under the circumstances, the omission was "not the result of negligence".

4. The District Court ruled Rule 2014 should not prove so "impossible a task" as to subject attorneys to "endless litigation over what would be enough". The Bankruptcy Court's reliance on this standard was not an abuse of discretion.

5. The Bankruptcy Court found that there was no evidence showing Shumaker disregarded any red flags that should have alerted it to the connections, or that the conflict system was inherently flawed, or that Shumaker maintained the conflict system in a manner that reflects poor intra-firm communication and data input.

6. The Bankruptcy Court did not err in concluding that the law firm's omission was non-negligent and inadvertant.

II. Venue (NRA) Texas Two Step – Good/Bad Faith Filings

NRA

"Texas Two Step"

- Process by which a company seeks to avoid liability, often for significant tort claims by forming a new company in Texas and transferring all liabilities to the new company, which then moves (in the case of Johnson & Johnson) to North Carolina, and files bankruptcy.

- The first step of the Texas Two-Step is a "divisive merger," by a company in which it splits it into two or more new companies.

- Assets are transferred to one of the new companies ("GoodCo") and the original company's assets are transferred to another newly-created company ("BadCo").

- This procedure is expressly permitted under Texas law, and the law of a number of other states.

- The second "step" is the commencement of a bankruptcy case for BadCo, which is intended to provide BadCo with the benefit of the automatic stay and shield the assets of GoodCo from the reach of creditors.

- The divestiture is often accompanied by a "funding agreement" between GoodCo and BadCo which generally provides that the recovery creditors likely would have received absent the divestiture is not materially diminished – a theory that often is subject to significant dispute.

- Although not the first use of the "Texas Two Step," the use of the procedure by Johnson & Johnson, the multi-billion pharmaceutical company to protect it from billions in liability related to its talc baby powder products which is alleged to have caused ovarian cancer and/or mesothelioma in thousands of individuals.

- Thousands of individuals have accused J&J's talc-based baby powder of causing them serious adverse health effects including mesothelioma and ovarian cancer

- J&J announced in 2020 that it discontinued production of talc-based baby powder in the U.S. after many U.S. retailers removed the talc-based baby powder from shelves in 2019

- By 2021, it was estimated that on average a new ovarian cancer complaint was being filed against J&J every hour for every day between January 2020 through October 2021, and a verdict was entered against J&J is a single case involving only 20 plaintiffs for over $6.9 billion (although later reduced to 2.2 billion). J&J's five year defense costs totaled approximately $4.5 billion.

- In October, 2021, J&J executed a divisive merger, and then commenced a bankruptcy case in North Carolina for its "Bad-Co" – "LTL Management" (LTL is an acronym for "Legacy Talc Litigation").

- The venue for the bankruptcy case was later transferred to the Bankruptcy Court for the District of New Jersey, where J&J has its headquarters, most of its assets and its principal operations.

- Following the transfer, an Official Committee of Talc Claimants filed a motion to dismiss the Debtor's chapter 11 case, claiming the case had not been filed in "good faith."

- According to the Committee, "this is a textbook case for bad faith dismissal under applicable law in the Third Circuit."

- Among a host of other arguments, the Committee asserted that there was no legitimate "fresh start" for a company that, at the time of its bankruptcy filing, was only two days old.

- The Debtor defended the bankruptcy filing and the divisive merger, claiming that it did not "block" or "remove" assets "from the reach" of the talc claimants. "To the contrary, the Funding Agreement . . . assures that the Debtor has the same, if not an enhanced, ability to satisfy the Talc Claims as Old JJCI had prior to the Corporate Restructuring."

- The Bankruptcy Court conducted a lengthy trial in February 2022.

- The issue before the Bankruptcy Court was essentially whether utilization of the "Texas Two Step" strategy alone can serve as the basis for dismissal of the bankruptcy case as a bad faith filing, for which there appeared to have been no clear precedent.

- The J&J case drew heated criticism from both plaintiff's lawyers and consumer advocates, and attracted the attention of politicians in Washington.

- A few days before the February trial began, the *Senate Judiciary Committee's Subcommittee on Federal Courts, Oversight, Agency Action and Federal Rights held what was reported to have been an intense hearing in which legislation to outlaw the "Texas Two Step" (along with nondebtor releases)* *was proposed and supported by a former bankruptcy judge and a number of bankruptcy professors and practitioners.*

- *The Nondebtor Release Prohibition Act*, which also addresses non-consensual third-party releases, would require bankruptcy judges to dismiss cases filed by entities that have taken on liabilities in a divisional merger within 10 years before the filing.

- The Bankruptcy Court, Judge Michael Kaplan recently denied the motion to dismiss, allowing the LTL bankruptcy case to continue.

- In Judge Kaplan's decision, he found that there was nothing inherently improper in use of the Texas Two Step process.

> "Let's be clear, the filing of a chapter 11 case with the expressed aim of addressing the present and future liabilities associated with ongoing global personal injury claims to preserve corporate value is unquestionably a proper purpose under the Bankruptcy Code."

- Judge Kaplan noted that he had to answer the "difficult" question of whether bankruptcy or the tort system would provide a more "beneficial and equitable path" to resolving LTL's talc liabilities. He wrote that he has a "strong conviction that the bankruptcy court is the optimal venue for redressing the harms of both present and future talc claimants in this case - ensuring a meaningful, timely, and equitable recovery."

- He went on to write that he does not intend to minimize or discredit the "inarguable benefits" of the tort system, but that it is "folly" to believe that the tort system "offers the only fair and just pathway of redress and that other alternatives should simply fall by the wayside."

- The U.S. Trustee, at the end of the trial, suggested that if the case were not dismissed, the court should consider the appointment of a chapter 11 trustee.

- The Court found that the record "does not support a finding of Debtor's pre-petition or postpetition malfeasance, or other cause" warranting the appointment of a chapter 11 trustee, but he agrees that there is a need for independent scrutiny of possible claims" as the case progresses.

- The debtor offered to consent to the appointment of an examiner to investigate, and derivative standing for the originally appointed TCC to pursue, any valid claims for possible avoidance actions or other claims arising out of the 2021 corporate restructuring that created LTL.

- The court also granted the debtor's motion to extend the preliminary injunction shielding nondebtor affiliates including J&J, as well as third parties including certain retailers and insurers, from talc litigation.

III. Prepacks and Plan Support Agreements a/k/a Restructuring Support Agreements

What are they and how did they come about?

With amendments that reduced the debtor's exclusivity period and the time for assumption and rejection of contracts, BAPCPA encouraged debtors to find ways to expedite the bankruptcy process. Teloni, Foteini, "Chapter 11 Duration, Preplanned Cases, and Refiling Rates: An Empirical Analysis in the Post-BAPCPA Era" (2015). SJD Dissertations. 3.

October of 2005 saw enactment of BAPCPA. One of BAPCPA's goals was to reduce the length of chapter 11 cases and BAPCPA did so by capping the extension of the exclusivity period. This resulted in the increase in the number of prepackaged or negotiated Chapter 11 cases.

Distinguish prepack cases from prenegotiated cases with PSAs

- In prepackaged bankruptcies creditors vote on the plan before the filing of the Chapter 11 petition
- In prenegotiated bankruptcies plan voting is conducted post-petition according to PSAs that have been negotiated prepetition between the debtor and its significant stakeholders.

What code and rule sections are implicated?

Prepacks trigger 365

- In prepacks, the PSA is considered an executory contract in which parties to the agreement have material unperformed obligations. Assumption will be approved provided that the debtor has exercised its reasonable business judgment when electing to enter into the agreement. A debtor is generally required only to make a showing that assumption will benefit the debtor's estate.

Post-Petition PSAs trigger 105, 363, and 9019

- If a PSA is entered into post-petition, it will be subject to court approval pursuant to 363(b), 105(a) and Rule 9019.
- Section 363(b) requires court approval of a debtor's use of property of the estate outside of the ordinary course of business.
- Section 105(a) provides that the "court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title."
- Under Rule 9019, the court may approve compromises and settlements when fair and equitable and in the best interests of the debtor's estate. The primary factors considered by the courts when determining whether to approve a settlement in the form of a PSA/RSA generally include: (1) the probability of success in the litigation; (2) the complexity, delay, and cost of the litigation; and (3) the best interests of creditors and the bankruptcy estate. Courts generally defer to a debtor's judgment, unless the settlement falls below the lowest point in the range of reasonableness in terms of benefits to the estate.
- The Debtor should be prepared to show that the PSA was the product of arms-length negotiations.

What are the benefits to PSAs?

- Expedite restructuring, plan confirmation, and supply exit strategy and certainty
- Reduction of costs associated with bankruptcy and limit time of judicial oversight
- Create less disruption to employee, customer, and business partner relationships
- Market forces assured of continued operations and viability of entity

What are common terms of a PSA?

- Stakeholders agree to vote in favor of properly solicited plan
- Global settlement of pending or threatened litigation between various constituents such as Creditors' Committee, prepetition lenders, and equity
- Lock up agreement/trading restrictions whereby purchasers/transferees of a debtor's debt execute joinder to PSA and agree to be bound by its terms
- Remedies for breach of PSA – typically specific performance (rather than money damages)

Are there circumstances in which a party can change course under a PSA and not provide support to a plan?

- *Material Adverse Changes* - If there is a material change between the terms set out in the plan support agreement and those included in the plan, the stakeholders do not have to support the plan.

- *Fiduciary Outs* - A party who signs a plan support agreement but then finds itself with interests adverse to the terms of the plan may no longer obligated to support the plan if such support violates its fiduciary duties.

What do creditors typically require of a debtor under a PSA?

- Timing milestones and benchmarks

Any negatives to PSAs/Prepack cases?

IV. Make Whole Claims

- Make whole premiums, also known as prepayment premiums, prepayment penalties, etc. are provisions in lending agreements that require borrowers, if they pay the principal prior to the maturity date, to pay other amounts meant to compensate the lender for amount of interest it otherwise would have been made through maturity.

- They are and have been standard provisions of commercial loan documents, but can vary significantly in their terms and their enforceability.

- They are borne out of the century old “perfect tender” rule which prohibits a borrower from prepaying its loan prior to its maturity date in the absence of contractual or statutory provisions allowing prepayment.

- However, parties to a loan agreement may contract out of the “perfect tender” rule and allow for prepayment of the debt in exchange for payment of an agreed-upon consideration.

- Historically, make whole premiums initially referenced voluntary prepayments of loans. However, eventually borrowers determined that they could trigger nonmonetary defaults causing the lender to declare a default and accelerate, thereby creating a nonvoluntary prepayment, and avoiding the express language of the make whole premium upon a voluntary prepayment.

- Lenders addressed this issue by adding provisions requiring make whole premiums due upon involuntary prepayments required upon borrower defaults and/or acceleration, including the commencement of insolvency proceedings.

- Whether a make whole premium amount is properly considered part of a creditor’s bankruptcy claim is determined by state law – most states provide they are recoverable if stipulated to in a contract. *In re Brandywine Townhouses, Inc.*, 518 B.R. 671 (Bankr. N.D. Ga. 2014).

- The collectability of make whole premiums, and debtor’s ability to avoid paying them in various contexts, in bankruptcy cases has received significant treatment in a number of recent cases.

- In *In re Mallinckrodt plc*, the U.S. Bankruptcy Court for the District of Delaware held in November 2021, that the debtors did not have to pay a “make-whole” premium in order to reinstate secured first-lien claims as unimpaired under a plan of reorganization. *In re Mallinckrodt Plc*, Case No. 20-12522 (JTD) (Del. Bankr. Nov. 5, 2021).

- In 2020, Mallinckrodt issued approximately $500 million in new debt to pay off old debt. The new debt included a make-whole provision that was due upon an acceleration of the notes, which would occur if the company voluntarily filed for bankruptcy prior to April 2022.

- Mallinckrodt filed for bankruptcy in October 2020. In its plan, it proposed to reinstate the first-lien notes (the noteholders would receive payments at the original rate, with the same maturity and security) but not pay the make-whole premium, which amounted to approximately $94 million.

- The debtors maintained that the noteholders could not vote against the plan, because the proposed treatment left them unimpaired by the plan.

- Mallinckrodt argued that the noteholders could be treated as unimpaired because (i) the make-whole did not need to be cured given that it was triggered only by the company's petition for Chapter 11, and (ii) the plan did not otherwise alter the legal, equitable or contractual rights of the noteholders, who would have "the same claims, against the same companies, with the same priority position, and the same terms."

- The noteholders disagreed, objecting to the plan, and contending that they could not be treated as unimpaired and that the statute did not apply to the curing of default leading to an acceleration of debt, i.e., neither the make-whole provision nor the debtors' failure to pay it accelerated the debt.

- In November 2021, the Bankruptcy Court overruled the creditor group's objection, holding that payment of interest and principal pursuant to the original indenture — but not of the make-whole — was sufficient to treat the noteholders as unimpaired.

- The Third Circuit reached a different result in 2016 *In re Energy Future Holdings Corp.* (*Del. Tr. Co. v. Energy Future Intermediate Holding Co. LLC* (*In re Energy Future Holdings Corp.*), 842 F.3d 247 (3d Cir. 2016) in which the debtor sought to refinance secured debt without triggering a make-whole under an "optional redemption" provision in the governing documents. They contended that payment of a debt after maturity is not a "redemption," and the maturity date had been accelerated upon the debtors' bankruptcy.

- The U.S. Court of Appeals for the Third Circuit disagreed, reasoning that a redemption may occur before or after a note's maturity, and it held that the redemption was "voluntary" because the debtors redeemed the notes over the noteholders' objections. Because the refinancing was an "optional redemption," the Third Circuit concluded that the indenture required the debtors to pay the make-whole.

- In a 2017 case involving similar facts and arguments, *In re MPM Silicones LLC* (*Momentive*), *In re MPM Silicones, LLC*, 2017 WL 4700314 (2d Cir. Oct. 20, 2017) the Second Circuit held that the make-whole was not payable.

- The court reasoned that payment on a debt that is automatically accelerated due to the debtor's bankruptcy filing is not an "optional redemption," because "redemption" refers to payments made prior to maturity, and this one was made after (the automatic acceleration clause changed the maturity date to the petition date).

- The Second Circuit went on to explain that even if this payment were a redemption, it was not "optional" because operation of the automatic acceleration clause made it mandatory.

- On December 22, 2021, the U.S. Bankruptcy Court for the District of Delaware issued another ruling regarding the enforceability of make-whole provisions. The court, in *In re Hertz Corp*., *Wells Fargo Bank, N.A. v. Hertz Corp.* (*In re Hertz Corp.*), No. 20-11218 2021 WL 6068390 (Bankr. D. Del. Dec. 22, 2021), in ruling on a motion to dismiss, found that certain noteholders were not entitled to recover make whole premiums, but other creditors may be, because of varying language in their underlying agreements.

- The confirmed plan provided for payment in full on the effective date to creditors regarding four series of notes, but did not provide for payment of make whole premium amounts, however, the noteholders preserved the right to contend that the additional payments were required in order for their claims to be unimpaired under the plan.

- The relevant provision for the first group of notes provided for a make-whole if the debtors redeemed the notes "prior to maturity" (defined as a date accelerated to the petition date upon a filing for bankruptcy). The second group of notes provided that a make-whole would be due if the debtors redeemed the notes "[a]t any time prior to [the specified date]."

- The court dismissed claims regarding the first group of notes but not the second. Regarding the first group, the court agreed with the debtors' argument that the undefined term "maturity" in the make-whole provision must refer to the common meaning of maturity.

- Thus, the court found that although the notes were redeemed prior to the original maturity date, they were not redeemed "prior to maturity" because the maturity date had been accelerated by the debtors' Chapter 11 petition.

- For the second group, the court denied the debtors' motion to dismiss, finding the noteholders claim to be plausible based on the express terms of the redemption provision regarding the make-whole being triggered by a redemption "prior to [the specified date]," a date that was not modified upon the debtors' bankruptcy filing.

- A case now pending in the U.S. Court of Appeals for the Fifth Circuit, *In re Ultra Petroleum Corp*., could provide further guidance as to the enforceability of make-whole premiums in the context of unsecured debt.

Faculty

Steven M. Berman is a partner in the Tampa, Fla., office of Shumaker, Loop & Kendrick, LLP, specializing in the firm's bankruptcy and creditors' rights practice group. He has more than 30 years of bankruptcy experience and focuses his practice on business bankruptcy litigation, representing creditors, investors, distressed-debt lenders, trustees, committees and business entities litigating disputes in bankruptcy court. Mr. Berman is Board Certified by the American Board of Certification in both Creditors' Rights Law and Business Bankruptcy Law, and he is a member of the Florida, California, District of Columbia, New York and Puerto Rico (Federal) bars. He is also admitted to practice before the Eleventh Circuit Court of Appeals and the U.S. Supreme Court. Mr. Berman serves on the board of directors of the American Board of Certification and is a member of its Faculty Committee. He also serves on ABI's Board of Directors, its Endowment Committee and its Task Force on Veterans and Servicemembers Affairs, and he routinely volunteers and speaks at its seminars and other programs. On a local level, Mr. Berman is a member of the Tampa Bay Bankruptcy Bar Association, the Bankruptcy Bar Association of the Southern District of Florida, the Southwest Florida Bankruptcy Professionals Association and the San Diego Bankruptcy Forum. He also guest lectures at the University of Florida College of Law and Stetson University College of Law, both in the advanced bankruptcy courses. Additionally, Mr. Berman serves as the Judge Advocate and Parliamentarian to the Coronado Yacht Club in Coronado, Calif., and volunteers in providing *pro bono* bankruptcy and insolvency services and training for U.S. Navy Judge Advocate General officers and staff, along with representation of service members and their families in need. He received his B.S. in multinational business operations from Florida State University and his J.D. from the University of Florida Levin College of Law.

David L. Gay is a shareholder with Carlton Fields, P.A. in Miami, where he focuses his practice on bankruptcy and creditors' rights, corporate reorganizations and restructurings, and commercial litigation. He represents debtors, creditors, financial institutions, trustees and creditors' committees in chapter 11 reorganizations and chapter 7 liquidations, as well as in fraudulent-transfer actions, preference actions, and litigation against directors and officers. As an experienced litigator in federal and state courts, Mr. Gay is known for his strategic approach throughout all phases of commercial litigation, from pre-litigation consulting to post-judgment collection to appeals. He also has significant experience in business planning and advisory matters, insolvency and restructuring matters, shareholder and partnership disputes, real property disputes, and collection matters. Mr. Gay is an active member of the Business Law Section of The Florida Bar, serving on a number of committees, including the committee studying revisions to Florida's Uniform Fraudulent Transfer Act. He also has been listed in *The Best Lawyers in America* and in *Florida Super Lawyers* since 2009. Prior to attending law school, Mr. Gay served as a military intelligence officer in the U.S. Army. He received his B.S. from the University of Florida and his J.D. *cum laude* from the University of Florida College of Law, where he was on the Moot Court Board and was co-founder and vice president of the University of Florida Association for Law & Business.

Tiffany Payne Geyer is a partner with BakerHostetler in Orlando, Fla., and practices primarily in the areas of bankruptcy and creditors' rights. She has represented both corporate and individual debtors in chapter 11 cases and individuals in chapter 7 cases, and her clients include health care businesses and medical professionals, investment bankers and financial advisors. She has also represented clients in the hospitality sectors, and has assisted in representing debtors in the energy sectors. Ms. Geyer has negotiated multiple settlements of guarantor liability and has experience with assignments for the benefit of creditors. She has also represented secured creditors, unsecured creditors, landlords and panel trustees. Ms. Geyer has been listed in *Chambers USA* for Bankruptcy/Restructuring in Florida and in *The Best Lawyers in America* in 2020 for Bankruptcy and Creditor/Debtor Rights/Insolvency and Reorganization Law, and she is a member of the Central Florida Bankruptcy Law Association (CFBLA), Federal Bar Association, American Bar Association and the International Women's Insolvency & Restructuring Confederation (IWIRC). She received her B.A. with honors in political science and public administration in 1998 from the University of Central Florida, and her J.D. in 2000 from the University of Florida Levin College of Law, where she received the Book Award for Legal Drafting and was a member of a trial competition team.

Edwin G. Rice is counsel with Bradley Arant Boult Cummings LLP in Tampa, Fla., where his practice focuses primarily in the areas of banking and insolvency. He has represented lenders, lessors, trustees, committees and debtors in chapter 11 cases, and he has legal experience in mortgage foreclosures, workouts, lending transactions, lending-related litigation and assignments for the benefit of creditors. Mr. Rice's bankruptcy experience includes the defense and prosecution of preference actions, fraudulent-transfer actions and other avoidance actions, claims litigation, dischargeability actions, relief-from-stay litigation, valuation litigation, contested confirmations, director and officer claim litigation, lease assumptions and rejections, bankruptcy sales and debtor-in-possession financing. Rated AV-Preeminent by Martindale-Hubbell, he is a past president and chairman of the Tampa Bay Bankruptcy Bar Association and is recognized by *Chambers USA*, *The Best Lawyers of America* and *Super Lawyers*. Mr. Rice received his B.S.B.A. in 1987 from the University of Florida and his J.D. in 1990 from the University of Florida Levin College of Law, where he was a member of the Order of the Coif.