American Bankruptcy Institute

Views from the Bench, 2019

Confirmation Roundtable

Jay M. Goffman, Moderator
Skadden, Arps, Slate, Meagher & Flom LLP; New York

Michael L. Bernstein
Arnold & Porter Kaye Scholer LLP; Washington, D.C.

Hon. Carla E. Craig
U.S. Bankruptcy Court (E.D.N.Y.); Brooklyn

Hon. Robert D. Drain
U.S. Bankruptcy Court (S.D.N.Y.); New York

Hon. Kevin R. Huennekens
U.S. Bankruptcy Court (E.D. Va.); Richmond

Peter M. Friedman, Facilitator
O'Melveny & Myers LLP; Washington, D.C

ABI Bankruptcy 2019: Views from the Bench
Confirmation Roundtable

Skadden

September 20, 2019

Georgetown University Law Center, Washington, D.C.

Panelists

Skadden

Jay M. Goffman, *Moderator*
Skadden, Arps, Slate, Meagher & Flom LLP

Hon. Carla E. Craig*
U.S. Bankruptcy Court (E.D.N.Y.)

Hon. Robert D. Drain*
U.S. Bankruptcy Court (S.D.N.Y.)

Hon. Kevin R. Huennekens*
U.S. Bankruptcy Court (E.D. Va.)

Peter M. Friedman, *Facilitator*
O'Melveny & Myers LLP

* The views expressed in this presentation do not necessarily represent the views of the judges. Nothing the judges say today may be construed as binding them to any legal position or commentary on the direction their courts may take in the future.

Skadden

The "One Day" Prepack

Prepacks - Fast Track to Confirmation

Skadden

- Two prepackaged cases confirmed in less than 24 hours in 2019:
  - *In re FullBeauty Brands Holding Corp.* (S.D.N.Y.)
  - *In re Sungard Availability Services Capital, Inc.* (S.D.N.Y.)
- Other prepacks confirmed on an extremely expedited basis include:
  - *In re Roust Corporation* (2016) (S.D.N.Y.) (7 days)
  - *In re Blue Bird Body Company* (2006) (D. Nev.) (32 hours)

Prepacks - Notice Requirements

Skadden

- US Trustee objections to these expedited prepacks tend to focus on
  - whether there has been adequate notice
  - whether notice periods can begin to run pre-filing
- **Federal Bankruptcy Rule 3017** requires 28 days' notice to all holders of claims and interests of the hearing on approval of the disclosure statement
- **Federal Bankruptcy Rule 2002** requires 28 days' notice to all holders of claims and interests of the deadlines for objections to the disclosure statement and the plan, and 28 days' notice of the hearings on the disclosure statement and plan confirmation
- **Federal Bankruptcy Rule 3020(b)(1)** provides objections to plan confirmation must be filed and served "within a time fixed by the court"
- Local bankruptcy rules may also prescribe notice periods
- Nothing in these rules specifically states that notice periods must begin to run post-petition

Skadden

Impairment
Make Whole Payments
Post-Petition Interest Rates

In Re Ultra Petroleum Corp., 913 F.3d 522 (5th Cir. 2019)

Skadden

- Facts:
  - Ultra and its subsidiaries were an E&P company forced into bankruptcy when oil and gas prices collapsed in 2015 and 2016
  - While Ultra was in chapter 11, oil prices rebounded and the company became solvent
  - Indenture provided that bankruptcy was an event of default, requiring payment of a **make whole amount** and **post-petition interest** at **contractual default rates**
  - Ultra's proposed plan would not pay the make whole amount and paid post-petition interest at the federal judgment rate

Ultra - Plan Impairment vs. Bankruptcy Code Impairment

Skadden

- Ultra claimed its plan paid all creditors in full and impaired no one
- The portions of the creditors' claims that were unpaid were disallowed under the Bankruptcy Code
  - Make whole payment was a claim for unmatured interest, disallowed pursuant to section 502(b)(2) of the Bankruptcy Code
  - Post-petition interest at the contract rate was disallowed, because pursuant to section 726(a)(5) of the Bankruptcy Code, creditors were only entitled to post-petition interest at the 'legal rate'
    - » 'legal rate' is generally accepted to be the federal judgment rate under 28 U.S.C. § 1961
- Hence, the Bankruptcy Code was responsible for impairing the creditors' claims, not the debtors' plan

Ultra - Plan Impairment vs. Bankruptcy Code Impairment

Skadden

- Fifth Circuit asked whether a “rich man’s creditors are ‘impaired’ by a plan that paid them everything allowed under the Bankruptcy Code.”
  - Answer: ‘No’
  - Court distinguished between ‘Bankruptcy Code Impairment’ and ‘Plan Impairment’
- Court found the make whole payment was unmatured interest under section 502(b) of the Bankruptcy Code
  - ‘economic equivalent of interest’ because it was intended to compensate the lender for lost interest
  - ‘unmatured’ because on the day of the filing, the debtors did not owe the make whole amount
    - » The acceleration clause which made the make whole payable upon a bankruptcy filing was an *ipso facto* clause because it keyed acceleration to the debtors’ decision to file for bankruptcy

Ultra - Solvent Debtor Exception

Skadden

- Fifth Circuit observed that the make whole payment might be payable *if* the ‘solvent debtor exception’ survived the enactment of the Bankruptcy Code in 1978
  - The ‘solvent-debtor exception’ originated under English bankruptcy law and gave creditors of a solvent debtor the right to interest post-petition where there was a contract for it
  - The Court expressed doubt that the exception survived, but remanded the question to the bankruptcy court for determination
- A form of the solvent debtor exception arguably survives in section 726(a) of the Bankruptcy Code, which provides the waterfall of priorities for distributing property in a chapter 7 case
  - Fifth priority, before the debtor receives any recovery, is “payment of interest at the legal rate from the date of the filing of the petition” on other claims paid by the debtor’s estate

Ultra - Solvent Debtor Exception

Skadden

- Section 1129(a)(7) of the Bankruptcy Code, the 'Best Interests of Creditors' test, incorporates section 726(a)'s waterfall provision in chapter 11
  - Requires a chapter 11 plan to provide that impaired creditors "will receive … not less than the amount that [they] would … receive if the debtor were liquidated under chapter 7"
- Distinction between the solvent debtor exception and section 726(a):
  - Solvent debtor exception gave a creditor the right to post-petition interest when a debtor was solvent <u>and</u> the creditor's contract with the debtor called for it – i.e., interest as *part of* a claim
  - Section 726(a) allows for interest to accrue *on* a claim

Make Whole Payments - *Ultra* vs. *EFH* and *Momentive*

Skadden

- *Ultra* suggests that make whole payments may be *per se* unenforceable under the Bankruptcy Code (unless the solvent debtor exception is found to survive)
- Other recent Court of Appeals decisions concerning the enforceability of make whole payments in bankruptcy:
  - Second Circuit in *In re Momentive Performance Materials Silicones, LLC*, 874 F.3d 787 (2d Cir. 2017)
  - Third Circuit in *In re Energy Future Holdings Corp.*, 842 F.3d 247 (3d Cir. 2016)
- The Second and Third Circuits reached different conclusions, but both courts based their analysis on the language of the underlying indenture
  - Neither Court of Appeals considered whether make whole payments could be considered unmatured interest and hence disallowed under the Bankruptcy Code

Make Whole Payments - *Ultra* vs. *EFH* and *Momentive*

Skadden

- Third Circuit in *EFH* held that make whole premiums were enforceable when EFH chose to redeem notes shortly after filing its bankruptcy petition
  - Indenture contained a redemption provision that entitled the holders of the notes to the payment of a make whole premium if EFH opted to redeem the notes in advance of maturity
  - Decision by EFH to redeem the notes before maturity triggered the make whole premium, regardless of the fact that the debt had been accelerated by the bankruptcy filing
- Third Circuit focused on language of indenture
  - 'Redemption' premium survives acceleration whereas a 'prepayment' premium does not
  - Acceleration of the notes upon filing did not automatically cancel EFH's obligation to pay the premium triggered by early redemption

Make Whole Payments in *Ultra* vs. *EFH* and *Momentive*

Skadden

- Second Circuit in *Momentive*, under similar circumstances to those in *EFH*, held that the make whole premium was not enforceable
  - Indenture governing notes contained optional redemption clauses providing for the payment of a make whole premium if Momentive opted to redeem the notes prior to a certain date
  - Notes had accelerated automatically upon filing
  - Momentive issued replacement notes under its chapter 11 plan
  - Noteholders argued they were entitled to payment of the make whole premium
    - » Second Circuit held that payment on the accelerated notes was a post-maturity payment, not a redemption
    - » Further, repayment obligation arose on account of the acceleration provisions in the indenture (to be distinguished from Momentive 'opting' to redeem prior to maturity), and so the provision requiring payment of the make whole premium was not triggered

Ultra - Post-Petition Interest

Skadden

- The Fifth Circuit found that the Ultra creditors were entitled to post-petition interest, but that the Bankruptcy Code was silent as to the appropriate rate of interest for unimpaired claims
- Section 726(a) speaks to post-petition interest paid at the 'legal rate' in chapter 7 cases
- Section 1129(a)(7) incorporates section 726(a) in chapter 11 cases, but section 1129(a)(7) applies specifically to impaired creditors
- Fifth Circuit remanded to bankruptcy court to determine appropriate rate, whether federal judgment rate or other rate supported by equities of the case

Skadden

Cram Down Interest Rates

Momentive - Calculation of Cram Down Interest Rates

Skadden

- Second Circuit decision in *Momentive* prescribed a two-step approach to determining cram down rate
  - 1. Determine if efficient market exists for exit loans in chapter 11 proceedings. If it exists, apply the market rate.
  - 2. If an efficient market does not exist, apply the *Till* formula rate.
- Remanded determination of interest rate to bankruptcy court
- Judge Drain's order on remand interpreted the Second Circuit's decision as requiring him to determine whether there was 'market efficiency' or 'process efficiency'
  - 'process efficiency' = "efficiency in the form of a fair and transparent competitive process involving sophisticated parties that arrives at a potential exit loan with term, size and collateral comparable to the proposed forced cram down 'loan.'"

Momentive - Calculation of Cram Down Interest Rates

Skadden

- 1L Notes cram down rate:
  - No traditional market efficiency for the 1L Notes
  - But, the debtors' exit financing was sufficiently similar in term, size and collateral to the 1L Notes, and had been negotiated at a time sufficiently proximate to plan confirmation, to serve as a reliable comparison and satisfy the 'process efficient' standard
- 1.5L Notes cram down rate:
  - No traditional market efficiency for the 1.5L Notes
  - No back-up exit financing sufficiently similar in term, size and collateral
  - Determined 'process efficient' market by combining terms from a proposed bridge facility commitment letter with expert testimony to calculate a step up from the back-up first-lien exit financing

Skadden

Rights Offerings

In re Pacific Drilling S.A., Case No. 17-13203 (Bankr. S.D.N.Y.)

Skadden

- Pacific Drilling's plan included a rights offering that was the subject of intense scrutiny and a "great deal of misgiving" on the part of the bankruptcy court
- On September 18, 2018, Pacific Drilling sought bankruptcy court approval of a $500 million rights offering, consisting of:
  - $350 million rights offering to be offered to holders of three classes of secured debt;
  - $100 million private placement for the Ad Hoc Group of Secured Noteholders
  - $50 million private placement for Pacific Drilling's equity holder
- Represented opportunity to buy stock at 46.9% discount to value of the equity under the plan

Pacific Drilling – Rights Offering

Skadden

- The rights offering included a backstop agreement with the Ad Hoc Group
- Ad Hoc Group guaranteed its own purchases of stock and had the exclusive right to purchase shares that eligible holders did not subscribe for
- Backstop fee equal to 8% of the amount of stock to be issued, payable in newly issued stock
  - 8% of $500 million is $40 million, but since the 8% fee was payable in the deeply discounted stock, the fee was worth much more than $40 million

Pacific Drilling – Rights Offering Not Approved

Skadden

- Bankruptcy Court did not approve the rights offering:
- 1. No legitimate justification offered for separate private placement to Ad Hoc Group
  - Gave the Ad Hoc Group a disproportionate share of the offering
- 2. Debtors had failed to show reasonableness of backstop fee, and the need for it
  - Bankruptcy court held 8% fee could only be paid with respect to shares for which no commitments were in place

Pacific Drilling – Rights Offering Revised

Skadden

- Debtors returned to court with revised rights offering proposal on September 25, 2018
  - Eliminated private placement to the Ad Hoc Group
  - Provided that $460 of equity would be offered to members of three impaired secured classes
  - Backstop fee: 8% on the uncommitted portions of the offering and 5% on the rest, payable in stock
- Bankruptcy court approved but with strong misgivings
  - Judge Wiles noted he was not completely satisfied with the evidence regarding the reasonableness of the proposed fee
  - Noted there are tools that can be used to calculate option values, and option formulas that take account of how exercise price compares to current value and that account for potential market volatility
    - » None of those tools had been used here

23 Skadden, Arps, Slate, Meagher & Flom LLP and Affiliates

Pacific Drilling – Court Commentary

Skadden

- Judge Wiles observed:
  - "nobody has made any effort to calculate the actual degree of risk involved here, or to calculate the actual value of the put option portion of the backstop fee, or to calculate just how volatile the markets would have to be in order to justify an option fee of the size that has been proposed, given how out-of-the-money the put option would be."
- Judge Wiles rejected the argument that he should approve the 8% fee in reliance on the debtors' business judgment
  - Noted these fees are paid in stock, and therefore have no practical effect on debtors themselves
  - Real impact is on other creditors, because of dilution
  - Further, "the principal to be guarded here is one that requires equal treatment of similarly situated creditors, which is more a matter of bankruptcy philosophy than it is a matter of business judgment."
  - Concern that fee represented an extra recovery for the Ad Hoc Group, rather than a reasonable, stand-alone financing term

24 Skadden, Arps, Slate, Meagher & Flom LLP and Affiliates

Pacific Drilling – Court Commentary

Skadden

- However ….
  - Court had expressed its concerns several times over several weeks
  - No indenture trustee or noteholder had complained
  - Debtors and other parties were asking for approval in unison
- Court concluded:
  - "I may be skeptical about what the evidence would show if objections were filed. I hope that in the future when these structures are presented, the parties will explore in more detail the issues and concerns that I have raised. But this is the wrong case in which to make rulings, particularly based only on skepticism. I have to rule on the evidence that is actually before me. While I have strong doubts, those doubts are not enough, without more and without any objections, for me to reject the terms that the parties have negotiated and for which they have sought approval today."

Ad Hoc Comm. of Non-Consenting Creditors v. Peabody Energy Corp. (In re Peabody Energy Corp.), 2019 U.S. App. LEXIS 23824

Skadden

- Peabody Energy Corp.'s plan of reorganization included a $1.5B new money raise, broken into two parts
- 1. $750M "Rights Offering"
  - Class 5B unsecured note holders and second lien note holders permitted to purchase common stock at a 45% discount to plan value
  - This rights offering was not contested
- 2. $750M "Private Placement"
  - Qualifying Class 5B unsecured note holders and second lien note holders could purchase preferred stock at a 35% discount to plan value, if they promised to:
  - (i) Buy a set amount of preferred stock
  - (ii) Backstop both the common and preferred stock offerings
  - (iii) Support plan confirmation process
  - Challenged by Ad Hoc Committee of Non-Consenting Creditors

Peabody - Summary

Skadden

- Debtors also agreed to pay creditors certain premiums 'in consideration for' their agreements
  - Rights Offering backstop fees worth $60M (i.e. 8% of the $750M raised) and a "Ticking Premium" worth $18,750,000 to be paid monthly through a designated closing date
  - Corresponding commitment fees and ticking premium were paid to creditors who participated in the Private Placement
  - All premiums paid in common stock of reorganized debtors
- In summary, holders of Class 5B and second lien note holder claims could purchase significant stock in the reorganized debtors at a discount and receive significant premiums for backstopping the new money raises and supporting the plan
- Separately, under the plan, Class 5B was expected to receive 22.1% of the face value of their claims, and the second lien note holders were expected to receive 52.4% of the face value of their claims

Peabody - Court of Appeals for the Eighth Circuit Decision

Skadden

- Ad Hoc Committee of Non-Consenting Creditors argued the right of qualifying creditors to participate in the Private Placement was unequal treatment for their claims
  - Violation of equal-treatment of creditors rule in section 1123(a)(4)
- Court of Appeals for the Eighth Circuit upheld the plan on August 9, 2019
- Observed courts in other circuits agree:
  - a plan may treat one set of claims holders more favorably than another
  - so long as the more favorable treatment is not for the claim but for distinct, legitimate rights or contributions separate from the underlying claim
- Court held opportunity to participate in the Private Placement was not 'treatment for' the participating creditors' claims
  - Rather, it was consideration for valuable new commitments
  - Participating creditors were receiving opportunity to buy preferred stock at a discount in exchange for their support of plan and shouldering "significant risks"

Peabody - Court of Appeals for the Eighth Circuit Decision

Skadden

- Eighth Circuit distinguished *Peabody* from the Supreme Court decision in *LaSalle*
  - In *LaSalle*, Supreme Court determined section 1123(a)(4) was violated where equity holders were given the exclusive right to receive ownership interests in reorganized debtors if they agreed to invest new money
- Facts of *Peabody* were distinguishable because:
  - 1. Ad Hoc Committee was not excluded from any opportunity and could have chosen to participate
  - 2. Creditors who participated in Private Placement were giving something of value up front in exchange for right to participate
  - 3. Debtors had considered alternative ways to raise capital, including proposals from Ad Hoc Committee, and determined that alternatives were less effective than accomplishing their goals than their plan
- Eighth Circuit concluded section 1123(a)(4) had not been violated

Skadden

Vote Designation

Pacific Western Bank v. Fagerdala USA-Lompoc, Inc. (In re Fagerdala USA-Lompoc, Inc.) 891 F.3d 848 (9th Cir. 2018)

Skadden

- Fagerdala used financing to purchase certain real property to assist with its manufacturing operations
- Pacific Western Bank subsequently purchased the loan and obtained a first lien against the property
- After Fagerdala defaulted on the loan, Pacific Western commenced nonjudicial foreclosure proceedings, and Fagerdala filed for chapter 11 protection
- Fagerdala's plan put Pacific Western's claim in Class 1 and general unsecured claims in Class 4
- In order to confirm its plan, Fagerdala needed to cram down Pacific Western's claim in compliance with section 1129(b), and to obtain acceptance from at least one impaired class in compliance with section 1129(a)(10)
- Fagerdala intended Class 4 to be its impaired accepting class

Fagerdala – Vote Designation

Skadden

- Pacific Western purchased more than half the Class 4 claims in number and approximately 10% in value
  - An entire class is deemed to accept a plan if creditors holding at least two-thirds in value and more than one-half in number vote in favor of the plan
  - Pacific Western purchased sufficient claims to control Class 4, and voted to reject the plan
- Fagerdala moved to designate Pacific Western's Class 4 votes under section 1126(e) on the grounds that they were not acquired in good faith
- Section 1126(e) of the Bankruptcy Code provides "On request of a party in interest, and after notice and a hearing, the court may **designate any entity whose acceptance or rejection of such plan was not in good faith**, or was not solicited or procured in good faith or in accordance with the provisions of this title."

Fagerdala – Vote Designation (Bankruptcy Court Decision)

Skadden

- The bankruptcy court designated Pacific Western's Class 4 votes, based on two primary rationales:
- 1. Pacific Western deliberately only purchased some of the Class 4 claims
  - Considered failure to purchase all Class 4 claims evidence of bad faith
- 2. Allowing Pacific Western "to block confirmation by purchasing such a small percentage of the unsecured debt . . . would be highly prejudicial to the creditors holding most of the unsecured debt."
  - Bankruptcy Court noted purchasing claims to obtain a blocking position is not *per se* bad faith under section 1126(e)
  - In this case, designation was appropriate because Pacific Western's conduct gave it an unfair advantage over creditors who were not offered the chance to sell their claims

Fagerdala – Vote Designation (Ninth Circuit Decision)

Skadden

- The Ninth Circuit overturned the decision and found designation was not appropriate
- Noted the concept of good faith under section 1126(e) is fluid, and that "enlightened self interest" is not bad faith
- Distinguished between "creditor's self interest as a creditor and a motive which is ulterior to the purpose of protecting a creditor's interest"
  - Neither purchasing additional claims for the purpose of protecting a creditor's own interest or purchasing a claim for the purpose of blocking a plan demonstrates bad faith **without something more**
- Ninth Circuit found bankruptcy court erred in finding bad faith based on Pacific Western's offer to purchase only a portion of Class 4 claims
  - While an offer to purchase all claims in a class may support a good faith determination, the failure to do so is not evidence of bad faith

Fagerdala – Vote Designation (Ninth Circuit Decision)

Skadden

- Ninth Circuit determined bankruptcy court incorrectly examined only the "*negative effect* of the action, not the *motivation* of the creditor"
  - Bankruptcy court incorrectly refused to consider Pacific Western's motivations and whether Pacific Western had acted to "secure some untoward advantage over other creditors *for some ulterior motive.*"

Skadden

The Utility of Section 1129(a)(10)

Section 1129(a)(10) – Impaired, Accepting Class Requirement

Skadden

- Section 1129(a)(10) of the Bankruptcy Code provides as a condition to confirmation: "If a class of claims is impaired under the plan, at least one class of claims that is impaired under the plan has accepted the plan, determined without including any acceptance of the plan by any insider."
- Section 1129(a)(10)'s utility has been questioned in light of the barriers to confirmation and creditor holdup value it creates in many chapter 11 cases
- In its *Final Report and Recommendations* (2014), the ABI Commission to Study the Reform of Chapter 11 recommended that confirmation of a chapter 11 plan should not require acceptance by at least one impaired class, and that section 1129(a)(10) should be deleted
- The ABI Commission stated that while some commentators and courts suggest that the purpose of section 1129(a)(10) is to ensure that a plan has some creditor support, this suggestion was not supported by either the legislative history or the Bankruptcy Code itself

ABI Commission Recommends Deleting Section 1129(a)(10)

Skadden

- The ABI Commission began its analysis by noting that claims classification and voting under sections 1122 and 1126 are subject to significant gamesmanship
  - Debtor may attempt to structure classes to isolate dissenting creditors, to ensure creditors supporting the plan dominate the class, or to 'artificially impair' a class
  - Creditors seeking to delay or disrupt confirmation may challenge classification or purchase claims to obtain blocking positions
- The ABI Commission debated the utility of section 1129(a)(10), querying whether the provision protects creditor interests or simply allows creditors to hold up the confirmation process
- The ABI Commission acknowledged section 1129(a)(10) may serve a gating role by ensuring a certain level of creditor support
- But the potential delay, cost, gamesmanship and value destruction attendant on the section outweighed this presumptive benefit

In re Jeppson, 66 B.R. 269 (Bankr. D. Utah 1986) - A Review of the History of Reorganization Law

Skadden

- The decision and legislative history in *In re Jeppson* presents a different view of the significance of section 1129(a)(10)
- The court undertook a lengthy review of the historical development of reorganization procedures and legislation in the United States
  - Illustrated that creditor control over the reorganization process was a dominant theme of chapter 11's legislative history
  - Chapter X, the business reorganization statute which was ultimately superseded by Chapter 11, moved away from this approach and replaced it with a paternalistic attitude towards creditors

In re Jeppson, 66 B.R. 269 (Bankr. D. Utah 1986) - A Review of the History of Reorganization Law

Skadden

- The Court ultimately declined to confirm a plan of reorganization filed by First Interstate Bank of Utah, the largest secured creditor of the debtors, because First Interstate had not submitted a disclosure statement for court approval or solicited votes on its plan
  - First Interstate argued at confirmation that approval of a disclosure statement and voting was a "meaningless exercise" and not required in this case, because First Interstate had signaled its acceptance of the plan and could cram down dissenting creditors
- Court determined that filing and obtaining court approval of a disclosure statement and the solicitation of votes was mandatory before a plan could be confirmed
  - "The expression of acceptance or rejection of a plan is not a meaningless exercise and the right to vote should not be abrogated in the interest of expediency"
- Some contemporary courts had not considered disclosure and voting to be necessary under similar circumstances

In re Jeppson, 66 B.R. 269 (Bankr. D. Utah 1986) - A Review of the History of Reorganization Law

Skadden

- Disclosure and voting were seen sometimes found to be unnecessary where an unimpaired class was 'deemed' to accept the plan under section 1126(f), thereby satisfying requirements of section 1129(a)(10)
  - Note: Section 1129(a)(10) as originally enacted only required that "at least one [non-insider] class of claims has accepted the plan"
  - Did not require that accepting class be impaired, or that the class actually vote
- Cram down was also permissible under section 1129(b) under these circumstances
- The Bankruptcy Court for the district of Utah had rejected this position, and had held that section 1129(a)(10) required the *affirmative* vote on an *impaired* class
  - Congress confirmed this was the correct approach and later amended the language of section 1129(a)(10) to clarify that the vote of an "impaired" class was indeed required

In re Jeppson, 66 B.R. 269 (Bankr. D. Utah 1986) - A Review of the History of Reorganization Law

Skadden

- The court emphasized the Bankruptcy Code had been drafted with an emphasis on disclosure and to equip creditors with the knowledge to decide whether voting in favor of a plan was in their best interests
  - The Bankruptcy Code intentionally defines impairment in the broadest possible terms
  - The Bankruptcy Code also clarifies that a claim holder *may* vote to accept or reject a plan
    - » Chapter X counted non-votes as rejections, but section 1126(c) specifies that acceptances are to be calculated based on claims actually voted
- "The disclosure, solicitation and voting requirements of the Bankruptcy Code are a streamlined and highly simplified procedure for business reorganization. **The opportunity for parties in interest to appear and effectively express a dissenting voice would be drastically diminished if these minimal creditor protections were ignored**."

Thank you to our
panelists and audience!

Skadden

Skadden, Arps, Slate, Meagher & Flom LLP and Affiliates

Faculty Biographies

Michael L. Bernstein is a partner in the Washington, D.C., office of Arnold & Porter Kaye Scholer LLP and chairs its national bankruptcy and corporate restructuring practice. He represents parties in a wide variety of bankruptcy and corporate restructuring matters and in related litigation throughout the U.S. Mr. Bernstein is a co-author of ABI's *Bankruptcy in Practice*, now in its Fifth Edition, and *Chapter 11-101: The Nuts and Bolts of Chapter 11 Practice CD-Rom*. A Fellow of the American College of Bankruptcy, he has written numerous articles, lectured on bankruptcy law topics and been interviewed by major newspapers and on television and radio. He has also testified before Congress as an independent expert, on several occasions, regarding proposed bankruptcy reform legislation. Mr. Bernstein has been recognized as a leading bankruptcy lawyer by numerous publications, including *The Best Lawyers in America*, *Chambers USA: America's Leading Business Lawyers*, *The Legal 500 US: Corporate and Finance*, *Guide to the World's Leading Insolvency and Restructuring Lawyers*, *Washington D.C. Super Lawyers*, *Washingtonian Magazine* and *Lawdragon 3000 Leading Lawyers in America*. He received his A.B. from Brandeis University and his J.D. from Northwestern School of Law.

Hon. Carla E. Craig is a U.S. Bankruptcy Judge for the Eastern District of New York in Brooklyn, appointed on Feb. 28, 2000, and appointed Chief Judge on March 1, 2007. During her years on the bench, she has presided over the chapter 11 cases of many nonprofit corporations, including Interfaith Medical Center, Victory Memorial Hospital, Caritas Health Care, The Brooklyn Hospital Center and other health care providers, as well as chapter 11 cases involving schools and religious congregations. Previously, Judge Craig was an associate with Milbank, Tweed, Hadley & McCloy and a partner with Hertzog, Calamari & Gleason. She later headed Brown Raysman Millstein Felder & Steiner LLP's bankruptcy practice prior to taking the bench. Judge Craig's law practice concentrated primarily in the areas of business bankruptcy and commercial litigation. She has been a regular lecturer for the Practicing Law Institute and is the author of a number of published articles on bankruptcy-related topics, including nonprofit chapter 11 cases, bankruptcy sales, retail bankruptcies and bankruptcy litigation. Judge Craig received her B.A. from Williams College in 1976 and her J.D. from the University of Michigan Law School in 1979.

Hon. Robert D. Drain is a U.S. Bankruptcy Judge for the Southern District of New York in White Plains. Since his appointment, he has presided over such chapter 11 cases as *Loral*, *RCN*, *Cornerstone*, *Refco*, *Allegiance Telecom*, *Delphi*, *Coudert Brothers*, *Frontier Airlines*, *Star Tribune*, *Reader's Digest*, *A&P*, *Hostess Brands*, *Christian Brothers* and *Momentive*. He also has presided over the ancillary or plenary cases of *Corporacion Durango*, *Satellites Mexicanas*, *Parmalat S.p.A.* and its affiliated U.S. debtors, *Varig S.A.*, *Yukos* (II), *SphinX*, *Galvex Steel*, *TBS Shipping*, *Excel Maritime*, *Nautilus*, *Landsbanki Islands*, *Roust* and *Ultrapetrol*. He also has served as the court-appointed mediator in a number of chapter 11 cases, including *New Page*, *Cengage*, *Quicksilver*, *LightSquared*, *Molycorp* and *Breitburn Energy*. Prior to his appointment to the bench in May 2002, Judge Drain was a partner in the bankruptcy department of Paul, Weiss, Rifkind, Wharton & Garrison, where he represented debtors, trustees, secured and unsecured creditors, official and unofficial creditors' committees, and buyers of distressed businesses and distressed debt in chapter 11 cases, out-of-court restructurings and bankruptcy-related litigation. He was also actively involved in several transnational insolvency matters. Judge Drain is a Fellow of the American College of Bankruptcy and a member and board member of ABI, a member of the International Insolvency Institute, and a member and board member of the National Conference of Bankruptcy Judges, as well as a founding member of the Judicial Insolvency Network. He also is the current chair of the Bankruptcy Judges Advisory Group established through the Administrative Office of the U.S. Courts, and was an adjunct professor for several years at St. John's University School of Law's LL.M. in Bankruptcy Program. He is currently is an adjunct professor at Pace University School of Law. Judge Drain has lectured and written on numerous bankruptcy-related topics and is the author of the novel *The Great Work in the United States of America*. He received his B.A. *cum laude* from Yale University and his J.D. from Columbia University School of Law, where he was a Harlan Fiske Stone Scholar for three years.

Peter M. Friedman is a partner with O'Melveny & Myers LLP in Washington, D.C., and a member of the firm's Restructuring and Distressed Company Litigation Practices. He represents troubled borrowers and public entities and their stakeholders, including lenders, bondholders, investors, and officers and directors in bankruptcy courts, district courts and courts of appeals across the country. In the past two years, he has litigated on behalf of the Governors of California and Puerto Rico in separate high-profile restructuring matters. He also currently represents a variety of financial institutions and high-net-worth individuals in fraudulent transfer litigation. His recent litigation includes serving as lead litigation counsel to the Puerto Rico Fiscal Agency and Financial Advisory Authority and Puerto Rico Governor Ricardo Rosselló in Puerto Rico's historic Title III restructuring proceedings, and representing California Gov. Gavin Newsom and the California Department of Finance in the *PG&E* bankruptcy. Mr. Friedman is a Fellow of the American College of Bankruptcy. Previously, he represented the U.S. Treasury and the Presidential Task Force on the Automobile Industry as lender and acquirer in the Chrysler and General Motors bankruptcies. He also advised LyondellBasell Industries as a debtor in every aspect of its bankruptcy restructuring of more than US$25 billion in debt, and represented US Bank, NA as indenture trustee for leveraged lease bonds in the Dynegy Holdings bankruptcy. Before joining O'Melveny, Mr. Friedman was a partner at a major New York law firm and clerked for Hon. Joel M. Flaum of the U.S. Court of Appeals for the Seventh Circuit. He is an adjunct professor of bankruptcy law at Georgetown University Law Center. Mr. Friedman was named one of five "Rising Stars" under 40 by *Bankruptcy Law360*, recognized as one of 12 "Outstanding Young Restructuring Lawyers" by *Turnarounds & Workouts* magazine, named a leading bankruptcy lawyer by *Chambers USA* from 2010-19, noted as one of the Best Lawyers in Washington, D.C., by *Washingtonian Magazine* and *SuperLawyers*, and has been named in *The Best Lawyers in America* for litigation and bankruptcy from 2014-19. He received his B.A. from Trinity College in 1994 and his J.D. from Northwestern University School of Law in 1998.

Jay M. Goffman is a partner with Skadden, Arps, Slate, Meagher & Flom LLP in New York and global co-head of its Corporate Restructuring Group, where has led transformational restructurings and transactions throughout the world encompassing virtually all major industries. The vast majority of Mr. Goffman's restructurings are completed via prepackaged restructurings. Some of the successful out-of-court restructurings/recapitalizations led by Mr. Goffman include those of America West Airlines, Centro Properties Group, DS Waters, Everest Capital, Evergreen International Aviation, Globalstar, Intrawest Resorts, Ion Media, the Portland Trailblazers, RREEF, Offshore Logistics, Travelport, Torm, Triumph Group (Vought Industries) and Westwood One. Mr. Goffman was a pioneer in the use of prepackaged restructurings and is widely regarded as one of the leaders in the field. In addition, he has advised on numerous traditional chapter 11 cases for U.S. and international companies, including SunEdison, China Fisheries, Lyondell-Basell, Olympia and York, Eastern Airlines, Excel Shipping, Nautilus Shipping, Quigley, Pacific Drilling, Syms, Filene's Basement, Texaco and Saxon Industries. Mr. Goffman also has represented lenders, committees and/or equityholders in many major restructurings, including those of Allegiance Telecom, American Airlines, AmeriServe, Atlantic Computer Systems, Bridge Information Systems, Chemtura, Focal, Colt Defense, Harry Macklowe/Equity Office Properties, Movie Gallery, Pacific Drilling, Pan Am, Pocket Communications, Radio Shack, Sunbeam and XO Communications. Mr. Goffman frequently lectures and writes on a variety of restructuring topics, including prepacks, mergers and acquisitions in distressed situations, distressed investing, fiduciary duties of boards of directors, "zone of insolvency" issues, confirmation issues, mass tort issues, cross-border and international insolvency issues, and general and basic bankruptcy analysis. He assisted the National Bankruptcy Review Commission with respect to legislative amendments regarding prepacks and co-chaired a committee of premier restructuring lawyers addressing potential bankruptcy legislation leading to certain congressional amendments to the Bankruptcy Code regarding prepacks. In addition, he was the keynote speaker at the 2012 Harvard Business School Turnaround Conference focusing on international restructuring, one of the lead speakers at the 2013 Quadrennial INSOL Conference in The Hague, and co-chair of the 2014 and 2016 ABI VALCON conferences, among other venues. Mr. Goffman is a Fellow of the American College of Bankruptcy. He also is a member of the International Insolvency Institute and a member of INSOL and its G36 Organization. Mr. Goffman serves on ABI's Board of Directors on its International Committee and co-chaired of the ABI Chapter 11 Reform Commission's Plan Process Committee, whose mandate was to evaluate all aspects of the plan of reorganization process in conjunction with a study of proposed revisions to the Bankruptcy Code. In addition, he co-chaired the Turnaround Management Association Futures Task Force. Mr. Goffman received his B.S. in 1980 in chemical psychobiology from the State University of New York at Binghamton and his J.D. in 1983 with honors from the University of North Carolina at Chapel Hill, where he was a member of the *University of North Carolina Law Review*.

Hon. Kevin R. Huennekens was appointed as a U.S. Bankruptcy Judge for the Eastern District of Virginia in Richmond on Sept. 11, 2006. Prior to his appointment, Judge Huennekens was a partner with the firm of Kutak Rock LLP. He also served as a panel trustee for the U.S. Bankruptcy Court for the Eastern District of Virginia (1988-2006) and is co-editor of the Virginia CLE publication *Bankruptcy Practice in Virginia* (2017). Judge Huennekens is a Fellow of the American College of Bankruptcy and a member of the National Conference of Bankruptcy Judges and ABI. He was also recognized in *Who's Who Legal USA* in Insolvency and Restructuring and *The International Who's Who of Insolvency and Restructuring* in 2006, and was listed in *The Best Lawyers in America* from 1995-2006. Judge Huennekens was an adjunct professor of law at the College of William & Mary Marshall Wythe School of Law from 1993-96, and he successfully argued the case of *Patterson v. Shumate*, 405 U.S. 253, 112 S. Ct. 2242 (1992), before the U.S. Supreme Court. He is a planning committee member of the annual Mid-Atlantic Institute on Bankruptcy and Reorganization Practice and has also been a speaker at Virginia CLE courses on basic and advanced bankruptcy. He is also a co-editor of the Virginia CLE Publication, *Bankruptcy Practice in Virginia* (2017). Judge Huennekens Judge Huennekens chaired the Advisory Committee on Executory Contracts and Leases of the ABI Commission to Study the Reform of Chapter 11. He received his B.A. from the College of William & Mary and his J.D. from the Marshall-Wythe School of Law at the College of William & Mary, where he was a member of the Order of the Coif and its law review.