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2022 Winter Leadership Conference

Making the Most of a Litigation Trust's Retained Causes of Action

*Hosted by the Unsecured Trade Creditors
and Bankruptcy Litigation Committees*

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Making the Most of a Litigation Trust’s Retained Causes of Action

Especially when retained causes of action are the only recoveries for residual stakeholders, having the right toolkit—with tools sharpened and up-to-date—is essential to preserving and maximizing value. This panel will cover statute of limitations issues, including the Golden Creditor Rule; identify pitfalls to avoid when bringing derivative claims, including *in pari delicto*; review lessons learned in bringing claims against equity sponsors; revive the concept of lender liability; provide tips of the trade for maximizing insurance recoveries; and explain the 546(e) safe harbor jurisprudence, among other relevant topics.

I. Introduction

II. Identifying and Preserving the Claims

- A. Deadlines, including deadlines in the DIP order or the D&O policies (such as claims-made deadlines and relation-back to a pre-existing lawsuit or notice), purchasing “tail” insurance coverage
- B. Formal and informal discovery, including Rule 2004 discovery
 - a. Discovery requests should include information regarding, among other things, the following:
 - i. All transactions over \$[X] within the relevant lookback period;
 - ii. All related-party transactions;
 - iii. All inter-company transfers over \$[X];
 - iv. All pending litigation involving an amount in dispute in excess of \$[X];
 - v. Any internal investigations; and
 - vi. Any governmental and/or regulatory investigations or inquiries.
 - b. Official committees are usually able to proceed informally; ad hoc committees should ensure that they are copied on all diligence information provided to an official committee.
- C. Independent fiduciaries, including examiners and special board committees

- a. In the event that, for example, a special committee or independent fiduciary is appointed to investigate asserted or potential claims, a committee should be actively involved to ensure that the company does not try to force a settlement on terms that are advantageous to the company/alleged bad actors. These actions should include, among other things:
 - i. Demanding that information shared with the special committee or fiduciary be shared simultaneously with the committee;
 - ii. Conducting formal and/or informal interviews;
 - iii. Monitoring and policing the use of “privilege” defense in the context of refusal to disclose information and/or documents;
 - iv. Cooperating with the special committee or fiduciary to procure access to third parties; and
 - v. Leading investigation on behalf of estate if there are claims that a special committee or fiduciary cannot bring (i.e., D&O claims related to D&O policies that contain an insured v. insured limitation that does not contain an exemption for debtors in possession).
 - b. The appointment of a special committee to conduct its own investigation with its own set of advisors is becoming increasingly common (*see, e.g., Nine West, Payless*)
- D. Determination to appoint an examiner to aid in investigation efforts and serve as “check” on debtor in possession
- a. Where there are obviously problematic prepetition transactions that need to be investigated, the appointment of an examiner may be appropriate.
 - b. Note, however, that this can be a risky path to pursue for many reasons, including the following:
 - i. It may be difficult to control the expenses and timeline associated with an independent examiner and his or her professionals; and
 - ii. The parties may face impediments to settling any potential litigation that is the subject of an examiner-conducted investigation, and the role of an examiner could become very prominent in large, complex cases (*see, e.g., Caesars, Tribune*)
- E. Document retention, access, and preservation issues, including chain-of-custody and other authentication/hearsay issues and access issues following a sale

- a. Litigation hold notices should be sent early on to debtors, debtors' directors and officers, and applicable third parties
- F. Plan issues, including: (i) third-party releases, (ii) requisite language to preserve claims, to provide access to the debtor's books and records, and to ensure cooperation, (iii) standing to pursue LLC derivative claims; (iv) control over attorney-client privilege (e.g., creditor trusts v. liquidating trusts), and control over instances of jointly held privileges (e.g., the debtor and D&Os in the event of prebankruptcy litigation); (v) oversight boards and committee (including related exculpation and indemnification issues); (vi) laying the foundation for "related to" jurisdiction through the disclosure statement, and (vi) vesting of creditor claims in a creditor trust, and navigating Securities Litigation Uniform Standards Act (a/k/a SLUSA) issues related to state common law fraud claims
- a. Implementation of "gatekeeper" language in Southern District of Texas to address exculpation ruling in *Matter of Highland Cap. Mgmt., L.P.*, 48 F.4th 419 (5th Cir. Sept. 7, 2022)
 - i. Sample "gatekeeper" language as recently incorporated into Sungard plan:

No party may commence, continue, amend, or otherwise pursue, join in, or otherwise support any other party commencing, continuing, amending, or pursuing, a Claim or Cause of Action of any kind against a Covered Party that arose or arises from or is related to any Covered Claim without first (i) requesting a determination from the Bankruptcy Court, after notice and a hearing, that such Claim or Cause of Action represents a colorable claim against a Covered Party and is not a Claim that the Debtors released under the Plan, which request must attach the complaint or petition proposed to be filed by the requesting party and (ii) obtaining from the Bankruptcy Court specific authorization for such party to bring such Claim or Cause of Action against any such Covered Party. For the avoidance of doubt, any party that obtains such determination and authorization and subsequently wishes to amend the authorized complaint or petition to add any Claims or Causes of Action not explicitly included in the authorized complaint or petition must obtain authorization from the Bankruptcy Court *before* filing any such amendment in the court where such complaint or petition is pending. The Bankruptcy Court will have sole and exclusive jurisdiction to determine whether a Claim or Cause of Action is colorable and, only to the extent legally permissible, will have jurisdiction to adjudicate the underlying colorable Claim or Cause of Action.

III. Investigating the Claims

- A. Funding, including through contingency-fee counsel and/or litigation funding (as well as the privilege issues that arise in seeking funding). Discovery issues and considerations related to litigation funding:
 - a. Discovery - A party may only discover a "nonprivileged matter that is relevant to any party's claim or defense." Fed. R. Civ. P. 26(b)(1)

- b. Defendants have argued funding documents are relevant to determine: the adequacy of class counsel; if the plaintiff no longer has standing because the patent or claim was transferred; whether funders are indispensable parties or witnesses; whether a funder declined to take a case because the patent in an infringement suit is invalid; whether the plaintiff's claims are barred under the statute of limitations; and "possible bias issues" with jury members and witnesses. Numerous courts have held that discovery of litigation funding documents is generally irrelevant and/or improper.

Worldview Entertainment Holdings Inc. v. Woodrow, 204 A.D. 3d 629 (N.Y. Sup. Ct. Apr. 28, 2022) (a five-justice panel Appellate Division summarily rejected the defendant's attempt to probe the plaintiff's financial arrangements through four document requests targeting the financing or assignment of plaintiff's claims);

SecurityPoint Holdings, Inc. v. U.S., 2019 WL 1751194 (Fed. Ct. Cl. Apr. 16, 2019) (see ECF Nos. 303, 404);

Benitez v. Lopez, 2019 WL 1578167, at *1 (E.D.N.Y. Mar. 14, 2019);

MLC Intellectual Prop. LLC v. Micron Tech., Inc., 2019 WL 118595, at *2 (N.D. Cal. Jan. 7, 2019);

Space Data Corp. v. Google LLC, 2018 WL 3054797, at *1 (N.D. Cal. June 11, 2018);

Mackenzie Architects P.C. v. VLG Real Estates Developers LLC, 2017 WL 4898743, at *3 (N.D.N.Y. Mar. 3, 2017);

VHT, Inc. v. Zillow Group, Inc., 2016 WL 7077235 (W.D. Wash. Sept. 8, 2016);

V5 Techs. v. Switch Ltd., 334 F.R.D. 306 (D. Nev. Dec. 20, 2019);

Art Akiane LLC v. Art & Soulworks LLC, 2020 WL 5593242 (N.D. Ill. Sept. 18, 2020);

United Access Techs. LLC v. AT&T Corp., 2020 WL 3128269 (D. Del. June 12, 2022);

In re Valsartan N-Nitrosodimethylamine (NDMA) Contamination Prods. Liab. Litig., 405 F. Supp. 3d 612 (D. N.J. Sept. 18, 2019);

Dupont v. Costco Wholesale Corp., 2019 WL 8158471 (E.D. La. Oct. 15, 2019);

Miller UK Ltd. v. Caterpillar, Inc., 17 F. Supp. 3d 711 (N.D. Ill. Jan. 6, 2014)

- B. Retaining professionals and deploying forensics technology to investigate, perform asset tracing, and piece the puzzle together; credible expert witnesses, if needed, to provide expert opinions

Gathering evidence from all sources, including the debtor's files, client-file requests to debtor's former counsel, SEC filings, file-access requests to the SEC, witness interviews, Rule 2004 discovery, requests under 28 U.S.C. § 1782 for foreign-related proceedings, accessing information gathered pursuant to Section 220 of Delaware General Corporation Law, and access to cooperating stakeholders (frequently creditors receiving trust interests under a plan)

- C. Preliminary solvency and damages analysis, including a determination of (i) what standard for insolvency may apply (*e.g.*, the state of incorporation under internal affair doctrine), including how "solvency" is defined under state law; (ii) when the company became insolvent (which may be relevant to both fraudulent transfer and fiduciary duty claims), (iii) which events or transactions seem to have been particularly damaging, and (iv) what damages were sustained by the company versus by its creditors or investors
- D. Forum options, including evaluation of: (i) where the trustee can file suit (which involves jurisdictional and venue considerations), and (ii) where the trustee should file suit (which involves statute-of-limitations and choice-of-law considerations)
- E. Personal jurisdiction considerations, and potential *forum non conveniens* defense considerations; Personal jurisdiction discovery (*e.g.*, *Toys "R" Us, Inc. v. Step Two, S.A.*, 318 F.3d 446 (3d Cir. 2003); *Chase Bank USA N.A. v. Hess Kennedy Chartered LLC*, No. 08-121-JJF, 2010 WL 3022921, at *1 (D. Del. Jul. 29, 2010).
- F. Tension between certain claims, including how: (i) D&O claims may trigger an exclusion in the D&O policy, (ii) D&O claims may establish an *in pari delicto* and/or causation defense for professionals, and (iii) some fraudulent transfer claims may establish an *in pari delicto* defense for professionals

IV. Litigating the Claims

- A. D&O claims
 - 1. Duty issues, including whether any fiduciary duties: (i) are eliminated (under Delaware's 8 Del. C. § 102(b)(7) or the applicable state equivalent), (ii) are exculpated, or (iii) are expanded to include the interests of creditors

2. Statute-of-limitations concerns, including: (i) common tolling doctrines, including the tolling granted under 11 U.S.C. § 108(a), and (ii) intervention into existing derivative litigation (*e.g.*, the *Erin Energy* case), (iii) whether the applicable statute is actually a “statute of repose”
 3. Insurance issues, including: (i) claims-made deadlines (and whether prior notice was sufficient); (ii) typical exclusions; (iii) policy-limits demands, (iv) dealing with coverage denials with consent judgments/assignments; (v) how the claims were described in a prior notice, and (vi) how a “claim” is defined in the policy
 4. Potential cost of legal defense of directors and officers, check applicable state law and LLC operating agreements
- B. Professional claims
1. Engagement letters, including: (i) choice-of-law clauses; (ii) arbitration and forum-selection clauses, and (iii) limitation-of-liability clauses
 2. Common defenses, including: (i) *in pari delicto*, and (ii) causation
- C. Lender/bank claims
1. Overview of these claims, including essential elements and common defenses
 2. Discuss recent cases sustaining such claims, including *Bailey Tool & Mfg. Co. v. Republic Bus. Credit (In re Bailey Tool & Mfg. Co)*, 2021 WL 6101847 (Bankr. N.D. Tex. Dec. 23, 2021)
- D. Fraudulent transfer claims
1. Statute-of-limitations concerns, including: (i) the 1-year discovery rule for an actual fraudulent transfer claim, and (ii) the Golden Creditor Rule (*e.g.*, *Williamson v. Smith (In re Smith)*, Case No. 19-40964, 2022 WL 1814415 (Bankr. D. Kan. June 2, 2022))
 2. Section 546(e) safe harbor, including recent cases such as: (i) *Kirschner v. Large Shareholders (In re Tribune Co. Fraudulent Conveyance Litig.)*, 10 F.4th 147 (2d Cir. 2021), (ii) *Kravitz v. Samson Energy Co., LLC (In re Samson Res. Corp.)*, 2022 WL 3135288 (Bankr. D. Del. Aug. 4, 2022); and *Alan D. Halperin, as the Trustee for the Tops Holding Litigation Trust v. Morgan Stanley Investment Management Inc., et al*, Adv. Pro. No. 20-08950 (Bankr. S.D.N.Y. Oct. 10, 2022), D.I. 972.
 3. Presumption Against Extraterritoriality (*Weisfelner v. Blavatnik (In re Lyondell Chem. Co.)*, 543 B.R. 127, 148 (Bankr. S.D.N.Y. 2016) and *Sec. Investor Prot.*

SIPA Liquidation Corp. v. Bernard L. Madoff Inv. Sec. LLC, 480 B.R. 501, 527–28 (Bankr. S.D.N.Y. 2012) versus *Barclay v. Swiss Fin. Corp. Ltd. (In re Midland Euro Exchange Inc.)*, 347 B.R. 708, 717 (Bankr. C.D. Cal. 2006))

Faculty

Hon. Hannah L. Blumenstiel is a U.S. Bankruptcy Judge for the Northern District of California in San Francisco. Prior to her appointment on Feb. 11, 2013, Judge Blumenstiel was an associate (2003-08) and then a partner (2008-12) with Winston & Strawn LLP, where she focused her practice on creditors' rights litigation in state and federal court, including bankruptcy court. From 2001 to 2003, Judge Blumenstiel was an associate with Murphy Sheneman Julian & Rogers LLP, where she represented debtors, creditors and trustees in bankruptcy cases and adversary proceedings. She served as a law clerk to Hon. Charles M. Caldwell of the U.S. Bankruptcy Court for the Southern District of Ohio (Eastern Division) from 1998 to 2001, and from 1997-98, she represented the State of Ohio's interests in bankruptcy cases as an assistant attorney general with the Revenue Recovery Section of the Ohio Attorney General's Office. Judge Blumenstiel sits on ABI's Board of Directors. She received her J.D. from Capital University Law School in 1997 while working full-time for the Columbus Bar Association as director of its *pro bono* initiative, "Lawyers for Justice," and her B.A. from Ohio State University in 1992.

Meredith A. Lahaie is a partner with Akin Gump Strauss Hauer & Feld LLP in New York and San Francisco. She represents debtors, creditors, bondholders, debtor-in-possession lenders and acquirers of businesses and assets in large, complex chapter 11 cases and out of court restructurings. Ranked as one of the industry's leading restructuring lawyers by *Chambers USA* and *Legal 500*, and recently named one of *The Deal's* Top Women Dealmakers in Restructuring, Ms. Lahaie advises on complex restructuring cases of all sizes, both in and out of court, and has handled matters for clients in industries as varied as real estate, retail, energy, shipping and entertainment. She is regarded as one of the industry's leading young restructuring lawyers, and in the last five years deals in which she played a central role have been recognized with 14 awards. Following law school, Ms. Lahaie clerked for Hon. Adlai S. Hardin in the U.S. Bankruptcy Court for the Southern District of New York. She received her B.A. *magna cum laude* in 2002 from Tufts University and her J.D. in 2005 from the University of Connecticut School of Law.

Eric D. Madden is a partner with Reid Collins & Tsai LLP in Dallas, where his practice focuses on the representation of liquidating trustees, creditor committees and private-equity funds in complex bankruptcy and business litigation cases. He has been listed in *The Best Lawyers in America* for bankruptcy litigation, is AV-rated by Martindale-Hubbell, and has been named a *Texas Super Lawyer* in business litigation. Mr. Madden is a former co-chair of ABI's Bankruptcy Litigation Committee and is a current co-chair of ABI's Bankruptcy Taxation Committee. He received both his B.A. and J.D. from the University of Kansas, where he was a member of Phi Beta Kappa and the Order of the Coif, and served as editor-in-chief of the *Kansas Law Review*.

Gordon Z. Novod is a principal with Grant & Eisenhofer P.A. in New York and heads the firm's bankruptcy and distressed litigation practice. He has 20 years of experience representing ad hoc and official committees, distressed investors, lenders, litigation trustees, indenture trustees, trade creditors and other parties in some of the most complex landmark restructurings and in litigation matters. Mr. Novod's practice focuses on representing litigation trustees and institutional investors in

litigation matters involving, among other things, bankruptcy avoidance, nonbankruptcy fraudulent transfers, fiduciary duty, unlawful dividend and corporate governance. He has experience litigating issues related to corporate debt securities in default and distressed situations, including exchange transactions, redemptions and the Trust Indenture Act. In the bankruptcy context, he has litigated all aspects of chapter 11 plans of reorganization, valuation and plan-confirmation proceedings, contested debtor-in-possession financing and cash-collateral use, the pursuit of fraudulent-transfer actions, and other matters involving bankruptcy-related litigation. In 2011, Mr. Novod was named on *Law360*'s list of "Rising Stars" in restructuring, which recognized him as "one of the five bankruptcy attorneys under 40 to watch." He was also named a finalist in The M&A Advisor's "40 under 40." The following year, he was recognized as a winner of the 2012 40 Under 40 East M&A Advisor Recognition Awards and selected for inclusion to the *New York Super Lawyers* list of "Rising Stars" for Bankruptcy. From 2013-21, he was selected to *New York Metro Super Lawyers* for Bankruptcy. Mr. Novod served on the New York City Bar Association's Committee on Bankruptcy and Corporate Reorganization. Prior to joining G&E, he was a partner in the bankruptcy & corporate restructuring group at Brown Rudnick in New York. He also formerly practiced in the corporate restructuring and bankruptcy group at Kramer Levin Naftalis & Frankel LLP. Mr. Novod received his B.A. from Emory University in 1998 and his J.D. from the Benjamin N. Cardozo School of Law at Yeshiva University in 2001.

Jolene E. Wee, CIRA is the owner, managing director and founder of JW Infinity Consulting, LLC in New York, a financial advisory firm specialized in providing transaction advisory, interim management, litigation consulting, and forensic accounting services to distressed companies and its stakeholders. Using her mathematics and computer science background, she deploys large-scale data analytics to derive forward-looking business insights based on her professional training in accounting, finance and economics. Ms. Wee has served as an advisor to investors, fiduciaries, creditor committees, debtors, legal counsel, distressed companies, high-net-worth individuals, and public agencies on restructuring, bankruptcy, litigation, forensic, financing, merger and buyout matters. She has also performed fraudulent-transfer analyses and business valuations on bankruptcy litigation matters. Her case experience includes companies in the banking, e-commerce, financial services, health care, insurance, manufacturing, professional services, real estate and retail industries with revenues of up to \$15B. Fluent in several Chinese and Southeast Asian languages, Ms. Wee was selected as a member of ABI's 2020 "40 Under 40" class. In 2018, she was named Valuation Adviser of the Year by *Finance Monthly Global Awards*. Ms. Wee is a subchapter V trustee in Region 2, covering the Eastern and Southern Districts of New York, and Region 4, covering Maryland, the District of Columbia and the Eastern District of Virginia. She received her bachelor's degrees in mathematics and business administration with a focus on finance from Berea College, and her M.B.A. from Miami University of Ohio.