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Update on Topical Issues in Bankruptcy

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Topical Issues in Bankruptcy:

Circuit Comparison of Make-Whole Premiums and Structured Dismissals Post-*Jevic*

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Make-Whole Premiums: Second, Third, and Fifth Circuit Comparison

What is a Make-Whole Premium?

- A "make-whole premium" is a provision in financing documents pursuant to which the borrower is obligated to pay an amount greater than the principal amount of debt remaining if the borrower decides to pay its principal early, most commonly according to a predetermined formula.
- These types of premiums are included in financing agreements to protect lenders from the loss of future fixed interest payments resulting from a borrower's decision to prepay debt.
- Disputes often arise in a chapter 11 case if a make-whole provision is triggered:
  - prior to bankruptcy and remains unpaid at the time of filing;
  - automatically by the commencement of a bankruptcy case;
  - during the bankruptcy by virtue of a pay down or refinancing; or
  - pursuant to the terms of a plan of reorganization.

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Make-Whole Premiums: Issues in Bankruptcy

- The Bankruptcy Code does not speak to the enforceability of make-whole premiums.
- As demonstrated by the case studies herein, several United States Courts of Appeal in popular filing jurisdictions have taken contrasting approaches in analyzing the enforceability of these provisions.
  - Focused on the parties' intent, the Third Circuit in ***Energy Future Holdings*** endorsed make-whole premiums as enforceable in chapter 11.
  - Shortly after the Third Circuit's ruling, the Second Circuit created a split in ***MPM Silicones*** and found that make-whole premiums generally do not survive a debtor's bankruptcy filing absent express language to the contrary.
    - Notwithstanding the MPM ruling, certain bankruptcy judges have found that careful drafting may render a make-whole premium enforceable.
  - The Fifth Circuit got in on the game in ***Ultra Petroleum*** and on remand, the Bankruptcy Court for the Southern District of Texas enforced make-whole premiums as liquidated damages and payable on a case by case review.

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Make-Whole Premiums: Issues in Bankruptcy (cont'd)

When analyzing the enforceability of make-whole premiums, courts have focused on the following issues:

- <u>Acceleration</u>
  - Make-Whole Premiums are commonly in conflict with acceleration provisions whereby the borrower must pay the full amount of the principal upon an event of default.
- <u>Optional Event of Default</u>
  - Is a bankruptcy-related Event of Default "optional?" If yes, the make-whole may be enforceable.
- <u>Redemption or Prepayment?</u>
  - Unlike a prepayment, a redemption may occur at or after maturity. Consequently, whether a make-whole premium is labeled a "prepayment" or "redemption" may affect its enforceability when the acceleration provision is triggered.
- <u>Unmatured Interest or Liquidated Damages?</u>
  - Is a make-whole premium "unmatured interest"?
  - Should a make-whole premium be considered akin to liquidated damages?
    - If the make-whole premium is deemed "unmatured interest," as defined in section 502(b)(2), it is not an allowable claim under the Bankruptcy Code if the creditor is unsecured or under-secured.
    - If a make-whole premium is deemed "liquidated damages," it can be allowed.
    - When determining whether a make-whole premium is unmatured interest or liquidated damages, courts have focused on whether it is structured as a one-time payment versus whether it accrues over time, among other things.

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Third Circuit Case Study: *Energy Future Holdings*

- On April 29, 2014, Energy Future Holdings ("EFH"), an electric utility company headquartered in Dallas, Texas, filed for chapter 11 protection in the Bankruptcy Court for the District of Delaware.
- The EFH debtors' $4 billion 10% ten-year indenture included a provision entitled "Optional Redemption" making the make-whole premium due and payable if the debtors "redeem[ed] all or a part of the notes at a redemption price equal to 100% of the principal amount of the notes redeemed plus the Applicable Premium [i.e., the make-whole] . . . and accrued and unpaid interest."
- The indenture also provided that "all outstanding notes shall be due and payable immediately without further action or notice" upon the filing of a bankruptcy petition.
- The EFH debtors proposed to refinance the secured debt without paying the make-whole premium.
- The Bankruptcy Court held that debtors could repay the secured debt without any premium as the notes were being paid upon a bankruptcy-induced acceleration and were not being redeemed at the borrower's option. The District Court affirmed.
- On appeal, however, the Third Circuit concluded the make-whole premium had been triggered and was enforceable.
- The Third Circuit focused on the parties' contractual intent and emphasized that a debtor's bankruptcy filing does not render specifically contracted-for make-whole premium provisions unenforceable.
- The Third Circuit found that the EFH debtors' decision to file for chapter 11 was indeed a voluntary act that triggered the redemption provision of the indentures and required satisfaction of the make-whole premium.
- Failure to pay the make-whole premium would "conflict[] with th[e] indenture's text and fail[] to honor the parties' bargain."

Third Circuit Case Study: *Energy Future Holdings* (cont'd)

> Section 3.07. Optional Redemption.
>
> (a) Notes Make Whole Redemption. At any time prior to May 15, 2016 (in the case of the 2021 Second Lien Notes) or March 1, 2017 (in the case of the 2022 Second Lien Notes), the Issuer may redeem each series of Notes, in whole or in part, at a redemption price equal to 100% of the principal amount of the series of Notes to be redeemed plus the Applicable Premium as of, and accrued and unpaid interest (including Additional Interest, if any) to, the applicable date of redemption (the "Redemption Date")...

- The Third Circuit's analysis focused on three questions:
  - Was there a redemption?
    - Yes, the redemptions are broad enough to encompass post-maturity repayments.
  - Was it optional?
    - Yes, because EFH had the option of reinstating the notes through its plan, but instead decided to refinance the notes.
  - Did it occur before the date specified in the indenture?
    - Yes.
- Thus, the make-whole was triggered and enforceable.

Second Circuit Case Study: *MPM Silicones*

- The United States Court of Appeals for the Second Circuit weighed in on make-whole premiums approximately one year after the Third Circuit's ruling.
- In April 2014, MPM Silicones ("MPM") commenced chapter 11 cases in the Bankruptcy Court for the Southern District of New York.
- Two years prior to commencing their chapter 11 cases, the MPM debtors had issued approximately $1.35 billion in secured notes with a weighted fixed interest rate of 9.08%.
- The indenture provided the noteholders would be entitled to a make-whole premium if the notes were repaid prior to their maturity in 2020.
- The MPM debtors' plan allowed the noteholders to elect to receive either full cash payment (without any make-whole premium) or replacement notes with the option of litigating in the bankruptcy court whether they were entitled to the make-whole premium.
- The Bankruptcy Court found the make-whole premium was not enforceable in bankruptcy. The District Court affirmed.
- The Second Circuit also affirmed, focusing its analysis on the issue of acceleration.
- The Second Circuit held that a make-whole premium is unenforceable when automatic acceleration arises solely from a bankruptcy filing.
  - Distinguishing the filing of a bankruptcy petition from a voluntary prepayment, the Court concluded"[a] payment made mandatory by operation of an automatic acceleration clause is not one made at [the debtors'] option."
- In conclusion, to be enforceable within the Second Circuit, the financing agreement must explicitly provide that a make-whole premium is not disallowed due to the existence of an automatic acceleration clause.

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Second Circuit Case Study: *MPM Silicones (cont'd)*

> 5. Optional Redemption.
>
> …[P]rior to October 15, 2015, the Issuer may redeem the Notes at its option, in whole at any time or in part from time to time, upon not less than 30 nor more than 60 days' prior notice…at a redemption price equal to 100% of the principal amount of the Notes redeemed plus the Applicable Premium as of, and accrued and unpaid interest and Additional Interest, if any, to, the applicable redemption date…

- The Second Circuit concluded that a "redemption" can occur only at or before maturity.
- Since the acceleration clause had advanced the maturity of the debt, the payment was not a redemption.
- Even if there was a redemption, it was not optional, as the obligation to repay the notes came about automatically by virtue of the acceleration clause.

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Fifth Circuit Case Study: *Ultra Petroleum Corporation*

- Ultra Petroleum Corporation ("Ultra"), a natural gas company headquartered in Englewood, Colorado, issued a series of notes totaling approximately $1.5 billion to various noteholders.
- Ultra subsequently filed for bankruptcy due to a decline in natural gas prices, which resulted in the company being unable to pay its noteholders.
- A sharp rise in commodity prices resulted in Ultra becoming solvent postpetition and able pay its noteholders in full.
- While the noteholders were unimpaired under the plan, the class distribution only included payment in full in cash plus postpetition interest, without the make-whole premium.
- The Ultra debtors argued that the make-whole premium should be disallowed as unmatured interest.
- The Bankruptcy Court ruled in favor of the noteholders and held that payment of the contractually-required make-whole premium and the post-petition interest at the default rate was required to render claims unimpaired—even if the Bankruptcy Code otherwise disallows such claims.
- However, on direct appeal, the Fifth Circuit subsequently held that a claim is not impaired simply because a plan fails to pay amounts that are disallowed under the Bankruptcy Code.
  - Under the Fifth Circuit's view, a creditor is not impaired if a provision of the Bankruptcy Code – in this case, section 502(b)(2) – takes away one of the creditor's rights.
  - Instead, a creditor is only impaired if the proposed plan does not give it all that it is entitled to, after taking account of any Code-based limitations on the creditor's rights.
- The Fifth Circuit remanded the case to the Bankruptcy Court to determine:
  - whether make-whole premiums constitute "unmatured interest" and are thus disallowed under section 502(b)(2); and
  - whether the solvent-debtor exception is still valid, and if so, whether it entitles noteholders to post-petition interest at contractual default rates.

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Fifth Circuit Case Study: *Ultra Petroleum Corporation (cont'd)*

- On remand, the Bankruptcy Court determined that the make-whole premium was not unmatured interest.
- The Bankruptcy Court held that the make-whole premium was instead a liquidated damages clause because it:
  - was one-time payment;
  - was triggered and contingent on the timing of the prepayment and the applicable Treasury rates at the time of prepayment;
  - does not compensate the lender for the borrower's use or forbearance of the lender's money; and
  - does not accrue over time.
- The Bankruptcy Court further held that the Solvent Debtor Exception still applies to corporations that become solvent during bankruptcy (*i.e.* they are able to pay creditors in full).
- According to the Solvent Debtor Exception, when the debtor becomes solvent during bankruptcy, unimpaired unsecured creditors have the right to post-petition interest. The *Ultra* court held that the proper post-petition interest rate is the contractual default rate.

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Fifth Circuit Case Study: *Ultra Petroleum Corporation*

- While the language in Ultra was not perfect, it was strong enough that there was no real dispute that the make-whole premium had been triggered.

8.2 Optional Prepayments.

(a) Fixed Rate Notes. The Company may, at its option, upon notice as provided below, prepay at any time all, or from time to time any part of, one or more series or tranches of fixed rate Notes … at 100% of the principal amount so prepaid, plus the Make-Whole Amount determined for the prepayment date with respect to such principal amount. …

This language alone would likely not have satisfied the *MPM Silicone* standard.

8.7 Make-Whole Amount.

"Make-Whole Amount" means, with respect to any fixed rate Note, an amount equal to the excess, if any, of the Discounted Value of the Remaining Scheduled Payments with respect to the Called Principal of such fixed rate Note over the amounts of such Called Principal, provided that the Make-Whole Amount may in no event be less than zero. For the purposes of determining the Make-Whole Amount, the following terms have the following meanings:

"Called Principal" means, with respect to any fixed rate Note, the principal of such Note that is to be prepaid pursuant to Section 8.2 or has become or is declared to be immediately due and payable pursuant to Section 12.1, as the context requires. …

However, the definition of the make-whole amount makes clear it is intended to apply post-acceleration.

12.1 Acceleration.

…Upon any Notes becoming due and payable under this Section 12.1, whether automatically or by declaration, such Notes will forthwith mature and the entire unpaid principal amount of such Notes, plus (w) all accrued and unpaid interest thereon … (x) any applicable Make-Whole Amount determined in respect of such principal amount (to the full extent permitted by applicable law)…shall all be immediately due and payable…. The Company acknowledges, and the parties hereto agree, that each holder of a Note has the right to maintain its investment in the Notes free from repayment by the Company (except as herein specifically provided for) and that the provision for payment of a Make-Whole Amount…by the Company, if any, in the event that the Notes are prepaid or are accelerated as a result of an Event of Default, is intended to provide compensation for the deprivation of such right under such circumstances.

And the acceleration provision is also express in requiring the make-whole.

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Another Third Circuit Case Study: *Hertz Corporation*

- Hertz Corporation ("Hertz"), a car rental company based in Estero, Florida, entered into four prepetition indentures with Wells Fargo, which contained language of automatic acceleration upon the filing of a bankruptcy and optional redemption provision with a make-whole premium.
- Hertz filed for bankruptcy due to disruptions caused to travel and its business operations resulting from the Covid-19 pandemic.
- The Hertz plan provided generally for payment in full in cash on the effective date to creditors plus post-petition interest to the effective date at the federal judgment rate or in the amount necessary to render them unimpaired and a distribution to shareholders of cash and new warrants or subscription rights.
- The confirmation order preserved the rights of the noteholders to assert entitlement to a make-whole premium and additional interest and other claims as necessary to render their claims unimpaired.
- Wells Fargo, as Indenture Trustee, filed a complaint seeking declaratory judgment that Hertz is required to pay post-petition interest and make-whole premium on two classes of notes.
- Wells Fargo alleged that because the noteholders were treated as unimpaired under the plan, their claims for post-petition interest and/or the make-whole premium must be paid.
- In response, Hertz filed a Motion to Dismiss.

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Another Third Circuit Case Study: *Hertz Corporation* (cont'd)

- The Court granted the motion to dismiss for the first class of notes, but denied the motion to dismiss for the second class of notes.
  - The first class of notes ("Class 1 Notes") specified that the make-whole premium was due if the notes are redeemed prior to "maturity."
  - The second class of notes ("Class 2 Notes") specified that the make-whole premium was due if the notes are redeemed prior to the "Stated Maturity," which is a defined term in the Indenture corresponding to the date the notes were originally due.
- The Hertz court held, among other things:
  - Class 1 Notes
    - "Maturity" must mean the common meaning of maturity, which under the terms of the Indenture includes maturity upon the acceleration caused by a bankruptcy filing.
    - Consequently, because the notes were redeemed before the initial "Stated Maturity" but after maturity arising as a result of the bankruptcy filing, the make-whole premium does not apply.
    - The Court granted Hertz's motion to dismiss with regards to the first class of notes.
  - Class 2 Notes
    - "Stated Maturity" is a defined term meaning when the notes were originally due. Because this date had not yet passed, the make-whole premium applies.
    - The Court denied Hertz's motion to dismiss with regards to the second class of notes.

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Another Third Circuit Case Study: *In re Hertz Corporation (cont'd)*

Class 1 Notes

6. Redemption. (a) The 2022 Notes will be redeemable, at the Company's option, in whole or in part, at any time and from time to time on and after October 15, 2017 and prior to maturity at the applicable redemption price set forth below. ... The 2022 Notes will be so redeemable at the following redemption prices (expressed as a percentage of principal amount), plus accrued and unpaid interest, if any, to the relevant Redemption Date (subject to the right of Holders of record on the relevant Regular Record Date to receive interest due on the relevant Interest Payment Date pursuant to Section 307 of the Indenture), if redeemed during the 12-month period commencing on October 15 of the years set forth below:

Redemption Period	Price
2017	103.125%
2018	102.083%
2019	101.042%
2020 and thereafter	100.000%

Section 602. Acceleration of Maturity; Rescission and Annulment. ... [I]f an Event of Default specified in Section 601(viii) or Section 601(ix) with respect to the Company occurs and is continuing, unless otherwise specified for Notes of any series in the applicable Notes Supplemental Indenture as contemplated by Section 301, the principal of and accrued but unpaid interest on all the Outstanding Notes will *ipso facto* become immediately due and payable without any declaration or other act on the part of the Trustee or any Holder...

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Another Third Circuit Case Study: *In re Hertz Corporation (cont'd)*

> **6. Redemption.** (a) The 2022 Notes will be redeemable, at the Company's option, in whole or in part, at any time and from time to time on and after October 15, 2017 and prior to maturity at the applicable redemption price set forth below. …

- The redemption premium was not triggered because acceleration advanced the "maturity" of the notes such that they were not paid "prior to maturity" as required by section 6.
- Unhelpfully for the noteholders, the indenture contained a defined term "Stated Maturity" – such that the court was able to conclude that "maturity" in section 6 meant something different.

> **Section 602. Acceleration of Maturity; Rescission and Annulment.** … [I]f an Event of Default specified in Section 601(viii) or Section 601(ix) with respect to the Company occurs and is continuing, unless otherwise specified for Notes of any series in the applicable Notes Supplemental Indenture as contemplated by Section 301, the principal of and accrued but unpaid interest on all the Outstanding Notes will *ipso facto* become immediately due and payable without any declaration or other act on the part of the Trustee or any Holder…

- Although section 602 was not helpful to the noteholders – since it did not mention the premium – the court concluded, consistent with *EFH*, that it was largely irrelevant to the analysis.

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Reconciling *EFH, MPM, Hertz,* and *Ultra*

- The *MPM Silicones* and *EFH* opinions are difficult to reconcile, with a major distinction between the two lying in the Court's differing views over what constitutes an optional redemption.
  - Conceivably, the divergent opinions were driven by context:
    - *EFH* involved a solvent debtor that had executed a long-planned strategy of refinancing its debt.
    - *MPM* involved an insolvent debtor that had formulated a restructuring once in bankruptcy.
- One point on which the *MPM* and *EFH* courts appear to agree is that a properly crafted acceleration provision may give rise to an obligation to pay a make-whole upon a bankruptcy default.
  - For instance, the Bankruptcy Court for the Southern District of New York in *1141 Realty Owner LLC,* which post-dates *MPM*, enforced a make-whole premium where the financing agreement unambiguously required its payment after default. *In re 1141 Realty Owner LLC*, 598 B.R. 534, 544 (Bankr. S.D.N.Y. 2019) ("One way to ensure that a make-whole is payable even after acceleration is to say so explicitly.").
  - *Hertz* further confirmed this principle when it declined to enforce the make-whole premium because the make-whole provision referred to the notes' maturity instead of the defined term "Stated Maturity" (which had not yet passed), making the "redemption" not apply since the notes were redeemed after the maturity date, which was the filing of the bankruptcy pursuant to the acceleration provision.
  - In *Ultra*, the Fifth Circuit held that because the make-whole provision made clear that it was intended to apply post-acceleration, and the acceleration clause expressly required the make-whole amount, the Make-Whole Premium was enforceable.

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Structured Dismissals Post-*Jevic*

What is a Structured Dismissal?

- A structured dismissal is a dismissal of a chapter 11 case coupled with some or all of the following additional provisions in the dismissal order:
  - Releases and/or exculpations (some more limited than others);
  - Protocols for reconciling and paying claims;
  - "Gifting" of funds; or
  - Provisions for the Bankruptcy Court's continued retention of jurisdiction over certain post-dismissal matters.
- A structured dismissal is an alternative to:
  - Proceeding with the confirmation of a liquidating chapter 11 plan;
  - Converting the chapter 11 case to a chapter 7; or
  - Seeking entry of an order dismissing the chapter 11 case, without the provisions noted above, returning the parties to their state law rights and remedies.

Advantages of Structured Dismissals

- Creditors may not want to fund a plan process when there is a significant amount of 503(b)(9) or other administrative claims that will swamp the value of a debtor's estate.
- Most structured dismissal orders contain some type of claims-reconciliation process to provide an expedited, cost-effective way to reconcile claims and distribute funds to creditors to achieve similar results to a chapter 11 plan.
- Converting the case may be more costly. Bringing in a chapter 7 trustee and new professionals could end up costing more and delay resolution than a structured dismissal.

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Structured Dismissal – Issues and Considerations

- Source of Authority. Case law is not settled on whether Bankruptcy Courts have authority under the code to approve structured dismissals.
  - Courts have noted that structured dismissals are controversial, have no explicit statutory basis, are disfavored by the ABI Commission on chapter 11 reform, and are generally unsuitable for individual debtors, unlike corporate debtors. *See In re Johnson*, 565 B.R. 417, 421 (Bankr. C.D. Cal. 2017).
  - Movants generally rely on two code provisions when requesting structured dismissals, neither of which explicitly grant the court the ability to grant structured dismissals:
    - 11 U.S.C. § 105(a): "The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title"
    - 11 U.S.C. § 349(b): "Unless the court, for cause, orders otherwise, a dismissal of a case . . .

      (1)reinstates—

      (A) any proceeding or custodianship superseded . . .

      (B) any transfer avoided under section . . .

      (C) any lien voided . . .

      (2) vacates any order, judgment, or transfer ordered . . .

      (3) revests the property of the estate in the entity in which such property was vested immediately before the commencement of the case . . ."
- Sub Rosa Plan. There is a debate regarding whether structured dismissals are in substance *sub rosa* plans, granting *de facto* plans of reorganization not subject to the confirmation process.
- Priority Skipping. Priority skipping in a structured dismissal (but not structured dismissals per se) was expressly disallowed in Jevic.

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Jevic and Absolute Priority

- Jevic Holding Corp. ("Jevic"), a trucking and transportation company, was purchased by Sun Capital in a leveraged buyout. The leveraged buyout was financed through a $101 loan from CIT Group.
- On May 20, 2008, Jevic filed a voluntary petition for relief in the Delaware Bankruptcy Court.
- The bankruptcy prompted two lawsuits:
  - Former Jevic truckdrivers sued Jevic for failure to provide proper notice of termination to employees in a violation of the federal WARN Act, and the truckdrivers were awarded a judgment providing that they be paid as priority wage claimants.
  - The official committee of unsecured creditors sued Sun Capital and CIT Group for fraudulent conveyance in connection with the leveraged buyout.
- Jevic, Sun Capital, CIT Group, and the committee subsequently entered into a Settlement Agreement that called for a structured dismissal whereby the WARN claimants would get paid nothing, but lower-priority general unsecured creditors would be paid.
- The WARN claimants objected to the Settlement Agreement, arguing that the distribution scheme violated the Bankruptcy Code's priority rules, and the case made its way to the Supreme Court.

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Jevic and Absolute Priority (cont'd)

- Issue: Can a structured dismissal include a distribution scheme that violates priority without the consent of affected creditors?
- Holding
  - No, Section 507 priority rules apply to structured dismissals, and therefore a structured dismissal cannot include a distribution scheme that violates priority without the consent of affected creditors.
  - More, specifically, the Court found that the Settlement Agreement violates priority because:
    - It is a final disposition (as opposed to interim relief);
    - It does not preserve the debtor as a going-concern;
    - It does not make disfavored creditors better off;
    - It does not promote the possibility of a confirmable plan;
    - It does not help restore the status quo ante; and
    - It does not protect reliance interests.
  - Potential exception? – can a priority-deviating scheme be allowed if:
    - They are interim distributions; and
    - They serve significant Bankruptcy Code-related objectives.

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Structured Dismissal Approved – *In re Great Atlantic & Pacific Tea Co.*

- Facing financial trouble due to increasing competition from discount supermarket chains, the Great Atlantic & Pacific Tea Company (A&P), once the largest grocery store retailer in the United States, began looking for M&A options in 2014.
- This process was unsuccessful, and A&P subsequently commenced a Sale Strategy whereby it solicited bids from 30 potential buyers, eventually receiving 8 bids.
- Given that the bidders were only willing to purchase A&P's assets free and clear of all liabilities, A&P filed its voluntary petition on July 10, 2015, reasoning that the "only viable path to maximize the value of [its] business and preserve thousands of jobs is a strategic chapter 11 filing to facilitate sales free and clear of liabilities."
- A&P successfully implemented the Sale Strategy, receiving $910 million in sales proceeds and entered into a Global Settlement with the only remaining secured creditors at the time and a majority of the union and pension plans.
- However, after nearly five years of proceeding in accordance with the Global Settlement, A&P was only able to pay 20% of its administrative expense claims due to insufficient funds and sought approval of a structured dismissal.
- The U.S. Trustee objected to the structured dismissal, arguing that it is a *sub rosa* Plan.

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Structured Dismissal Approved – *In re Great Atlantic & Pacific Tea Co.* (cont'd)

- Issue: Is the proposed structured dismissal, which does not pay administrative expense claimants in full, appropriate?
- Holding
  - Yes, because:
    - The Debtors are unable to confirm a chapter 11 plan because they cannot meet the requirements of section 1129 of the Bankruptcy Code.
      - "The Debtors' assets and the Debtors' secured debt are such that with the exception of a limited carveout from the secured creditors' collateral, there are no unencumbered assets available for distribution to unsecured creditors."
      - "Consequently, it is highly unlikely that the Debtors would be able to confirm a Chapter 11 Plan, which unless waived by administrative expense creditors, requires payment in full of allowed administrative expenses form the effective date of the plan."
    - Conversion of the case to a Chapter 7 would create unnecessary administrative expenses without enhancing the prospect for recoveries and is not in the best interests of creditors.

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Structured Dismissal Denied – *In re Old BBP, Inc.*

- Old BBP, Inc. ("Bumble Bee") is a canned food company that known for producing canned tuna, salmon, chicken, and other seafood.
- In 2017, Bumble Bee fell into financial trouble when it was fined $25 million by the Department of Justice for antitrust violations after pleading guilty in a tuna price-fixing scandal with Tri-Union Seafoods LLC, and Starkist. Bumble Bee also faced a class action from direct purchasers of the tuna.
- Due to its "significant legal challenges" and potential defaults under their prepetition financing agreements, Bumble Bee filed for chapter 11 bankruptcy on November 21, 2019 in the Bankruptcy Court for the District of Delaware.
- During bankruptcy, Debtors entered into an agreement to sell substantially all of its assets to FCF Co., Ltd. for $928 million.
- In connection with the sale, Bumble Bee, the Committee of Unsecured Creditors, Term Loan Lenders, and other Secured Parties entered into a Global Settlement with the following terms:
  - The wind down of Bumble Bee's estate.
  - The establishment of a Creditor Trust, where the Trust Assets would be held and administered for the benefit of unsecured creditors. Of note, the creditors' committee was allowed to select the Trustee to the Creditor's Trust.
  - No class skipping was involved.
- The U.S. Trustee and Sponsor Lion Capital objected to the structured dismissal, arguing that it is a *sub rosa* Plan and that it would dispose the remaining assets of Bumble Bee's estate without allowing the estate any possibility of paying off a significant tax liability to the IRS in connection with the Sale.

Structured Dismissal Denied – *In re Old BBP, Inc.* (cont'd)

- Issue: Is the proposed structured dismissal appropriate?
- Holding
  - No, the court dismissed the Global Settlement motion.
  - The Court's principal issue with the Global Settlement was that it did not provide for distributions to the IRS, which had potentially tens of millions of dollars in priority tax claims, far in excess of the estate's only remaining asset, $1.4 million reserved to address potential litigation claims.
  - Notably, the IRS had been provided notice of all of the proceedings, which included the Sale, the Global Settlement, and the Motion to Dismiss, and it had not asserted a tax claim or objected to any of the relief.
  - However, Bumble Bee had not filed a tax return, and therefore the IRS did not know that it had this potentially large claim.
  - Ultimately, the court stated that Bumble Bee has an "affirmative obligation" to discuss the Global Settlement with the IRS.
  - The IRS opposed the Global Settlement, and the case was eventually converted to a Chapter 7.

Getting Creative – *Basic Energy*

- Basic Energy Services, Inc. ("Basic"), a provider of wellsite services to oil and gas companies, filed its voluntary petition on August 17, 2021 after the COVID-19 pandemic drastically reduced energy demand in 2020.
- In the bankruptcy, Basic sought approval of transactions for a sale of substantially all of its assets.
- After the Covid-19 pandemic drastically reduced energy demand in 2020, Basic filed for its voluntary petition in the Bankruptcy Court for the Southern District of Texas on August 17, 2021 seeking to obtain asset purchase agreements.
- The Sponsor was also a prepetition lender that was involved in a number of disputes with Basic regarding its priority and rights to sales proceeds.
- Ultimately, Basic, the Ad Hoc Group, and the official committee of unsecured creditors, negotiated a Global Settlement that provided, among other things:
  - Consolidation of the remaining assets of the Debtors' estates to the main case.
  - Appointment of wind down officer to replace the Board.
  - Allocation of $1.5 million available for distribution to administrative creditors.
  - Allocation of $1.5 million available for distribution to unsecured creditors.
  - Satisfaction in full of unpaid employee health and welfare claims, and certain secured tax claims.
  - Immediate interim cash distribution to prepetition secured Noteholders, if certain prerequisites are met. The estimated amount of this distribution is $12 million.
  - The maintenance of disputed claims reserve pending resolutions of all disputes with the Sponsor on account of its prepetition loans.
- The U.S. Trustee and the Sponsor objected to the Global Settlement, arguing that it was a *sub rosa* plan. The Sponsor further argued that the failure to immediately distribute any funds to it was class-skipping.

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Getting Creative – *Basic Energy* (cont'd)

- Issue: Is the proposed structured dismissal scheme appropriate?
- Holding
  - Yes, once the original request for consolidation was dropped, the Court approved the scheme as a Global Settlement pursuant to Rule 9019.
  - While courts must "give deference to the reasonable views of creditors," the Global Settlement was created of sound business judgment.
  - Basic's decision to set cash aside in an interest-bearing account pending resolutions of disputes with the Sponsor did not violate Jevic.
  - The Global Settlement was not a final resolution of the case that the Court relied upon. The Court indicated willingness to revisit the approval of the Global Settlement, including allowing the U.S. Trustee to file a Motion to convert the case to a Chapter 7 and setting a hearing date for the Debtor to appear and "show cause why the case should not be converted to Chapter 7."
- Basic has since settled the Sponsor's claims.
- The U.S. Trustee filed its motion to convert the case to a Chapter 7 on January 6, 2022. The matter has been adjourned to May 16th.

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Faculty

Hon. Kevin J. Carey is a partner in Hogan Lovells US LLP's Business Restructuring and Insolvency practice in Philadelphia and is a retired bankruptcy judge. He also is ABI's President and represents both companies and creditors in domestic and cross-border bankruptcy proceedings. Judge Carey was first appointed to the U.S. Bankruptcy Court for the Eastern District of Pennsylvania in 2001, then in 2005 began service on the U.S. Bankruptcy Court for the District of Delaware (serving as chief judge from 2008-11). During that time, he authored more than 200 reported decisions, issued important rulings on key issues such as valuation, fiduciary duties and other complex chapter 11 and confirmation issues, and presided over such high-profile cases as Exide Technologies, Tribune Co. and New Century Financial. Judge Carey was the first judge to serve as global chair of the Turnaround Management Association and is an honorary member of the Turnaround, Restructuring and Distressed Investing Hall of Fame, as well as a Distinguished Fellow of the Association of Insolvency & Restructuring Advisors. In addition, he is a Fellow of the American College of Bankruptcy and a member of the International Insolvency Institute, as well as a contributing author to *Collier on Bankruptcy* and a member of the National Conference of Bankruptcy Judges. He also is a part-time adjunct professor in the LL.M. in Bankruptcy program at St. John's University School of Law in New York City. Judge Carey began his legal career in 1979 clerking for Bankruptcy Judge Thomas M. Twardowski, then served as clerk of court of the U.S. Bankruptcy Court for the Eastern District of Pennsylvania. He received his B.A. in 1976 from Pennsylvania State University and his J.D. in 1979 from Villanova University School of Law.

Robert J. Feinstein is the managing partner of the New York office of Pachulski Stang Ziehl & Jones LLP, which he opened in 2011. He represents debtors, creditors' committees, equity committees, acquirers and examiners in business reorganizations and related litigation. He also has experience representing various constituencies in cross-border insolvencies. Mr. Feinstein's recent engagements include lead counsel to the official creditors' committees appointed in the chapter 11 cases of J. Crew, Rockdale Marcellus, Alamo Drafthouse, Whiting Petroleum, Ascena (Ann Taylor/LOFT/Lane Bryant), Ditech, Payless ShoeSource, The Weinstein Co., Barney's Inc., Aeropostale and Jevic Holding Corp. (appearing on behalf of the creditors' committee in the U.S. Supreme Court). On the debtor side, he has represented Digital Domain Media Group, former world heavyweight champion Mike Tyson, and *Penthouse* magazine publisher General Media, Inc. in their chapter 11 cases. He is an adjunct professor in the St. Johns University LL.M. in Bankruptcy Program and frequently writes and lectures on bankruptcy topics. Mr. Feinstein is a Fellow of the American College of Bankruptcy and frequently writes and lectures on bankruptcy topics. He is ranked among Bankruptcy/Restructuring attorneys by *Chambers USA*, was listed by *Lawdragon* as one of the 2020 "Lawdragon 500 Leading Global Restructuring & Insolvency Lawyers," and is a member of the International Insolvency Institute. He also served as an officer of the Insolvency Section of the International Bar Association. Mr. Feinstein received his B.A. from Lafayette College and his J.D. *magna cum laude* from Boston University School of Law.

Gianfranco Finizio is a partner at Kilpatrick, Townsend & Stockton LLP in New York and focuses his practice on bankruptcy and insolvency matters. He has experience representing, among other parties in interest, official committees of unsecured creditors, whose members include trade creditors, service-providers, bondholders, indenture trustees, unsecured lenders, landlords and class action plaintiffs in all facets of insolvency proceedings. Prior to joining the firm, Mr. Finizio worked as an associate at a New York law firm where his practice focused on bankruptcy, creditors' rights and restructuring law. While attending law school, he served as a judicial intern to Hon. Stephen A. Bucaria in the New York Supreme Court. He was also a staff member of the *ABI Law Review*. Mr. Finizio was listed in the 2021 edition of *Chambers USA: America's Leading Lawyers for Business* in the area of Bankruptcy/Restructuring. He also was recognized as New York "Rising Star" in 2021 and the six years immediately preceding for Business Bankruptcy by *Super Lawyers* magazine. Mr. Finizio received his B.B.A. *cum laude* from George Washington University and his J.D. from St. John's University School of Law, where he received a CALI Award.

Douglas Mannal is a partner with Kramer Levin Naftalis & Frankel LLP in New York, where he advises and represents a diverse range of clients, including ad hoc creditor groups, creditors' committees, and major secured and unsecured creditors, as well as debtors, bank agents, financial institutions and other parties, in complex and often high-profile chapter 11 bankruptcy cases, out-of-court restructurings and other distressed situations. He has led representations of creditors' committees in numerous high-profile chapter 11 cases, including recently in Gulfport Energy Corp., Alpha Media, McClatchy Co., Frontier Communications, Bristow Group Inc., RAIT Funding LLC, Seadrill Ltd., CHC Group Ltd., Arch Coal Inc. and Residential Capital. On behalf of creditors, Mr. Mannal has designed and implemented numerous litigation-focused and negotiated strategies designed to maximize creditor recoveries. His creditor-focused work includes proposing and confirming plans of reorganization; investigating and prosecuting viable estate causes of action; negotiating intercreditor disputes; crafting cash collateral orders, debtor-in-possession/exit financing packages and creditor-sponsored equity rights offerings; challenging confirmation of nonconsensual plans; and terminating exclusivity to propose alternative creditor-sponsored plans, all with the goal of exponentially increasing creditors' returns. He also often advises hedge funds and financial institutions regarding investments in distressed companies with complex corporate and capital structures, including in the purchase and sale of bank and bond debt, trade claims and derivatives. Mr. Mannal counsels debtors and distressed businesses, helping them navigate the complex legal, financial and operational issues that arise from filing for chapter 11 reorganization. His debtor-focused experience includes obtaining debtor-in-possession financing, negotiating forbearance agreements, achieving support from trade vendors, conducting sales of nonessential business lines, and negotiating plans of reorganization with secured lenders, creditors' committees and other stakeholders. *Chambers USA* recognized him from 2013-21 as a leading lawyer in the field, *Turnarounds & Workouts* named him among the Outstanding Young Restructuring Lawyers for 2017 and 2020, and *Law360* selected him as a Rising Star in 2017, one of only five lawyers selected in the field of bankruptcy law. In addition, *Lawdragon 500* named him among Leading U.S. Bankruptcy and Restructuring Lawyers (2021-22) and Leading Global Restructuring and Insolvency Lawyers (2020). Mr. Mannal received his B.A. in government and law in 1995 from Lafayette College and his J.D. from Brooklyn Law School in 2000.

Jennifer L. Rodburg is a Restructuring and Insolvency partner with Fried, Frank, Harris, Shriver & Jacobson LLP in New York, where she focuses her practice on the representation of creditors and investors in corporate restructurings both in and out of court. She represents hedge funds, private-equity funds, banks, property owners, asset-acquirers and other strategic parties in connection with prepackaged and traditional bankruptcy proceedings, DIP and exit financings, § 363 sales and other distressed situations. Ms. Rodburg has a broad range of experience in representing official and unofficial creditors' committees and equity committees in connection with chapter 11 cases and out-of-court restructuring situations. She also counsels investment funds, financial institutions and other clients on issues involved in trading distressed debt, analyzing the risks associated with potential investments and acquiring financially distressed companies. Ms. Rodburg is consistently recognized by *Chambers USA: America's Leading Lawyers for Business* as a leading individual in Bankruptcy/Restructuring and by *Legal 500* in Corporate Restructuring. She also was named an "Outstanding Young Restructuring Lawyer" in the April 2009 issue of *Turnarounds & Workouts*. Ms. Rodburg lectures on bankruptcy-related matters for seminars and panels sponsored by the Association of the Bar of the City of New York and other professional organizations. She is a member of ABI, the American Bar Association, the New York State Bar Association and the New York City Bar, and she is admitted to the bar in New York, New Jersey, the District of Columbia and the U.S. District Court for the Southern District of New York. Ms. Rodburg received her B.A. *magna cum laude* from the University of Pennsylvania in 1997 and her J.D. in 2000 from New York University School of Law.

Alexander V. Rohan, CFA, CPA is a managing director of Miller Buckfire & Co., LLC in New York and has more than 25 years of investment banking, legal and financial advisory experience, most of which has involved all aspects of complex corporate restructurings. He has held senior investment banking positions at B Riley FBR, Guggenheim Securities and Jefferies, where he advised companies, creditors, shareholders, boards, management teams and organized labor. Prior to that, he held various roles at Genworth Financial/GE Asset Management, Paul Weiss and Ernst & Young. Mr. Rohan has advised on approximately 125 transactions representing more than $150 billion in liabilities as both advisor and principal involving balance-sheet restructurings, M&A, capital-raising, amendments, waivers, consents, tenders, direct investments, business unit dispositions and collective bargaining agreements. During his time at Genworth Financial, he was responsible for approximately $500 million of hedge fund and private-equity investments. Mr. Rohan is a former restructuring attorney. He serves on the board of directors of the May Ellen and Gerald Ritter Foundation, BuildOn! and Stamford Police Foundation, and is an honorary member of the Association of Professional Flight Attendants (APFA), which represents around 26,000 employees of American Airlines. Mr. Rohan received his a B.B.A. in public accounting from Pace University and his J.D. from NYU School of Law.

Sunny Singh is a partner in the Weil, Gotshal & Manges LLP's Business Finance & Restructuring Department in New York, where he advises debtors, creditors, sponsors, investors, acquirers, lenders and other interested parties in all aspects of distressed and insolvency situations both in and out-of-court. He has worked on some of the largest and most complex restructuring matters, including representing the chapter 11 debtors in Exide, a global restructuring that resulted in achieving a first-of-its-kind global settlement with more than a dozen regulators to resolve hundreds of millions of dollars of Exide's historical environmental liabilities, the Sears debtors in their chapter 11 cases, and J.Crew in its groundbreaking out-of-court exchange, which won the *Financial Times* North American Innovative Lawyers (2017) award for "Accessing New Markets and Capital." Most recently, Mr. Singh was ranked Up and Coming for Bankruptcy/Restructuring by *Chambers USA*, and in 2020 he was honored as one of ABI's "40 Under 40." He has also been named a "Rising Star" for Restructuring and Insolvency in the U.S. by *IFLR1000* for 2020 and 2022, a "Rising Star" by Legal Media Group's *Expert Guides* for 2021, and a "Rising Star" by *Law360* for 2017. Prior to joining the firm, Mr. Singh clerked for Hon. Robert D. Drain of the U.S. Bankruptcy Court for the Southern District of New York from 2006-08. He received his J.D. *summa cum laude* in 2006 from Hofstra University Law School.

Paul H. Zumbro is a partner in Cravath, Swaine & Moore LLP's Corporate Department in New York and heads the firm's Financial Restructuring & Reorganization practice. His practice focuses on restructuring transactions and related financings, both in and out of court, as well as on bankruptcy M&A transactions. Mr. Zumbro recently represented PG&E in one of the largest and most complex bankruptcy cases in U.S. history to fairly and efficiently resolve liabilities resulting from the 2017 and 2018 Northern California wildfires. He also represented The Weinstein Co. (TWC) in its voluntary petition for chapter 11 bankruptcy. Under Mr. Zumbro's leadership, Cravath's FR&R practice was named a 2020 and 2019 Practice Group of the Year by *Law360*, and Cravath was named the 2019 "Restructuring Advisory Firm of the Year" by *The Deal*. Mr. Zumbro received his B.A. *cum laude* and with distinction from Yale College in 1992 and his J.D. from Columbia Law School in 1997, where he was a Harlan Fiske Stone Scholar.