



AMERICAN
BANKRUPTCY
INSTITUTE

2023 Annual Spring Meeting

When Creditors Strike Back

Paul J. Labov, Moderator

Pachulski Stang Ziehl & Jones; New York

Mark R. Greenberg

Alvarez & Marsal; New York

Jennifer B. Kimble

Lowenstein Sandler LLP; New York

Hon. Christopher M. Lopez

U.S. Bankruptcy Court (S.D. Tex.); Houston

Bankruptcy Wars

A not so long time ago, in a Bankruptcy Court not so far away....

*It is a period of bankruptcy unrest.
Debtors and Lenders of the evil empire have worked together to squeeze every penny from vendors, landlords, and other unsecured financial participants (i.e., bondholders!).*

During the early days of the chapter 11 case, a group of rebel UCC lawyers have set upon a plan to neutralize such debtor and lender overreach and to restore order to a fragile bankruptcy system in which all parties should have meaningful input.

Pursued by Debtors' CROs, and lenders' lawyers and investment bankers, Princess Kimble and Labov Skywalker enlist the help of Hans Greenberg to ensure that the levers of the bankruptcy process and equity are restored in time for the Second Day Hearing before Master Jedi Judge Lopez.

**Bankruptcy Wars
Creditors Strike Back**



CREDITORS STRIKE BACK

Mark Greenberg | Alvarez & Marsal North America, LLC

Jennifer B. Kimble | Lowenstein Sandler LLP

Paul J. Labov | Pachulski, Stang, Ziehl & Jones LLP

The Honorable Christopher Lopez | United States Bankruptcy Court for the Southern District of Texas

April [21], 2023



Day 1

Judge Protecting All Stakeholders Against Alienating Lender and Sinking Case

How far / hard to push back on various issues (recent trends)

- 506(c) waiver via interim DIP order [Case Example: Party City (SD Texas)]
- Roll-up of prepetition debt via interim DIP order [Case Example: Cineworld (SD Texas)]
- Challenge period expiration upon entry of final DIP order [Case Example: [Altera (SD Texas)]

Credibility of declarants

Impact of RSA

3



Day 1

Ad Hoc Creditor Groups

Who are the ad hoc creditor groups?

- Tort Claimants - Product liability & abuse cases [Case Examples: LTL (New Jersey); Boy Scouts of America (Delaware)]
- Landlords
- Note Holders

What are their agendas?

4



Day 2

DIP Financing – Preventing Lenders from Controlling the Case

| Challenge the DIP / Test Declarant | Challenge the Lender Protection Package |
|--|---|
| <ul style="list-style-type: none"> Financing alternatives Pricing (return on fees and interest) Milestones Budget / administrative solvency <p>Case Example: Clovis Oncology (Delaware)</p> | <ul style="list-style-type: none"> Liens on unencumbered assets Liens on avoidance actions and the proceeds thereof Paydown of interest v. principal 506(c) waiver 552 waiver / Marshalling waiver RSA Tie-in (Day 1 or Day 40 – locks the case in) Challenge period / Investigation budget Releases <p>Case Example: Tuesday Morning (ND Texas)</p> |

5



Day 2

Cash Management – Preventing Value Leakage

| Concerns | Strategy |
|--|---|
| <ul style="list-style-type: none"> Post-petition cash transferred from Debtors to non-Debtor affiliates does not benefit the estate and will not be recoverable Post-petition I/C transactions between Debtors could render a Debtor entity administratively insolvent Description of “ordinary course” I/C transactions is vague No description of “non-ordinary course” I/C transactions No limits placed on I/C transactions whatsoever, so anything goes No visibility into post-petition I/C transactions | <ul style="list-style-type: none"> Include restrictions or notice requirements within order pertaining to: <ul style="list-style-type: none"> I/C transactions recorded as equity instead of debt New I/C loans I/C transactions above a certain dollar amount Include reporting requirements within the order, such as an I/C matrix as of the petition date and monthly post-petition I/C matrices broken down by transaction type (e.g., trade, loan, other) <p>Case Examples: Mallinckrodt (Delaware); Edison Mission Energy (ND Illinois)</p> |

6



Day 2

Critical Vendor Motion – Ensuring Fair Treatment Among Vendors

| Concerns | Strategy |
|---|--|
| <ul style="list-style-type: none"> Payments will be made to vendors that are not actually critical, thus increasing their recoveries to the detriment of other unsecured creditors No visibility into Debtors' decision-making process Preference waiver Contract counterparty? | <ul style="list-style-type: none"> Obtain critical vendors list with pre-petition obligations and rationale for "critical" treatment Include restrictions or notice requirements within the order pertaining to: <ul style="list-style-type: none"> Payments to unlisted vendors Payments in excess of pre-petition obligations Include reporting requirements within the order, such as trade agreements and weekly list of vendor payments <p>Case Examples: EMAS Chiyoda Subsea Limited (SD Texas); LSC Communications (SD New York)</p> |

7



Day 2

Sale Process – Maximizing Values for Unsecured Creditors

| Bidding Procedures Concerns | Strategy |
|---|---|
| <ul style="list-style-type: none"> Sale timeline adequacy <ul style="list-style-type: none"> Liquidity concerns and ensuring proper runway for sale – a tie-in to the DIP Loan Impact on process of stalking horse v. no stalking horse at time of bid procedure approval Committee participation rights in sales process <ul style="list-style-type: none"> Consultation v. consent Bid protections, overbids and potential effect on sale process | <ul style="list-style-type: none"> Prepare benchmarking analysis to justify a longer sale timeline, which should account for the pre-petition marketing process (if any) and industry-specific concerns Analyze liquidity impact of an extension, and limit the extension request as needed Ensure Committee has sufficient rights in order to play an active role in the sale process Put on evidence in support of an objection |

8



Day 2 / 3

KEIP / KERP – Preserving Cash

Key Questions

- Are the proposed KEIP/ KERP program(s) necessary and appropriate given the trajectory of the case?
- Who are the participants, what are their roles, how are payouts calculated, when are the payouts made?
- Layup?
- Are proposed payouts market?
- Who is paying for the program(s)?

Case Examples:

- **ResCap (SD New York):** KEIP approval denied as sale metrics deemed not incentivizing because case filed with stalking horse bids [Docket 1286]
- **Clovis Oncology (Delaware):** KEIP approved as sale metrics deemed incentivizing although case filed with stalking horse bid [Docket 480]

9



Day 3 and Beyond

May The Force Be With You

Investigation

- Committee investigation v. "independent" board investigation
- Significant business transactions

Plan Negotiations

- Gifting plans / class skipping
- Preservation of Retained Causes of Action

Conversion or Stipulated Dismissals

10



Faculty

Mark R. Greenberg, CPA, CIRA, DBV is a managing director at Alvarez & Marsal North American Commercial Restructuring in New York. He also co-leads the firm's Unsecured Creditors' Committee Advisory practice. For more than 15 years, Mr. Greenberg has provided advisory services to debtors, creditors and equity-holders in both bankruptcy and out-of-court restructurings within a variety of industries. He has provided advisory services to debtors and creditors in both bankruptcy and out-of-court restructurings across a range of industries, including energy, shipping, manufacturing and retail. Additionally, Mr. Greenberg has experience involving corporate bankruptcy reorganizations. He has developed and implemented strategies to maximize creditor recoveries, and his responsibilities have included the analysis of business plans, development of cash-flow forecasts, review of financial statements and evaluation of cash-management systems. Mr. Greenberg's bankruptcy expertise encompasses asset sales, intercompany and cross-border issues, fraudulent conveyances and substantive consolidation. He has also successfully negotiated restructuring proposals, debtor-in-possession financing facilities and plans of reorganization/liquidation. Mr. Greenberg's notable clients include: AES Eastern Energy, Calpine, Chuck E. Cheese, Claim Jumper, Contoladora Comercial Mexicana, Corsicana, Earth Fare, Edison Mission Energy, Emas Chiyoda, Energy Future Holdings, Fairmount Chemical, Fred's, Hollander Sleep Products, Horsehead, Jenny Craig, KPE Engineering, Lehman Brothers, LifeCare, Love Culture, LSC Communications, Lucky Brand Dungarees, Mallinckrodt, M. Fabrikant & Sons, Montco Offshore, Nellson Nutraceutical, National Realty Investment Advisors, Oreck, Overseas Shipholding Group, PRC, SageCrest, Scottish Re, Service Net Solutions, Southaven Power, Synergy Pharmaceuticals, Takata, The Clare at Water Tower, Tintri, Wellington and Wellman. He also provided critical expert testimony during the plan confirmation trial on behalf of the Mallinckrodt UCC. Mr. Greenberg received his bachelor's degree in accounting from Lehigh University.

Jennifer B. Kimble is counsel in Lowenstein Sandler LLP's New York office, where she frequently represents chapter 11 debtors, official committees of creditors and retirees, stalking-horse purchasers, lenders and trustees in bankruptcy proceedings, commercial litigation and out-of-court restructurings. She has more than 15 years of experience in the mining, automotive and consumer goods sectors. Ms. Kimble serves on the ABI's Board of Directors and was member of ABI's inaugural class of "40 under 40" in 2017. She also currently serves as Immediate Past Chair of IWIRC. Ms. Kimble is admitted to practice law in Alabama, Mississippi and New York. She received her undergraduate degree *summa cum laude* from Mississippi State University and her J.D. from the University of Mississippi.

Paul J. Labov is an attorney with Pachulski Stang Ziehl & Jones in New York and specializes in representing clients in a wide range of industries in chapter 11 and workouts, include creditors' committees, ad hoc creditor groups, institutional and nontraditional lenders, large unsecured creditors, trustees and liquidation trusts. He also represents and advises private-equity firms in the purchases and sales of distressed debt and assets. Mr. Labov has been recognized for his work in bankruptcy and financial restructuring by *New York Super Lawyers*, and was recognized in *New York Super Lawyers Rising Stars* from 2013-17. He is admitted to practice in New York and New Jersey. Mr. Labov received his undergraduate degree from George Washington University and his J.D. from Seton Hall University School of Law.

Hon. Christopher M. Lopez is a U.S. Bankruptcy Judge for the Southern District of Texas in Houston, appointed on Aug. 14, 2019. He previously was a member of the Business, Finance & Restructuring Group of Weil, Gotshal & Manges LLP and focused on representations ranging from top global corporations in mega-restructurings to middle-market debtor and creditor representations. Judge Lopez lectures across the country on bankruptcy issues. He also serves as an adjunct professor at Thurgood Marshall School of Law. Judge Lopez currently serves as a council member of the State Bar of Texas Bankruptcy Law Section, an advisor to the State Bar of Texas Young Lawyers Committee, a member of the Nominations Committee for the National Conference of Bankruptcy Judges, and a member of the National Bankruptcy Conference. He received his B.A. in psychology in 1996 from the University of Houston, his M.A. in religion in 1999 from Yale Divinity School and his J.D. from the University of Texas School of Law in 2003.