



AMERICAN
BANKRUPTCY
INSTITUTE

2018 Winter Leadership Conference

ABI Talks

Douglas E. Deutsch, Moderator

Clifford Chance US LLP; New York

Did That Really Happen in Court Today?

Hon. Kevin J. Carey

U.S. Bankruptcy Court (D. Del.); Wilmington

**#MeToo: Where I've Been, and Where Bankruptcy
Professionals Are Going**

Cathy R. Herschopf

Cooley LLP; New York

Sovereign Citizens Movement

Thomas M. Horan

Fox Rothschild LLP; Wilmington, Del.

A Rose Is a Rose Is a Rose — or Is It?

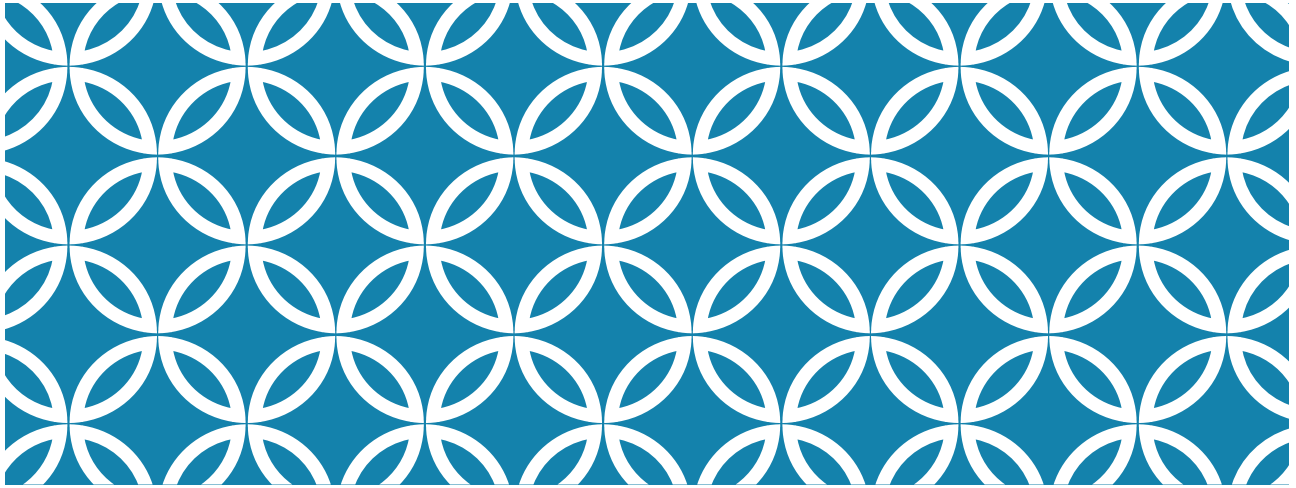
Ronald R. Peterson

Jenner & Block; Chicago

**The AlixPartners/McKinsey Dispute: "Sour Grapes" Tempest
in a Teapot, or the New Normal?**

Thomas J. Salerno

Stinson Leonard Street LLP; Phoenix



“TED TALKS”

*Did That Really
Happen In Court
Today?*

1. LEARN HOW TO TAKE

“YES”

FOR AN ANSWER



2. DON'T INSULT THE JUDGE



3. KNOW YOUR JUDGE

Favorite Vacation Spot



4. AN EXPERT WITNESS,
WHO ANSWERS THE QUESTION
ASKED ON CROSS EXAMINATION
THE FIRST TIME IT IS ASKED . . .



5. DURING A LONG EXAMINATION,

MAKE SURE THE JUDGE IS ENGAGED!

6. ALTHOUGH IT IS
NECESSARY TO “MAKE A
RECORD” IN SUPPORT OF
YOUR CASE, IT IS MORE
IMPORTANT TO CONVINCE
THE JUDGE THAT YOU ARE
RIGHT BECAUSE HER
DECISION
WILL LIKELY BE
THE FINAL ONE



7. IT IS NOT THE
TASK OF AN
ADVERSE WITNESS
TO MAKE
YOUR CASE



" PERMISSION TO TREAT THE WITNESS
AS HOSTILE, YOUR HONOR ? "

8. THERE IS A BUSINESS SOLUTION
TO MOST DISPUTES



FIND IT!

9. DO NOT IGNORE BAD FACTS OR “TOUGH” LAW



10. DON'T JUST ANTICIPATE HARD QUESTIONS FROM THE JUDGE; INVITE THEM



11. YOUR CLIENT IS PAYING
YOU A LOT OF MONEY
TO TELL ITS STORY.

REMEMBER: THREE “C’S”

TELL IT:

CLEARLY, CONCISELY AND
CONFIDENTLY





1.

Sovereign Citizens

Core Themes

- Refusal to recognize government
- Distrust of currency
- Rejection of taxation
- Believe they are bound only by "common law"
- Sheriff is the highest law enforcement authority in U.S.



2.

What do they want?

"Freedom"

Freedom from court jurisdiction

Freedom from laws governing property

Freedom from traffic laws and police stops

Freedom from vehicle registration

Davey, B, Gibson, M., and Ladd Jr., A. (Producers), & Gibson, M. (Director). (1995). Braveheart [Motion picture]. USA: Paramount Pictures.



3.

The Government is Illegitimate

- The original common law government is gone
- Now, the government is based on statute and deprives citizens of rights granted by God
- The 14th Amendment turned Americans into federal corporate citizens who were tricked into giving up their state citizenship
- Citizens have agreed to replace their rights with privileges

4.

Redemption Theory

- The government became bankrupt when it abandoned the Gold Standard
- Money now lacks value, so the government pledged its citizens as collateral to foreign governments
- Social security numbers are a means to register the government's collateral
- Use of capital letters on government documents refers to the corporate being or the "straw man" - not the person itself



5.

Redemption Theory

- Each citizen has a monetary value that can be discerned from her social security number
- Money is held by the U.S. Treasury in a "straw man" account for each citizen
- Citizens can access this money to pay down their debts through (fraudulent) UCC and IRS filings

6.

How many are there?

There's no way to count them.

Estimates have ranged from 100,000 to 400,000+, but there's no generally accepted methodology

Scholars often cite each other's estimates without agreeing on each other's methodologies

...No reason to believe the estimates



9.

How do they spread their message?



- Websites
- Books
- "How-To" kits
- Traveling shows
- Fake law schools
 - Nitty Gritty Law School
 - Erwin Rommel School of Law

10.



12.

Police Confrontations

Frequent confrontations and arguments with police.

In 2010, in West Memphis, Jerry Ralph Kane Jr. killed two police officers who pulled him over, and engaged in a firefight with police that also left him and his 16 year old son dead

Kane traveled the country running foreclosure prevention seminars using sovereign citizen theory



13.



In re Giordano's Enterprises, Inc. (Bankr. N.D. Ill. 2011)

Motion for
Citizen's
Demand

- John Apostolou was owner of Giordano's
- Debtor-in-Possession until Apostolou turned sovereign citizen
- Filed documents saying that Apostolou and his wife were "American Freeman, free inhabitants of the Illinois state, and we find it impossible to obtain State declared Legal Tender at Law"
- They don't believe in the U.S. legal system
- They don't believe in U.S. currency
- Chapter 11 Trustee appointed

16.

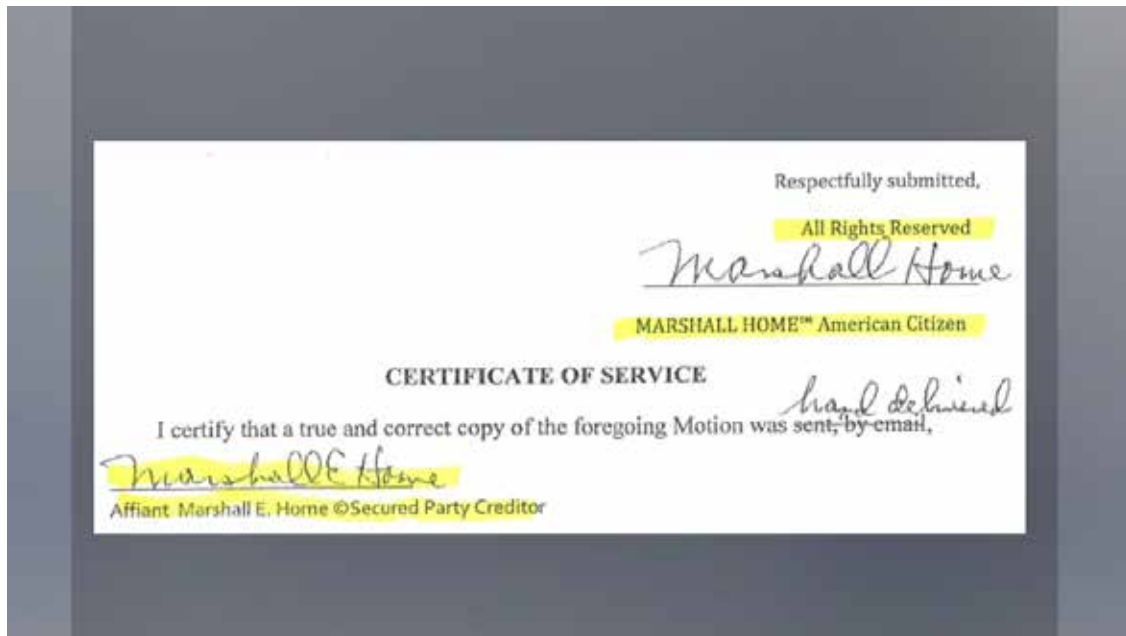
MOTION FOR CITIZEN'S DEMAND FOR TRIAL BY JURY BK C § 426

COMES NOW Marshali Home and John Apostolou, American Citizens, non-corporate, sui juris non-licensed attorney litigant, the undersigned, and, without accepting the jurisdiction of this court, moves the court as follows:

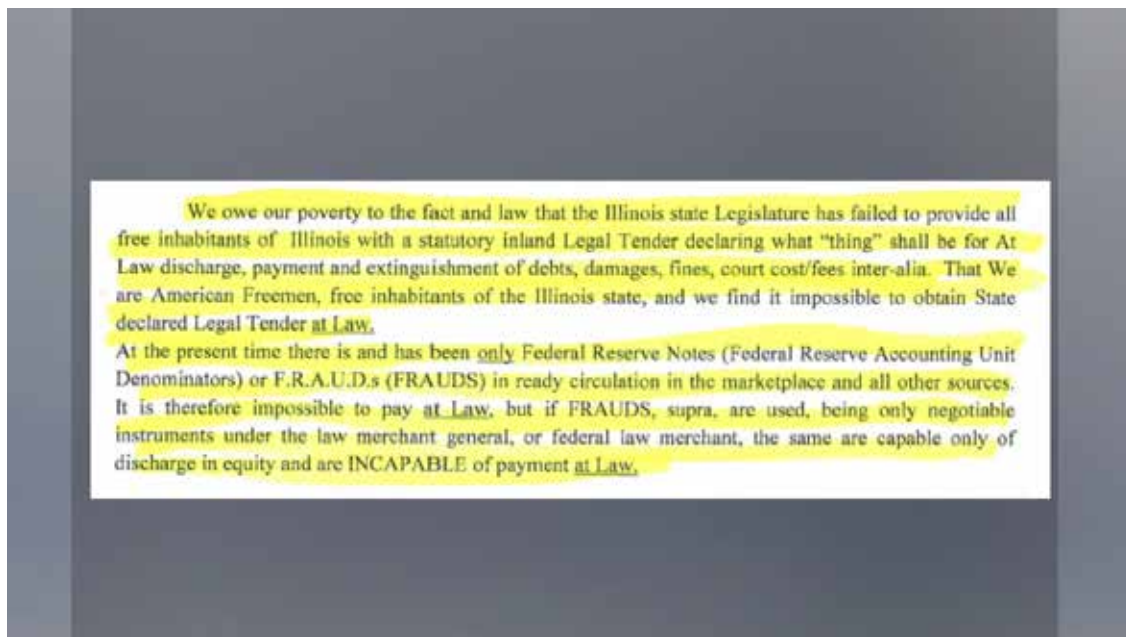
Certificate
of Service

FRAUDs

17.



18.



19.

Sovereign Citizen Bankruptcy Fraud

U.S. v. Robert G. Wray a/k/a Robert Mac Wray, a/k/a Robert-George Wray, a/k/a Robert-George Wray of the Christ Clan, a/k/a Robert-George of the Wray Clan, a/k/a Robert Wray, a/k/a Robert George

No. 15-3468 (3d Cir. Nov. 4, 2016)

21.

Dr. Dennis Erik Fluck Von Kiel

- His name was Dennis Fluck
- He defaulted on loans from the U.S. Department of Health and Human Services (HHS)
- HHS obtained a judgment and could not locate Fluck because he changed his name to Dennis Erik Von Kiel
- Von Kiel filed a chapter 7 petition in the Eastern District of Pennsylvania (Case No. 10-21364 (REF))
- The case didn't go so well...his discharge was denied because the court found he had the ability to pay his debts

22.

Robert Wray aka Robert-George of the Wray Clan or Robert-George: Wray of the Christ Clan

- Claimed to be a lawyer representing Von Kiel as "attorney-at-lawe" for the "Constitutional Lawe Association"
- Together, they conspired in a scheme to help Dr. Von Kiel avoid paying income taxes and student loans
- Wray advised Von Kiel to become ordained by the International Academy of Lymphology as a minister and sign a vow of poverty
- Von Kiel assigned all assets and income to the academy
- Von Kiel also directed his employer to deposit his wages into a bank account in Orem, UT, from which they were transferred to TrueLife Ministry, Inc., which Von Kiel controlled

23.

Pastor

(1) Plaintiff is a man with a porous nose. Standing in the front tense place.

(2) to illegal wire alteration/computer of credit (Plaintiff) was without authorization by the student marketing org., vs DOJ, vs Dept of Education (DOE) (line body of plaintiff/Plaintiff)

Diagnosis

... (text continues) ...

(3) Plaintiff has a physical Diagram Diagram, a Post Traumatic Stress Disorder (PTSD) that involves fear of over being, fear of being overwhelmed but feels that may be a significant factor in both cases that especially when the majority of all parties are both themselves! The Plaintiff did

24.

Parties

- ① Plaintiff is a man with a proper Noun Name Standing in the present tense phrase

Time 1: 1:23:23

25.

Jurisdiction

As jurisdiction is the first matter of Business and as the government orders is/was a captured in a fictitious tense by notation, what thing is outside the law, comes now having Erik Van Kiel in his own proper upper & lower case noun name & stands in the present tense as a citizen-in-party where in there is lawful record and original Calves and Counter-complaints in Standard English as holder in due course & registered creditor of the debt person complained against, identified originally as "Dennis Felt" Erik Van Kiel in Rebuttal to the US Govt (through US DOJ/DOE) Government claim, shows why the alleged "Loser" are already discharged, to wit:

Erik Van Kiel is an American Creditor, holder in due course of his own name, which makes him a citizen-in-party with standing in law

26.

⑧ to ILLEGAL Name Alteration/Corruption of creditor's (Plaintiff) name without AUTHORIZATION by the Student Marketing Assc., VS DOJ, VS Dept of Education (DOE) (see body of Proceedings/Attachments)

27.

(43) Plaintiff has a physician Diagnosed Diagnosis of Post Traumatic Stress Disorder (PTSD) that involves fear of over Bearing, corrupt and/or uncontrolled Govt. officials that may be a significant factor in Govt. Run trial especially where the majority of all parties are Govt. themselves! The Plaintiff did

28.



35.

Thomas Horan



Fox Rothschild ^{LLP}
ATTORNEYS AT LAW



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www.foxrothschild.com/tom-horan/



O: 302-480-9412

37.

AMERICAN BANKRUPTCY INSTITUTE

Thomas M. Horan

Sovereign Citizens and Bankruptcy

American Bankruptcy Institute Winter Leadership Conference

December 7, 2018

Resources for Study of Sovereign Citizens:

- On Twitter, there are active accounts for people who study sovereign citizens and other extremist movements.
 - Mark Pitcavage, Senior Research Fellow, Anti-Defamation League, <https://twitter.com/egavactip>
 - JJ MacNab, Fellow, George Washington University Program on Extremism, <https://twitter.com/jjmacnab>
- There also are serious studies of the sovereign citizen movement from a policy perspective
 - *Sovereign Citizen Movement: an empirical study on the rise in activity, explanations of growth, and policy prescriptions*, Brian S. Slater, available at <http://scholarworks.uark.edu/cgi/viewcontent.cgi?article=3062&context=etd>
 - *An Analysis of the Sovereign Citizen Movement: Demographics and Trial Behaviors*, Stephen Garrett Smith, available at <http://scholarworks.uark.edu/cgi/viewcontent.cgi?article=3062&context=etd>
 - Sovereign Citizens Movement, Southern Poverty Law Center, available at <https://www.splcenter.org/fighting-hate/extremist-files/ideology/sovereign-citizens-movement>
 - *Without Prejudice: What Sovereign Citizens Believe*, J.M. Berger, available at <https://extremism.gwu.edu/sites/g/files/zaxdzs2191/f/downloads/JMB%20Sovereign%20Citizens.pdf>
 - *Uncommon Law: Understanding and Quantifying the Sovereign Citizen Movement*, Michelle M. Mallek, December 2016, Thesis, Naval Postgraduate School, available at <http://www.dtic.mil/dtic/tr/fulltext/u2/1031403.pdf>

- *The Sovereign Citizen Denaturalization and the Origins of the American Republic*, Patrick Weil, University of Pennsylvania Press, 2012, ISBN 9780812222128
- *The Lawless Ones: The Resurgence of the Sovereign Citizen Movement*, 2d Ed., Anti-Defamation League, available at <https://www.adl.org/sites/default/files/documents/assets/pdf/combating-hate/Lawless-Ones-2012-Edition-WEB-final.pdf>
- *A Cultural Topography of the Sovereign Citizens Movement: Are They a Terrorist Threat?*, Piper Blotter Biery, available at <https://digitalcommons.usu.edu/cgi/viewcontent.cgi?article=4584&context=etd>
- *Sovereign Citizens and Competency to Stand Trial*, George F. Parker, Journal of the American Academy of Psychiatry and the Law Online June 2018, available at <http://jaapl.org/content/46/2/167.full-text.pdf>
- *What is the Sovereign Citizen Movement, what do they believe and how are they spreading?*, Matthew Sweeney, June 19, 2018, available at <https://www.radicalisationresearch.org/guides/sweeney-sovereign-citizen-movement/>
- Resources from a law enforcement point of view
 - *Sovereign Citizens: A Growing Domestic Threat to Law Enforcement*, Federal Bureau of Investigation Counterterrorism Analysis Section, September 1, 2011, available at <https://leb.fbi.gov/articles/featured-articles/sovereign-citizens-a-growing-domestic-threat-to-law-enforcement>
 - *Sovereign Citizens: An Introduction for Law Enforcement*, Federal Bureau of Investigations Domestic Terror Operations Unit, available at http://www.mschiefs.org/wp-content/uploads/2012/05/Sovereign_Citizens_Intro_For_LE.pdf
- Recent examples of sovereign citizens in the news
 - *Despite Dred Scott claim, Columbia 'sovereign citizen' convicted in debt scam*, The State (Columbia, SC), Nov. 19, 2018, available at <https://www.thestate.com/news/local/crime/article221761540.html>
 - *New Underwood man faces prison time in water bill dispute*, Rapid City Journal (Rapid City, SD), Nov. 28, 2018, available at <https://rapidcityjournal.com/news/local/crime-and-courts/new-underwood-man->

[faces-prison-time-in-water-bill-dispute/article_9c398b08-54bd-588f-b589-b95a0c90b65a.html](https://www.kansascity.com/news/state/kansas/article216582525.html)

- *Man accused of igniting CA wildfire is sovereign citizen with possible KS connection*, The Kansas City Star, Aug. 13, 2018, available at <https://www.kansascity.com/news/state/kansas/article216582525.html>
- *Robeson casinos raided; dozens of 'sovereign citizens' arrested*, WRAL (Raleigh, NC), July 23, 2018, available at <https://www.wral.com/robeson-casinos-raided-dozens-of-sovereign-citizens-arrested/17715724/>
- *Colorado Prosecutors Hope To Send A Message With 'Sovereign Citizen' Convictions*, Colorado Public Radio, May 24, 2018, available at <http://www.cpr.org/news/story/with-three-sovereign-citizen-convictions-colorado-prosecutors-hope-to-send-a-message>
- *New documents suggest Las Vegas shooter was conspiracy theorist – what we know*, The Guardian, May 19, 2018, available at <https://www.theguardian.com/us-news/2018/may/19/stephen-paddock-las-vegas-shooter-conspiracy-theories-documents-explained>
- *Learn to Spot the Secret Signals of Far-Right 'Sovereign Citizens'*, Vice, May 1, 2018, available at https://www.vice.com/en_us/article/8xkp74/learn-to-spot-the-secret-signals-of-far-right-sovereign-citizens
- *Nashville Suspect Once Called Himself a 'Sovereign Citizen,' Police Say. What Is That?*, The New York Times, April 23, 2018, available at <https://www.nytimes.com/2018/04/23/us/sovereign-citizen.html>
- *Sovereign citizens plotted jailbreak, abduction of sheriff and judge*, Southern Poverty Law Center, Sept. 6, 2018, available at <https://www.splcenter.org/hatewatch/2018/09/06/sovereign-citizens-plotted-jailbreak-abduction-sheriff-and-judge>
- *Republican Lawmaker: Recognize Sovereign Citizens or Pay \$10,000 Fine*, The Daily Beast, Jan. 4, 2018, available at <https://www.thedailybeast.com/republican-lawmaker-recognize-sovereign-citizens-or-pay-dollar10000-fine>

A Rose is a Rose is a Rose

Ron Peterson
Winter Leadership
American Bankruptcy Institute
December 8, 2018
Scottsdale, AZ



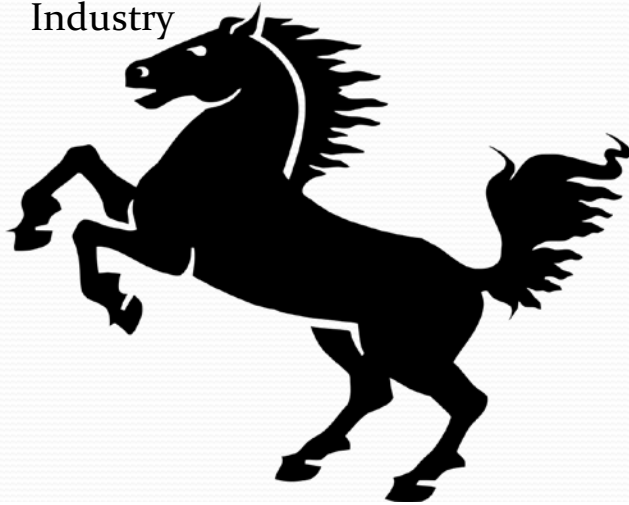
11 U.S.C. 101(54) What's a Transfer

- The term “transfer” means---
 - (A) the creation of a lien;
 - (B) the retention of title as a security interest;
 - (C) the foreclosure of a debtor's equity of redemption; or,
 - (D) each mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with—
 - (i) property; or,
 - (ii) an interest in property.

Bonded Financial v. European American Bank, 838 F.2d 890 (7th Cir. 1988)

Results Orientated.

Prevention of Havoc to the Industry



Ivey v. First Citizens Bank & Tr. Co. (In re Whitley), 848 F.3d 205 (4th Cir. 2017)

Historical Precedent: *N.Y. Cty. Nat'l Bank v. Massey*, 192 U.S. 138 (1904). Unclear whether the Supreme Court actually said deposits were not transfers or they were not fraudulent transfers.

Meoli v. Huntington Nat'l Bank, 848 F.3d 716 (6th Cir. 2017)

Follows *Bonded*, but here the Bank may have had actual knowledge of the fraud.



Schoenmann v. Bank of the West (In re Tenderloin Health), 849 F.3d 1231 (9th Cir. 2017)

Legislative History? What Legislative History?

House Report

Transfer. It is derived and adapted, with stylistic changes, from Section 1(30) of the Bankruptcy Act. A transfer is a disposition of an interest in property. The definition of transfer is as broad as possible. Many of the potentially limiting words in current law are deleted, and the language is simplified. . . . Any transfer of an interest in property is a transfer, including a transfer of possession, custody or control even if there is no transfer of title, because possession, custody, and control are interests in property. A deposit in a bank account or similar account is a transfer.

H.R. Rep 95-595 at 314 (1977)

*Henry v. Official Comm. Of
Unsecured Creditors of
Walldesign, Inc (In re
Walldesign Inc.), 872 F.3d
954 (9th Cir. 2017), cert.
denied sub nom. Henry v.
Weiss, 138 S. Ct. 2575 (2018)*

Is there a difference between dominion and control?



The Jay Alix/McKinsey *Battle Royale*—Sour Grapes Tempest In a Teapot or The New Normal?

ABI TED Talks
December 6, 2018

Thomas J. Salerno, Esq.
STINSON LEONARD STREET, LLP



WINTER LEADERSHIP CONFERENCE
DECEMBER 6-8, 2018 · SCOTTSDALE, AZ



What's All the Noise About?

Jay Alix v. McKinsey & Co., Inc., et al.
Case No. 18-CV-04141 (JMF)

United States District Court (SDNY)

Initial Complaint: May 2018

Amended Complaint: September 2018

"JURY TRIAL DEMANDED"

Over 230 Pages

115 pages of detailed factual allegations

116 pages outlining 7 legal causes of action

Pending Motion To Dismiss: **Filed October
10, 2018**

(91 pages plus exhibits)

Potential train wreck happening in real time!



Can't Tell The Players Without A Scorecard!

In this Corner!

Jay Alix (nearly 40 years of high profile, large case restructuring cases)

represented by Boies Schiller Flexner LLP (New York).

NOTE: ALIX PARTNERS IS NOT THE LITIGANT HERE!

"Judge not, lest ye be judged!"

In the Opposite Corner!

McKinsey & Co. (and 3 affiliates) and 7 principals (many with legal backgrounds, and including one Senior Partner that is a former Alix Partners partner)

represented by Debevoise & Plimpton (and a host of others) (New York)

LET'S GET READY TO RUMBLE!



Battle Of The Titans!!!!!!



Two sophisticated, well-funded and well represented financial advisory titans going to head to head, bringing to light the less than polite world of high stake restructurings that may be known but rarely talked about—the rough and tumble chaos management that comprise the world of large, complex restructurings.



Make no mistake—I take no position on the merits or lack thereof of the legal or factual allegations here.

No answer has even been filed, and a motion to dismiss is pending.

That said, this is an unprecedented look into the sharp elbowed, sometimes ruthless world of high stakes professional retentions in large cases...the curtain has been irreversibly peeled back and this will not go quietly into the night!



Dynamics Of The Start Of Large Restructurings... Barely Controlled Chaos!!!!!!





Joint administration, cash collateral and DIP financing, critical vendors, cash management, utilities, employee wages, taxes, insurance, PACA, PASA, Statements/Schedules, First Day Declarations, committee formations, ongoing discussions with the UST/SEC/IRS/EPA/ABC... and let's not forget **professional retentions!!!!**



Just How Much Money Are We Talking About Here?

A lot....a boatload....

1. "The field of bankruptcy consulting, as it presently exists, has its genesis in the early 1980s, which saw a sharp increase in the number of large businesses filing for bankruptcy protection under Chapter 11 of the then-new Bankruptcy Code....**emerging leaders in this new market, such as [Alix Partners—"AP"]**, Alvarez & Marsal, and others, soon filled this void and began providing crisis and interim managers to troubled companies. ... McKinsey first entered the field of bankruptcy consulting in or around 2001... **Since 2010, McKinsey...has been engaged as a restructuring, turnaround, or financial advisor for nine Chapter 11 bankruptcies, for which it has received over \$100 million in fees—and over \$125 million including pre-petition and post-petition fees.** ... [in 13 different bankruptcy cases]"

Amended Complaint ¶¶ 47-48

2. **Lehman Brothers** Chapter 11 filed in 2008, plan confirmed in 2012. The fees incl. post-confirmation wind down work for professionals (through 2013)? **\$2.2 BILLION!** (Yup, that's a "B")

"Five Years Later, Lehman Bankruptcy Fees Hit \$2.2 Billion", *CNN Business* (September 13, 2013)





So What? This Country Is Based on Making Money!

True enough—but can't ignore the bankruptcy overlay....

Ultimately, bankruptcy is a **zero sum game**, dealing with “trust fund” types of assets, and fees for professionals come from someone else's pot.

Other People's Money!

Which brings us to the Alix/McKinsey lawsuit....



Legal Theories In Lawsuit? Seven (7):

- **Bankruptcy fraud** in violation of 18 U.S.C. §§ 152(2), 152(3), and 152(6);
- **Mail fraud** in violation of 18 U.S.C. § 1341;
- **Wire fraud** in violation of 18 U.S.C. § 1343;
- **Obstruction of justice** in violation of 18 U.S.C. §§ 1503(a) and 1512(c);
- **Witness tampering** in violation of 18 U.S.C. § 1512(b);
- **Unlawful monetary transactions** in violation of 18 U.S.C. § 1957(a); and
- **Inducement to interstate or foreign travel** in violation of 18 U.S.C. § 2314.

Amended Complaint ¶ 3



Four (4) Overarching/Interrelated Themes Alleged...

First—"Pay to Play" With Professional Network:

"Specifically, McKinsey has offered illegal "pay-to-play" arrangements to attorneys that handle high-stakes bankruptcy matters, whereby McKinsey offered to refer its vast network of consulting clients to those attorneys in exchange for the attorneys exclusively referring bankruptcy clients to McKinsey US and/or McKinsey RTS for professional employment. In this way, McKinsey has avoided competition, as well as the traditional "beauty contest" through which the overwhelming majority of bankruptcy consulting assignments are made."

Amended Complaint ¶ 15



Second—"Stack The Deck"

"[McKinsey] knew that if they revealed [their] conflicts of interest as required by Rule 2014 of the Federal Rules of Bankruptcy Procedure and Section 327 of the Bankruptcy Code, [they] would be disqualified from employment under 11 U.S.C. § 327 in the thirteen Chapter 11 bankruptcy cases that it has handled to date. Defendants also knew that by misrepresenting and concealing those disqualifying conflicts, they could improperly gain large bankruptcy assignments instead of AP. Absent Defendants' unlawful conduct, McKinsey would not have been able to effectively compete against AP in the bankruptcy restructuring market, given McKinsey's roster of clients and alumni connections, which have posed serious conflicts of interests in the high-profile bankruptcy proceedings in which McKinsey has sought employment. "

Amended Complaint ¶ 4



Third-- Take Cases From Competitors

“McKinsey’s three top competitors in the field of bankruptcy consulting are AP, Alvarez & Marsal, and FTI Consulting, which collectively have provided consultancy services in approximately 75% of the bankruptcy cases since 2010 involving assets over \$1 billion in which neither McKinsey US nor McKinsey RTS have served as advisors. Of those cases, AP obtained approximately 24.5% of the contracts.”

Amended Complaint ¶ 49



Fourth—“Dribble Out” Your Disclosures—aka “Catch Me If You Can!”

“McKinsey’s declarations in its earliest cases simply concealed all of its connections. In later cases, McKinsey implemented a new form of disclosure hitherto unknown to any bankruptcy judge or practitioner, called “**disclosure by category**.” When Defendants were forced to stop this novel practice, they began to **incrementally disclose some of McKinsey’s connections over a series of declarations, even though those connections existed at the commencement of the cases**, while continuing to conceal many others. Indeed, as the Wall Street Journal noted, in all but two cases, McKinsey disclosed no connections in its initial disclosures, opting instead to make incomplete, piecemeal disclosures over the course of the bankruptcy case.”

Amended Complaint ¶ 12



The “Free Bite” Allegations!

“No one needs to get hurt here...”

“On multiple occasions beginning in September 2014, Alix confronted Barton and Sternfels with evidence of McKinsey’s repeated violations of bankruptcy law. As discussed below, during the remainder of 2014 and over the course of the next year, Alix spoke with Barton about McKinsey’s conduct in bankruptcy consulting cases on at least eleven occasions, including three lengthy in-person meetings and eight substantive and lengthy telephone conferences...”

Amended Complaint ¶ 119



“Here’s a little something for your troubles...”

“At 11:00 a.m. on Thursday, October 15, 2015, Alix met with Barton at McKinsey & Co.’s offices in New York City for their eleventh interaction and their third and final in-person meeting. Once again, Alix confronted Barton regarding McKinsey RTS’s continued violations of its disclosure obligations... [McKinsey] offered Alix bribes to keep quiet. Specifically, Barton offered to introduce AP to Fortescue, a large iron ore mining company in Australia that needed consulting services. Alix immediately declined. Barton then offered to introduce AP to Volvo in Europe, saying they needed AP’s help. Again, Alix immediately declined Barton’s offer, which he viewed as a shocking and improper attempt to bribe him. In over four decades of experience in bankruptcy consulting, no competitor had ever offered Alix any restructuring assignment or introduction of any kind, let alone two very large international consulting assignments during the same meeting. Barton’s offers were blatant attempted pay-offs and bribes offered in return for Alix dropping the issues he had raised concerning McKinsey’s acknowledged pay-to-play scheme and its illegal disclosure declarations. Indeed, these offers followed the same pattern as the pay-to-play allegation that Alix had raised.”

Amended Complaint ¶ 134

More on this in a minute....



Don't We All "Fudge" A Bit In Disclosures?

Disclosures come in all shapes and sizes, so who am I to judge?



Bankruptcy Rule 2014(a): For a mere rule, it certainly generated some serious controversy...

Rule 2014 (Employment Of Professional Persons)

(a) Application for an Order of Employment.

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



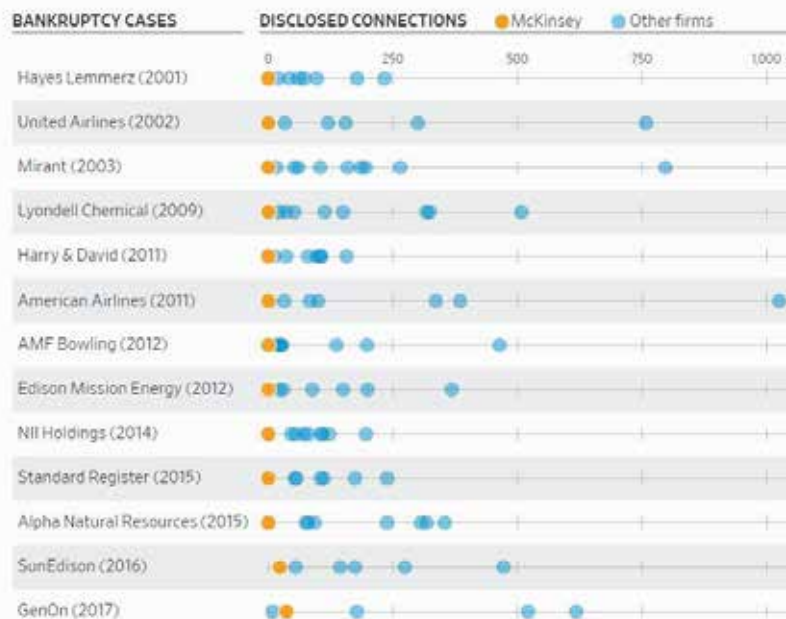
Hmmm...There's That Pesky Data Thing....

McKinsey Disclosures In 13 Cases From 2001-2013



Checking for Conflicts

Advisers, law firms and other professionals in bankruptcy cases are supposed to disclose all relationships that might give rise to a conflict of interest. In the 13 chapter 11 cases McKinsey & Co. has worked on, it has initially identified the names of far fewer such connections than other firms.

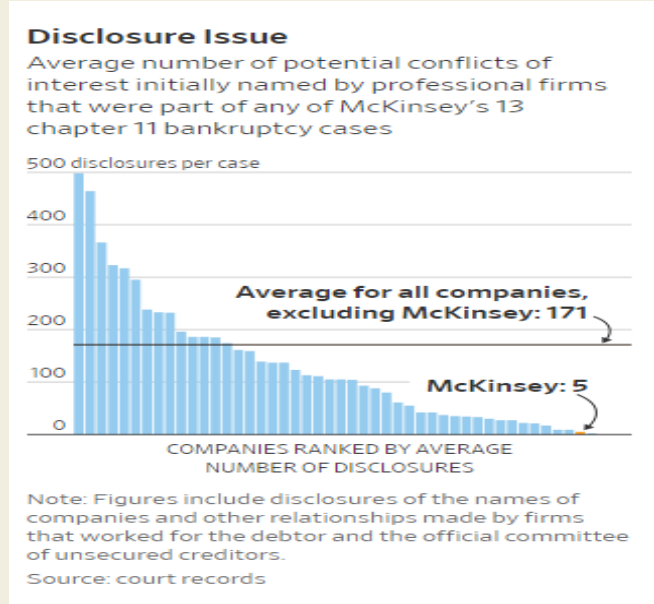


Note: Figures include disclosures of the names of companies and other relationships made by firms that worked for the debtor and the official committee of unsecured creditors.

Source: court records



Average Number Of Potential Conflicts Disclosed (13 Chapter 11 Cases At Issue):



Amended Complaint ¶ 11



So, How Far Do You Need To Go In Rule 2014 Disclosures According To Jay Alix?

Here's where it starts to get a little..."dicey"



Big Bankruptcies, Big Professional Firms, Big Contacts!

Our industry/professional connections are kinda what we sell when we compete for these gigs!

“McKinsey & Co. is the **world’s largest standalone business management consulting firm**. It serves many of the world’s largest corporations... McKinsey’s connections are extensive. **According to its website, McKinsey provides services to the following business sectors: [Lists out 22 industry sectors, starting with “Advanced Electronics” and ending with “Travel, Transport & Logistics”]**”

Amended Complaint ¶ 60



“But Wait, There’s More!”

- McKinsey also has **30,000 “alumni”**—former McKinsey employees—most of whom are now employed in other businesses or government. More Fortune 500 CEOs are alumni of McKinsey than of any other company. **McKinsey actively develops and exploits its alumni for new business investment and referrals and facilitates alumni job placement.**
- McKinsey has its own exclusive, high-performing internal investment funds...that serves as **McKinsey’s investment arm**. **...[McKinsey] invests approximately \$25 billion on behalf of McKinsey’s current and former partners and employees...[and] has taken significant equity positions in many of McKinsey’s clients.**
- Apart from the fact that McKinsey...failed to disclose that numerous creditors were McKinsey clients, they also failed to disclose that **numerous McKinsey alumni were employed by various creditors as executives...** Disclosure of these connections was required because such creditors have a **potential strategic advantage** by virtue of their inside knowledge of, and concealed relationships with, McKinsey, which they could leverage in negotiations over the structure of the bankruptcy plan.

Amended Complaint ¶¶ 61, 62, 176



Not Surprisingly, McKinsey Is Having None of It!

Motion to Dismiss is **scathing!**

- McKinsey has complied with the letter of the law.
- Jay Alix is “obsessively” seeking to drive McKinsey from the marketplace.
- He presumes to “lecture” other experienced financial advisors.
- He is the lone rogue here: “The explanation for his failure [to address the “fatal shortcomings” in his complaint] is simple: the deficiencies in Alix’s claims are manifestly incurable. **It is easy to see why neither AlixPartners nor any other debtor adviser has joined Jay Alix in this action...**” (Motion To Dismiss at 17)
- Jay Alix is engaging in “anticompetitive” behavior.



Three Questions Come To Mind Here!

First---isn’t this a true Catch 22?

- Need large sophisticated firms to actually do these large sophisticated cases.
- The larger the firm, the more “connections” they have by definition (it’s how they got to be huge firms in the first place!)
- So, is this the **law of unintended consequences** here? Disqualify large firms based on “connections” and wind up with failed restructurings based on lack of meaningful help?



Three Questions Come To Mind Here!

Second—on the whole “bribe” thing.....

- If you take the complaint at face value, it is clear that it seeks to protect the “integrity” of the system (at least to a degree)
- McKinsey has been in the game since 2001, so by the time of Jay Alix meetings with McKinsey in 2014-2015, according to Alix, McKinsey had been “gaming the system” then for at least 13 or so years.
- So, if McKinsey had agreed to “walk away” from the restructuring practice or change its ways as demanded by Alix, would these affronts to the integrity of the system have been “ignored” or overlooked by Alix? Would Jay be an accessory after the fact?
- Could be viewed as extortion by some, but what do I know?



Three Questions Come To Mind Here!

Third—where does the whole “connections” disclosure requirement lead to, and where does it end?

Does it become a “materiality” type of analysis? Disclosure required if I advise a competitor in unrelated matters if they have **5% of the market? 10%**? How do you even really know?

Aren’t non-bankruptcy clients entitled to some degree of confidentiality?



So where's this all heading?

Put another way, what is it Jay really wants here?

"Justice"? Protect the "integrity" of the system?

A bigger piece of the large dollar restructuring pie?

Disgorgement of all fees paid to McKinsey?

Disqualification in future restructuring cases?

Drive McKinsey from the marketplace?

All of the above?



Hard To Know!

That said, at least **two things** are true!

The legal fees will be **astronomical!** The meter ticking is deafening!

Politicians have now gotten involved--so we have that going for us! ("In a letter to the director of the U.S. Trustee Program on July 11, [House Judiciary Committee Member Andy] Biggs [R-AZ] asked the government watchdog to explain how McKinsey's restructuring arm... disclosed connections at a ratio of 5 to 171 compared to 45 other firms and advisers in the Chapter 11 cases it has been involved in." *Law360* July 18, 2018) **(I feel better already...)**



View From The Cheap Seats: Problematic For Jay Alix—Is He The Right Messenger?

“But in broad strokes, the Amended Complaint suffers from two overarching fatal flaws: (1) a business competitor like AlixPartners is not the type of party to whom RICO provides a cause of action here because it has not been *directly* injured; and (2) a dispute over the first defect in sharp relief with his self-centered and misguided allegation that the purpose of Rule 2014(a) is to “provide a level playing field for professionals [like AlixPartners] in bankruptcy.”... That is wrong: the rule protects the interests of the parties to chapter 11 cases, not the interests of competitors of the advisor retained by the chapter 11 debtor. Alix attempts to obscure the second defect by making sweeping pronouncements of what the law is, without actual support.”

Motion To Dismiss at 20-21

**“HELL HATH NO FURY LIKE AN FA
SPURNED!”**



More Problematic For Jay Alix—Where’s The Causation/Economic Beef Here?

“The Amended Complaint rests on the insupportable premise that AlixPartners has standing to pursue a civil RICO claim for competitive injuries purportedly suffered as a result of McKinsey’s Rule 2014(a) disclosures in thirteen bankruptcy cases. Those RICO claims fly in the face of settled Supreme Court precedent that precludes a competitor like AlixPartners from suing under that statute for indirect harms like those of which Alix complains. The alleged injuries are not only indirect, and thus incapable of satisfying RICO’s proximate cause requirement, but they are so attenuated that the Amended Complaint fails to plead actual, “but-for” causation. The alleged chain of actual causation is facially implausible given, among other things, Alix’s failure to allege that (in all but one case) AlixPartners even applied for the thirteen bankruptcy assignments won by McKinsey and his inability ever to prove that any debtor would have retained AlixPartners or that any bankruptcy court would have approved such a retention.”

Motion to Dismiss at 18



Bottom Line---Does It Even Matter At This Point?

No doubt that both McKinsey and Alix are “**all in**” at this point!

- This is not a garden variety lawsuit that can be **quietly settled** (indeed, if economic motivations were even the driving force).

Taken to its logical conclusion, **isn’t someone going to prison here?**

See *U.S. v. John Gillene* (15 month prison sentence for Milbank Tweed partner’s failure to fully comply with disclosure requirements of Rule 2014 in the Erie-Bucyrus Chapter 11—for the quaint fee amount in that case of \$2 million). Regan, “Eat What You Kill: Fall Of A Wall Street Lawyer” (U of M Press 1998).



The Die Is Cast---Can This Train Even Be Stopped Now?

Westmoreland Objection By Mar Bow Re McKinsey Retention/Disclosures

Case 18-35672 Document 632 Filed 11/30/18 Page 1 of 1

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE: §
WESTMORELAND COAL COMPANY, *et* § CASE NO: 18-35672
al. § CHAPTER 11
§
Debtors. § Jointly Administered
§ DAVID R. JONES

ORDER
(Docket No. 629)

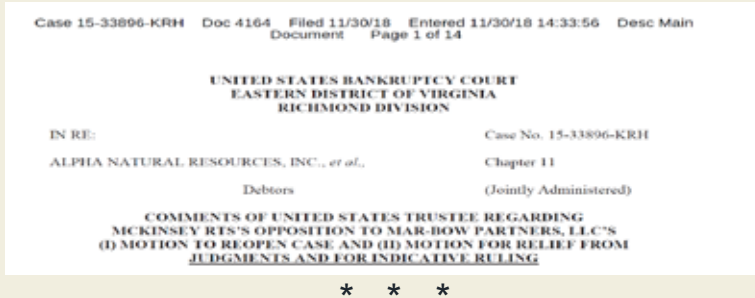
ENTERED
11/30/2018

* * *

The Court wishes to make clear that, at this point, it is making no findings or conclusions regarding the conduct of any person or entity. **The Court and those sworn to protect the bankruptcy process have a duty to investigate allegations raised by parties and to facilitate a transparent fact-finding process to protect our government’s institutions and the public confidence in those institutions.**



ANR Motion to Reopen Case



Based on the U.S. Trustee's latest investigation into McKinsey's disclosures in these cases, **McKinsey's repeated characterization in 2016 of MIO's status as a "blind trust" was inaccurate.** MIO was not a blind trust and Jon Garcia, McKinsey's president, ratified MIO investment decisions. Nevertheless, it was not until September 2018 that McKinsey publicly disclosed that Mr. Garcia sat on the MIO board, including its investment subcommittee, during these cases. And it was not until the most recent disclosures filed in November 2018 that McKinsey publicly disclosed that, because of these roles, Mr. Garcia affirmatively ratified MIO's investment decisions. Moreover, McKinsey still has not adequately disclosed information about MIO's direct investments and Mr. Garcia's role in supervising them. Finally, despite representations to the U.S. Trustee that it would publicly file the remaining disclosures relating to MIO that it provided in-camera to the Court in 2016, to date McKinsey has not done so. Had McKinsey accurately disclosed its MIO relationship and how MIO operated from the start (i.e., that MIO was not a "blind trust"), the U.S. Trustee would have asked the court to require full disclosures of MIO's investments in interested parties. **Rule 2014 mandates as much. McKinsey's deficient and potentially misleading representations about its relationship with MIO, and the lack of timely, voluntary, and direct candor in making disclosures warrant redress and justify the reopening of the case so that the Court can order the disgorgement of fees or any other remedies that this Court deems appropriate.**



So To Come Full Circle—Is This A Sour Grapes Tempest In A Teapot, Or Will It Change The Way We Practice Law?

Put another way, is this a *Twist Cap* blip or a *Marathon Oil* game changer?



For My Money Four (4) Things Are Certain:

First: Any professional that is not brain dead will be putting renewed focus on disclosures (“more is better”).



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Second: Given the political ramifications of this dispute and the attention to this issue as a “judicial integrity” issue, it will go to the **Supreme Court** (whether they grant certiorari is of course never a certainty), or (God forbid) **Congress** tries to fix it!



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Third: Decent chance that McKinsey becomes the **Milberg Weiss of advisory firms**...The ultimate victims of their own success?



For My Money Four (4) Things Are Certain:

Finally, I believe that the long term effect of this dispute will be that large **institutional advisory powerhouses will sell off those practices to stay competitive** (like we saw when the accounting firms began to garner too much attention from the mix of the audit and advisory practices).

In my opinion this is a game changer, not a blip.

Is this ultimately a beneficial development for the capital markets?



Who knows?

One thing I do know, however...



When the titans battle, mere mortals have no choice but to pay attention whether we want to or not!