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BUSINESS RESTRUCTURING REVIEW

SECURED LENDERS WIN VICTORY IN SANCHEZ BANKRUPTCY

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The Ad Hoc Group of Senior Secured Noteholders and DIP Lenders (the "Ad Hoc Group") obtained a unanimous judgment in their favor in an appeal following Sanchez Energy Company's long-running, hard-fought bankruptcy case. Once the decision becomes final, it will provide the Ad Hoc Group with shares of reorganized Sanchez worth approximately $700 million.

Sanchez declared bankruptcy in 2019 with more than $2 billion of prepetition debt. Approximately $500 million of this debt was owed to the Ad Hoc Group's senior secured noteholders (the "SSNs") and was secured by prepetition liens on substantially all of Sanchez's assets. The SSNs also provided debtor-in-possession ("DIP") financing to Sanchez, investing another $100 million into the company postpetition.

After oil and gas prices dropped precipitously during the COVID-19 pandemic, the value of Sanchez's assets declined. To give the company a chance to survive, the creditors reached a consensual bankruptcy plan to reorganize the company. The plan provided for post-confirmation litigation of avoidance actions challenging the SSNs' prepetition liens and to allow the unsecured creditors to make a related claim that avoidance of these liens would also lead to avoidance of the postpetition liens securing the DIP loan. The plan reorganized Sanchez into Mesquite Energy, Inc. and issued 20% of the shares of Mesquite to the DIP Lenders. The remaining 80% of the company would be allocated in accordance with the results of the lien dispute—titled the "Lien Related Litigation" under the bankruptcy plan. The parties stipulated that Sanchez's equity value for purposes of the Lien Related Litigation was $85 million. To facilitate Sanchez's reorganization, the SSNs released their prepetition liens.

In the first phase of the Lien Related Litigation, the bankruptcy court ruled that the DIP Lenders' liens were coterminous with those held by the SSNs, so if the SSNs' liens were avoidable, then the DIP Lenders' liens were too. In a second phase of the proceeding, the bankruptcy court held that correction affidavits perfecting the SSNs' liens may be avoidable preferences if the elements of Bankruptcy Code Section 547(b)(5) were satisfied. At the beginning of a hearing on the third phase of the Lien Related Litigation, the bankruptcy court reversed its initial ruling that the DIP Lenders' and Senior Secured Noteholders' liens were coterminous with one another. The unsecured creditor representative then changed

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course and argued that the bankruptcy court could still award it shares, because Bankruptcy Code Section 550(a) allows courts to award the "value" of an avoidable transfer.

The bankruptcy court ruled that the plan allowed shares to be awarded based on a hypothetical valuation of the Section 550(a) causes of action. After a contentious evidentiary hearing, the bankruptcy court found that the correction affidavits were avoidable preferences and valued the Section 550(a) claims at $200 million, awarding the unsecured creditors approximately 70% of the shares of Mesquite.

The Fifth Circuit held that under Sanchez's bankruptcy plan, "when the bankruptcy court reversed course and upheld the DIP liens, not only were the Ad Hoc Secured Creditors entitled to twenty percent of the equity (the minimum specified by the Plan), but they should have been entitled to one hundred percent according to their superpriority liens that covered all of Sanchez's assets." The court also found that the Section 550(a) claims against the SSNs were valueless. Applying the single satisfaction rule, the Fifth Circuit held that "[c]ourts cannot award value under Section 550(a) when the estate has recovered its transferred property in kind." Because the SSNs returned their liens, a Section 550(a) claim could not net a monetary return.

Jones Day represented the Ad Hoc Group in this matter, obtaining a complete and unanimous reversal of the bankruptcy court's final order.

NEW YORK BANKRUPTCY COURT EXAMINES COMI FOR PURPOSES OF CHAPTER 15 RECOGNITION OF FOREIGN RESTRUCTURING PROCEEDINGS INVOLVING MULTINATIONAL COMPANIES

Corinne Ball • Dan T. Moss • Jasper Berkenbosch • Artur L. Badra

As chapter 15 of the Bankruptcy Code quickly approaches its 20th anniversary in a global economy, the volume of cross-border bankruptcy cases has rapidly escalated. With multinational companies having affiliates throughout the world, the challenges of applying the rules laid down in chapter 15 and similar cross-border bankruptcy legislation enacted in other countries for "recognition" abroad have become more pronounced. One such challenge is determining the location of a foreign debtor's "center of main interests" ("COMI") for purposes of chapter 15 recognition.

The U.S. Bankruptcy Court for the Southern District of New York recently addressed this question in *In re InterCement Brasil S.A.*, 668 B.R. 802 (Bankr. S.D.N.Y. 2025). The court granted a petition seeking chapter 15 recognition of a Brazilian reorganization proceeding involving a group of affiliated debtors, some of which were incorporated in other countries. However, the court concluded that the COMI of the group's Dutch and Spanish financing affiliates, which had commenced insolvency proceedings in the Netherlands and Spain, was in Brazil.

LAWYER SPOTLIGHT: DAN REYNOLDS

Dan Reynolds, a partner in Jones Day's Cleveland Office, focuses on corporate restructuring, representing major constituencies involved in distressed transactions including companies both in and out of bankruptcy, parties looking to acquire assets through chapter 11, and other major stakeholders. Dan is part of Jones Day's market-leading team in the automotive supply base, having successfully led commercial negotiations and out-of-court restructurings for numerous tier 1 automotive suppliers both domestically and in cross-border transactions. Dan's unique industry knowledge of these situations enables clients to swiftly move through commercial negotiations—permitting the possibility of an out-of-court restructuring.

Dan has represented entities involved in all manner of restructuring transactions, including distressed sales and acquisitions, the structuring and consummation of spin-offs, and other out-of-court transactions. He also counsels management teams and distressed companies in fraudulent conveyance, illegal dividend, fiduciary duty, and piercing the corporate veil issues.

Representative clients include Vintage Wine Estates, Diebold Nixdorf, Shiloh Industries, FirstEnergy, Peabody Energy, FTD Companies, Westmoreland Resource Partners, Vari-Form Holdings Group, and Relativity Media.

Dan also serves on the Northern Ohio Advisory Board for the Ohio, Kentucky, and Indiana Chapter of the Make-A-Wish Foundation.

RECOGNITION AND PROCEDURES UNDER CHAPTER 15

Chapter 15 was enacted in 2005 to govern cross-border bankruptcy and insolvency proceedings. It is patterned on the 1997 UNCITRAL Model Law on Cross-Border Insolvency (the "Model Law"), which has been enacted in some form by more than 50 countries.

Both chapter 15 and the Model Law are premised upon the principle of international comity, or "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws." *Hilton v. Guyot*, 159 U.S. 113, 164 (1895). Chapter 15's stated purpose is "to provide effective mechanisms for dealing with cases of cross-border insolvency" with the objective of, among other things, cooperation between U.S. and non-U.S. courts. 11 U.S.C. § 1501(a).

Under section 1515 of the Bankruptcy Code, the "foreign representative" of a non-U.S. debtor may file a petition in a U.S. bankruptcy court seeking "recognition" of a "foreign proceeding." Section 101(24) of the Bankruptcy Code defines "foreign representative" as "a person or body, including a person or body appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of such foreign proceeding."

The basic requirements for recognition under chapter 15 are outlined in section 1517(a), namely: (i) the proceeding must be "a foreign main proceeding or foreign nonmain proceeding" within the meaning of section 1502; (ii) the "foreign representative" applying for recognition must be a "person or body"; and (iii) the petition must satisfy the requirements of section 1515, including that it be supported by the documentary evidence specified in section 1515(b). If these requirements are satisfied, "an order recognizing a foreign proceeding shall be entered." 11 U.S.C. § 1517(a).

"Foreign proceeding" is defined in section 101(23) of the Bankruptcy Code as:

> [A] collective judicial or administrative proceeding in a foreign country, including an interim proceeding, under a law relating to insolvency or adjustment of debt in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation.

More than one bankruptcy or insolvency proceeding may be pending with respect to the same foreign debtor in different countries. Chapter 15 therefore contemplates recognition in the United States of both a foreign "main" proceeding—a case pending in the country where the debtor's COMI is located (*see* 11 U.S.C. § 1502(4))—and foreign "nonmain" proceedings, which may be pending in countries where the debtor merely has an "establishment" (*see* 11 U.S.C. § 1502(5)). A debtor's COMI is presumed to be the location of the debtor's registered office, or "habitual residence" in the case of an individual. *See* 11 U.S.C. § 1516(c). However, when the debtor is a special purpose financing entity with no operations aside from managing creditor relationships and repaying corporate group debts, such entity's COMI (at least under applicable Second Circuit precedent) is not the entity's registered office but is determined by evaluating where the corporate "nerve center" is located. *In re Oi Brasil Holdings Coöperatief U.A.*, 578 B.R. 169, 218-21 (Bankr. S.D.N.Y. 2017) ("*Oi Brasil*").

However, the registered office and habitual residence presumption can be overcome. *See In re ABC Learning Centres Ltd.*, 445 B.R. 318, 328 (Bankr. D. Del. 2010) (stating that "the COMI presumption may be overcome particularly in the case of a 'letterbox' company not carrying out any business" in the country where its registered office is located), *aff'd*, 728 F.3d 301 (3d Cir. 2013).

Various factors have been deemed relevant by courts in determining a debtor's COMI, including the physical location of each debtor entity's headquarters, managers, employees, investors, primary assets, and creditors, as well as the jurisdiction whose law would apply to most of the debtor's disputes. *See In re SPhinX, Ltd.*, 351 B.R. 103 (Bankr. S.D.N.Y. 2006), *aff'd*, 371 B.R. 10 (S.D.N.Y. 2007).

In addition, courts have considered any relevant activities, including liquidation or reorganization activities and administrative functions. *See Morning Mist Holdings Ltd. v. Krys (In re Fairfield Sentry Ltd.)*, 714 F.3d 127 (2d Cir. 2013) ("*Fairfield Sentry*"). Courts may also consider the situs of each debtor entity's "nerve center," including the location from which such entity's "activities are directed and controlled, in determining a debtor's COMI." *Id.* at 138. "[R]egularity and ascertainability" by creditors are also important factors in the COMI analysis. *Id.*; *In re British Am. Ins. Co.*, 425 B.R. 884, 912 (Bankr. S.D. Fla. 2010) ("The location of a debtor's COMI should be readily ascertainable by third parties."); *In re Betcorp Ltd.*, 400 B.R. 266, 289 (Bankr. D. Nev. 2009) (looking to the whether COMI is ascertainable by creditors). Creditors' expectations regarding the location of a debtor's COMI are also relevant. *See In re Serviços de Petróleo Constellation S.A.*, 613 B.R. 497 (Bankr. S.D.N.Y. 2019); *Oi Brasil*, 578 B.R. at 228.

COMI can sometimes be found to have shifted, or "migrated," from a foreign debtor's original principal place of business or habitual residence to a new location. *See Pirogova,* 593 B.R. at 410; *In re Creative Finance Ltd. (In Liquidation)*, 543 B.R. 498 (Bankr. S.D.N.Y. 2016). In *Fairfield Sentry*, the Second Circuit ruled that, due principally to the present verb tense of the language of section 1517, the relevant time for assessing COMI is the chapter 15 petition date, rather than the date a foreign insolvency proceeding is commenced with respect to the debtor. The Fifth Circuit previously reached the same conclusion in *In re Ran*, 607 F.3d 1017 (5th Cir. 2010), as did the bankruptcy court in *British American*.

In *Fairfield Sentry*, the Second Circuit also expressed concern about possible COMI "manipulation," ruling that a court "may look at the period between the commencement of the foreign proceeding and the filing of the Chapter 15 petition to ensure that a debtor has not manipulated its COMI in bad faith." *Fairfield Sentry*, 714 F.3d at 138; *see also In re Mega Newco, Ltd.*, 2025 WL 601463 (Bankr. S.D.N.Y. Feb, 24, 2025) (granting chapter 15 recognition of a UK "scheme of arrangement" proceeding commenced on behalf of a newly formed subsidiary of a Mexican company for the purpose of restructuring the parent company's U.S. law-governed debt, but noting that the court would have had "serious questions" as to whether the debtor's scheme should be recognized under chapter 15 had there been evidence that the restructuring "structure" had been opposed, unfair, or thwarted creditor expectations); *In re O'Reilly*, 598 B.R. 784 (Bankr. W.D. Pa. 2019) (denying the petition of a foreign bankruptcy trustee for recognition under chapter 15 of a debtor's Bahamian bankruptcy case and finding that, although the case was otherwise eligible for recognition, the debtor's COMI was no longer in the Bahamas when the trustee filed the chapter 15 petition and the trustee failed to demonstrate that the debtor even had an "establishment" there); *In re Ocean Rig UDW Inc.*, 570 B.R. 687 (Bankr. S.D.N.Y. 2017) (ruling that scheme of adjustment proceedings pending in the Cayman Islands should be recognized as "foreign main proceedings" under chapter 15, even though the debtors' COMI had been shifted to the Caymans less than a year before the proceedings were commenced, because the country in which the debtors' COMI had previously been located did not have a law permitting corporate restructurings), *appeal dismissed*, 585 B.R. 31 (S.D.N.Y. 2018), *aff'd*, 2019 WL 1276205 (2d Cir. Mar. 19, 2019); *In re Suntech Power Holdings Co.*, 520 B.R. 399 (Bankr. S.D.N.Y. 2014) (the court-appointed liquidators of a Cayman Islands-incorporated debtor in a Cayman liquidation proceeding did not manipulate the debtor's COMI in bad faith where, although the debtor's COMI prior to filing its chapter 15 petition was in China, where the debtor was managed, and the debtor did not conduct any activities in the Caymans, the liquidators, after assuming control of the debtor's affairs, performed substantial liquidation activities in the Caymans such that its COMI legitimately shifted to the Caymans).

In cases involving multiple foreign debtors, COMI must be determined on an entity-by-entity basis. *See In re Black Press Ltd.*, No. 24-100044 (MFW) (Bankr. D. Del. Feb. 14, 2024) (unpublished order) (Doc. No. 73) (in a case involving multiple enterprise group debtors, the court must examine each debtor's COMI separately, rather than the enterprise group as a whole, for purposes of chapter 15 recognition; U.S. debtors' guarantee of their Canadian parent company's debts was an insufficient basis to conclude that the U.S. debtors' COMI was located in Canada, or that the U.S. debtor's even maintained an "establishment" in Canada); *In re Servicos de Petroleo Constellation S.A.*, 600 B.R. 237, 244 (Bankr. S.D.N.Y. 2019) ("While the Constellation Group is discussed as a group entity at times throughout this opinion's opening sections for context, it is important to bear in mind that the Court's recognition is granted on an individual debtor by debtor basis."); *In re OAS S.A.*, 533 B.R. 83, 92 n.8 (Bankr. S.D.N.Y. 2015).

An "establishment" is defined by section 1502(2) as "any place of operations where the debtor carries out a nontransitory economic activity." *See In re Mood Media Corp.*, 569 B.R. 556 (Bankr. S.D.N.Y. 2017) (concluding that an "establishment" must be an actual place from which economic market-facing activities are regularly conducted). Unlike with the determination of COMI, there is no statutory presumption regarding the determination of whether a foreign debtor has an establishment in any particular location. *See British American*, 425 B.R. at 915.

A foreign debtor's restructuring activities alone are inadequate to support a finding that the debtor has an establishment for purposes of foreign nonmain proceeding recognition. *See Ran*, 607 F.3d at 1028 (holding that if a foreign "bankruptcy proceeding and associated debts, alone, could suffice to demonstrate an establishment, this would render the framework of Chapter 15 meaningless. There would be no reason to define establishment as engaging in a nontransitory economic activity. The petition for recognition would simply require evidence of the existence of the foreign proceeding."); *see also In re Modern Land (China) Co.*, 641 B.R. 768, 785–86 (Bankr. S.D.N.Y. 2022) (a foreign restructuring proceeding "cannot itself constitute nontransitory economic activity to support recognition as a foreign nonmain proceeding"); *Rozhkov v. Pirogova (In re Pirogova)*, 612 B.R. 475, 484 (S.D.N.Y. 2020) (same).

Recognition under chapter 15 "is not to be rubber stamped by the courts," and the bankruptcy court must carefully examine whether a foreign bankruptcy or insolvency proceeding qualifies as either a main or a nonmain proceeding under chapter 15. *See In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.*, 374 B.R. 122, 125 (Bankr. S.D.N.Y. 2007), *aff'd*, 389 B.R. 325 (S.D.N.Y. 2008); *accord In re Glob. Cord Blood Corp.*, 2022 WL 17478530, at *6 (Bankr. S.D.N.Y. Dec. 5, 2022) ("'But recognition is not a rubber stamp exercise,' and the burden rests on the foreign representative to prove each of the requirements of Section 1517.") (quoting *Creative Finance*, 543 B.R. at 514).

INTERCEMENT

InterCement Group ("IC Group") is a large cement producer based in Brazil. IC Group consists of its Brazil-incorporated and headquartered holding company ("IC Holding") and various holding and operating company affiliates, most of which are not based in Brazil.

IC Holding engages in capitalization and financing activities for IC Group and is responsible for IC Group's business management. Another holding company affiliate, InterCement Participações S.A ("ICP"), which is incorporated and has a registered office in Brazil, is responsible for ICG Holding's investments in the cement sector. ICP acts as the head of IC Group. ICP and its board of directors and executive officers make the strategic, financial, and operational decisions for all IC Group companies. All of ICP's directors, officers, and employees are located in Brazil

Brazil-incorporated InterCement Brasil S.A. ("IC Brasil")—IC Group's principal operating company in Brazil—engages in all aspects of cement production and sales in Brazil. Nearly all of its employees are located in Brazil.

NON-BRAZILIAN FINANCING AFFILIATES

The IC Group has a number of non-Brazilian affiliates established to facilitate group company access to domestic and international capital markets. Those affiliates include InterCement Financial Operation B.V. ("IC Netherlands") and InterCement Trading e Inversiones S.A. ("IC Spain").

IC Netherlands. IC Netherlands is an indirect subsidiary of ICP. Its principal assets are intercompany claims and $2 million in cash held principally in Brazilian bank accounts. As of 2024, IC Netherlands' debts included $750 million in U.S. dollar-denominated unsecured notes (the "NY Notes") issued under an indenture governed by New York law, and approximately $436 million in intercompany loans extended by ICP.

The NY Notes are guaranteed by IC Brasil and ICP. Apart from the intercompany loans, IC Netherlands has no Brazilian creditors. The offering memorandum for the NY Notes states that IC Netherlands is a Dutch corporation and describes the IC Group as a Brazilian company with a significant portion of its operations in Brazil. It also cautions noteholders that, in the event of a bankruptcy filing by IC Netherlands (somewhere in Europe, but governed by Dutch insolvency law), guarantors IC Brasil and ICP might also file for bankruptcy, but in Brazil.

Because the operations generating cash flow in the IC Group to make interest payments on the NY Notes occur in Brazil, certain disputes likely to impact IC Netherlands would largely be governed by Brazilian law. However, except for intercompany agreements, IC Netherlands is not a party to any agreements governed by Brazilian law.

IC Netherlands has no employees. Its Dutch office is shared with a Dutch corporation that provides record-keeping, mail, tax and certain other services. IC Netherlands pays taxes and files annual reports in the Netherlands, which are subject to approval by ICP employees in Brazil. Its books and records are located in the Netherlands, with copies separately maintained in Brazil. IC Netherlands shares an audit committee with the other companies in the IC Group.

IC Netherlands has six directors, half of whom reside or are located in the Netherlands and half of whom reside in Brazil. Actions by its board require the approval of at least one Dutch and one Brazilian director. Because the Dutch directors are not employees of the IC Group, they rely on the Brazilian directors for information regarding group operations.

The operations of IC Netherlands are run primarily out of Brazil, with ICP's agents conducting noteholder meetings, coordinating investor relations, auditing financial statements, and making marketing decisions from Brazil. ICP's board makes material strategic decisions for all IC Group companies from Brazil. Although ICP is responsible for directing the payment of funds from other IC Group companies to make interest payments on the NY Notes, IC Netherlands' board ultimately decides whether and when to make such payments.

IC Spain. IC Spain is a Spain-incorporated company that is also an indirect subsidiary of ICP. Like IC Netherlands, IC Spain supports the IC Group's international financing efforts, including by guaranteeing debentures (the "Debentures") issued by IC Brasil and ICP in the Brazilian capital markets. The Debentures are governed by Brazilian law.

IC Spain's registered office is in Spain. It has a single employee located in Spain, one director located in Spain, and two directors residing in Brazil (both of whom are ICP employees). In making decisions, the IC Spain board does not take instruction from ICP or any other IC Group agents. ICP employees, however, provide IC Spain with legal, finance, treasury, tax, accounting, compliance, and investor relations services.

IC Spain's books and records are maintained in Spain, with copies separately maintained in Brazil. Book and record entries must be approved by an ICP employee.

Other than the stock of certain affiliates, IC Spain's assets consist of cash held in Spanish bank accounts. Its creditors are both Brazilian and non-Brazilian, but the holders of the Debentures guaranteed by IC Spain are mostly Brazilian. It has also has intercompany debts to other IC Group companies.

Foreign Bankruptcy Cases and U.S. Chapter 15 Proceedings. In July 2024, certain IC Group companies, including, among others, ICP, IC Brasil, IC Spain, IC Netherlands, and IC Holding (collectively, the "debtors") commenced a court-supervised mediation proceeding in Brazil with several creditors, including the holders of the Debentures. After the debtors negotiated an agreement in principal with the Debenture holders concerning the terms of a restructuring plan (the "EJ Plan"), the Brazilian court converted the mediation into a consensual *recuperação extrajudicial proceeding* (the "EJ Proceeding"), and enjoined creditor collection efforts to give the debtors time to seek support for the EJ Plan.

On July 9, 2024, a NY Noteholder filed a petition in a Dutch court seeking the appointment of a "restructuring expert" to devise a restructuring plan for IC Netherlands under the Dutch *Wet homologatie onderhands akkoord* ("WHOA").

On July 15, 2024, the debtors' duly appointed (via cooperate resolution) foreign representative (the "FR") filed a petition in the U.S. Bankruptcy Court for the Southern District of New York seeking chapter 15 recognition of the EJ Proceeding as a foreign main or nonmain proceeding. Pending a determination on the recognition petition, the U.S. bankruptcy court granted provisional relief under section 1521(a)(6) of the Bankruptcy Code temporarily enjoining creditor collection efforts.

On July 16, 2024, IC Spain filed a notice in a Spanish court that it had initiated negotiations with creditors and requested a temporary injunction of creditor collection efforts (the "Spanish Proceeding"). The Spanish court approved the requested relief. A different Spanish court later entered an order recognizing the Brazilian RJ Proceeding (defined below) in Spain (unlike Brazil, Spain has not enacted a version of the Model Law but implemented reforms to its bankruptcy laws in 2022 that provide for recognition of foreign bankruptcy proceedings). The Ad Hoc Group appealed the recognition order.

On July 31, 2024, the Dutch court entered an order commencing a voluntary public restructuring procedure for IC Netherlands (the "Dutch Proceeding") and denying the NY Noteholder's request for the appointment of a restructuring expert. Instead, the court appointed an "observer" to oversee the formulation of a restructuring plan. In its order, the Dutch court found that IC Netherlands' COMI was in the Netherlands in accordance with the European Insolvency Regulation (the "EIR"), which regulates cross-border insolvency cases within the European Union.

In early December 2024, the Dutch Court denied the NY Noteholder's petition to commence a liquidation proceeding for IC Netherlands, thereby allowing the Dutch Proceeding to continue. In its order, the Dutch Court reiterated its finding that the IC Netherlands' COMI was in the Netherlands.

On December 3, 3024, after the debtors determined that creditor negotiations in the EJ Proceeding were futile, the debtors commenced a *recuperação judicial* proceeding under Brazilian law (the "Brazilian RJ Proceeding"). That proceeding was deemed a separate insolvency proceeding from the EJ Proceeding because the Brazilian RJ Proceeding included certain additional IC Group debtor companies.

On December 9, 2024 (referred to hereafter as the "chapter 15 petition date," even though it was the second chapter 15 filing for the debtors), the FRC filed another chapter 15 petition in the U.S. bankruptcy court seeking chapter 15 recognition of the debtors' Brazilian RJ Proceeding and asserted that the COMI for each chapter 15 entity was in Brazil.

An ad hoc group of the NY Noteholders (the "Ad Hoc Group") objected to recognition, arguing that the COMI of IC Netherlands and IC Spain are in the Netherlands and Spain, respectively.

THE BANKRUPTCY COURT'S RULING

The U.S. bankruptcy court granted the petition for recognition of the Brazilian RJ Proceeding as a foreign main proceeding under chapter 15. However, in so ruling, the court found that the COMI of all of the debtors, including IC Netherlands and IC Spain, is in Brazil.

Chief U.S. Bankruptcy Judge Martin Glenn initially explained that courts in the Second Circuit have long agreed that the "Brazilian RJ process" satisfies the standards for chapter 15 recognition. *InterCement*, 668 B.R. at 821 (citation omitted). He therefore declined to discuss those standards in detail.

Addressing the COMI of each of the debtors, Judge Glenn noted that the parties did not dispute that the COMI of ICP and IC Brasil was located in Brazil, where the companies were incorporated, had a registered office, and conducted operations. Therefore, he concluded, the presumption in section 1516(c) that COMI is situated in the country containing a foreign debtor's registered office had not been overcome or even refuted.

The COMI of IC Netherlands and IC Spain, however, was contested.

The FR claimed that IC Netherlands' COMI is in Brazil, whereas the Ad Hoc Group argued that it is in the Netherlands. Guided by *Oi Brasil*, which had strikingly similar facts, Judge Glenn explained that, whereas in this case, "a foreign debtor is a special purpose financing vehicle (SPV) with no operations other than managing relationships with creditors and paying off obligations on behalf of a larger corporate parent, the debtor's COMI should be determined by the location of the corporate 'nerve center,'" which in this case is in Brazil. *Id.* at 822 (citing *Oi Brasil*, 578 B.R. at 222–30). Moreover, Judge Glenn noted, developments immediately before the commencement of the Brazilian RJ Proceeding—specifically, the mediation and the Brazilian EJ Proceeding—bolster the FR's argument that IC Netherlands' COMI as of the second chapter 15 petition date was in Brazil.

Judge Glenn emphasized that those developments "establish conclusively" that IC Netherlands' COMI was in Brazil as of the second chapter 15 petition date because the company's "primary business activity" was restricted to repayment of the NY Notes. He also noted that the efforts of IC Netherlands to repay the NY Notes "[were] channeled through—and [their] success depended on—the success of the [mediation] and Brazilian EJ Proceeding and related creditor negotiations in Brazil." *Id.* at 823. Moreover, the U.S. bankruptcy court found that, because all of those activities were "publicly and widely disclosed," they strongly indicated that the creditors of IC Netherlands were notified of the proceedings in Brazil. "By contrast," Judge Glenn wrote, "no restructuring activities with the capacity to materially impact [IC Netherlands'] ability to conduct its business occurred in the Netherlands during this timeframe." *Id.* at 823–24.

The U.S. bankruptcy court rejected the Ad Hoc Group's argument that, because IC Netherlands asserted in the Dutch Proceeding that its COMI was in the Netherlands, and the Dutch court agrees in its findings, IC Netherlands should be estopped from taking a contradictory position in the chapter 15 proceeding. According to Judge Glenn, "[c]orporate entities are not precluded from having different COMIs in European and Chapter 15 proceedings because a 'COMI finding under the [EIR] in the Dutch proceedings is not the same as a COMI finding under Chapter 15 of the Bankruptcy Code.'" *Id.* at 825 (quoting *Oi Brasil*, 578 B.R. at 206). In a chapter 15 proceeding, Judge Glenn explained, COMI must be determined as of the chapter 15 petition date, whereas COMI under the EIR is to be determined as of the filing date of the foreign insolvency proceeding for which recognition is sought. *Id.* In other words, IC Netherlands' COMI when it filed the Dutch Proceeding might have been in the Netherlands, but, based on events occurring between that date and the chapter 15 petition date, the company's COMI for purposes of chapter 15 recognition was in Brazil.

The U.S. bankruptcy court came to the same conclusion regarding IC Spain. Judge Glenn noted that IC Spain's operations as of the chapter 15 petition date (and the date on which the Brazilian RJ Proceeding commenced) consisted of restructuring its obligations under the Debentures, activities that "predominantly occurred in Brazil." *Id.* Moreover, he found that IC Spain's creditors, including the Debenture holders, were clearly aware of the IC Group's restructuring efforts in Brazil.

The U.S. bankruptcy court accordingly concluded that IC Spain's COMI for purposes of chapter 15 recognition was in Brazil. In so ruling, the court rejected the Ad Hoc Group's speculation that any "events in Spain" after the chapter 15 petition date were "plainly engineered to boost Petitioners' recognition efforts." According to Judge Glenn, although a court has the authority to examine the time period between the foreign bankruptcy commencement and chapter 15 filing dates to prevent improper or bad faith COMI manipulation, there was no evidence of any such misconduct in this case. *Id.* at 826 n.16.

Finally, the U.S. bankruptcy court extended the provisional injunctive relief granted after the initial chapter 15 filing to supplement the automatic stay that comes into force upon chapter 15 recognition under section 1520(a)(1) of the Bankruptcy Code.

OUTLOOK

The bankruptcy court's decision in *InterCement* is a primer on assessing COMI for purposes of recognition of a foreign bankruptcy case under chapter 15 of the Bankruptcy Code. Key takeaways from the ruling include:

- In cross-border bankruptcy cases involving multiple affiliated foreign debtors, each debtor's COMI must be determined separately, rather than the COMI of the enterprise group as a whole.
- COMI for purposes of chapter 15 recognition should be determined as of the chapter 15 petition date rather than the commencement debt of the foreign bankruptcy proceeding for which recognition is sought.
- A U.S. bankruptcy court is not bound by the determinations of a foreign bankruptcy court as to COMI under other cross-border insolvency laws, such as the EIR, that may have different standards for determining COMI.
- COMI may shift over time depending upon the foreign debtor's activities prior and subsequent to commencement of its foreign bankruptcy proceeding. In some cases, such a shift may be deemed improper or bad-faith COMI manipulation or accepted by the court as a form of good forum shopping.
- If a corporate group's nerve center is centrally located, notwithstanding group subsidiaries and affiliates having registered offices elsewhere, such nerve center may justify foreign main status for subsidiaries and affiliates that participate in a cross-border restructuring.

FIFTH CIRCUIT REIGNS IN BANKRUPTCY COURT GATEKEEPING IN CHAPTER 11 PLANS

Dan B. Prieto

Provisions in chapter 11 plans releasing non-debtors from liability for pre-bankruptcy conduct in exchange for funding for plan distributions or post-confirmation operations have long been used as a means to facilitate confirmation of plans, even after the U.S. Supreme Court ruled in 2024 in the Purdue Pharma chapter 11 cases that the Bankruptcy Code does not permit nonconsensual, third-party releases under chapter 11 plans that do not pay creditors in full. The Supreme Court's ruling, however, was limited to releases. This left open the possibility that chapter 11 plan "exculpation" clauses limiting the liability of certain non-debtor entities for actions taken in connection with a bankruptcy case may, or "gatekeeping" provisions requiring court approval before suing designated non-debtors may still be permissible.

In the wake of *Purdue*, the U.S. Court of Appeals for the Fifth Circuit reexamined the validity of chapter 11 plan exculpation and gatekeeping provisions in *Matter of Highland Cap. Mgmt., L.P.*, 132 F.4th 353 (5th Cir. 2025), *stayed pending petition for cert.*, 2025 WL 1522875 (May 29, 2025), *cert. denied and stay vacated*, 2025 WL 1621149 (U.S. June 9, 2025) ("*Highland II*"). A three-judge panel of the Fifth Circuit reversed a district court's order confirming a chapter 11 plan, ruling that the district court failed to narrow the definition of "protected parties" in an exculpation clause of an investment company's plan, which was initially approved in 2021, despite the Fifth Circuit's 2022 decision directing it to do so. According to the Fifth Circuit panel, although bankruptcy injunctions in the form of exculpation provisions are not identical to plan releases, they cannot be used to shield from liability non-debtors that are not legally entitled to releases. In addition, the Fifth Circuit emphasized that gatekeeping "is patently beyond the power of an Article I court under §105 [of the Bankruptcy Code]" if it protects anyone other than the debtor, independent directors, the creditors' committee, and committee members.

VALIDITY OF THIRD-PARTY RELEASES, EXCULPATION CLAUSES, AND GATEKEEPING PROVISIONS

Section 524(e) of the Bankruptcy Code provides that, "[e]xcept as provided in subsection (a)(3) of this section [making the discharge injunction applicable to actions to collect against community property], discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt." Even so, chapter 11 plans confirmed by bankruptcy courts in certain circuits commonly included provisions that either release or exculpate various non-debtors from certain liabilities.

Chapter 11 plan releases have provided for the relinquishment of both prepetition and postpetition claims belonging to the debtor or non-debtor third parties (e.g., creditors or shareholders) against various non-debtors.

Although it is generally accepted that a chapter 11 plan can release non-debtors from claims of other non-debtors if the release is consensual, the U.S. Supreme Court, in *Harrington, United States Trustee, Region 2 v. Purdue Pharma L.P.*, 603 U.S. 204 (2024) ("*Purdue*"), threw a wrench into the chapter 11 gears when it ruled that no provision in the Bankruptcy Code other than section 524(g) (providing for the creation of a trust for the payment of asbestos personal injury claims) authorizes a chapter 11 plan to release the claims of nonconsenting creditors against non-debtor entities absent full satisfaction of such claims.

In so ruling, the majority reasoned that:

> The "catchall" provision in section 1123(b)(6) of the Bankruptcy Code stating that a chapter 11 plan "may" also "include any other appropriate provision not inconsistent with the applicable provisions of this title" must be construed narrowly in light of its surrounding context and read to "embrace only objects similar in nature" to the specific examples preceding it, all of which deal with the relationship between a debtors and its creditors, rather than the "radically different" power to discharge the debts of a non-debtor without the consent of affected creditors;
>
> The proponents of a chapter 11 plan cannot evade the Bankruptcy Code's general limitation that a discharge applies only to debtors who place "substantially all of their assets on the table" and its exclusion from discharge of debts based on "fraud" or those alleging "willful and malicious injury" simply "by rebranding the discharge a 'release'"; and
>
> If lawmakers had intended "to reshape traditional practice so profoundly" in the Bankruptcy Code, compared to its predecessor statutes, by "extending to courts the capacious new power the plan proponents claim, one might have expected them to say so expressly somewhere" in the Bankruptcy Code itself.

The majority emphasized that nothing in its ruling should be construed to call into question consensual releases in a bankruptcy reorganization plan, and further declined to express a view on what qualifies as a consensual release, observing that those sorts of releases pose different questions and may rest on different legal grounds. Similarly the majority declined to pass upon a plan that provides for full satisfaction of claims against a non-debtor. The majority also expressly cabined its ruling to the situation before it, noting that "we hold only that the [B]ankruptcy [C]ode does not authorization a release and injunction that, as part of a plan of reorganization under Chapter 11, effectively seeks to discharge claims against a nondebtor without the consent of affected claimants." *Id.* at 206.

Purdue, however, did not address the validity of chapter 11 plan exculpation or gatekeeping provisions, which similarly release, enjoin, or condition the prosecution of certain claims against non-debtors.

Exculpation clauses typically specify the scope of, or the standard of care (e.g., ordinary negligence, gross negligence, or willful misconduct) governing, an exculpated party's liability for conduct during the course of the bankruptcy case. *See In re Aegean Marine Petroleum Network Inc.*, 599 B.R. 717, 721 (Bankr. S.D.N.Y. 2019) (noting that "an appropriate exculpation provision should say that it bars claims against the exculpated parties based on the negotiation, execution, and implementation of agreements and transactions that were approved by the Court"); *In re Murray Metallurgical Coal Holdings, LLC*, 623 B.R. 444, 501 (Bankr. S.D. Ohio 2021); *see also Blixseth v. Credit Suisse*, 961 F.3d 1074, 1084 (9th Cir. 2020) (distinguishing releases and exculpation clauses), *cert. denied*, 141 S.Ct. 1394 (2021).

Such provisions commonly insulate estate fiduciaries, including officers, directors, and employees of the debtors and the reorganized debtors, as well as advisers and professionals retained by the estate, official committees, and their members from most claims arising from their official conduct during the chapter 11 case. *See, e.g., In re PWS Holding Corp.*, 228 F.3d 224, 246 (3d Cir. 2000); *In re LATAM Airlines Grp. S.A.*, 2022 WL 2206829, at *50 (Bankr. S.D.N.Y. June 18, 2022); *In re Aegean Marine Petroleum Network Inc.*, 599 B.R. 717, 720 (Bankr. S.D.N.Y. 2019)).

A gatekeeping provision in a chapter 11 plan is an injunction barring litigation against critical plan participants without the bankruptcy court's approval after the court determines that the proposed litigants have a "colorable claim" that the bankruptcy court or some other court with jurisdiction can adjudicate. Such provisions are an outgrowth of the "*Barton* doctrine." Named for the decision in *Barton v. Barbour*, 104 U.S. 126 (1881), the *Barton* doctrine requires that "leave of the appointing forum must be obtained by any party wishing to institute an action in a non-appointing forum against a trustee for the acts done in the trustee's official capacity and within the trustee's authority as an officer of the court." *ACE Insurance Co., Ltd. v. Smith (In re BCE West, L.P.)*, 2006 WL 8422206, *2 (D. Ariz. Sept. 20, 2006) (quoting *In re DeLorean Motor Co.*, 991 F.2d 1236, 1240 (6th Cir. 1993)); *accord Villegas v. Schmidt*, 788 F.3d 156, 159 (5th Cir. 2015) (under the *Barton* doctrine, the bankruptcy court may require a party to "obtain leave of the bankruptcy court before initiating an action in district court when the action is against the trustee or other bankruptcy-court-appointed officer, for acts done in the actor's official capacity"); *In re Christensen*, 598 B.R. 658, 665 (Bankr. D. Utah 2019) ("*Barton* is strictly a 'jurisdictional gatekeeping doctrine," and it strips all courts—except the bankruptcy court that appointed the trustee—of subject-matter jurisdiction to hear a lawsuit against the trustee unless the appointing court gives its permission to sue the trustee elsewhere.") (footnotes and citations omitted).

Some courts have broadened the scope of the *Barton* doctrine to include a variety of court-appointed fiduciaries and their agents. *See Lawrence v. Goldberg*, 573 F.3d 1265, 1270 (11th Cir. 2009) (applying the *Barton* doctrine to the trustee's lawyers and creditors who "functioned as the equivalent of court appointed officers"); *In re Cir. City Stores, Inc.,* 557 B.R. 443, 447 (Bankr. E.D. Va. 2016) (observing that the *Barton* doctrine has long applied to other types of court-appointed parties in bankruptcy, including liquidating trusts, trustees, and counsel for trustees, with the purpose being to "prevent trustees from being subject to legal proceedings that interfere with their ability to administer the estate"); *see generally* COLLIER ON BANKRUPTCY ¶ 10.01 (16th ed. 2025) (citing and discussing cases). However, the Fifth Circuit has never adopted this approach.

The Fifth Circuit addressed the validity of exculpation and gatekeeping provisions in *Highland II*.

HIGHLAND II

Highland Capital Management, L.P. (the "debtor") is a Texas-based investment firm cofounded by James Dondero ("Dondero"). Facing myriad unpaid judgments and liabilities arising from its management of publicly traded investment portfolios, the debtor filed for chapter 11 protection in October 2019 in the Northern District of Texas. After the bankruptcy filing, the debtor's unsecured creditors' committee (the "committee") negotiated an agreement whereby Dondero would resign as an officer and director to serve instead as an "unpaid portfolio manager," and the committee would select a board of three independent directors to govern the debtor.

Even though Dondero was no longer on the debtor's board, he proposed several chapter 11 plans (opposed by the committee and the new board), interfered with client relations, and generally disrupted the chapter 11 case. As a consequence, in 2020, the committee forced him to resign from his portfolio management role. The bankruptcy court later held Dondero in civil contempt for his behavior.

Anticipating that Dondero would continue to disrupt the debtor's reorganization, the committee and the debtor's board proposed a chapter 11 plan that included exculpation and injunction

provisions designed to shield the debtor and related entities from certain liabilities.

The plan's exculpation provision permanently barred any claims against a group of "Exculpated Parties" for any conduct related to:

> the filing and administration of the Chapter 11 Case; (ii) the negotiation and pursuit of the Disclosure Statement, the Plan, or the solicitation of votes for, or confirmation of, the Plan; (iii) the funding or consummation of the Plan (including the Plan Supplement) or any related agreements, instruments, or other documents, the solicitation of votes on the Plan, the offer, issuance, and Plan Distribution of any securities issued or to be issued pursuant to the Plan, including the Claimant Trust Interests, whether or not such Plan Distributions occur following the Effective Date; (iv) the implementation of the Plan; and (v) any negotiations, transactions, and documentation in connection with the foregoing clauses (i)-(iv).

The exculpation did not extend to actions by the debtor's general partner or employees predating the appointment of the new board, and it excluded liabilities arising from "acts or omissions that constitute bad faith, fraud, gross negligence, criminal misconduct, or willful misconduct."

"Exculpated Parties" included the debtor and its successor and assigns, employees, the debtor's general partner, the independent directors, the committee, committee members acting in their official capacity, professionals retained by the debtor and the committee during the chapter 11 case, and various "related parties."

The plan's injunction provision barred "Enjoined Parties" from "taking any actions to interfere with the implementation or consummation of the Plan." It also prohibited Enjoined Parties from suing, enforcing orders, or asserting rights of setoff to recover from the debtor or its property. In addition, the injunction provision include the following gatekeeping clause with respect to "Protected Parties":

> [N]o Enjoined Party may commence or pursue a claim or cause of action of any kind against any Protected Party that arose or arises from or is related to the Chapter 11 Case, the negotiation of the Plan, the administration of the Plan or property to be distributed under the Plan, the wind down of the business of the Debtor or Reorganized Debtor, the administration of the Claimant Trust or the Litigation Sub-Trust, or the transactions in furtherance of the foregoing without the Bankruptcy Court (i) first determining, after notice and a hearing, that such claim or cause of action represents a colorable claim of any kind, including, but not limited to, negligence, bad faith, criminal misconduct, willful misconduct, fraud, or gross negligence against a Protected Party and (ii) specifically authorizing such Enjoined Party to bring such claim or cause of action against any such Protected Party[.]

The debtor's plan defined the "Protected Parties" as the debtor and its successors and assigns, including the reorganized debtor, direct and indirect majority-owned subsidiaries, funds managed by the debtor, employees, the independent directors, the committee, committee members acting in their official capacity, trusts established under the plan to pay creditor claims as well as their trustees, the members of a trust oversight committee acting in their official capacities, professionals retained by the debtor and the committee, and various other related entities.

The plan defined "Enjoined Parties" as all entities holding claims against or equity interests in the debtor, whether or not the entity filed a claim or voted on the plan; Dondero; any entity that appeared or filed a pleading in the bankruptcy case; and specified related entities.

Dondero and several other parties, including two entities owned or controlled by Dondero—NexPoint Asset Management, L.P. and NexPoint Advisors, L.P. (collectively, "NexPoint")—objected to the plan. The Office of the U.S. Trustee (the "UST," and together with Dondero and NexPoint, the "appellants") also objected to the plan's exculpation provision, arguing that it was an impermissible nonconsensual third-party release.

The bankruptcy court confirmed the debtor's chapter 11 plan over the objections.

On direct appeal, the Fifth Circuit reversed the plan confirmation order, but only to the extent that it exculpated certain non-debtors in violation of section 524(a), and remanded the case below. *See NexPoint Advisors L.P. v. Highland Capital Mgmt.*, 48 F.4th 419 (5th Cir. 2022) ("*Highland I*"), *cert. denied*, 144 S. Ct. 2714 (2024), *and cert. denied*, 144 S. Ct. 2715 (2024), *on remand*, 2023 WL 2250145 (Bankr. N.D. Tex. Feb. 27, 2023). Among other things, the court of appeals held that, although the Fifth Circuit categorically bars non-debtor releases, a chapter 11 plan may give the bankruptcy court a gatekeeper function to approve or disapprove litigation against entities that would be protected by exculpations in other circuits.

The Fifth Circuit rejected the argument that exculpations could be authorized under sections 105(a), which provides that a bankruptcy court "may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code]," and 1123(b)(6) of the Bankruptcy Code (described above). According to the court, "in this circuit, § 105(a) provides no statutory basis for a nondebtor exculpation . . . [a]nd the same logic extends to § 1123(b)(6)." *Id.* at 437. The Fifth Circuit acknowledged the circuit split as to whether third parties may be exculpated, but emphasized that "[the Fifth Circuit] along with the Tenth Circuit hold § 524(e) categorically bars third-party exculpations absent express authority in another provision of the Bankruptcy Code."

The Fifth Circuit then ruled that the exculpation provision before it could extend only to the debtor and related entities, the unsecured creditors' committee and its members, and the debtor's independent directors "for conduct within the scope of their duties." *Id.* at 438. The court reiterated that conclusion on rehearing, clarifying that the gatekeeper clause in the plan's injunction provision was not fully lawful because it was overly broad.

On remand, the bankruptcy court granted the debtor's motion to alter the exculpation provision in its chapter 11 plan in accordance with the Fifth Circuit's decision in *Highland I* by limiting the scope of the provision to the debtor, the independent directors, the committee, and committee members. In doing so, it overruled the appellants' objection to the motion on the basis that the changes to the plan in the definition of "Exculpated Parties" should also be made to the definition of "Protected Parties" in the gatekeeper clause.

The Fifth Circuit granted the appellants' motion for a direct appeal of the bankruptcy court's remand order.

THE FIFTH CIRCUIT'S RULING

A three-judge panel of the Fifth Circuit held that the bankruptcy court failed on remand to implement its ruling in *Highland I* properly.

Writing for the panel, Chief U.S. Circuit Court Judge Jennifer Walker Elrod explained that, by failing to make a conforming change in the definition of "Protected Parties," "the bankruptcy court exceeded its power under the Bankruptcy Code by allowing the Plan to improperly protect non-debtors from liability." *Highland II*, 132 F.4th at 358.

The Fifth Circuit reiterated its previous pronouncement that section 105(a) of the Bankruptcy Code does not give a bankruptcy court unlimited ability to deploy its equitable powers, but is limited to actions consistent with other provision in the Bankruptcy Code. In this case, Judge Elrod emphasized, bankruptcy injunctions that, like releases, similarly act to protect non-debtors, clearly violate section 524(e), the Supreme court's ruling in *Purdue*, and Fifth Circuit precedent. *Id.* at 358–59 (citing *Purdue*, 603 U.S. at 227; *Bank of N.Y. Trust Co. v. Official Unsecured Creditors' Comm. (In re Pacific Lumber Co.)*, 584 F.3d 229, 252 (5th Cir. 2009) ("*Pacific Lumber*"); *In re Vitro S.A.B. de C.V.*, 701 F.3d 1031, 1059, 1061–62 (5th Cir. 2012); *In re Zale Corp.*, 62 F.3d 746 (5th Cir. 1995)).

Next, the Fifth Circuit panel explained that, although bankruptcy courts have some power to act as gatekeepers to litigation in accordance with the *Barton* doctrine—even if they would not have jurisdiction to adjudicate such claims or the bankruptcy case has concluded—"they nonetheless do not have unrestricted power to protect non-debtors from liability via a pre-filing injunction." *Id.* at 359. According to the court, gatekeeping prevents usurpation of the powers of the bankruptcy court that would prevent the court from distributing bankruptcy estate assets in accordance with statutory priorities, and protects a bankruptcy trustee from unjustified personal liability for actions taken in the trustee's official capacity. However, Judge Elrod emphasized, the Fifth Circuit has "never extended the *Barton* doctrine to give bankruptcy courts gatekeeping power over claims against non-debtors." *Id.* Gatekeeping, she explained, "is patently beyond the power of an Article I court under § 105" if it shields anyone other than the debtor, independent directors, the creditors' committee, and committee members for conduct within the scope of their duties. *Id.* at 362.

The Fifth Circuit ruled that the definition of "Protected Parties" in the chapter 11 plan's gatekeeper clause must, like the definition of Exculpated Parties, be limited to the debtor, the independent directors, the committee, and the committee members. It accordingly reversed the bankruptcy court's order in part and remanded the case below with a direction to amend the debtor's chapter 11 plan in accordance with its decision.

OUTLOOK

On May 29, 2025, the U.S. Supreme Court granted the debtor's emergency motion to stay the Fifth Circuit's ruling pending the Supreme Court's decision on the debtor's anticipated petition for a writ of *certiorari*. However, on June 9, 2025, the Court vacated the stay and denied the debtor's petition for *certiorari* in a one-page order that offered no explanation for the decision.

Even before *Purdue*, the Fifth Circuit had rejected third-party releases and injunctions of third-party claims against non-debtors (in non-asbestos chapter 11 cases subject to section 524(g) of the Bankruptcy Code) except in instances where such injunctions channeled claims to allow recovery from separate assets, thereby avoiding discharging non-debtors. *See Pacific Lumber*, 584 F.3d at 252; *Zale*; 62 F.3d at 760). The Tenth Circuit has also prohibited such non-debtor releases or injunctions. *See Landsing Diversified Props. v. First Nat'l Bank & Tr. Co. of Tulsa (In re W. Real Estate Fund, Inc.)*, 922 F.2d 592 (10th Cir. 1990). Given its previous views on the subject, the Fifth Circuit's decision in *Highland II* does not represent a sea change in this area.

NEW YORK BANKRUPTCY COURT ADOPTS "REALISTIC POSSIBILITY" STANDARD FOR FREE AND CLEAR SALES UNDER 11 U.S.C § 363(F)(5)

Jeffrey B. Ellman • Alexandra L. Wainwright

Section 363(f)(5) of the Bankruptcy Code allows a bankruptcy trustee to sell estate property free and clear of any competing interest in the property (such as a lien or other security interest) if the interest holder "could be compelled, in a legal or equitable proceeding, to accept" a money satisfaction in exchange for its interest. However, courts disagree regarding what circumstances trigger this section. For example, is it enough that such an interest could be eliminated in state foreclosure sale? In *In re Urban Commons 2 West LLC*, 668 B.R. 42 (Bankr. S.D.N.Y. 2025), the U.S. Bankruptcy Court for the Southern District of New York weighed in on this question. It rejected the narrow view adopted a decade earlier in the same district by the district court in *Dishi & Sons v. Bay Condos LLC*, 510 B.R. 696 (S.D.N.Y. 2014), but cabined the potentially broader view espoused by some courts (and of concern to the *Dishi* court) by adopting what it termed a "realistic possibility" standard.

FREE-AND-CLEAR BANKRUPTCY ASSET SALES

Section 363(b)(1) of the Bankruptcy Code provides in relevant part that a bankruptcy trustee or chapter 11 debtor-in-possession ("DIP"), "after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate." Section 363(f) of the Bankruptcy Code authorizes a trustee or DIP to sell estate property "free and clear of any interest in such property of an entity other than the estate," but only if one of the following is true:

(1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;
(2) such entity consents;
(3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;
(4) such interest is in bona fide dispute; or
(5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

11 U.S.C. § 363(f).

A bankruptcy court's power to order sales free and clear of a competing interest without the consent of the party asserting the interest has been recognized for more than a century. *See Ray v. Norseworthy*, 90 U.S. 128, 131–32 (1875). It promotes the expeditious liquidation of estate assets by avoiding delay caused by sorting out disputes concerning the validity and extent of competing interests, which can later be resolved in a centralized forum. It also facilitates the estate's realization of the maximum value possible from an asset. A prospective buyer would discount its offer significantly if it faced the prospect of protracted litigation to obtain clear title to an asset. *See In re WBQ P'ship*, 189 B.R. 97, 108 (Bankr. E.D. Va. 1995); *accord In re Realia, Inc.*, 2012 WL 833372, *10 (B.A.P. 9th Cir. Mar. 13, 2012) (noting that "the purpose of the 'free and clear' language is to allow the debtor to obtain a maximum recovery on its assets in the marketplace"), *aff'd*, 569 F. App'x 544 (9th Cir. 2014).

Under section 363(f)(5), estate property may be sold free and clear of a competing interest in the asset (such as a mortgage or a security interest) if the holder of the interest "could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest." For example, "[a]pplicable nonbankruptcy law may recognize a monetary satisfaction when the lienholder is to be paid in full out of the proceeds of the sale or otherwise." COLLIER ON BANKRUPTCY ¶ 363.06[6] (16th ed. 2025).

Most courts agree that section 363(f)(5) applies if any *third party* could compel the interest holder to accept money in exchange for their interest under state law, such as through a foreclosure or sale under the Uniform Commercial Code ("UCC"). *See, e.g., In re Boston Generating, LLC*, 440 B.R. 302, 333 (Bankr. S.D.N.Y. 2010) (approving the sale of debtors' assets free and clear of certain liens under section 363(f)(5) "because the [lenders] could be compelled under state law to accept general unsecured claims to the extent the sale proceeds are not sufficient to pay their claims"); *In re Jolan, Inc.*, 403 B.R. 866, 870 (Bankr. W.D. Wash. 2009) (approving a sale free and clear of liens "[b]ecause there are Washington legal and equitable proceedings by which lienholders may be compelled to accept money satisfactions"); *see also In re Stephens*, 402 B.R. 1, 5 (B.A.P. 10th Cir. 2009) ("It is well-established that property rights in bankruptcy are created and defined by state law. As such, every bankruptcy case necessarily involves the bankruptcy court's consideration and application of state law.").

A minority of courts, however, have held that section 363(f)(5) applies only when the debtor itself, rather than a third party, could compel the interest holder to exchange its interest for money. *See Dishi*, 510 B.R. at 711. Because a debtor cannot initiate a foreclosure or UCC sale, for example, this approach substantially narrows the scope of section 363(f)(5), especially where the proceeds are insufficient to pay underwater liens (as were at issue in *Urban Commons*).

The *Dishi* court adopted this narrow view to avoid what it perceived would be a statutory redundancy—namely, if section 363(f)(5) encompasses actions that *any party* could bring, then it also encompasses the situations already covered elsewhere in subsections (1)–(4) of section 363(f). *See id.* at 710–11 (citing *In re Smith*, 2014 WL 738784, at *2 (Bankr. D. Or. Feb. 26, 2014) (listing various hypothetical proceedings that purportedly satisfy section 363(f)(5)); *see also In re Ricco, Inc.*, 2014 WL 1329292, at **9–10 (Bankr. N.D. W. Va. Apr. 1, 2014) (noting that "the statute requires that the trustee or debtor be the party able

to compel monetary satisfaction for the interest which is the subject of the sale," eliminating concerns of redundancy) (quoting *In re Haskell L.P.*, 321 B.R. 1, 9 (Bankr. D. Mass. 2005)).

In addition, according to *Dishi*, a broad interpretation of section 363(f)(5) could allow virtually any interest to be wiped away in a free-and-clear sale. *Dishi*, 510 B.R. at 710–11. ("[I]t is difficult to see when paragraph (5) will *not* permit a free and clear sale."). As an example of the concern for overbreadth, the *Dishi* court identified the hypothetical availability of eminent domain or tax lien foreclosures as proceedings that could be used to compel an entity to accept a money satisfaction of its interest. Because these hypothetical proceedings could be available in almost any situation, section 363(f)(5) could strip away virtually any interest, a result the *Dishi* court found to be inappropriately unchecked.

In *Dishi*, the district court's decision also was influenced by section 363(f)(5)'s interaction with section 363(e) of the Bankruptcy Code. There, the DIP wanted to sell a lease free and clear of a leasehold intertest, but the leaseholder wanted to remain in possession under section 363(e), which requires a bankruptcy court, upon the request of any party holding an "interest" in property being used, sold, or leased during a bankruptcy case, to provide "adequate protection" of that interest. *Dishi*, 510 B.R. at 699–700. The court agreed that section 363(f) applied to the sale of a lease because a leasehold interest is an "interest" under section 363(e). *Id.* at 701. Because section 363(e) obligated the court to provide adequate protection of the leaseholder's interest, the court allowed the lessee to remain in possession of the premises for the duration of the lease. *Id.* at 711–12. The court accordingly concluded that a foreclosure proceeding by a third-party mortgagee could not compel the leaseholder to accept money in exchange for its leasehold interest. *Id.* at 711.

URBAN COMMONS

Urban Commons 2 West LLC and four affiliated companies (collectively, the "debtors") filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code in the Southern District of New York in November 2022 with the intent to liquidate their assets, which included long-term leasehold interests in a New York City hotel (the "Lease Interests"). The debtors proposed a liquidating chapter 11 plan and sought court approval to sell the Lease Interests free and clear of all liens, claims, interests, and encumbrances under sections 363(b) (governing sales of estate property outside the ordinary course of a debtor's business) and 363(f)(5) of the Bankruptcy Code in a credit bid transaction with the debtors' secured lender, for amounts less than the lender's $114 million loan balance. A contractor with a junior (and highly underwater) mechanic's lien on the hotel property (securing a claim for $189,000 in unpaid prepetition services) objected to the free-and-clear sale, arguing that neither section 363(f)(5) nor any other subsection of section 363(f) authorized such a sale free of its interests.

THE BANKRUPTCY COURT'S RULING

In a September 26, 2024, bench ruling, the bankruptcy court approved the sale of the Lease Interests under section 363(f)(5) free and clear of the contractor's mechanic's lien. The court issued a written opinion explaining and expanding upon its ruling on March 4, 2025.

At the outset of his opinion, U.S. Bankruptcy Judge Philip Bentley noted that, although the district court's decision in *Dishi* has "significant precedential weight," a bankruptcy court is not bound to follow that precedent (at least in the Second Circuit). *See Urban Commons*, 668 B.R. at 44 n.1. After reviewing various court interpretations of section 365(f)(5), the bankruptcy court rejected the rationale articulated in *Dishi* and instead adopted a broader interpretation of the provision.

Judge Bentley explained that when property of a bankruptcy estate is sold for less than the face amount of liens encumbering it (an "underwater" asset), section 363(f)(5) is frequently the only available basis for a free-and-clear sale because: (i) in such cases, if a secured creditor whose lien is not in bona fide dispute refuses to consent to the sale, subsections (2), (3), and (4) of section 363(f) do not apply by their terms; and (ii) many courts interpret section 363(f)(1) narrowly to apply only to a limited number of non-bankruptcy laws permitting non-judicial sales free and clear of liens. *Id.* at 46. The court also noted that, for decades after the enactment of the Bankruptcy Code in 1978, courts and legal commentators have recognized as indisputable that free-and-clear sales under section 363(f)(5) were "widely available because foreclosure sales and UCC sales satisfied that [provision]." *Id.* (citations omitted).

According to Judge Bentley, this understanding was "briefly threatened" by a Ninth Circuit Bankruptcy Appellate Panel's decision in *Clear Channel Outdoor, Inc. v. Knuppfer (In re PW, LLC)*, 391 B.R. 25 (B.A.P. 9th Cir. 2008), where the court reversed a bankruptcy court's approval of a free-and-clear sale under section 363(f)(5), concluding that the parties failed to identify any "legal or equitable proceeding" permitting such a sale under applicable bankruptcy or non-bankruptcy law. However, subsequent court rulings blunted the impact of *Clear Channel*, noting that the panel did not rule that no qualifying proceedings existed under applicable non-bankruptcy law, but merely that the parties had not identified any, and reaffirming that the availability of state law foreclosure or other enforcement remedies satisfies section 363(f)(5). *Id.* at 47 (citing *In re Boston Generating*, 440 B.R. 302, 333 (Bankr. S.D.N.Y. 2010); *In re Jolan, Inc.*, 403 B.R. 866, 969-70 (Bankr. W.D. Wash. 2009)). Although the decade-old *Dishi* opinion "has attracted little attention," Judge Bentley explained, the decision represents a "renewed threat to the widespread availability of free-and-clear sales for underwater assets." *Id.*

The bankruptcy court was not persuaded by the rationale and concerns articulated in *Dishi*. It rejected the district court's overly restrictive approach, arguing that its "construction [was] so narrow as to virtually nullify section 363(f)(5)." *Id.* at 48. Instead, the court posited an alternative "middle ground construction" of the provision "more consistent with the text and purposes of section 363(f)(5)." Specifically, Judge Bentley explained, a free-and-clear sale should be permitted under section 363(f)(5), not in cases where "any conceivable hypothetical proceeding" exists "that might compel interest holders to accept a money satisfaction, but only proceedings that might realistically be brought in the case if the automatic stay were lifted or did not apply." *Id.* In most cases, he noted, state law foreclosure proceedings or UCC sales would satisfy section 363(f)(5) under that formulation.

According to the bankruptcy court, this interpretation would remedy the *Dishi* court's concerns about the potential overbreadth of section 363(f) because many hypothetical proceedings that could eliminate certain interests do not meet that "realistic possibility standard." For example, Judge Bentley noted, easements and covenants running with the land would survive foreclosure and therefore cannot be extinguished by section 363(f)(5). Therefore, a debtor seeking to sell assets free and clear of such interests would have to satisfy one of the other subsections of section 363(f). *Id.* at 48-9. Likewise, eminent domain and tax lien foreclosures would have to be more that theoretical possibilities to be used as the basis for a free and clear sale under section 363(f)(5). As Judge Bentley explained, "eminent domain would be relevant only in the rare case where there was a realistic possibility that the government might use that power to take the debtor's property." *Id.* at 48

The bankruptcy court further explained that its middle-ground interpretation "conforms more closely" with section 363(f)(5)'s "text, statutory context, and purposes." According to Judge Bentley: (i) section 363(f)(5) is written in the "passive voice," indicating that the provision applies in circumstances where any creditor (and not merely the trustee or the debtor), could compel acceptance; (ii) because foreclosure and UCC sales are the main state law alternatives to bankruptcy asset sales, "it makes sense that Congress would have looked to such state law mechanisms to determine which property interests would be extinguished by a bankruptcy sale"; and (iii) this approach comports with the Bankruptcy Code's broader purpose "to balance the competing interests of secured creditors and the debtor." *Id.* at 49–50. By contrast, the bankruptcy court emphasized, the *Dishi* court's narrow construction of section 363(f)(5) "would undercut the purpose of the provision" by allowing junior lien holders to "retain their liens and potentially be able to enforce them against the buyer for full value, even though the value of their interest in the collateral is zero," lowering the price that a buyer would be willing to pay. *Id.* at 50.

OUTLOOK

The mechanic's lien holder did not appeal the bankruptcy court's ruling in *Urban Commons*. Thus, we will not have the benefit in this case of a renewed examination of the issue by a district court in the Southern District of New York or the Second Circuit.

The bankruptcy court's decision in *Urban Commons* bridges the gap between the conflicting interpretations of section 363(f)(5). However, the ruling creates a division within the Southern District of New York, thereby causing uncertainty for debtors and potential debtors in that district with respect to such sales. Otherwise, the ruling is a positive development for debtors and bankruptcy trustees seeking to maximize the value of the bankruptcy estate by selling estate property free and clear of conflicting interests. It reinforces the long-standing (and majority) view that section 363(f)(5) permits free-and-clear sales in cases where the party asserting a competing interest in an underwater asset can be forced to accept a money judgment in a legal or equitable proceeding under applicable non-bankruptcy law, such as a state foreclosure or UCC sale.

This article was prepared with the assistance of Kelsey Moore, an associate in Jones Day's Cleveland Office.

PURDUE PROHIBITION OF NONCONSENSUAL THIRD-PARTY CHAPTER 11 PLAN RELEASES DOES NOT APPLY TO BANKRUPTCY ASSET SALES

Daniel J. Merrett

The U.S. Supreme Court's 2024 ruling in the Purdue Pharma bankruptcy cases generally prohibiting nonconsensual releases of non-debtors in chapter 11 plans sent shockwaves through the restructuring community. With one fell swoop, it appeared to upend long-standing practice facilitating successful chapter 11 cases premised upon releases of third parties in exchange for funding to pay creditor claims and achieve confirmation of restructuring or liquidation plans. Since *Purdue*, courts have been called upon to interpret the scope of the ruling, including whether it applies outside the context of chapter 11 plans. The U.S. Bankruptcy Court for the Eastern District of Virginia addressed this issue in *In re Hopeman Brothers Inc.*, 667 B.R. 101 (Bankr. E.D. Va. 2025). It joined two other bankruptcy courts in concluding that *Purdue* simply does not apply to injunctions or releases approved as part of bankruptcy settlements or asset sales under section 363 of the Bankruptcy Code.

PURDUE

In 2024, the U.S. Supreme Court handed down a long-awaited ruling regarding the validity of nonconsensual third-party releases in the chapter 11 plan of pharmaceutical company Purdue Pharma, Inc. and its affiliated debtors. In *Harrington, United States Trustee, Region 2 v. Purdue Pharma L.P.*, 603 U.S. 204 (2024), a 5–4 majority of the Court reversed and remanded a 2023 ruling by the U.S. Court of Appeals for the Second Circuit affirming the bankruptcy court's order confirming the debtors' chapter 11 plan. According to the majority, no provision in the Bankruptcy Code other than section 524(g) (providing for the creation of a trust for the payment of asbestos personal injury claims) authorizes a chapter 11 plan to release the claims of nonconsenting creditors against non-debtor entities absent full satisfaction of such claims.

In so ruling, the majority reasoned that:

- The "catchall" provision in section 1123(b)(6) of the Bankruptcy Code stating that a chapter 11 plan "may" also "include any other appropriate provision not inconsistent with the applicable provisions of this title" must be construed narrowly in light of its surrounding context and read to "embrace only objects similar in nature" to the specific examples preceding it, all of which deal with the relationship between a debtor and its creditors, rather than the "radically different" power to discharge the debts of a non-debtor without the consent of affected creditors;
- The proponents of a chapter 11 plan cannot evade the Bankruptcy Code's general limitation that a discharge applies only to debtors who place "substantially all of their assets on the table" and its exclusion from discharge of debts based on "fraud" or those alleging "willful and malicious injury" simply "by rebranding the discharge a 'release'"; and
- If lawmakers had intended "to reshape traditional practice so profoundly" in the Bankruptcy Code, compared to its predecessor statutes, by "extending to courts the capacious new power the plan proponents claim, one might have expected them to say so expressly somewhere" in the Bankruptcy Code itself.

The majority emphasized that nothing in its ruling should be construed to call into question consensual releases in a bankruptcy reorganization plan, and further declined to express a view on what qualifies as a consensual release, observing that those sorts of releases pose different questions and may rest on different legal grounds. Similarly, the majority declined to pass upon a plan that provides for full satisfaction of claims against a non-debtor. The majority also expressly cabined its ruling to the situation before it, noting that "we hold only that the [B]ankruptcy [C]ode does not authorize a release and injunction that, as part of a plan of reorganization under Chapter 11, effectively seeks to discharge claims against a nondebtor without the consent of affected claimants." *Id.* at 206.

The dissent faulted the majority opinion for being both "wrong on the law" and devastating for opioid victims. According to the dissent, the majority ignored the reality of shared assets (e.g., insurance) and shared liability (e.g., indemnity) and disregarded a goal of bankruptcy, which is to ensure the fair and equitable recovery for creditors, instead promoting a "race to the courthouse." *Id.* at 227 (dissenting opinion).

The reach of *Purdue* beyond nonconsensual third-party releases in a chapter 11 plan has been a matter of dispute. The bankruptcy court weighed in on the debate in *Hopeman*.

HOPEMAN

Hopeman Brothers, Inc. (the "debtor") operated as a "ship joiner" subcontractor to outfit vessel interiors. It ceased operating in the 1980s but maintained a corporate presence to deal with approximately 126,000 personal injury claims arising from its use of products containing asbestos. Over the years, the debtor purchased asbestos-related insurance from various carriers. The coverage periods for most of the policies (both primary and excess) expired in 1984.

In 1985, the debtor and some of its insurers entered into agreements whereby the signatory insurers agreed to share pro rata liability for asbestos-related claims. On June 30, 2024, after coverage under most of its policies was exhausted, the debtor filed for chapter 11 protection in the Eastern District of Virginia. At that time, fewer than 3,000 of the asbestos personal injury claims against the debtor remained unresolved.

In July 2024, the debtor sought bankruptcy court approval of a settlement with certain insurers (the "settling insurers") with which

there were coverage disputes. Under the proposed settlement: (i) the settling insurers would pay the debtor a specified sum to fund a chapter 11 plan liquidation trust to pay asbestos claimants; (ii) in exchange, the settling insurers would be released and discharged from all claims related to the policies; (iii) the policies would be sold back to the debtor under section 363 of the Bankruptcy Code; and (iv) asbestos claimants would be enjoined from asserting claims against the settling insurers arising from the policies.

The Office of the U.S. Trustee and certain other parties (collectively, the "objectors") opposed the proposed settlement. Among other things, the objectors argued that the prohibition in *Purdue* of nonconsensual third-party releases in chapter 11 plans also applies to section 363 sales. The bankruptcy court overruled the objections and approved the settlement. In doing so, the court found that the debtor had satisfied the standard for the approval of a settlement under Rule 9019 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules) and relevant case law. The court also made detailed findings that the sale of the insurance policies back to the settling insurers satisfied the standard for approval of an asset sale under section 363 of the Bankruptcy Code.

The objectors appealed the order approving the settlement and sale, and moved for a stay pending resolution of the appeal.

THE BANKRUPTCY COURT'S RULING

The bankruptcy court denied the motion for a stay pending appeal.

U.S. Bankruptcy Judge Keith L. Phillips explained that, in accordance with Bankruptcy Rule 8007 and relevant case law, to obtain a stay pending appeal, a party must show: (i) a likelihood of success on the merits; (ii) irreparable injury in the absence of a stay; (iii) the absence of harm to other parties if a stay were granted; and (iv) the public interest would be served by the issuance of a stay. *Hopeman,* 667 B.R. at 105 (citing *Long v. Robinson*, 432 F.2d 977, 979 (4th Cir. 1970)).

According to Judge Phillips, the objectors failed to demonstrate that they were likely to prevail on the appeal because their reliance on *Purdue* as erecting a bar to third-party injunctions in connection with sales free and clear of liens under section 363 was misplaced. The bankruptcy court rejected the "novel" argument that, because in the aftermath of *Purdue*, the propriety of granting an injunction against third parties or a release to the seller in a section 363 sale is an issue of first impression in the Fourth Circuit, the court should stay its ruling until it could be reviewed by an appellate court.

Injunctions and releases, Judge Phillips explained, have long been a feature of "free and clear" bankruptcy asset sales, and the power to grant such relief is inherent within the bankruptcy court's authority to authorize such sales. Although section 363(f) of the Bankruptcy Code expressly provides that a proposed sale satisfying one of the specified conditions is free and clear of any competing interest in the sold asset, Judge Phillips wrote, "an actual injunction barring creditors from suing a purchaser of estate assets is sometimes necessary and appropriate to give the 'free and clear' aspect of § 363(f) meaning." *Id.* at 106. The source of the court's authority to grant such injunctive relief, the court emphasized, is section 105(a) of the Bankruptcy Code, which gives a bankruptcy court the power to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code]."

The bankruptcy court also noted that a debtor's liability insurance policies are property of its bankruptcy estate that may be sold under section 363 with court approval. Judge Phillips explained that in mass tort bankruptcy cases, debtors and their insurers often enter into settlement agreements characterized as "buyback" transactions to provide funding for the payment of tort claimants, and that such a buyback, followed by termination of the policy, is considered a "sale" of the policy by the debtor to the insurer that can be approved under sections 363(b) and 363(f) and/or pursuant to Bankruptcy Rule 9019 as a settlement. *Id.* (citing *In re Chemtura Corp.*, 2009 WL 10806754 (Bankr. S.D.N.Y. Oct. 29, 2009); *In re Boy Scouts of Am. and Delaware BSA, LLC*, 642 B.R. 504, 569–70 (Bankr. D. Del. 2022) (supplemented by Case No. 20-10343 (LSS), 2022 WL 20541782 (Bankr. D. Del. Sept. 8, 2022)); *In re USA Gymnastics*, No. 18-09108-RLM-11, Doc. No. 1776 at 16 (Bankr. S.D. Ind. Dec. 16, 2021) (plan confirmation order)).

If a creditor were allowed to independently pursue its claim against the debtor's property after it had been sold under section 363, Judge Phillips wrote, it "would have a chilling effect on the sale of assets in bankruptcy." *Id.* at 107.

The bankruptcy court noted that the propriety of enjoining claims against the purchaser/settling insurer in connection with a buy-back sale and settlement with insurers was recognized in at least two recent (post-*Purdue*) court decisions. *See In re Roman Cath. Diocese of Rockville Centre,* 665 B.R. 71, 74 (Bankr. S.D.N.Y. 2024); *In re Bird Global, Inc.*, No. 23-20514-CLC (Bankr. S.D. Fla. Aug. 2, 2024), *aff'd sub nom. Wright v. Bird Global*, No. 24-CV-23086-RAR (S.D. Fla. Aug. 21, 2024).

In *Bird*, the debtor filed an emergency motion to stay a chapter 11 plan confirmation order that contained an insurance settlement provision similar to the one proposed in *Hopeman*. The bankruptcy court in *Bird* denied the motion. In so ruling, it concluded that *Purdue* did not preclude the issuance of releases or injunctions in connection with negotiated settlements governed by Bankruptcy Rule 9019 or the sale of a debtor's insurance policies under section 363. In *Rockville Centre*, the bankruptcy court similarly approved a settlement agreement containing releases and injunctions after rejecting the argument that *Purdue* applied in the context of a section 363 sale, as distinguished from confirmation of a chapter 11 plan.

According to the court in *Hopeman*, the Supreme Court in *Purdue* specifically cabined its holding to nonconsensual third-party releases in chapter 11 plans, and "[n]othing in the opinion suggests that the protections afforded a buyer under § 363, including the ability of the purchaser to obtain the asset free of the claims of the debtor's creditors, were intended to be abrogated." *Hopeman*, 667 B.R. at 108.

Therefore, the bankruptcy court ruled that the objectors had failed to demonstrate a likelihood of success on the merits of its appeal:

> Presenting a legal position that no other court has accepted but no court in the presiding court's jurisdiction has rejected may remotely create an issue of first impression. However, if the position has little merit, there is no "likelihood of prevailing." Here, based on the law, the language of *Purdue*, and current precedent, [the objectors have] failed to establish that [they are] likely to succeed on appeal, and [they have] therefore failed to satisfy the first requirement for a stay.

Id. at 109. The court also noted that, despite the purported importance of the issue and the lack of controlling precedent, the objectors never sought to appeal the ruling directly to the Fourth Circuit. *Id.* at 105 n.7.

The bankruptcy court found that the objectors also failed to satisfy the other requirements for a stay pending appeal. Specifically, the objectors did not present any evidence that they would be irreparably harmed absent a stay, whereas the debtor would be substantially harmed if the proposed settlement/sale were scrapped, and litigation costs associated with contesting the issues settled would diminish the amount available for distribution to creditors. In addition, the court concluded, "public policy is best served by preserving the finality of sales in bankruptcy." *Id.* at 110.

OUTLOOK

Although *Hopeman* involved a request for a stay pending appeal, the bankruptcy court's ruling regarding the movants' failure to demonstrate a likelihood of success on the merits of the appeal is significant. The decision (and two other recent rulings on which the court relied) limit the reach of the Supreme Court's holding in *Purdue* to preclude nonconsensual third-party releases or injunctions in chapter 11 plans. According to all three courts, in keeping with the strong bankruptcy policy of finality and certainty in free-and-clear bankruptcy estate sales, *Purdue* does not prohibit injunctive relief or releases protecting a purchaser in a bankruptcy asset sale under section 363.

The aftermath of *Purdue* has been a flurry of court rulings, principally from bankruptcy courts, interpreting and applying the Supreme Court's decision. Most of these cases address whether proposed releases or injunctions in a chapter 11 plan are consensual and therefore not barred by *Purdue*. *See, e.g., In re Lavie Care Centers, LLC*, 2024 WL 4988600, at *11 (Bankr. N.D. Ga. Dec. 5, 2024) (ruling that a chapter 11 plan's opt-out mechanism created a consensual release permitted by *Purdue* and noting "an overwhelming majority of cases find that a creditor's vote to accept a plan containing a third-party release (like the Plan) makes the release consensual"); *In re Smallhold Inc.*, 665 B.R. 704 (Bankr. D. Del. 2024) (ruling that a non-debtor release in a chapter 11 plan was consensual and that a creditor would be bound by the release if the creditor voted on the plan but did not opt out, but that a creditor that did not vote would not be bound); *In re Robertshaw US Holding Corp.*, 662 B.R. 300 (Bankr. S.D. Tex. 2024) (concluding that *Purdue* did not change prevailing Fifth Circuit law and holding that consensual third-party releases in a liquidating chapter 11 plan were appropriate and afforded affected parties constitutional due process, where creditors were given detailed notice about the plan and the plan objection and voting deadlines, ballots gave creditors the opportunity to opt out, the third-party release language was specific enough to put releasing parties on notice of the types of claims released, and the third-party release was an integral part of the plan and a condition of related settlements).

Hopeman illustrates that the debate is far from over regarding the ramifications and scope of *Purdue*. Nevertheless, the decision is clearly a positive development for parties to bankruptcy asset sales as well as other stakeholders for whom such sales provide funding to pay creditors or facilitate the confirmation of a plan.

Jones Day represented the Roman Catholic Diocese of Rockville Centre in its chapter 11 case.

AVIANCA: SECOND COURT ADOPTS "BILLING DATE" APPROACH TO TIMELY PERFORMANCE OF UNEXPIRED COMMERCIAL PERSONAL PROPERTY LEASES IN BANKRUPTCY

Genna Ghaul • Benjamin C. Sandberg

In 1984 and 1994, Congress amended the Bankruptcy Code to add protections for commercial real property and equipment lessors. Those provisions—sections 365(d)(3) and section 365(d)(5), respectively—generally require a bankruptcy trustee or chapter 11 debtor in possession ("DIP") to timely pay most post-petition obligations arising under a commercial lease. Court rulings interpreting section 365(d)(3) are plentiful, but there are few decisions addressing section 365(d)(5).

Section 365(d)(5) provides that, pending the decision to assume or reject an unexpired commercial personal property lease in a chapter 11 case, the trustee or DIP must timely perform all of the debtor's obligations under the lease "first arising" during the period 60 days after the bankruptcy petition date, unless the bankruptcy court orders otherwise. Courts disagree, however, regarding when obligations of the DIP "arise," with two different approaches staked out by bankruptcy and appellate courts, including several federal circuit courts. The "billing date" approach focuses on the date obligations are billed or become due under the terms of the lease, whereas the "accrual" approach examines when obligations accrue under the lease regardless of when they are billed or become due.

The U.S. Court of Appeals for the Second Circuit weighed in on the debate as a matter of apparent first impression in *In re Avianca Holdings S.A.*, 127 F.4th 414 (2d Cir. 2025). The Second Circuit adopted the majority "billing date" approach to determine the obligations that must be paid under section 365(d)(5). In so ruling, the Second Circuit joined with the Third, Sixth, and Seventh Circuits on this issue. According to the Second Circuit, "the billing date approach is the approach most consistent with the text of Section 365(d)(5), the Bankruptcy Code as a whole, and sound bankruptcy policy."

ASSUMPTION OR REJECTION OF EXECUTORY CONTRACTS AND UNEXPIRED LEASES IN BANKRUPTCY

Section 365(a) of the Bankruptcy Code gives the trustee (or DIP, pursuant to section 1107(a)) the power to assume (reaffirm) or reject (breach) the debtor's "executory" contracts or unexpired leases (generally defined as contracts or leases where the obligations of both the DIP and the other party are so far unperformed that the failure of either to complete performance would constitute a material breach excusing the other's performance), subject to bankruptcy court approval.

Section 365(d) lays out various deadlines by which a trustee must assume a contract or lease as well as the trustee's obligation to pay amounts due under such contracts or leases before deciding whether to assume or reject them.

Under Section 365(d)(2), the trustee or DIP may assume or reject an executory contract or unexpired residential lease or a lease of personal property of the debtor at any time before confirmation of a chapter 11 plan. However, the court, upon the request of a non-debtor counterparty, may order that a contract or lease be assumed or rejected prior to that time. *See* 11 U.S.C. § 365(d)(2).

Section 365(d)(3) provides that the trustee or DIP must timely perform all of the debtor's obligations, with certain exceptions, "arising from and after" the order for relief (i.e., the petition date) under any unexpired nonresidential real property lease until such time that the lease is assumed or rejected, "notwithstanding section 503(b)(1)" of the Bankruptcy Code. Section 503(b)(1) confers administrative expense priority on "the actual, necessary costs and expenses of preserving the estate," which have been interpreted to include rent payable under unexpired real property leases. *See Burival v. Roehrich (In re Burival)*, 613 F.3d 810, 812 (8th Cir. 2010) (real property rent claims under section 365(d)(3) are an example of an administrative claim that is not specifically referred to in section 503(b), brought in by use of the construction canon of section 102(3)).

Pursuant to section 365(d)(4), an unexpired lease of nonresidential real property with respect to which the debtor is the lessee will be deemed rejected if the trustee or DIP does not assume or reject the lease by the earlier of: (i) the date that is 120 days after the date of entry of the order for relief; or (ii) the date of entry of an order confirming a plan. The bankruptcy court may, under section 365(d)(4)(B), extend the time for assumption or rejection for 90 days on motion of the trustee or a lessor.

Finally, section 365(d)(5) provides that:

> The trustee shall timely perform all the obligations of the debtor, except those specified in section 365(b)(2) [providing that defaults based on a debtor's financial condition need not be cured prior to assumption], first arising from or after 60 days after [the petition date] under an unexpired lease of personal property (other than personal property leased to an individual primarily for personal, family, or household purposes) until such lease is assumed or rejected notwithstanding section 503(b)(1) of this title, unless the court, after notice and a hearing and based on the equities of the case, orders otherwise with respect to the obligations or timely performance thereof.

11 U.S.C. § 365(d)(5).

Section 365(d)(5) was added to the Bankruptcy Code in 1994 to protect commercial equipment lessors. *See In re Sturgis Iron & Metal Co., Inc.*, 420 B.R. 716, 742 (Bankr. W.D. Mich. 2009). The amendment came a decade after lawmakers added section 365(d)(3) to the Bankruptcy Code to protect commercial real property lessors. *Id.*

An obligation that must be paid pursuant to section 365(d)(5) is entitled to administrative expense priority under section 503(b)(1) whether or not the creditor's service in question preserved or benefitted the bankruptcy estate. *See In re Sylva Corp.,* 519 B.R. 776, 782 (B.A.P. 8th Cir. 2014); *In re Bella Logistics LLC*, 583 B.R. 674, 677–82 (Bankr. W.D. Tex. 2018). A critical question for many debtors, then, is when an obligation "arises" for purposes of section 365(d)(5). If it arises prepetition and the debtor fails to satisfy the obligation, the lessor's claim is treated as an unsecured prepetition claim, whereas an obligation arising during the 60-day postpetition window described in section 365(d)(5) is entitled to administrative expense status.

Compared to cases interpreting section 365(d)(3), there are relatively few court decisions construing section 365(d)(5), and until recently, nearly none addressing the meaning of the phrase "first arising from." However, because section 365(d)(3) uses a similar phrase, decisions construing that section are relevant in making that determination. *See In re Bella Logistics LLC*, 583 B.R. 674, 679 n.7 (Bankr. W.D. Tex. 2018); *In re Pettingill Enterprises, Inc.*, 486 B.R. 524, 531–32 (Bankr. D.N.M. 2013); *In re Lakeshore Const. Co. of Wolfeboro, Inc.*, 390 B.R. 751,756 (Bankr. N.H. 2008); *see also Sylva Corp*., 519 B.R. at 781 ("[While] the operative language of [Section] 365(d)(3) and (d)(5) are similar enough that cases under [Section] 365(d)(3) . . . are relevant to provide guidance to a court interpreting a situation under [Section] 365(d)(5), they are not necessarily 'automatic' or dispositive.").

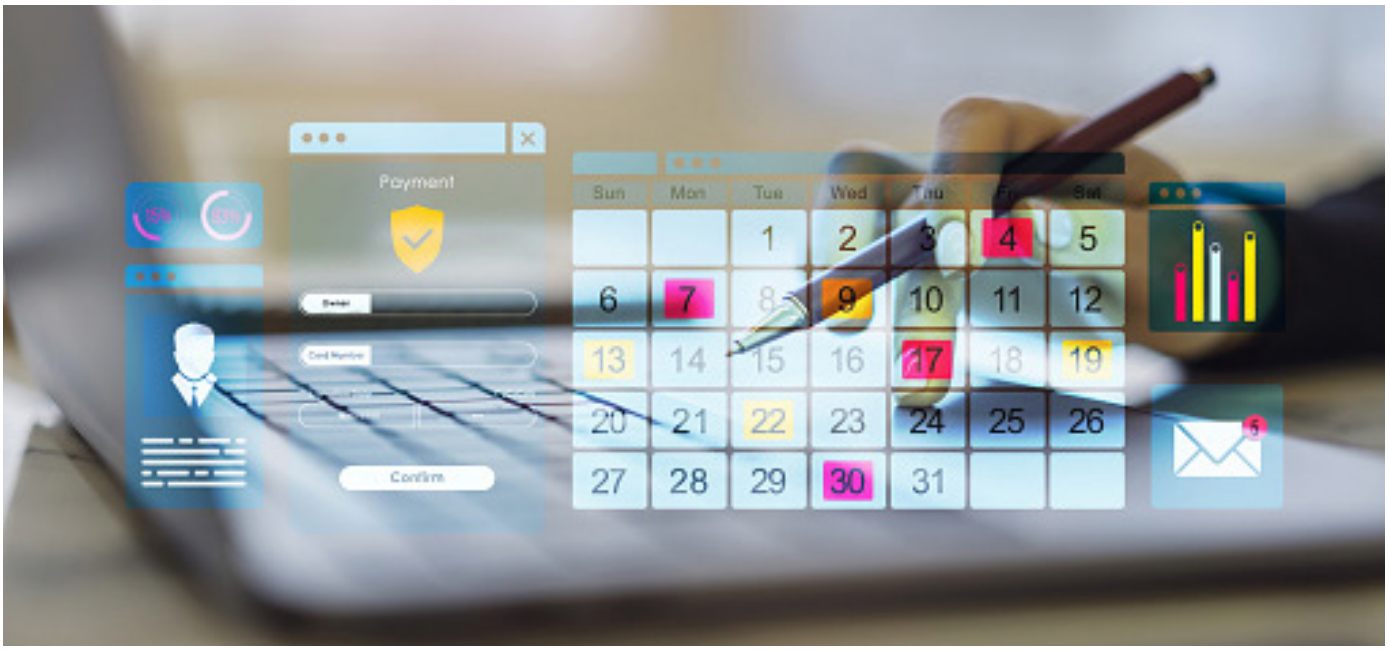
The "accrual" approach (sometimes referred to as the "proration" approach) and the "billing date" approach arrive at different answers for the critical question of when an obligation arises. Under the "accrual" approach, an obligation arises when it accrues, meaning that the trustee or DIP debtor is required to pay only obligations that actually accrue postpetition regardless of when the obligations come due under the operative lease. By contrast, under the "billing date" approach, an obligation arises under an unexpired lease once it comes due under the operative lease, regardless of when the obligation can be said to have accrued.

Courts are split on which approach is the right one. The majority position, adherents of which (prior to the Second Circuit's ruling in *Avianca*) include the Third, Sixth, and Seventh Circuits, is that the "billing date" approach is the better reasoned one. *See Centerpoint Props. v. Montgomery Ward Holding Corp. (In re Montgomery Ward Holding Corp.)*, 268 F.3d 205, 209–12 (3d Cir. 2001) (construing section 365(d)(3)); *Koenig Sporting Goods, Inc. v. Morse Road Co. (In re Koenig Sporting Goods, Inc.)*, 203 F.3d 986, 989–90 (6th Cir. 2000) (same); *HA-LO Indus., Inc. v. CenterPoint Props. Trust*, 342 F.3d 794, 796, 798–800 (7th Cir. 2003) (same); *accord Burival v. Creditor Comm. (In re Burival)*, 406 B.R. 548, 550, 551–54 (B.A.P. 8th Cir. 2009) (same); *Bullock's Inc. v. Lakewood Mall Shopping Ctr. (In re R.H. Macy & Co., Inc.)*, 1994 WL 482948, at *10–13 (S.D.N.Y. Feb. 23, 1994) (Sotomayor, J.) (same); *Urban Retail Props. v. Loews Cineplex Ent. Corp.*, 2002 WL 535479, at **5–8 (S.D.N.Y. Apr. 9, 2002) (same).

Even so, a significant minority of courts (including those in the Second Circuit prior to the *Avianca* ruling) have adopted the "accrual" approach. *See, e.g.*, *In re Door to Door Storage, Inc.*, 2018 WL 1899361, *2 (W.D. Wash. Apr. 20, 2018) (construing section 365(d)(3)); *El Paso Props. Corp. v. Gonzalez (In re Furr's Supermarkets, Inc.)*, 283 B.R. 60, 62 (B.A.P. 10th Cir. 2002) (same).

AVIANCA HOLDINGS

Air carrier Avianca leases many of the aircraft that it uses to operate its business. Certain entities (the "Initiators") helped Avianca broker some of these lease agreements. The Initiators' services were all performed prior to Avianca's entry into the aircraft leases,



but the lease agreements expressly provided that the Initiators would be paid in installments over the term of the leases. *Id.* In particular, each lease provided that "[t]he Lessee shall on each Additional Rental Payment Date pay to the Lessor at the Initiator Account, by way of additional rental payment, installments of the Initiator Compensation … [and that the] obligations to pay the Initiator Fees hereunder are unconditional."

At the onset of the COVID pandemic, Avianca and certain affiliates filed for chapter 11 protection in the Southern District of New York. At that time, installment payments were still due to the Initiators under the lease agreements. However, after the 60-day grace period specified in section 365(d)(3) expired (and the debtor had not yet decided to assume or reject the leases), Avianca failed to make the scheduled installment payments.

Avianca claimed that, because the amounts due to the Initiators were earned entirely in the prepetition period (meaning that the obligations accrued before the bankruptcy filing), the Initiators' claims should be treated as general unsecured claims. The Initiators responded by seeking an order from the bankruptcy court compelling Avianca pursuant to sections 365(d)(5) and 503(b) to make the installments payment that came due after the petition date until such time that Avianca assumed or rejected the leases.

The bankruptcy court ruled in favor of the Initiators, but only in part. According to the bankruptcy court, although no court had previously ruled on the definition of "arising from" in section 356(d)(5), the Initiators were correct that no payment was due from the debtors (and therefore, no payment obligation arose) "until and unless its due date was reached" under the leases. The court accordingly held that "both the plain meaning of the statutory terms and the commercial realities of the parties' arrangement here was that there are multiple payment 'obligations' that 'arise' on their respective due dates as specified in the applicable leases."

The bankruptcy court rejected various policy and legislative history arguments raised by Avianca. It explained that the unambiguous language of section 365(d)(5), which specifically provides that it applies "not withstanding section 503(b)(1)," supports its conclusion. This explicit carve-out, the court emphasized, "omits any benefit to the estate requirement" that would otherwise apply in assessing whether an expense is entitled to administrative priority.

However, the bankruptcy court ruled that, even though Avianca was obligated to make the scheduled installment payments under section 365(d)(5), the Initiators' claims were not entitled to administrative expense priority because they arose from prepetition transactions.

Avianca appealed the ruling to the district court, which affirmed, concluding Avianca's "obligation[s] to make the disputed payments 'arose' upon their respective due dates for purposes of Section 365(d)(5), and as such, that those [payments] merit timely and complete payment by [Avianca] pursuant to that provision." *In re Avianca Holdings*, No. 23 CIV. 1211 (KPF), 2023 WL 9016495, at *4 (S.D.N.Y. Dec. 29, 2023), *aff'd*, 127 F.4th 414 (2d Cir. 2025). In so ruling, the district court found the reasoning of courts that have embraced the "billing approach" to be more persuasive. Avianca appealed to the Second Circuit.

THE SECOND CIRCUIT'S RULING

A three-judge panel of the Second Circuit affirmed the ruling below.

Writing for the panel, U.S. Circuit Court Judge Gerard E. Lynch examined the language of section 365(d)(5) and determined that the word "arise" in the provision refers to the moment "when payment comes due under the terms of a lease." *Avianca Holdings*, 127 F.4th at 423. After a textual analysis of section 365(d)(5), the Second Circuit concluded that "Section 365(d)(5) requires the debtor-in-possession to perform the debtor's contractual duties that come into being under an unexpired lease of personal property at least 60 days after the order for relief." *Id.* at 424.

The Second Circuit then discussed this finding in the context of the statutory scheme surrounding section 365(d)(5). Judge Lynch drew a distinction between when a "claim" of a creditor arises as opposed to when an "obligation" of a debtor arises.

A "claim," he explained, is defined in section 101(10)(A) of the Bankruptcy Code in relevant part as a "right to payment, whether or not such right is reduced to judgment, liquidated, disputed, undisputed, legal, equitable, secured or unsecured." Stated differently, a claim is a "(1) right to payment (2) that arose before the filing of the petition." *Id.* (quoting *Elliott v. Gen. Motors LLC (In re Motors Liquidation Co.)*, 829 F.3d 135, 136 (2d Cir. 2016)). According to Judge Lynch, this definition would suggest that the Initiators' "claim" arose prior to the petition date. However, he emphasized, section 365(d)(5), does not speak of a creditor's "claim," but instead of a debtor's "obligation."

The Second Circuit rejected Avianca's attempt to conflate the two terms and applied a different test to determine when an obligation arises for purposes of section 365(d)(5)—namely, when the payment has come due "under the terms of the lease." *Id.* at 425. The Second Circuit also noted that section 365(d)(5)'s explicit carve-out from the requirement in section 503(b)(1) to show that an expense is an actual, necessary cost of preserving the estate negated Avianca's argument that its "estate should not bear an expense for which it receives no benefit." *Id.*

Finally, the Second Circuit held that its adoption of the "billing date" approach comports with public bankruptcy policy, including the purpose of section 365, which "is to balance the state law contract right of the creditor to receive the benefit of his bargain with the federal law equitable right of the debtor to have an opportunity to reorganize." *Id.* at 425–26. (citation and internal quotation marks omitted). In section 365(d)(5), the Second Circuit wrote, lawmakers elected "to tip the balance slightly in favor of

creditor protection as compared to the baseline rules set out elsewhere in the Code." *Id.* at 426.

However, Judge Lynch noted, any inequity to the debtor caused by tipping the balance in favor of commercial lessor protections under the provision is subject to "two safety valves" in cases where the automatic resumption pf payments after 60 days interferes with administration of the bankruptcy estate: (i) the debtor has a 60-day grace period during which it can decide whether to assume or reject the lease before resuming payments; and (ii) the debtor can ask the bankruptcy court to amend its payment obligations after expiration of the 60-day grace period on the basis that, among other things, resuming payments would be a windfall for certain creditors who fully performed under their contracts prepetition. *Id.* According to the Second Circuit, Avianca chose not to rely on either of these safety valves and must abide by the consequences of its decision, "which will require it to pay the Initiators on a priority basis." *Id.*

OUTLOOK

The Second Circuit's ruling in *Avianca Holdings* is significant for a number of reasons. First, the decision would appear to be a matter of first impression among bankruptcy and appellate courts (including the federal circuits courts of appeals) in determining what obligations must be paid under commercial personal property leases prior to assumption or rejection in accordance with the "arising from" language in section 365(d)(5) of the Bankruptcy Code. Second, the court of appeals adopted the "billing date" approach applied by the majority of courts (including three other circuits) construing the meaning of the similar language of section 365(d)(3), which applies to the payment of pre-assumption or rejection obligations under commercial real property leases.

Avianca Holdings widens the rift among courts regarding this issue, although there is as yet no circuit split that might invite the U.S. Supreme Court to resolve the dispute. In addition, because many courts in the Second Circuit had embraced the minority approach in construing section 365(d)(3) prior to the Second Circuit's ruling in *Avianca Holdings*, the decision may represent a sea change concerning this issue. *See, e.g.*, *Newman v. McCrory Corp. (In re McCrory Corp.)*, 210 B.R. 934, 939–40 (S.D.N.Y. 1997); *Child World, Inc. v. Campbell/Mass. Trust (In re Child World, Inc.)*, 161 B.R. 571, 573–77 (S.D.N.Y. 1993) (same); *In re Stone Barn Manhattan LLC*, 398 B.R. 359, 365–68 (Bankr. S.D.N.Y. 2008) (same).

Interestingly, despite the 60-day grace period specified in section 365(d)(5), if Avianca's failure to make postpetition installment payments to the Initiators under the lease were deemed to be an event of default, it could have triggered the aircraft lessors' rights under section 1110 of the Bankruptcy Code, thereby jeopardizing Avianca's ability to continue using the leased aircraft. Apparently, this issue did not arise in any material respect during the chapter 11 case.

NEWSWORTHY

The International Insolvency Institute, a nonprofit corporation dedicated to the improvement of international insolvency systems and procedures, awarded ***Corinne Ball (New York)*** with the "2025 Outstanding Contributions Award." Corinne is recognized for her contributions and service to the field of insolvency as well as the insolvency community. Corinne is the second female ever to receive this award. The award was presented during the Institute's 25th annual conference in São Paulo, Brazil, on June 8, 2025.

Jones Day obtained a unanimous judgment in favor of the Ad Hoc Group of Senior Secured Noteholders and DIP Lenders in an appeal before the U.S. Court of Appeals for the Fifth Circuit following Sanchez Energy Company's long-running, hard-fought chapter 11 case. Once the decision becomes final, it will provide the Ad Hoc Group with shares of reorganized Sanchez worth approximately $700 million. The Jones Day team included ***Bruce Bennett (Los Angeles)***, ***Noel J. Francisco (Issues & Appeals; Washington)***, and ***Christopher DiPompeo (Washington)***.

On behalf of the Kaiser Gypsum Company and Hanson Permanente Cement, ***Jones Day*** successfully urged the U.S. Court of Appeals for the Fourth Circuit, on remand from the U.S. Supreme Court, to reaffirm the confirmation of a chapter 11 reorganization plan and reject the challenges of one of the companies' insurers. The Jones Day team included ***C. Kevin Marshall (Washington)***, ***Gregory M. Gordon (Dallas)***, and ***Brinton Lucas (Issues & Appeals; Washington)***.

An article written by ***Corinne Ball (New York)*** titled "Distressed M&A: Settling Controversies Through Plan Confirmation Hits a Road Bump: New Standard Announced" was published in the April 23, 2025, edition of the *New York Law Journal*.

Roger Dobson (Sydney) and ***Kathryn Sutherland-Smith (Sydney)*** recently presented to more than 120 finance professionals, in both Sydney and Melbourne, as part of our Fast Track Finance Seminar Series. Roger and Kathryn provided financiers with a timely "Restructuring Toolkit" to support their borrowers to navigate the current challenging financial environment and maximize value in downside scenarios.

An article written by ***Dan B. Prieto (Dallas)*** titled "Immunity Waiver Ruling a Setback for Ch. 7 Trustees" was published in the May 8, 2025, edition of *Law360*.

An article written by ***Corinne Ball (New York)*** titled "Chapter 15; Encountering the U.S. Trustee on the Road to Provisional Recognition for Entities Organized in the U.S. that Are Debtors in a Foreign Proceeding" was published in the June 25, 2025, edition of the *New York Law Journal*.

An article written by ***Dan B. Prieto (Dallas)*** titled "U.S. Supreme Court Rules that Bankruptcy Code Provides Only Limited Abrogation of Sovereign Immunity to Avoidance Actions" was published on May 26, 2025, by *Lexis Practical Guidance*.

An article written by ***Corinne Ball (New York)***, ***Dan T. Moss (Washington/New York)***, ***Ben Larkin (London)***, and ***David Harding (London)*** titled "New York Bankruptcy Court Recognizes English Scheme of Arrangement Proceeding Under Chapter 15 Despite Concerns of Improper COMI Manipulation" was published on May 28, 2025, by *Lexis Practical Guidance*.

An article written by ***Caitlin Cahow (Atlanta/Chicago)*** titled "Disappointed Bidder in Bankruptcy Asset Sale Orders Waived Argument that Buyers Did Not Act in Good Faith by First Raising It on Appeal" was published on May 28, 2025, by *Lexis Practical Guidance*.

An article written by ***Mark A. Cody (Chicago)*** titled "Chapter 11 Filing Without Consent of Independent Director Dismissed as Unauthorized" was published on May 27, 2025, by *Lexis Practical Guidance*.

BUSINESS RESTRUCTURING REVIEW

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Managing Editor: Mark G. Douglas

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