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BUSINESS RESTRUCTURING REVIEW

JONES DAY'S BUSINESS RESTRUCTURING & REORGANIZATION PRACTICE NAMED A 2025 "PRACTICE GROUP OF THE YEAR–BANKRUPTCY" BY *LAW360*

Jones Day's Business Restructuring & Reorganization Practice was named a 2025 "Practice Group of the Year—Bankruptcy" by *Law360*. Now in its 15th year, the *Law360* series "honor(s) attorney teams behind the litigation wins and major deals that resonated throughout the legal industry this past year."

According to *Law360*, Jones Day's bankruptcy attorneys "spent 2024 on the frontiers of their practice." Notable representations included, among others: (i) assisting Johnson & Johnson subsidiary Red River Talc LLC to file for chapter 11 protection with a prepackaged plan to implement an historically large talc injury settlement; (ii) helping dating app company Spark Networks SE to navigate a new German bankruptcy law and a parallel proceeding under chapter 15 of the U.S. Bankruptcy Code; and (iii) assisting the Roman Catholic Diocese of Rockville Centre, Long Island, the sixth-largest Catholic diocese in the United States, and its 136 parishes to obtain confirmation of a chapter 11 plan. The plan was confirmed after a settlement was reached with the Diocese's insurers to fund in part distributions to victims of abuse under a settlement trust in exchange for a consensual release of liabilities that passed muster under the U.S. Supreme Court's 2024 ruling in the Purdue Pharma chapter 11 cases.

Jones Day's Business Restructuring & Reorganization Practice has more than 100 attorneys across the globe, out of a larger body of 2,500 lawyers. Global practice leader Heather Lennox observed that the Jones Day matters handled in 2024 showcased but a few of the strengths of the restructuring practice: outstanding experience in mass tort cases, leading knowledge of cross-border restructurings, and a top-tier practice both in the United States and on the Continent. Lennox credits Jones Day's success to a Firm culture that enables seamless integration across different practice areas and international borders to achieve the best results for clients, consistent with Jones Day's "One Firm Worldwide" philosophy.

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In *In re Serta Simmons Bedding, LLC*, 125 F.4th 555 (5th Cir. 2024), *as amended*, No. 23-20281 (5th Cir. Jan. 21, 2025), *revised and superseded*, No. 23-20181 (5th Cir. Feb. 14, 2025), *reh'g denied*, No. 23-20181 (5th Cir. Feb. 18, 2025), the U.S. Court of Appeals for the Fifth Circuit reversed and vacated in part a bankruptcy court order confirming the chapter 11 plan of mattress manufacturer Serta Simmons Bedding, LLC ("Serta"). The Fifth Circuit concluded that a plan provision indemnifying participating lenders in connection with a 2020 "uptier," or "position enhancement," transaction, whereby Serta issued new debt secured by a priming lien on its assets and purchased its existing debt from participating lenders at a discount, violated the terms of Serta's 2016 credit agreement.

The Fifth Circuit also remanded the case to the bankruptcy court for consideration of the excluded lenders' counterclaims in various related adversary proceedings. In so ruling, the Fifth Circuit concluded that: (i) the uptier transaction was not a permissible "open market purchase" under the credit agreement; (ii) the doctrine of "equitable mootness" did not bar review of the plan confirmation order even though the plan had been substantially consummated; (iii) the indemnity relating to the uptier transaction in Serta's chapter 11 plan must be removed because the indemnity claims were disallowed as contingent claims for reimbursement, and the indemnity violated the "equal treatment" requirement for plan confirmation.

LAWYER SPOTLIGHT: JUAN FERRÉ

Juan Ferré, a partner in Jones Day's Madrid Office, focuses his practice on complex and often distressed financial restructurings and insolvency proceedings on a domestic and cross-border level. He has represented creditors, debtors, directors, shareholders, and distressed investors in the gaming, aviation, manufacturing, automotive, real estate, and construction sectors.

His most recent experience in 2024 and 2025 includes advising a subsidiary of a large U.S.-based industrial conglomerate with insolvency-related issues, acting for a large Tier 1 auto parts supplier in connection with the potential wind down of its Spanish operations, and representing a Korean-based asset manager in relation to the restructuring of a €110 million real estate financing advanced to one of its portfolio companies. He also assisted a London-based asset manager with enforcement, litigation, and restructuring advice in connection with two Spanish real estate financings, and acted for two different groups of syndicated lenders in relation with the refinancing of two leveraged buyout financings. Juan has represented the board of directors of a Spanish airline in connection with the restructuring of its financial indebtedness and assisted a large U.S.-based industrial group with the insolvency filings of its Spanish subsidiary.

During 2022 and 2023, Juan advised a group of junior lenders in relation to the debt restructuring of a large Spanish-headquartered steel manufacturer. This was the first case in Spain in which lenders obtained control of the equity of a company by applying newly enacted restructuring rules that allow for debt-for-equity swaps without the debtor's and shareholders' consent.

Juan is a member of CERIL (Conference on European Restructuring and Insolvency Law), INSOL (International Association of Restructuring, Insolvency & Bankruptcy Professionals), TMA (Turnaround Management Association), and ABI (American Bankruptcy Institute). Among his many honors and distinctions, he has been ranked by *Chambers Europe* (2014–2024), *The Legal 500 EMEA* (2020–2024), *Best Lawyers* (2008–2025), and *IFLR1000 The Guide to the World's Leading Financial and Corporate Law Firms* (2019–2024).

EQUITABLE MOOTNESS

"Mootness" is a doctrine that precludes a reviewing court from reaching the underlying merits of a controversy. An appeal can be either constitutionally, statutorily, or equitably moot. Constitutional mootness is derived from Article III of the U.S. Constitution, which limits the jurisdiction of federal courts to actual cases or controversies and, in furtherance of the goal of conserving judicial resources, precludes adjudication of cases that are hypothetical or merely advisory.

An appeal can also be rendered moot (or otherwise foreclosed) by statute. For example, section 363(m) of the Bankruptcy Code provides that, absent a stay pending appeal, "[t]he reversal or modification on appeal of an authorization . . . of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith."

The court-fashioned remedy of "equitable mootness" bars adjudication of an appeal when a comprehensive change of circumstances has occurred, such that it would be inequitable for a reviewing court to address the merits of the appeal. In bankruptcy cases, appellees often invoke equitable mootness as a basis for precluding appellate review of an order confirming a chapter 11 plan.

The doctrine of equitable mootness is sometimes criticized as an abrogation of federal courts' "virtually unflagging obligation" to hear appeals within their jurisdiction. *See In re One2One Commc'ns, LLC*, 805 F.3d 428, 433 (3d Cir. 2015); *In re Charter Commc'ns, Inc.*, 691 F.3d 476, 481 (2d Cir. 2012). According to this view, dismissing an appeal on equitable mootness grounds "should be the rare exception." *In re Tribune Media Co.*, 799 F.3d 272, 288 (3d Cir. 2015); *accord In re Pac. Lumber Co.*, 584 F.3d 229, 240 (5th Cir. 2009) (equitable mootness should be applied "with a scalpel rather than an axe").

Moreover, although the U.S. Supreme Court has declined on several occasions to weigh in on the propriety of the equitable mootness doctrine, it recently expressed skepticism regarding the concept of mootness generally as a bar to a federal court's consideration of the merits of any appeal. *See MOAC Mall Holdings LLC v. Transform Holdco LLC*, 143 S. Ct. 927, 935 (2023) (in ruling that an order approving a lease assignment as a part of a bankruptcy sale transaction was not statutorily moot under section 363(m) of the Bankruptcy Code, the Court noted that "[o]ur cases disfavor these kinds of mootness arguments").

Substantially similar tests have been applied by most circuit courts in assessing whether an appeal of a chapter 11 confirmation order should be dismissed under equitable mootness. Those tests generally focus on whether the appellate court can fashion effective and equitable relief. *See, e.g., PPUC Pa. Pub. Util. Comm'n v. Gangi*, 874 F.3d 33, 37 (1st Cir. 2017) (considering whether: (i) the appellant diligently pursued all available remedies to obtain a stay of the confirmation order; (ii) the challenged chapter 11 plan had progressed "to a point well beyond any practicable appellate annulment"; and (iii) providing relief would harm innocent third parties); *JPMCC 2007-C1 Grasslawn Lodging, LLC v. Transwest Resort Props., Inc. (In re Transwest Resort Props., Inc.)*, 801 F.3d 1161, 1167–68 (9th Cir. 2015) (applying a four-factor test, including whether the court "can fashion effective and equitable relief without completely knocking the props out from under the plan and thereby creating an uncontrollable situation for the bankruptcy court"); *Tribune Media,* 799 F.3d at 278 (considering "(1) whether a confirmed plan has been substantially consummated; and (2) if so, whether granting the relief requested in the appeal will (a) fatally scramble the plan and/or (b) significantly harm third parties who have justifiably relied on plan confirmation"); *Search Market Direct, Inc. v. Jubber (In re Paige)*, 584 F.3d 1327, 1339 (10th Cir. 2009) (applying a six-factor test, including the likely impact upon a successful reorganization of the debtor if the appellant's challenge is successful); *In re United Producers, Inc.*, 526 F.3d 942, 947–48 (6th Cir. 2008) (three-factor test); *TNB Fin., Inc. v. James F. Parker Interests (In re Grimland, Inc.)*, 243 F.3d 228, 231 (5th Cir. 2001) (considering "(1) whether the complaining party has failed to obtain a stay, (2) whether the plan (here, the liquidation) has been substantially consummated, and (3) whether the relief requested would affect the rights of parties not before the court or the success of the plan").

A common element of almost all of these tests is whether the chapter 11 plan has been substantially consummated. Section 1101(2) of the Bankruptcy Code provides that "substantial consummation" of a chapter 11 plan occurs when substantially all property transfers proposed by the plan have been completed, the debtor or its successor has assumed control of the business and property dealt with by the plan, and plan distributions have commenced.

CHAPTER 11 PLAN EQUAL TREATMENT REQUIREMENT

Section 1123 of the Bankruptcy Code sets forth various requirements for a chapter 11 plan. Among them is the requirement in section 1123(a)(4) that a plan must "provide the same treatment for each claim or interest of a particular class, unless the holder of a particular claim or interest agrees to a less favorable treatment of such particular claim or interest." Section 1123(a)(4) addresses only the equal treatment of claims or interests in the same class of claims and interests, not a chapter 11 plan's overall treatment of creditors or interest holders. *See generally* COLLIER ON BANKRUPTCY ¶ 1123.01[4][b] (16th ed. 2025).

Some circuit courts of appeals have concluded that a chapter 11 plan may treat certain claimholders more favorably than others, provided the disparate plan treatment is based on identified rights or contributions from the favored claimants separate from their claims. *See Ad Hoc Committee of Non-Consenting Creditors v. Peabody Energy Corp. (In re Peabody Energy Corp.)*, 933 F.3d 918, 925 (8th Cir. 2019) (agreeing with the approach adopted by three other circuits in holding that a chapter 11 plan treating one set of claim holders more favorable than another set of claim holders does not violate section 1123(a)(4) "so long as the

treatment is not for the claim but for distinct, legitimate rights or contributions from the favored group separate from the claim"); *Ahuja v. LightSquared Inc.,* 644 F. App'x 24, 29 (2d Cir. 2016) (section 1123(a)(4) was not violated where a plan treated certain interest holders more favorably than other interest holders with interests in the same class because the favored interest holder: (i) held a secured claim in addition to its interest; and (ii) had "agreed to attribute" to the reorganized debtor certain causes of action against third parties); *Mabey v. Sw. Elec. Power Co. (In re Cajun Elec. Power Coop., Inc.)*, 150 F.3d 503, 518–19 (5th Cir. 1998) (a plan proponent's payments to certain members of a debtor power cooperative did not violate section 1123(a)(4) because the payments were "reimbursement for plan and litigation expenses," not payments "made in satisfaction of the [members'] claims against [the debtor]"); *Acequia, Inc. v. Clinton (In re Acequia, Inc.)*, 787 F.2d 1352, 1362–63 (9th Cir. 1986) (upholding confirmation of a plan that provided payments to one shareholder because payments to the shareholder were for the shareholder's service as a director and officer of the debtor, not for the shareholder's ownership interest).

DISALLOWANCE OF CONTINGENT CLAIMS FOR CONTRIBUTION OR REIMBURSEMENT

Section 502(e)(1) of the Bankruptcy Code disallows certain contingent claims asserted by co-debtors for contribution or reimbursement. It provides as follows:

> Notwithstanding subsections (a), (b), and (c) of this section and paragraph (2) of this subsection, the court shall disallow any claim for reimbursement or contribution of an entity that is liable with the debtor on or has secured the claim of a creditor, to the extent that—
>
> (A) such creditor's claim against the estate is disallowed;
>
> (B) such claim for reimbursement or contribution is contingent as of the time of allowance or disallowance of such claim for reimbursement or contribution; or
>
> (C) such entity asserts a right of subrogation to the rights of such creditor under section 509 of this title.

The purpose of section 502(e) is to protect the bankruptcy estate against the risk of double payment on claims. Without it, a debtor could be liable to the primary creditor as well as co-liable parties seeking contribution. According to its legislative history, section 502(e)(1) "adopts a policy that a surety's claim for reimbursement or contribution is entitled to no better status than the claims of the creditor assured by such surety." *See* 124 Cong. Rec. H11,094 (daily ed. Sept. 28, 1978); S17,410-11 (daily ed. Oct. 6, 1978).

SERTA SIMMONS

In November 2016, Serta entered into three credit facilities providing for $1.95 billion in first-lien term loans, $450 million in second-lien term loans, and a $225 million asset-based revolving loan. The credit agreement governing the loans (the "2016 Credit Agreement") provided as follows with respect to assignment of the debt to "Affiliated Lenders" and Serta:

> Notwithstanding anything to the contrary contained herein, any Lender may, at any time, assign all or a portion of its rights and obligations under this Agreement in respect of its Term Loans to any Affiliated Lender on a non-pro rata basis (A) through Dutch Auctions open to all Lenders holding the relevant Term Loans on a pro rata basis or (B) through open market purchases, in each case with respect to clauses (A) and (B), without the consent of the Administrative Agent[.]

Therefore, the 2016 Credit Agreement expressly allowed Serta to repurchase its debt on a non-pro rata basis through either a Dutch Auction or by means of "open-market purchases" involving fewer than all of the lenders.

Section 2.18 of the Credit Agreement provided that pro rata sharing did not apply to "any payment obtained by any Lender as consideration for the assignment of or sale of a participation in any of its Loans to any permitted assignee or participant, including any payment made or deemed made in connection with Section 2.22, 2.23, 9.02(c) and/or Section 9.05." *Id.* (quoting 2016 Credit Agreement § 2.18).

Amendments to the 2016 Credit Agreement could be freely made with the consent of only a simple majority of the lenders, unless the amendment involved a "sacred right." Sacred rights, however, were subject to an exception for any purchase of debt under section 9.05(g):

> [T]he consent of each Lender directly and adversely affected thereby (but not the consent of the Required Lenders) shall be required for any waiver, amendment or modification that: . . . waives, amends or modifies the provisions of Sections 2.18(b) or (c) of this Agreement in a manner that would by its terms alter the pro rata sharing of payments required thereby (except in connection with any transaction permitted under Sections 2.22, 2.23, 9.02(c) and/or 9.05(g) or as otherwise provided in this Section 9.02).

After Serta began experiencing financial challenges (even prior to the pandemic), it began to explore both liquidity enhancement and liability management alternatives. In connection with Serta's discussions with its lenders, two lender groups—the "PTL Lenders" and the "Objecting Lenders"—emerged with competing offers to address Serta's ongoing liquidity and financing problems. The Objecting Lenders, in fact, had acquired the majority of their debt holdings with the anticipation of entering into a position enhancement transaction with Serta that would exclude the PTL Lenders.

Serta ultimately elected to pursue the proposal offered by the PTL Lenders—i.e., the 2020 Transaction. The 2020 Transaction provided for the creation of a priority tranche of debt consisting

of: (i) $200 million in new financing provided by the PTL Lenders; and (ii) $875 million in exchanged loans, with the first-lien loans exchanged at 74% and the second-lien loans exchanged at 39%. The Objecting Lenders were not invited to participate in the 2020 Transaction.

In June 2020, the Objecting Lenders, all of which were first-lien lenders, sued in New York state court to enjoin the 2020 Transaction. The state court denied the injunction based on the plaintiffs' failure to establish a likelihood of success on the merits. The Objecting Lenders filed a second suit in New York state court in 2022 seeking the same relief.

Armed with a restructuring support agreement, Serta filed for chapter 11 protection on January 23, 2023, in the Southern District of Texas. Serta proposed a chapter 11 plan that, as later amended, provided for: (i) reduction of Serta's debt from $1.9 billion to $315 million by means of a debt-for-equity swap; (ii) new exit financing to be provided by the PTL Lenders in exchange for a "basket of consideration" that included indemnification by the reorganized Serta against any liability arising from the 2020 Transaction; (iii) payment of general unsecured claims in full; (iv) partial payment of certain other unsecured claims; and (v) a $1.5 million payment to existing equity holders as consideration for the preservation of certain tax attributes. Serta's unsecured creditors' committee supported the amended plan as part of a global settlement with Serta.

The day after Serta filed for bankruptcy, Serta and the PTL Lenders commenced an adversary proceeding against the Objecting Lenders seeking a determination that the 2020 Transaction was permitted by the 2016 Credit Agreement. The Objecting Lenders asserted counterclaims and third-party claims seeking both a determination that the 2020 Transaction violated the 2016 Credit Agreement, and money damages for the plaintiffs' alleged violations of the 2016 Credit Agreement's implied covenant of good faith and fair dealing. The parties filed competing motions for summary judgment.

In March 2023, the bankruptcy court awarded partial summary judgment to the PTL Lenders, holding that the term "open market purchase" in section 9.05(g) of the 2016 Credit Agreement was unambiguous, and that the 2020 Transaction constituted a permitted "open market purchase" under section 9.05(g) of the 2016 Credit Agreement. The bankruptcy court certified a direct appeal of that judgment to the Fifth Circuit. It later certified a direct appeal of its judgment in the adversary proceeding in favor of the PTL Lenders on the remaining counterclaims and third-party claims.

While the appeal was pending, the bankruptcy court consolidated its consideration of confirmation of Serta's plan with the disposition of certain issues remaining in the adversary proceeding.

The bankruptcy court confirmed Serta's chapter 11 plan (including the indemnity) on June 14, 2023. In confirming the plan, the court rejected the Objecting Lenders' argument that, by including an indemnity in favor of the PTL Lenders for any liability related to the 2020 Transaction, the plan violated sections 502(e)(1)(B) and 509(c) of the Bankruptcy Code (the latter allows a co-obligor of the debtor who pays a debt for which the debtor is primarily liable to be subrogated to the rights of the creditor that the co-obligor paid, with certain exceptions). According to the Objecting Lenders, the plan's indemnity provision was merely a continuation of a substantially similar indemnity the debtors granted to the PTL Lenders prepetition, rather than a new indemnity arising from a settlement in bankruptcy between the debtors and the PTL Lenders. The Objecting Lenders also argued that the plan violated the absolute priority rule by providing for a $1.5 million payment to holders of equity interests while the Objecting Lenders' claims were not being paid in full.

According to the bankruptcy court, the Objecting Lenders misconstrued Serta's plan in arguing that the plan violated sections 502(e)(1)(B) and 509(c) by allowing Serta's prepetition indemnity of the PTL Lenders to pass through the plan unaffected. It explained that the indemnification provision in the plan was new—it replaced the previous indemnification provision that expired upon Serta's bankruptcy filing. Moreover, the court emphasized, given the PTL Lenders' agreement to equitize nearly $1 billion in debt and provide exit financing, the new indemnity was a sound exercise of Serta's business judgment and represented a settlement that was fair, equitable, and in the best interests of Serta's estate. The bankruptcy court characterized as "irrelevant" the fact that Serta's decision interfered with the Objecting Lenders' litigation strategy.

Next, the bankruptcy court ruled that the $1.5 million to be paid under the plan to existing equity holders did not violate the absolute priority rule because Serta agreed to make the payment in exchange for "new value" in the form of a $54 million tax benefit held by equity. This decision too, it noted, represented a reasonable business judgment.

Addressing the adversary proceeding, the bankruptcy court noted that, based on the overwhelming evidence adduced at trial, the 2020 Transaction was the result of good-faith, arm's-length negotiations by parties acting in accordance with the duties owed to their respective creditors, investors, and owners. In addition, the court determined that the 2020 Transaction was binding and enforceable in all respects.

According to the bankruptcy court, the evidence demonstrated that: (i) the parties were "keenly" aware that the 2016 Agreement was a "loose document," and the Objecting Lenders understood what that entailed when they acquired the majority of their claims long after the debt was originally issued; (ii) there was no evidence of an improper motive on behalf of Serta or the PTL Lenders, who, unlike the Objecting Lenders, acted "defensively and in good faith"; and (iii) neither Serta nor the PTL Lenders breached the 2016 Credit Agreement by entering into the 2020 Transaction.

This harsh result for the Objecting Lenders, the court emphasized, was entirely foreseeable by the sophisticated parties involved and could have been avoided with more skillful drafting of the 2016 Credit Agreement.

Shortly after the bankruptcy court confirmed Serta's plan, the Objecting Lenders and creditor Citadel Equity Fund Ltd. ("Citadel") (collectively, the "Appellants"), which had purchased its claims after the 2020 Transaction, appealed the confirmation order to the district court and sought a stay of effectiveness of the plan. On June 21, 2023, the bankruptcy court denied the Appellants' motion for an emergency stay of the order pending the appeal. On June 29, 2023, a district court denied substantially similar motions for a stay pending appeal filed by the Appellants. Immediately afterward, Serta announced that its chapter 11 plan had become effective, bolstering its argument that any appeal of the confirmation order was equitably moot.

On July 26, 2023, the bankruptcy court certified a direct appeal of its confirmation order proceedings to the Fifth Circuit, which consolidated all the appeals.

THE FIFTH CIRCUIT'S RULING

A three-judge panel of the Fifth Circuit reversed the bankruptcy court's judgments in favor of Serta and the PTL Lenders in the adversary proceeding and reversed the plan confirmation order to the extent that it approved the indemnity related to the 2020 Transaction.

The Fifth Circuit panel agreed with the Appellants that the 2020 Transaction was not a permissible open market purchase under the 2016 Credit Agreement because, if Serta wanted to make an open market purchase under the terms of section 9.05(g) of the 2016 Credit Agreement, "and thereby circumvent the sacred right of ratable treatment," it should have purchased the loans on the secondary market for syndicated loans—the relevant "market" in this case—rather than "private[ly] engag[ing] individual lenders outside of this market. *See Serta Simmons*, 2025 WL 495336, at *14. According to U.S. Circuit Judge Andrew S. Oldham, the expansive definition of "open market purchase" proffered by Serta and the PTL Lenders as an "acquisition of something for value in competition among private parties" would render the Dutch Auction alternative in the 2016 Credit Agreement superfluous. *Id.* Such an expansive definition, he explained, was not supported by "industry usage," including a guide published by the Loan Syndication and Trading Association, which "endorses either a narrow definition of open market purchase confined to buybacks or a conception of open market purchase that does not fit the 2016 [Credit] Agreement." *Id.* at *16. Moreover, Judge Oldham explained, the Objecting Lenders' past behavior did not demonstrate that the parties understood the 2016 Credit Agreement to allow uptier transactions.

Because the bankruptcy court's judgment dismissing the Objecting Lenders' counterclaims in the adversary proceeding was predicated on its finding that the uptier transaction was valid, the Fifth Circuit vacated the judgment in part and remanded the case below for adjudication of the counterclaims.

The Fifth Circuit then ruled that Serta's chapter 11 plan improperly indemnified the PTL Lenders for liabilities arising from the 2020 Transaction.

Addressing equitable mootness, the Fifth Circuit noted that the doctrine is "a bit of a misnomer" and must be distinguished from "real mootness," which implicates a court's constitutional jurisdiction. Judge Oldham wrote that "we differentiate between '*inability* to alter the outcome (real mootness)' and '*unwillingness* to alter the outcome ("equitable mootness")."' *Id.* at *17.

According to the Fifth Circuit, appellate review of the plan confirmation order was not barred by the doctrine of equitable mootness for several reasons.

First, although the Appellants failed to obtain a stay pending appeal and Serta's plan had been substantially consummated, excision of the indemnity from the plan would not "affect either the rights of parties not before the court or the success of the plan." *Id.* at *18 (citation and internal quotation marks omitted). Judge Oldham explained that excision would benefit Serta, but not the PTL Lenders, and Objecting Lenders (like Citadel) that received the indemnity but did not participate in the 2020 Transaction would be only nominally impacted because they did not need the indemnity. He concluded that it was unclear whether any third parties would be harmed by excision. *Id.*

Next, the Fifth Circuit found that Serta's prospects for a successful reorganization under the plan would improve with the massive contingent indemnity obligation, and it was therefore unclear whether excision would threaten the success of the plan. Judge Oldham rejected the argument that removal of the indemnity was impossible "without unwinding the entire Plan and triggering a whole new confirmation proceeding." *Id.* at *19. Although unraveling the plan would have "substantial consequences," he explained, the "surgical exercise" of excising the indemnity would not.

In addition, the Fifth Circuit emphasized, a finding of equitable mootness in this case would defeat the use of the "direct appeal" process under 28 U.S.C. § 158(d)(2) in expediting appeals in significant cases and generating binding appellate precedent in bankruptcy. *Id.* (citing *Pac. Lumber*, 584 F.3d at 241–42).

The Fifth Circuit rejected the argument that excising the indemnity would be unfair because the PTL Lenders would never have agreed to support the chapter 11 plan without it. "If endorsed," Judge Oldham wrote, "this argument would effectively abolish appellate review of even clearly unlawful provisions in bankruptcy plans." *Id.* at *20. He also noted that "[p]arties supporting such provisions could always argue that they would have done things differently if they had known the provisions would later be exercised." *Id.* In any case, the Fifth Circuit emphasized, the PTL Lenders were well aware that the indemnity might be invalidated as part of the normal appellate process, and "[w]e will not save such sophisticated parties from the consequences of their action." *Id.*

Turning to the merits, the Fifth Circuit ruled that, by including the indemnity as part of a "settlement" nominally authorized by section 1123(b)(3)(A), the plan violated section 502(b)(1)(B), which disallows contingent claims for reimbursement by co-obligors. According to Judge Oldham, all parties acknowledged that the prepetition indemnity would have been disallowed by section 502(b)(1)(B), and couching the revived (and largely indistinguishable) plan indemnity as a "settlement" was nothing more than an "impermissible end run" around the provision. Section 1123(b)(3)(A)'s language permitting settlement or adjustment of claims as part of a plan, he noted, "is 'to weak a read' to support the settlement indemnity .... [because the provision] does not affirmatively provide for the back-end resurrection of claim already disallowed on the front end." *Id.* at *22 (citing *Czyzewski v. Jevic Holding Corp.*, 580 U.S. 451, 466 (2017)).

Finally, the Fifth Circuit held the plan indemnity violated the equal treatment requirement in section 1123(a)(4) because, although all creditors in class 3 (i.e., the PTL Lenders) and class 4 (creditors like Citadel that did not participate in the 2020 Transaction but purchased their claims afterward) received the indemnity under the plan, the "expected value of the indemnity varied dramatically depending on whether members had participated in the 2020 Uptier." *Id.* at *23. For the PTL Lenders, Judge Oldham explained, the indemnity was potentially worth tens of millions of dollars, whereas it was "worth little or even nothing" to non-participants. *Id.*

Based on its analysis, the Fifth Circuit concluded that excision of the indemnity from Serta's chapter 11 plan was the appropriate remedy. It accordingly reversed the plan confirmation order to the extent it approved the indemnity.

OUTLOOK

On January 21, 2025, the Fifth Circuit panel issued an amended opinion making clear that on remand, the ruling applies to the movants' breach of contract counterclaims against the participating lenders named in the adversary proceeding and to the movants' claims against third-party participating lenders that were not named plaintiffs. In its February 14, 2025, opinion revising and replacing its original ruling, the Fifth Circuit noted that "[o]ur dismissal does not prevent the [Objecting Lenders] from recovering any damages to which they might be entitled based on the open market purchase issue." *Id.* at *10 n.11.

On February 18, 2025, the Fifth Circuit denied the PTL lenders' motion for reconsideration of the ruling, which they argued has "massive implications" for the trillion-dollar syndicated loan market.

"Creditor on creditor" violence in the form of uptier, "position enhancement," or "liability management" transactions has featured prominently in headlines during the last five years. In part, this is a consequence of the exponential growth of the $1.3 trillion leveraged U.S. loan market during the last decade, which has coincided with the loosening of loan covenants, including financial covenants and typical contract provisions obligating lenders to be repaid and treated equally.

The Fifth Circuit's ruling in *Serta Simmons* is an important development for a number of reasons. It represents the first time that a federal circuit court of appeals has weighed in on the propriety of such transactions. The decision is a significant setback for obligors attempting to use these increasingly popular transactions to restructure their debts either outside or in chapter 11. Because the court excised Serta's obligation to indemnify participating lenders, lenders may be hesitant in the future to rely on open market exceptions—a common feature in many credit agreements—to restructure debt, forcing borrowers to devise other workarounds to limit litigation exposure. Even the Fifth Circuit noted in its opinion that, even though Serta's 2020 Transaction was the first major uptier, "it was far from the last," and although "every contract should be taken on its own, today's decision suggests that exceptions will often not justify an uptier."

Thus, the Fifth Circuit acknowledged that the terms of the credit agreement in any particular case might warrant a different conclusion regarding the validity of an uptier transaction. In fact, on the same day that the Fifth Circuit handed down its ruling, a five-judge panel of the Appellate Division of the New York Supreme Court unanimously reversed a lower court ruling denying motions to dismiss excluded lenders' contractual challenges to Mitel Networks' 2022 non-pro-rata uptier exchange, and directed the lower court to grant the motions to dismiss.

According to the appellate court, the uptier transaction did not breach the underlying credit agreement, principally because, unlike in *Serta Simmons*, the credit agreement in *Mitel Networks* included an exception allowing the company to "purchase" loans "at any time," without the "open market" qualifier. *See Ocean Trails CLO VII v. MLN Topco. Ltd*, 233 A.D.3d 614, 2024 WL 5248898 (N.Y. App. Div. 2024). The excluded lenders sought to appeal the decision to the N.Y. Court of Appeals, but the parties reached a settlement to resolve the litigation shortly before Mitel filed a pre-negotiated chapter 11 case on March 10, 2025, in the Southern District of Texas to implement the uptier restructuring.

Other key takeaways from *Serta Simmons* include: (i) courts look askance at attempts to circumvent the Bankruptcy Code's claims disallowance provisions; and (ii) in applying the equal treatment requirement for confirmation of a chapter 11 plan, the court should carefully examine the economic impact of the plan's proposed treatment of creditors in the same class.

NEW JERSEY BANKRUPTCY COURT RULING HIGHLIGHTS THE UTILITY OF CHAPTER 15 IN ENFORCING FOREIGN BANKRUPTCY COURT ORDERS IN THE UNITED STATES AS A MATTER OF COMITY

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"Comity" is a principle of jurisprudence whereby, under appropriate circumstances, one country recognizes within its borders the legislative, executive, or judicial acts of another nation. Many recent court rulings have examined the indispensable role of comity in the context of foreign bankruptcy or insolvency proceedings that have been "recognized" by U.S. courts during the two decades since the enactment of chapter 15 of the Bankruptcy Code. However, U.S. courts have a long history of granting comity to foreign laws or tribunals (including bankruptcy courts) in cases outside the scope of cross-border bankruptcy cases filed under chapter 15. Recent rulings by the U.S. Court of Appeals for the Third Circuit and the U.S. Bankruptcy Court for the District of New Jersey involving the same company in a Singapore liquidation proceeding illustrate the advantages of chapter 15 in recognizing and enforcing foreign bankruptcy court orders as a matter of "adjudicative" comity.

The Third Circuit recently updated its previous guidance regarding deference under principles of comity to a foreign bankruptcy proceeding in *Vertiv, Inc. v. Wayne Burt PTE, Ltd.*, 92 F.4th 169 (3d Cir. 2024) ("*Vertiv*"). The court vacated and remanded a New Jersey district court order dismissing breach of contract litigation commenced by a lender against a Singaporean company due to the pendency of the borrower's Singapore liquidation proceeding because, although the borrower's court-appointed liquidator made a *prima facie* showing that adjudicative comity was warranted, the district court did not fully apply the standard governing such relief.

Stymied by this avenue of attack, the liquidator then filed a petition under chapter 15 seeking recognition of the debtor's Singapore liquidation proceeding. He also sought an order recognizing and enforcing a judgment of the Singapore bankruptcy court directing the lender to surrender stock pledged to secure the loan for administration in the debtor's liquidation proceeding. The bankruptcy court granted the motion for recognition and enforcement of the Singapore court's turnover order as a matter of adjudicative comity. *See In re Wayne Burt Pte. Ltd. (In Liquidation)*, 2024 WL 5003229 (Bankr. D.N.J. Dec. 6, 2024), *appeal filed*, No. 24-19956 (MBK) (Bankr. D.N.J. Dec. 17, 2024), *motion for stay pending appeal filed*, No. 24-19956 (Bankr. D.N.J. Dec. 18, 2024) (hearing adjourned to Apr. 16, 2025).

Thus, by filing a chapter 15 petition, the liquidator in 65 days obtained relief (albeit subject to a ruling on appeal) from the bankruptcy court that had eluded him for more than four years in non-chapter 15 litigation before the New Jersey district court and

the Third Circuit. This outcome is one that chapter 15 was specifically designed to accomplish consistent with its underlying purpose as a framework for coordinating cross-border bankruptcy cases under principles of comity.

INTERNATIONAL COMITY

Even if a U.S. court has jurisdiction over a lawsuit involving foreign litigants, the court may conclude that a foreign court is better suited to adjudicate the dispute out of deference to the foreign court as a matter of international comity.

Comity is "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).

International comity has been interpreted to include two distinct doctrines: (i) "legislative," or "prescriptive," comity; and (ii) "adjudicative" (or "adjudicatory") comity, or "comity among courts." *In re Vitamin C Antitrust Litig*., 8 F.4th 136, 144 n.7 (2d Cir. 2021) (citing *Maxwell Comm'n Corp. v. Societe Generale (In re Maxwell Comm'n Corp.)*, 93 F.3d 1036, 1047 (2d Cir. 1996); *Cooper v. Tokyo Elec. Power Co. Holdings, Inc.*, 960 F.3d 549, 566 (9th Cir. 2020)).

The former "shorten[s] the reach of a statute"—one nation will normally "refrain from prescribing laws that govern activities connected with another state when the exercise of such jurisdiction is unreasonable." *Official Comm. of Unsecured Creditors of Arcapita Bank B.S.C.(C) v. Bahrain Islamic Bank (In re Arcapita Bank B.S.C.(C))*, 575 B.R. 229, 237 (Bankr. S.D.N.Y. 2017), *aff'd*, 640 B.R. 604 (S.D.N.Y. 2022).

Adjudicatory comity is an act of deference whereby the court of one nation declines to exercise jurisdiction in a case that is properly adjudicated in a foreign court. *Id.* at 238; *accord Mujica v. AirScan, Inc.*, 771 F.3d 580, 599 (9th Cir. 2014) (under the doctrine of adjudicatory comity, the court considers whether it should "decline to exercise jurisdiction over matters more appropriately adjudged elsewhere") (citation and internal quotation marks omitted). Adjudicatory comity comes into play only if a matter before a U.S. court is either pending in, or has resulted in a final judgment from, a foreign court. *See Gross v. German Found. Indus. Initiative*, 456 F.3d 363, 393 (3d Cir. 2006); *Spencer v. Kugler*, 454 F.2d 839, 847 n.17 (3d Cir. 1972).

Because a foreign nation's interest in the equitable and orderly distribution of a foreign debtor's assets is an interest deserving respect and deference, foreign bankruptcy proceedings are one category of foreign litigation that generally mandates dismissal of "parallel" U.S. court litigation under adjudicative comity. *Canada Southern Railway Co. v. Gebhard*, 109 U.S. 527, 532, 537–40 (1883); *Royal and Sun Alliance Ins. Co. of Canada v. Century Int'l Arms*, 466 F.3d 88, 92–93 (2d Cir. 2006); *Stonington Partners, Inc. v. Lernout & Hauspie Speech Products N.V.*, 310 F.3d 118, 126 (3d Cir. 2002), *as amended* (3d Cir. Nov. 12, 2002).

Stated differently, there must be a "parallel" (i.e., duplicative) foreign proceeding. *Arcapita*, 575 B.R. at 238 (citing *Sec. Inv'r Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC (In re Madoff)*, 2016 Bankr. LEXIS 4067, at *32 (Bankr. S.D.N.Y. Nov. 21, 2016), *vacated and remanded*, 917 F.3d 85 (2d Cir. 2019), *and vacated and remanded*, 12 F. 4th 171 (2d Cir. 2021); *Royal & Sun Alliance Ins. Co. of Canada v. Century Int'l Arms, Inc.*, 466 F.3d 88, 92–97 (2d Cir. 2006)). U.S. courts typically consider adjudicatory comity in considering whether to: (i) abstain from exercising jurisdiction (akin to abstaining under the doctrine of *forum non conveniens*) in deference to a pending foreign proceeding; (ii) enforce a foreign court's judgment in the United States; or (iii) preclude re-litigation of a claim or issue previously adjudicated by a foreign court. *See Diorinou v. Mezitis*, 237 F.3d 133, 139–40 (2d Cir. 2001) (citing cases).

In this context, deference to the foreign court is warranted "so long as the foreign proceedings are procedurally fair and . . . do not contravene the laws or public policy of the United States." *CT Inv. Mgmt. Co., LLC v. Cozumel Caribe, S.A. de C.V. (In re Cozumel Caribe, S.A. de C.V.),* 482 B.R. 96, 114 (Bankr. S.D.N.Y. 2012).

A pair of rulings handed down by the Third Circuit prior to 2024 addressed what courts should examine in deciding whether to abstain on comity grounds in deference to a foreign bankruptcy proceeding. In the first, *Remington Rand Corp. Del. v. Bus. Sys. Inc.*, 830 F.2d 1260 (3d Cir. 1987), the Third Circuit emphasized that comity is generally warranted if the foreign country's bankruptcy laws share the "fundamental principle" of U.S. bankruptcy law "that assets be distributed equally among creditors of similar standing." *Id.* at 1271. It also cautioned that U.S. courts must "guard against forcing American creditors to foreign proceedings in which their claims will be treated in some manner inimical to this country's policy of equality." *Id.* (citation omitted).

The Third Circuit provided additional guidance on this issue in *Philadelphia Gear Corp. v. Philadelphia Gear de Mexico, S.A.*, 44 F.3d 187 (3d Cir. 1994). In that case, guided by *Remington*, the court ruled that a party seeking a stay of U.S. litigation based on comity to a foreign bankruptcy proceeding must make a *prima facie* showing that: "the foreign bankruptcy law shares our policy of equal distribution of assets," and "the foreign law mandates the issuance or at least authorizes the request for the stay." *Id.* at 193. In the event of such a *prima facie* showing, the court must determine "whether according comity to the [foreign] proceedings would be prejudicial to the interests of the United States." *Id.* at 194. In making that inquiry, a court should assess, "along with any other issues it finds relevant," the following four issues (the "*Philadelphia Gear* test"): (i) whether the foreign court presiding over the bankruptcy proceedings is a duly authorized tribunal; (ii) whether the foreign bankruptcy law provides for equal

treatment of creditors; (iii) whether a stay of U.S. litigation would be "in some manner inimical to this country's policy of equality"; and (iv) whether the party opposing comity would be prejudiced by a stay of the U.S. litigation. *Id.*

ROLE OF COMITY IN CHAPTER 15 CASES

Comity is the bedrock of chapter 15 of the Bankruptcy Code, which was enacted nearly 20 years ago to provide a framework of principles patterned on the 1997 UNCITRAL Model Law on Cross-Border Insolvency (the "Model Law") to govern cooperation and coordination among courts presiding over cross-border bankruptcy cases. The Model Law has been implemented in some form by more than 50 countries.

Section 1501(a) of the Bankruptcy Code states that the purpose of chapter 15 is to "incorporate the [Model Law] so as to provide effective mechanisms for dealing with cases of cross-border insolvency with the objectives of," among other things, cooperation between U.S. and foreign courts, greater legal certainty for trade and investment, fair and efficient administration of cross-border cases to protect the interests of all stakeholders, protection and maximization of the value of a debtor's assets, and the rehabilitation of financially troubled businesses.

Section 1508 requires U.S. courts interpreting chapter 15 to "consider its international origin, and the need to promote an application of this chapter that is consistent with the application of similar statutes adopted by foreign jurisdictions."

Under section 1515, the "foreign representative" of a foreign debtor may file a petition in a U.S. bankruptcy court seeking "recognition" of a "foreign proceeding."

Section 101(24) 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."

"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 center of main interests ("COMI") is located (*see* 11 U.S.C. §§ 1502(4) and 1517(b)(1))—and foreign "nonmain" proceedings, which may be pending in countries where the debtor merely has an "establishment" (*see* 11 U.S.C. §§ 1502(5) and 1517(b)(2)). 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). An establishment is defined by section 1502(2) as "any place of operations where the debtor carries out a nontransitory economic activity."

Upon recognition of a foreign "main" proceeding, section 1520(a) of the Bankruptcy Code provides that certain provisions of the Bankruptcy Code automatically come into force, including: (i) the automatic stay preventing creditor collection efforts with respect to the debtor or its U.S. assets (section 362, subject to certain enumerated exceptions); (ii) the right of any entity asserting an interest in the debtor's U.S. assets to "adequate protection" of that interest (section 361); and (iii) restrictions on use, sale, lease, transfer, or encumbrance of the debtor's U.S. assets (sections 363, 549, and 552).

Following recognition of a foreign main or nonmain proceeding, section 1521(a) provides that, to the extent not already in effect, and "where necessary to effectuate the purpose of [chapter 15] and to protect the assets of the debtor or the interests of the creditors," the bankruptcy court may grant "any appropriate relief."

Such relief includes, among other things, a stay of any action against the debtor or its U.S. assets not covered by the automatic stay, an order suspending the debtor's right to transfer or encumber its U.S. assets, an order "entrusting the administration or realization of all or part of the debtor's assets within the territorial jurisdiction of the United States to the foreign representative or another person, including an examiner, authorized by the court" (11 U.S.C. § 1521(a)(5)), and an order "granting any additional relief

that may be available to a trustee," with certain exceptions. 11 U.S.C. § 1521(a)(7)).

Section 1521(b) similarly provides that, upon recognition of a foreign main or nonmain proceeding, the court may entrust the distribution of the debtor's U.S. assets to the foreign representative or another person, provided the court is satisfied that the interests of U.S. creditors are "sufficiently protected."

Section 1507(a) of the Bankruptcy Code provides that, upon recognition of a main or nonmain proceeding, the bankruptcy court may provide "additional assistance" to a foreign representative "under [the Bankruptcy Code] or under other laws of the United States." However, the court must consider whether any such assistance, "consistent with principles of comity," will reasonably ensure that: (i) all stakeholders are treated fairly; (ii) U.S. creditors are not prejudiced or inconvenienced by asserting their claims in the foreign proceeding; (iii) the debtor's assets are not preferentially or fraudulently transferred; (iv) proceeds of the debtor's assets are distributed substantially in accordance with the order prescribed by the Bankruptcy Code; and (v) if appropriate, an individual foreign debtor is given the opportunity for a fresh start. *See* 11 U.S.C. § 1507(b).

Section 1522(a) provides that the bankruptcy court may exercise its discretion to order the relief authorized by sections 1519 and 1521 upon the commencement of a case or recognition of a foreign proceeding "only if the interests of the creditors and other interested entities, including the debtor, are sufficiently protected."

Section 1506 sets forth a public policy exception to any of the relief otherwise authorized in chapter 15, providing that "[n]othing in this chapter prevents the court from refusing to take an action governed by this chapter if the action would be manifestly contrary to the public policy of the United States." However, section 1506 requires a "narrow reading" and "does not create an exception for any action under Chapter 15 that may conflict with public policy, but only an action that is 'manifestly contrary.'" *In re Fairfield Sentry Ltd.*, 714 F.3d 127, 139 (2d Cir. 2013); *accord In re ABC Learning Ctrs. Ltd.*, 728 F.3d 301, 309 (3d Cir. 2013) (the public policy exception should be invoked only under exceptional circumstances concerning matters of "fundamental importance" to the United States). The public policy exception is applicable "where the procedural fairness of the foreign proceeding is in doubt or cannot be cured by the adoption of additional protections" or where recognition or other chapter 15 relief "would impinge severely a U.S. constitutional or statutory right." *In re Qimonda AG Bankr. Litig.*, 433 B.R. 547, 570 (E.D. Va. 2010).

WAYNE BURT

Vertiv, Inc. and two affiliates (collectively, "Vertiv") are Delaware corporations headquartered in New Jersey. In January 2020, Vertiv sued Wayne Burt PTE Ltd. ("Burt"), a Singaporean corporation, and Cetex Petrochemicals LTD ("Cetex") in the U.S. District Court for the District of New Jersey (the "N.J. district court") seeking to collect on a defaulted loan secured by Burt's approximately 47% equity ownership interest in Cetex (the "Cetex Shares"). Shortly afterward, the N.J. district court signed a consent order awarding Vertiv nearly $30 million in damages and declaring that the Cetex Shares were now owned by Vertiv.

In September 2020, Vertiv filed a nearly identical action in the N.J. district court against Burt and a Burt affiliate, Wayne Burt Petro Chemical Private Ltd. ("Burt Petro"). The court entered a consent judgment against the defendants in that case in November 2020.

Burt's court-appointed liquidator, Farooq Ahmad Mann (the "Liquidator") moved to vacate both judgments in February 2021 claiming that: (i) a liquidation proceeding had been filed against Burt under the Singapore Companies Act in the Singapore High Court (the "Singapore Liquidation Proceeding") before Vertiv sued Burt and Burt Petro in the N.J. district court; (ii) the Burt officers who agreed to the consent judgments entered in the litigation lacked the authority to act on Burt's behalf because such authority was vested under Singapore law solely in the Liquidator; (iii) the loans upon which those judgments were based never existed; and (iv) the Liquidator had not intervened in the N.J. district court litigation sooner because he did not have notice of the proceedings.

The N.J. district court vacated both judgments in July 2021, finding substantial and compelling evidence that the loans were fraudulent. Two months afterward, Vertiv filed an amended complaint against Burt in the now consolidated actions seeking a judgment on the same claims as well as a breach-of-contract claim against one of Burt's directors who had allegedly guaranteed the loan and signed the vacated consent judgments.

Burt then sought dismissal of the N.J. district court litigation either on international comity grounds in deference to the Singapore Liquidation Proceeding or because the court lacked personal jurisdiction over Burt.

The N.J. district court ruled that dismissal of the litigation was warranted as an exercise of comity. *See Vertiv, Inc. v. Wayne Burt Pte, Ltd.*, 2022 WL 17352457 (D.N.J. Nov. 30, 2022), *vacated and remanded*, 92 F.4th 169 (3d Cir. 2024). Although the parties disputed which test should apply, the court concluded that comity was appropriate under both the *Philadelphia Gear* test and the similar four-factor test applied in *Austar Int'l Ltd. v. AustarPharma LLC*, 425 F. Supp. 3d 336 (D.N.J. 2019), which considers whether: (i) a foreign country has jurisdiction over the action; (ii) the foreign and U.S. proceedings are "parallel" or "duplicative"; (iii) "extraordinary circumstances" exist justifying a stay or dismissal of the U.S. litigation; and (iv) U.S. public policy militates against a stay or dismissal of the U.S. litigation. *Id.* at 363. Vertiv appealed the ruling to the Third Circuit.

Before the Third Circuit ruled on the appeal, the Liquidator commenced an action in the Singapore High Court requesting an order requiring Vertiv to return the Cetex Shares to Burt (the "Singapore Cetex Litigation"). Vertiv did not participate in the

Singapore Cetex Litigation, which resulted in the Singapore High Court issuing a default judgment against Vertiv (the "Cetex Judgment") directing Vertiv to "forthwith" surrender the Cetex Shares to the Liquidator. Vertiv disregarded the Cetex Judgment and continued to prosecute the Third Circuit appeal.

In February 2024, the Third Circuit vacated the N.J. district court's order dismissing Vertiv's amended complaint on appeal and remanded the case below for further proceedings. *See Vertiv, Inc. v. Wayne Burt PTE, Ltd.*, 92 F.4th 169 (3d Cir. 2024). In doing so, the Third Circuit "updated" its nearly three-decades-long guidance regarding deference under principles of comity to a foreign bankruptcy proceeding and articulated a "refreshed" standard for adjudicatory comity.

The Third Circuit did not fault the district court's findings that Burt had made a *prima facie* showing that adjudicatory comity was appropriate under the *Philadelphia Gear* test because: (i) Singapore law shares the U.S. policy of equality of distribution of assets among similarly situated creditors; and (ii) Singapore law authorizes a stay or dismissal of the U.S. litigation and prohibits any action against a debtor in a liquidation proceeding without leave of the court, which was not obtained in this case.

However, the Third Circuit vacated the district court's ruling and remanded the case below because the district court failed to apply the remainder of the *Philadelphia Gear* test. A more detailed discussing of the Third Circuit's ruling is available in our article, "Third Circuit Updates Its Standard for Granting Comity to Foreign Bankruptcy Proceedings."

On remand, the Liquidator renewed his motion to dismiss the N.J. district court litigation, and the matter was referred to a magistrate judge after Vertiv made robust discovery demands regarding Singapore insolvency law. Subsequently, the Liquidator retained Jones Day to pursue chapter 15 relief. On October 8, 2024, the Liquidator, as Burt's foreign representative (the "FR"), filed a petition in the U.S. Bankruptcy Court for the District of New Jersey for chapter 15 recognition of the Singapore Liquidation Proceeding. The FR concurrently filed a motion for an order recognizing and enforcing the Cetex Judgment under sections 1521 and 1507 of the Bankruptcy Code.

On November 7, 2024, the U.S. bankruptcy court entered an order recognizing the Singapore Liquidation Proceeding under chapter 15 as a foreign main proceeding, which automatically stayed the N.J. district court litigation.

Vertiv opposed the motion seeking recognition and enforcement of the Cetex Judgment, arguing that the U.S. bankruptcy court—rather than the Singapore High Court—should determine whether the Cetex Shares should be surrendered to the FR.

THE BANKRUPTCY COURT'S RULING

On December 12, 2024, within 65 days of filing the chapter 15 petition, the U.S. bankruptcy court granted the FR's motion for an order recognizing and enforcing the Cetex Judgment under sections 1521(a) and 1507 of the U.S. Bankruptcy Code and as a matter of adjudicative comity.

U.S. Bankruptcy Judge Michael B. Kaplan wrote that "[t]here is no question that the steps taken by the [FR] to secured the availability of the Cetex stock certificates for anticipated disposition consistent with Singapore law serves the interests of all creditors in the Singapore Liquidation Proceeding," thereby satisfying the "sufficient protection" requirement of section 1522(a). *Wayne Burt*, 2024 WL 5003229, at *4.

The bankruptcy court explained that, as noted by the Third Circuit in *Vertiv*, there are "many similarities" between the U.S. bankruptcy process and the Singapore insolvency system, including:

(i) The "*pari passu* principle" is a "fundamental principle" of Singapore's insolvency law, whereby the property of a liquidating debtor must be applied *pari passu* in satisfaction of its debts, except as provided otherwise by the statutory priority scheme;

(ii) Court-appointed liquidators are officers of, and accountable to, the Singapore court;

(iii) Creditors have the right to submit proof of their claims with the liquidator and can seek relief from the Singapore court if dissatisfied with a liquidator's decision to allow or disallow claims;

(iv) Liquidators are required to notify creditors of the liquidation proceeding so that they may file proof of their claims against the debtor;

(v) Foreign creditors have the same rights as domestic creditors under Singapore law to participate in liquidation proceedings;

(vi) A liquidator has the power to take custody or control of the debtor's assets under the supervision of the Singapore court; and

(vii) Once the Singapore court has entered a winding-up order, an automatic stay prevents creditor collection efforts, although the court may grant relief from the stay under appropriate circumstances.

Id. at **4–5 (citing *Vertiv*, 92 F.4th at 183).

According to Judge Kaplan, there was no dispute that Vertiv received notice of both the Singapore Liquidation Proceeding and the Cetex Litigation. Moreover, although Vertiv had the right to submit proof of its debt in the Singapore Liquidation Proceeding, it did not do so. Nor had it chosen to participate in the Singapore Cetex Litigation. Finally, he noted, even though the Cetex Judgment was a default judgment, Vertiv could still ask

the Singapore High Court to set the judgment aside. Accordingly, the bankruptcy court found that Vertiv's interests were sufficiently protected in both the Singapore Litigation Proceeding and the Singapore Cetex Litigation, "both in the substance of the law contained in the Singapore Companies Act and in its application." *Id.* at *5.

The bankruptcy court concluded that enforcing the Cetex Judgment was appropriate under section 1507 of the Bankruptcy Code because it "assures just treatment of all holders of claims against the debtor's property." The Cetex Litigation, Judge Kaplan explained, was an "effort to marshal an asset of the Wayne Burt insolvency estate for the benefit of all of Wayne Burt's creditors." Also, enforcement of the Cetex Judgment would "prevent the potential preferential or fraudulent disposition of [the] Wayne Burt insolvency estate by entrusting the Cetex shares to the supervision of the Singapore High Court, until such time as the issue of their ownership can be decided with finality." *Id.* at *6.

As a "matter of comity," the bankruptcy court found that enforcement of the Cetex Judgment was appropriate under the *Philadelphia Gear* test, as refreshed by the Third Circuit in *Vertiv*. According to Judge Kaplan: (i) the Singapore Liquidation Proceeding and the chapter 15 case were "parallel"; (ii) the second prong of the test did not apply because no plan of reorganization was involved; (iii) Singapore insolvency laws are "substantially similar" to the U.S. bankruptcy system; and (iv) Vertiv was not prejudiced by being required to participate in the Singapore Liquidation Proceeding—having chosen to contract with a Singaporean company, Vertiv should have foreseen that it might be required to participate in a Singapore liquidation of its counterparty, and had an opportunity to participate in the Singapore Liquidation.

Judge Kaplan concluded his opinion by stating that "principles of comity and the underlying objectives of Chapter 15" do not allow the Bankruptcy Court to "stand in appellate review of the rulings made by the Singapore High Court," especially where Vertiv "maintain[s] the capacity to pursue appeals and other necessary relief from the foreign court."

OUTLOOK

Vertiv appealed the bankruptcy court's decision on December 17, 2024. It filed a motion for a stay pending appeal on December 18, 2024, with a hearing that has been adjourned to April 16, 2025.

Regardless of the outcome of the appeal, *Wayne Burt* and *Vertiv* highlight the application of adjudicative comity in chapter 15 cases and other federal litigation, as well as the strategic advantages of deploying chapter 15 when there is a history of prolonged litigation parallel to a pending foreign insolvency proceeding. In *Wayne Burt*, the Liquidator, by filing a chapter 15 case, obtained relief in 65 days (albeit subject to a pending appeal) that he was unable to obtain in more than four years of litigation before the N.J. district court and the Third Circuit. He was able to do so because comity is the bedrock of chapter 15, and its provisions were designed precisely so that U.S. bankruptcy courts can provide assistance to foreign bankruptcy courts and the court-appointed representatives of foreign debtors. Chapter 15 provides unique advantages and protections that otherwise may not be available in other cases involving adjudicative comity, such as an automatic stay of creditor collection efforts in the United States upon recognition of a foreign main proceeding and the bankruptcy court's power to grant other forms of assistance to a foreign bankruptcy court, such as the enforcement in the United States of the foreign court's orders.

It should be noted that courts disagree as to whether, once enacted in 2005, chapter 15 recognition of a foreign bankruptcy proceeding became the exclusive mechanism for a U.S. court under principles of comity to recognize the foreign proceeding and to enforce a foreign court's orders or the terms of a restructuring plan. *Compare Moyal v. Munsterland Gruppe GmbH & Co.*, 539 F. Supp. 3d 305, 309 n.1 (S.D.N.Y. 2021) (dismissing litigation against a German company, and ruling that, under principles of comity, U.S. litigation against a German company was stayed by operation of German law when the company filed for bankruptcy in Germany, and deeming "absurd" the notion that Chapter 15 recognition should be a prerequisite to seeking relief as it would "fly in the face of comity principles"); and *EMA Garp Fund v. Banro Corp.,* 2019 WL 773988, at *5 (S.D.N.Y. Feb. 21, 2019) (dismissing litigation against a Canadian company and its former CEO, finding that, under principles of comity, the lawsuit was barred by Canadian court orders approving the company's Canadian bankruptcy proceeding and releasing all claims against the defendants, and stating that "the fact that Defendants did not file a recognition proceeding in [a] U.S. court" was "irrelevant" to its comity determination"), *with Halo Creative & Design Ltd. v. Comptoir Des Indes Inc.*, 2018 WL 4742066 (N.D. Ill. Oct. 2, 2018) (denying a motion for a stay of U.S. litigation in light of the pendency of the defendant's Canadian bankruptcy proceeding because a U.S. bankruptcy court had not recognized the Canadian bankruptcy under chapter 15); *see also In re Silicon Valley Bank (Cayman Islands Branch)*, 658 B.R. 75, at 90 n.7 (Bankr. S.D.N.Y. 2024) ("While section 1509(f) permits a foreign debtor to sue in a U.S. court to collect or recover on a claim involving property of the debtor even in the absence of recognition, a broader question exists whether comity applies to allow courts to recognize foreign judgments in insolvency cases absent Chapter 15 recognition. It remains an unsettled question . . ."). In *Vertiv*, the Third Circuit did not address the issue, despite the pendency of the Singapore Liquidation Proceeding.

Courts subscribing to the approach that chapter 15 recognition is the exclusive mechanism for granting comity to foreign bankruptcy proceedings sometimes rely on section 1509 of the Bankruptcy Code. Section 1509(b) provides that, if the U.S. bankruptcy court recognizes a foreign proceeding, the foreign representative may apply directly to another U.S. court for appropriate relief, and a U.S. court "shall grant comity or cooperation to the foreign representative." Section 1509(c) accordingly specifies that a request for comity or cooperation from another U.S. court "shall be accompanied by a certified copy of an order granting

recognition" under chapter 15. If a U.S. bankruptcy court denies a petition for recognition of a foreign proceeding, section 1509(d) authorizes the court to "issue any appropriate order necessary to prevent the foreign representative from obtaining comity or cooperation" from U.S. courts. Finally, section 1509(f) provides that the failure of a foreign representative to obtain chapter 15 recognition does not preclude the representative from suing in a U.S. court to collect or recover on a claim owned by the foreign debtor.

Section 1509 and its legislative history have been interpreted to reflect lawmakers' intention that chapter 15 be the "exclusive door to ancillary assistance to foreign proceedings," with the goal of controlling such cases in a single court. COLLIER at ¶ 1509.03 (quoting H.R. Rep. No. 109-31(I), 110 (2005) ("Parties would be free to avoid the requirements of [chapter 15] and the expert scrutiny of the bankruptcy court by applying directly to a state or Federal court unfamiliar with the statutory requirements . . . . This section concentrates the recognition and deference process in one United States court, ensures against abuse, and empowers a court that will be fully informed of the current status of all foreign proceedings involving the debtor.")).

Even so, despite the enactment of chapter 15, U.S. courts continue to grant recognition to foreign bankruptcy court orders, particularly if the party seeking recognition is not a "foreign representative," in which case chapter 15 recognition is not necessary. *See generally* COLLIER at ¶ 1509.02 (noting that "courts regularly rule that chapter 15 recognition is not a prerequisite to grant comity to foreign proceedings on the request of a party other than a foreign representative"); *see, e.g., Trikona Advisers Ltd. v. Chugh*, 846 F.3d 22 (2d Cir. 2017) (affirming a district court ruling giving collateral estoppel effect to the findings of a foreign insolvency court, even though no chapter 15 petition had been filed on behalf of the foreign debtor seeking recognition of its Cayman Islands winding-up proceeding, and noting that, because the party seeking such relief was not a "foreign representative" under chapter 15, the provisions of chapter 15 simply did not apply); *Barclays Bank PLC v. Kemsley*, 44 Misc. 3d 773 (N.Y. Sup. 2014) (chapter 15 recognition was not necessary to enforce, at the request of an individual debtor, a discharge order in a UK bankruptcy proceeding, even though a U.S. bankruptcy court previously denied the UK bankruptcy trustee's petition for chapter 15 recognition of the bankruptcy, because chapter 15's plain language applies only to a "foreign representative" such as a trustee).

NEW JERSEY BANKRUPTCY COURT: MOTION NOT NECESSARY TO ASSUME UNEXPIRED LEASE

Brad B. Erens • Richard H. Howell

The ability to assume, assume and assign, or reject executory contracts and unexpired leases is a power central to ability of a bankruptcy trustee or chapter 11 debtor-in-possession ("DIP") to maximize the value of the estate for the benefit of all stakeholders. Although the Bankruptcy Code establishes deadlines by which a trustee or DIP must assume or reject contracts or unexpired leases, it does not lay out what a trustee or DIP must do to assume or reject those contracts or leases.

The resulting lack of guidance has caused disagreement among the courts concerning the proper procedural vehicle for assumption or rejection. Some have concluded that only a motion, as suggested by Rules 6006 and 9014 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), is sufficient for assumption or rejection, but other courts have not foreclosed the possibility of alternative means for assumption or rejection. In *In re Rite Aid Corp*., 23-18993, 2024 WL 4715336 (Bankr. D.N.J. Nov. 6, 2024), the U.S. Bankruptcy Court for the District of New Jersey weighed in on this debate, ruling that, under the unambiguous terms of the Bankruptcy Code and in line with its underlying purpose, a trustee or DIP need not file a motion to assume an unexpired lease. Instead, the court concluded, a less formal notice filed with the court, even as part of a chapter 11 plan supplement, sufficed under the circumstances.

ASSUMPTION AND 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, subject to bankruptcy court approval. Section 365(d) lays out various deadlines by which a trustee must assume a contract or lease.

In a chapter 7 case, the trustee must decide whether to assume or reject an executory contract or unexpired lease of residential real property or a personal property lease within 60 days after entry of the order for relief (in voluntary cases, the petition date) unless the court, for cause, extends the assumption or rejection deadline. *See* 11 U.S.C. § 365(d)(1). If the trustee fails to act within the 60-day period, the contract or lease is deemed rejected.

In a chapter 9, 11, 12, or 13 case, the trustee or DIP may assume or reject an executory contract or unexpired residential lease or a lease of personal property at any time before confirmation of the 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).

Pursuant to section 365(d)(4), in a case under any chapter of the Bankruptcy Code other than chapter 15, 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 chapter 9, 11, 12, or 13 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.

The Bankruptcy Code does not specify any particular steps the trustee or DIP must take to assume, assume and assign, or reject a contract or lease. However, Bankruptcy Rule 6006(a) provides that "[Bankruptcy] Rule 9014 governs a proceeding to assume, reject, or assign an executory contract or unexpired lease, other than as part of a plan." Bankruptcy Rule 9014(a) states that, "[i]n a contested matter not otherwise governed by these rules, relief must be requested by motion." In addition, Bankruptcy Rule 9013 provides in relevant part that "[a] request for an order must be made by written motion" unless an application is authorized by the Bankruptcy Rules or the request is made during a hearing.

Guided by the statute and these procedural rules, many courts have concluded that a motion is the exclusive vehicle for assumption, assumption and assignment, or rejection. *See generally* COLLIER ON BANKRUPTCY ("COLLIER") ¶ 365.05 (16th ed. 2025) (noting that "[e]xcept for assumption in a plan, assumption may be accomplished only by a motion").

According to a leading commentator, the "overwhelming majority" view is that "the trustee can manifest the intention to assume or reject an . . . unexpired lease only by formal motion." *Id.* at ¶ 6006.01[2][a]. The minority view, however, recognizes implied, tacit, or informal assumption. *Id.* (stating that "[d]espite the fact that Rules 6006(a), 9014, and 9013 require the filing of a motion to assume or reject an executory contract or unexpired lease, the doctrine of tacit, or informal, assumption survives, but only in a small minority of older cases").

RITE AID

Rite Aid Corporation and its affiliates (collectively, the "debtors") sought chapter 11 protection on October 15, 2023, in the District of New Jersey. On the petition date, one of the debtors was a lessee under an unexpired nonresidential lease (the "Lease") with Fair Oaks, LLC ("Fair Oaks") for real property in California. On December 20, 2023, pursuant to section 365(d)(4)(B), the bankruptcy court entered an order extending the time for the debtors to assume or reject their nonresidential real property leases up to and including May 13, 2024 (the "Assumption Deadline").

The debtors expressed their intent to assume the Lease several times prior to the Assumption Deadline. First, the debtors filed a notice of assumption of leases with a schedule of leases they intended to assume, including the Lease with Fair Oaks. The debtors also filed a draft schedule of assumed leases with a supplement to its second amended chapter 11 plan, again including the Lease.

Finally, on May 13, 2024, the debtors filed a third amended plan supplement and attached a "Schedule of Assumed Executory Contracts and Unexpired Leases" (the "Assumption Schedule") that listed the leases it had decided to assume, including the Lease with Fair Oaks.

However, the debtors did not file a motion to assume the Lease or to otherwise extend the Assumption Deadline beyond May 13, 2024.

Fair Oaks subsequently filed a motion under section 365(d)(2) to compel rejection of the Lease. Fair Oaks contended that absent a formal motion to assume, notices of assumption such as the Assumption Schedule could serve neither to extend an assumption deadline nor to assume an unexpired lease under section 365. According to Fair Oaks, the Lease should therefore be deemed rejected because the Assumption Deadline had passed without a proper assumption. The debtors responded that the Assumption Schedule filed with the bankruptcy court and served on Fair Oaks gave Fair Oaks notice of their decision to assume the Lease, which they had therefore properly assumed.

THE BANKRUPTCY COURT'S RULING

The bankruptcy court agreed with Fair Oaks that a timely motion is necessary to *extend* the deadline to assume or reject a nonresidential real property lease pursuant to section 365(d)(4)(B). Because the debtors did not file any such motion, the court found that the Assumption Deadline for the Lease remained May 13, 2024.

The court disagreed with Fair Oaks, however, that the debtors failed to assume the Lease prior to the Assumption Deadline. U.S. Bankruptcy Judge Michael B. Kaplan looked to the language of the statute, its purpose, and persuasive case law to conclude that a motion is not required for assumption under section 365, and that the debtors had assumed the Lease via the Assumption Notice.

According to the court, the text of the statute is dispositive. Section 365, the court noted, does not include an explicit requirement that a motion be filed to effectuate the assumption of a lease. Instead, section 365(d) merely provides that a lease will be deemed rejected if the trustee neither assumes nor rejects it by the specified deadline The court concluded that reading "assume" to mean "file a motion to assume" would be an impermissible "torturing" of the text of the statute. *Rite Aid*, 2024 WL 4715336, at *4.

Judge Kaplan bolstered his reasoning by looking to other subsections of section 365. For instance, he noted that Congress *did* add an explicit requirement in section 365(d)(4)(B) that a motion be filed to obtain an extension of the deadline to assume or reject. Congress, the court reasoned, could have added such a requirement to the nearby section 365(d)(4)(A), but chose not to do so. Moreover, Judge Kaplan found that the word "assume" is used in other subsections of section 365, but reading "assume" to mean "file a motion to assume" in other subsections of the statute would produce absurd results. *Id.*

The bankruptcy court also emphasized that its ruling was consistent with the purpose of section 365(d)(4): to provide a deadline by which a debtor must act and to give a landlord certainty regarding its property. The court concluded that this purpose is served when the debtor makes a decision regarding a lease and communicates that decision to the landlord appropriately, *whether in the form of a motion or some other way*.

OUTLOOK

The ruling in *Rite Aid* cuts against the bright line rule adopted by the vast majority of bankruptcy courts; namely, that a motion, and a motion alone, is necessary for assumption of an executory contract or an unexpired lease. If it stands, the decision should be of interest to debtors and a cautionary tale for non-debtor contract or lease co-parties.

A key takeaway for debtors is that, at least in the U.S. Bankruptcy Court for the District of New Jersey, a formal motion may not be necessary to assume an unexpired lease or an executory contract. Although courts are unlikely to embrace the long-discarded tacit assumption approach, they may be inclined to find that a lease or contract has been assumed in cases where the debtor explicitly stated its intent to assume in a document filed with the bankruptcy court and provided to the non-debtor co-party.

If this approach becomes more acceptable, it would place the burden squarely on the shoulders of co-parties to exercise vigilance by carefully monitoring court filings that may impact their rights under a contract or lease, as distinguished from a formal motion to assume or reject.

SECOND CIRCUIT: BANKRUPTCY CODE'S LEASE ASSUMPTION AND ASSIGNMENT PROVISIONS APPLY ONLY TO "TRUE LEASES"

Genna Ghaul

The ability of a bankruptcy trustee or chapter 11 debtor-in-possession ("DIP") to assume and assign executory contracts and unexpired leases is an invaluable tool for generating value for a bankruptcy estate to pay creditor claims and provide funding for a chapter 11 plan. However, the provisions of the Bankruptcy Code governing assumption and assignment of unexpired leases apply only to "true" or "bona fide" leases, as distinguished from many financing arrangements commonly utilized in real estate transactions. *See In re PCH Associates*, 804 F.2d 193, 198 (2d Cir. 1986). The U.S. Court of Appeals for the Second Circuit examined this issue in *MOAC Mall Holdings LLC v. Transform Holdco LLC (In re Sears Holdings Corp.)*, 2024 WL 5113165 (2d Cir. Dec. 16, 2024). The court of appeals affirmed a district court ruling that the Bankruptcy Code's deadline for assuming or rejecting a nonresidential real property lease did not apply to a shopping center "lease" because the agreement was not a true lease, and neither the debtor nor the purported assignee of the agreement waived or forfeited the argument that the lease was not bona fide.

ASSUMPTION, REJECTION, AND ASSIGNMENT OF UNEXPIRED LEASES IN BANKRUPTCY

A bankruptcy trustee or DIP generally has the right to "assume" (reaffirm) or "reject" (disavow, resulting in breach) unexpired leases under section 365(a) of the Bankruptcy Code. 11 U.S.C. § 365(a). Moreover, most assumed leases can be assigned as a means of creating value for the bankruptcy estate. *See* 11 U.S.C. § 365(c) and (f).

Section 365(d)(4) provides that a nonresidential real property "lease" under which the debtor is the lessee "shall be deemed rejected, and the trustee shall immediately surrender that nonresidential real property to the lessor," if the trustee or DIP does not assume or reject the lease by the earlier of 120 days after the bankruptcy petition date or the date of confirmation of a plan, unless the court grants a 90-day extension "on the motion of the trustee or lessor for cause." 11 U.S.C. § 365(d)(4).

The Bankruptcy Code itself does not define the term "lease" in the context of section 365(d)(4) or otherwise. Many courts, however, including courts in the Second Circuit, have interpreted section 365(d)(4) to apply only to "true" or "bona fide" leases. *See In re PCH Associates*, 804 F.2d at 198; *accord Int'l Trade Admin. v. Rensselaer Polytechnic Inst.*, 936 F.2d 744 (2d Cir. 1991) ("*RPI*"); *see generally* Collier on Bankruptcy ¶ 365[3] (16th ed. 2025) (noting that "courts have been vigilant to limit the application of section 365 to true leases, not disguised financing arrangements . . . . [and that] [e]very appellate court, other than the Third Circuit, that has considered the issue holds that substance

controls and that only a 'true lease' counts as a 'lease' under section 365").

In determining whether an agreement is a true lease, many courts apply an "economic substance test" to ascertain whether, notwithstanding the labels used in the agreement, "the parties intended to impose obligations and confer rights significantly different from those arising from the ordinary landlord/tenant relationship." *PCH Associates*, 804 F.2d at 200.

Second Circuit courts consider various factors in determining whether a particular transaction is a true lease pursuant to section 365(d)(4), including:

> (i) whether the "rental" payments were calculated to compensate the lessor for the use of the land, or rather were structured for some other purpose, such as to ensure a particular return on an investment; (ii) whether the purchase price was related to the fair market value of the land, or whether it was calculated as the amount necessary to finance the transaction; (iii) whether the property was purchased by the lessor specifically for the lessee's use; (iv) whether the transaction was structured as a lease to secure certain tax advantages; [and] (v) whether the lessee assumed many of the obligations normally associated with outright ownership, including the responsibility for paying property taxes and insurance.

In re Hotel Syracuse, Inc., 155 B.R. 824, 838–39 (Bankr. N.D.N.Y. 1993) (citing *PCH Associates*, 804 F.2d at 200–01; *In re Wingspread Corp.*, 116 B.R. 915, 923 (Bankr. S.D.N.Y. 1990)). Lease provisions that permit or require the lessee to purchase the premises for a nominal sum at the end of the term of the lease are also relevant. *In re Hotel Syracuse, Inc.,* 155 B.R. 838-39 (citing *Wingspread,* 116 B.R. at 923); *In re Opelika Mfg. Corp.*, 67 B.R. 169, 171 (Bankr. N.D. Ill. 1986). Other indicia "that a lease is a financing vehicle include: (i) an option price bearing little resemblance to fair market value; (ii) an option price that is minimal in comparison with total payments; and (iii) rental payments equal to or greater than the selling price." *Wingspread*, 116 B.R. at 923 (citation omitted).

SEARS HOLDINGS

Iconic retailer Sears filed for chapter 11 protection in the Southern District of New York in October 2018. In February 2019, the bankruptcy court approved the sale of substantially all of Sears's assets for $5.2 billion to Transform Holdco LLC and an affiliate (together, "Transform"), companies created and controlled by former Sears CEO Eddie Lampert and several other former Sears executives.

The sale transaction gave Transform the right, following assumption by Sears, to assign 660 Sears store leases, including a lease with MOAC Mall Holdings LLC ("MOAC") for premises located in the Mall of America (the "MOAC Lease"). Signed in 1991, the MOAC Lease was atypical in the retail industry. It included a term of 100 years and, because Sears constructed the premises at its own expense, an annual rent obligation of only $10, which Sears prepaid until 2021. The MOAC Lease and a related operating agreement did not require Sears to pay a "percentage rent." However, the MOAC Lease's terms did require Sears to pay taxes, common area charges, and insurance at the rate of approximately $1.1 million annually.

In connection with the sale of Sears's assets to Transform, the bankruptcy court initially approved Transform's assumption and assignment of all Sears's leases except the lease with MOAC, which objected to the proposed assignment. MOAC objected, arguing that Sears failed to provide "adequate assurance" of Transform's future performance, as required by section 365(b)(3) of the Bankruptcy Code, which specifically governs the assignment of shopping center leases. *In re Sears Holdings Corp.*, 613 B.R. 51, 60 (S.D.N.Y.), *vacated on reh'g*, 616 B.R. 615 (S.D.N.Y. 2020), *vacated and remanded*, 2023 WL 7294833 (2d Cir. Nov. 6, 2023); *see also* 11 U.S.C. § 365(b)(3). During the litigation over MOAC's objection, the parties stipulated several times to extend the 120-day deadline for assumption or rejection of the MOAC Lease specified in section 365(d)(4) of the Bankruptcy Code. Sears also stipulated to the existence of a shopping center lease subject to section 365(b)(3).

The bankruptcy court overruled MOAC's objection and entered an order approving assumption and assignment of the MOAC Lease as part of the sale transaction. MOAC appealed to the district court and sought a stay of the bankruptcy court's assignment order. The bankruptcy court denied MOAC's request for a stay pending appeal, reasoning that authorization to assign a lease—as distinguished from approval of a sale or a lease—did not fall within the scope of section 363(m) of the Bankruptcy Code, which provides that, unless a party challenging an order authorizing a bankruptcy sale or lease is stayed pending appeal, reversal or modification of the order on appeal does not affect the validity of the sale or lease to a good faith purchaser (commonly referred to as "statutory mootness").

The bankruptcy court confirmed a chapter 11 plan for Sears in October 2019. The plan, which became effective in October 2022, established a liquidating trust to administer Sears's vestigial assets. Shortly before the effective date of the plan, the court approved a settlement in which Transform and Sears agreed that in the event that the assumption and assignment of the MOAC Lease were overturned, Sears would take any actions necessary either to effect assignment of the MOAC Lease to Transform or to give Transform the economic benefit intended by the transaction.

In the appeal of the bankruptcy court's adequate assurance ruling, the district court agreed with MOAC and initially vacated the bankruptcy court's assumption and assignment order. However, Transform argued for the first time in its motion for rehearing that the appeal was mooted by section 363(m) because MOAC failed to obtain a stay pending appeal of the sale order. Constrained by applicable precedent, the district court ultimately vacated its initial decision and ruled that the assignment of the MOAC Lease to Transform qualified as a "sale" and, because MOAC never obtained a stay pending its appeal, MOAC's appeal must be dismissed as moot on jurisdictional grounds under section 363(m).

MOAC appealed to the Second Circuit, which affirmed in a summary order. In its ruling, the Second Circuit explained that because MOAC's appeal was moot under section 363(m), the district court lacked jurisdiction to hear it. *See In re Sears Holdings Corp.,* 2021 WL 5986997 (2d Cir. Dec. 17, 2021).

MOAC appealed the ruling to the U.S. Supreme Court, which vacated the Second Circuit's ruling and remanded the case below. *See MOAC Mall Holdings LLC v. Transform Holdco LLC*, 598 U.S. 288 (2023). The Court unanimously rejected Transform's argument that the appeal was moot because "no legal vehicle remains available for undoing" the lease assignment and MOAC could not "possibly obtain any effectual relief," regardless of the Court's decision. "Our cases," the Court wrote, "disfavor these kinds of mootness arguments." *Id.* at 295.

The Court also held that section 363(m) of the Bankruptcy Code is not a jurisdictional "precondition to relief" because there is no "clear statement" in the text of the provision indicating that Congress intended for it to be jurisdictional. *Id.* at 298–302.

On remand from the Supreme Court, the Second Circuit agreed with the district court that Transform had failed to satisfy section 365(b)(3) (establishing adequate assurance of future performance requirements for the assignment of shopping center leases). It accordingly remanded the case to the district court for it to determine a "remedial course." *In re Sears Holdings Corp.*, 2023 WL 7294833, at 1 (2d Cir. Nov. 6, 2023).

On remand to the district court, MOAC argued that section 365(d)(4) of the Bankruptcy Code required that the MOAC Lease be deemed rejected and immediately surrendered to MOAC because the MOAC Lease had not been timely assumed or rejected under section 365(d)(4) of the Bankruptcy Code (and the parties' stipulations to extend the 120-day period stated therein). Transform countered that section 365(d)(4) did not apply because the MOAC Lease was not a "true lease."

The district court agreed with Transform, holding that section 365(d)(4) did not apply, and finding that that Transform and Sears had not waived or forfeited that argument. It accordingly vacated the assumption and assignment of the MOAC Lease and directed that it be returned to the Sears liquidating trust.

MOAC appealed to the Second Circuit.

THE SECOND CIRCUIT'S RULING

A three-judge panel of the Second Circuit affirmed the district court's ruling in a unanimous opinion.

The Second Circuit agreed with the district court that the MOAC Lease was not a true lease in accordance with the "economic substance" analysis applied by the court in *RPI* (which originated from the court's earlier decision in *PCH Associates*). The Second Circuit noted that *RPI* was "on all fours" with the case before it. *Sears Holdings*, 2024 WL 5113165, at *3. It explained that *RPI* involved a 99-year ground lease with a base rent for the entire term that was prepaid over the initial three years of the lease, and the tenant was obligated to pay taxes, assessments, utility charges, and other fees. Based principally on these lease terms, and its finding that the tenant "assume[d] and discharge[d] many of the risks and obligations ordinarily attributed to outright ownership of property, such as the payment of property taxes," the Second Circuit in *RPI* concluded that the purported lease was not a true lease. *Id.* (quoting *RPI*, 936 F.2d at 749). It also emphasized that a contrary conclusion would give the landlord an inequitable windfall. *Id.* (quoting *RPI*, 936 F.2d at 751).

Mindful of the equities at stake, the Second Circuit in *Sears Holdings* likewise found that permitting the landlord MOAC to recapture the leased premises more than 60 years before the expiration of the MOAC Lease would amount to a windfall, the gross inequity of which bolstered its conclusion that section 365(d)(4) did not apply to "this unusual transaction." *Id.* In weighing the inequities, the court emphasized how unfair it would be to revert the MOAC Lease to MOAC more than 60 years before the expiration of the MOAC Lease, despite MOAC having "'received the substance of its bargained for consideration.'" *Id.* The Second Circuit accordingly held that the MOAC Lease was not a true lease governed by section 365(d)(4), and "there was no basis for the MOAC Lease to revert to MOAC once the district court vacated the assumption and assignment of the lease to Transform." *Id.* at *4.

The Second Circuit also determined that Sears and Transform neither waived nor forfeited the argument that the MOAC Lease was not a true lease governed by section 365(d)(4). According to the court, Sears and Transform did not intentionally and unequivocally relinquish their right to make the argument by referring to the MOAC Lease as a "lease" in the stipulations extending the 120-period to assume or reject. Instead, the Second Circuit attributed their conduct to "at most . . . oversight" or "thoughtlessness." *Id.* at *5.

The Second Circuit also agreed with the district court's finding that there was no forfeiture because "there was no earlier phase in the litigation in which it would have been necessary—or even appropriate—for Transform or Sears to assert that the MOAC Lease was not a 'true lease' and thus not subject to § 365(d)(4)." *Id.* (citation and internal quotation marks omitted). Specifically, the Second Circuit explained the issue "only became live" after remand to the district court, and Sears and Transform were not obligated to "raise every possible alternate ground upon which the lower court could have decided an issue." *Id.* (citation and internal quotation marks omitted).

OUTLOOK

On March 17, 2025, Transform and the liquidating trustee filed a petition asking the Supreme Court to review the Second Circuit's ruling. Although not precedential, the Second Circuit's ruling in *Sears Holdings* is significant for a number of reasons. First, it reinforces the principle that section 365 of the Bankruptcy Code applies only to true or bona fide leases. Consequently, agreements denominated as lease transactions that are actually financing arrangements are not subject to the strictures of section 365, and may therefore not be assumed or assigned in accordance with the procedures and requirements set forth in the provision. The Second Circuit reaffirmed this principle even though the purported lessee stipulated to the existence of a "lease" several times. Second, the decision is instructive in illustrating that a bankruptcy court should examine the economic substance of an agreement rather than the labels given to it by the signatories in determining whether the agreement is a true lease.

Sears Holdings is a bitter pill to swallow for MOAC. Despite having prevailed in the Supreme Court on the statutory mootness dispute (on an important issue of bankruptcy law), MOAC now confronts the reality that, because the assumption and assignment of the MOAC Lease was void *ab initio*, the lease now belongs to the Sears liquidating trust, which is no longer in bankruptcy and therefore not subject to the strictures of section 365 (even if it applied). Presumably, in accordance with the settlement agreement between Sears and Transform, the liquidating trustee will either assign the MOAC Lease to Transform or take whatever steps are necessary to allow Transform to obtain the equivalent economic benefit of assignment.

U.S. BANKRUPTCY COURT DIRECTS TURNOVER OF CHAPTER 15 DEBTOR'S ASSETS FOR ADMINISTRATION IN FOREIGN BANKRUPTCY PROCEEDING

Dan T. Moss • Corinne Ball • Isel M. Perez • Ryan Sims

Nearing its 20th anniversary, chapter 15 of the Bankruptcy Code is an invaluable framework for coordinating cross-border bankruptcy cases involving foreign debtors that have assets located in the United States. It includes a host of provisions empowering a U.S. bankruptcy court to provide assistance to a foreign bankruptcy court or its representatives under the principle of international comity. One form of assistance—turnover of a foreign debtor's U.S. assets for administration in its "recognized" bankruptcy or restructuring proceeding—was the subject of a ruling handed down by the U.S. Bankruptcy Court for the Southern District of New York. In *In re ECM Straits Fund I, LP*, 2024 WL 4712995 (Bankr. S.D.N.Y. Nov. 7, 2024), the bankruptcy court approved a settlement between chapter 15 debtors' foreign representatives and an entity that nominally held stock owned by the debtors whereby the stock would be transferred to the foreign representatives for administration in the debtors' Cayman Islands liquidation proceeding.

PROCEDURES, RECOGNITION, AND RELIEF 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).

Under section 1515 of the Bankruptcy Code, the representative of a foreign 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."

"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 center of main interests ("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). An establishment is defined by section 1502(2) as "any place of operations where the debtor carries out a nontransitory economic activity."

Upon recognition of a foreign "main" proceeding, section 1520(a) of the Bankruptcy Code provides that certain provisions of the Bankruptcy Code automatically come into force, including: (i) the automatic stay preventing creditor collection efforts with respect to the debtor or its U.S. assets (section 362, subject to certain enumerated exceptions); (ii) the right of any entity asserting an interest in the debtor's U.S. assets to "adequate protection" of that interest (section 361); and (iii) restrictions on use, sale, lease, transfer, or encumbrance of the debtor's U.S. assets (sections 363, 549, and 552).

Following recognition of a foreign main or nonmain proceeding, section 1521(a) provides that, to the extent not already in effect, and "where necessary to effectuate the purpose of [chapter 15] and to protect the assets of the debtor or the interests of the creditors," the bankruptcy court may grant "any appropriate relief," including a stay of any action against the debtor or its U.S. assets not covered by the automatic stay, an order suspending the debtor's right to transfer or encumber its U.S. assets, and "any additional relief that may be available to a trustee," with certain exceptions.

Under section 1521(b), the court may "at the request of the foreign representative, entrust the distribution of all or part of the debtor's assets located in the United States to the foreign representative or another person, including an examiner, authorized by the court, provided that the court is satisfied that the interests of creditors in the United States are sufficiently protected."

Section 1522(a) provides that the bankruptcy court may exercise its discretion to order the relief authorized by section 1519 (authorizing certain pre-recognition relief) or section 1521 "only if the interests of the creditors and other interested entities, including the debtor, are sufficiently protected."

"Sufficient protection" with the meaning of section 1521(b) has three elements: (i) just treatment of all creditors; (ii) protection of U.S. creditors against prejudice and inconvenience arising from having to assert their claims in the foreign proceeding; and (iii) distribution of the assets of the foreign debtor's estate in accordance with the priorities established under U.S. law. *See In re Markus*, 610 B.R. 64, 76 (Bankr. S.D.N.Y. 2019), *aff'd* 620 B.R. 31 (S.D.N.Y. 2020) (citing *In re Atlas Shipping A/S*, 404 B.R. 726 (Bankr. S.D.N.Y. 2009)); *see also In re ENNIA Caribe Holding N.V.*, 596 B.R. 316, 322 (Bankr. S.D.N.Y. 2019) (noting that a determination of sufficient protection "requires a balancing of the respective parties' interests").

Section 1507(a) of the Bankruptcy Code provides that, upon recognition of a main or nonmain proceeding, the bankruptcy court may provide "additional assistance" to a foreign representative "under [the Bankruptcy Code] or under other laws of the United States." However, the court must consider whether any such assistance, "consistent with principles of comity," will reasonably ensure that: (i) all stakeholders are treated fairly; (ii) U.S. creditors are not prejudiced or inconvenienced by asserting their claims in the foreign proceeding; (iii) the debtor's assets are not preferentially or fraudulently transferred; (iv) proceeds of the debtor's assets are distributed substantially in accordance with the order prescribed by the Bankruptcy Code; and (v) if appropriate, an individual foreign debtor is given the opportunity for a fresh start. *See* 11 U.S.C. § 1507(b).

Section 1506 of the Bankruptcy Code sets forth a public policy exception to the relief otherwise authorized in chapter 15, providing that "[n]othing in this chapter prevents the court from refusing to take an action governed by this chapter if the action would be manifestly contrary to the public policy of the United States."

ECM STRAITS

Cayman Islands exempted limited partnership ECM Straits Fund I, LP ("ECM") provided venture capital to technology-enabled growth companies located primarily in the United States, Malaysia, Indonesia, and Turkey. ECM held direct or indirect investments in 12 portfolio companies, including ZeeMee, Inc. and predecessors-in-interest of Phenom People, Inc. ("Phenom"). ECM made many of its investments through its wholly owned subsidiary TransAsia E-Commerce Inc. ("TEC," and together with ECM, the "debtors").

The debtors also held investments directly or indirectly in a series of private investment funds (the "KludeIn Funds") and Elixir America Holdings, Inc. ("Elixir"), a Delaware corporation that nominally held membership interests in the KludeIn Funds. Elixir, however, ceased to exist in 2021 because it failed to pay Delaware franchise taxes.

For reasons that were unclear based on the debtors' books and records, the ZeeMee and Phenom stock (the "Stock") was registered as being owned by the KludeIn Funds and Elixir rather than the debtors, even though the debtors funds were used to acquire the Stock.

In 2022, the debtors were placed into liquidation proceedings in the Caymans (the "Cayman Proceedings"). In December 2023, the debtors' Cayman court-appointed liquidators (as the debtors' foreign representatives (the "FRs")) filed petitions in the U.S. Bankruptcy Court for the Southern District of New York seeking chapter 15 recognition of the Cayman Proceedings. The bankruptcy court granted the petitions on January 30, 2024, recognizing the Cayman Proceedings as foreign main proceedings.

The FRs claimed that the Stock rightfully belonged to the debtors and should be turned over by the KludeIn Funds, Elixir, or their affiliates to be administered in the Cayman Proceedings. As Elixir ceased to exist in 2021, the FRs negotiated a settlement with the KludeIn Funds whereby the funds agreed to transfer the Stock to the debtors in exchange for a release.

The FRs sought bankruptcy court approval of the settlement under Rule 9019(a) of the Federal Rules of Bankruptcy Procedure as well as an order pursuant to section 1521(b) of the Bankruptcy Code entrusting the Stock to the FRs. According to the FRs, the proposed settlement fell "well within the range of reasonableness," and relief under section 1521(b): (i) was warranted because the Cayman Proceedings provided a forum for all of the debtors' creditors, regardless of their domicile, to submit claims and be heard; and (ii) was a natural extension of the bankruptcy court's order recognizing the Cayman Proceedings as foreign main proceedings. The motion was unopposed.

THE BANKRUPTCY COURT'S RULING

The bankruptcy court approved the settlement and ordered that the Stock be turned over to the FRs for administration in the Cayman Proceedings.

Initially, U.S. Bankruptcy Judge Martin Glenn concluded that the proposed settlement between the FRs and the KludeIn Funds should be approved as being "fair and equitable and in the best interests of the [debtors'] estate" according to the factors articulated by the U.S. Court of Appeals for the Second Circuit in *In re Iridium Operating LLC*, 478 F.3d 452 (2d Cir. 2007).

Among other things, the bankruptcy court found that: (i) the FRs demonstrated a possibility of success on the merits of turnover litigation under section 542(b) of the Bankruptcy Code (made applicable in chapter 15 cases in the court's discretion pursuant to section 1521(a)(7)) on the basis that the KludeIn Funds held the Stock in constructive trust for the debtors; (ii) litigation over ownership of the Stock could be costly, thereby rendering the settlement the "only reasonable" means of resolution; (iii) the paramount of interests of creditors were best served by the settlement, which was likely to "conserve estate assets and maximize value for creditors"; (iv) no parties objected to the proposed settlement; (v) the parties were represented by informed, experienced counsel, and it was undisputed that the court reviewing the settlement was experienced and knowledgeable; (vi) the scope of the releases included in the proposed settlement was appropriate; and (vii) the settlement was the product of arm's-length bargaining. *ECM Straits*, 2024 WL 4712995, at **5–8.

Judge Glenn also determined that relief under section 1521(b) was appropriate because creditors were "sufficiently protected." He explained that the FRs intended to distribute the Stock or its proceeds in the Cayman Proceedings, and although the debtors had no known U.S. creditors, the Cayman Proceeding offered a forum for all of the debtors' foreign creditors to submit claims.

OUTLOOK

Chapter 15 of the Bankruptcy Code and the Model Law on which it is patterned are premised on the principle of comity, a concept that figures prominently (and expressly) in many of the provisions of both legal frameworks. This means that, under the principle of "adjudicative" comity, the role of a U.S. bankruptcy court in cross-border bankruptcy cases under chapter 15 is to provide assistance to a foreign bankruptcy court presiding over a foreign debtor's reorganization or bankruptcy case as well as the court-appointed representatives of the debtor. That assistance can include injunctive relief to prevent creditors from proceeding against the foreign debtor's assets or, as illustrated by *ECM Straits*, an order of a U.S. bankruptcy court directing turnover of the foreign debtor's U.S. assets to a foreign representative so that the assets can be administered in the foreign debtor's bankruptcy or reorganization case abroad.

The significance of the ruling in *ECM Straits* lies principally in its focus on the role of a U.S. bankruptcy court as a facilitator—almost akin to an adjunct of the foreign bankruptcy court—in a chapter 15 case. It also highlights the power of a U.S. court presiding over a chapter 15 case to approve compromises and settlements that promote the efficacy of the process.

Finally, *ECM Straits* illustrates that although chapter 15 relief is sometimes perceived to be limited to actions ancillary to a recognized foreign bankruptcy proceeding, a U.S. bankruptcy court has the power to grant relief—in this case, the approval of a settlement—that benefits the foreign debtor's estate even in the absence of equivalent or parallel relief in the foreign bankruptcy court.

NINTH CIRCUIT: NO INJURY TO CREDITORS REQUIRED FOR AVOIDANCE OF INTENTIONALLY FRAUDULENT TRANSFER

Daniel J. Merrett • Jim Stewart

To assist a bankruptcy trustee or chapter 11 debtor-in-possession ("DIP") in maximizing the value of the bankruptcy estate for the benefit of all stakeholders, the Bankruptcy Code authorizes a trustee or DIP to avoid certain pre-bankruptcy transfers made, or obligations incurred, that either intentionally defrauded creditors or are constructively fraudulent because the debtor was insolvent at the time of the transaction (or rendered insolvent thereby) and received less than fair value in exchange. In *In re O'Gorman*, 115 F.4th 1047 (9th Cir. 2024), the United States Court of Appeals for the Ninth Circuit considered as a matter of first impression whether a trustee or DIP may avoid an intentionally fraudulent transfer in the absence of injury to creditors. The Ninth Circuit joined the Fourth and Eight Circuits in ruling that proof of injury to creditors is not required to avoid a fraudulent transfer under the Bankruptcy Code. The court also held that injury to creditors is not necessary for a bankruptcy trustee to have constitutional standing to assert an avoidance claim because the trustee has a "judicially cognizable interest" in avoiding the transfer on behalf of the bankruptcy estate.

AVOIDANCE OF TRANSFERS IN BANKRUPTCY

Section 548 of the Bankruptcy Code provides that, subject to the requirements of that section, a trustee (or a DIP) "may avoid any transfer . . . of an interest of the debtor in property, or any obligation . . . incurred by the debtor, that was made or incurred within 2 years before the date of the filing of the petition." 11 U.S.C. § 548(a)(1).

Fraudulent transfers that can be avoided include both: (i) actually fraudulent transfers, which are transfers made with "actual intent to hinder, delay, or defraud" creditors (*see* 11 U.S.C. § 548(a)(1)(A)); and (ii) constructively fraudulent transfers, which are "transactions that may be free of actual fraud, but which are deemed to diminish unfairly a debtor's assets in derogation of creditors." COLLIER ON BANKRUPTCY ("COLLIER") ¶ 548.05 (16th ed. 2024); 11 U.S.C. § 548(a)(1)(B). A transfer is constructively fraudulent if the debtor received "less than a reasonably equivalent value in exchange for such transfer or obligation" and was, among other things, insolvent, undercapitalized, or unable to pay its debts as such debts matured. *See* COLLIER at ¶ 548.05; 11 U.S.C. § 548(a)(1)(B).

Fraudulent transfers may also be avoided by a trustee or DIP under section 544(b) of the Bankruptcy Code, which provides that, with certain exceptions, "the trustee may avoid any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is voidable under applicable law by a creditor holding an unsecured claim that is allowable under section 502 of [the Bankruptcy Code] or that is not allowable only under

section 502(e) of [the Bankruptcy Code].” 11 U.S.C. § 544(b)(1). This provision permits a trustee to step into the shoes of a “triggering” unsecured creditor that could have sought avoidance of a transfer under applicable non-bankruptcy law (e.g., the Uniform Fraudulent Transfer Act or its successor, the Uniform Voidable Transactions Act, which has been enacted in many states). *See generally* COLLIER at ¶ 544.06. Section 544(b) is an important tool, principally because the reach-back period for avoidance of fraudulent transfers under state fraudulent transfer laws (or even non-bankruptcy federal laws, such as the Internal Revenue Code) is typically longer than the two-year period for avoidance under section 548. *Id.*

Section 547(b) of the Bankruptcy Code provides in relevant part that, with certain exceptions, a trustee or DIP may avoid any transfer made by an insolvent debtor within 90 days of a bankruptcy petition filing (or up to one year, if the transferee is an insider) to a creditor for or on account of an antecedent debt, if the creditor, by reason of the transfer, receives more than it would have received in a chapter 7 liquidation and the transfer had not been made. 11 U.S.C. § 547(b).

Unauthorized postpetition transfers of estate property may be avoided under section 549, and other provisions of the Bankruptcy Code authorize the trustee or DIP to avoid certain other kinds of transfers. *See* 11 U.S.C. § 545 (certain statutory liens); 11 U.S.C. § 553(b) (certain setoffs); 11 U.S.C. § 724(a) (avoidance of liens securing certain claims for damages, fines, penalties, and forfeitures).

If a transfer is avoided under any of these provisions, section 550 of the Bankruptcy Code authorizes the trustee or DIP to recover the property transferred or its value from the initial or subsequent transferees, with certain exceptions.

STANDING

“Standing” is the legal capacity to commence litigation in a court of law. It is a threshold issue—a court must determine whether a litigant has the legal capacity to pursue claims before the court can adjudicate the dispute.

To establish “constitutional” or “Article III” standing, a plaintiff must have a personal stake in litigation sufficient to make out a concrete “case” or “controversy” to which the federal judicial power may extend under Article III, section 2, of the United States Constitution. *See Pershing Park Villas Homeowners Ass’n v. United Pac. Ins. Co.*, 219 F.3d 895, 899 (9th Cir. 2000); *accord TransUnion LLC v. Ramirez,* 594 U.S. 413, 423 (2021). It is a long-settled point of federal law that, if the plaintiff does not claim to have suffered an injury caused by the defendant for which the court can provide a remedy, then there is no case or controversy for a federal court to resolve. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 563 (1992).

In bankruptcy cases, various provisions of the Bankruptcy Code confer another type of standing on various entities (e.g., the debtor, the DIP, the trustee, creditors, equity interest holders, official committees, or indenture trustees), among other things, to participate generally in a bankruptcy case or commence litigation involving causes of action or claims that either belonged to the debtor prior to filing for bankruptcy or are created by the Bankruptcy Code. For example, in a chapter 11 case, section 1109 of the Bankruptcy Code provides that “[a] party in interest, including the debtor, the trustee, a creditors committee, an equity security holders’ committee, a creditor, an equity security holder, or any indenture trustee may raise and may appear and be heard on any issue” in a chapter 11 case.

This “bankruptcy” or “statutory” standing is distinct from constitutional standing. Among other differences, constitutional standing is jurisdictional—if a potential litigant lacks constitutional standing, the court lacks jurisdiction to adjudicate the dispute. *See In re Wilton Armetale, Inc.*, 968 F.3d 273, 280–81 (3d Cir. 2020).

O’GORMAN

Debbie O’Gorman (the “debtor”) owned a 30-acre parcel of land in California (the “property”). In 2010, she recorded a second deed of trust against the property in favor of an attorney (“Reynolds”) who had performed certain pre-bankruptcy legal services for the debtor. By 2019, the debtor had defaulted on the senior mortgage. Reynolds cured the debtor’s $300,000 default through advance mortgage payments. However, in February 2020, he initiated a nonjudicial foreclosure on his second deed of trust.

Another lawyer ("Utnehmer") contacted the debtor in July 2020 and offered to save the property from foreclosure by transferring it to an irrevocable land trust. The transfer agreement provided that upon the sale of the property, after payment of all liabilities and reimbursement of capital contributions, the debtor would receive a priority distribution of $235,000.

To effectuate the transfer, Utnehmer created three entities: a land trust; Pacific Equities, a real estate investment group created to fund and develop the property; and a corporate trustee for the land trust. The beneficiaries of the land trust were a separate trust settled by the debtor (with a 20% interest) and Pacific Equities (80%). Utnehmer held an interest in Pacific Equities and was an officer of the trustee.

The debtor transferred the property to the land trust in January 2021. The grant deed showed that no transfer tax was paid, and the debtor attested that she received no money in exchange for the transfer of the property, which she estimated had a value of $2.5 million at the time of the transfer. The debtor continued to live on the property after the transfer to the land trust.

The debtor filed a chapter 7 case in August 2021 in the Northern District of California. She scheduled her interest in the property as an asset, stated that it was worth approximately $3 million, and asserted that the January 2021 transfer of the property to the land trust was "voidable." The debtor estimated that her non-real estate assets were worth a total of approximately $26,000. She also scheduled 26 secured and unsecured creditors.

Reynolds—the beneficiary of the second deed of trust on the property—filed a secured claim for approximately $1.5 million. The bankruptcy court disallowed Reynolds's claim, however, finding that Reynolds never loaned the debtor the money secured by the deed of trust.

In November 2021, the chapter 7 trustee sued the land trust, the land trustee, and Pacific Equities to avoid the transfer of the property as: (i) an actual and constructive fraudulent transfer under sections 548(a)(1)(A) and 548(a)(1)(B); and (ii) a preferential transfer under section 547(b).

Finding that several "badges of fraud" existed with respect to the transfer of the property to the land trust (e.g., the debtor remained in control of the property, the transfer was designed to thwart foreclosure, the transfer involved substantially all of the debtor's assets, and the debtor received no consideration in exchange) and that there were no disputed material issues of fact, the bankruptcy court granted the trustee's motion for partial summary judgment on the intentional fraudulent transfer claim.

A Ninth Circuit bankruptcy appellate panel upheld the ruling on appeal. Among other things, the appellate panel rejected the defendants' argument that harm to creditors (in this case, Reynolds and the debtor's 26 other creditors) is a necessary element for an avoidance claim under section 548(a)(1)(A).

According to the court, the defendants never raised the argument below, and "[i]n any case, they are wrong . . . [because] '[a]ctual damages' or 'actual harm' is not an element of an actual fraudulent transfer claim." *In re O'Gorman*, 2022 WL 17851422, at *6 (B.A.P. 9th Cir. Dec. 21, 2022), *aff'd*, 115 F.4th 1047 (9th Cir. 2024).

THE NINTH CIRCUIT'S RULING

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

Before the Ninth Circuit, the defendants argued that the chapter 7 trustee lacked Article III standing to bring a claim under section 548(a)(1)(A) of the Bankruptcy Code because none of the debtor's creditors were harmed by the transfer of the property. Although they cited no controlling authority, the defendants asserted that "[c]ourts have consistently held that an avoidance action can only be pursued if there is some benefit to creditors and may not be pursued if it would only benefit the Debtor." *In re O'Gorman*, 115 F.4th at 1055 (internal quotation marks omitted). According to the defendants, the transfer did not cause an actionable injury to any creditor because Reynolds did not have a valid claim at the time of the transfer, and the unsecured creditors would be paid in full by the anticipated $235,000 priority distribution to the debtor from the sale of the property.

U.S. Circuit Court Judge Morgan Christen rejected this argument, writing that it "confuses justiciability with the merits of the [chapter 7] Trustee's claim." *Id.* The Ninth Circuit held that, "to satisfy Article III's injury requirement, the Trustee has the burden to demonstrate only that he has a 'judicially cognizable interest' in avoiding the transfer on behalf of the estate, irrespective of the particular statute under which he seeks relief." *Id.* (citations omitted).

"To have standing to bring this suit," Judge Christen explained, the chapter 7 trustee was "required to establish an injury to the estate—not, as [the defendants] argue, to Reynolds or any of the Debtor's other creditors." *Id.* at 1056. Because there was no question that the transfer of the property to the land trust depleted the assets of the debtor's estate, the Ninth Circuit court held that the estate suffered an injury in fact that could be remedied by avoidance of the transfer. Consequently, the chapter 7 trustee satisfied the requirements for Article III standing.

The Ninth Circuit then considered whether injury to a creditor is a required element of section 548(a)(1)(A). Noting that it had not yet faced this question, the Ninth Circuit panel agreed with other circuits that, based on the plain language of the provision, which focuses on the debtor's intent, avoidance of a transfer as an intentionally fraudulent transfer does not require any showing of injury to creditors. *Id.* at 1057 (citing *Tavenner v. Smoot*, 257 F.3d 401, 407 (4th Cir. 2001); *In re Sherman*, 67 F.3d 1348, 1355 n.6 (8th Cir. 1995)).

According to Judge Christen, "[t]his interpretation upholds the goals of efficiency and finality in bankruptcy," because a reading of section 548 that "makes the fraudulent nature of a transfer

dependent upon the post hoc determination of the validity of creditors' claims would risk upending the work trustees perform at the outset of bankruptcy proceedings to marshal the assets available to pay creditors' claims." *Id.*

The Ninth Circuit found no error with the bankruptcy court's decision to grant partial summary judgment, noting the weight of the evidence establishing actual fraudulent intent and the defendants' failure to present any admissible evidence raising any genuine dispute as to whether there was a legitimate purpose behind the transfer.

OUTLOOK

In *O'Gorman*, the Ninth Circuit, as a matter of first impression, joined the Fourth and Eighth Circuits in concluding that injury to creditors is neither: (i) an element of a claim for the avoidance of an intentionally fraudulent transfer under section 548(a)(1)(A) of the Bankruptcy Code; or (ii) necessary for a bankruptcy trustee to have constitutional, or Article III, standing to bring avoidance litigation because the trustee has a "judicially cognizable interest" in avoiding the transfer on behalf of the estate, which is harmed by a fraudulent transfer.

Although, apparently, no other circuit court of appeals has ruled squarely on the issue, the Sixth Circuit has at least suggested without directly addressing the issue that harm to creditors may be an element of an intentional fraudulent transfer claim under section 548(a)(1)(A). *See Zentek GBV Fund IV v. Vesper*, 19 F. App'x 238, 244 n.4 (6th Cir. 2001) (noting that "even if [the debtor's majority owner] intended only to hinder, delay or defraud [a secured creditor], the fact that other creditors were harmed brings [the owner's] actions squarely within the strictures of § 548(a)(1)(A)").

NEWSWORTHY

Corinne Ball ***(New York)*** and ***Dan T. Moss*** ***(Washington and New York)*** received a 2025 Readers' Choice Award from content aggregator JD Supra in the field of Bankruptcy.

Roger Dobson ***(Sydney)*** was included in the "Hall of Fame" in the practice area "Restructuring & Insolvency" in the 2025 edition of *The Legal 500 Asia-Pacific*.

An article written by ***Brad B. Erens*** ***(Chicago)*** titled "*Hertz*: Third Circuit Weighs in on Make-Whole Premiums and the 'Solvent-Debtor Exception'" was published in Vol. 38, No. 1-2025 of the *AIRA Journal*.

Bruce Bennett ***(Los Angeles)***, ***Corinne Ball*** ***(New York)***, ***Ben Larkin*** ***(London)***, and ***Heather Lennox*** ***(Cleveland and New York)*** were ranked by *Chambers Global 2025*. The Restructuring/Insolvency practice is one of nine practices receiving a global-wide practice ranking.

Part I of a two-part article written by ***Corinne Ball*** ***(New York)*** and ***Christopher DiPompeo*** ***(New York)*** titled "Rediscovering Section 157(b)(5) Transfers in Mass Tort Bankruptcies" was published in the March 2025 edition of the *ABI Journal*.

An article written by ***Corinne Ball*** ***(New York)*** titled "Distressed M&A: Mass Torts, Bankruptcy and Furthering the Search for Consensus: Another Purdue Decision" was published in the December 23, 2024, edition of the *New York Law Journal*.

An article written by ***Heather Lennox*** ***(Cleveland and New York)***, ***Corinne Ball*** **(New York)**, ***Gregory M. Gordon*** **(Dallas)**, ***Dan T. Moss*** ***(Washington and New York)***, and ***Gary L. Kaplan*** ***(Miami)*** titled "The Year in Bankruptcy: 2024" was published on February 1, 2025, by *Lexis Practical Guidance*.

An article written by ***Brad B. Erens*** ***(Chicago)*** titled "Cramdown of Equity in Chapter 11 Plan Requires Assessment of Equity's Value to Satisfy 'Fair and Equitable' Standard" was published on February 1, 2025, by *Lexis Practical Guidance*.

An article written by ***Dan T. Moss*** ***(Washington and New York)***, ***Corinne Ball*** **(New York)**, ***David S. Torborg*** **(Washington)**, and ***Michael C. Schneidereit*** ***(New York)*** titled "Ninth Circuit: Reversal on Appeal of Order Denying Chapter 15 Recognition Does Not Retroactively Trigger Automatic Stay" was published on February 1, 2025, by *Lexis Practical Guidance*.

An article written by ***Corinne Ball*** ***(New York)*** titled "Distressed M&A: Safe Harbor Protection Extends to Overarching Transfer" was published in the January 27, 2025, edition of the *New York Law Journal*.

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