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National Conference of Bankruptcy Judges: Musings of a Chapter 11 Mind

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Educational Materials

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Musings of a Chapter 11 Mind

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Musings of a Chapter 11 Mind

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Paying Commercial Real Estate Rent in Post-COVID Bankruptcy

Instructors:

Jason DeJonker

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Commercial Rent Pre-COVID

- Ordinarily, a debtor who is also a commercial tenant must pay rent on a timely basis during bankruptcy
- A debtor may petition the court to postpone making rent payments for up to 60 days after the filing date, upon cause shown

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Commercial Rent Post-COVID

- Following the onset of the COVID-19 pandemic, commercial tenant debtors have routinely sought to postpone many obligations, including rent payments
- This type of remedy is largely new and the legal bases remain in flux

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Potential Remedies

- §105(a) imbues courts with inherent equitable powers, allowing for broad remedies;
- §305(a) empowers courts to suspend bankruptcy proceedings;
- §365(d)(3) allows for deferral of lease obligations, including rent, for up to 60 days after the petition date;
- Contract law – the onset of COVID-10 may trigger force majeure clauses or the doctrines of impossibility or frustration of purpose

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Lessons from Critical Vendor Motions

- Critical vendor motions allow for full payment of certain pre-petition claims while other pre-petition unsecured creditors will likely recover a fraction of their claim
- Courts originally authorized these motions based on the doctrine of necessity, a 19th century common law doctrine

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Critical Vendor Motions (cont.)

- Bankruptcy courts then also relied upon their inherent equitable power under §105(a)
- The Seventh Circuit's decision in *Kmart* held that neither §105(a) nor the doctrine of necessity authorized these motions
- Thereafter, courts have also relied upon §363(b), which governs the use of assets outside of the ordinary course of business
- Although critical vendor motions are relatively common, they do not fit squarely under the Code and their statutory basis remains in question

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Post-COVID Case Law

- As with critical vendor motions, motions to defer rent during COVID-19 have an uncertain and ever-evolving legal and statutory justification

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Post-COVID Case Law – Hitz

- On February 24, Hitz filed for chapter 11 bankruptcy protection
- In mid-late April, Hitz's landlord filed motions to either force Hitz to pay rent or for relief from the automatic stay
- The court held that the governor's stay at home orders, which negatively affected Hitz's business, triggered the force majeure clause in the operative lease and partially excused Hitz from paying rent

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Post-COVID Case Law - Craftworks

- On March 3, Craftworks filed for chapter 11 bankruptcy protection. Shortly thereafter, Craftworks' post-petition financing facility was terminated, forcing them to close stores
- On March 20, Craftworks filed a motion to temporarily add additional pleading requirements for non-debtors, buying Craftworks additional time to administer their bankruptcy and reduce fees

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Craftworks (cont.)

- While Craftworks' motion was the first high profile case to seek procedural changes as a result of COVID, it met minimal pushback
- Although the court indicated that the remedies Craftworks initially sought were likely beyond what it would and could grant, the court eventually granted the relief Craftworks sought

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Post-COVID Case Law – Modell's

- On March 11, Modell's filed for chapter 11 bankruptcy protection
- On March 23, Modell's filed a motion to temporarily suspend much of the bankruptcy and to defer payment on all non-essential expenses, including rent

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Modell's (Cont.)

- Modell's relied on §305 and §105 (in the alternative), citing the uncertainty that COVID has brought and the need to conserve funds
  - In a subsequent reply brief, Modell's also relied upon state contract law, including the doctrines of impossibility and frustration of purpose, and the takings doctrine
- Importantly, they sought relief beyond 60 days after the bankruptcy filing date – exceeding the duration allowed in §365(d)(3), which drew many objections

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Modell's (Cont.)

- Landlords objected on numerous grounds, including that the relief sought was beyond the scope of the Code, conflicted with the Code, and kept landlords from exercising their statutory and contractual rights and remedies
- Despite these objections, the court issued several orders granting debtor's motions, basing its decision on §§105 and 305

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Post-COVID Case Law – Pier 1

- On February 17, Pier 1 filed for chapter 11 bankruptcy protection
- On March 31, Pier 1 filed a motion defer payment on all non-critical expenses, including rent, and to adjourn all pleadings related to paying creditors or relief from the automatic stay

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Pier 1 (cont.)

- Pier 1 relied primarily on §105 as well as the terms of the controlling leases, the takings doctrine, and the contract law doctrines of impossibility and frustration of purpose
- As with Modell's, Pier 1 sought to limit expenses in the face of uncertainty brought by COVID and the relief sought extended beyond 60 days after the filing date

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Pier 1 (cont.)

- Similar to Modell's, Pier 1 received numerous objections from landlords, which were generally on identical grounds
- These objections largely alleged that landlords were not adequately protected and that the relief sought violated §365(d)(3)

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Pier 1 (cont.)

- The court granted Pier 1's relief through two orders and a memorandum opinion
- The opinion held that the debtors could defer rent payments and that deferral could require additional adequate protection
- Importantly, the court held that deferring rent beyond 60 days after the filing date did not circumvent §365(d)(3) because such rent would become an administrative expense claim

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Post-COVID Case Law – §365(d)(3)

- As the effects of COVID-19 have developed across the country and certain states have relaxed or lifted their shelter in place orders, debtors have increasingly sought to defer rent under §365(d)(3)
- Unlike other rent deferral motions, §365(d)(3) explicitly allows for temporary rent deferral

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§365(d)(3) (cont.)

- Debtors utilizing this include CEC Entertainment (Chuck E. Cheese), Brooks Brothers, J.C. Penney, and Ascena Retail (Ann Taylor)
- Despite the clear statutory basis, these motions have still drawn the ire of landlords
- Nonetheless, courts have granted these motions in virtually every major post-COVID chapter 11 bankruptcy

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Post-COVID Case Law – CEC Ent.

- On June 24, CEC filed for chapter 11 bankruptcy protection
- CEC sought relief under §365 to defer its rent obligations, which the court granted on an interim basis
  - The motion remains pending and the court has not yet issued a final order
- Nonetheless, unlike other recent cases, on August 3 CEC sought further deferral of rent

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CEC Ent. (cont.)

- Specifically, CEC relied upon state contract law, including the doctrine of frustration of purpose, the operable force majeure clause, and §105
- Because CEC filed the motion recently, there have been no responsive pleadings filed. Nonetheless, it remains the first recent, large debtor to seek such abatement

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Post-COVID Case Law

- In many of these cases, the debtors had sufficient funds to pay rent (either cash on hand or through DIP financing) but still sought, and received, deferral:
  - CEC Entertainment had approximately $90 million in cash on hand
  - Pier 1's DIP lender agreed to finance unpaid rent, paid in subsequent periods, while the deferral motion was pending
  - 24 Hour Fitness received $50 million in initial DIP financing, with $200 million more committed (and an additional $250 million roll-up)
  - J.C. Penney had nearly $500 million in cash on hand as of the filing date and their DIP lenders committed to $900 million in financing, including $450 million in new money

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Potential Additional Issues

- Some commercial tenant debtors who have successfully deferred rent fear the prospect of floods of landlord litigation, particularly when their rent deferrals expire
- Landlords also worry about the prospect of rent deferrals causing administrative insolvency or unrealistic budget expectations

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National Conference of Bankruptcy Judges
Musings of a Chapter 11 Mind

Jennifer Taylor
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October 23, 2020

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Disclaimer

The thoughts expressed in these materials and in the accompanying presentation are presented for discussion purposes only and do not necessarily represent the views of the presenter or of O'Melveny & Myers LLP

Question:

When is an unperfected security interest in a deposit account not avoidable in a Chapter 11 bankruptcy?

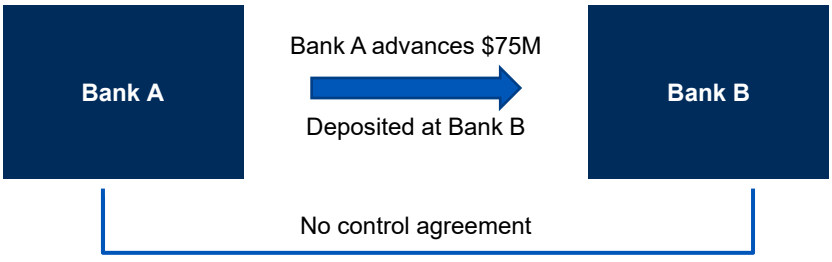
Hypothetical – Pre-emptive Revolver Draws

Debtor experiences a precipitous and adverse effect in its industry or the economy generally (e.g. Covid-19, drop in oil prices, name your catastrophic event)

To shore up liquidity (and perhaps even in anticipation of a Chapter 11 filing), Debtor draws down the remaining $75M of availability on its revolving line of credit

Assume the lender, Bank A, funds the draw request

Suppose Bank A deposits the $75M advance in Debtor's account at Bank B, with no control agreement in place



Assertion:

Bank A has an <u>unavoidable</u> security interest in the $75M deposited at Bank B notwithstanding the failure of Bank A to perfect its security interest in the deposit account maintained with Bank B

11 U.S.C. § 544. Trustee as Lien Creditor and as Successor to Certain Creditors and Purchasers

(a) The trustee shall have, as of the commencement of the case, and without regard to any knowledge of the trustee or of any creditor, the rights and powers of, or may avoid any transfer of property of the debtor or any obligation incurred by the debtor that is voidable by—

- (1) a creditor that extends credit to the debtor at the time of the commencement of the case, and that obtains, at such time and with respect to such credit, a judicial lien on all property on which a creditor on a simple contract could have obtained such a judicial lien, whether or not such a creditor exists;
- (2) a creditor that extends credit to the debtor at the time of the commencement of the case, and obtains, at such time and with respect to such credit, an execution against the debtor that is returned unsatisfied at such time, whether or not such a creditor exists; or
- (3) a bona fide purchaser of real property, other than fixtures, from the debtor, against whom applicable law permits such transfer to be perfected, that obtains the status of a bona fide purchaser and has perfected such transfer at the time of the commencement of the case, whether or not such a purchaser exists.

UCC § 9-317. Interests That Take Priority Over or Take Free of Security Interest or Agricultural Lien

(a) [Conflicting security interests and rights of lien creditors.]

A security interest or agricultural lien is subordinate to the rights of:

- (1) a person entitled to priority under Section 9-322; and
- (2) except as otherwise provided in subsection (e), a person that becomes a lien creditor before the earlier of the time:
  - (A) the security interest or agricultural lien is perfected; or
  - (B) one of the conditions specified in Section 9-203(b)(3) is met and a financing statement covering the collateral is filed.

UCC § 9-203(b)(3). Conditions for Enforceability

- **(A)** the debtor has authenticated a security agreement that provides a description of the collateral and, if the security interest covers timber to be cut, a description of the land concerned;
- **(B)** the collateral is not a certificated security and is in the possession of the secured party under Section 9-313 pursuant to the debtor's security agreement;
- **(C)** the collateral is a certificated security in registered form and the security certificate has been delivered to the secured party under Section 8-301 pursuant to the debtor's security agreement; or
- **(D)** the collateral is deposit accounts, electronic chattel paper, investment property, or letter-of-credit rights, and the secured party has control under Section 9-104, 9-105, 9-106, or 9-107 pursuant to the debtor's security agreement.

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What Does a Gift Have to Do with Bankruptcy?*

Rosa J. Evergreen, Arnold & Porter

**These materials are intended to provide a general overview of select issues concerning "gifting." They do not constitute legal advice nor do they necessarily reflect the views of the author or any of the lawyers or judges who are participating on the panel discussing these materials.*

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Section 1122 – Classification

Bankruptcy Code Section 1122

(a) Except as provided in subsection (b) of this section, a plan may place a claim or an interest in a particular class only if such claim or interest is substantially similar to the other claims or interests of such class.

(b) A plan may designate a separate class of claims consisting only of every unsecured claim that is less than or reduced to an amount that the court approves as reasonable and necessary for administrative .

Section 1122: Classification of Claims or Interests

- The Bankruptcy Code provides that claims and interests may only be grouped together for the purposes of a plan of reorganization if those claims and interests are "substantially similar" to the other claims or interests of such claim. *See* 11 U.S.C. § 1122(a).
- While not defined in the Bankruptcy Code, numerous courts have found that "substantially similar" means alike in legal character or effect.
  - "'Substantially similar' generally has been interpreted to mean similar in legal character to other claims against a debtor's assets or to other interests in a debtor." *See In re Aegerion Pharmaceuticals, Inc.*, 605 B.R. 22, 30 (Bankr. S.D.N.Y. 2019).

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Section 1122: Classification of Claims or Interests (Cont.)

- Courts have held that while claims must be similar to be placed in the same class, all similar claims need not be placed in the same class as long as there is a valid business or financial reason for their separation. *See In re Aegerion Pharmaceuticals, Inc.*, 605 B.R. 22 (Bankr. S.D.N.Y. 2019); *In re Adelphia Commc'ns Corp.*, 368 B.R. 140 (Bankr. S.D.N.Y. 2007); *Teamsters Nat'l Freight Indus. Negotiation Comm. v. U.S. Truck Co. (In re U.S. Truck Co.)*, 800 F.2d 581 (6th Cir. 1986).
  - Section 1122 "does not require that similar classes be grouped together, but merely that any group be homogenous." *In re Drexel Burnham Lambert Group, Inc*., 138 B.R. 714, 715 (Bankr. S.D.N.Y. 1992).

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Section 1129 – Confirmation of a Plan

Section 1129: Confirmation of a Plan

- The Bankruptcy Code requires that, with respect to each class of claims or interests impacted under the plan, the plan either: (i) be accepted by such class; (ii) leave such class unimpaired; or (iii) afford such class treatment in compliance with the "cramdown" provisions of section 1129(b). *See* 11 U.S.C. § 1129 (a-b).
- The "cramdown" provision allows for the confirmation of a plan despite a lack of acceptance by impaired classes as long as: (i) all other plan requirements are satisfied; (ii) the plan does not "discriminate unfairly"; and (iii) the plan is "fair and equitable" with respect to each impaired, non-accepting class. *See* 11 U.S.C. § 1129(b).

Section 1129: Unfair Discrimination Test

- Section 1129(b) allows a plan to discriminate, so long as it is not "unfair discrimination."
  - Or stated another way, the Bankruptcy Code does not prohibit *all* discrimination; rather, there cannot be "unfair discrimination."
- There is not a uniform test for "unfair discrimination," but several courts have adopted the unfair discrimination test articulated by Professor Bruce Markell. *See A New Perspective on Unfair Discrimination in Chapter 11*, 72 Am. Bankr. L.J. 227, 249 (1998); *In re Tribune Media Co.,* 587 B.R. 606, 618 (D. Del. 2018); *In re Armstrong World Indus., Inc.*, 348 B.R. 111 (D. Del. 2006).

Section 1129: Unfair Discrimination Test (Cont.)

- Under the Markell test a rebuttable presumption of unfair discrimination will arise when there is: (i) a dissenting class; (ii) another class of the same priority; and (iii) a difference in treatment under the plan that results in either (a) a materially lower percentage recovery for the dissenting class; or (b) a materially greater risk to the dissenting class in connection with its proposed distribution.
- In *TC1 2 Holdings, LLC*, 428 B.R. 117, 157-58 (Bankr. D. N.J. 2010), the Court noted that "[v]arious standards have been developed by the courts to test whether a plan unfairly discriminates. Generally, a plan will not be found to have unfairly discriminated if:

  (a) the discrimination is supported by a reasonable basis,

  (b) the discrimination is necessary for reorganization,

  (c) the discrimination is proposed in good faith, and

  (d) the degree of the discrimination is directly related to the basis or rationale for the discrimination."

Section 1129: Fair and Equitable

- "A plan is **fair and equitable** with respect to an impaired, dissenting class of unsecured claims if:
  1) it pays the class's claims in full, or if
  2) it does not allow holders of any junior claims or interests to receive or retain any property under the plan 'on account of' such claims or interests."

  See In re Armstrong World Industries, Inc., 432 F.3d 507, 512 (3rd Circ. 2005) (*citing* 11 U.S.C. § 1129(b)(2)(B)(i)-(ii)).
- This concept that a senior class must be paid in full before a junior class of creditors under a plan is called the "absolute priority rule."

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The Gifting Doctrine

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The Gifting Doctrine

- The "gifting doctrine" under a plan: senior creditors forgo a portion of the recovery in order to provide a recovery to junior creditors. *See In re Journal Register Co*., 407 B.R. 520 (Bankr. S.D.N.Y. 2009); *In re Union Fin. Servs. Grp., Inc*., 303 B.R. 390 (Bankr. E.D. Mo. 2003).
- Gifting can be horizontal or vertical:
  - Horizontal: Unequal gifts to two classes of junior creditors
  - Vertical: Skipping over a class

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The Gifting Doctrine (Cont.)

- One of the first cases to analyze "gifting" was *In re SPM Manufacturing Co*., 984 F.2d 1305 (1st Cir. 1993).
  - "The Code does not govern the rights of creditors to transfer or receive nonestate property. While the debtor and the trustee are not allowed to pay nonpriority creditors ahead of priority creditors ... creditors are generally free to do whatever they wish with the bankruptcy dividends they receive, including to share them with other creditors." *SPM*, 984 F.2d at 1313.
- Some courts have held that presumption of unfair discrimination or inequitable as a result of disparate treatment can be rebutted if the treatment is the result of a gift.
- Other courts have held that the "gifting doctrine" violates the absolute priority rule.

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The Gifting Doctrine (Cont.)

- For a discussion of the history of the gifting doctrine, *see* Leah M. Eisenberg, *Gifting and Asset Reallocation in Chapter 11 Proceedings: A Synthesized Approach,* 29 Am. Bankr. Inst. J. 50, 50 (Sept. 2010).
  - ➢"Courts have approved, and will continue to approve, gifting and asset reallocation as part of pre-plan settlements as long as certain factors are present. Approvable gifts are those that do not directly violate the priority structure of the Bankruptcy Code, and if they do violate the priority structure, they must be (1) gifts of non-estate property or (2) justified by strong business considerations." 29 Am. Bankr. Inst. J. 50, 50 (Sept. 2010).

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Some Gifting Cases

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Some Gifting Cases

Denied:

- *In re DBSD North America, Inc.,* 634 F.3d 79 (2nd. Cir. 2011) (the plan violated the absolute priority rule).
- *In re Snyders Drug Stores, Inc*., 307 B.R. 889 (Bankr. N.D. Ohio 2004) (the plan unfairly discriminated against an impaired class of creditors that rejected the plan).
- *In re Armstrong World Industries, Inc.,* 432 F.3d 507 (3rd Cir. 2005) (the plan violated the absolute priority rule).

Approved/ Confirmed:

- *In re Genesis Health Ventures, Inc*., 266 B.R. 591 (Bankr. D. Del. 2001).
- *In re Union Financial Services Group, Inc.,* 303 B.R. 390 (Bankr. E.D. Mo. 2003).
- *In re Journal Register Co*., 407 B.R. 520 (Bankr. S.D.N.Y. 2009).

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In re Nuverra Environmental Solutions, Inc.

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In re Nuverra

Background/ Facts:

- Pre-packaged plan (the "Plan") filed in 2017 in the Delaware Bankruptcy Court, Case No. 17-10949 (KJC).
- Approximately $500 million in debt, secured by all assets.
- Along with debt secured by assets, there was also unsecured note debt and trade debt.
- Plan provided for conversion of most of the secured debt to equity and a rights offering.
- Under the Plan, secured creditors would "gift" to two classes of unsecured creditors: the holders of notes and the holders of trade debt.
- The gift to the two classes was disparate: (i) holders of unsecured senior notes to receive approximately 4-6 percent recovery of their claims; and (ii) trade and other creditors whose claims arose from day-to-day operations to receive a 100 percent recovery.

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In re Nuverra (Cont.)

- Trade creditors voted to accept the Plan and holders of unsecured notes voted against.
- One of the noteholders objected to the Plan, arguing that it was unfairly discriminatory due to the unequal distributions.
- The Bankruptcy Court gave a bench ruling on July 24, 2017, overruling the objection and confirming the Plan. *See* Transcript of Hearing, Case No. 17-10949 [Dkt. No. 363].
- The Bankruptcy Court held that the unequal distribution created a presumption of unfair discrimination, but that such presumption had been rebutted.

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In re Nuverra (Cont.)

- The Bankruptcy Court explained that, without the gift, the noteholders were not entitled to any distribution and further, the distribution promoted a successful reorganization of the debtors.
- The Bankruptcy Court further clarified that the distribution was not in fact from estate property, rejecting the argument that such a distribution was in violation of the absolute priority rule.
- The Bankruptcy Court ultimately confirmed the Plan over the objection.

In re Nuverra (Cont.)

- Objector sought emergency motion for stay of order confirming the Plan. The District Court denied the motion. *See In re Nuverra Environmental Solutions*, *Inc*., Case No. 17-1024, 2017 WL 3326453 (D. Del., Aug. 3, 2017).
- On appeal of the Bankruptcy Court's decision, the District Court held that (i) the appeal was equitably moot; (ii) plan did not "unfairly discriminate," and (iii) the debtors had a rational basis for placing unsecured creditors which held trade and business-related claims separate from other general unsecured creditors. *See In re Nuverra Environmental Solutions, Inc*., 590 B.R. 75 (D. Del. 2018).

In re Nuverra (Cont.)

- The District Court affirmed the Bankruptcy Court's finding that the presumption of unfair discrimination had been rebutted, explaining that the distribution to the trade creditors in this case had no impact on the distribution to the other unsecured creditors because the record was clear that unsecured creditors were not entitled to anything under the Bankruptcy Code's priority scheme. In other words, the greater percentage distribution could be attributed to the "gift."
- The District Court, in a review of previous precedent, agreed with the position advanced by the debtors that "courts in this circuit have held that such a horizontal gift is not unfair discrimination against the class that does not receive the larger gift when (i) the creditor that does not receive the larger gift is not entitled to a distribution under a plan, and (ii) no class junior to the creditor receives a distribution under the plan." *Id.* at 95; *see also In re Genesis Health Ventures, Inc.*, 266 B.R. 591 (Bankr. D. Del. 2001).

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In re Nuverra (Cont.)

- Notice of appeal filed on Sept. 24, 2018 in Third Circuit, Case No. 18-3084.
- In the summary of case filed by Appellant, the issues to be raised on appeal were:

1. Did the District Court err in determining that the Bankruptcy Appeal was equitably moot, when: (i) the individual relief requested by Appellant would neither fatally scramble the plan nor significantly harm third parties; and (ii) Appellant is the only member of Class A6 to object to the plan and to appeal the decisions below, and thus is the only member eligible for relief?
2. Did the Bankruptcy Court err in concluding that the Debtors' Amended Prepackaged Plans of Reorganization Under Chapter 11 of the Bankruptcy Code (the "Plan") [ECF No. 226] satisfied 11 U.S.C. § 1129(b)(1)'s requirement that a plan not discriminate unfairly, where the Plan provides that Class A6 will receive $0.04–$0.06 per dollar on the total amount claimed by all noteholders of the 9.875% Senior Notes due 2018, while Classes A7, B7 and C7 (the "Preferred Classes") are to be paid in full on the basis that distributions to Classes A6 and the Preferred Classes constitute a "gift" made by the Debtors' secured creditors?
3. Did the Bankruptcy Court err in concluding that the Plan did not improperly classify the claims in Class A6 separate from other general unsecured claims?

See Concise Summary of Case filed by Appellant David Hargreaves, Case No. 18-3084, October 08, 2018 (3rd Cir.).

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Enforceability of Make-Whole Premiums in Bankruptcy

Jessica Liou

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III. Considerations Relevant to Enforceability Analysis
IV. Select Cases

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I. Overview

- Provisions providing for a make-whole, prepayment, or other premiums are commonly found in bond indentures and credit agreements.
- The enforceability of these provisions in bankruptcy may materially impact the size and treatment of creditors' allowed claims against a debtor's estate.
- Case law discussing the allowance in bankruptcy of claims arising from these provisions varies by jurisdiction and has substantially evolved over the last decade, making the issue one ripe for additional litigation.

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II. Provisions Relevant to Enforceability Analysis

Provisions Typically Found in Bond Indentures

- **"Make-Whole"**
  - Permits an issuer to redeem/repay notes before maturity but requires the issuer to pay a lump sum amount derived from a formula based on the net present value (NPV) of future coupon payments that will not be paid as a result of early redemption/repayment.
  - Available during the "No Call" period (discussed herein).

- **"Optional Redemption Schedule"**
  - Permits an issuer to redeem/repay notes before maturity but requires the issuer to pay amounts derived from the principal amount of the notes to be redeemed/repaid; amounts typically decline ratably as the maturity date of the notes draws near. (*E.g.*, 105% of principal to be redeemed, if paying within first X years.)
  - Available after the "No Call" period.

Provisions Typically Found in Credit Agreements

- **"Prepayment Penalty"**
  - **Yield Maintenance Formula:** Permits a borrower to repay its debt before maturity but requires the borrower to pay a lump sum amount intended to estimate the actual damages to the lender resulting from prepayment.
    - Amount can be equal to the difference between the interest income the lender would have earned if the agreement was performed and the interest income the lender would be deemed to have earned by timely mitigating its damages.
    - In some cases, parties fix the reinvestment rate at the rate of interest that could be obtained through investment in a U.S. Treasury note of a maturity similar to that of the relevant loan.
  - **Fixed Prepayment Fee:** Permits a borrower to repay its debt before maturity but requires the borrower to pay a fixed lump sum.
    - Specific negotiated dollar amount, or
    - A percentage of the outstanding principal loan balance (which is more typical)
      - Percentage can stay the same throughout the term of the loan, or
      - Percentage can decline or disappear as the loan gets closer to maturity.

Provisions Typically Found in Credit Agreements

- **"Soft Call"**
  - In credit agreements, prepayment penalties typically take the form of a "soft call," which means that a prepayment fee is triggered if the borrower refinances the credit agreement with lower priced bank debt within a certain time period (usually the first 12 months).
  - Typically found in first lien credit agreements.

- **"Hard Call"**
  - Where a prepayment fee is triggered if the borrower prepays the debt for any reason.
  - Typically found in junior debt credit agreements, such as second lien and mezzanine debt facilities.

Other Typical Provisions in Debt Documents

- **"No Call"**
  - Prohibits a borrower or issuer from repaying debt before maturity.
    - For bank debt, the trend is to prohibit repayment within the first 1-3 years.
    - For bond debt, the no call period is tied to the maturity date.

- **"Acceleration"**
  - Provides lenders or bondholders the right to demand full payment of all amounts owing under the loan agreement or indenture upon the occurrence of a specified event or circumstance (usually, an event of default).
  - **"Automatic Acceleration"**
    - Typically, a bankruptcy filing will constitute an event of default that results in an automatic acceleration of the outstanding debt, meaning that no action by the lender/bondholders or notice to the borrower is required for all amounts owing to become immediately due and payable.

Purpose of Make-Whole and Prepayment Premium Provisions

- To determine the borrower's and creditor's rights in the event repaying a debt before it matures becomes economically efficient for the borrower.
  - From the creditor's perspective, it provides yield protection.
    - When debt is redeemed before maturity or repaid upon default, a make-whole or prepayment provision requires the borrower to pay an amount above the principal and interest due on the debt to compensate the lender for economic loss suffered as a result of the redemption or repayment.
  - From the borrower's perspective, it provides freedom to repay debt before maturity.
    - Many jurisdictions, including NY, have adopted the "perfect tender in time" rule, which prohibits a borrower from repaying a loan before maturity in the absence of a specific contractual provision permitting early repayment.

III. Relevant Considerations in Enforceability Analysis

Enforceability Analysis: General Overview

- Determining whether a make-whole or prepayment premium or no call provision supports claims in bankruptcy requires:
  - Analyzing the contract under state law (as may be informed by bankruptcy law) to determine
    - Was the make-whole payment triggered or the no-call provision breached?
    - If so, to what extent are damages due?
  - Considering whether the state law claims are allowable under federal bankruptcy law
    - Is the make-whole claim a claim for unmatured interest?
    - Is the debtor solvent?

Enforceability Analysis: Contract Analysis Overview

- Under the express terms of the debt documents, is a make-whole due and payable?
  - ***The governing agreement should explicitly provide for a make-whole or prepayment premium***
    - Some courts, however, suggest that failure to include an explicit make-whole or prepayment premium provision does not foreclose a creditor's ability to claim general expectation damages or damages arising under a no-call provision.
  - ***Determine when the make-whole premium is triggered under the explicit terms of the governing agreement.***
    - Is the premium triggered upon a bankruptcy filing, upon an automatic acceleration, or upon a voluntary prepayment or redemption?

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When is the Make-Whole Premium due and payable?

- ***Does automatic acceleration upon a bankruptcy event of default cause the debt to mature on the petition date?***
  - Courts have generally held that, upon an automatic contractual acceleration (as opposed to an automatic acceleration by operation of bankruptcy law), the acceleration date becomes the new maturity date of the debt.
    - *See, e.g., In re MPM Silicones, LLC*, 874 F.3d 787, 802-03 (2d Cir. 2017) (agreeing with holding in *In re AMR* that automatic acceleration of debt upon a bankruptcy filing advanced the maturity date to the petition date); *In re AMR Corp.*, 730 F.3d 88, 103 (2d Cir. 2013) (holding that automatic acceleration upon a bankruptcy event of default changed the maturity date from some date in the future to the petition date); *In re LHD Realty Corp.*, 726 F.2d 327, 330-31 (7th Cir. 1984); see also *Premier Entm't Biloxi LLC v. U.S. Bank Nat'l Assoc. (In re Premier Entm't Biloxi LLC)*, 445 B.R. 582, 627 (Bankr. S.D. Miss. 2010) (noting that indentures clearly stated that notes automatically accelerated upon a bankruptcy event of default and, as a result, maturity date changed from the original date to the date of the acceleration); *In re Solutia Inc.*, 379 B.R. 473, 484 (Bankr. S.D.N.Y. 2007) (same); *In re Calpine Corp.*, 365 B.R. 392, 398 (Bankr. S.D.N.Y. 2007) (same).
  - Some courts, however, distinguish between the meaning of "maturity date" for purposes of determining when a make-whole premium is triggered and "maturity" for purposes of when the debt actually came due.
    - *See, e.g., In re Chemtura Corp.*, 439 B.R. 561, 601 (Bankr. S.D.N.Y. 2010) (noting that bondholders had a "better argument" that make-whole was applicable to any payment made before the "maturity date," notwithstanding debt may have matured before maturity date).

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When is the Make-Whole Premium due and payable? (cont'd)

- ***Does a repayment or refinancing in bankruptcy qualify as a voluntary prepayment or redemption under the terms of the contract?***
  - *What qualifies as a "Prepayment"?*
    - Many courts have held that if the debt has matured as a result of automatic contractual acceleration, then the repayment cannot constitute a prepayment that triggers an early repayment provision.
      - *See, e.g., In re Premier Entm't Biloxi LLC*, 445 B.R. at 631-32 (holding that automatic acceleration provision under indenture had the effect of changing the maturity date to the petition date, which became the new maturity date); *In re Solutia Inc.*, 379 B.R. at 483 (same); *see also U.S. Bank Trust Nat'l Ass'n v. Am. Airlines, Inc. (In re AMR Corp.)*, 485 B.R. 279, 298 (Bankr. S.D.N.Y. 2013) (characterizing payment after automatic acceleration as a post-maturity date payment, not a *pre*payment), *aff'd In re AMR Corp.*, 730 F.3d 88 (2d Cir. 2013).
    - Some courts, however, distinguish between a prepayment and a redemption (see next slide).

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When is the Make-Whole Premium due and payable? (cont'd)

- ***Does a repayment or refinancing in bankruptcy qualify as a voluntary prepayment or redemption under the terms of the contract? (cont'd)***
  - *What qualifies as a "Redemption"?*
    - If the debt documents distinguish between a payment pursuant to a redemption and a payment pursuant to acceleration, then a court might find that a repayment after automatic acceleration of the debt cannot qualify as a redemption.
      - *See In re MPM Silicones, LLC*, 874 F.3d at 802-03 (holding a post-maturity payment does not constitute a redemption, which can only occur at or prior to maturity); *see also In re AMR Corp.*, 485 B.R. at 289-99 (holding that a repayment after an acceleration did not qualify as a voluntary redemption where the indenture distinguished between amounts due in connection with a redemption and amounts due in connection with acceleration).
    - At least one court has taken an expansive view of the meaning of redemption to include repayment after the debt has matured, including pursuant to automatic acceleration.
      - *See, e.g., In re Energy Future Holdings Corp.*, 842 F.3d at 255 (holding that "redemption" refers to both pre- and post-maturity payment of debt).

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When is the Make-Whole Premium due and payable? (cont'd)

- ***Does a repayment or refinancing in bankruptcy qualify as a voluntary prepayment or redemption under the terms of the contract? (cont'd)***
  - *What qualifies as "Voluntary"?*
    - Some courts have found that payments made after automatic acceleration upon a bankruptcy filing or pursuant to a chapter 11 plan may not be considered voluntary payments.
      - *See, e.g., In re MPM Silicones, LLC,* 874 F.3d at 803 ("A payment made mandatory by operation of an automatic acceleration clause is not one made at [the debtor's] option."); *In re AMR*, 730 F.3d at 103 (holding post-acceleration payment was not a voluntary prepayment); *In re Public Serv. Co. of N.H.*, 114 B.R. 813, 818-19 (Bankr. D.N.H. 1990) (finding that debtor's repayment of secured debt under chapter 11 plan proposed by another party was not "voluntary" and would not trigger prepayment penalty); *In re Planvest Equity Income Partners IV*, 94 B.R. 644, 644-45 (Bankr. D. Ariz.. 1988) (noting that "prepayment penalty provisions are generally interpreted to mean that the penalty is allowed only where the prepayment is voluntary" and holding that payments made pursuant to a chapter 11 plan of liquidation are not voluntary prepayments and that a debtor's disposition of property under a Chapter 11 may be involuntary).
    - Some courts, however, have held that under certain circumstances where other options for treatment or satisfaction of the debt claims are available, repayment in chapter 11 can constitute a voluntary payment.
      - *See, e.g., In re Energy Future Holdings*, 842 F.3d at 255 (holding that borrower's repayment of notes that had been automatically accelerated as a result of bankruptcy was "voluntary" because borrower had the option to reinstate the debt under its chapter 11 plan); *Cf. Imperial Coronado Partners, Ltd. v. Home Fed. Sav. & Loan Ass'n*, 96 B.R. 997, 1000 (9th Cir. B.A.P. 1989) (finding debtor's decision to sell the property in a 363 sale to pay off the loan, as opposed to refinancing the property and deaccelerating the loan as part of a reorganization plan, was voluntary and enforcing prepayment premium where debtor repaid loan after lender had accelerated the amount due).

When is the Make-Whole Premium due and payable? (cont'd)

- ***Is the clause providing for automatic acceleration of the debt upon a bankruptcy event of default an unenforceable ipso facto clause?***
  - Courts in the Second Circuit have held that a contractual acceleration clause in a debt document that provides for automatic acceleration of the debt upon a bankruptcy filing is *not* a per se unenforceable ipso facto clause.
    - *Ipso facto* clauses are generally enforceable, except when contained in an executory contract or unexpired lease.
    - *See, e.g., In re AMR Corp.*, 485 B.R. at 296; *In re Gen'l Growth Props.*, 451 B.R. 323, 329 (Bankr. S.D.N.Y. 2011); *see also In re GMX Res., Inc.*, Case No. 13-11456 (SAH) (Bankr. W.D. Okla. Aug, 29, 2013) (D.I. 687) ("not every bankruptcy default provision is unenforceable in bankruptcy…only in the narrow circumstance where the contract at issue is an executory contract or unexpired lease").
  - Parties will usually agree that the loan agreement or indenture is not an executory contract.

When is the Make-Whole Premium due and payable? (cont'd)

- ***Can the creditor decelerate the debt postpetition?***
  - Courts have generally held that such an action, even if contractually permitted under the debt documents, is barred by the automatic stay as an attempt to increase a creditor's claim at the expense of the debtor's estate and its other creditors.
    - *See, e.g., In re Energy Future Holdings*, 533 B.R. 106 (Bankr. D. Del. 2015) (denying motion to lift the stay filed by bondholders seeking to decelerate notes); *In re MPM Silicones, LLC*, Case No. 14-22503 (RDD), 2014 WL 4436335, at *23 (Bankr. S.D.N.Y. Sept. 9, 2014) (holding deceleration of notes after a bankruptcy filing was barred by the automatic stay); *In re AMR Corp.*, 485 B.R. at 294 (same), *aff'd In re AMR Corp.*, 730 F.3d 88, 112 (2d Cir. 2013); *In re Solutia Inc.*, 379 B.R. at 484-85 (finding that attempt to decelerate notes violated the automatic stay).

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Automatic Acceleration Provisions: Is the premium triggered by bankruptcy?

Premium Not Triggered	*Ambiguous*	*Premium Likely Triggered*
"[I]f an Event of Default referred to in…Section 4.01(g) [bankruptcy event of default]…shall have occurred and be continuing, then and in every such case the unpaid principal amount of the Equipment Notes then outstanding, together with accrued but unpaid interest thereon and all other amounts due thereunder ***(but for the avoidance of doubt, without Make-Whole Amount)***, shall immediately and without further act become due and payable without presentment, demand, protest or notice, all of which are hereby waived…."	"Notwithstanding the foregoing, in the case of an Event of Default arising under clause…7 of Section 6.01(a) hereof [which includes a bankruptcy event of default], all principal of and ***premium, if any***, interest (including Additional Interest, if any) and any other monetary obligations on the outstanding notes shall be due and payable immediately without further action or notice." *What does the Optional Redemption Provision say about when a make-whole premium is due?*	"[I]f the Notes are accelerated or otherwise become due prior to the Maturity Date [i.e., December 1, 2017] as a result of an Event of Default [which includes a bankruptcy event of default]…[and] ***[i]f such acceleration occurs before December 1, 2014, the amount*** of principal, accrued and unpaid interest and premium on the Notes that become ***due and payable shall equal the Make-Whole Redemption Price*** in effect on the date of such acceleration, as if such acceleration were a Make-Whole Redemption of the Notes accelerated."

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Make-Whole: State Law Analysis

- Assuming the premium is triggered under the contract, is the entirety of the make-whole or prepayment premium enforceable under state law?
  - ***Which state law governs the contract?***
  - ***Applying the governing state law, what is the test to determine if a make-whole provision is enforceable?***
    - In New York, the test to determine the enforceability of a make-whole provision is the same as that for determining the enforceability of a liquidated damages provision.
    - An unambiguous liquidated damages provision will be enforced, especially if negotiated by sophisticated and represented parties in an arm's-length and equal negotiation. A liquidated damages provision that is a penalty is unenforceable.
    - A liquidated damages is enforceable if:
      - the actual damages are difficult to determine AND
      - the sum stipulated is not "plainly disproportionate" to the possible loss.
    - The soundness of a liquidated damages provision is tested in light of the circumstances that existed at the time the agreement was entered into rather than at the time the damages are incurred or become payable.

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Make-Whole: Bankruptcy Law Analysis

- Assuming the premium is triggered under the contract and is enforceable under state law, is a claim for the make-whole or prepayment premium allowable under bankruptcy law?
  - ***Would the claim for make-whole or prepayment premium be disallowed as unmatured interest under section 502(b)(2)?***
    - No, these obligations are liquidated damages.
      - *See In re School Specialty, Inc.*, 2013 WL 1838513, at *5 (Bankr. D. Del. Apr. 22, 20130); *In re Trico Marine Servs., Inc.*, 450 B.R. 474, 480-81 (Bankr. D. Del. 2011); *Noonan v. Fremont Fin. (In re Lappin Elec. Co.)*, 245 B.R. 326, 330 (Bankr. E.D. Wis. 2000).
    - Yes, these obligations are proxies for unmatured interest.
      - *See, e.g., In re Ridgewood Apartments of DeKalb Cnty., Ltd.*, 174 B.R. 712, 720 (Bankr. S.D. Ohio. 1994).

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Make-Whole: Bankruptcy Law Analysis

- Assuming the premium is triggered under the contract and is enforceable under state law, is a claim for the make-whole or prepayment premium allowable under bankruptcy law? (cont'd)
  - ***Would the claim for make-whole or prepayment premium be allowed as a secured claim under section 506(b)?***
    - Yes, if the creditor is oversecured; the make-whole or prepayment premium is provided for under the agreement; and the make-whole or prepayment premium is a "reasonable" fee, cost, or charge.
      - Courts apply different tests to determine what is "reasonable."
      - Most courts, however, have looked at whether or not the claim bears some relationship to the amount of loss a lender would experience upon early repayment of a loan. *See, e.g., In re School Specialty, Inc.*, 2013 WL 1838513, at *5; *In re 400 Walnut Assocs. L.P.*, 461 B.R. 308, 321-22 (Bankr. E.D. Pa. 2011); *Atrium View, LLC v. Eastern Sav. Bank, FSB (In re Atrium View, LLC)*, 2008 WL 5378293, at *2-3 (Bankr. M.D. Pa. Dec. 24, 2008).
  - If the debt automatically accelerated on the petition date, some courts skip this question on the basis that section 506(b) only applies to claims that accrue postpetition.
  - If the claim is not allowable as a secured claim, it may still be allowable as an unsecured claim.

IV. Select Cases

Premier Entm't Biloxi LLC v. U.S. Bank Nat'l Ass'n (In re Premier Entm't Biloxi LLC), 445 B.R. 582 (Bankr. S.D. Miss. 2010)

- The secured debt of Premier Entm't included 10.75% mortgage notes. The notes were governed by an indenture that included:
  - A no-call provision prohibiting the debtors from repaying the notes before February 1, 2008, a period covering the first half of the 8-year term of notes.
  - An optional redemption provision, which gave the debtors the option to redeem the notes after the no-call period, subject to a gradually decreasing prepayment premium until the maturity date of February 1, 2012.
  - A provision providing for an additional prepayment premium if the debtors willfully caused certain events of default (including a voluntary bankruptcy filing) to occur to accelerate the notes with the intention of avoiding the no-call provision.
- Bankruptcy was an event of default under the governing documents, causing automatic acceleration of the debt, but the notes did not provide for payment of the prepayment premiums upon such acceleration.
- Premier Entm't filed for bankruptcy on September 19, 2006. The debtor's plan of reorganization provided for the payment in full of the notes within the no-call period.

Premier Entm't Biloxi LLC v. U.S. Bank Nat'l Ass'n (In re Premier Entm't Biloxi LLC), 445 B.R. 582 (Bankr. S.D. Miss. 2010) (cont'd)

- **No Call Provision: Breached & Unsecured Claim Allowed**
  - Court held the no-call was breached, but because the provisions were not specifically enforceable in bankruptcy, the debtors could repay the debt.
  - But, the court also held that the lenders were entitled to an unsecured claim for breach of the no-call provision because equitable considerations that would otherwise preclude enforcing such a provision were not present in a solvent debtor case.
- **Make-Whole or Prepayment Premium: Not Triggered**
  - Court held prepayment premiums were not triggered because the debtors did not file bankruptcy with sole purpose of avoiding no-call, debt automatically accelerated upon a bankruptcy event of default thereby advancing maturity date, and no premium was explicitly due upon prepayment after acceleration.
- **Allowability of Claims Based on Make-Whole or Prepayment Premium: Liquidated Damages**
  - Court held claims based on prepayment premiums were liquidated damages, not claims for unmatured interest, and were "charges" under section 506(b).

In re Solutia Inc., 379 B.R. 473 (Bankr. S.D.N.Y. 2007)

- Secured debt of Solutia included 11.25% senior secured notes due 2009. The indenture included:
  - An optional redemption period, which had expired at the time of the bankruptcy filing.
- Bankruptcy was an event of default under the indenture, causing automatic acceleration of the debt, but did not provide for payment of a make-whole premium upon such acceleration.
- Solutia filed for bankruptcy on December 17, 2003 and sought to prepay the 2009 notes under its plan of reorganization, which provided for payment in full, in cash, to the bondholders of their allowed claims. The payment did not include interest at the contract rate through the original maturity date of the 2009 notes.

In re Solutia Inc., 379 B.R. 473 (Bankr. S.D.N.Y. 2007) (cont'd)

- **No Call Provision: Did Not Exist & No Unsecured Claim Allowed**
  - Court refused to imply existence of a no-call provision (and therefore allow damages for breach thereof) where the indenture did not explicitly provide for one.
- **Make-Whole or Prepayment Premium: Not Triggered**
  - Court held that prepayment claims were not triggered because the indenture failed to explicitly provide for a premium in the event of automatic acceleration, the automatic acceleration clause reflected the bondholders' deliberate decision to give up a future income stream in return for an immediate right to collect entire debt upon a bankruptcy event of default, and the debt was not prepaid before maturity because acceleration advanced the maturity date.
- **Allowability of Claims Based on Make-Whole or Prepayment Premium: Not Addressed**

In re Energy Future Holdings Corp., 842 F.3d 247 (3d. Cir 2016)

- Secured debt of Energy Future Intermediate Holding Company LLC and EFIH Finance Inc. ("EFIH") included 10% first-lien notes due 2020 and second lien notes due in 2021 and 2022. The indentures for each series of Notes included optional redemption provisions that provided for the payment of a make-whole if the notes were voluntarily redeemed prior to a specified date.
- Bankruptcy was an event of default under the indentures, causing the notes to automatically accelerate.
  - First Lien Indentures: Automatic acceleration provision provided that "all outstanding Notes shall be due and payable immediately without further action or notice".
  - Second Lien Indentures: Automatic acceleration provision provided that "all principal of and *premium, if any,* interest…and any other monetary obligations on the outstanding [Second Lien Notes shall be due] due and payable immediately" (emphasis added).
- EFIH filed for bankruptcy on April 29, 2014 and sought to refinance the 2020 notes, without paying a make-whole premium.
- EFIH later refinanced a portion of the second-lien notes, again, without paying the make-whole premium.

In re Energy Future Holdings Corp., 842 F.3d 247 (3d. Cir 2016) (cont'd)

- **No Call Provision: Not Applicable**
- **Make-Whole or Prepayment Premium: Triggered**
  - Court held that make-whole was triggered because the post-maturity refinancing was a redemption under New York law, the redemption was at EFIH's option and the indenture explicitly provided for a premium tied to an optional redemption (versus "prepayment" before maturity), which was unaffected by the automatic acceleration of the debt upon a bankruptcy filing.
- **Allowability of Claims Based on Make-Whole or Prepayment Premium: Not Addressed**

In re MPM Silicones L.L.C., 874 B.R. 787 (2d. Cir 2017)

- The indenture trustees for the holders of approximately $1.1 billion of First Lien Notes and $250 million of 1.5 Lien Notes asserted that they were entitled to a make-whole premium pursuant to their indentures as a result of the repayment (in the form of the issuance of replacement notes under the Debtors' plan of reorganization) of the Senior Notes before their stated contractual maturity date.
- Bankruptcy was an event of default under the indentures, causing the notes to automatically accelerate on the petition date.

In re MPM Silicones L.L.C., 874 B.R. 787 (2d. Cir 2017) (cont'd)

- **No Call Provision: Not Applicable**
- **Make-Whole or Prepayment Premium: Not Triggered**
  - Affirmed the bankruptcy court and district court decisions that the optional redemption provisions were not triggered and no make-whole premium was due. The Second Circuit held that when the notes accelerated automatically upon a bankruptcy filing, it advanced the maturity date of the notes and contractually required repayment. Any repayment by the Debtors post-maturity (including in the form of the replacement notes) was therefore (i) not a "redemption," which could only occur at or before maturity, and (ii) not a repayment made at the debtors' option.
- **Claims Based on Make-Whole or Prepayment Premium: Not Addressed**

In re Ultra Petroleum Corp., 575 B.R. 361 (Bankr. S.D. Tex. 2017) ("*Ultra I*")

- Ultra Resources issued multiple series of unsecured notes totaling approximately $1.46 billion pursuant to an indenture and three supplements. The indenture included an optional redemption provision that provided for a make-whole premium if the debt was repaid prior to a specified date.
- Bankruptcy was an event of default under the indentures, causing automatic acceleration of the debt, including the principal, prepetition interest, postpetition interest and "any applicable Make-Whole Amount."
- The acceleration provision in the Notes contained the following language:
  - "The Company acknowledges, and the parties hereto agree, that each holder of a Note has the right to maintain its investment in the Notes free from repayment by the Company…and that the provision for payment of a Make-Whole Amount [or] prepayment premium…by the Company, if any, in the event that the Notes are prepaid or are accelerated as a result of an Event of Default, is intended to provide compensation for the deprivation of such right under such circumstances."

In re Ultra Petroleum Corp., 575 B.R. 361 (Bankr. S.D. Tex. 2017) ("*Ultra I*") (cont'd)

- Ultra Resources and its affiliated debtors filed for bankruptcy on April 26, 2016. During the cases, the estates became solvent as commodity prices rose. The Debtors proposed a plan of reorganization that provided for payment in full, in cash, of all unsecured claims. The plan treated the noteholders as unimpaired. The noteholders objected to the plan on the basis that, for their claims to be truly unimpaired, the Debtors would be also be required to pay postpetition interest at the default contract rate and the make-whole premium.
- **No Call Provision: Not addressed**
- **Make-Whole or Prepayment Premium: Triggered (not disputed)**
- **Allowability of Claims Based on Make-Whole or Prepayment Premium: Liquidated Damages**
  - Court found that, under New York law, the make-whole premium was an enforceable liquidated damages provision. It did not address whether the make-whole claim should be disallowed as unmatured interest under section 502(b)(2) of the Bankruptcy Code.

In re Ultra Petroleum Corp., 913 F.3d 533 (5th Cir. 2019) ("*Ultra II*"), and 943 F.3d 758 (5th Cir. 2019) ("*Ultra III*")

- Subsequent to *Ultra I*, the Fifth Circuit issued an opinion reversing in part and remanding the bankruptcy court's decision. *See in re Ultra Petroleum Corp.*, 913 F.3d 533 (5th Cir. 2019) ("*Ultra II*").
  - In *Ultra II*, the Fifth Circuit remanded the issue of whether or not to allow the make-whole claim. Notwithstanding this, it stated in dicta that it found the debtors made a "compelling argument" that the make-whole claim was unmatured interest under section 502(b)(2) for three reasons: (1) the make-whole premium was the economic equivalent of interest, (2) the make-whole premium had not matured at the time of the bankruptcy filing, which was not impacted by the automatic acceleration clause because it was an unenforceable *ipso facto* clause, and (3) the cases finding make-whole premiums are not unmatured interest are not persuasive, and a finding that a make-whole premium is an enforceable liquidated damages does not preclude it also being unmatured interest.
  - The Fifth Circuit also stated that, if the bankruptcy court determined that the pre-Code rule that gave the creditors of a solvent debtor the "right to interest wherever there is a contract for it" survived, then the make-whole claim would be allowable as an exception to section 502(b)(2).
- Subsequent to *Ultra II*, the Fifth Circuit granted a petition for rehearing en banc. It withdrew *Ultra II* and issued a new opinion superseding it. *See In re Ultra Petroleum Corp.*, 943 F.3d 758 (5th Cir. 2019) ("*Ultra III*").
  - In *Ultra III*, the Fifth Circuit softened its prior statements about whether make-whole premiums should be treated as unmatured interest. It noted that the bankruptcy court had not considered the issue and that determination of whether a make-whole premium is unmatured interest "depends on the dynamics of the individual case," and "the bankruptcy court is often best equipped to understand these individual dynamics-at least in the first instance." It remanded the question of whether the make-whole premium should be disallowed as unmatured interest under section 502(b)(2) back to the bankruptcy court.

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Musings of a Chapter 11 Mind

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The thoughts expressed in these materials and in the accompanying presentation are presented for discussion purposes only and do not necessarily represent the views of the presenter or of O'Melveny & Myers LLP

Hypothetical – Pre-emptive Revolver Draws

Debtor experiences a precipitous and adverse effect in its industry or the economy generally (e.g. Covid-19, drop in oil prices, name your catastrophic event)

To shore up liquidity (and perhaps even in anticipation of a Chapter 11 filing), Debtor draws down the remaining $75M of availability on its revolving line of credit

Assume the lender, Bank A, funds the draw request

Question 1:

WHY WOULD THE LENDER DO THAT!?!

Can a MAC be called during COVID?

A party "faces a heavy burden when it attempts to invoke a material adverse effect clause in order to avoid its obligation".

"A short-term hiccup in earnings should not suffice" to establish a MAC has occurred.

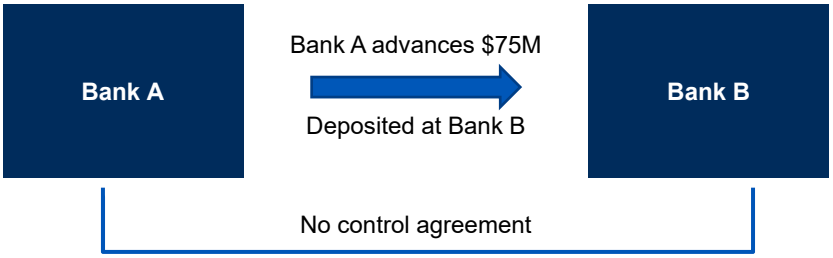
It's a company's "long-term earnings power, … which one would expect to be measured in years rather than months" that is the consideration.

Akorn, Inc. v. Fresenius Kabi AG, 2018 WL 4719347, at *53 (Del. Ch. Ct. Oct. 1, 2018).

Question 2:

When is an unperfected security interest in a deposit account not avoidable in a Chapter 11 bankruptcy?

Suppose Bank A deposits the $75M advance in Debtor's account at Bank B, with no control agreement in place



Assertion:

Bank A has an <u>unavoidable</u> security interest in the $75M deposited at Bank B notwithstanding the failure of Bank A to perfect its security interest in the deposit account maintained with Bank B

11 U.S.C. § 544. Trustee as Lien Creditor and as Successor to Certain Creditors and Purchasers

(a) The trustee shall have, as of the commencement of the case, and without regard to any knowledge of the trustee or of any creditor, the rights and powers of, or may avoid any transfer of property of the debtor or any obligation incurred by the debtor that is voidable by—

- (1) a creditor that extends credit to the debtor at the time of the commencement of the case, and that obtains, at such time and with respect to such credit, a judicial lien on all property on which a creditor on a simple contract could have obtained such a judicial lien, whether or not such a creditor exists;
- (2) a creditor that extends credit to the debtor at the time of the commencement of the case, and obtains, at such time and with respect to such credit, an execution against the debtor that is returned unsatisfied at such time, whether or not such a creditor exists; or
- (3) a bona fide purchaser of real property, other than fixtures, from the debtor, against whom applicable law permits such transfer to be perfected, that obtains the status of a bona fide purchaser and has perfected such transfer at the time of the commencement of the case, whether or not such a purchaser exists.

UCC § 9-317. Interests That Take Priority Over or Take Free of Security Interest or Agricultural Lien

(a) [Conflicting security interests and rights of lien creditors.]

A security interest or agricultural lien is subordinate to the rights of:

- (1) a person entitled to priority under Section 9-322; and
- (2) except as otherwise provided in subsection (e), a person that becomes a lien creditor before the earlier of the time:
  - (A) the security interest or agricultural lien is perfected; or
  - (B) one of the conditions specified in Section 9-203(b)(3) is met and a financing statement covering the collateral is filed.

UCC § 9-203(b)(3). Conditions for Enforceability

- **(A)** the debtor has authenticated a security agreement that provides a description of the collateral and, if the security interest covers timber to be cut, a description of the land concerned;
- **(B)** the collateral is not a certificated security and is in the possession of the secured party under Section 9-313 pursuant to the debtor's security agreement;
- **(C)** the collateral is a certificated security in registered form and the security certificate has been delivered to the secured party under Section 8-301 pursuant to the debtor's security agreement; or
- **(D)** the collateral is deposit accounts, electronic chattel paper, investment property, or letter-of-credit rights, and the secured party has control under Section 9-104, 9-105, 9-106, or 9-107 pursuant to the debtor's security agreement.

An Alternative? – 11 U.S.C. § 545(e) – Safe Harbor for Transfers under Securities Contracts

- **(e)** Notwithstanding sections 544, 545, 547, 548(a)(1)(B), and 548(b) of this title, the trustee may not avoid a transfer that is a . . . transfer made by or to (or for the benefit of) a . . . financial institution, financial participant, or securities clearing agency, in connection with a securities contract, as defined in section 741(7) . . . that is made before the commencement of the case, except under section 548(a)(1)(A) of this title.

- "The term "transfer" includes the grant of a lien for purposes of section 546(e)." *Lehman Brothers Holdings Inc. v. JPMorgan Chase Bank, N.A. (In re Lehman Brothers Holdings Inc.)*, 469 B.R. 415 (Bankr. S.D.N.Y. 2012).

- BUT: Syndicated loans are not securities. *Kirschner v. J.P. Morgan Chase Bank, N.A.*, 2020 WL 2614765 (S.D.N.Y. May 22, 2020)

Another Alternative? – UCC § 9-315 – Secured Party's Rights in Proceeds

- (a)(2) a security interest ***attaches*** to any identifiable proceeds of collateral.
- (c) A security interest in proceeds is a perfected security interest if the security interest in the original collateral was perfected.
- (d) A perfected security interest in proceeds becomes unperfected on the 21st day after the security interest attaches to the proceeds unless:
  - (1) the following conditions are satisfied:
    - (A) a filed financing statement covers the original collateral;
    - (B) (B) the proceeds are collateral in which a security interest may be perfected by filing in the office in which the financing statement has been filed; and
    - (C) (C) the proceeds are not acquired with cash proceeds;
  - (2) the proceeds are identifiable cash proceeds; or
  - (3) the security interest in the proceeds is perfected other than under subsection (c) when the security interest attaches to the proceeds or within 20 days thereafter.

Question 3:

Assuming that the proceeds of the revolver draw are subject to a perfected security interest, can the security interest nevertheless be avoided as a fraudulent transfer?

Rubin – Revolver Draws as Potentially Fraudulent Transfers

Rubin v. Manufacturers Hanover Trust Co., 661 F.2d 979 (2d Cir. 1981): Every draw on a revolving line of credit is a incurrence of an obligation

- Solvency and reasonably equivalent value must be evaluated upon each draw.
- Even if the entry into the credit agreement was not initially a fraudulent transfer, subsequent draws can render incremental security or incremental guarantee obligations subject to clawback
- Should the lenders themselves argue that they were intentionally fraudulent transfers?

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Paying Commercial Real Estate Rent in Post-COVID Bankruptcy

Instructors:

Jason DeJonker

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Commercial Rent Pre-COVID

- Ordinarily, a debtor who is also a commercial tenant must pay rent on a timely basis during bankruptcy
- A debtor may petition the court to postpone making rent payments for up to 60 days after the filing date, upon cause shown

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Commercial Rent Post-COVID

- Following the onset of the COVID-19 pandemic, commercial tenant debtors have routinely sought to postpone many obligations, including rent payments
- This type of remedy is largely new and the legal bases remain in flux

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Potential Remedies

- §105(a) imbues courts with inherent equitable powers, allowing for broad remedies;
- §305(a) empowers courts to suspend bankruptcy proceedings;
- §365(d)(3) allows for deferral of lease obligations, including rent, for up to 60 days after the petition date;
- Contract law – the onset of COVID-10 may trigger force majeure clauses or the doctrines of impossibility or frustration of purpose

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Lessons from Critical Vendor Motions

- Critical vendor motions allow for full payment of certain pre-petition claims while other pre-petition unsecured creditors will likely recover a fraction of their claim
- Courts originally authorized these motions based on the doctrine of necessity, a 19th century common law doctrine

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Critical Vendor Motions (cont.)

- Bankruptcy courts then also relied upon their inherent equitable power under §105(a)
- The Seventh Circuit's decision in *Kmart* held that neither §105(a) nor the doctrine of necessity authorized these motions
- Thereafter, courts have also relied upon §363(b), which governs the use of assets outside of the ordinary course of business
- Although critical vendor motions are relatively common, they do not fit squarely under the Code and their statutory basis remains in question

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Post-COVID Case Law

- As with critical vendor motions, motions to defer rent during COVID-19 have an uncertain and ever-evolving legal and statutory justification

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Post-COVID Case Law – Hitz

- On February 24, Hitz filed for chapter 11 bankruptcy protection
- In mid-late April, Hitz's landlord filed motions to either force Hitz to pay rent or for relief from the automatic stay
- The court held that the governor's stay at home orders, which negatively affected Hitz's business, triggered the force majeure clause in the operative lease and partially excused Hitz from paying rent

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Post-COVID Case Law - Craftworks

- On March 3, Craftworks filed for chapter 11 bankruptcy protection. Shortly thereafter, Craftworks' post-petition financing facility was terminated, forcing them to close stores
- On March 20, Craftworks filed a motion to temporarily add additional pleading requirements for non-debtors, buying Craftworks additional time to administer their bankruptcy and reduce fees

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Craftworks (cont.)

- While Craftworks' motion was the first high profile case to seek procedural changes as a result of COVID, it met minimal pushback
- Although the court indicated that the remedies Craftworks initially sought were likely beyond what it would and could grant, the court eventually granted the relief Craftworks sought

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Post-COVID Case Law – Modell's

- On March 11, Modell's filed for chapter 11 bankruptcy protection
- On March 23, Modell's filed a motion to temporarily suspend much of the bankruptcy and to defer payment on all non-essential expenses, including rent

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Modell's (Cont.)

- Modell's relied on §305 and §105 (in the alternative), citing the uncertainty that COVID has brought and the need to conserve funds
  - In a subsequent reply brief, Modell's also relied upon state contract law, including the doctrines of impossibility and frustration of purpose, and the takings doctrine
- Importantly, they sought relief beyond 60 days after the bankruptcy filing date – exceeding the duration allowed in §365(d)(3), which drew many objections

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Modell's (Cont.)

- Landlords objected on numerous grounds, including that the relief sought was beyond the scope of the Code, conflicted with the Code, and kept landlords from exercising their statutory and contractual rights and remedies
- Despite these objections, the court issued several orders granting debtor's motions, basing its decision on §§105 and 305

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Post-COVID Case Law – Pier 1

- On February 17, Pier 1 filed for chapter 11 bankruptcy protection
- On March 31, Pier 1 filed a motion defer payment on all non-critical expenses, including rent, and to adjourn all pleadings related to paying creditors or relief from the automatic stay

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Pier 1 (cont.)

- Pier 1 relied primarily on §105 as well as the terms of the controlling leases, the takings doctrine, and the contract law doctrines of impossibility and frustration of purpose
- As with Modell's, Pier 1 sought to limit expenses in the face of uncertainty brought by COVID and the relief sought extended beyond 60 days after the filing date

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Pier 1 (cont.)

- Similar to Modell's, Pier 1 received numerous objections from landlords, which were generally on identical grounds
- These objections largely alleged that landlords were not adequately protected and that the relief sought violated §365(d)(3)

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Pier 1 (cont.)

- The court granted Pier 1's relief through two orders and a memorandum opinion
- The opinion held that the debtors could defer rent payments and that deferral could require additional adequate protection
- Importantly, the court held that deferring rent beyond 60 days after the filing date did not circumvent §365(d)(3) because such rent would become an administrative expense claim

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Post-COVID Case Law – §365(d)(3)

- As the effects of COVID-19 have developed across the country and certain states have relaxed or lifted their shelter in place orders, debtors have increasingly sought to defer rent under §365(d)(3)
- Unlike other rent deferral motions, §365(d)(3) explicitly allows for temporary rent deferral

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§365(d)(3) (cont.)

- Debtors utilizing this include CEC Entertainment (Chuck E. Cheese), Brooks Brothers, J.C. Penney, and Ascena Retail (Ann Taylor)
- Despite the clear statutory basis, these motions have still drawn the ire of landlords
- Nonetheless, courts have granted these motions in virtually every major post-COVID chapter 11 bankruptcy

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Post-COVID Case Law – CEC Ent.

- On June 24, CEC filed for chapter 11 bankruptcy protection
- CEC sought relief under §365 to defer its rent obligations, which the court granted
- Nonetheless, unlike other recent cases, on August 3 CEC sought further deferral of rent

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CEC Ent. (cont.)

- Specifically, CEC relied upon state contract law, including the doctrine of frustration of purpose, the operable force majeure clauses, and §105
- Although CEC filed its motion to abate over two months ago, the Court has not yet issued a final order and the parties continue to brief the issue

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Post-COVID Case Law

- In many of these cases, the debtors had sufficient funds to pay rent (either cash on hand or through DIP financing) but still sought, and received, deferral:
  - CEC Entertainment had approximately $90 million in cash on hand
  - Pier 1's DIP lender agreed to finance unpaid rent, paid in subsequent periods, while the deferral motion was pending
  - 24 Hour Fitness received $50 million in initial DIP financing, with $200 million more committed (and an additional $250 million roll-up)
  - J.C. Penney had nearly $500 million in cash on hand as of the filing date and their DIP lenders committed to $900 million in financing, including $450 million in new money

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Potential Additional Issues

- Some commercial tenant debtors who have successfully deferred rent fear the prospect of floods of landlord litigation, particularly when their rent deferrals expire
- Landlords also worry about the prospect of rent deferrals causing administrative insolvency or unrealistic budget expectations

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94th Annual NCBJ Conference: Musings of a Chapter 11 Mind

What Does a Gift Have to Do with Bankruptcy?*

Rosa J. Evergreen, Arnold & Porter

**These materials are intended to provide a general overview of select issues concerning "gifting." They do not constitute legal advice nor do they necessarily reflect the views of the author or any of the lawyers or judges who are participating on the panel discussing these materials.*

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Section 1122 – Classification

Bankruptcy Code Section 1122

(a) Except as provided in subsection (b) of this section, a plan may place a claim or an interest in a particular class only if such claim or interest is substantially similar to the other claims or interests of such class.

(b) A plan may designate a separate class of claims consisting only of every unsecured claim that is less than or reduced to an amount that the court approves as reasonable and necessary for administrative .

Section 1122: Classification of Claims or Interests

- The Bankruptcy Code provides that claims and interests may only be grouped together for the purposes of a plan of reorganization if those claims and interests are "substantially similar" to the other claims or interests of such claim. *See* 11 U.S.C. § 1122(a).
- While not defined in the Bankruptcy Code, numerous courts have found that "substantially similar" means alike in legal character or effect.
  - "'Substantially similar' generally has been interpreted to mean similar in legal character to other claims against a debtor's assets or to other interests in a debtor." *See In re Aegerion Pharmaceuticals, Inc.*, 605 B.R. 22, 30 (Bankr. S.D.N.Y. 2019).

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Section 1122: Classification of Claims or Interests (Cont.)

- Courts have held that while claims must be similar to be placed in the same class, all similar claims need not be placed in the same class as long as there is a valid business or financial reason for their separation. *See In re Aegerion Pharmaceuticals, Inc.*, 605 B.R. 22 (Bankr. S.D.N.Y. 2019); *In re Adelphia Commc'ns Corp.*, 368 B.R. 140 (Bankr. S.D.N.Y. 2007); *Teamsters Nat'l Freight Indus. Negotiation Comm. v. U.S. Truck Co. (In re U.S. Truck Co.)*, 800 F.2d 581 (6th Cir. 1986).
  - Section 1122 "does not require that similar classes be grouped together, but merely that any group be homogenous." *In re Drexel Burnham Lambert Group, Inc.*, 138 B.R. 714, 715 (Bankr. S.D.N.Y. 1992).

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Section 1129 – Confirmation of a Plan

Section 1129: Confirmation of a Plan

- The Bankruptcy Code requires that, with respect to each class of claims or interests impacted under the plan, the plan either: (i) be accepted by such class; (ii) leave such class unimpaired; or (iii) afford such class treatment in compliance with the "cramdown" provisions of section 1129(b). *See* 11 U.S.C. § 1129 (a-b).
- The "cramdown" provision allows for the confirmation of a plan despite a lack of acceptance by impaired classes as long as: (i) all other plan requirements are satisfied; (ii) the plan does not "discriminate unfairly"; and (iii) the plan is "fair and equitable" with respect to each impaired, non-accepting class. *See* 11 U.S.C. § 1129(b).

Section 1129: Unfair Discrimination Test

- Section 1129(b) allows a plan to discriminate, so long as it is not "unfair discrimination."
  - ➢Or stated another way, the Bankruptcy Code does not prohibit *all* discrimination; rather, there cannot be "unfair discrimination."
- There is not a uniform test for "unfair discrimination," but several courts have adopted the unfair discrimination test articulated by Professor Bruce Markell. *See A New Perspective on Unfair Discrimination in Chapter 11*, 72 Am. Bankr. L.J. 227, 249 (1998); *In re Tribune Media Co.,* 587 B.R. 606, 618 (D. Del. 2018); *In re Armstrong World Indus., Inc.*, 348 B.R. 111 (D. Del. 2006).

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Section 1129: Unfair Discrimination Test (Cont.)

- Under the Markell test a rebuttable presumption of unfair discrimination will arise when there is: (i) a dissenting class; (ii) another class of the same priority; and (iii) a difference in treatment under the plan that results in either (a) a materially lower percentage recovery for the dissenting class; or (b) a materially greater risk to the dissenting class in connection with its proposed distribution.
- In *TC1 2 Holdings, LLC*, 428 B.R. 117, 157-58 (Bankr. D. N.J. 2010), the Court noted that "[v]arious standards have been developed by the courts to test whether a plan unfairly discriminates. Generally, a plan will not be found to have unfairly discriminated if:

  (a) the discrimination is supported by a reasonable basis,

  (b) the discrimination is necessary for reorganization,

  (c) the discrimination is proposed in good faith, and

  (d) the degree of the discrimination is directly related to the basis or rationale for the discrimination."

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Section 1129: Fair and Equitable

- "A plan is **fair and equitable** with respect to an impaired, dissenting class of unsecured claims if:
  1) it pays the class's claims in full, or if
  2) it does not allow holders of any junior claims or interests to receive or retain any property under the plan 'on account of' such claims or interests."

  See In re Armstrong World Industries, Inc., 432 F.3d 507, 512 (3rd Circ. 2005) (*citing* 11 U.S.C. § 1129(b)(2)(B)(i)-(ii)).
- This concept that a senior class must be paid in full before a junior class of creditors under a plan is called the "absolute priority rule."

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The Gifting Doctrine

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The Gifting Doctrine

- The "gifting doctrine" under a plan: senior creditors forgo a portion of the recovery in order to provide a recovery to junior creditors. *See In re Journal Register Co*., 407 B.R. 520 (Bankr. S.D.N.Y. 2009); *In re Union Fin. Servs. Grp., Inc*., 303 B.R. 390 (Bankr. E.D. Mo. 2003).
- Gifting can be horizontal or vertical:
  - Horizontal: Unequal gifts to two classes of junior creditors
  - Vertical: Skipping over a class

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The Gifting Doctrine (Cont.)

- One of the first cases to analyze "gifting" was *In re SPM Manufacturing Co*., 984 F.2d 1305 (1st Cir. 1993).
  - "The Code does not govern the rights of creditors to transfer or receive nonestate property. While the debtor and the trustee are not allowed to pay nonpriority creditors ahead of priority creditors ... creditors are generally free to do whatever they wish with the bankruptcy dividends they receive, including to share them with other creditors." *SPM*, 984 F.2d at 1313.
- Some courts have held that presumption of unfair discrimination or inequitable as a result of disparate treatment can be rebutted if the treatment is the result of a gift.
- Other courts have held that the "gifting doctrine" violates the absolute priority rule.

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The Gifting Doctrine (Cont.)

- For a discussion of the history of the gifting doctrine, *see* Leah M. Eisenberg, *Gifting and Asset Reallocation in Chapter 11 Proceedings: A Synthesized Approach,* 29 Am. Bankr. Inst. J. 50, 50 (Sept. 2010).
  - ➢"Courts have approved, and will continue to approve, gifting and asset reallocation as part of pre-plan settlements as long as certain factors are present. Approvable gifts are those that do not directly violate the priority structure of the Bankruptcy Code, and if they do violate the priority structure, they must be (1) gifts of non-estate property or (2) justified by strong business considerations." 29 Am. Bankr. Inst. J. 50, 50 (Sept. 2010).

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Some Gifting Cases

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Some Gifting Cases

Denied:

- *In re DBSD North America, Inc.,* 634 F.3d 79 (2nd. Cir. 2011) (the plan violated the absolute priority rule).
- *In re Snyders Drug Stores, Inc*., 307 B.R. 889 (Bankr. N.D. Ohio 2004) (the plan unfairly discriminated against an impaired class of creditors that rejected the plan).
- *In re Armstrong World Industries, Inc.,* 432 F.3d 507 (3rd Cir. 2005) (the plan violated the absolute priority rule).

Approved/ Confirmed:

- *In re Genesis Health Ventures, Inc*., 266 B.R. 591 (Bankr. D. Del. 2001).
- *In re Union Financial Services Group, Inc.,* 303 B.R. 390 (Bankr. E.D. Mo. 2003).
- *In re Journal Register Co*., 407 B.R. 520 (Bankr. S.D.N.Y. 2009).

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In re Nuverra Environmental Solutions, Inc.

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In re Nuverra

Background/ Facts:

- Pre-packaged plan (the "Plan") filed in 2017 in the Delaware Bankruptcy Court, Case No. 17-10949 (KJC).
- Approximately $500 million in debt, secured by all assets.
- Along with debt secured by assets, there was also unsecured note debt and trade debt.
- Plan provided for conversion of most of the secured debt to equity and a rights offering.
- Under the Plan, secured creditors would "gift" to two classes of unsecured creditors: the holders of notes and the holders of trade debt.
- The gift to the two classes was disparate: (i) holders of unsecured senior notes to receive approximately 4-6 percent recovery of their claims; and (ii) trade and other creditors whose claims arose from day-to-day operations to receive a 100 percent recovery.

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In re Nuverra (Cont.)

- Trade creditors voted to accept the Plan and holders of unsecured notes voted against.
- One of the noteholders objected to the Plan, arguing that it was unfairly discriminatory due to the unequal distributions.
- The Bankruptcy Court gave a bench ruling on July 24, 2017, overruling the objection and confirming the Plan. *See* Transcript of Hearing, Case No. 17-10949 [Dkt. No. 363].
- The Bankruptcy Court held that the unequal distribution created a presumption of unfair discrimination, but that such presumption had been rebutted.

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In re Nuverra (Cont.)

- The Bankruptcy Court explained that, without the gift, the noteholders were not entitled to any distribution and further, the distribution promoted a successful reorganization of the debtors.
- The Bankruptcy Court further clarified that the distribution was not in fact from estate property, rejecting the argument that such a distribution was in violation of the absolute priority rule.
- The Bankruptcy Court ultimately confirmed the Plan over the objection.

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In re Nuverra (Cont.)

- Objector sought emergency motion for stay of order confirming the Plan. The District Court denied the motion. *See In re Nuverra Environmental Solutions*, *Inc*., Case No. 17-1024, 2017 WL 3326453 (D. Del., Aug. 3, 2017).
- On appeal of the Bankruptcy Court's decision, the District Court held that (i) the appeal was equitably moot; (ii) plan did not "unfairly discriminate," and (iii) the debtors had a rational basis for placing unsecured creditors which held trade and business-related claims separate from other general unsecured creditors. *See In re Nuverra Environmental Solutions, Inc*., 590 B.R. 75 (D. Del. 2018).

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In re Nuverra (Cont.)

- The District Court affirmed the Bankruptcy Court's finding that the presumption of unfair discrimination had been rebutted, explaining that the distribution to the trade creditors in this case had no impact on the distribution to the other unsecured creditors because the record was clear that unsecured creditors were not entitled to anything under the Bankruptcy Code's priority scheme. In other words, the greater percentage distribution could be attributed to the "gift."
- The District Court, in a review of previous precedent, agreed with the position advanced by the debtors that "courts in this circuit have held that such a horizontal gift is not unfair discrimination against the class that does not receive the larger gift when (i) the creditor that does not receive the larger gift is not entitled to a distribution under a plan, and (ii) no class junior to the creditor receives a distribution under the plan." *Id.* at 95; *see also In re Genesis Health Ventures, Inc.*, 266 B.R. 591 (Bankr. D. Del. 2001).

In re Nuverra (Cont.)

- Notice of appeal filed on Sept. 24, 2018 in Third Circuit, Case No. 18-3084.
- In the summary of case filed by Appellant, the issues to be raised on appeal were:

1. Did the District Court err in determining that the Bankruptcy Appeal was equitably moot, when: (i) the individual relief requested by Appellant would neither fatally scramble the plan nor significantly harm third parties; and (ii) Appellant is the only member of Class A6 to object to the plan and to appeal the decisions below, and thus is the only member eligible for relief?
2. Did the Bankruptcy Court err in concluding that the Debtors' Amended Prepackaged Plans of Reorganization Under Chapter 11 of the Bankruptcy Code (the "Plan") [ECF No. 226] satisfied 11 U.S.C. § 1129(b)(1)'s requirement that a plan not discriminate unfairly, where the Plan provides that Class A6 will receive $0.04–$0.06 per dollar on the total amount claimed by all noteholders of the 9.875% Senior Notes due 2018, while Classes A7, B7 and C7 (the "Preferred Classes") are to be paid in full on the basis that distributions to Classes A6 and the Preferred Classes constitute a "gift" made by the Debtors' secured creditors?
3. Did the Bankruptcy Court err in concluding that the Plan did not improperly classify the claims in Class A6 separate from other general unsecured claims?

See Concise Summary of Case filed by Appellant David Hargreaves, Case No. 18-3084, October 08, 2018 (3rd Cir.).

Faculty

Jason J. DeJonker is a partner in the Chicago office of Bryan Cave Leighton Paisner LLP, where he focuses his practice on lender- and borrower-side loan workouts, representations of debtors and secured creditors in chapter 11 bankruptcy cases (including DIP and exit finance) and the plan-confirmation process, commercial foreclosures, and complex collection and judgment-collection matters. Out of the courtroom, he routinely counsels clients on structuring distressed transactions (including traditional M&A and commercial real estate transactions involving all asset types), provides advice to corporate management and boards of directors on fiduciary duty issues, and helps private-equity and traditional lender clients in structuring commercial real estate and C&I loans. Mr. DeJonker serves on the firm's Global Diversity & Inclusion Advisory Board and is an active member of the firm's Partner Advisory Board. He recently joined the board of directors of Link Unlimited, an organization that connects high-potential African-American high school students in the Chicago area with mentors, resources and foundational skills required for success as they advance into, through and beyond college. Mr. DeJonker is admitted to practice in Illinois and before the U.S. District Courts for the Western District of Wisconsin and the Northern District of Illinois, the Illinois Supreme Court, and the U.S. Court of Appeals for the Third, Sixth, Seventh and Ninth Circuits. He is listed in *The Best Lawyers in America* for 2020 and 2021, and in *Chambers USA* for 2020. Mr. DeJonker received his B.A. in 1997 from the University of Illinois-Urbana-Champaign and his J.D. *cum laude* in 2000 from the University of Illinois.

Rosa J. Evergreen is a partner in the Washington, D.C., office of Arnold & Porter Kaye Scholer LLP in its Bankruptcy and Restructuring group. She has experience in all aspects of bankruptcy and corporate restructuring, including complex chapter 11 cases, bankruptcy litigation, out-of-court restructurings and distressed acquisitions. Ms. Evergreen is active in many bankruptcy-related professional organizations, including ABI and the International Women's Insolvency & Restructuring Confederation. She has been recognized in *Chambers USA*, *The Best Lawyers in America*, *Washington, DC Super Lawyers* and *Washingtonian Magazine*. She was named one of 12 "Outstanding Young Restructuring Lawyers" by *Turnarounds & Workouts* for 2017, and she was named as one of ABI's "40 under 40" emerging leaders for 2018. Ms. Evergreen maintains an active *pro bono* practice and received the DC Bar's Laura N. Rinaldi Pro Bono Lawyer of the Year Award for 2018. Prior to joining Arnold & Porter, she was a law clerk to Hon. Stephen C. St. John of the U.S. Bankruptcy Court for the Eastern District of Virginia. Ms. Evergreen received her B.A. from Georgetown University and her M.B.A. and J.D. from William & Mary.

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the same year. She is one of the editors of the Weil Bankruptcy Blog, has served on the firm's task force focused on Dodd-Frank financial legislation, and practices pro bono in the areas of family law and criminal appeals, where she successfully argued before the New York State Appellate Division to uphold an order of protection and was part of a team that successfully overturned a death penalty conviction for a mentally impaired defendant after 19 years. She has been recognized for her pro bono contributions by Sanctuary for Families Center for Battered Women's Legal Services as a recipient of its 2012 Pro Bono Achievement Award. Ms. Liou received her B.A. *magna cum laude* from New York University, where she was awarded the Albert Gallatin Scholarship and Founder's Day Award, and her J.D. from Boston College Law School, where she served as a legal writing teaching assistant and articles editor of the *Third World Law Journal* and was awarded the inaugural Commitment to Change Award.

Hon. Christopher M. Lopez is a U.S. Bankruptcy Judge for the Southern District of Texas in Houston, appointed on Aug. 14, 2019. Before his appointment, he was a member of the Business, Finance & Restructuring Group of Weil, Gotshal & Manges LLP. Judge Lopez received his B.A. from the University of Houston, his M.A. in religion from Yale Divinity School, and his J.D. from the University of Texas School of Law.

Jennifer Taylor is a partner in O'Melveny & Myers LLP's Corporate Finance and Restructuring Practice groups in San Francisco and is a member of O'Melveny's Fintech and Emerging Technologies industry groups. She has negotiated debt-financing transactions of all varieties, including financings for leveraged buyouts, secured and unsecured working-capital facilities, venture-debt facilities and other structured financings, including mezzanine loans, high yield and DIP financing for debtors in bankruptcy. In the restructuring realm, Ms. Taylor represents clients at all levels of the capital structure in connection with workout transactions and chapter 11 reorganizations. She also regularly represents investors in connection with distressed acquisitions of businesses and debt. Ms. Taylor was named one of ABI's "40 Under 40" program in 2019 and has been recommended by *Legal 500* in 2017, and she was recognized as a "Rising Star" by *Law360* for 2016 and the International Women's Insolvency & Restructuring Confederation (IWIRC) in 2014. She is also the recipient of O'Melveny's Warren Christopher Values Award, awarded to members of the firm that most exemplify O'Melveny's core values. Ms. Taylor chairs O'Melveny's Diversity Committee in its San Francisco office, co-chairs the Northern California chapter of IWIRC and has served on the board of directors of the San Francisco Botanical Garden. She received her B.A. in political science and economics from Stanford University and her J.D. cum laude from the University of California, Hastings College of the Law, where she was a member of the *Hastings Law Journal* and received the ABI Medal of Excellence, the Witkin Award for Academic Excellence in Bankruptcy, and the CALI Awards in Legal Writing and Research, Bankruptcy and Secured Transactions.