AMERICAN BANKRUPTCY INSTITUTE

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Indentured Trusts in the Bankruptcy Process

Hosted by the Business Reorganization and Unsecured Trade Creditors Committees

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CONCURRENT SESSION

2021

ISSUES FOR INDENTURE TRUSTEES IN BANKRUPTCY

TREATMENT OF HOLDERS' CLAIMS IN PLANS OF REORGANIZATION

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RIGHTS AND DUTIES OF INDENTURE TRUSTEES

To Whom Does an Indenture Trustee Owe a Duty?

- Indenture Trustees have a duty to <u>all</u> noteholders.
- "Prudent Person" Standard
  - "If an Event of Default has occurred and is continuing, the Trustee shall exercise such of the rights and power vested in it by [the] Indenture **and use the same degree of care and skill in its exercise as a prudent person would exercise or use under the circumstances in the conduct of his or her own affairs**."
- Control by Majority
  - "The Holders of a majority in aggregate principal amount of the then outstanding Notes may direct the time, method and place of conducting any proceeding for exercising any remedy available to the Trustee. However, (i) the Trustee may refuse to follow any direction that conflicts with law or this Indenture, that may involve the Trustee in personal liability, or that the Trustee determines in good faith may be unduly prejudicial to the rights of Holders not joining in the giving of such direction . . . ."

ISSUES THAT ARISE IN CONNECTION WITH HOLDER TREATMENT IN PLANS OF REORGANIZATION

Disparate Treatment

- To be confirmable, a plan of reorganization must provide the same treatment for each claim of a particular class unless otherwise agreed to by the claimholder receiving less favorable treatment.
  - *See* 11 U.S.C. § 1123(a)(4).
- Oftentimes, however, certain subsets of holders (i.e. an *ad hoc* group) might receive additional consideration under a plan.
- This additional consideration is generally granted to those holders as a result of the varying hats that they've worn during the bankruptcy case.
- Does an indenture trustee have a duty to ensure that all holders are treated equally under a plan?
  - Holders *may* be afforded differing rights, but *not* solely on account of their status as a noteholder.

PEABODY

In re Peabody Energy Corp., 933 F.3d 918 (8th Cir. 2019)

- Dispute among settling noteholders and an *ad hoc* group of non-settling noteholders.
- Among other provisions, the plan contemplated a "private placement" whereby qualifying creditors could purchase preferred stock of the reorganized Debtors at a discount to plan value.
- Certain creditors, including members of the Ad Hoc Group, could qualify to participate in the private placement if they:
  - (1) Held a certain class of claim;
  - (2) Signed an agreement that committed the creditor to purchase a certain amount of preferred stock;
  - (3) Agreed to backstop a rights offering; and
  - (4) Agreed to support the reorganization plan.
- Members of the Ad Hoc Group elected not to participate in the private placement.

PEABODY (CONT.)

In re Peabody Energy Corp., 933 F.3d 918 (8th Cir. 2019)

- 8th Circuit ruled that the reorganization plan did not violate the equal treatment rule of § 1123(a)(4).
- The right to participate in the private placement was not "treatment for" a claim. Rather, it was consideration for valuable new commitments from the creditors that chose to participate.
- 8th Circuit agreed with cases from other circuits that held that "a reorganization plan may treat one set of claim holders more favorably than another so long as the treatment is not for the claim but for distinct, legitimate rights or contributions from the favored group separate from the claim."
- Indenture Trustees can find comfort in *Peabody* that disparate treatment among noteholders could be justified so long as the disparate treatment is not on account of a holder's status as a noteholder.

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Limitations Upon Default: Direction from Holders, Personal Claims vs. Noteholder Claims

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Overview

Limitations Upon Default

- Model Indenture Provisions, ABA Revised Model Simplified Indenture (2000)
- Form Direction Letter

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Model Indenture Provisions

Key Provisions:

- Events of Default, Section 6.01
- Acceleration, Section 6.02
- Control by Majority, Section 6.05
- Rights of Holders to Receive Payment, Section 6.07
- Collection Suits by the Indenture Trustee
- Duties of Indenture Trustees, Section 7.01
- Rights of Indenture Trustees, Section 7.02
- Compensation and Indemnity, Section 7.07

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Section 6.01. Events of Default

An "Event of Default" occurs if:

(1) the Company fails to pay interest on any Security when the same becomes due and payable and such failure continues for a period of [30] days;

(2) the Company fails to pay the Principal [or premium/interest] of any Security when the same becomes due and payable at maturity, upon redemption or otherwise;

(3) the Company fails to comply with any of its other agreements in the Securities or this Indenture and such failure continues for the period and after the notice specified below;

(4) the Company pursuant to or within the meaning of any Bankruptcy Law:

(A) commences a voluntary case,

(B) consents to the entry of an order for relief against it in an involuntary case,

(C) consents to the appointment of a Custodian of it or for all or substantially all of its property,

(D) makes a general assignment for the benefit of its creditors; **or**

(5) a court of competent jurisdiction enters an order or decree under any Bankruptcy Law that:

(A) is for relief against the Company in an involuntary case,

(B) appoints a Custodian of the Company or for all or substantially all of its property, **or**

(C) orders the liquidation of the Company, and the order or decree remains unstayed and in effect for 60 days.

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Section 6.02. Acceleration

If an Event of Default occurs and is continuing, the Trustee by notice to the Company, or the Holders of at least 25% in Principal amount of the Securities by notice to the Company and the Trustee, may declare the Principal of and accrued and unpaid interest on all the Securities to be due and payable. Upon such declaration the Principal and interest shall be due and payable immediately.

The Holders of a majority in Principal amount of the Securities by notice to the Company and the Trustee may rescind an acceleration and its consequences if the rescission would not conflict with any judgment or decree and if all existing Events of Default have been cured or waived except nonpayment of Principal or interest that has become due solely because of the acceleration.

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Section 6.05. Control by Majority

The Holders of a majority in Principal amount of the Securities may direct the time, method and place of conducting any proceeding for any remedy available to the Trustee or exercising any trust or power conferred on the Trustee. However, the Trustee may refuse to follow any direction that conflicts with law or this Indenture, is unduly prejudicial to the rights of other Securityholders, or would involve the Trustee in personal liability or expense for which the Trustee has not received a satisfactory indemnity.

Consider also including:

- "Prior to taking any action under this Indenture, the Trustee will be entitled to indemnification satisfactory to it in its sole discretion against all losses and expenses caused by taking or not taking such action."

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Section 6.03. Other Remedies

If an Event of Default occurs and is continuing, the Trustee may pursue any available remedy to collect the payment of Principal or interest on the Securities or to enforce the performance of any provision of the Securities or this Indenture.

The Trustee may maintain a proceeding even if it does not possess any of the Securities or does not produce any of them in the proceeding. A delay or omission by the Trustee or any Securityholder in exercising any right or remedy accruing upon an Event of Default shall not impair the right or remedy or constitute a waiver of or acquiescence in the Event of Default. All remedies are cumulative to the extent permitted by law.

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Collection Suit by Trustee

While Section 6.03 (Other Remedies) of the Model Indenture empowers the Trustee to pursue "any available remedy to collect the payment of Principle or Interest", also consider also including a provision expressly providing the Trustee with the power to bring collection suits:

Collection Suit by Trustee. If an Event of Default specified in Section 6.01(i) or (ii) hereof occurs and is continuing, the Trustee is authorized to recover judgment in its own name and as trustee of an express trust against the Company for the whole amount of principal of, premium, if any, and interest remaining unpaid on the Securities and interest on overdue principal and, to the extent lawful, interest and such further amount as shall be sufficient to cover the costs and expenses of collection, including the reasonable compensation, expenses, disbursements and advances of the Trustee, its agents and counsel.

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Section 7.01. Duties of Trustee

(a) If an Event of Default has occurred and is continuing, the Trustee shall exercise such of the rights and powers vested in it by this Indenture, and use the same degree of care and skill in their exercise, as a prudent person would exercise or use under the circumstances in the conduct of its own affairs.

(b) Except during the continuance of an Event of Default:

(1) The Trustee need perform only those duties that are specifically set forth in this Indenture and no others.

(2) In the absence of bad faith on its part, the Trustee may conclusively rely, as to the truth of the statements and the correctness of the opinions expressed therein, upon certificates or opinions furnished to the Trustee and conforming to the requirements of this Indenture. However, the Trustee shall examine the certificates and opinions to determine whether or not they conform to the requirements of this Indenture.

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Section 7.02. Rights of Trustee (Cont.)

Additional Rights of the Trustee to consider including:

- None of the provisions of this Indenture shall require the Trustee to expend or risk its own funds or otherwise to incur any liability, financial or otherwise, in the performance of any of its duties hereunder, or in the exercise of any of its rights or powers if it shall have reasonable grounds for believing that repayment of such funds or indemnity satisfactory to it against such risk or liability is not assured to it.
- The rights, privileges, protections, immunities and benefits given to the Trustee, including, without limitation, its right to be indemnified, are extended to, and shall be enforceable by, the Trustee in each of its capacities hereunder, and each agent, custodian and other Person employed to act hereunder.

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Form Direction Letter

Structure overview:

- Identify relevant notes
- Factual background
- Identify basis for Holders to direct Trustee to exercise remedies
- Describing specific claims vs. general default
- Steps taken to date
- Instruction to Indenture Trustee
- Indemnification
- Payment
- Miscellaneous provisions

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Default:

- Identify:
  - the default(s);
  - background facts relevant to the default(s);
- Defaults may be general or more specific (i.e. a Bankruptcy default, or Fundamental Change default)

General Default

Directing Holders identified a number of concerns arising from IPO that resulted in the dilution of the equity of the obligor of the notes. The Directing Holders believe that the Company's ability to satisfy the Notes in full at their Maturity in [date] has been impaired.

Bankruptcy Default:

On [date], Company (the "Debtor") filed a voluntary petition for relief under chapter 11 of title 11 of the United States Code, 11 U.S.C. §§ 101, *et seq.*, in the United States Bankruptcy Court for the District of [Sate]. The Debtor's bankruptcy case (the "Bankruptcy Case") will be administered under Case No. 20-2007. Filing the petition constitutes an Event of Default under Section 6.01 of the Indenture.

Fundamental Change Default:

On [date], Company announced that it had entered into a sale of substantially all of its equipment and intellectual property with [Purchaser] (the "Transaction").

The Directing Holders believe that the Transaction constitutes a Fundamental Change (as defined under [Section] giving rise to obligations under the Indenture for Company to offer within 20 days of the closing of the Transaction to repurchase the Notes. The Company's failure to make such an offer constituted an immediate Event of Default, providing (among other rights and remedies) either the Trustee or the holders of 25% or more in aggregate principal of the Notes the right to declare the principal of, and accrued and unpaid interest on, all the Notes to be due and payable.

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Direction Paragraphs:

- Provide instruction to Indenture Trustee on the acts to be taken.
- Reserve the right to provide future direction.
- The instruction may, among other things, direct the indenture trustee to:
  - hire special counsel;
  - commence litigation;
  - enter settlement regarding identified claims; and
  - accelerate outstanding notes
- *Must ensure direction does not include personal claims for holders*

[...]

In accordance with [Section] of the Base Indenture, the Directing Holders hereby request and direct the Trustee to (a) retain [Litigation Counsel] as special litigation counsel to the Trustee on the terms set forth on Schedule 1 hereto, together with such other and further terms as may be agreed to in writing by the Directing Holders, the Trustee, and the Litigation Counsel, respectively in in accordance with the terms of the applicable engagement letter (the "Litigation Counsel Terms") and (b) authorize Litigation Counsel to commence suit in the name of the Trustee to prosecute the claims set forth in the **form of complaint attached hereto as Exhibit B**. Subject to the rights, powers and duties of the Trustee under the Indenture and applicable law, the Directing Holders may provide future directions to the Trustee (including with respect to the foregoing) through written instruction, including via email without the need for further former direction letter.

The Trustee is hereby instructed and directed to carry out each of the above directions (collectively, the "Direction").

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Fees, Expenses and Indemnification Paragraphs:

- Source of Payment Paragraphs
  - Provide for source of payment to cover Trustee's fees and expenses.
  - Source may be from either distributions from the trust or bankruptcy estate, payment from holders, or advance payments

Liability Among Holders:

- Provide for several liability of Directing Holders, as determined by each Directing Holder's pro rata share of the principal amount of the Notes.

Subrogation to Indenture Trustee:

- Subrogate the Directing Holders to the Indenture Trustee

Indemnity terminates on earlier of:

- final payment/distribution to Holders and/or the Trustee on account of the Notes; or the release of the Trustee and other Indemnified Persons.

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Paragraph Concerning Assignment of Notes After Direction

- Provide that Directing Holders can assign their Notes after issuing a direction letter, that Directing Holder's indemnity and professional fee obligations remain with the Directing Holder and are not assigned, unless:
  - written notice of the assignment is provided by the original Directing Holder; and
  - the assignee of the Notes agrees in writing to be bound by the terms of the direction letter.
- Once these conditions are met, the assignee becomes a Directing Holder.

[...]

Each Directing Holder may assign or transfer any of its Notes; provided, however, that such Directing Holder's obligations with respect to the Indemnity and Professional Fees shall continue unaffected by such assignment or transfer unless, upon written notice to the Trustee after such assignment or transfer, the assignee or transferee of such Notes agrees in writing to be bound by the terms hereof (including, without limitation, with respect to the Indemnity and the Professional Fees) and otherwise to become a "Directing Holder."

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Questions?

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Indenture Trustee Remedial Standing Prior to Default

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Indenture trustees' pre-default rights and duties

- **"Indenture" defined:** An indenture is a written agreement that bestows legal title of securities in the indenture trustee, whose job is to protect the interests of individual holders whose interests may be diverse.
- The rights, duties and obligations of an indenture trustee are defined by the terms of the indenture.
- **Indenture trustee's pre-default duties:** An indenture trustee's duties, pre-default, are typically ministerial in nature, such as distributing money, monitoring covenants, keeping a record of registered bondholders and, in the case of secured indebtedness, holding collateral and taking steps to maintain perfection of liens.
- The indenture trustee must exercise those duties with due care and avoid conflicts of interest.
- Courts are reluctant to infer any pre-default rights and duties beyond what is set forth in the indenture. *See, e.g.*, *Hazard v. Chase Nat'l Bank of City of New York*, 287 N.Y.S. 541, 570 (Sup. Ct. N.Y. 1936) ("The trustee under a corporate indenture . . . Has his rights and duties defined, not by the fiduciary relationship, but exclusively by the terms of the agreement.")

Indenture trustee's post-default rights and duties

- What constitutes an "Event of Default" is defined in the indenture. Events of Default typically include missed payments, covenant violations and bankruptcy filings.
- **Additional rights post-default:** The occurrence of an Event of Default affords an indenture trustee additional rights to take action, including the following:
  - Accelerating indebtedness;
  - Commencing litigation to collect indebtedness and enforce provisions of the indenture and related notes;
  - Commencing litigation to enjoin transactions restricted by the terms of the indenture (incurring indebtedness, issuing dividends, selling assets, etc.); and
  - Seeking declaratory judgment of default.
- **Change of duties post-default:** After the occurrence of an Event of Default, the indenture trustee must exercise care and skills as a fiduciary, though its duties and obligations remain circumscribed by the rights afforded to the indenture trustee under the indenture.

Can an indenture trustee sue absent an Event of Default?

Issue: At times, an indenture trustee may be directed by a requisite number of its holders to commence litigation in the absence of an Event of Default, often in hopes of stopping or avoiding/unwinding transactions that are detrimental to holders. Whether the indenture trustee has standing to commence this type of litigation is often disputed.

This issue is increasingly important because aggressive holders are seeking more frequently to direct indenture trustees to take action even prior to the occurrence of an Event of Default.

A recent decision from the Supreme Court of New York involving Neiman Marcus addressed that issue head-on. The answer in that case was that the indenture trustee had no standing to sue because the indenture did not expressly provide remedial rights to the indenture trustee pre-default.

UMB Bank N.A. v. Neiman Marcus Group

UMB Bank, N.A. v. Neiman Marcus Group, Inc., 68 Misc. 3d 977 (N.Y. Sup. Ct. 2020).

- Neiman Marcus acquired luxury retailer, MyTheresa, in 2014. The brand outperformed the rest of the company's operations and was its most valuable asset.
- In 2017, in an apparent effort to shield MyTherersa from Neiman Marcus's creditors, Neiman Marcus changed the designation of the entities that owned MyTheresa to unrestricted subsidiaries. The indenture at issue permitted the transfer of the equity of unrestricted subsidiaries, and in 2018 Neiman Marcus conveyed the MyTheresa subsidiaries to its parent company (an affiliate of Ares) for no consideration. Neiman Marcus was insolvent at the time of the transfer, which stripped substantial value from the company.
- In 2019, Neiman Marcus received ratification of the transaction from a majority of bondholders in exchange for new notes with a partial lien on the stock of MyTheresa and some preferred equity in the parent corporation. As part of that transaction, which was approved by 90% of the holders, all prior defaults were waived.
- At the direction of Marble Ridge, which was a non-consenting holder, UMB Bank sued Neiman Marcus and Ares under theories of actual and constructive fraudulent transfer.

UMB Bank, N.A. v. Neiman Marcus Group

Neiman Marcus and Ares moved to dismiss the complaint on the grounds that UMB Bank lacked standing, since there was no continuing default. Neiman Marcus and Ares relied on Sections 6.2 and 6.3 of the indenture, which conditioned UMB's right to take actions on the existence of an event of default.

- 6.2 Acceleration
  - "*If an Event of Default occurs and is continuing*, either the Trustee, by written notice to the Issuers . . . may declare the Contractual Performance Amount to be due and payable. Upon such a declaration, such Contractual Performance Amount will be due and payable immediately."
- 6.3 Other Remedies
  - "*If an Event of Default occurs and is continuing*, the Trustee may pursue any available remedy (including a lawsuit for breach of contract) to collect the payment of principal of or interest on the Notes or to enforce the performance of any provision of the Notes, this Indenture (including sums owed to the Trustee, the Agents and their agents and counsel) and the Guarantees."

Among other cases, Neiman Marcus and Ares relied on *U.S. Bank N.A. v. U.S. Timberlands Klamath Falls, LLC,* 2004 WL 1699057 (Del. Ch. 2004). In that case, the trustee asserted claims for declaratory relief, breach of fiduciary duty, fraudulent conveyance, and fraud, without alleging the existence of any default. The Delaware Court of Chancery dismissed the trustee's complaint for lack of standing, since no default existed under the indenture. Notably, a default was later called, and the complaint was re-filed and survived a standing challenge.

UMB Bank, N.A. v. Neiman Marcus Group

UMB argued, in response, that Section 6.5 of the indenture authorized the trustee to sue regardless of whether there was an event of default. That section provides:

- "The Holders of a majority in principal amount of the *then outstanding Notes* may direct the time, method and place of conducting any proceeding *for any remedy available to the Trustee* or of exercising any trust or power conferred on the Trustee, *provided, however*, that the holders of a majority in aggregate principal amount of the Third Lien Notes voting, acting and being treated together as a single series in the aggregate shall have the right to direct the time, method, and place of conducting any proceeding for any remedy available to the Notes Collateral Agent or of exercising any trust or power conferred on the Notes Collateral Agent or of directing the Notes Collateral Agent with respect to any actions under the Security Documents."

UMB further argued that because it had been directed by the majority of outstanding noteholders to pursue the case, Sections 6.2 (acceleration), 6.3 (other remedies to collect payment of principal) and 6.6 (no-action clause) – all of which are predicated on the occurrence and continuation of an event of default – were inapplicable.

UMB argued that *Timberland* was distinguishable because it did not address the comparable provision to Section 6.5 of the Neiman Marcus indenture and argued that the construction urged by Neiman Marcus/Ares is commercially reasonable.

Finally, UMB argued that depriving the indenture trustee of standing would gut fraudulent transfer law, since neither the trustee (because of Sections 6.2 and 6.3) nor the holders (because of 6.6) would have the ability to bring suit where there is no pending default.

The Court dismisses for lack of standing

The New York Supreme Court, in a decision from July 2020, agreed with Neiman Marcus and Ares.

- The Court noted that the issue was one of first impression in New York and dismissed the case on the basis that UMB lacked standing.
- The Court further ruled that Section 6.5 "is not an independent source of authority for the Trustee to act." Rather, that section "simply details how Noteholders may direct the Trustee to conduct 'any proceeding for any remedy' that is already 'available to' the Trustee and powers that are 'conferred on' the Trustee" under the express terms of the indenture.
- Those remedies arise under Section 6.3, according to the Court, and they were unavailable to UMB because there was no default: "Section 6.5 only allows Noteholders to direct the Trustee with regard to 'any remedy' that the Indentures make available to it, and the Indentures only make the remedy of asserting tort claims available if 'an Event of Default occurs and is continuing.'"
- Read as a whole, the Court ruled that "it is clear that the Indentures only permit Trustee actions after an Event of Default" and that no pre-default suit is contemplated.
- The Court found that, since this dispute involved sophisticated parties, this result is consistent with public policy of enforcing contracts in a "predictable manner consistent with their clear terms." "Any negative market consequences can be easily remedied. Deal documents can provide trustees with broader pre-default rights, and the market can price deals accordingly."

Big Picture Considerations

Going forward, there are several considerations for both holders and indenture trustees in situations similar to *Neiman Marcus.*

- Holders may wish to negotiate more favorable indenture provisions upfront – potentially looser no action clauses and express provisions permitting indenture trustees to sue in certain instances absent default. This may be hard to do, since investors rarely have much say in the drafting of indentures for healthy issuers, and it's likely to be very hard to bargain for this right in an ongoing deal.
- Be aware of the indenture trustee's rights absent a default. Certainty regarding these rights is important both for trustees, who need to make decisions on how to act, and holders, who need to underwrite their investments.
- Be diligent about investigating and calling defaults. Had the indenture trustee been directed to sue on the MyTheresa transaction before the default was waived, the result likely would have been different.

Considerations for Indenture Trustees

Indenture trustees must understand the scope of their pre-default rights. Aggressive investors increasingly are making pre-default demands, but commencing suit without clear-cut standing imposes risk.

- The indenture trustee could potentially be in breach of the indenture.
- Commencing litigation pre-default in absence of clear-cut standing may establish an informal precedent that the indenture trustee will be willing to do so again in future deals.

There are several ways for an indenture trustee to mitigate risk.

- Lean on advice of counsel. Not only will the indenture trustee be well informed of its rights and options, but exculpatory language in most indentures will reduce liability for indenture trustees acting in reliance on advice of counsel.
- Consider seeking judicial guidance. Options may include seeking trust instruction, including under Minn. Stat. §501C.0808, Subd. 7 (submission to court jurisdiction for a trust direction), or seeking declaratory action to determine the indenture trustee's right to take action. This action may be coupled with a request for injunctive and/or equitable relief.
- If the decision is made to proceed with pre-default litigation, the indenture trustee should obtain a clear direction and bulletproof indemnity from the directing holders.

Faculty

Daniel B. Besikof is a partner with Loeb & Loeb LLP in New York and represents a wide variety of stakeholders in chapter 11 bankruptcy proceedings, corporate restructurings and liquidations, including debtors, lenders, administrative and collateral agents, indenture trustees, lessors, lessees, licensors, licensees, trade creditors, committees, investors and chapter 7 and liquidating trustees. His practice also focuses on representing defendants in bankruptcy-related litigation, including avoidance actions. Mr. Besikof advises clients in commercial litigation matters and has represented lenders and agents in the negotiation and documentation of secured and unsecured credit facilities involving term loans, revolving lines of credit and letters of credit. Prior to joining Loeb & Loeb LLP, he was an associate at Luskin, Stern & Eisler LLP. Mr. Besikof has been named a "New York Metro Rising Star" in Bankruptcy & Creditor/Debtor Rights by Thomson Reuters (2011-15 editions) and is rated AV-Preeminent by Martindale-Hubbell. He is a member of the Turnaround Management Association, ABI, the Association of the Bar of the City of New York and the Barry L. Zaretsky Roundtable Steering Committee Mr. Besikof is admitted to the Bars of New York and Minnesota, and before the U.S. District Courts for the Southern and Eastern Districts of New York, as well as the U.S. Supreme Court. He received his B.S. in 2000 from the University of Wisconsin and his J.D. in 2004 from Brooklyn Law School, where he received the *American Bankruptcy Law Journal* Student Prize. Following law schoool, he was a judicial jntern for Hon. Elizabeth Stong of the U.S. Bankruptcy Court for the Eastern District of New York.

Beth M. Brownstein is a partner in Arent Fox LLP's Financial Restructuring and Bankruptcy group in the firm's New York office. She represents committees of unsecured creditors and retired employees, secured creditors, indenture trustees, bondholder and noteholder groups, DIP lenders and other entities in chapter 11 proceedings and out-of-court restructurings, including in indenture trustee enforcement litigation. Over the last several years, Ms. Brownstein has played a lead role in some of the most significant corporate reorganizations in the U.S., including the chapter 11 cases of Caesars Entertainment Operating Co. Inc., Claires Stores Inc., Cenveo Inc., Vantage Drilling Co., Cengage Learning Inc. and Eastman Kodak Company. She also represented indenture trustees in enforcement litigation involving Algeco Scottsman Global Financial PLC, Merrimack Pharmaceuticals Inc. and BankAtlantic Bancorp, Inc. Immediately prior to joining Arent Fox, Ms. Brownstein clerked for Hon. Allan L. Gropper and Hon. Prudence Carter Beatty, both U.S. Bankruptcy Judges for the Southern District of New York. She received her B.B.A. with honors from the University of Michigan, her M.B.A. *cum laude* from the University of Miami and her J.D. *cum laude* from the University of Miami School of Law.

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James J. McGinley is a senior managing director at Ankura Consulting Group, LLC in Fairfield, N.Y., and has far-reaching experience in relationship-management, corporate trusts and restructurings in which he has represented bondholders in distressed situations and chapter 11 cases. He has developed several business lines for global financial institutions and served on many of the most significant unsecured creditors' committees in recent history. Mr. McGinley is a member of ABI, the Loan Syndications & Trading Association and the Turnaround Management Association. He received his B.S. in business management from St. John's University and is a graduate of the Xerox International Center for Sales Training and Management Development.