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Recent Confirmation Developments

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Hon. Christopher S. Sontchi
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CONCURRENT SESSION

2021

ABI NEW YORK CONFERENCE

Chapter 11 Plan Confirmation Issues

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Panelists

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Discussion: Hot Topics on Confirmation Related Issues

1. Plan Voting
   a. Recent Developments in Claims Classification
2. Plan Funding
   a. Recent Issues Regarding Right Offerings
3. Exiting Chapter 11
   a. Feasibility and the Issue of Recidivism
   b. Alternatives to Confirmation — Structured Dismissals

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Plan Voting

Recent Developments in Claims Classification

- Under section 1122(a) of the Bankruptcy Code, "a plan may place a claim . . . in a particular class only if such claim . . . is substantially similar to the other claims . . . of such class."
- Section 1122(a) does not ***require***, however, that substantially similar claims be placed in the same class.
  - "Plan proponents . . . have considerably broad discretion in deciding how to classify claims." *In re W.R. Grace & Co.*, 475 B.R. 34, 109–10 (D. Del. 2012).
- A plan may not separately classify similar claims to gerrymander the plan vote, i.e., to create an "impaired consenting class."
- A plan may separately classify similar claims so long as there is a reasonable, non-arbitrary basis for the separate classification.
  - For example, trade creditors may be classified separately from other general unsecured creditors where trade creditors are "essential" to the reorganized debtor's business and a necessary relationship to maintain for a successful reorganization.
- Recent case law has shown the extent to which debtors may separately classify similar claims and still satisfy the requirements of section 1122(a).

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Plan Voting (cont'd)

***In re Novinda Corp.*, 585 B.R. 145 (10th Cir. B.A.P. (Colo.) 2018)**

- Prior to filing for chapter 11, the debtor "developed and produced a product to remove mercury from coal ash waste generated by coal-fired power plants" (the "Product"). *Id*. at 149. The debtor financed the Product development and production through venture capital funding, secured loans, and unsecured loans.
- By January 2015, three creditors (collectively, the "Creditors"), including Colloid Environmental Technologies Company, LLC ("Colloid"), had invested nearly $7.2 million in the debtor's business.
  - As a condition of the Creditors' continued investment, Colloid became the exclusive manufacturer of the Product and received payment from the debtor for its manufacturing costs and an agreed-upon profit.
  - The debtor also agreed to pay Colloid for increased manufacturing costs upon 30 days' notice.
- Subsequently, Colloid imposed on the debtor a significant increase in manufacturing costs and a change in its payment terms. Two months later, the debtor filed a chapter 11 bankruptcy petition.

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Plan Voting (cont'd)

***In re Novinda Corp.*, 585 B.R. 145 (10th Cir. B.A.P. (Colo.) 2018)** (cont'd)

- By the time the debtor filed for chapter 11, the Creditors owned 18% of the debtor. Certain investment funds (the "Funds") had also made substantial equity infusions in the debtor prior to the debtor's chapter 11 filing.
- Following its chapter 11 filing, the debtor alleged that Colloid fabricated the manufacturing cost increase to drive the debtor out of business and usurp its business.
- The debtor contended that it has claims for (i) breach of contract, (ii) aiding and abetting a breach of fiduciary duty, and (iii) fraud (the "Litigation Claims").
- While in chapter 11, the debtor sold substantially all of its assets to the Funds and implemented a chapter 11 liquidation plan (the "Plan"). The only assets that were not sold were the Litigation Claims, which were left for the plan administrator to pursue.
- The Plan would be funded by (i) the Funds contributing $400,000 to the debtor's estate and (ii) any recovery from the debtor's Litigation Claims.

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Plan Voting (cont'd)

***In re Novinda Corp.*, 585 B.R. 145 (10th Cir. B.A.P. (Colo.) 2018)** (cont'd)

- The debtor structured its Plan into 12 classes. Unsecured claims were divided into four separate classes:
  - **Class 1** consisted of eight priority wage claims of former employees for accrued vacation leave pursuant to section 507(a)(4). The debtor was reasonably certain that it would have an impaired accepting class from the holders of these claims, which were to be paid in full through four quarterly payments but deemed impaired because holders would not receive interest on the claims' deferred payment.
  - **Class 3** consisted of unsecured trade claims (other than the Creditors) and the Funds' unsecured claims to be paid pro rata along with Class 4 from any remaining funds left in the estate after payment of Classes 1 and 2 and satisfaction of estate expenses. The Funds' claims in this class were subordinated to the other Class 3 claims. Once all non-Funds' claims were satisfied, the Funds would receive pro rata distributions along with Class 4.
  - **Class 4** consisted of the Creditors' unsecured claims, which were to be paid a pro rata distribution as determined by the aggregate amount of Classes 3 and 4, but would not benefit from the Funds' voluntary subordination to the other claims in Class 3.
  - **Class 5** consisted of nine unsecured claims of $1000 or less, which would be paid at 70% shortly after the effective date of the Plan. Any Class 3 or 4 claims could have elected to reduce their claim to $1000 and receive treatment pursuant to Class 5.

Plan Voting (cont'd)

***In re Novinda Corp.*, 585 B.R. 145 (10th Cir. B.A.P. (Colo.) 2018)** (cont'd)

- The Creditors objected to confirmation of the Plan, arguing, *inter alia*, that classes 3, 4, and 5 were unfairly discriminatory and were improperly classified for gerrymandering purposes.
- The Bankruptcy Court overruled their objections and confirmed the plan. The Creditors appealed both the order overruling their objections and the confirmation order.
- On appeal, the 10th Circuit BAP affirmed and found that Classes 3, 4, and 5 were not improperly classified for the following reasons.

Plan Voting (cont'd)

***In re Novinda Corp.*, 585 B.R. 145 (10th Cir. B.A.P. (Colo.) 2018)** (cont'd)

- ***First***, Classes 3, 4, and 5 were not separately classified to gerrymander the vote on the plan because Class 1 satisfied the impaired consenting class requirement. Moreover, it was both necessary and appropriate to classify Class 1 apart from Classes 3, 4, and 5.
- ***Second***, while the Bankruptcy Court acknowledged that nine creditors is a small number for a voting class, it found that the creation of Class 5 was an appropriate "administrative convenience" class as authorized by section 1122(b) of the Bankruptcy Code.
- ***Third***, there was a reasonable basis to classify Classes 3 and 4 separately where (a) evidence showed that holders in Class 4 would likely cast their vote for "ulterior motives"; and (b) by separately classifying the Creditors' claims into Class 4, the Debtor was able to preserve any claims it may have for equitable subordination of those claims.
- ***Finally***, in concluding that there was no unfair discrimination against the Creditors' claims, the Court clarified that the Funds' agreement to receive a less favorable treatment by subordinating its claim is permitted by Section 1123(a)(4). While this resulted in more favorable treatment to other creditors in the class, such an agreement does not necessarily implicate Section 1129(b)(1)'s discrimination provision.

Plan Funding

Recent Issues Regarding Rights Offerings

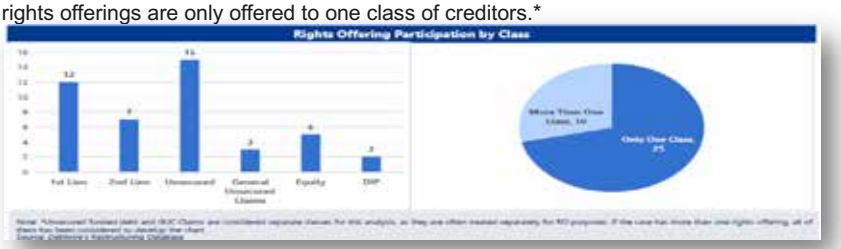
- The issuance of new debt and/or equity pursuant to a rights offering is a useful way to ensure that a reorganized entity will have sufficient liquidity upon emergence.
- In 2020, approximately 30 chapter 11 cases included a rights offering component in their reorganization.*
  - These rights offerings raised approximately $19.8 billion.*
- Through a rights offering, a debtor offers creditors and/or equity security holders the right to purchase equity in the reorganized entity, usually at a discount to the assumed value of the reorganized entity.
  - Out of the ten companies in 2020 that offered rights at a discount to plan value, six of those offered a discount of 35%.*
- A key component of a rights offering is a backstop commitment, which is often committed by a small subset of self-selected stakeholders or third parties. The "backstop parties" agree to purchase any unsubscribed shares to guarantee that sufficient capital is raised through the rights offering.
  - In exchange for providing the backstop commitment, these backstop parties typically receive a separate commitment fee and/or break-up fee, which is often necessary to secure their commitment.
  - In 2020, the weighted average backstop fee premium was approximately 7.2% of the dollar amount of the rights offering.*

*Source: Debtwire, Transaction Trends Overview: 2020 Rights Offerings, April 2021

Plan Funding (cont'd)

Recent Issues Regarding Rights Offerings (cont'd) – Rights Offering Participation

- Typically, rights offerings are only offered to one class of creditors.*



- Recently, courts have focused on the extent of participation made available to similarly situated creditors in rights offerings, which has prompted some interesting unsettled questions:
  - How should courts be evaluating who has the right to participate and to what extent?
  - Is there a guiding legal principle that courts should adhere to when evaluating rights offerings?
  - Should rights offerings be evaluated for purposes of plan treatment or as sources of exit financing?
  - Does it matter whether there is a separate backstop fee or discount being made available to the committed financing sources?

*Source: Debtwire, Transaction Trends Overview: 2020 Rights Offerings, April 2021

Plan Funding (cont'd)

Exit Financing: *In re Peabody Energy Corp.*, 582 B.R. 771 (Bankr. E.D. Mo. 2017)

- In *Peabody*, the debtors' proposed rights offering was evaluated as a form of exit financing.
  - Through their plan of reorganization, the debtors proposed to raise $750 million through a private placement of preferred equity sold at a 35% discount, and raise another $750 million through a rights offering exempted from registration under section 1145 of the Bankruptcy Code, sold at a 45% discount. *Id.* at 776.
  - The Bankruptcy Court approved this plan of reorganization and its related transactions over objections from the Ad Hoc Committee and others. *See* Confirmation Order, Docket No. 2763.
  - The Ad Hoc Committee appealed the confirmation order and argued that the 35% discount on equity sold under the private placement agreement was an additional benefit which should have been offered on equal terms to all creditors of those classes pursuant to section 1123(a)(4), which requires a plan to "provide the same treatment for each claim or interest of a particular class," unless a holder of a claim or interest agrees to lesser treatment.
  - It also argued the plan was not "proposed in good faith" as required by section 1129(a)(3).

Plan Funding (cont'd)

Exit Financing: ***In re Peabody Energy Corp.*****, 582 B.R. 771 (Bankr. E.D. Mo. 2017)** (cont'd)

- The District Court affirmed the Bankruptcy Court's decision and found that the 35% discount to certain creditors was "not merely a benefit, but also an obligation and a commitment to refrain from trading and to purchase a substantial amount of equity with the attendant risk of substantial loss."
- The courts also found that the plan was proposed in "good faith" by the debtors, who worked to maximize creditor recovery and satisfy a wide variety of stakeholders, ultimately achieving "overwhelming" support by creditors other than the Ad Hoc Committee.

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Plan Funding (cont'd)

Plan Treatment: ***In re Pacific Drilling*****, No. 17-13193 (MEW) (Bankr. S.D.N.Y. 2017)**

- In comparison, in *Pacific Drilling*, Judge Wiles focused on the plan treatment aspect of an uncontested rights offering.
- Here, the debtors sought approval of an equity commitment in which holders of three classes of under-secured debt would have the right to purchase their allocated portion of a total $500 million of equity in the reorganized debtor, all at the same 46.9% discount to plan value. *See* Docket No. 535.
  - Holders of unsecured claims had the right to purchase $350 million of equity in the reorganized company at a 46.9% discount to plan value through a rights offering; and
  - An ad hoc group of lenders and noteholders (the "Ad Hoc Group"), and existing majority shareholder Quantum Pacific Group, had the right to purchase $100 million and $50 million of equity, respectively, at the same discount in a private placement.
    - The Ad Hoc Group would also backstop the rights offering in exchange for the $100 million private placement and a fee of 8% of the full $500 million equity raise, payable in equity of the reorganized debtor.
- Judge Wiles declined to approve this rights offering, ruling that (a) "no legitimate justification had been offered for the proposed separate private placement to the Ad Hoc Group," and (b) the debtors had "failed to show the reasonableness of the proposed backstop fee." *See* Docket No. 631, at 6.

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Plan Funding (cont'd)

Plan Treatment: *In re Pacific Drilling*, No. 17-13193 (MEW) (Bankr. S.D.N.Y. 2017) (cont'd)

- A week later, the debtors presented a further revised rights offering and backstop committee fee that eliminated the Ad Hoc Group's $100 million private placement and revised the 8% backstop fee so that it would apply only to the uncommitted portion of the rights offering and a 5% fee would apply to the remainder. *See* Docket No. 607.
- Ultimately, Judge Wiles confirmed this uncontested rights offering. *See* Docket No. 622.
- In his remarks, Judge Wiles expressed "hope that in the future when these structures are presented, parties will explore in more detail the issues and concerns that I have raised." Sep. 25, 2018, Hr'g Tr., Docket No. 634, at 29.
  - Judge Wiles was very concerned with the backstop fee, which he considered "an extra payment and an extra recovery rather than a real standalone financing term." *Id*. at 17, 28.

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Plan Funding (cont'd)

Plan Treatment: *In re Garrett Motion Inc.*, No. 20-12212 (MEW) (Bankr. S.D.N.Y. 2020)

- More recently, in *Garrett*, Judge Wiles expressed similar concerns with a proposed rights offering and backstop commitment agreement proposed by the debtors and a majority of their stakeholders.
- In January 2021, after a contested auction process, the debtors selected a proposed plan sponsored by a group of third-party investors (the "Plan Sponsors") and a group that comprised approximately 51% of the debtors' shareholders (the "Additional Investors"). *See* Docket No. 717.
- The plan included a direct investment opportunity for the Plan Sponsors and Additional Investors and a rights offering component to all shareholders, which collectively underwent a variety of modifications during the course of the case to address certain comments made by the debtors and Judge Wiles at various hearings.
  - The original plan proposed a capital raise of $1.15 billion of Series A Preferred (with a 12% dividend payable in cash or in-kind at the reorganized debtors' option that was convertible into common stock at a conversion price of $3.50 per common share).
  - The original allocation of the Series A Preferred backstop was split between the Plan Sponsors ($690.8 million) and the Additional Investors ($360 million).
  - Holders of common stock would be reinstated and receive subscription rights to purchase up to $100 million of Series A Preferred.

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Plan Funding (cont'd)

Plan Treatment: *In re Garrett Motion Inc.*, No. 20-12212 (MEW) (Bankr. S.D.N.Y. 2020) (cont'd)

- The revised plan, selected by the debtors as the winning bid, provided for the following:
  - $1.25 billion of Series A Preferred (with a 11% dividend payable in cash or in-kind at the reorganized debtors' option that was convertible into common stock at a market-based price rather than a set $3.50);
    - $690.8 million was allocated to the Plan Sponsors; $360 million was allocated to the Additional Investors
  - Subscription rights for holders of common stock increased up to $200 million of Series A Preferred; and
  - Shareholders were also given the option to cash out at $6.25 per share.
- The Equity Committee objected to this plan and proposed rights offering on a number of grounds, including that the proposed plan failed to treat shareholders equally. *See* Docket No. 879.
- Judge Wiles also expressed a number of concerns with the proposed allocation of the investment opportunity that focused on whether the Additional Investors were receiving better treatment than other shareholders because of their blocking position in the class and ability to "lock up" a deal with other stakeholders and/or block a class vote.

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Plan Funding (cont'd)

Plan Treatment: *In re Garrett Motion Inc.*, No. 20-12212 (MEW) (Bankr. S.D.N.Y. 2020) (cont'd)

- In discussing his concerns, Judge Wiles also touched on whether there was really a fair market test for the new money as a part of the auction and whether there was really equal opportunity for parties to submit competing bids in light of the coordination agreement between the majority of the debtors' stakeholders.
- The debtors, parties to the winning bid, and the Equity Committee agreed to mediate to try and address the bankruptcy court's concerns with the rights offering.
- As a result of mediation, the new capital raise was revised to $1,300.8 million allocated as follows:
  - The Plan Sponsors were allocated $668.8 million in Series A Preferred Stock;
  - The rights offering was enlarged to $632 million, fully backstopped by the Plan Sponsors and Additional Investors in exchange for a direct minimum allocation of approximately 8% of the offered shares to the Additional Investors, resulting in up to $270 million of the rights offering being available to shareholders that were not party to the plan support agreement;
  - The conversion price of the Series A Preferred Stock was raised from $3.50 to $5.25; and
  - The cash out election remained.
- Judge Wiles approved this revised rights offering. *See* Docket No. 1015.

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Exiting Chapter 11 — Feasibility and Recidivism

- Section 1129(a)(11) of the Bankruptcy Code requires that a plan be feasible at confirmation; otherwise, the bankruptcy court cannot confirm the plan.
  - Feasibility is often evaluated as a "reasonable assurance" of success upon emergence. *See Kane v. Johns-Manville Corp.*, 843 F.2d 636, 649 (2d Cir. 1988).
- Recently, many companies in the energy and retail space have filed for a second chapter 11 bankruptcy within a few years after emerging from their first chapter 11 proceeding.
  - For example, Paragon, Payless, Gymboree, Halcon, Vanguard, DiTech, and Charming Charlie.
- This has resurrected the question of whether reorganization plans are being approved too easily.
  - Should judges employ independent advisors to analyze feasibility or should judges rely on sophisticated professionals and the adversarial process?

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Exiting Chapter 11 — Feasibility and Recidivism (cont'd)

***In re City of Detroit*, No. 13-53846 (Bankr. E.D. Mich. 2013)**

- In Detroit's chapter 9 proceeding, a few months prior to confirmation, Judge Steven Rhodes *sua sponte* issued an order to show cause why he should not appoint an expert to independently review the feasibility of Detroit's plan. *See* Docket No. 3170.
  - No party objected to this order.
- In early April 2014, Judge Rhodes filed a solicitation for candidates and two weeks later he interviewed five candidates with certain party participation. *See* Docket Nos. 3610 and 4068.
- He appointed Martha Kopacz, whose activities included private discussions with Judge Rhodes, the Detroit mayor, the Detroit emergency manager, Detroit City Council members, most department heads, representatives of the Detroit Institute of Arts, foundations funding the Grand Bargain, lawyers for the pension systems, and others. *See* Docket No. 4215; Transcript at 159-61, Docket No. 7617.
- The duties of the Bankruptcy Court's expert were described as "render[ing] an opinion on the feasibility of the plan of adjustment for the City of Detroit and to render an opinion on the reasonableness of the assumptions that underlie the revenue, expenses, and the plan payments." *See* Transcript at 138, Docket No. 7617; Docket No. 4215.

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Exiting Chapter 11 — Feasibility and Recidivism (cont'd)

***In re City of Detroit*, No. 13-53846 (Bankr. E.D. Mich. 2013)** (cont'd)

- The appointment order provided that, after submitting her expert report, the Bankruptcy Court's expert would be made available for a "consolidated deposition by any interested parties." *See* Docket No. 4215.
- Prior to the confirmation hearing, the Bankruptcy Court's expert submitted a report of over 200 pages explaining why she believed Detroit's plan was feasible and testified at trial. *See* Docket No. 6090.

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Exiting Chapter 11 — Feasibility and Recidivism (cont'd)

Numerous articles have been written regarding the issue of recidivism, discussing its causes and whether it is a matter of concern. Unfortunately, the articles do not provide a uniform, objective baseline for analyzing the issues. A non-comprehensive bibliography is attached hereto as **Appendix A**. To have a constructive dialogue on the subject, it may be helpful to identify some of the important threshold questions:

- Is recidivism a problem in need of a solution, or does it simply represent an iterative process of reorganizing with some risk-taking (in order to provide the possibility of meaningful recoveries) in which some plans work and others fail?
  - Is a 50−60% "success" rate unacceptable?
  - Who is the aggrieved party?
- The "Delaware Issue"
  - Is there an issue about the speed of the case relative to outcomes?
  - Are the larger cases that file in Delaware (and a few other jurisdictions) comparable to cases elsewhere in the country?
- What is the Bankruptcy Court's role in evaluating feasibility?
  - In a fully-consensual plan scenario?
  - Is a non-consensual scenario any different?
  - Is there a difference between a private-sector case and a public sector case?

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Exiting Chapter 11 — Alternatives to Confirmation

- The end-goal of every chapter 11 proceeding is to confirm a plan.
- In circumstances where confirmation is not possible or highly unlikely, the U.S. Trustee often moves to convert the case to chapter 7, which comes with additional administrative burdens.
- For those chapter 11 debtors that are unlikely to confirm, a potential alternative to conversion is a structured dismissal.
- In 2017, the Supreme Court clarified that structured dismissals that provide for distributions cannot violate the absolute priority scheme of the Bankruptcy Code absent the consent of affected creditors. *See Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973 (2017).
- Post *Jevic*, chapter 11 debtors have used structured dismissals to avoid conversion to chapter 7, typically after implementing a 363 sale. *See In re Sunco Liquidation Inc. (Sungevity)*, No. 17-10561 (Bankr. D. Del.).
  - Can structured dismissals be used in retail chapter 11 proceedings as an alternative to chapter 7 conversion post asset sales?
    - Does what administrative creditors want matter?
  - Are there avenues other than a structure dismissal to avoid conversion to chapter 7 when a debtor is unlikely to confirm a chapter 11 plan?

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Exiting Chapter 11 — Alternatives to Confirmation (cont'd)

Potential Conversion: *In re Forever 21*, No. 19-12122 (Bankr. D. Del. 2019)

- In February 2020, the bankruptcy court approved a sale of substantially all of the debtors' assets and certain liabilities for approximately $81 million. *See* Docket No. 927.
- On August 19, 2020, the U.S. Trustee filed a motion to convert the chapter 11 case to chapter 7 for three main reasons. *See* Docket No. 1511. Approximately 2% of holders of administrative claims joined the motion. *See* Docket No. 1529.
  - First, under subsection 1112(b)(4)(A) there was a "continuing loss to or diminution of the estate and the absence of a reasonable likelihood of rehabilitation."
  - Second, under subsection 1112(b)(4)(F), the Debtors had not timely filed certain monthly operating reports.
  - Third, under subsection 1112(b)(4)(K), the Debtors were delinquent in paying $17,625 of U.S. Trustee fees (this point was resolved prior to the hearing).
- The debtors, the unsecured creditors' committee, and approximately 19% of holders of administrative claims opposed the motion. *See* Docket Nos. 1532, 1534-36, 1540, 1543-54, 1564.
- The Bankruptcy Court granted the U.S. Trustee's request. *See* Sept. 16, 2020, Hr'g Tr.

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Exiting Chapter 11 — Alternatives to Confirmation (cont'd)

Potential Conversion: *In re Forever 21*, No. 19-12122 (Bankr. D. Del. 2019) (cont'd)

- Shortly thereafter, the debtors filed a motion to reconsider arguing that while the Bankruptcy Court found that it may be highly unlikely that the debtors will confirm a plan, it also found that there was no continuing loss to the estate since the sale. *See* Docket No. 1590.
- The Bankruptcy Court granted the motion to reconsider. *See* Docket No. 1632.
- The debtors have yet to confirm a chapter 11 plan.
  - In December 2020, the Bankruptcy Court approved an administrative claims settlement. *See* Docket No. 1724.

Exiting Chapter 11 — Alternatives to Confirmation (cont'd)

Structured Dismissal: *The Great Atlantic & Pacific Tea Co., Inc.*, No. 15-23007 (Bankr. D. Del. 2015)

- Recently, on March 22, 2021, the debtors and the unsecured creditors' committee filed a joint motion for an "orderly conclusion" of the debtors chapter 11 cases. *See* Docket No. 4726.
  - Early in the chapter 11 proceedings, the debtors implemented an asset sale for approximately $910 million.
  - Shortly thereafter, the debtors reached a settlement agreement with certain unionized employees and pension plans, which resolved all potential section 1113 and 1114 issues. *See* Docket No. 2868.
  - Post sale and settlement, the debtors continued to pursue confirmation of a chapter 11 plan and emerge from bankruptcy.
  - Unfortunately, the debtors have been unable to achieve confirmation and are now administratively insolvent.
- The parties to the motion did not refer to their request as a "structured dismissal," but noted that to the extent the Bankruptcy Court considered it a structured dismissal their proposed process complies with *Jevic*.
- Pursuant to the motion, the debtors and the creditors' committee sought approval of a settlement that would result in an approximately 20% distribution to administrative claim holders and result in an "orderly" dismissal of the chapter 11 cases pursuant to certain case resolution procedures.

Exiting Chapter 11 — Alternatives to Confirmation (cont'd)

Structured Dismissal: ***The Great Atlantic & Pacific Tea Co., Inc.*****, No. 15-23007 (Bankr. D. Del. 2015)** (cont'd)

- Among other things, the case resolution procedures include:
  - Establishing a wind-down entity to administer the debtors remaining obligations and dismissing the remaining debtor entity cases;
  - Consolidating and administering all remaining matters through the wind-down entity;
    - The wind-down entity will administer the distributions, which adhere to the Bankruptcy Code's priority scheme
    - The wind-down entity will be authorized to resolve claim disputes
  - Leaving a limited automatic stay in place;
  - Enforcing prior orders entered in the chapter 11 proceeding, including releases granted in prior settlements approved by the court; and
  - A limited exculpation provision will be included in the dismissal order.
- On May 11, 2021, Judge Drain approved the structured dismissal over the objections of the U.S. Trustee and McKesson Corp., a member of the unsecured creditors' committee.
  - The U.S. Trustee's main objection was that the structured dismissal allowed the debtors to implement their own "liquidating plan" without adhering to confirmation requirements.

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Appendix A

Bibliography

On the issues of feasibility, recidivism, and a Bankruptcy Court's role, below is a non-exhaustive list of articles:

- Edward I. Altman, *Revisiting the Recidivism – Chapter 22 Phenomenon in the U.S. Bankruptcy System*, Brook. J. Corp. Fin. & Com. L. 253 (2014)
- Kenneth Ayotte & David A. Skeel, *An Efficiency-Based Explanation for Current Corporate Reorganization Practice*, 73 U. Chi. L. Rev. 425 (2006)
- Stephen H. Case, *Some Confirmed Chapter 11 Plans Fail. So What?*, 47 B.C. L. Rev. 59 (2005)
- Andrew B. Dawson, *Beyond the Great Divide: Federalism Concerns in Municipal Insolvency*, 11 Harv. L. & Pol'y Rev. 3 (2017)
- Melissa B. Jacoby, *Federalism Form and Function in the Detroit Bankruptcy*, 33 Yale J. on Reg. 55 (2016)
- Lynn M. LoPucki & Sara D. Kalin, *The Failure of Public Company Bankruptcies in Delaware and New York: Empirical Evidence of a "Race to the Bottom*," 54 Vand. L. Rev. 231 (2001)
- David A. Skeel, *What's So Bad About Delaware?*, 54 Vand. L. Rev. 309 (2001)
- James H.M. Sprayregen et al., *Chapter 11: Not Perfect, But Better Than The Alternatives*, 14 J. Bankr. L. & Prac. 6 Art. 1 (2005)
- Samuel Star & John Yozzo, *Chapter 22 Filings Deserve a More Nuanced Narrative*, 38 Am. Bankr. Inst. J. 30 (2019)

Faculty

Robert D. Gordon is a partner in the Jenner & Block's Restructuring and Bankruptcy Practice in New York, where he represents and provides strategic counsel to distressed companies, independent directors, creditors' and retirees' committees, investors, pension systems, liquidating agents, and other parties-in-interest in complex and high-stakes workouts and restructurings, both in the public sector and in the private sector, spanning numerous industries. Currently, he is serving as counsel to the Official Committee of Retirees in the restructuring proceedings for the Commonwealth of Puerto Rico, representing the interests of approximately 160,000 public-sector retirees, owed approximately $58 billion in connection with the funding of their accrued pensions. Before joining the firm in 2017, Mr. Gordon served as special restructuring counsel to the Detroit Retirement Systems in the City of Detroit's landmark chapter 9 bankruptcy case. In addition to his central role in the public-sector bankruptcy and restructuring proceedings of the Commonwealth of Puerto Rico and the City of Detroit, Mr. Gordon has played key roles in numerous private-sector restructurings arising out of a broad range of industries, including automotive, real estate, gaming, hospitality, retail, manufacturing, aviation and telecommunications. Among his clients are distressed companies, creditors' and retirees' committees, pension systems, secured and unsecured creditors, distressed-asset investors, lessors, trustees and liquidating agents. His representations include fraudulent transfer actions, preference actions, and other commercial and bankruptcy-related litigation. Mr. Gordon is also currently serving as a federal court-appointed receiver in a Securities and Exchange Commission enforcement action involving an international Ponzi scheme. He is also a member of the National Association of Federal Equity Receivers (NAFER). Mr. Gordon has been recognized in *The Best Lawyers in America* in the area of Bankruptcy and Creditor-Debtor Rights Law every year from 2010 to the present. He is a frequent speaker on, among other topics, municipal bankruptcy, including its potential impact on retiree benefits. Mr. Gordon is a member of the State Bar of Michigan, ABI and the Turnaround Management Association, for which he is a member of the board of directors of its Michigan chapter. He is admitted to practice in Illinois, Michigan and New York, and he is admitted to the U.S. District Courts for the Eastern and Western Districts of Michigan, the Northern District of Illinois and the Southern District of New York, and the U.S. Courts of Appeals for the Sixth and Second Circuits. Mr. Gordon received his B.A. in 1985 from the University of Michigan and his J.D. from the University of Michigan Law School in 1989.

Fred B. Ringel is the co-chair of Robinson Brog Leinwand Greene Genovese & Gluck, P.C.'s Business Finance and Restructuring Department in New York and has more than 35 years of experience representing virtually all constituencies in complex chapter 11 cases throughout the U.S. He also has trial experience litigating various bankruptcy issues. Mr. Ringel recently completed a three-day bench trial leading to the successful resolution of a client's multi-million dollar mortgage claim where the mortgagee claimed that the operative documents were forged. Recently, he completed a 10-day trial leading to the successful confirmation of three chapter 11 plans where title to several apartment buildings was contested by the former owners, who alleged that several of the operative documents, including the deeds, were forged and that the properties were subject to a constructive trust. He also confirmed the plan in *West End Financial Advisors LLC*, a difficult and complex chapter 11 case of 18 affiliated hedge funds that were involved a Ponzi scheme, and Sonix Medical Resources Inc., a group of diagnostic imaging centers in the New York/New Jersey Metropolitan area. Mr. Ringel has experience counseling secured lenders as acquirers in chapter 11 and 7 cases

and has experience representing landlords in many of the large national retail chapter 11 cases in the last three decades. He represented more than 35 shopping center owners in the Kmart Corp. chapter 11 bankruptcy in Chicago and recently represented several bidders acquiring leases from A & P in its second chapter 11 case. He has also represented landlords in dozens of other national retail cases, such as Circuit City, Deb Shops, Linens n' Things, Radio Shack, Brookstone and Coldwater Creek. He has also defended adversary proceedings seeking to recover preferences and fraudulent conveyances, and has experience representing investors in "Ponzi" scheme cases who have been sued by trustees seeking to "claw back" funds paid to them. Mr. Ringel received his B.A. from the State University of New York at Buffalo and his J.D. from Brooklyn Law School.

Roopesh Shah is a senior managing director of Evercore's Restructuring and Debt Advisory Group in New York, which he joined in 2017. He has worked on numerous restructuring assignments, advising companies, creditors and other parties on refinancings, exchange offers, consent solicitations, amendments, out-of-court restructurings, chapter 11 bankruptcy reorganizations, distressed mergers and acquisitions, § 363 asset sales and cross-border restructuring issues. He also has been involved in numerous DIP and exit financings for companies in chapter 11 and several "rescue" financings for distressed clients. Mr. Shah's client engagements include work for Alcatel-Lucent, Arcapita, Associated Materials, ATU, California Resources, Catalina Marketing, Chesapeake Energy, Chicago Bridge & Iron, Claire's Stores, Cobalt International Energy, Comverse Technologies, Edcon, Frontier Communications, hibu, Imtech, Isola, Keystone Automotive, MACH Gen, McDermott, Movie Gallery, Norske Skog, Pfleiderer, Sea Island, Select Staffing, Selecta, Sequana, Serta, Spectrum Brands, Syncreon, Targus, Toys "R" Us, Tronox, Vanguard Resources, Wastequip, Windstream, Zekelman Industries and The Yellowstone Club. Prior to joining Evercore, he was the global head of Goldman Sachs' Restructuring Finance and Advisory Group, a director in the Restructuring Group of Miller Buckfire & Co. and a vice president in the Mergers & Acquisitions Group of Wasserstein Perella & Co. Mr. Shah received his B.S. in economics from the Wharton School of the University of Pennsylvania, with concentrations in finance, marketing and information technology.

Hon. Christopher S. Sontchi is Chief U.S. Bankruptcy Judge for the District of Delaware in Wilmington, initially appointed in 2006, and is a frequent speaker in the U.S. and abroad on issues relating to corporate reorganizations. He also is a Lecturer in Law at The University of Chicago Law School and teaches corporate bankruptcy to international judges through the auspices of the World Bank and INSOL International. Judge Sontchi is a member of the International Insolvency Institute, Judicial Insolvency Network, National Conference of Bankruptcy Judges, ABI and INSOL International. He was recently appointed to the International Advisory Council of the Singapore Global Restructuring Initiative and the Founders' Committee of The University of Chicago Law School's Center on Law and Finance. Judge Sontchi has published articles on creditors' committees, valuation, asset sales and safe harbors. Prior to his appointment, he was in private practice, representing a wide variety of nationally based enterprises with diverse interests in most of the larger chapter 11 reorganization proceedings filed in Delaware. Judge Sontchi served on the ABI Commission to Study the Reform of Chapter 11's Financial Contracts, Derivatives and Safe Harbors Committee and testified on safe harbors for financial contracts before the Subcommittee on Regulatory Reform, Commercial and Antitrust Law of the House Committee on the Judiciary. Following law school, Judge Sontchi clerked for Hon. Joseph T. Walsh in the Delaware Supreme Court. He received his B.A. Phi Beta Kappa with distinction in political science from the University of North Carolina at Chapel Hill and his J.D. from the University of Chicago Law School.

Rachel C. Strickland is a partner with Willkie Farr & Gallagher LLP in New York and co-chairs its Business Reorganization and Restructuring Department, where she advises distressed companies and financial and strategic investors in complex chapter 11 cases, bankruptcy acquisitions and out-of-court restructurings. She is also a member of the firm's Executive Committee. Over the past year, Ms. Strickland has continued to represent a variety of clients, including an ad hoc group of noteholders of Remington Outdoor Co. in its chapter 11 restructuring, an ad hoc group of lenders of Windstream Holdings, an ad hoc group of senior lenders of HCR Manorcare, an ad hoc group of lenders of LBI Media, and senior lenders to Fallbrook Technologies Inc. in its chapter 11 restructuring. She also has been instrumental in a number of chapter 11 cases addressing valuation disputes, including LightSquared Inc. and Smurfit-Stone Corp., in both of which she negotiated successful settlements for her clients. Ms. Strickland has been recognized by *Turnarounds & Workouts* for her lead role representing the debtors in the precedent-setting restructuring of Momentive Performance Materials, which was also featured in the publication's listing of the most successful restructurings. She is ranked as a leading Bankruptcy and Restructuring Law practitioner in New York by *Chambers USA* (2009-18), and in 2018, she was invited to become part of the Thirtieth Class of Fellows of the American College of Bankruptcy. Ms. Strickland received her B.A. in 1994 from Michigan State University and her J.D. in 1998 from New York University School of Law.

Aparna V. Yenamandra is a restructuring associate in the New York office of Kirkland & Ellis LLP. Her representative matters including representing Charming Charlie, a Houston-based specialty retailer focused on fashion jewelry, handbags, apparel, gifts and beauty products, in its chapter 11 restructuring in the U.S. Bankruptcy Court for the District of Delaware; Linn Energy, LLC and its affiliates in its chapter 11 cases filed in the U.S. Bankruptcy Court for the Southern District of Texas; Aspect Software Inc., a leading provider of software and technology solutions for customer care centers worldwide, in its prearranged restructuring; and Energy Future Holdings Corp. and 70 of its affiliates in their prearranged chapter 11 cases in the U.S. Bankruptcy Court for the District of Delaware. Ms. Yenamandra received her B.A. *cum laude* in economics and political science in 2009 from New York University and her J.D. *magna cum laude* in 2012 from Villanova University School of Law, where she was a member of the Order of the Coif and an associate editor of the *Villanova Law Review*.