AMERICAN BANKRUPTCY INSTITUTE

Annual Spring Meeting

CONCURRENT SESSION

A Potpourri of Ethical Considerations in Real Estate Bankruptcy

Hosted by the Ethics and Real Estate Committees

Robert J. Keach, Moderator
Bernstein Shur; Portland, Maine

Greg Corbin
North Point Real Estate Group; New York

Lee B. Hart
Nelson Mullins Riley & Scarborough LLP; Atlanta

Patricia B. Jefferson
Miles & Stockbridge; Baltimore

Mark Power
Thompson Coburn LLP; New York

2024

American Bankruptcy Institute
Annual Spring Meeting

April 18-20, 2024

A POTPOURRI OF ETHICAL CONSIDERATIONS IN REAL ESTATE BANKRUPTCIES

Moderator:

Rober J. Keach
Bernstein Shur
rkeach@bernsteinshur.com

Panelists:

Greg Corbin
Northgate Real Estate Group
greg@northgatereg.com

Lee B. Hart
Nelson Mullins
Lee.hart@nelsonmullins.com

Patricia B. Jefferson
Miles & Stockbridge P.C.
pjefferson@mslaw.com

Mark T. Power
Thompson Coburn LLP
mpower@thompsoncoburn.com

MODEL RULES OF PROFESSIONAL CONDUCT

Rule 1.7: Conflict of Interest: Current Clients

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest.

A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or
(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
(2) the representation is not prohibited by law;
(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
(4) each affected client gives informed consent, confirmed in writing.

Comment to Rule 1.7:

[1] Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. Concurrent conflicts of interest can arise from the lawyer's responsibilities to another client, a former client or a third person or from the lawyer's own interests. For specific Rules regarding certain concurrent conflicts of interest, see Rule 1.8. For former client conflicts of interest, see Rule 1.9. For conflicts of interest involving prospective clients, see Rule 1.18. For definitions of "informed consent" and "confirmed in writing," see Rule 1.0(e) and (b).

[2] Resolution of a conflict of interest problem under this Rule requires the lawyer to: 1) clearly identify the client or clients; 2) determine whether a conflict of interest exists; 3) decide whether the representation may be undertaken despite the existence of a conflict, i.e., whether the conflict is consentable; and 4) if so, consult with the clients affected under paragraph (a) and obtain their informed consent, confirmed in writing. The clients affected under paragraph (a) include both of the clients referred to in paragraph (a)(1) and the one or more clients whose representation might be materially limited under paragraph (a)(2).

[3] A conflict of interest may exist before representation is undertaken, in which event the representation must be declined, unless the lawyer obtains the informed consent of each client under the conditions of paragraph (b). To determine whether a conflict of interest exists, a lawyer

should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and non-litigation matters the persons and issues involved. See also Comment to Rule 5.1. Ignorance caused by a failure to institute such procedures will not excuse a lawyer's violation of this Rule. As to whether a client-lawyer relationship exists or, having once been established, is continuing, see Comment to Rule 1.3 and Scope.

[4] If a conflict arises after representation has been undertaken, the lawyer ordinarily must withdraw from the representation, unless the lawyer has obtained the informed consent of the client under the conditions of paragraph (b). See Rule 1.16. Where more than one client is involved, whether the lawyer may continue to represent any of the clients is determined both by the lawyer's ability to comply with duties owed to the former client and by the lawyer's ability to represent adequately the remaining client or clients, given the lawyer's duties to the former client. See Rule 1.9. See also Comments [5] and [29].

[5] Unforeseeable developments, such as changes in corporate and other organizational affiliations or the addition or realignment of parties in litigation, might create conflicts in the midst of a representation, as when a company sued by the lawyer on behalf of one client is bought by another client represented by the lawyer in an unrelated matter. Depending on the circumstances, the lawyer may have the option to withdraw from one of the representations in order to avoid the conflict. The lawyer must seek court approval where necessary and take steps to minimize harm to the clients. See Rule 1.16. The lawyer must continue to protect the confidences of the client from whose representation the lawyer has withdrawn. See Rule 1.9(c).

Rule 3.1 Meritorious Claims or Contentions

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

Comment to Rule 3.1

[1] The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure. The law, both procedural and substantive, establishes the limits within which an advocate may proceed. However, the law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change.

[2] The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. What is required of lawyers, however, is that they inform

themselves about the facts of their clients' cases and the applicable law and determine that they can make good faith arguments in support of their clients' positions. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law.

[3] The lawyer's obligations under this Rule are subordinate to federal or state constitutional law that entitles a defendant in a criminal matter to the assistance of counsel in presenting a claim or contention that otherwise would be prohibited by this Rule.

Rule 3.3 Candor Towards the Tribunal

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Comment to Rule 3.3:

[1] This Rule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal. See Rule 1.0(m) for the definition of "tribunal." It also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition. Thus, for example, paragraph (a)(3) requires a lawyer to take

reasonable remedial measures if the lawyer comes to know that a client who is testifying in a deposition has offered evidence that is false.

[2] This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate's duty of candor to the tribunal. Consequently, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, the lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false.

Representations by a Lawyer

[3] An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein, for litigation documents ordinarily present assertions by the client, or by someone on the client's behalf, and not assertions by the lawyer. Compare Rule 3.1. However, an assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in Rule 1.2(d) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. Regarding compliance with Rule 1.2(d), see the Comment to that Rule. See also the Comment to Rule 8.4(b).

Legal Argument

[4] Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)(2), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction that has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.

Offering Evidence

[5] Paragraph (a)(3) requires that the lawyer refuse to offer evidence that the lawyer knows to be false, regardless of the client’s wishes. This duty is premised on the lawyer’s obligation as an officer of the court to prevent the trier of fact from being misled by false evidence. A lawyer does not violate this Rule if the lawyer offers the evidence for the purpose of establishing its falsity.

[6] If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer the false evidence. If only a portion of a witness's testimony will be false, the lawyer may

call the witness to testify but may not elicit or otherwise permit the witness to present the testimony that the lawyer knows is false.

[7] The duties stated in paragraphs (a) and (b) apply to all lawyers, including defense counsel in criminal cases. In some jurisdictions, however, courts have required counsel to present the accused as a witness or to give a narrative statement if the accused so desires, even if counsel knows that the testimony or statement will be false. The obligation of the advocate under the Rules of Professional Conduct is subordinate to such requirements. See also Comment [9].

[8] The prohibition against offering false evidence only applies if the lawyer knows that the evidence is false. A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact. A lawyer's knowledge that evidence is false, however, can be inferred from the circumstances. See Rule 1.0(f). Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.

[9] Although paragraph (a)(3) only prohibits a lawyer from offering evidence the lawyer knows to be false, it permits the lawyer to refuse to offer testimony or other proof that the lawyer reasonably believes is false. Offering such proof may reflect adversely on the lawyer's ability to discriminate in the quality of evidence and thus impair the lawyer's effectiveness as an advocate. Because of the special protections historically provided criminal defendants, however, this Rule does not permit a lawyer to refuse to offer the testimony of such a client where the lawyer reasonably believes but does not know that the testimony will be false. Unless the lawyer knows the testimony will be false, the lawyer must honor the client's decision to testify. See also Comment [7].

Remedial Measures

[10] Having offered material evidence in the belief that it was true, a lawyer may subsequently come to know that the evidence is false. Or, a lawyer may be surprised when the lawyer's client, or another witness called by the lawyer, offers testimony the lawyer knows to be false, either during the lawyer's direct examination or in response to cross-examination by the opposing lawyer. In such situations or if the lawyer knows of the falsity of testimony elicited from the client during a deposition, the lawyer must take reasonable remedial measures. In such situations, the advocate's proper course is to remonstrate with the client confidentially, advise the client of the lawyer's duty of candor to the tribunal and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence. If that fails, the advocate must take further remedial action. If withdrawal from the representation is not permitted or will not undo the effect of the false evidence, the advocate must make such disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal information that otherwise would be protected by Rule 1.6. It is for the tribunal then to determine what should be done — making a statement about the matter to the trier of fact, ordering a mistrial or perhaps nothing.

[11] The disclosure of a client's false testimony can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer cooperate in deceiving the court, thereby subverting the truth-finding process which the adversary system is designed to implement. See Rule 1.2(d).

Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. Thus the client could in effect coerce the lawyer into being a party to fraud on the court.

Preserving Integrity of Adjudicative Process

[12] Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process, such as bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official or other participant in the proceeding, unlawfully destroying or concealing documents or other evidence or failing to disclose information to the tribunal when required by law to do so. Thus, paragraph (b) requires a lawyer to take reasonable remedial measures, including disclosure if necessary, whenever the lawyer knows that a person, including the lawyer's client, intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding.

Duration of Obligation

[13] A practical time limit on the obligation to rectify false evidence or false statements of law and fact has to be established. The conclusion of the proceeding is a reasonably definite point for the termination of the obligation. A proceeding has concluded within the meaning of this Rule when a final judgment in the proceeding has been affirmed on appeal or the time for review has passed.

Ex Parte Proceedings

[14] Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. However, in any ex parte proceeding, such as an application for a temporary restraining order, there is no balance of presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision.

Withdrawal

[15] Normally, a lawyer's compliance with the duty of candor imposed by this Rule does not require that the lawyer withdraw from the representation of a client whose interests will be or have been adversely affected by the lawyer's disclosure. The lawyer may, however, be required by Rule 1.16(a) to seek permission of the tribunal to withdraw if the lawyer's compliance with this Rule's duty of candor results in such an extreme deterioration of the client-lawyer relationship that the lawyer can no longer competently represent the client. Also see Rule 1.16(b) for the circumstances in which a lawyer will be permitted to seek a tribunal's permission to withdraw. In connection with a request for permission to withdraw that is premised on a client's misconduct, a lawyer may reveal information relating to the representation only to the extent reasonably necessary to comply with this Rule or as otherwise permitted by Rule 1.6.

Rule 4.1 Truthfulness in Statements to Others: Transactions with Persons other than Clients

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

Comment to Rule 4.1:

Misrepresentation

[1] A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements. For dishonest conduct that does not amount to a false statement or for misrepresentations by a lawyer other than in the course of representing a client, see Rule 8.4.

Statements of Fact

[2] This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud. Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation.

Crime or Fraud by Client

[3] Under Rule 1.2(d), a lawyer is prohibited from counseling or assisting a client in conduct that the lawyer knows is criminal or fraudulent. Paragraph (b) states a specific application of the principle set forth in Rule 1.2(d) and addresses the situation where a client's crime or fraud takes the form of a lie or misrepresentation. Ordinarily, a lawyer can avoid assisting a client's crime or fraud by withdrawing from the representation. Sometimes it may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm an opinion, document, affirmation or the like. In extreme cases, substantive law may require a lawyer to disclose information relating to the representation to avoid being deemed to have assisted the client's crime or fraud. If the lawyer can avoid assisting a client's crime or fraud only by disclosing this information, then under paragraph (b) the lawyer is required to do so, unless the disclosure is prohibited by Rule 1.6.

INSIDER CONTROL ISSUES IN REAL ESTATE CASES:

11 U.S. Code § 1104 - Appointment of trustee or examiner

(a) At any time after the commencement of the case but before confirmation of a plan, on request of a party in interest or the United States trustee, and after notice and a hearing, the court shall order the appointment of a trustee--

(1) for cause, including fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor by current management, either before or after the commencement of the case, or similar cause, but not including the number of holders of securities of the debtor or the amount of assets or liabilities of the debtor; or

(2) if such appointment is in the interests of creditors, any equity security holders, and other interests of the estate, without regard to the number of holders of securities of the debtor or the amount of assets or liabilities of the debtor.

(b)(1) Except as provided in section 1163 of this title, on the request of a party in interest made not later than 30 days after the court orders the appointment of a trustee under subsection (a), the United States trustee shall convene a meeting of creditors for the purpose of electing one disinterested person to serve as trustee in the case. The election of a trustee shall be conducted in the manner provided in subsections (a), (b), and (c) of section 702 of this title.

(2)(A) If an eligible, disinterested trustee is elected at a meeting of creditors under paragraph (1), the United States trustee shall file a report certifying that election.

(B) Upon the filing of a report under subparagraph (A)--

(i) the trustee elected under paragraph (1) shall be considered to have been selected and appointed for purposes of this section; and

(ii) the service of any trustee appointed under subsection (a) shall terminate.

(C) The court shall resolve any dispute arising out of an election described in subparagraph (A).

(c) If the court does not order the appointment of a trustee under this section, then at any time before the confirmation of a plan, on request of a party in interest or the United States trustee, and after notice and a hearing, the court shall order the appointment of an examiner to conduct such an investigation of the debtor as is appropriate, including an investigation of any allegations of fraud, dishonesty, incompetence, misconduct, mismanagement, or irregularity in the management of the affairs of the debtor of or by current or former management of the debtor, if--

(1) such appointment is in the interests of creditors, any equity security holders, and other interests of the estate; or

(2) the debtor's fixed, liquidated, unsecured debts, other than debts for goods, services, or taxes, or owing to an insider, exceed $5,000,000.

(d) If the court orders the appointment of a trustee or an examiner, if a trustee or an examiner dies or resigns during the case or is removed under section 324 of this title, or if a trustee fails to qualify under section 322 of this title, then the United States trustee, after consultation with parties in interest, shall appoint, subject to the court's approval, one disinterested person other than the United States trustee to serve as trustee or examiner, as the case may be, in the case.

(e) The United States trustee shall move for the appointment of a trustee under subsection (a) if there are reasonable grounds to suspect that current members of the governing body of the debtor, the debtor's chief executive or chief financial officer, or members of the governing body who selected the debtor's chief executive or chief financial officer, participated in actual fraud, dishonesty, or criminal conduct in the management of the debtor or the debtor's public financial reporting.

everything I've heard, a trustee is warranted in this case, Your Honor. Thank you.

THE COURT: Okay. All right. Anyone else?

COUNSEL: (No audible response)

RULING ON EVIDENTIARY HEARING RE U.S. TRUSTEE AND BSP'S MOTION FOR APPOINTMENT OF A CHAPTER 11 TRUSTEE

THE COURT: Okay. I have before me two motions, each of which seeks the appointment of a Chapter 11 trustee for this Debtor. The first is by the United States Trustee, and the second is by the Debtor's largest Creditor, Benefit Street Partners. The Debtor vehemently objects to the motions, and I have held a two-day evidentiary hearing on the motions and just concluded oral argument on them.

The motions prompted the submission of extensive documentary evidence that appears in several binders, as well as led to the hearing testimony of the following witnesses: David Goldwassers -- David Goldwasser, the Debtor's Chief Restructuring Officer, who was appointed essentially with the commencement of Debtor's Chapter 11 case; the Debtor's two controlling interest holders; as well as the controlling interest holders of the management company for the Debtor, Toby Moskovits and Michael Lichtenstein; and the Debtor's Financial Advisor, Mark Podgainy.

In addition, I heard the testimony of Mr. Rauch, the Debtor's Chief Financial Officer or Financial Manager, in

essence, the Debtor's head bookkeeper. I further heard the testimony of three -- I'm sorry -- yes, three employees or officers of Benefit Street, Michael Comparato, Tanya Mollova, and Peter Touhill, all with respect to the disclosure and understanding of the management of the Debtor at the time that the Benefit Street loan was incurred, as well as the terms of the Benefit Street Partner's loan.

I also heard testimony by Margot Wainger, who was the closing attorney for Benefit Street with respect to that loan; and again, the documents pertaining to management of the borrower hotel as part of that loan. And finally, I heard testimony of Luis Rivera, who was a tax expert with regard to the Debtor's tax reporting.

In section 1104(a)(1) of the Bankruptcy Code, which is the only provision under which the two movants make their motions, Congress provided that:

"At any time after the commencement of the case, but before confirmation of a plan on a request of a party in interest, or the United States trustee, and after notice of a hearing, the court shall order the appointment of a trustee for cause, including fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor by current management, either before or after the commencement of the case, or similar cause, but not including the number of holders of securities of the debtor or the amount of assets or

liabilities of the debtor."

Because of the importance of the Debtor in Possession model in Chapter 11 cases, the Second Circuit has noted: "The standard for section 1104 appointment is very high." In re Smart World Technologies LLC 423 F.3d 166, 176 (2d. Cir. 2005):

"It has been repeatedly held that the appointment of a chapter 11 trustee is an extraordinary remedy and that there is a strong presumption in favor of allowing a debtor to remain in possession absent a showing of the need to appoint a trustee under section 1104(a)." See In re Adelphia Communications Corp., 336 B.R. 610, 655 (Bankr. S.D.N.Y. 2006).

"The party seeking the appointment a trustee has the burden of showing by clear and convincing evidence cause under section 1104(a)(1)." Id. at 656; see also, In re Sillerman, S-i-l-l-e-r-m-a-n, 605 B.R. 631, (Bankr. S.D.N.Y. 2019) -- oh, at -- excuse me -- at page 640 through 41.

That decision notes and it stands to reason that while there is a presumption that the debtor's management shall remain in possession in chapter 11 cases and that this is extraordinary relief to appoint a trustee, the grounds for the appointment of a trustee are in fact extraordinary in and of themselves. One does not expect people to commit fraud, to be dishonest, or to engage in gross mismanagement, or be truly incompetent. As then-bankruptcy Judge Vyskocil said in the Sillerman case, the fundamental inquiry by the court under

section 1104(a)(1) is whether the debtor in possession, i.e., its management, can be trusted to carry out its fiduciary obligations. Id.

And that tracks back to Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343, 355 (1985). The list of specific grounds for cause under section 1104(a)(1) is by its terms not exclusive. Additional bases for cause may exist. However, as noted by the Adelphia Communications court, the court should keep in mind that:

"While the words following 'including' do not by definition represent the only basis for a finding of cause, words are nevertheless known by the company they keep." 336 B.R. at 656.

Generally speaking then, if one doesn't establish by clear and convincing evidence that the debtor's current management either pre- or post-bankruptcy has committed fraud, or has been dishonest, or has shown incompetence or gross mismanagement of the affairs of the debtor, then one would show related concepts like self-dealing; such as, when management ignores potential causes of action and has failed to disclose them, or acted in a way that makes it clear that they don't take them seriously, and indeed, may well have hidden them all of which are frankly, to my mind, is another way of saying that one acted fraudulently or dishonesty. See, for example, In re Sharon Steel, 871 F.2d 1217 (3d Cir. 1989); In re Oklahoma

Refining Co., 838 F.2d 1133 (10th Cir. 1988); In re PRS Insurance Group, Inc., 274 B.R. 381, (Bankr. D. Del. 2001); In re Intercat, Inc., 247 B.R. 911 (Bankr. S.D. Ga. [*sic*]); In re Microwave Prod. of America, Inc., 102 B.R. 666 (Bankr. W.D. Tenn. [*sic*]); and In re Humphreys Pest Control Franchises, Inc., 40 B.R. 174 (Bankr. E.D. Pa. [*sic*]); as well as the Sillerman case that I've previously cited and cases cited by it in its discussion of 1104(a)(1) -- see also, In re Grasso, 2012 Bankr. LEXIS 6247 (Bankr. E.D. Pa. Oct. 16, 2012).

The Debtor has responded to the motions in large part by arguing that operationally, it is doing quite well; and in fact, has seen its way through an extremely difficult period for it and its competitors occasioned by the COVID pandemic, which obviously had presented enormous problems for the hotel industry.

The Debtor also contends, as set forth in Ms. Moskovits' declaration, that Ms. Moskovits and Mr. Lichtenstein add value to the business based on their contacts in the community, and their success in attracting occupants of the hotel through creating buzz, and taking advantage of and in some instances sponsoring events in the neighborhood.

While those types of arguments carry significant weight for a motion under section 1104(a)(2), which provides for the appointment of a trustee if such appointment is in the interest of creditors, any equity security holders, and other

interests of the estate, which clearly does contemplate considering the interests of creditors given the posture of the case, and the condition of the business, I do not believe those considerations are meaningful in any material way with regard to a motion under section 1104(a)(1).

It appears to me clearly that Congress made the choice -- which one might question, but I cannot because it's the statute that I have to follow -- but it doesn't matter how effective economically management may be in running a business if it is shown by clear and convincing evidence that they have engaged in fraud or dishonesty, or truly gross mismanagement, which obviously contradicts the -- the argument that the hotel is being run well, then a trustee must be appointed. There's no -- there's no doubt about it; they must be appointed.

The movants have not argued that management is ineffective. They submitted a declaration by Mr. Isenberg to show that, but it was withdrawn when I ruled that Mr. Howard's declaration would be not admissible, because it really was not an issue that was properly addressed in the 1104(a)(1) context. Any gross mismanagement or incompetence that is alleged here by the movants is alleged as another way of saying that management has been in the past and/or during the course of this case dishonest, or -- or otherwise not acting as a proper fiduciary. And one can say, I guess, that since one is supposed to be a fiduciary, and if one doesn't act as a fiduciary, one is

therefore incompetent. But it's only in that sense that I believe these motions would implicate incompetence or gross management -- gross mismanagement; their focus is on fraud and dishonesty.

The Debtor's second argument, although a related one, is that whatever fraud, or dishonesty, or improper conduct by someone who is a fiduciary has been identified and proven by clear and convincing evidence, that misconduct is pre-petition primarily, and has been, and/or will be corrected going forward. In essence, the argument suggests that: All right, you may have caught us speeding, but we should still be allowed to drive the car.

I actually disagree with the Debtor's reading of the case law that allows such an argument to be made in the 1104(a)(1) context. The closest analogy I think for that -- or basis for that argument is In re Sundale, Ltd., 400 B.R. 890 (Bankr. S.D. Fla. 2009) which also involved an operator of a hotel.

The facts in that case show, however, as found by Judge Isicoff, that: "There was no evidence that the manner in which the operator operated his entities cash pre-petition defrauded any creditors." That's a quote at page 903 of the opinion.

The court in Sundale also found that standing alone, failure to pay real estate taxes or personal property taxes,

and that one month during the case, the debtor did not pay its payroll taxes while acknowledging that in some circumstances, failure to pay taxes can constitute cause to appoint a trustee, it was not in the context of that case, the Sundale case, sufficient cause to appoint a trustee. Id.

I agree with Judge Isicoff, that it is often the case that a debtor enters bankruptcy with a substantial tax bill and may even for a brief period not pay taxes post-petition; although, a meaningful failure to do so, does constitute cause under section 1112 of the Bankruptcy Code; the post-petition taxes coming due unless they're in dispute.

In addition to those types of taxes, the debtor in Sundale did not pay one month during the case of payroll taxes, which are transfer taxes, which are -- with the non-payment of which is much more meaningful because one is a fiduciary owing trust fund taxes; and therefore, the failure to pay them particularly when knowing and unexcused is a breach of fiduciary duty that state and federal law recognizes.

I believe it is certainly not the case that once you get a pass for willfully failing to pay trust fund taxes over a prolonged period, for purposes of section 1104(a)(1). And I have no doubt that Judge Isicoff would agree -- would agree with that proposition.

In the Sundale opinion, the debtor also had numerous inaccuracies in its schedules and statements of financial

affairs, the so-called SOFAs. But with regard to those errors, the court stated:

"Based on the testimony, these problems appear to be a function of attorney error and miscommunication rather than deliberate omission. The transfers were certainly not hidden in the documents turned over in discovery. Thus while unfortunate, and in context troubling, the movants have failed to establish these omissions were deliberate attempts of debtor's management to conceal transfers."

Finally, Judge Isicoff noted that:

"There is no question that the debtor's finances could have been better managed pre-petition, but other than failing to establish exactly how much of the debtor's principal's personal funds have been used to get the hotel built, and keep the hotel running, the movants have failed to demonstrate that the flow of money in and out of the debtors was designed to, or in fact did, cheat or defraud creditors." 400 B.R. at 906, which is also where the earlier quoted language appears.

Here, as I will go into in a moment, the record is quite different and shows a series of serious and I believe willful failures to disclose and appropriation of assets that are -- that should not have been undertaken by the fiduciary. At times, some of those actions also appear to me to rise to the level of fraud.

The Debtor makes one last related argument, which is that not only are the Debtor's principals important to the economic health of the hotel -- which I've already addressed that may or may not be true -- but I believe that for purposes of 1104(a)(1), it is irrelevant if it is shown that they committed the types of acts that constitute cause under that section.

But also, the Debtor argues that in the future, they won't really be running the Debtor; rather, other parties who will have some contracted role for the Debtor in the future and currently have had a contracted role with the Debtor, namely, Mr. Goldwasser as CRO, and in the future, one or more people from Getzler Henrich, the Debtor's financial advisor, will have sufficient control over the Debtor that it will be properly run consistent with a manager's fiduciary duties.

It is true that if new management comes in that actually can control the Debtor, I and my colleagues have ruled that a trustee does not need to be appointed. I ruled that way in the Refco case. Judge Glenn ruled that way in The 1031 Tax case. And that's consistent with the statute. But there's no suggestion that Mr. Lichtenstein and Ms. Moskovits are gonna depart the scene. They still control this Debtor; they still control the management company, and they will going forward.

Moreover, it is clear to me from Mr. Goldwasser's testimony, and Mr. Podgainy's testimony, that each of them has

clearly felt the pressure from the Debtor's principals here. Mr. Goldwasser still has not corrected the schedules to reflect, for example, transfers made to insiders within one year of the petition date; nor has he corrected Schedule G to reflect the existence of at least a claimed management agreement.

He relied solely upon Mr. Podgainy to address the allegations by the Examiner with respect to significant potentially avoidable transfers to either Mr. Lichtenstein, Ms. Moskovits, or their companies. He did not, as far as I can see, perform any due diligence on that analysis by Mr. Podgainy.

Mr. Podgainy relied heavily, as did Mr. Rauch earlier, both pre- and post-petition, on representations by the target of those avoidable-transfers allegations, Mr. Lichtenstein. And the key element of those allegations, mainly whether roughly $20 million of payments by the Debtors in the four years before the commencement of the bankruptcy case to insiders could be characterized as debt or simply returns on equity was not analyzed by Mr. Podgainy at all.

And there was no mystery about that; it was clear that he did not analyze whether those transfers were on account of debt, and therefore, it would've been for fair consideration on reasonably equivalent value and immune from the fraudulent-transfer laws therefor, or were on account of equity.

So while again, I accept that in the right circumstances new independent management, in some instances even where old management remains in place subject to very circumscribed limits, may justify a decision not to appoint a trustee, those aren't the facts here. This is a closely held limited liability company that is treated as a partnership for tax purposes.

Mr. Lichtenstein and Ms. Moskovits are the management of this company in my view having sat through two days of evidentiary hearings. They cannot be isolated in a way that Congress would accept given the plain language of section 1104(a)(1) under the circumstances. At least as far as I can see, that has not happened to date.

There have been, although it was like pulling teeth, certain improvements in the Debtor's reporting. Although that took a motion or the threat of a motion by the U.S. Trustee, it was ultimately an agreed cash management order where certainly the Court -- and I doubt any other parties, at least not the U.S. Trustee -- was kept in the dark as to the nature of the relationship, which was not a two-party relationship between the Debtor and the management company; but rather a, in the best of terms, a three-party relationship between the Debtor, the management company, and a Northside entity that held as Mr. Rauch described it a clearing account for funding the Debtor existed at least up to the petition date, but was never

disclosed.

It is also clear to me that without stating whether the Examiner's report is true and accurate or not because of the hearsay rule, obtaining disclosure of the intercompany relationships beyond the Debtor and the management company extending to all of the insider transferees and transferors that are insider companies controlled by Ms. Moskovits and Mr. Lichtenstein was also like pulling teeth.

And frankly, I still doubt that we have a completely clear picture of that, given the number of the transactions and the difficulty in trying to reconcile them as evidenced not only by the Examiner's efforts to do so, but also Mr. Rauch's own testimony with regard to how long it took him to generate Exhibit 22, the so-called Wythe Acquisition Equity and Loans Report, which was at least a week; and during which, he largely accepted characterizations from Mr. Lichtenstein as to how those numbers should be treated. And by the way, they're only treated in the aggregate.

Mr. Podgainy, it appears, spent much longer trying to foot out the various transactions. And at the end of the day, his testimony in his declaration, which served as his direct testimony, is in and of itself difficult to follow given that it treats as transfers to and from the Debtor a non-Debtor entity, an upper-tear holding company of the Debtor, 96W. And states at page 4 that:

"Other major categories of outflows included $23 million transferred between the management company's own accounts; 18 million insider loan payments; and 4.9 million to the Debtor."

Those are management company transactions.

And as far as the Debtor is concerned, the testimony by Mr. Podgainy at pages 2 and 3 shows 19 million came from so-called insider loans, which included some amount of an 800,000 escrow fund, which he was not able to explain; 6.2 million of which was treated as a repayment of insider loans.

Although, again, Mr. Podgainy was quite clear in saying that he made no evaluation as to whether something was a loan or not; leading ultimately to a conclusion on page 6 that the aggregate of loans provided by insiders to the Debtors, again, you can simply use the word financings as opposed to loans, or payments by insiders to the Debtor and the management company, was $26,772,411 in aggregate payments made to insiders by the Debtor, which would include 96W and the management company, was $20,294,876.

I have no belief -- although the issue is not squarely before me -- but I have no belief that any of the payments that are denominated by the Debtor as loans are in fact loans, or were in fact loans. And that is meaningful for a number of reasons. First, the Debtor never disclosed any payments to insiders made within a year of the petition date.

Secondly, the Debtor never disclosed any loans on its schedules to insiders -- I mean, sorry -- from insiders.

And Mr. Rogoff is entirely right, whether a party decides to waive a claim is no excuse for failing to list it on the schedules; certainly not an excuse to do so before it has been waived, because the fact that someone claims something as -- as a loan, has consequences beyond its being a claim in the bankruptcy case.

For example, it highlights something that I believe would've caught everyone by surprise namely that somehow insiders to the Debtor were purporting to make loans to it, which would've led to a much-earlier inquiry into the very odd set of books that this Debtor and the management company kept and its odd relationship with the insiders.

In addition, the failure to disclose those purported loans means that one is not aware of the inflow and outflow that is detailed by Mr. Podgainy well over a year later in the bankruptcy case, and the potential for quite serious avoidance claims. Because obviously, as I've said, if these are not loans, then a very strong case can mean -- can show that the transfers are avoidable.

There's more to the nondisclosure than that however. The testimony by Mr. Rauch, who I generally found credible -- although, I think subject to pressure as a young man from his boss or bosses -- was that he was aware of no written

agreements memorializing any loans or lines of credit; nor was Mr. Goldwasser aware of any such agreements. Nevertheless, after the Examiner's report appeared in draft, where the issue of avoidable fraudulent transfers was front and center and the potential defense to a significant portion of that was the assertion that there were loans, quite suspiciously written loan agreements dated from 2016 and 2017 appeared.

I believe, under the circumstances, that I've just outlined those agreements are dishonest; that they were created after the fact to come up with this argument. If they existed at the time, I believe that they would've been dishonest in a different way, in violation of the underlying Benefit Street Partners loan agreements. But I don't believe they existed. And I believe the evidence clearly and convincingly shows that they were manufactured after the fact. That's also reflected that -- that evidence is also reflected in the fact that the original tax return filed by -- filed with respect to the Debtor, doesn't show any loan agreements or amounts paid on loans.

So, it appears to me that the Debtor's management's assertion of these insider loans at the time that it did, in and of itself, warrants the appointment of a trustee. But as important, I believe, and separately as a basis for the appointment of a trustee, the Debtor, through its management, created a cash management system that as opposed to the normal

hotel and operating company relationship, contemplated a third party, and insider -- again, Northside -- through which a vast number of transactions would be run. There appears to me to be no economic substance for that structure.

And I agree with Mr. Rivera that that raises a serious red flag. It may well be the case that leaving aside the characterization of the funds invested in the Debtor as loans, did in fact come entirely from the insiders and was not the result of any round-tripping of money from the Debtor, through the management company to insiders, through the Northside clearing account, and then back again to the Debtor as a loan.

But the structure had no reason to exist in the first place. If in fact one were to make legitimate investments in the Debtor, you would do it to the Debtor, and repay it directly from the Debtor as shown as specific repayments for specific debts; or if permissible, an equity investment.

But the multiple accounts that underlie the Debtor's cash management system -- which was not disclosed to the Court or the Trustee until the Examiner' report, although I accept that in most instances, it appears that after the cash management order was entered, that structure which still exists wasn't used -- involved a mind-boggling number of accounts and transfers in those accounts out of the Debtor, or into the Debtor, or out of the management company, and into the

management company, from and to insider entities.

It was described by Mr. Rauch as not really mattering because it was all in the family. But of course, fiduciaries can't act as if it's all in the family unless they're just acting with respect to their family and not third parties, like Creditors. Those transactions subjected the Debtor to significant undue credit risk. I mean, the record actually reflects the Ms. Moskovits and Mr. Lichtenstein own other entities that are in bankruptcy that received transfers and may well have made transfers to the Debtor.

It is clear based on that record that the management company, which should've been a pass-through entity except for a legitimate management fee, was not entirely a legitimate pass-through entity because of its role with these other entities. It should've just been pass-through entity between the Debtor and itself, as far as bringing in receipts from the hotel's operation and pay expenses.

But that's not how it acted. And indeed, neither Mr. Goldwasser nor Mr. Podgainy was even aware, and I -- I -- I dare say this didn't even come up in discovery; that notwithstanding the assertion that the management company had no revenues other than through the Debtor, and was a pass-through, it had separate non-Debtor-related accounts that could be used for any purpose. But again, there would be no real economic purpose for the management company to use them; as

opposed to some other Northside entity.

The ill effects of this structure, which I clearly find was not inadvertent, but was adopted knowingly since the difficulty of operating it had to be offset by some actual reason, which to me is -- has nothing to do with the Debtor's smooth functioning or the management company's smooth functioning.

The -- the problematic aspect of this structure is highlighted by two other reasons, each of which would be an independent basis to appoint a trustee. First, when it became clear to Mr. Rauch the Debtor was not paying hotel occupancy trust fund taxes required to be paid by the City of New York, he asked that a separate account be set up so that those collections by the Debtor could be placed in it; and presumably, that they would be paid out of it to pay the taxes.

But that account over which Mr. Lichtenstein and Ms. Moskovits have authority was misused. Money came into it, both pre- and post-petition, but pre-petition and shortly after the petition date, it was depleted; not to pay the trust taxes, but for instead in -- in many cases, as shown by the evidence, payment of obligations of the insiders and their companies, or in some instances of the hotel or the management company.

Contrary to Mr. Lichtenstein's declaration, this was not a one-time inadvertent error. The depletion of this account, both pre- and post-petition, was intentional as he

acknowledged in his testimony live, and justified after the fact by his belief that the money would be put back eventually or paid eventually.

But trust fund monies really aren't fungible; nor are they subject to setoff; nor were they even the subject of a dispute at the time that the funds were depleted from the account. That, too, was an after-the-fact manufacture by the Debtor's principal. The record is clear that not only did the Debtor not file any quarterly reports of collections of occupancy tax for over four years, but there was no dispute in terms of one party disputing with another party over the amount owed until well into the bankruptcy case.

So holding the funds aside as a reserve for a dispute, if that was frankly even what was the excuse for it, was only a dispute in Mr. Lichtenstein's mind. And frankly, I don't accept that that was why they were either set aside or paid out; they were just used for other purposes contrary to the fiduciary obligations of the Debtor's principals. They clearly were not used as had been alleged to do the best to keep the hotel afloat. The testimony showed that this money in large measure went to other entities.

The management structure also was used in a way that enabled the management company to receive government-funded loans meant to address the COVID crisis, a PPP loan and an EIDL loan, both undertaken as borrower by the management company

ostensibly to pay obligations of the management company incurred in managing the hotel: PPP loans to pay payroll, and EIDL loans for working capital.

The record reflects that to the contrary, very shortly after the PPP loan was received, more than half of the proceeds did not go to pay payroll of people that were working at the hotel, but again went for insider purposes; not for the management company, which was a pass-through ostensibly, but for other insider projects. That is a harm not only to the Debtor and the management company that runs the Debtor and funds the Debtor, but also to the government. It's dishonest to the government.

Similarly, the EIDL loan was not used for the Debtor, but also was not used in large measure for working capital, a requirement of the EIDL loan program, which is also dishonest not only to the Debtor and the management company that manages the Debtor ostensibly as a pass-through, but also to the government and the bank lender.

Moreover, in the application to One [*sic*] Oak, the lender on the PPP loan, the management company, run by the same people that run the Debtor, did not disclose the pass-through nature of the management company; although, the form says that one should identify all insiders, not just insiders that are separately getting money. And that may well have misled the bank.

As part of that application process for PPP loans, the Debtor's management also provided to Live Oak, the perspective lender, a tax return for the hotel manager borrower that showed its revenues. But testimony was conclusive that in fact the revenues shown on that tax return provided to Live Oak in connection with the PPP loan process were in fact the Debtor's revenues.

And that comes through in two ways. First, testimony from the Debtor's managers that the revenues generated by the hotel are the Debtor's; and second, by the fact that the Debtor's own schedules and statements show essentially the same amount as its revenues, as are shown on the hotel manager's tax return provided on February 24, 2021 to Live Oak in connection with the PPP loan process.

Lastly, I believe that the evidence is clear and convincing that the Debtor's management also attempted to mislead the Court and the parties by presenting when they did a purported drafted management agreement at or around the time of the cash management motion and dispute, but backdated to well before the petition date.

Again, Mr. Goldwasser testified that there was no written management agreement. He didn't list one in Schedule G of the schedules. There would be no more important executory contract for a Debtor like this than its agreement with the hotel manager; that is the fundamental executory contract if it

existed on the petition date that would be scheduled in the schedules, and it wasn't.

It appeared when it was convenient for the Debtors to show it in connection with ostensible cash management responsibilities; and frankly, other aspects to my mind that would be favorable to the Debtor's insiders in an even at that point highly contested bankruptcy case. Namely, highlighting the management company's rights in the event of the transfer of the hotel and a higher-than-average management fee.

Again, it does little good to say that we've now altered those provisions and have a revised management agreement. The point is, I believe the evidence is clear and convincing one cannot trust the Debtor's principals to deal like fiduciaries with this Debtor. In multiple ways, they have not done so. I believe they've created documents after the fact to increase their leverage or to make their legal position stronger. And that's cause for appointment of a trustee just as the other aspects of cause that I've detailed here are as well.

So I will grant the motions, and appoint an operating Chapter 11 trustee. I strongly agree with Mr. Zipes' comment that this does not mean that this Debtor will go into sale mode. The U.S. Trustee knows a number of people who can serve as an operating trustee for this hotel.

The fact that a trustee appoint -- is appointed,

opens up the exclusive period to anyone to file a plan; that would include the Debtor's principals. And as I said, it is conceivable to me that if they are only economic backers of a plan, and not hands-on managers or managers with control over the finances, such a plan if it's otherwise confirmable, could be confirmed.

But under the current facts, it is clear to me the Congress would require their replacement for what they have done pre-petition and what they have not done in terms of fair and honest dealings with the Court and the Creditors post-petition. It may well be that some will find the hotel less attractive if they are not directly involved in its operation, but that is a tradeoff that Congress when it drafted section 1104(a)(1). And it certainly is a logical tradeoff.

So I'll look for one order granting both motions.

Mr. Zipes, and Mr. Rogoff, you can decide who's gonna draft it. You don't need to formally settle the order. You should run it by Mr. Spelfogel just so that he can make sure it's consistent with my ruling. But it's -- it's really pretty simple, I'm appointing an operating trustee. Um --

MR. ROGOFF: (Inaudible)

THE COURT: -- and -- let me just say that in the interim, no one in management of this hotel should dig any deeper hole for themselves.

MR. ROGOFF: So, Your Honor, first of all, thank you

very much. And again, I appreciate the Court's time in -- in wading through all of this. And Your Honor actually just hit the point that I do -- did wanna make, which is about the hole. Certainly, based upon the grounds of the appointment of a trustee, we do have concerns for the hotel, for the operation, for our collateral.

There's a couple of things that we'd like to request your order to -- your -- that Your Honor to consider for us to put into the order pending the appointment of the trustee. First, we would like to make sure that nothing is removed from the hotel by the -- by the insiders that all of the hotel's property and asset remain. We would ask, as part of our adequate protection of our collateral, that we be permitted to post a security guard, which can be done in a non-intrusive manner; just to -- to help safeguard that.

Second, that the insiders should not have the access to make anymore payments or transfers to anybody, to make sure that cash collateral is not being used inappropriately. And if Your Honor is -- finds that acceptable, we could put language into the order that makes it clear that that hole cannot be deepened by them taking any action to remove or otherwise affect the assets of the estate, or otherwise make transfers.

MR. SPELFOGEL: Well, Your -- Your -- Your Honor, maybe stating the obvious, but it's a operating hotel. And there are day-to-day obligations to pay to keep the lights on

which would be very detrimental, so I'm not sure until --

THE COURT: But I -- I think what Mr. Rogoff is talking about is no transfers out of the two-way relationship between the management company and the hotel; no transfers --

MR. SPELFOGEL: We -- we just --

THE COURT: -- to insiders other than the management company.

MR. SPELFOGEL: All right. If -- if -- and it's -- if it's to -- regarding insiders, we do understand that; we just wanna make sure that the --

THE COURT: Right.

MR. SPELFOGEL: -- obviously, that the -- the lights can be kept on and the hotel functioning, which obviously --

THE COURT: Sure.

MR. SPELFOGEL: -- would not (inaudible) --

THE COURT: Right.

MR. SPELFOGEL: -- anybody's benefit.

THE COURT: Right. And when I -- when I say --

MR. ROGOFF: I will --

THE COURT: -- replacement of management, I'm talking about the people in control; I'm talking about the -- the two principals. And it's up to the trustee as to what happens with anyone else. And I -- not the --

MR. SPELFOGEL: Your Honor --

THE COURT: -- U.S. Trustee, the -- the -- the

THE INTERSECTION OF REAL ESTATE VALUATION AND ETHICS

The valuation of real estate has long been a critical piece of many bankruptcies, implicated by and used in connection with numerous elements of the bankruptcy process, including:

- Asset Schedules
- Asset value vs. Liabilities
- Asset value vs. revenues/cash flow
- Priority of payments under Absolute Priority Rule
- DIP Financing and cash collateral usage
- Liquidation value of the company
- Adequate protection for lender
- Section 1111(b) election
- Plan of Reorganization

There are various ways to value property, each with their own considerations:

- MAI Appraisal: Comparable Sales, Income Approach, Replacement Value
- Broker Opinion of Value: Comparable Sales, Income approach
- County Assessed Value
- Debtor's Book Value
- Arm's Length Offers Received
- Foreclosure Value (higher) vs. Replacement Value (lower)
- Commercially Reasonable Sale Process
- Public Auction
- Financial Model

Ethical questions that may arise in connection with real estate valuations:

What must counsel disclose to the court?
What valuations are appropriate to use for initial schedules?
What are reasonable assumptions for an appraiser to make?

Greatest real estate crisis since the financial crisis': German bank alerts the market on exposure to commercial real estate

BYGIULIA MORPURGO, TASOS VOSSOS, NEIL CALLANAN AND BLOOMBERG

February 7, 2024 at 5:10 PM EST

The troubles in the US commercial property market, which have already hit banks in New York and Japan, moved to Europe this week, elevating fears about broader contagion.

The latest victim was Germany's Deutsche Pfandbriefbank AG, which saw its bonds slump on concern about its exposure to the sector. It responded by issuing an unscheduled statement Wednesday that it had increased provisions because of the "persistent weakness of the real estate markets."

It described the current turmoil as the "greatest real estate crisis since the financial crisis."

Lenders are taking increasing provisions on debt extended to property owners and developers as loans begin to sour after rising interest rates eroded the value of buildings around the world. On Tuesday, Treasury Secretary Janet Yellen said that losses in commercial real estate are a worry that will put stress on owners, but added that she thinks the problem is manageable.

For offices in the US, where the return to work following the pandemic has been slower and less substantial, the value destruction has been particularly bad. And some predict the full impact might not even be fully priced in yet. Analysts at Green Street said that a further writedown of as much as 15% may be needed this year.

"Appraisal values remain much too high," they wrote in a note. "Lenders that base their decisions on these appraisals have greater odds of taking impairments" and some could face "strain" as a result.

The plunge in German lenders' bonds was the latest in a series of warning signals. New York Community Bancorp was cut to junk by Moody's Investors Service after flagging real estate problems, while Japan's Aozora Bank recorded its first loss in 15 years due to provisions on loans extended to US commercial properties.

"There are serious concerns in the US CRE market," said Rabobank credit strategist Paul van der Westhuizen. "It's a not an issue for larger US and European banks but the smaller property-focused German banks are feeling a bit of pain. Right now it's more a profitability issue than a solvency issue for them though. They have sufficient capital and are less exposed to the threat of deposit runs than pure retail banks are."

In its results last week, Deutsche Bank AG recorded provisions for losses in US commercial real estate that were more than four times bigger than a year earlier. It warned that refinancing poses the greatest risk to the struggling sector as asset values suffer.

Elsewhere in Europe, Switzerland's Julius Baer Group Ltd. said it would write down huge loans to bankrupt property company Signa. While it was a specific issue, it's added to the broader worries about how far things could spread.

On Tuesday, Morgan Stanley held a call with clients recommending they sell Deutsche PBB's senior bonds. The notes due in 2027 tanked over 5 cents after that to 97, according to CBBT data compiled by Bloomberg. Meanwhile, the bank's AT1 notes slumped as much as 15 cents to 36 between Tuesday and Wednesday.

Deutsche PBB said Wednesday that while it has increased loan-loss provisions to €210-215 million for the full year, it "remains profitable thanks to its financial strength."

Sonja Forster, vice president of European Financial Institution Ratings at Morningstar DBRS, said PBB's "focus on prime locations and relatively conservative LTVs provide some downside protection."

"However, given that the refinancing risk is still high and fresh equity available to borrowers is limited we are monitoring the situation very closely," she said.

Concerns over PBB has spread to other banks with CRE exposure. Aareal Bank AG bonds have lost about 10 points in the last two days and are now quoted at 76 cents on the euro. In November, it reported that the value of US non-performing loans had risen more than fourfold over the previous year.

A spokesperson for Aareal declined to comment.

Deutsche Bank shares were down about 3.7% as of 2:40 p.m. Frankfurt time and Commerzbank AG declined 3.2%, both underperforming the Euro Bank Stoxx Index.

Bafin, the country's banking regulator, said it's monitoring the situation, declining to comment on specific lenders.

Germany's central bank warned last year about the risks surrounding commercial real estate, saying there could be "significant adjustments" that lead to higher defaults and credit losses.

“The outstanding volume of loans granted by the German banking system to the US commercial real estate market is comparatively small, but relatively concentrated at individual banks,” the Bundesbank said.

Germany’s Landesbanks have also felt the pain of their exposure to commercial real estate; in the first half of 2023, the major state banks – Helaba, BayernLB, LBBW and NordLB – posted provisions of about €400 million in total.

If the CRE losses spread to Europe through smaller German banks, that would have an echo of the 2008 global financial crisis. Back then, it was the Landesbanks that got into trouble, when their exposure to subprime mortgages in the US led to billions of euros of writedowns.

“You have to be mindful as you don’t know exactly where the bottom is,” said Raphael Thuin, head of capital markets strategies at Tikehau Capital. “We are aware that there could be more pain to come in commercial real estate.”

INSIDER LEASES AND REAL ESTATE TRANSACTIONS

It is not uncommon for companies to form related entities for the purpose of owning and leasing real estate, for legitimate legal and tax planning purposes. However, when the property owner files bankruptcy, numerous ethical quagmires that arise, including:

Whether the lease is market rate

Whether rent is being paid timely

Is the lease burdensome or valuable to the estate

Separating the duty owed to the client/debtor versus to the principals of the debtor, who may have an ownership interest in the tenant.

AMERICAN BANKRUPTCY INSTITUTE
JOURNAL
The Essential Resource for Today's Busy Insolvency Professional

Sales to Insiders: Are They Entirely Fair?

Contributing Editor:
Daniel J. Carragher
Day Pitney LLP; Boston
djcarragher@daypitney.com

The recent confirmation of the chapter 11 plan in *In re Station Casinos Inc.* in the District of Nevada[1] is one of the latest examples of a case that focused attention on the fairness of the §363 sale process that allows insiders to acquire a business as a going concern while creditors are left unsatisfied. The press reports and news releases from the debtors tout the fact that Frank and Lorenzo Fertitta will continue to control the business founded by their father 30 years ago and will be the largest shareholders of the new company formed to succeed the debtors. The plan met with vigorous opposition from the unsecured creditors and a dissident secured lender group until compromises were reached following the completion of the § 363 sale. Secured creditors of the operating company received substantial recoveries, but were not paid in full. Unsecured creditors will see no recovery at all except to the extent they realize value from warrants to acquire a small interest in the new holding company. How is it that the controlling shareholders managed to preserve the enterprise's going-concern value and repurchase the assets for their own benefit at a fraction of the company's debts?


Daniel J. Carragher

The answer lies in the degree of scrutiny applied to insider sales and the court's assessment of the fairness of the sale process and the price paid by the insiders. Fairness of insider transactions outside of the bankruptcy arena typically requires that the transaction be "entirely fair" to a corporation and its stakeholders. Should bankruptcy courts be bound by that same standard, or will a lower threshold be acceptable where a sale to insiders appears as the only viable alternative to liquidation? By requiring a sale to insiders to meet the entire fairness doctrine, public perception of the bankruptcy process will be enhanced, and the appearance of insiders reaping the benefits of chapter 11 at the expense of creditors can be avoided.

About the Author

Daniel Carragher is a partner in Day Pitney's Bankruptcy and Creditors' Rights and Commercial and Institutional Finance practice groups in Boston.

Heightened Scrutiny for Insider Transactions

The normal rule in sales of assets under § 363(b)(1) is that the bankruptcy courts will not substitute their own views regarding a proposed sale as long as it is supported by a reasonable exercise of the debtor's business judgment.[2] Where the sale is to an insider or insiders who stand to benefit from the sale, the standard for approval is higher.[3] The level of inquiry required for sales to insiders is not spelled out with precision and had been developed on a case-by-case basis, focusing on the nature of the sale process, exposure of the assets to market, openness of the proceedings and fairness of the price paid by the insiders. In the *Bidermann Industries* case, for example, the court refused to approve a letter agreement for a management-sponsored leveraged buyout where the debtor had not hired an investment banker to test the market, the debtor's turnaround consultant and CEO would own stock in the purchaser and the debtor's majority shareholder would receive multiple stock options, a five-year consulting agreement, a $750,000 cash payment for his agreement not to compete and release of all claims by the debtor.

In a nonbankruptcy setting, transactions with corporate insiders are subject to a high degree of scrutiny. In *Weinberger v. UOP Inc.*,[4] the Delaware Supreme Court held that directors of a Delaware corporation must demonstrate their utmost good faith and the most scrupulous inherent fairness of the bargain when they stand on both sides of a transaction. Under the "entire fairness" standard of judicial review, directors must demonstrate that the challenged transaction is entirely fair to the stockholders both in terms of "fair dealing," which entails an examination of when the transaction was timed and how it was initiated, structured, negotiated and disclosed to the directors, and "fair price," which entails an examination of the economic and financial considerations of the transaction. In determining whether a transaction is entirely fair, the Delaware courts consider factors such as (1) the presence of an independent board majority, (2) the active and aggressive search for third-party bidders that preceded the execution of the agreement, (3) diligent efforts by a special committee that has engaged in true arm's-length negotia-

News at 11 II

1 Case no. 09-52477-GWZ.

2 *Comm. of Equity Sec. Holders v. Lionel Corp. (In re Lionel Corp.)*, 722 F.2d 1063, 1071 (2d Cir. 1983); *Off. Comm. of Subordinated Bondholders v. Integrated Resources Inc. (In re Integrated Resources Inc.)*, 147 B.R. 650, 656 (Bankr. S.D.N.Y. 1992); *In re Global Crossing Ltd.*, 295 B.R. 726, 742-43 (Bankr. S.D.N.Y. 2003).

3 *In re Bidermann Indus. U.S.A. Inc.*, 203 B.R. 547 (Bankr. S.D.N.Y. 1997). *See also In re Summit Global Logistics Inc.*, No. 08-11566, 2008 Bankr. LEXIS 896, at *27 (Bankr. D. N.J. March 26, 2008); *In re Univ. Heights Ass'n*, No. 06-12672, 2007 Bankr. LEXIS 1200, at *13 (Bankr. N.D.N.Y. Jan. 22, 2007); *C & J Clark Am. Inc. v. Carol Ruth Inc. (In re Wingspread Corp.)*, 92 B.R. 87 (Bankr. S.D.N.Y. 1988) (sales to fiduciaries in chapter 11 cases are not *per se* prohibited but are subject to heightened scrutiny because they are rife with possibility of abuse).

4 *Weinberger v. UOP Inc.*, 457 A.2d 701 (Del. 1983).

tions with the controlling stockholder, (4) the ability of the special committee to abandon the transaction with the controlling stockholder in favor of a better deal without an unreasonable penalty and (5) the price offered being at a premium to the price determined by the special committee's financial adviser.[5]

The Station Casinos *Case*

The *Station Casinos* case presents the latest example of a contested sale to insiders. Station Casinos and its subsidiaries owned and operated 10 major hotel/casino properties, plus eight smaller casino properties in the Las Vegas metro area. After nearly nine months in chapter 11 and the negotiation of interim compromises with the mortgage lenders on the leased Las Vegas properties (the Propco properties), the debtors proposed to pursue separate paths for the Propco properties and their remaining casinos (the Opco assets). As to the 11 casinos included in the Opco assets, the debtors proposed a § 363 sale to a newly formed entity as the stalking-horse bidder for $772 million. The Fertitta family, through a newly formed gaming company, would initially own nearly half of the equity in the purchaser and would sell part of their interest to the investment group that had led the 2007 going-private transaction for Station Casinos. The Propco properties, along with rights in certain intellectual property and other intangibles owned by Station Casinos, were excluded from the § 363 sale but were transferred to the same new entity under the plan of reorganization. The Fertittas' gaming company continues to operate all of the casinos. Clearly, the participation of the Fertitta family in the purchasing entity made the § 363 sale of the Opco assets an insider transaction and implicated the heightened scrutiny for such transactions.

The debtors' primary competitor in the local Las Vegas market had attempted to buy the debtors' business for some time, but was not selected as the stalking-horse bidder and ultimately withdrew from the § 363 auction, citing the alleged unfairness of the bidding procedures and the exclusion of player databases and information technology critical to operation of the casinos. Creditor groups complained that the proposed division of assets between the Propco properties and Opco assets would depress prices and divert value away from Station Casino creditors. They claimed that the debtors' investment banker had not actively marketed the Opco assets prior to selection of the insider group as the lead bidder, had not distributed a book to potential buyers and had not established a data room for due diligence. The creditor groups also objected to the proposed 30-day timeframe for interested purchasers to conduct due diligence and submit letters of intent, particularly because the assets being sold comprised a multi-billion dollar enterprise with thousands of employees in a highly regulated industry. The bankruptcy court overruled the objections to the § 363 sale and approved the bidding procedures. When no counteroffers were submitted, the stalking-horse bidder was declared the successful purchaser.

The court evaluated the bid-procedures motion for the § 363 sale under a heightened standard of scrutiny and concluded that the debtors satisfied a heightened review of the transactions, citing *Brown v. Kinross Gold U.S.A. Inc.*[6] and *In re Zenith Elecs. Corp.*[7] In reaching its conclusions, the court found that the stalking-horse bid was "a fair and reasonable reflection of what stakeholders who know the most about the Station enterprise believe to be the true potential worth of such enterprise in the right hands,"[8] that the debtors and the agent banks had "conducted a vigorous competition between [the competitor] and the ultimate Stalking-Horse Bidder to determine who they would propose to be the stalking-horse bidder"[9] and that "the Auction will take place pursuant to appropriate court supervision and overseen by...SCI's Independent Director and the consultation parties."[10]

To Sell or Not to Sell: An Examiner's Question?

The *Station Casinos* court refused to order the appointment of an examiner to oversee the sale process, but in other situations, examiners have played a key role in evaluating and negotiating § 363 sales where insiders are competing for the assets. In the *Summit Global Logistics* case, the debtor's investment banker conducted a thorough pre-petition marketing effort, which did not result in a third-party offer. After the filing, an examiner was appointed when there was insufficient creditor interest in forming a creditors' committee. The court tasked the examiner with evaluating the debtor's proposal to sell the business to a management group for $65 million to $70 million. The examiner and debtor provided the court with ample evidence as to the diligent—but unsuccessful—attempts to sell the business as a going-concern, both pre- and post-petition. The examiner also reviewed the fairness of the purchase price and concluded that it represented a fair valuation of the assets.[11] Because the debtor was a public company, the sale process involved an independent committee of the board with its own independent counsel. The court found that the public nature of the § 363 sale provided the necessary ratification of an insider transaction to satisfy Delaware Code title 8, § 144, and that the transparency of the sale process and the marketing efforts of the debtor satisfied the heightened burden with respect to the proposed management-led purchase.[12]

In the *Fontainebleau Las Vegas Holdings* chapter 11 case, the bankruptcy court *sua sponte* ordered the appointment of an examiner to negotiate and supervise a § 363 sale of the debtors' 63-story hotel and casino complex on the Las Vegas strip, which had been under construction until financing ran out in 2008 and was then only 70 percent complete.[13] The examiner's appointment was in response to the imminent failure of the reorganization efforts due to lack of funding, the inability to strike a deal with a third-party stalking-horse bidder and allegations of conflict of interest by the debtors and the controlling stockholders over a potential insider purchase proposal and allocation of sale proceeds between the different debtors' estates. The examiner was given the responsibility of negotiating the terms of any agreement with potential purchasers, including any stalking-horse bidder, and was directed to report on his progress every 10 days. The examiner's appointment led to an improved recovery for creditors through a sale to a new entrant in the bidding process, Icahn Nevada Gaming.

The *Fontainebleau Las Vegas Holdings* case also highlights a weak-

5 *In re Cysive Inc. S'holdrs. Litig.*, 836 A.2d 531 (Del. Ch. 2003).

6 *Brown v. Kinross Gold U.S.A. Inc.*, 531 F.Supp.2d 1234, 1246 (D. Nev. 2008) (articulating "entire fairness" standard, which "entails evaluating both whether the offer price constituted fair value and whether the offer was the product of fair dealing").

7 *In re Zenith Elecs. Corp.*, 241 B.R. 92, 108 (Bankr. D. Del. 1999). *In re Station Casinos Inc.*, No. 09-52477, *slip op.* at 8 (Bankr. D. Nev. July 14, 2010) (findings of fact and conclusions of law).

8 *Id.* at 13.

9 *Id.*

10 *Id.* at 18.

11 *In re Summit Global Logistics Inc.*, 2008 Bankr. LEXIS 896, at *30.

12 *Id.* at *35-37.

13 *In re Fontainebleau Las Vegas Holdings LLC*, No. 09-21481 (Bankr. S.D. Fla. Oct. 14, 2009) (Order Appointing Examiner to Examine, Negotiate and Supervise § 363 Sale of Assets).

ness in the examiner option. The bankruptcy court's order appointing the examiner provided that the examiner's fees and expenses should be paid from the secured creditors' collateral, without resolving pending disputes as to the scope and priority of liens. In response to an appeal by one group of secured creditors, the district court reversed this aspect and directed the debtor to recover all fees paid to the examiner and his professionals.[14] The district court noted that only a trustee, and not an examiner, may avail himself or herself of § 506(c),[15] and that an examiner's fees cannot be surcharged against secured creditors' collateral.

Sales by Trustees

A natural question is whether the heightened scrutiny of insider sales should apply to a sale proposed by a trustee instead of a debtor in possession (DIP), which was answered in the affirmative in *In re Blixseth*.[16] In this case, the court refused to approve a sale of property owned by debtor Edra Blixseth, which was located in the midst of the Yellowstone Mountain Club development. The sale proposed by the chapter 7 trustee was to a secured creditor for an $8 million credit-bid, plus a $500,000 carve-out for the estate, and included a general release of all claims against the creditor. The court found that the creditor had very close ties to the debtor and the Yellowstone Mountain Club, and refused to apply the standard applicable to noninsider sales under *In re Canyon Partnership*,[17] or to give deference to the trustee's business judgment. Instead, the court applied the more rigorous *Bidermann* standard for evaluating insider transactions. The trustee claimed that he had no funds to hire an appraiser and had not engaged a broker to market the property or obtain an opinion of value. The trustee relied solely on the purchaser's appraisal and on his belief that no other party would bid more for the property given the extent of the secured claim and the creditor's right to credit-bid under § 363(k). Primarily due to the trustee's failure to test the market prior to proposing the sale to the secured creditor, the court denied the limited notice and bidding procedures proposed by the trustee. The court also questioned the proposed release of claims because another party had just been authorized to pursue potential claims against the secured creditor.

The *Blixseth* court's focus on value and evaluation of an insider sale under heightened scrutiny is appropriate. While the independent trustee had the exclusive authority to sell assets and was not burdened by the conflicts of interest that apply when a DIP seeks to sell assets to an insider, applying heightened scrutiny to any purchase by an insider advances the public policy of assuring that "the conduct of bankruptcy proceedings not only should be right but must seem right."[18]

Conclusion

Courts should critically evaluate the fairness and timing of the sale process to determine whether the debtor has truly pursued sales to third-party buyers and created a level playing field for outsiders to compete against the interested insiders. Where a special committee of independent directors has been formed, the functioning and independence of the committee needs to be evaluated to determine whether the interests of insiders have been favored over a sale to outsiders. This may involve greater reliance on fiduciaries such as trustees and examiners, but where the appointment of an examiner is not a viable option, the evidence presented by the debtor and the purchaser will need to prove the fairness of the sale process.

The fairness of the price paid by an insider is more difficult to evaluate. The absence of higher or better offers under the constraints of a typical § 363 auction sale does not necessarily prove the fairness of the sale price because timing issues may prevent legitimately interested buyers from submitting bids. Only in a truly open auction proceeding with free access to information and adequate time to formulate bids will the auction mechanism establish fairness of price and satisfy the heightened scrutiny that applies to insider sales. Credible expert opinion should be introduced to establish that the price is fair. By drawing on the standards that apply to public companies under the entire fairness doctrine and requiring objective proof of the fairness of a sale price, courts will be able to assure that § 363 sales involving insiders are not only right, but also "seem right" to the public. ■

[14] *Desert Fire Prot. v. Fontainebleau Las Vegas Holdings LLC (In re Fontainebleau Las Vegas Holdings LLC)*, No. 09-23683, slip op. at 59 (S.D. Fla. July 14, 2010).

[15] Citing *Hartford Underwriters Ins. Co. v. Union Planters Bank NA*, 530 U.S. 1, 6 (2000).

[16] *In re Blixseth*, No. 09-60452, 2010 Bankr. LEXIS 585 (Bankr. D. Mont. Feb. 23, 2010).

[17] *In re Canyon P'ship*, 55 B.R. 520 (Bankr. S.D. Cal 1985).

[18] *In re Bidermann Indus. U.S.A. Inc.*, 203 B.R. at 549, citing Judge Friendly's comments in *In re Ira Haupt & Co.*, 361 F.2d 164, 168 (2d Cir. 1966).

Reprinted with permission from the ABI Journal, Vol. XXIX, No. 9, November 2010.

Faculty

Greg Corbin is the president and founder of Northgate Real Estate Group in New York. In addition to his focus on the sale and workout of properties in chapter 11 and chapter 7 bankruptcy, he specializes in judicial and UCC foreclosures, loan and REO sales, restructuring, and the disposition of stalled construction sites. Mr. Corbin has received numerous prestigious awards throughout his career, most recently the 2023 RED Bankruptcy Broker of the Year, 2023 CoStar PowerBroker, 2023 NYREJ Commercial Real Estate Visionary, 2023 *IE Magazine* Top Turnaround Professional, 2022 *Crain's* Most Influential People in Real Estate, 2022 Property IDX Broker of the Year, 2022 *New York Real Estate Journal* Industry Leader and 2022 CoStar PowerBroker. He and his team have been involved in the sale of over $3.3 billion of investment properties spanning all major asset classes, including multi-family apartment buildings, development sites, factory/warehouses, transitional housing facilities, bulk condominium packages, industrial, retail, hotel, office, mixed-use and commercial buildings. Mr. Corbin experienced in bankruptcy, foreclosure and borrower/lender workouts, and he frequently shares his insights and expertise on podcasts and at major conferences. In recent years, he has been a featured speaker at numerous prestigious events, including the 2024 IMN Distressed Forum for Bank Special Assets, the 2024 Real Estate Deal CRE Conference, the 2023 Financial Poise CREW, the 2023 PCON Real Estate Conference, the 2023 Beard Group Distressed Investing Conference and the 2023 Debtwire Restructuring Forum. Prior to starting Northgate, Mr. Corbin spent four years at Rosewood Realty Group as the president of Bankruptcy and Restructuring. While there, he and his team arranged the sale, workout or recapitalization of over 100 buildings, development sites, membership interests and loans totaling $1.1 billion in underlying collateral. Before Rosewood, Mr. Corbin spent a decade at Besen & Associates. Prior to that, he was a director of sales at Massey Knakal, now Cushman and Wakefield. Mr. Corbin was a co-chair of the YJP Real Estate Division for over a decade and a co-founder of the NYIC Real Estate Group, and he is a member of ABI's Real Estate Committee. He also was the founder and is a current board member of the nonprofit Give to Give Foundation, a co-founder of The Legion, and a co-founder of Fuel For Truth. Mr. Corbin is a graduate of Horace Mann and Boston University.

Lee B. Hart is a partner with Nelson Mullins Riley & Scarborough LLP in Atlanta, where he focuses his practice on restructuring, workouts, bankruptcy and finance. His primarily represents lenders, finance companies and national corporations in connection with the recovery, restructuring and resolution of troubled debts. Mr. Hart litigates cases in bankruptcy courts and trial courts in Georgia and nationally. He also has real estate finance experience, including involvement in the structuring and restructuring of complex real estate loans and underlying financing vehicles. Mr. Hart has been listed in *The Best Lawyers in America* for Bankruptcy and Creditor Debtor Rights/Insolvency and Reorganization Law from 2021–22, as a Dealmaker in the *Atlanta Business Chronicle* for 2009, and as a "Rising Star" in Banking in *Georgia Super Lawyers* from 2014-17. He is a member of ABI, the Commercial Finance Association, the American Bar Association and the Turnaround management Association. Mr. Hart received his B.S. in industrial and labor relations in 2004 from Cornell University and his J.D. in 2007 from the University of Florida Levin College of Law, where he was admitted to the Order of the Coif and served as articles editor of the University of Florida Journal of Public Policy and as a member of the *Florida Journal of International Law*.

Patricia B. Jefferson is a principal at Miles & Stockbridge P.C. in Baltimore in its Creditors' Rights and Bankruptcy Group, as well as the Real Estate and Commercial Finance Group. She represents diverse clients (lenders, unsecured creditors, potential asset-purchasers, trustees and other interested parties) in all aspects of bankruptcy cases, including cash collateral, debtor-in-possession financing, asset sales, dischargeability litigation, claims objections, avoidance actions and lease disputes. Additionally, she represents and advises secured lenders in formulating and executing workout strategies outside of bankruptcy. In addition to her bankruptcy experience, Ms. Jefferson regularly advises clients regarding distressed real estate and commercial foreclosures and receivership actions. She has served on the panel of chapter 7 bankruptcy trustees for the U.S. District Court for the District of Maryland since 2019, and has been appointed as a receiver under Maryland's Uniform Commercial Receivership Act. Ms. Jefferson is a regular speaker at legal education seminars and has been recognized as a leading bankruptcy lawyer in Baltimore by *Chambers USA* since 2015. In addition, she was included in the *Maryland Daily Record*'s "VIP List: Successful before 40" in 2018, and was recognized as an emerging leader by The M&A Advisor in 2019. Ms. Jefferson received her J.D. with honors from the University of Maryland School of Law, where she was elected to the Order of Barristers and served as an associate editor of *The Business Lawyer* and as vice-president of the Moot Court Board.

Robert J. Keach is a shareholder at Bernstein, Shur, Sawyer & Nelson in Portland, Maine, where he practices in the area of bankruptcy, reorganization and workouts. He focuses on the representation of various parties in workouts and bankruptcy cases, including debtors, creditors, creditors' committees, lessors and third parties acquiring troubled companies and/or their assets. Mr. Keach has appeared as a panelist on national bankruptcy, lender liability and creditors rights programs, and he is the author of several articles on bankruptcy and creditors' rights appearing in the *ABI Law Review*, *Commercial Law Journal* and *ABI Journal*, among other publications. He also is a contributing author to *Collier Guide to Chapter 11: Key Topics and Selected Industries* (2011 Ed.). Mr. Keach is recognized as a "Star Individual" in Corporate M&A/Bankruptcy in *Chambers USA*, in *The Best Lawyers in America* (Ten-Year Certificate), and by *New England Super Lawyers* (Bankruptcy and Top 100 Lawyers in New England regardless of specialty). Mr. Keach is admitted to practice in both state and federal courts in Maine and Massachusetts, as well as the First, Second, Seventh and Eighth Circuit Courts of Appeals and the U.S. Supreme Court. He is Board Certified in Business Bankruptcy Law by the American Board of Certification. Mr. Keach is the estate representative (and former chapter 11 trustee) in the cross-border railroad reorganization of Montreal Maine & Atlantic Railway, Ltd. He also is currently the fee examiner for a post-confirmation trust in a mass tort chapter 11 case. Mr. Keach has, *inter alia*, represented ad hoc committees in the *Homebanc Mortgage*, *New Century TRS Holdings* and *Nortel Networks* cases in Delaware, as well as a public utilities commission in the *FairPoint Communications* case in the Southern District of New York. He is a Fellow of the American College of Bankruptcy and a past president (2009-10) of ABI. Mr. Keach received ABI's Lifetime Achievement Award in 2021 and co-chaired ABI's Commission to Study the Reform of Chapter 11. He received his J.D. in 1980 from the University of Maine.

Mark Power is a partner with Thompson Coburn LLP in New York and has experience in all aspects of financial restructuring and insolvency issues. He represents creditors' committees, debtors, noteholders, lenders and secured creditors in bankruptcy proceedings, as well as acquirers of and investors in troubled, distressed and bankrupt companies. He also counsels management and creditors with respect to insolvency matters and crisis management. Mr. Power has played a prominent role in

large and small restructurings and bankruptcies throughout the U.S. He has represented sellers and purchasers of debt and equity positions of troubled companies and acquirers of distressed businesses in such industries as telecommunications and integrated communications providers; e-commerce; internet and technology; manufacturing; marketing; retail chains and energy. He also has counseled lenders in post-petition financing transactions in such industries as retail, manufacturing, telecommunications, environmental remediation, restaurant chains and hospitality. Mr. Power has worked on behalf of creditors and other parties-in-interest in bankruptcy reorganization and liquidation proceedings, including the handling of DIP-financing or cash-collateral motions, relief from the automatic stay and adequate protection matters, the assumption or rejection of unexpired leases or executory contracts, valuation hearings, plan formulation and drafting, and confirmation hearings. He also represents plaintiffs or defendants in a variety of adversary proceedings regarding lien and priority issues, preferences, equitable subordination, fraudulent conveyances and/or inter-creditor disputes. Mr. Power lectures frequently on current restructuring and bankruptcy issues. He also contributes to various publications and seminar materials on a variety of restructuring and bankruptcy topics. Mr. Power received his B.B.A. in 1985 from The George Washington University and his J.D. *cum laude* in 1988 from Boston College Law School.