AMERICAN BANKRUPTCY INSTITUTE

New York City Bankruptcy Conference

BAPCPA and Legislative Fixes: 20 Years Later

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CONCURRENT SESSION

2024

Creditor Protections: Commercial Real Estate Leases

Background & Commentary

- **"Letter of the Law" Before BAPCPA:** Unexpired nonresidential real property leases deemed rejected after 60 days per 365(d)(4), but code section is silent with respect to the number of extensions or their duration
- **"Letter of the Law" After BAPCPA:** Unexpired nonresidential real property leases deemed rejected after earlier of (i) 120 days or (ii) plan confirmation date, subject to a single extension of 90 days for cause; further extensions require affirmative consent of the impacted landlord
- **Impetus for the Change:** A desire to provide landlords with a louder voice in the restructuring process, given the lengthy and / or serial extensions of the lease assumption / rejection deadline which had become commonplace pre-BAPCPA
- **Impact of the Change:** Significant pressure placed on debtors with multiple store leases to make swift and final decisions regarding go-forward footprint; functional inability to "stress test" a business plan inside of a chapter 11

Illustrative Cases

Toys R Us

BORDERS

mervyns

Sources

- Landlord Beware: BAPCPA Affects Nonresidential Real Estate Leases Too, 1-Oct ABI Journal (2006)
- https://www.law.cornell.edu/uscode/text

Creditor Protections: 503(b)(9) Claims

Background & Commentary

- **"Letter of the Law" Before BAPCPA:** Limited primarily to reclamation rights enumerated under 546(c), which had narrow windows and required expedient action on part of a creditor
- **"Letter of the Law" After BAPCPA:**
  - Section 503(b)(9) added to the code, which provides an administrative expense claims equal to "the value of any goods received by the debtor within 20 days before the date of commencement of a case under this title in which the goods have been sold to the debtor in the ordinary course of such debtor's business"
  - 546(c) also modified to expand reclamation window to 45 days
- **Impetus for the Change:** A view that certain cases – most notably, large retail bankruptcies – were being informally financed on the backs of trade creditors with unsecured, nonpriority claims
- **Impact of the Change:** Creation of a new class of claimant with administrative priority status, increasing exit financing requirements and diminishing a debtor's negotiating leverage in plan of reorganization discussions

Illustrative Cases

BED BATH & BEYOND

BON-TON

Pier 1 imports

Sources

- https://www.law.cornell.edu/uscode/text

Creditor Protections: Adequate Assurance For Utilities

Background & Commentary

- **"Letter of the Law" Before BAPCPA:**
  - Utility prohibited from altering, refusing or discontinuing services due to BK filing
  - Utility may alter, refuse or discontinue service if adequate assurance of payment (in the form of a deposit or other security) for service after such date has not been furnished within 20 days of order for relief
- **"Letter of the Law" After BAPCPA:**
  - Utility may alter, refuse or discontinue utility service if the utility does not receive adequate assurance of payment for utility service that is satisfactory to the utility within 30 days of filing date
  - Adequate assurance of payment specified to mean (1) a cash deposit, (2) an LC, (3) a CD, (4) a surety bond, (5) a prepayment (6) mutually agreed upon form of security
  - Admin claim is specifically excluded from the definition of "assurance of payment"
- **Impetus for the Change:** Debtors would routinely argue that timely payment history + admin claim treatment of postpetition utility claims = "adequate assurance"
- **Impact of the Change:** Two-week deposit in segregated account typically proposed by Debtors in utility motions; impetus on utilities to raise objections

Illustrative Cases

Lucre Inc.

Storehouse Inc.

Sources

- Utilities After BAPCPA: What's Changed, 1-Mar ABI Journal (2007)
- https://www.law.cornell.edu/uscode/text

Creditor Protections: Consumer Privacy Ombudsman Provisions

Background & Commentary

- **"Letter of the Law" Before BAPCPA:** Significantly in flux, with the "internet boom" raising widespread concern regarding how businesses would use the information consumers provided online
- **"Letter of the Law" After BAPCPA:** BAPCPA makes three changes to the Bankruptcy Code that together create a new process for selling or leasing customer information - (i) a new 101(41A) defines the term "personally identifiable information," (ii) amendments to 363 limit the debtor's ability to sell or lease personally identifiable information, and (ii) a new 332 controls which appointment of consumer privacy ombudsmen and defines their role in the sale process
- **Impetus for the Change:** Logical evolution of Leahy-Hatch Amendment to Senate Bill 420, which took an interest in ensuring that consumer information collected pursuant to a privacy policy was treated consistently in a bankruptcy sale
- **Impact of the Change:** Acknowledgment of consumer rights in the "age of the internet;" Emphasis on increased need for proper sale transaction planning

Illustrative Cases

Toysmart.com LLC

Living.com Inc.

Sources

- Handling Customer Data in Bankruptcy Mergers and Acquisitions / Coping with the Consumer Privacy Ombudsman Provisions of BAPCPA, 1-Jul ABI Journal (2005)
- https://www.law.cornell.edu/uscode/text

Creditor Protections: Section 365(b) Cure for Nonmonetary Defaults

Background & Commentary

- **"Letter of the Law" Before BAPCPA:** Former section 365(b)(2)(D) exempted from cure defaults relating to "the satisfaction of any penalty rate or provision relating to a default arising from any failure by the debtor to perform nonmonetary obligations"
- **"Letter of the Law" After BAPCPA:** Congress amended 365(b)(2)(D) and 365(b)(1)(A) such that exemptions for nonmonetary defaults in non-lease executory contracts could no longer be argued as being exempt from the cure obligation
- **Impetus for the Change:** Delta between State court views and BK court enforcement of contractual breaches including "going dark" under a commercial lease, failure to go operational by a date certain, and failure to close by a specified date
- **Impact of the Change:** Places increased control in the hands of contract parties wishing to void, renegotiate, or otherwise modify agreements with a debtor counterparty

Illustrative Cases

Escarent Entities, LP

Sources

- It's Too Late, Baby, Now It's Too Late: the New Cure Standard for Nonmonetary Defaults Under Section 365(b) – Will Hueske, Weil
- https://www.law.cornell.edu/uscode/text

Creditor Protections: Plan Requirements for Tax Claims

Background & Commentary

- **"Letter of the Law" Before BAPCPA:** Deferred payments must be completed within six years of the assessment date.
- **"Letter of the Law" After BAPCPA:**
  - Deferred payments must be completed within five years beginning with the petition date
  - Payments must be in the form of regular installments
  - Payment schedule must be no less favorable than the payment schedule of the most favored class of non-priority, unsecured claims provided for by the plan
  - Same payment schedule applies to tax claims secured by a lien that, if unsecured, would otherwise be described in 507(a)(8)
- **Impetus for the Change:** View that - despite being holders of priority claims - tax claimants were not necessarily receiving "priority treatment" as compared to holders of general unsecured claims
- **Impact of the Change:** As a common priority claimant, the IRS will benefit from these modifications

Sources

- United States Attorneys' Bulletin, July 2006, Volume 54, Number 4
- https://www.law.cornell.edu/uscode/text

Administrative Provisions

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Exclusivity Limitations

- Prior to BAPCPA there were no limits on number of exclusivity extensions, and a Debtor could obtain indefinite exclusivity extensions from the court.
- BAPCPA amended Section 1121; now, debtors are now only entitled to a total of eighteen months of exclusivity, plus two extra months for solicitation.
- In many cases, this does not have a meaningful impact, since the Debtor will always be best situated to put forth a plan, and other parties in interest may be unable or unwilling to prepare a competing plan.
- As a practical matter, the length of most cases is now governed by milestones contained in financing orders. This change may have accelerated the process but it is likely the length of cases would have shortened in any event.

UCC Disclosure Obligations / Challenges to Committee Appointments

- Following BAPCPA, the United States Trustee can be ordered by the court to change committee membership if necessary to ensure adequate representation.
- Further, BAPCPA entitles creditors to who are not committee members to receive certain information, as part of the committee's work.
- These amendments allow for more openness and disclosure and ensure fairness among committee representation.
- As a practical matter this has resulted in creation of Committee informational websites but not much else.

Disinterestedness Requirements for Financial Advisors

- Previously, a financial advisor was not disinterested if it had been any underwriter of any securities in the last three years. Further, a law firm was not disinterested if it had acted as counsel for such a transaction.
- BAPCPA removed these disqualifying provisions and ensured that such professionals could be retained if they otherwise met the requirements of Section 327.
- This has allowed for greater continuity in Company professionals pre and post bankruptcy. It is unclear whether this has been good for the process.

Involuntary Cases: Petitioning Creditor Claim may not be Subject of Bona Fide Dispute

- Under § 303(b)(1), a petitioning creditor cannot be "the subject of a bona fide dispute" with respect to either liability or amount.
- The Bankruptcy Code does not define what constitutes a "bona fide dispute"; courts typically apply an objective test to determine if there is a bona fide dispute.
- As recently addressed by the Second Circuit, "A bona fide dispute exists if 'there is either a genuine issue of material fact that bears upon the debtor's liability or a meritorious contention as to the application of law to undisputed facts.'" *Tate v. Navient Sols., LLC (In re Navient Sols., LLC)*, 2023 U.S. App. LEXIS 12067, *6 (May 17, 2023).
- The petitioning creditor bears the initial burden to establish that there is no bona fide dispute. Once they do so, the burden shifts to the debtor.

Motions to Convert/Appoint a Chapter 11 Trustee or Examiner

- BAPCPA also requires that an examiner be appointed upon request, so long as the Debtor's unsecured debt exceeds $5 million.
- In *FTX*, the Third Circuit held that Section 1104(c) was not permissive; once the requirements are met, an examiner must be appointed, and the only role of the court is to determine the scope of the examiner's duty. *In re FTX Trading Ltd.*, 91 F.4th 148 (3d Cir. 2024).
- Practically, this did not have a major impact; following remand, Judge Dorsey appointed an examiner with a limited scope, who was given 60 days to file an initial report, with a budget not to exceed $1,600,000.
- The FTX outcome highlights the weakness in the statute.

Limitations on KERPs

- Previously, the bankruptcy code did not have any prohibitions on KERPs. Instead, courts applied a "sound business judgment" standard to determine if such programs were permissible.
- BAPCPA added 503(c), which gives courts stricter guidelines and limits KERPs such that they cannot benefit insiders of the Debtors.
- This change was likely necessary on account of large KERPs allowing payments to insiders in cases such as *Enron* and *WorldCom*.
- In *In re Borders*, 453 B.R. 459 (Bankr. S.D.N.Y. 2011), the court applied these factors and determined that the employees in question were not directors or officers, and therefore the KERP was permissible.
- Replaced by KEEPS which often achieve the same result the statute attempted to avoid.

Disclosure Statement – Tax Consequences

- Following BAPCPA, disclosure statements now require a full discussion of federal tax implications of the plan on the debtor, and the hypothetical impact on a holder of a claim or interest.
- Under Section 1125, "adequate information" now includes "discussion of the potential material Federal tax consequences of the plan to the debtor, any successor to the debtor, and a hypothetical investor typical of the holders of claims or interests in the case, that would enable such a hypothetical investor of the relevant class to make an informed judgment about the plan . . . ."

Pre-pack/Negotiated Voting Permitted to Continue Post-Petition

- Debtors of prepackaged plans prior to BAPCPA had to stop solicitation upon filing a petition, and a court order was required in order to continue solicitation.
- After BAPCPA, prepackaged plans are easier to solicit, as Debtors can continue solicitation that began prior to the petition date.
- The prevents dissenting creditors from being able to halt solicitation and slow down the process.
- With the proliferation of Restructuring Support Agreements this has contributed to the trend towards negotiating a plan prior to filing and allowing cases to spend little time in bankruptcy perhaps trading speed and efficiency for due process.

BAPCPA Update Panel

NYC ABI May 9, 2024

UNCITRAL Model Law and Chapter 15

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I. Section 304 and Comity

a. Prior to 1978, courts in the United States considered both comity and the protection of local creditors as most significant determinants for whether to defer to foreign insolvency proceedings.

i. Caselaw -- "Comity," in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws. *Hilton v. Guiyot*, 159 U.S. 113, 163-164 (1895).

ii. Section 2(a)(22) of the Bankruptcy Act of 1898 (as amended 1962) -- a court may "exercise, withhold, or suspend the exercise of jurisdiction, having regard to the rights or convenience of local creditors and to all other relevant circumstances, where a bankrupt has been adjudged bankrupt by a court of competent jurisdiction without the United States."

iii. Former Bankruptcy Rule 119-1 (1974) – "When a proceeding for the purpose of the liquidation or rehabilitation of his estate has been commenced by or against a bankrupt in a court of competent jurisdiction without the United States, the court of bankruptcy may, after hearing on notice to the petitioner or petitioners' and such other persons as it may direct, having regard to the rights and convenience of local creditors and other relevant circumstances, dismiss a case or suspend the proceedings therein under such terms as may be appropriate."

b. Former Section 304 was added as part of the 1978 Bankruptcy Code to provide a clearer statutory framework for recognition of foreign proceedings, including specific factors courts should evaluate when considering whether to defer to a foreign proceeding and filing procedures for commencing a case ancillary to a foreign proceeding.

i. Section 304 ancillary case commenced with the filing of a petition by a foreign representative, and parties in interest could object to the petition/relief requested

ii. Section 304(c) provided that in determining whether to grant relief "the court shall be guided by what will best assure an economical and expeditious administration of such estate, consistent with-

1. just treatment of all holders of claims against or interests in such estate:

2. protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceeding;

3. prevention of preferential or fraudulent dispositions of property of such estate;

4. distribution of proceeds of such estate substantially in accordance with the order prescribed by this title;

5. comity; and if appropriate,

6. the provision of an opportunity for a fresh start for the individual that such foreign proceeding concerns."

iii. Relief available under Section 304 included

1. Enjoining the commencement or continuation of- (A) any action against a debtor with respect to property involved in such foreign proceeding; or such property; or (B) the enforcement of any judgment against the debtor with respect to such property, or any act or the commencement or continuation of any judicial proceeding to create or enforce a lien against the property of such estate;

2. Entry of an order providing for the turnover of the property of such estate, or the proceeds of such property, to such foreign representative; or

3. other appropriate relief.

c. The majority of Courts applying section 304 found that comity should be granted to foreign insolvency proceedings except where enforcement of foreign based rights "would be the approval of a transaction which is inherently vicious, wicked or immoral, and shocking to the prevailing moral sense." *In re Culmer*, 25 B.R. 621 (Bankr. S.D.N.Y. 1982). These cases focused on comity as an overriding principle that ran through the other five factors under section 304. *See e.g.*, *Victrix S.S. Co., v. Salen Dry Cargo*, 825 F.2d 709, 716 (2d Cir. 1987) (recognizing Swedish bankruptcy proceedings); *Cunard S.S. Co. v. Salen Reefer Servs*., 773 F.2d 452, 461 (2d Cir. 1985) (granting comity to a Swedish bankruptcy proceeding and vacating an attachment in the U.S.); *Pravin Banker*

Assocs. v. Banco Popular del Peru, 165 B.R. 379, 385-86 (S.D.N.Y. 1994) (recognizing a Peruvian bank liquidation); *In re Rubin*, 160 B.R. 269, 283 (Bankr. S.D.N.Y. 1993) (recognizing an Israeli liquidation of a reinsurance company); *Allstate Life Ins. v. Linter Group Ltd*., 994 F.2d 996 (2d Cir. 1992) (recognizing an Australian proceeding and finding that comity is warranted), *aff'd*, 994 F.2d 996 (2d Cir.), cert. denied, 114 S. Ct. 386 (1993); *In re Brierley*, 145 B.R. 151, 163-68 (Bankr. S.D.N.Y. 1992) (recognizing an English bankruptcy proceeding); *Lindner Fund, Inc. v. Polly Peck Int'l PLC*, 143 B.R. 807, 810 (S.D.N.Y. 1992) (extending comity to an English reorganization proceeding);

d. Some Courts nevertheless denied relief under section 304, finding that comity was only one factor to be considered. These courts often cited the lack of protection afforded to local creditors and the differences between US law and the law of the foreign proceeding. *See, e.g*., In re Toga Manufacturing, 28 B.R. 165 (Bankr. E.D. Mich. 1983) (denying relief in favor of protecting local US based creditor, whose lien would not be afforded similar treatment under the laws of the Canadian proceeding); *In re Papeleras Reunidas, S.A*., 92 B.R. 584 (Bankr. E.D.N.Y. 1988) (denying relief on the ground that comity is only one factor and finding that consideration of the comity factor "requires an analysis of the effect that the recognition of a foreign proceeding has upon the laws, public policies and the rights of citizens of the United States.). Similarly, the Second Circuit focused on the lack of protections for a secured creditor's position in refusing to turn over US based assets to the foreign representative for disposition in the foreign proceeding. *In re Treco*, 240 F.3d 148, 156 (2d Cir. 2001).

e. *In re Maxwell Communications Corporation plc* – December 1991, parallel filings in US and England by Maxwell companies following the death of Robert Maxwell; Bankruptcy Court in SDNY and English Court adopted joint protocol for cooperation during the cases ("Maxwell Protocol") that provided a framework for managing cross border insolvency cases.

II. UNCITRAL Model Law and Chapter 15

a. UNCITRAL Model Law on Cross Border Insolvency enacted 1997

i. Model Law provides modern legal framework to more effectively address cross-border insolvency proceedings concerning debtors experiencing severe financial distress or insolvency.

ii. Focus on authorizing and encouraging cooperation and coordination between jurisdictions, rather than attempting the unification of substantive insolvency law, and respects the differences among national procedural laws.

iii. For the purposes of the Model Law, a cross-border insolvency is one where the insolvent debtor has assets in more than one State or where

some of the creditors of the debtor are not from the State where the insolvency proceeding is taking place.

b. Model Law enacted as chapter 15 of the U.S. Bankruptcy Code with the BAPCPA amendments in 2005; also provided for related changes to Fed. R. Bankr. P., other sections of the Bankruptcy Code

c. Section 1501 statement of purpose -- Chapter 15 enacted to incorporate the Model Law, to provide effective mechanisms for dealing with cases of cross border insolvency.

d. Overriding philosophy of chapter 15 is deference to foreign insolvency proceedings, e.g., comity, and avoidance of piecemeal distribution of the debtor's estate. Among the express objectives of chapter 15 is to promote the "fair and efficient administration of cross-border insolvencies that protects the interests of all creditors, and other interested entities, including the debtor . . ." § 1501(a)(3).

e. Section 1515 provides simplified process for commencement of foreign cases. Foreign representative need only submit a certified copy of decision of foreign court or other evidence commencing foreign proceedings and appointing foreign representative; documents must be translated into English.

f. Section 1517 provides simple criteria for recognition ("shall recognize"). Must be:

   i. A foreign proceeding (a "collective judicial or administrative proceeding" under a law related to insolvency or adjustment of debt, where assets and affairs of debtor are subject to oversight by a foreign court for the purpose of reorganization or liquidation) that is either a foreign main or non-main proceeding --

      1. Foreign main – foreign proceeding pending in location of debtor's center of main interest,

      2. Foreign non-main – foreign proceeding pending where debtor has an establishment (basically assets, operations, employees).

   ii. Petition is filed by a "foreign representative" – either a person or body appointment to administer debtor's liquidation or reorganization or to act as representative of foreign proceeding

   iii. Petition complies with requirements of section 1515.

g. Hearing on recognition generally scheduled for 21 days after petition is filed. Interim relief available under section 1519 (including application of automatic stay) for interim period as to specific creditors.

h. Automatic relief available under section 1520 upon recognition as a foreign main proceeding, including application of automatic stay. Similar relief available upon request to court for foreign non-main proceeding. In either case, the basic relief doesn't require additional showing and is a simple exercise of comity.

i. Additional relief available upon motion pursuant to section 1521, subject to requirements for protection of creditors, public policy. Here is where traditional issues of balancing rights of local creditors vs. comity to another legal proceeding show up.

j. Additional relief may include

    i. Discovery under Rule 2004

    ii. Recognition/enforcement of foreign insolvency plans,

    iii. Turnover of assets located in the US to foreign representative for administration in foreign proceeding

    iv. Other relief available to a trustee (other than authority to commence avoidance actions under US bankruptcy law).

k. Section 1528 – provides for commencement of plenary proceeding (typically under chapter 11) in the US following recognition of foreign proceeding in a chapter 15 case

    i. Follow on plenary proceedings concern property within the territorial United States

    ii. Foreign representative may use plenary proceeding to assert avoidance actions under US Bankruptcy Code

l. Case law since 2005 has resolved questions concerning issues such as:

    i. COMI determination– In the US, COMI measured as of time of chapter 15 filing, not time of filing of foreign proceeding – permits recognition of insolvency proceedings for letter box companies formed under law of one jurisdiction that are operated in other jurisdictions

    ii. Litigation of foreign avoidance actions – permitted in a chapter 15 case

    iii. Chapter 15 court will avoid liens entered with respect to assets in the US between the time the chapter 15 petition is filed and the hearing on recognition

    iv. *In re Barnett* – Second Circuit applied bankruptcy venue requirements to chapter 15 case so debtor required to show that it has property in the jurisdiction to file; typically satisfied by funds in attorney retainer account.

v. Section 1506 public policy exception very narrowly interpreted – US Bankruptcy Courts generally do not require outcome in foreign proceeding to be the same as would occur under US law as long as there is no manifest injustice/prejudice, and there are findings in the foreign decision that would support basis for such relief or relief is consensual. Compare In re Vitro S.A.B. de C.V., 701 F.3d 1031 (5th Cir. 2012) (denying enforcement of Mexican concurso confirmed as a result of insider votes that would have enjoined rights of bondholders against non-debtor subsidiaries on a non-consensual basis); with In re PT Bakrie Telecom TBK, 628 B.R. 859 (Bankr. S.D.N.Y. 2021) (courts may enforce non-debtor releases in connection with a chapter 15 case even where such releases would not be permitted in a plenary case in the US, but there must be findings supporting releases) (citing cases).

m. Effect – since the enactment of Chapter 15, foreign debtors routinely file proceedings in US Courts to, *inter alia*:

i. enforce plans that were enacted in home jurisdiction;

ii. obtain discovery regarding assets held in the US/claims against parties subject to US jurisdiction;

iii. provide authority to appear in US courts;

iv. prosecute avoidance actions under foreign law against persons subject to jurisdiction in the United States.

Consumer Provisions and Small Business Provisions

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The changes to the Bankruptcy Code as enacted by BAPCPA were intended to make it harder for consumers to qualify for chapter 7 and receive a discharge. The most significant changes for consumer debtors were (1) the creation of the "means test", (2) certain limitations on serial or repeat filings and the imposition of the automatic stay, and (3) a requirement for all individual debtors, whether chapter 7, 11 or 13, to participate in pre-bankruptcy credit counseling.

The changes to the Bankruptcy Code as enacted by BAPCPA also created the newly defined term "small business case" and modified the definition of "small business" into the newly defined term "small business debtor", which were meant to streamline the chapter 11 process for cases where aggregate debt, at the time, of its enactment, did not exceed $2,000,000.

BAPCPA also modified the definition of "single asset real estate debtor" to eliminate the $4,000,000 monetary limit, expanding the definition to a much larger population of real estate debtors. Also with respect to single asset real estate debtors, changes to the automatic stay provisions of section 362 require that in order for a "single asset real estate debtor" to maintain the benefits of the automatic stay it must either file a confirmable plan or commence making monthly payments to the creditor seeking stay relief within 90 days of the date of the order for relief (or 30 days from a determination that a debtor is a single asset real estate debtor, whichever is later), with such payments made in an amount equal to the applicable non-default interest rate.

Finally BAPCPA also imposed new duties on lawyer's representing debtors by adding a new definition: "Debt relief agency" at Section 101(12)(a) and at Section 707, providing that a lawyer's signature on a petition or other pleading is a certification that the lawyer has performed a reasonable investigation into the factors leading up to the bankruptcy filing or other pleading, that the petition or other pleading is well grounded in fact and law or that there is a good faith argument for a reversal or modification of existing law and that counsel does not have knowledge that the information in the debtor's schedules is incorrect.

These are just a few of the many significant BAPCPA changes to the bankruptcy code that I am going to highlight in this portion of the panel.

Means Testing: Section 707(b) and Section 521

Pre BAPCPA, the "means test" did not exist. Rather, there was a presumption in favor of the debtor being entitled to relief under the Bankruptcy Code except upon a showing of "substantial abuse".

After BAPCPA:

BAPCPA established the means test. The means test looks back at 6-months of an individual's income and then compares it to the median income in that debtor's state and the debtor's personal debt and expenses. Some of the data comes from the Census Bureau (median income) and some from the IRS (National standards for food, clothing and other items; national standards for out-of-pocket health care expenses; local standards for housing, utilities and transportation). There is a presumption of abuse if the debtor's income is above the state median.

Pursuant to Section 521(a)(1)(B), Individual debtors are required to file additional financial information including:
"copies of all payment advices or other evidence of payment received within 60 days before the filing of the petition…;
a statement of monthly net income, itemized to show how the amount is calculated; and
a statement disclosing any reasonably anticipated increase in income or expenditures over the 12-month period following the date of the filing of the petition…",
This information is utilized in the application of the means test.

Section 521 also added a requirement for debtor's to provide copies of tax returns.

Failure to timely file the 521 documents within 45 days results in automatic dismissal on the 46th day, but dismissal of a case may be delayed on motion by the debtor if made within the original 45 day period or by the trustee on a showing that the debtor attempted in good faith to file payment advices and creditors are best served by administering the bankruptcy case.

The BAPCPA changes were meant to deter chapter 7 bankruptcy filings by individuals who could afford to repay their debts and instead have the cases filed as, or converted to, chapter 13 where some debt repayment is made under a chapter 13 plan.

Extended Time Between Discharges: 727(a)(8) and 1328(f)

Pre-BAPCPA, limitations on discharge for chapter 7 and chapter 13 filing was 6 years between filings.

BAPCPA expanded the time period between chapter 7 cases so that a debtor could not obtain a subsequent discharge if there was a prior chapter 7 filing within 8 years before the petition date.

There was also a change to Section 1328 which added a provision that a chapter 13 debtor would be denied a discharge if the debtor received a discharge under a prior chapter 7, 11 or 12 within 4 years from the prior case filing or within 2 years of a prior chapter 13 case filing.

Mandatory Credit Counseling: Section 109(h) and 727(a)(11)

Pre BAPCPA, the Bankruptcy Code did not contain any financial education requirements.

BAPCPA mandated individual debtors, for all chapters, 7, 11 and 13, take a credit counseling class prior to the petition being filed and to take a personal financial management court prior to a

discharge issuing (see 727(a)(11). Failure to comply with the credit counseling and debtor education requirements subject the case to dismissal.

Serial Filings and the Automatic Stay: Section 362(c)(3) and 362(d)(4):

With respect to serial filings, in a case where there was a prior bankruptcy case pending within the prior year, which case was dismissed, the automatic stay is only in effect for 30 days. In order to extend the stay, the debtor must file a motion and overcome the presumption that the case was not filed in good faith. If a debtor was a debtor in two or more cases pending within the prior year that were dismissed, there is no automatic stay unless the debtor files a motion for the imposition of the stay and overcomes a presumption that the case was not filed in good faith.

New Section 362(d)(4) provides for "in rem" stay relief upon a finding of an intent to delay, hinder or defraud a secured creditor by multiple bankruptcy filings with respect to the subject real property.

Domestic Support and Related Obligations: Section 362 and 507

Pre -BAPCPA, Section 507(a)(7) governed domestic support obligations, which did not have a first priority of payment.

BAPCPA modified Section 507(a)(1) to make domestic support obligations the first priority in distributions, moving them up from the 7th priority.

BAPCPA also modified Section 362 to provide that a bankruptcy filing does not operate as a stay of a proceeding, or the commencement of a proceeding, with respect to the establishment of paternity, the establishment or modification of a domestic support obligation, custody/visitation, and divorce (with the exception of determinations regarding property of the estate) or regarding domestic violence or stay the collection of a domestic support obligation from property that is not property of the estate, or stay the withholding of income that is property of the estate to pay a domestic support obligation.

Chapter 13 Lien Stripping: Section 1325(a)

Lien stripping in chapter 13 is no longer permitted under BAPCPA for certain purchase money security interests and secured creditors retain their liens on collateral until the full amount is paid or the plan term is completed.

Chapter 11 Individual Debtors: Section 1115, 1123 and 1129

BAPCPA added Section 1115 which includes property acquired after the petition date to be considered property of the debtor's estate, including post-petition earnings. Section 1123(a)(8) requires an individual chapter 11 debtor to fund any plan from future earnings/income. Section 1129(a)(15) requires an individual chapter 11 debtor, in the event of an unsecured creditor confirmation objection, to commit a contribution of the debtor's "disposable income" to the term of a plan.

Single Asset Real Estate Debtors:

As noted in the introduction, BAPCPA also modified the definition of "single asset real estate debtor" to eliminate the $4,000,000 monetary limit, expanding the definition to a much larger population of real estate debtors. Changes to the automatic stay provisions require that in order for a "single asset real estate debtor" to maintain the benefits of the automatic stay it must either file a confirmable plan or commence making monthly payments to the creditor seeking stay relief within 90 days of the petition date (or 30 days from a determination that a debtor is a single asset real estate debtor, whichever is later), made in an amount equal to the applicable non-default interest rate. The statute also specifies that the monthly payments may be made from rents or other income generated by the property.

Small Business Debtor Provisions: Sections 101(51), 1116, 1121 and 1129

Pre-BAPCPA, Section 101(51)(c) defined "small business" as "a person engaged in commercial or business activities…whose aggregate noncontingent liquidated secured and unsecured debt as of the date of the petition do not exceed $2,000.000. Debtor's could make an election to be treated as a small business.

BAPCPA added a definition for "small business case" and "small business debtor". A small business debtor has certain additional financial reporting requirements, including filing its balance sheet, statement of operations, cash flow statement and most recently filed tax return with its petition or within 7 days of filing the petition. A small business debtor is also subject to a far more expedited confirmation process including: the plan and disclosure being filed no later than 300 days after the petition date; and confirmation of the plan occurring no later than 45 days after the plan is filed. Exclusivity in a small business case is 180 days, which is subject to extension. However, extension of the exclusivity period, as well as the 45 day plan confirmation period, is only available if the debtor (1) evidences by a preponderance of the evidence that "it is more likely than not that the court will confirm a plan within a reasonable period of time", (2) the new deadline is fixed when the extension is granted; and (3) any order extending the deadline is signed before expiration of the prior deadline.

These small business debtor provisions are distinguishable from the more recently created subchapter v provisions enacted under the Small Business Reorganization Act (but have some overlapping financial reporting requirements), which expands on the small business provisions, provides an alternative form of chapter 11, and, from what I have read, especially with the increase in debt limit to $7,500,000, comprises a substantial percentage of newly filed chapter 11 cases.

Sanctions Imposed on Debtor's Counsel: Section 707(b) and 526

The new definition of Debt Relief Agency may include lawyers which subjects counsel to certain required disclosures.

The BAPCPA changes potentially subject counsel to sanctions or other penalties/liability for failure to adequately verify the accuracy and legal basis for information contained in a debtor's schedules and other pleadings.

BAPCPA Impact on Bankruptcy Asset Sales

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I. Use, Sale or Lease of Personally Identifiable Information

- The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 made several key revisions to the Bankruptcy Code that create a framework for selling or leasing customer information under Section 363 of the Bankruptcy Code.
    - New § 101(41A) defines the term "personally identifiable information."
    - Amendments to § 363 limit the debtor's ability to sell or lease personally identifiable information.
    - New § 332 addresses appointment of Consumer Privacy Ombudsman (CPO) and defines role the role of the CPO.
- Even in the absence of specific bankruptcy regulations concerning PII, companies and trustees handling such data still had to consider other legal frameworks such as state privacy laws and general principles of privacy and data protection. However, these considerations varied widely and were not uniformly enforced under bankruptcy conditions.

- "Personally identifiable information" (PII)
    - PII is information obtained from a purchaser of consumer goods or services that is specific to that individual and would, by itself, allow identification of the individual.
    - Section 101(41A) of the Bankruptcy Code defines "personally identifiable information" as:
        - The term "personally identifiable information" means—
            - **(A)** if provided by an individual to the debtor in connection with obtaining a product or a service from the debtor primarily for personal, family, or household purposes—
                - **(i)** the first name (or initial) and last name of such individual, whether given at birth or time of adoption, or resulting from a lawful change of name;
                - **(ii)** the geographical address of a physical place of residence of such individual;
                - **(iii)** an electronic address (including an e-mail address) of such individual;
                - **(iv)** a telephone number dedicated to contacting such individual at such physical place of residence;
                - **(v)** a social security account number issued to such individual; or

        - **(vi)** the account number of a credit card issued to such individual; or
    - **(B)** if identified in connection with 1 or more of the items of information specified in subparagraph (A)—
        - **(i)** a birth date, the number of a certificate of birth or adoption, or a place of birth; or
        - **(ii)** any other information concerning an identified individual that, if disclosed, will result in contacting or identifying such individual physically or electronically.

- Use, Sale or Lease of PII
    - Section 363(b)(1) of the Bankruptcy Code governs a debtor's ability to "use, sell, or lease" PII.
        - Generally, a debtor may not sell or lease PII if, at the time of the commencement of a bankruptcy case, the debtor's privacy policy prohibits the transfer of PII to unaffiliated entities.
    - Notwithstanding this general prohibition, a sale is permitted, pursuant to section 363(b)(1)(B) of the Bankruptcy Code, if:
        - after the appointment of a consumer privacy ombudsman, the court approves the sale (i) giving consideration to the facts, circumstances, and conditions of the sale and (ii) finding that no showing was made that the sale would violate applicable nonbankruptcy law.

- Consumer Privacy Ombudsman - CPO
    - Section 332(b) of the Bankruptcy Code provides that the Ombudsman shall "provide to the court information to assist the court in its consideration of the facts, circumstances, and conditions of the proposed sale or lease of PII under section 363(b)(1)(B)."
    - Among other things, the Ombudsman may present the following information to the Court:
        - the debtor's privacy policy;
        - the debtor's terms and conditions;
        - the privacy impact on consumers if the sale closes; and
        - alternative solutions that might mitigate the privacy impact.

- Applicable Non-Bankruptcy Law
    - Section 5 of the Federal Trade Commission Act (the "FTC Act")
        - The FTC has general authority to issue regulations to implement protections against unfair and deceptive acts and practices. Section 5 of the FTC Act

directs the FTC to prevent persons and corporations from using "unfair or deceptive acts or practices in or affecting commerce."

- The FTC has interpreted Section 5 of the FTC Act as prohibiting an entity's collection, use, or disclosure of PII in a manner that is contrary to a promise made to consumers in its privacy policy, including a promise not to share such information with third parties.

- *Toysmart*
  - The *Toysmart* settlement has become the benchmark used by the FTC when evaluating whether PII may be sold notwithstanding provisions to the contrary in a company's privacy policy.
  - In *Toysmart*, the debtor sought bankruptcy court approval to sell certain assets, including its customer lists, through a public auction. However, this was directly contrary to *Toysmart's* privacy policy; the FTC sought to enjoin the sale.
  - "Qualified Buyer" means an entity that is acquiring PII as part of a larger asset sale **and**:
    - (a) agrees to operate the debtor as a going concern and concentrates in the same business or market as the debtor;
    - (b) expressly agrees to be bound by, and succeed to, the debtor's existing privacy policy;
    - (c) agrees to be responsible for any violation of existing privacy policy; **and**
    - (d) agrees that prior to making any material change to the debtor's existing privacy policy, obtains affirmative consumer consent.

- The Children's Online Privacy Protection Act of 1998 ("COPPA")
  - COPPA prohibits unfair or deceptive acts or practices in connection with the collection, use, or disclosure of Personally Identifiable Information from and about children under the age of 13 obtained from the Internet.
  - COPPA requires that companies that collect information from children provide notice on their websites concerning what information they collect, how they will use that information and what disclosure practices will apply to that information.
  - Pursuant to the FTC's rules interpreting COPPA, a company must, among other things, obtain parental consent "to any material change in the collection, use, and/or disclosure practices to which the parent has previously consented."

- The Gramm-Leach-Bliley Act ("GLBA")

        - Title V, Subtitle A of the GLBA governs the treatment of non-public personal information about consumers by domestic financial institutions. Subject to certain exceptions, the GLBA prohibits a financial institution from disclosing nonpublic personal information concerning consumers to nonaffiliated third parties, unless the financial institution satisfies certain notice and opt-out requirements, and provided that the consumer has not elected to opt-out of the disclosure.
        - Even in cases where a debtor is not a "financial institution," CPOs have found it instructive that the FTC has interpreted the GLBA as not requiring new initial (and opt-out) notices in situations in which the surviving entity adopts the policies and practices of the acquired entity.
    - Applicable state consumer protection laws
        - Most, if not all, prohibit deceptive representations to consumers.
        - Recently enacted state privacy laws – California leading the way
            - https://pro.bloomberglaw.com/insights/privacy/state-privacy-legislation-tracker/
- Example cases in which a CPO was appointed
    - Century 21, Stein Mart, Fred's, Bon-Ton, Borders
    - How those cases would have resolved had they not been in bankruptcy
- Thinking ahead…
    - Do we need to re-think any provisions of the Code pertaining to PII as it relates to the use of generative artificial intelligence utilized to enhance PII

II. Time to Assume/Reject Unexpired Real Property Leases and Impact on Restructurings

- From:https://commission.abi.org/sites/default/files/statements/04jun2013/Supplemental_Written_Testimony_of_L_Gottlieb_for_Commission_to_Study_the_Reform_of_Chapter_11.pdf:
    - Prior to BAPCPA, a debtor had 60 days to decide whether to assume or reject its commercial real estate leases, without the consent, and often over the objection, of its lessors. The court could, however, extend that period of time "for cause."
    - The Bankruptcy Code did not define "cause" for purposes of § 365, but took into account a number of factors, including: (1) whether the debtor was "paying for the use of the property"; (2) whether "the debtor's continued occupation could damage the lessor beyond the compensation available under the Bankruptcy Code"; (3) whether the lease was the debtor's primary asset; (4) whether the debtor had sufficient time to formulate a plan of reorganization; (5) the complexity of the case facing the debtor; and (6) the number of leases that the debtor had to evaluate. See, e.g., In re Burger Boys, Inc., 94 F.3d 755 (2d Cir. 1996). In practice, extensions of time

were granted routinely–often up to the date of plan confirmation–provided the debtor remained current on all its post-petition obligations to the lessor.

- BAPCPA revised section 365(d)(4) to place an outside limit of 210 days on the time by which a debtor must assume or reject a commercial real estate lease. Specifically, section 365(d)(4) provides that a commercial real estate lease is deemed rejected if not assumed by the debtor by the earlier of (i) 120 days after the petition date; or (ii) confirmation of a plan. Courts are authorized to extend the 120-day period for up to an additional 90 days for cause shown. Extensions beyond 210 days—irrespective of whether the retailer operates 10 stores or 1,000 stores—are not within the discretion of the bankruptcy courts and may only be granted upon the consent of the landlord

- Timeline Impact
- Outcome Impact

Avoidance Actions/Safe Harbors Section

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I. Revisions to 11 U.S.C. § 547 (Preference Actions)

a. Clarified the requirements for a defendant to assert an ordinary course affirmative defense under 11 U.S.C. § 547(c)(2).

i. Prior to BAPCPA, a defendant asserting the ordinary course affirmative defense was required to prove that the payment of a debt incurred by the debtor in the ordinary course of business or financial affairs of the debtor and the transferee was **both** (A) made in the ordinary course of business or financial affairs of the debtor or the transferee; **and** (B) made according to ordinary business terms. 11 U.S.C. § 547(c)(2).

ii. BAPCPA deleted the "and" and replaced it with an "or".

iii. Now, a defendant only has to prove former subsections (A) ***or*** (B). Not both subsections.

iv. Subsections (A) and (B) are referred to as "subjective" and "objective" tests, respectively. These fact intensive tests pre-dated BAPCPA.

1. Subjective test: Defendant must prove that the alleged preference payments were consistent with the debtor's payments to the defendant prior to the preference period.
2. Objective test: Defendant must prove that the alleged preference payments were consistent with the terms and payment practices in the defendant's industry.

b. Further attempted to fix a potential problem allowing an estate to avoid arm's length transfers made to a third party that also benefits an insider that may have guaranteed the debtor's obligations.

i. *Issue arose in 1989 when the Seventh Circuit Court of Appeals in Levit v. Ingersoll Rand Fin. Corp. (In re Deprizio*), 874 F .2d 1186, 1200-01 (7th Cir.1989), held that Section 547(b) may allow avoidance of a loan payment

made within the extended 1 year preference period, even though the payment was made to a non-insider lender, because an insider had guaranteed the loan.

ii. The potential exposure to an estate's claw back of payments to third party, non-insider lenders was called the "*Deprezio* problem".

iii. Congress attempted to fix the problem in 1994 by enacting 11 U.S.C. § 550(c), which prohibited an estate from avoiding a transfer where the transferee was not an insider.

iv. As the fix was made to section 550 and not to section 547, concerns arose that the 1994 legislative fix left open the door for an estate to avoid a grant of a lien to a third party creditor during the preference period, but then preserve the lien for the benefit of the estate under section 551.

v. BAPCPA enacted 11 U.S.C. § 547(i) to close this loophole: "If the trustee avoids under subsection (b) a transfer made between 90 days and 1 year before the date of the filing of the petition, by the debtor to an entity that is not an insider for the benefit of a creditor that is an insider, such transfer shall be considered to be avoided under this section only with respect to the creditor that is an insider.

c. Prohibits an estate whose debts are not primarily consumer debts (*i.e.*, a corporate debtor estate) from a avoiding a transfer valued at less than $5,000 (now adjusted to $7,575 as of 2022) under 11 U.S.C. § 547(c)(9).

II. Revisions to 11 U.S.C. § 548 (Fraudulent Transfers Actions)

a. Expanded the reach back period from 1 to 2 years under 11 U.S.C. § 548(a)(1).

i. This allows a trustee or debtor in possession to avoid a transfer that was made on or within 2 years of the date of the bankruptcy petition that meets the other requirements of 11 U.S.C. § 548(a).

b. Makes transfers to insiders under employment contracts, not in the ordinary course of business, subject to the constructive fraud provisions of 11 U.S.C. § 548(a)(1)(B)(ii)(IV).

i. The estate can challenge a transfer under an employment contract to an insider that occurred within 2 years of the filing of the bankruptcy.

ii. A defendant can defend on the basis of a reasonably equivalent value being given for the transfer such as services rendered in the course of employment.

c. Allows the estate the ability to set aside certain transfers made within 10 years of the filing of the bankruptcy under 11 U.S.C. § 548(e).

i. Applies to transfer by a debtor with the actual intent to hinder, delay, or defraud a creditor to a self-settled trusts or similar device where debtor (i) is a beneficiary and (ii) made the subject transfer.

ii. Intent was to avoid small dollar shake downs of creditors in business bankruptcies.

iii. Dollar value will be adjusted in 2025.

III. Expansion of Securities Safe Harbors

a. Bankruptcy law generally prohibits the exercise of contractual remedies without court permission:

i. The automatic stay is a statutory provision under 11 U.S.C. § 362 that broadly prohibits creditors from pursuing collection efforts against a debtor, including exercising setoffs or liquidating collateral.

b. Special safe harbors for securities contracts, commodity contracts, forward contracts, and repurchase agreements.

i. Prior to BAPCPA, Congress made various revisions to the Bankruptcy Code to clarify that exercising remedies under certain qualifying financial contracts was an exception from the automatic stay to allow creditors to

such contracts to exercise contractual liquidation, termination, or acceleration.

ii. These exceptions were included into Section 555 for securities contracts, Section 556 for commodities contracts or forward contracts, Section 559 for repurchase agreements, and Section 560 for swap participants.

iii. These are generally referred to as "securities safe harbors" although they are not limited to qualifying "securities."

c. BAPCPA made various technical amendments to clarify and broaden the scope of the securities safe harbors including:

i. Amended the definition of "forward contract" under 11 U.S.C. § 101(25) to include any option to enter into a forward contract, a master agreement that provides for a forward contract, and any security or arrangement or other credit enhancement related to a forward contract.

ii. Added a broad definition for a "financial participant" under 11 U.S.C. § 101(22A), which definition is included in the exclusions to the automatic stay under Sections 555, 556, 559, and 560.

1. Defined as: "(A) an entity that, at the time it enters into a securities contract, commodity contract, swap agreement, repurchase agreement, or forward contract, or at the time of the date of the filing of the petition, has one or more agreements or transactions described in paragraph (1), (2), (3), (4), (5), or (6) of section 561(a) with the debtor or any other entity (other than an affiliate) of a total gross dollar value of not less than $1,000,000,000 in notional or actual principal amount outstanding (aggregated across counterparties) at such time or on any day during the 15-month period preceding the date of the filing of the petition, or has gross mark-to-market positions of not less than $100,000,000 (aggregated across counterparties) in one or more such agreements or transactions with the debtor or any other entity (other than an affiliate) at such time or on any day during the 15-month period preceding the date of the filing of the petition; or (B) a clearing organization (as defined in

section 402 of the Federal Deposit Insurance Corporation Improvement Act of 1991).

iii. Added 11 U.S.C. § 561 to specifically preserve the contractual right to terminate, liquidate, accelerate or offset under a "master netting agreement" and across all types of safe harbor contracts.

1. A "master netting agreement" is defined as "an agreement providing for the exercise of rights, including rights of netting, setoff, liquidation, termination, acceleration, or close out, under or in connection with one or more contracts . . . ." 11 U.S.C. § 101(38A).

iv. Added 11 U.S.C. § 562 to provide the means and timing for calculating damages under any swap agreement, securities contract, forward contract, commodity contract, repurchase agreement, or master netting agreement upon rejection by a debtor or trustee.

1. Damages are measured as of the earlier of the date of the rejection of the contract or the date of any liquidation, termination, or acceleration. If there are no commercially reasonable determinants of value as of such dates, damages are to be measured as of the earliest subsequent date on which there are commercially reasonable determinants of value.

Faculty

Michael T. Driscoll is a partner in the Finance and Bankruptcy Practice Group of Sheppard Mullin's New York office, where he focuses on problem loan workouts, bankruptcy, judicial and nonjudicial foreclosure, and creditors' rights and commercial law. He also maintains an active *pro bono* practice, including representing nonprofit organizations and individuals in immigration proceedings. Before joining Sheppard Mullin, Mr. Driscoll served as a trial attorney in the Office of the U.S. Trustee for the Southern District of New York. During his tenure, he represented the U.S. Trustee's Office in more than 150 chapter 11 cases by ensuring compliance with applicable laws, rules and regulations during all phases of bankruptcy cases. He joined the Department of Justice directly from law school through the Attorney General's Honors Program. Prior to law school, Mr. Driscoll was an active-duty and reserve officer in the U.S. Marine Corps. He served two tours in Iraq and has been awarded two Navy and Marine Corps Achievement Medals and a Combat Action Ribbon. He was honorably discharged from the Marine Corps as a Major. Mr. Driscoll received his B.A. in 2000 from Creighton University and his J.D. in 2010 from the John Marshall Law School, where he was an executive board member of *The John Marshall Review of Intellectual Property Law*.

Richelle Kalnit is a senior vice president with Hilco Streambank in New York, where she manages intellectual property disposition engagements for the firm. She has experience in the sale of intangible assets in bankruptcy, Article 9 foreclosure transactions, out-of-court sale processes, receiverships and assignments for the benefit of creditors. Having managed sale processes for assets including brands, software, patent portfolios, digital assets and marketplace accounts, Ms. Kalnit is well-versed in structuring sale processes and bringing those processes to value-maximizing conclusions, whether through creative auction techniques or private transactions. She is a frequent panelist and contributor on topics related to asset sales and intangible assets. Ms. Kalnit has nearly 20 years of deal experience, having joined Hilco Streambank after practicing restructuring law for more than a decade. Prior to joining Hilco Streambank, she was a member of the bankruptcy and restructuring group of Cooley LLP. During her tenure at the firm, she managed the sale, reorganization and/or liquidation of several of the nation's most prominent retailers, consumer product companies, hotels and restaurants. She began her career at the law firm of King & Spalding LLP. Ms. Kalnit is a member of the University of Pennsylvania Professional Women's Alliance, ABI, the Turnaround Management Association, the International Women's Insolvency & Restructuring Confederation and the National Association of Bankruptcy Trustees. She is a frequent panelist and contributor on topics related to asset sales and intangible assets. Ms. Kalnit received her undergraduate degree *cum laude* from the University of Pennsylvania and her J.D. *cum laude* from the Benjamin N. Cardozo School of Law at Yeshiva University, where she was in the top 10% of her class.

Brian Maloney is a partner with AlixPartners, LLP in New York, where he works closely with underperforming companies in a wide variety of corporate recovery situations. His experience, amassed over more than a decade, includes cash-flow forecasting, long-term financial modeling, business segment rationalization, restructuring plan scenario analysis and implementation, and asset divestitures. Mr. Maloney has experience across a multitude of industries, having served clients in the transportation, gaming, hospitality, industrial services, manufacturing and retail sectors. He has provided

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Hon. Jil Mazer-Marino is a U.S. Bankruptcy Judge for the Eastern District of New York in Brooklyn, sworn in on Oct. 23, 2020. She previously was a partner at Cullen and Dykman LLP's Bankruptcy and Creditors' rights department, where her practice was nearly entirely bankruptcy-focused. Judge Mazer-Marino has chapter 11 experience representing debtors, creditors and creditor committees in chapter 11 business reorganizations. She also served as a chapter 7 panel trustee for the Southern District of New York for 10 years. Before joining Cullen and Dykman in 2019, Judge Mazer-Marino practiced with Meyer, Suozzi, English & Klein, P.C. from 2008-19, Rosen Slome Marder LLP from 2003-08 and Willkie Farr & Gallagher LLP from 1991-99. She also clerked for former EDNY Chief Bankruptcy Judge Conrad B. Duberstein. Judge Mazer-Marino received her undergraduate degree from the State University of New York at Albany and her J.D. from St. John's University School of Law.

Barbra R. Parlin is a partner in Holland & Knight LLP's New York office and a member of the firm's Litigation Section. Her practice focuses on advising parties involved in complex commercial insolvency and restructuring proceedings, as well as related litigation and transactional matters. She represents both U.S.-based and foreign companies, court-appointed liquidators, indenture trustees, secured and unsecured lenders, asset-buyers, landlords, licensors, parties to prepetition contracts and leases, and litigants in adversary proceedings in connection with both domestic and cross-border insolvency cases, as well as out-of-court restructurings and wind-down proceedings. In addition, Ms. Parlin advises clients on the business aspects of bankruptcy and workouts, providing counsel with respect to pre-bankruptcy planning, transaction review, claims, distressed asset sales, and lending and investment strategies. Her experience crosses a broad array of industries, including corporate and structured finance, aviation, securities, manufacturing, transportation, construction, real estate, higher education, energy, technology, telecommunications, retail, health care, resort and hospitality, leasing, professional firms and maritime. She appears on behalf of clients in matters pending in bankruptcy courts around the country, as well as in other state and federal courts. Ms. Parlin also has experience in matters concerning corporate governance and fiduciary duties, director and officer liability, derivative actions, securities and common law fraud litigation and investigations, and other commercial litigation. She has advised boards of directors with respect to their fiduciary obligations and has managed a broad range of litigation matters, including bankruptcy and avoidance litigation, securities fraud, shareholder derivative litigation, SEC investigations, merger and acquisition (M&A) litigation, corporate governance actions, construction litigation, directors' and officers' insurance issues, and other general commercial litigation. Ms. Parlin has served as the Holland & Knight New York office's recruiting partner, chair of the New York office's diversity committee, and partner-coordinator of the New York office's Women's Initiative. She currently is a member of the New York office's operations committee. Ms. Parlin currently is a member of the New York office operations committee and a member of the advisory board for ABI's New York City Bankruptcy Conference. She received her B.A. *magna cum laude* in religious studies from Yale University and her J.D. *cum laude* from New York University School of Law, where she received the George A. Katz Memorial Award for Academic Excellence in Securities Regulation from New York University School of Law, and also served as staff editor and articles editor of the *Environmental Law Journal*.

Lori A. Schwartz is a partner with Leech Tishman in New York, where she focuses her practice on business fnance and restructuring. She regularly represents debtors, trustees, committees, landlords, lenders, secured creditors and other interested parties in chapter 11 reorganizations across a variety of industries. Ms. Schwartz has been involved in the confrmation of complex plans of reorganization for numerous companies in the U.S. Bankruptcy Courts for the Southern and Eastern Districts of New York. She received her B.A. from Franklin & Marshall College and her J.D. from Brooklyn Law School.

Glenn E. Siegel is a partner with Morgan, Lewis & Bockius LLP's Business and Finance Practice in New York and former co-head of the firm's Restructuring and Bankruptcy practice. He has decades of experience handling high-level bankruptcies and counseling major stakeholders and clients on all sides of bankruptcy and restructuring matters. In the chapter 11 bankruptcy of automotive parts maker Delphi Corp., Mr. Siegel counseled the largest debtor-in-possession lender in its acquisition of Delphi. In the chapter 11 bankruptcy of Residential Capital, he counseled the largest residential mortgage-backed securities (RMBS) trustees to achieve a settlement of billions of dollars in claims. Mr. Siegel represents shareholders, bondholders, indenture trustees, creditor committees, secured creditors, debtors and other participants in bankruptcy and workout matters. He frequently lectures on issues pertaining to public-debt-holders, including claims trading, second-lien loans and subordination. He also frequently authors and co-authors articles on bankruptcy-related topics and developments. Prior to joining Morgan Lewis, Mr. Siegel was a partner in the bankruptcy practice of another international law firm. He received his B.A. from Brooklyn College in 1979, his J.D. from Boston University School of Law in 1982 and his LL.M. in corporate law from New York University School of Law in 1984.