Weil

Bankruptcy Blog

Lookback Period: Eight Weeks

Debra A. Dandeneau
debra.dandeneau@weil.com
+1 212 310 8541

The Weil Bankruptcy Blog has been busy writing about all the hottest bankruptcy issues, while at the same time giving you some longer weekends with our Bankruptcy Beach Reading light reading. In the spirit of the back to school season (which has started for many students around the country even if the New York region still adheres to the post-Labor Day model), for the rest of this week we will be stepping back and giving you the CliffsNotes/Spark Notes/Masterplots (choose your generation) version of our entries over the last eight weeks. Given the state of the stock market, don't you think now is the time to start cramming?

Will We Ever Get to Test Whether a Bitcoin Exchange Is an Eligible Debtor?

Over several posts, the Weil Bankruptcy Blog explored some of the potential obstacles to a bitcoin exchange's eligibility to be a debtor under the Bankruptcy Code. In the most recent post, *Banks and Bitcoin Exchanges*, Scott Bowling considered whether a bitcoin exchange would be considered a bank.[1] Most types of banks are ineligible to be debtors under section 109(d) of the Bankruptcy Code. Scott concluded that bitcoin exchanges likely would not be considered to fall within the category of banks that are ineligible to file because bitcoin exchanges generally do not accept deposits (unless you consider bitcoin wallets the equivalent of a deposit account), bitcoin exchanges are not presently regulated like banks, and bitcoin exchanges have no available resolution framework outside of bankruptcy law.

Structured Dismissals Just Got a Little More Popular

Within the last few years, structured dismissals went from an unknown concept to a more accepted exit strategy (particularly after 363 sales) that permits an estate with limited assets to bypass both conversion to a chapter 7 and confirmation of a plan. After the Third Circuit issued its decision in *In re Jevic Holding Corp.*,[2] Abigail Lerner and Blaire Cahn explained in their two-part series, *Third Circuit Authorizes Structured Dismissals in Limited Circumstances*,[3] and *In a Close Call, Third Circuit Approves Settlement Agreement and Structured Dismissal that Deviate from Bankruptcy Code's*

Priority Scheme[4] what a structured dismissal is and the importance of the decision by the Third Circuit to uphold the strategy. As Abby explains in more detail, a structured dismissal is dismissal of the chapter 11 case under section 1112(b), but one that is preceded by orders of the court that may approve settlements or establish claims allowance and distribution procedures, among other things. In *Jevic*, the Third Circuit held that dismissal of a case need not return all parties to the *status quo ante*, but may be affected by orders of the bankruptcy courts that alter the effects of dismissal. Specifically, the Third Circuit refused, in a close call, to overturn a settlement that placed funds received from settling defendants in a fraudulent transfer action into a trust that would make distributions to unsecured creditors, subject to dismissal of the bankruptcy case. Such settlement and dismissal, however, avoided the priority distribution rules of section 507 of the Bankruptcy Code and, therefore, eliminated the right of certain former employees to obtain a distribution ahead of other unsecured creditors. In the particular case of *Jevic*, the Third Circuit concluded that the structured dismissal that had been approved by the bankruptcy court was the "least bad alternative" given that, if the case had been converted, the unsecured creditors would have received no distribution.

ABI Commission Likes the Flexibility in Existing Valuation Methods

As part of our continuing series on the ABI Commission's recommendations on changes to the Bankruptcy Code, we also have reported on the Commission's recommendations to leave existing principles in tact. One such approach that the Commission recommended be left unchanged was valuation in bankruptcy cases. In *If It Ain't Broke, Don't Fix It*, David Griffiths discusses the three principal valuation methodologies in bankruptcy – the cost/asset based approach, the market approach, and the income approach – against the backdrop of the ABI Commission's decision to stick with the flexibility afforded by allowing courts to determine the appropriate methodology under the circumstances of the case.[5]

Circuits Can't Agree on the *Barton* Doctrine

Every now and then, we come across a decision addressing the Barton doctrine – the principle derived from the 1881 U.S. Supreme Court decision that required a party seeking to sue a court-appointed individual (there, a receiver). It is rare, though, when we find not only two new circuit court decisions addressing the doctrine, but ones that disagree with each other. That is the situation discussed in Alana Heumann's entry, *A Tale of Two Circuits: Recent Applications of the Barton Doctrine*.[6] The split between the Eleventh Circuit and the Fifth Circuit focuses directly on the doctrine in bankruptcy – to what extent should the Barton doctrine apply at all to suits against bankruptcy trustees or other individuals whose retention is approved by the court. The Eleventh Circuit, applying the doctrine broadly, held in *Coen v. Stutz (In re CDC Corporation)*,[7] held that the doctrine applied to protect a chapter 11 debtor's general counsel because he had agreed to serve at the request of the debtor's chief restructuring officer, and his "executive service agreement" had been approved by the court. In contrast, the Fifth Circuit interprets *Barton* narrowly and held in *Carroll v. Abide*[8] that the *Barton* doctrine does not apply when a suit is brought in the same court that appointed the trustee.

The Latest Issues on the 363 Scene

Several articles during this period addressed disputes arising in the context of 363 sales. In *Onward, Christian Soldiers: Some Guidance on 363 Sales, Fair Auctions, and Proposed Sales to Insiders*,[9] Doron Kenter discussed the problems faced in *In re Family Christian, L.L.C.*,[10] when a non-for-profit operator of a chain of stores selling religious merchandise sought approval to sell their assets to their founder after an auction that the court described as "nothing less than chaotic." The bankruptcy court, however, concluded not only that the auction was "flawed," but that the debtors had failed to demonstrate a sound business justification for the sale. Charlie Chen addressed an issue relevant to coal cases – what is the nature of a contract that grants an exclusive right to mine and remove coal, and is that right assignable

notwithstanding an anti-assignment provision? As discussed in *Kentucky Bankruptcy Court Holds That Coal Mining Lease Is Not an Executory Contract or Unexpired Lease and Is Transferable Pursuant to Section 363 Despite an Anti-Assignment Provision*,[11] the bankruptcy court in *In re Manalapan Mining Company, Inc.*[12] applied Kentucky law and determined that the coal mining leases at issue represented conveyances of property interests and not real property leases. Moreover, because the leases required the lessor not to unreasonably withhold its consent to assignment, the court found that the lessor was unreasonable in withholding its consent, and the debtor could assign its rights under the leases over the lessor's objection.

Speaking of consent, what does it mean for a holder of an interest in property to "consent" to a sale free and clear of such interest under section 363(f)(2) of the Bankruptcy Code? Debora Hoehne discussed a recent decision holding that silence does not constitute the requisite consent under section 363(f)(2) in *Does Silence Mean Consent? Some Courts Have Found That It Does Not (at Least for Purposes of Sales Under Section 363(f))*.[13] Under that decision, "consent" requires an affirmative consent by the lienholder, not a failure to object after receiving notice of the proposed sale. It is worth noting that, in that case, the selling debtor did not appear to seek authority under any other subsections of section 363(f).

Property Co-Owner Not Off the Hook in Refusing to Sign Mortgage

Ben Farrow's piece, *[Un]signed, Sealed, Delivered: Is It Still Yours?* focused on equitable subrogation and how a lender might apply it when a property co-owner refuses to execute a new mortgage when the other co-owner refinances an earlier mortgage that was signed by both parties.[14] Applying D.C. law, the court in *In re Stevenson*[15] allowed the subsequent lender to step into the shoes of the original lender under the jurisdiction's five-prong test for equitable subrogation: (1) The new lender paid off the prior mortgage so it could protect its "own interest" by having a first priority mortgage; (2) the new lender did not "act as a volunteer" because the mortgage was consideration for its loan; (3) the new lender was not liable for the prior mortgage; (4) the proceeds from the new loan paid off the entire prior mortgage; and (5) subrogation would "not work any injustice to the rights of others."

Ninth and Third Circuits Continue to Whittle (Hack?) Away at Equitable Mootness

One wonders whether in a few years plan proponents will have to change their strategies relating to mooting out an appeal from a confirmation order. As discussed in two blog entries during this period, circuit courts continue to limit the principle that allows an appeal from an order confirming a plan to be dismissed on the grounds that the plan was substantially consummated, and the court will be unable to unscramble the egg, close Pandora's box, put Humpty Dumpty back together again, or [choose your favorite other metaphor].

In light of The Ninth Circuit's decision in *JPMCC 2007-C1 Grasslawn Lodging, LLC v. Transwest Resort Props., Inc.*,[16] one might question what it takes for a chapter 11 plan to moot out an appeal from a confirmation order. Jessica Diab explained in *A Word from the Ninth Circuit: Substantial Consummation Is Not the Final Word!* that the Ninth Circuit shrugged off concerns about protecting a third party investor against potential changes in a confirmed plan as a result of an appeal by the mortgage lender, concluding that a savvy investor that had been actively involved in the plan confirmation and subsequent appeals was not the type of "innocent" third party that the doctrine of equitable mootness was intended to protect.[17] It is worth noting that, in a strong dissent, Judge Smith noted that the effect of the opinion will be to discourage potential investors from investing until and unless a confirmation order is final and non-appealable, which could delay considerably a debtor's emergence from chapter 11.

One might be tempted to write off the Ninth Circuit if the Third Circuit were not keeping up with the Ninth Circuit in its approach. Charles Persons described the Third Circuit's history on equitable mootness and its recent decision on the matter in *Equitable Mootness on Life Support. The Third Circuit Further Pares Back*

the Abstention Doctrine in One2One Communications.[18] Indeed, Charles noted that *In re One2One Communications*[19] reads like a plea from the Third Circuit to put an end to the doctrine of equitable mootness. In that case, in which the appealing creditor also argued that the doctrine of equitable mootness was unconstitutional (an issue that the Third Circuit said it had no authority to decide), the Third Circuit framed the issue as whether "the plan could be retracted with great difficulty." The debtor had no publicly traded securities and had only one secured creditor with a claim under $100,000. Its plan did not provide for "new financing, mergers or dissolutions of entities, issuance of stock or bonds, name change, change of business location, change in management or any other significant transactions." The debtor listed a number of post-confirmation transactions that would be difficult to unravel, but the Third Circuit brushed these off, noting," These transactions, including the investment by the Plan Sponsor, the commencement of distributions, the hiring of new employees and entering into various agreements with existing and new customers are likely to transpire in almost every bankruptcy reorganization where the appealing party is unsuccessful in obtaining (or fails to seek) a stay."

I Guess We Can Say These Tenants "Reveled" in Their Right to Elect to Remain in Possession

Section 365(h) of the Bankruptcy Code protects lessees under real property leases rejected by debtor lessors by permitting those lessees to elect to remain in possession during the remaining term of the rejected lease (including extensions at the option of the lessee). One possible way around this protection, though, is to argue that lessees' rights under their agreements are not "true leases" entitled to the protection of section 365(h). This was the tactic employed by the Revel Entertainment debtors and discussed in Yvanna Custodio's entry, *Puhlease, It's a Lease: Bankruptcy Court Upholds Agreements as True Leases Entitled to Section 365(h) Protections*.[20] Both the debtors and the purchaser of their assets (and successor to their rights) attempted to bar tenants from using premises leased by the debtors on the grounds that the leases were actually management or joint venture agreements outside the ambit of section 365(h). Applying New Jersey law, though, the bankruptcy court disagreed and held that the leases were, in fact, true leases. More importantly, the court went on to hold that section 363(f), which permits a sale free and clear of interests under certain circumstances, could not trump (oh, that's another case) the rights of lessees under section 365(h).

Recent Decisions Demonstrate Inconsistent Approaches to Recharacterizing Loans as Equity

Seeking to recharacterize a loan as a disguised equity contribution, particularly when the lender is an insider of the debtor, is a favorite weapon in creditors' arsenal. Two recent articles discuss the approaches taken in some of the circuits and demonstrate that the circuit in which a case is pending will play a significant role in determining how likely a creditor's challenge to a loan will be. In *Debt or Equity? Which Circuit? Recent Cases on Equitable Recharacterization*,[21] Brenda Funk discussed two cases relating to a "loan" made by an insider. One arose in the Fourth Circuit, which has squarely held that the bankruptcy court's equitable powers permit recharacterization. Not surprisingly, the loan in that case was recharacterized. The other arose in the Eighth Circuit, where the Court of Appeals has not ruled on whether the bankruptcy court's equitable powers extend that far. Because, however, the typical factors applied in determining recharacterization tipped towards finding a "true loan," the court did not have to address whether the remedy of rechacterization was available in the Eighth Circuit.

In *Tenth Circuit Declares "No Recharacterization Without Justification,"*[22] Christopher Hopkins discussed a split decision in the Tenth Circuit, in *In re Alternate Fuels, Inc.*,[23] that held that recharacterization is permitted under the bankruptcy court's 105(a) equitable powers, but made it clear that the recharacterization remedy should be used sparingly. Applying factors first set forth by the Tenth Circuit in *Sender v. The Bronze Group, Ltd. (In re Hedged Investments Assoc., Inc.)*,[24] the court noted that the promissory notes at issue were valid and

enforceable under state law and refused to recharacterize notes held by the debtor's sole equityholder. Notably, although undercapitalization is a frequently cited factor, the majority cautioned against too much reliance on such factor, reasoning that the market for rescue financing would be chilled if the recharacterization analysis placed too disproportionate weight on the poor capital condition of faltering entities.

Fewer (Creditors) Is More When It Comes to a Debtor's Challenge to an Involuntary Filing

In most large cases, the issue of how many creditors must commence an involuntary case is irrelevant because the debtor typically will have more than the twelve creditors needed to require at least three petitioning creditors. Abigail Lerner, however, reported on one case in which counting the number of outstanding creditors was crucial to the outcome of the involuntary case in *Bankruptcy Court Reinforces the Notion That Counting Number of Eligible Creditors Commencing an Involuntary Case Really Counts*.[25] In *In re The District at McAllen, L.P.*,[26] only two creditors filed the voluntary petition. Therefore, it was crucial that the debtor prove that it had at least twelve creditors. But, as the decision reminds us, not just any creditors. To count as an eligible creditor for purposes of calculating the number of creditors, the creditor's claim had to be not contingent, not subject to a bona fide dispute as to liability or amount, not held by an insider of the debtor, and unsecured. After eliminating claims of taxing authorities with fully secured claims, insiders, creditors owed more to the debtor than they were owed by the debtor, and tenants of the debtor who held contingent claims, the number of creditors was reduced to below twelve, and only one valid petitioning creditor was required.

Tenth Circuit Clarifies individual Exemption for Distributions from Retirement Plans

Although the Weil Bankruptcy Blog tends to focus on issues relating to corporate reorganizations, we remain interested in noteworthy decisions that affect individual debtors. Debra McElligott discussed one such case in *Same Dollars, Different Treatment: Tenth Circuit Holds That Distributions From a Retirement Plan Do Not Fall Within the Colorado State Law Exemption Statute*.[27] In the case, *Gordon v. Wadsworth (In re Gordon)*,[28] the Tenth Circuit interpreted Colorado's exemption statute and held that payouts from individual debtors' 401(k) retirement accounts are not exempt assets. One issue that was somewhat unclear was whether the court's decision extends to all payments from retirement accounts. Debbie concludes, however, that the reasoning of the decision appears to limit its effect to prepetition payments from such accounts.

Where Should the Court Draw the Line on Legal Advice?

In *Blurred Lines: Seventh Circuit Keeps Alive Claims Based Upon Law Firm's Alleged Failure to Advise on Degrees of Business Risk*,[29] Matthew Goren discussed the potential effect on restructuring advisors of a decision refusing to dismiss a malpractice action against a law firm. In that case, a chapter 7 trustee commenced a malpractice action against a law firm that had advised now-insolvent hedge funds that had invested in what turned out to be a Ponzi scheme, arguing that the firm had failed to recognize certain "serious red flags" that should have led the firm to advise the hedge funds to seek additional protections in their negotiations with the fraudulent investment scheme. In keeping the action alive, the Seventh Circuit noted that "within the scope of the engagement a lawyer must tell the client which different legal forms are available to carry out the client's business, and how (if at all) the risks of that business differ with the different legal forms."

SDNY Bankruptcy Court Recognizes the OAS Foreign Main Proceedings in Brazil

Over the objections of a group of bondholders, Bankruptcy Judge Drain from the Southern District of New York recognized as "foreign main proceedings" the proceedings filed by OAS S.A. and its affiliates in Brazil. In his three-part series, Maurice Horwitz broke down the elements of the court's decision. In *SDNY Sides with Fifth Circuit and the UNCITRAL Model Law when Granting Recognition to OAS S.A. et al.*,[30] Moe

discussed the bankruptcy court's conclusion that the foreign representative designated by OAS met the definition of "foreign representative" even though he was authorized by OAS's board, and not the Brazilian court, to act as the representative. The bankruptcy court concluded that the definition of "foreign representative" under section 101(24) of the Bankruptcy Code does not require that a foreign representative by judicially appointed. It also held that, because the OAS debtors retained full control of their assets, subject to the oversight of the judicial administrator, they effectively functioned as debtors in possession with the authority to appoint a foreign representative.

In his second entry, *SDNY Holds That Austrian Financing Subsidiary Has Its Center of Main Interests in Brazil*,[31] Moe discussed the bankruptcy court's conclusion that Brazil was the center of main interests ("COMI") of OAS's Austrian subsidiary, which happened to be the issuer of the notes held by the creditors challenging recognition. Notwithstanding the presumption that a debtor's COMI is located where the debtor's registered office is located, the bankruptcy court found that the Austrian subsidiary was a special purpose financing entity that did not conduct business, own assets, have a physical location, or employ anyone in Austria. Moreover, the Austrian subsidiary's only business was to issue the notes. Accordingly, the bankruptcy court found that Brazil was the "nerve center" of the OAS entities, including the Austrian financing subsidiary.

Finally, in *SDNY Takes Narrow View of Chapter 15's Public Policy Exception*,[32] Moe focused on the bankruptcy court's rejection of the noteholders' argument that the bankruptcy court should deny recognition of OAS's Brazilian bankruptcy proceedings because certain aspects of Brazilian bankruptcy law, or the Brazilian proceedings themselves, are "manifestly contrary" to U.S. public policy. This argument arises under section 1506 of the Bankruptcy Code, which permits the bankruptcy court to refuse to take an action under chapter 15 if such "action would be manifestly contrary to the public policy of the United States." The bankruptcy court, however, noted the U.S. courts have interpreted section 1506 narrowly and found that, notwithstanding the noteholders' expressed concerns about a lack of due process in the Brazilian proceedings, given the U.S. courts' narrow interpretation of section 1506, the ability of the noteholders to seek further judicial review of certain ex parte orders of the Brazilian court, and that some concerns were simply speculation about what might happen in the Brazilian proceeding, the proposed actions were not manifestly contrary to U.S. public policy.

A Default Is a Default, and Reinstatement Doesn't Change That

Alana Heumann examined the effect of reinstatement of a debt under section 1123 of the Bankruptcy Code on a lender's ability to claim default interest in *The Cure: Eleventh Circuit Entitles Lender to Default Rate Interest*.[33] In *In re Sagamore Partners*,[34] the Eleventh Circuit rejected the debtor's argument that it need not pay accrued default interest as a condition to reinstatement of a loan under the debtor's plan. In so holding, the Eleventh Circuit relied upon the language of section 1123(d) of the Bankruptcy Code, which requires the debtor to cure defaults in accordance with the terms of the underlying documents and applicable non-bankruptcy law. The Eleventh Circuit also upheld the lender's right to assert alternative remedies—here, late fees – and held that the lender did not waive its claim to interest by asserting a (later withdrawn) claim for late fees.

Lien Stripping vs. Lien Rides Through – What's a Debtor to Do?

During this lookback period, we have seen a number of decisions dealing with the effect of bankruptcy cases on secured claims. In *Why Won't the Courts Apply the Plain Language of Section 1141(c)? Second Circuit Misses the Chance to Get It Right in Northern New England Telephone Operations*,[35] I discussed the Second Circuit's decision to express support for the "lien rides through" *Dewsnup* principles. Even though the secured creditor actively participated in the case before it, the court felt compelled to rule that a secured creditor's "participation" in a chapter 11 case is one of the requirements that must be satisfied

before a plan can revest property of the debtor's estate in the reorganized debtor free and clear of that creditor's interest.

Katherine Doorley discussed two decisions on "lien stripping" – avoiding a lien to the extent the value of the collateral is less than the lienholder's interest – in *Two New Decisions Appear to Support Lien Stripping (Under Certain Conditions)*.[36] In *Boukatch v. Midfirst (In re Boukatch)*,[37] the Ninth Circuit BAP held that a lien can be stripped following a chapter 13 debtor's payment of all amounts payable under his or her plan even if the individual debtor is not eligible for a discharge. In *In re John Paul Smith*,[38] Kate discussed a decision of the U.S. Bankruptcy Court for the Eastern District of North Carolina that somehow conditioned confirmation of an individual chapter 11 debtor's plan upon making all payments required by the plan (a condition not satisfied by Mr. Smith). The decision, however, might be read to suggest that, if Mr. Smith had made all his payments, he could have stripped an underwater secured creditor's lien.

The Burden of the Bundle in Section 365

A number of ostensibly conflicting principles guide assumption or rejection of executory contracts under section 365 of the Bankruptcy Code – a debtor may not cherry pick provisions in a contract (*i.e.*, it must assume or reject a contract *in toto*), but a single contract that is really multiple contracts might be severable. What happens when the parties expressly state that multiple contracts should be treated as one? That was the issued addressed in Delaware, and discussed by Jessica Diab, in *It's All or Nothing: Delaware District Court Says Debtor Cannot Pick and Choose From Bundle of Related Agreements!*[39] After determining that a software license agreement was assumable notwithstanding section 365(c)(1) of the Bankruptcy Code because the agreement allowed for the assignment, the Delaware District Court nevertheless held that, if the debtor wanted to assume a software license, it also was required to assume a number of related agreements because all of the agreements were intended to be part of an integrated bundle. In so ruling, the district court held that agreements need not even be executed simultaneously to form part of an integrated contract. Among other things, the reference among the agreements to other agreements and incorporation of each other's terms led the court to conclude that the parties intended for the related agreements to be treated as one integrated agreement.

Believe It or Not, But *Manville* Continues to Generate Decisions

Johns-Manville emerged from its historic chapter 11 case in 1988, but its legacy continues – not just in the use of 524(g) injunctions patterned after those of Manville and other early asbestos debtor pioneers, but also in disputes that have continued to work their way through the judicial system. Abigail Lerner addressed the latest such decision in *SDNY Bankruptcy Court Says Claims Against Insurer Need Not Be "Inextricably Intertwined" with Insurer's Relationship with Debtor to Fall Within Scope of Channeling Injunction*.[40] In a ruling that likely has relevance to the interpretation of channeling injunctions under section 524(g) of the Bankruptcy Code, the Bankruptcy Court for the Southern District of New York ruled that so-called "independent" claims asserted against Manville's insurance broker were barred by the channeling injunction in the Manville plan and confirmation order because they were "related to" the services provided by the broker to Manville. The bankruptcy court rejected the claimant's argument that broker was required to show that the claims were "inextricably intertwined" with the broker's relationship with Manville to be protected under the channeling injunction.

Breathing New Relevance Into the Trust Indenture Act

We have witnessed a spate of lawsuits recently in which bondholders have attempted to derail out-of-court restructuring efforts using the Trust Indenture Act. Jessica Liou described one such notable decision in *What Marblegate Can Teach Us About the Protections Available to Minority Noteholders in an Out-of-Court Restructuring*.[41] In *Marblegate Asset Management, LLC v. Education Management Corp.*,[42] interpreted section 316(b) of the Trust Indenture Act,

which prohibits the right of a bondholder to receive or sue for timely payment of principal or interest on its claim from being impaired without its consent. Jessica discussed the different meanings ascribed to section 316(b) and analyzed the SDNY's broad reading of the section, essentially protecting against any actions that provide a lesser than originally bargained for under an indenture outside of bankruptcy. Subsequent to this Lookback Period, we wrote on the August 27th decision by District Judge Scheindlin in *BOKF, N.A. v. Caesars Entertainment Corporation*,[43] in which Judge Scheindlin denied the plaintiffs' motion for summary judgment on their section 316(b) claims, but rejected many of the defenses raised by Caesars."[44]

When Has Publication Notice Generated This Much Paper?

The series of decisions in the *New Century* case have been interesting for their focus on the quality of publication notice, particularly as it pertains to potentially unknown consumer creditors. Debora Hoehne addressed the latest twist in the case in *Known or Unknown? Third Circuit Questions Standing in New Century Appeal*.[45] In short, the Third Circuit punted on the issue of sufficiency of publication notice for unknown creditors. Because the district court had concluded that the publication notice was insufficient to afford due process to unknown creditors, the district court had not addressed whether the consumers in *New Century* were known or unknown creditors. Accordingly, the Third Circuit ruled, until and unless the district court considered that issue, any determination regarding the sufficiency of the publication notice would constitute an advisory opinion. The court kicked the case back down to the district court, where it awaits further decision (and more commentary from the Weil Bankruptcy Blog).

Chesapeake's Decision on Make-Whole Damages Offers Lessons on Litigation-Based Financing

Brian Wells has been following the continuing saga of the consequences of Chesapeake Energy's unfortunate decision to call an early redemption of certain notes. In his latest entry, *Chesapeake Remand Decision Sets Damages at Make-Whole Price and Offers Food for Thought on Bankruptcy Litigation Strategy*,[46] Brian discussed the SDNY's rejection of Chesapeake's argument that it should only pay "restitution" damages (the present value of payments the noteholders would have received if the notes had not been redeemed), and not a make-whole (worth an additional $280 million), to noteholders. Chesapeake argued that such approach was equitable because Chesapeake had relied upon the district court's judgment (later overturned on appeal) that Chesapeake was not required to pay the make-whole upon early redemption of the notes. In determining the damages, though, the district court followed the express language of the indenture and required Chesapeake to pay the entire make-whole. In addressing the decision, Brian noted how the ongoing litigation drove trading on the notes and compared those activities to the more complicated analyses that factor into trading on notes in a bankruptcy case.

Single Transaction Sets the Standard for Ordinary Course in the Tenth Circuit

Debra McElligott discussed the Tenth Circuit's interpretation of what constitutes "ordinary course of business" for a preference defense in *"Ordinary" Doesn't Always Mean "Often": Tenth Circuit Holds That First-Time Transaction Can Qualify for the Ordinary Course of Business Exception Under Section 547*.[47] Section 547(c)(2) allows a preference defendant to protect a transfer "(A) made in the ordinary course of business affairs of the debtor and the transferee; or (B) made according to ordinary business terms." In interpreting subsection (A), the Tenth Circuit considered whether the language required that the ordinary course of transactions between the parties be established (which would require more than one transaction), or whether it was sufficient for the defendant to establish that the payment was in the ordinary course of each party's business affairs. The Tenth Circuit adopted the latter approach and found that when the debtor made the payment two days before its due date and without any collection action by the preference defendant, the debtor's payment fell within the "ordinary course" defense of section 547(c)(2)(A).

The Importance of Keeping Pace with PACER

Every now and then, we see a decision that reminds us of the importance of actively monitoring a case instead of sitting back and hoping that you will be served properly. Charlie Chen reported on such a case in *Back to School Basics: Attorneys Should Confirm Their Address Information Is Correct and Monitor Their Case Docket*.[48] The decision at issue, *In re Lezell*,[49] reads like a *Series of Unfortunate Events* (Lawyer's Edition). Two months too late, the lawyer for the petitioning creditors in an unsuccessful involuntary filing sought to revisit court orders awarding attorneys' fees to the debtors. His argument was that he had not received proper notice because he had not received e-mail notification of the orders. The court, however, found that the attorney had not actually registered for electronic filing and, therefore, could not complain of non-receipt. Moreover, the court found that the lawyer had insufficient grounds to rebut the certificate of service stating that a physical copy of the orders had been mailed to him, finding that the lawyer's knowledge that his address was sometimes confused with another address imposed an obligation on the lawyer to monitor the docket by way of his PACER account.

1. *See Banks and Bitcoin Exchanges* dated June 29, 2015 on the Weil Bankruptcy Blog.
2. 787 F.3d 173 (3d Cir. 2015).
3. *See In re Jevic Holding Corp. Part I: Third Circuit Authorizes Structured Dismissals in Limited Circumstances* dated June 30, 2015 on the Weil Bankruptcy Blog.
4. *See In re Jevic Holding Corp. Part II: In a Close Call, Third Circuit Approves Settlement Agreement and Structured Dismissal that Deviate from Bankruptcy Code's Priority Scheme* dated July 1, 2015 on the Weil Bankruptcy Blog.
5. *See If It Ain't Broke, Don't Fix It: ABI Commission Recommends No Change To Judicial Valuation* dated July 6, 2015 on the Weil Bankruptcy Blog.
6. *See A Tale of Two Circuits: Recent Applications of the Barton Doctrine* dated July 7, 2015 on the Weil Bankruptcy Blog.
7. Case No. 14-13133, 2015 WL 3619606 (11th Cir. June 11, 2015).
8. 788 F.3d 502 (5th Cir. 2015).
9. *See Onward, Christian Soldiers: Some Guidance on 363 Sales, Fair Auctions, and Proposed Sales to Insiders* dated July 8, 2015 on the Weil Bankruptcy Blog.
10. 533 B.R. 600 (Bankr. W.D. Mich. 2015)
11. *See Kentucky Bankruptcy Court Holds That Coal Mining Lease Is Not an Executory Contract or Unexpired Lease and Is Transferable Pursuant to Section 363 Despite an Anti-Assignment Provision* dated July 20, 2015 on the Weil Bankruptcy Blog.
12. Case Nos. 13-61501 and 13-61502 (Bankr. E.D. Ky. June 19, 2015).
13. *See Does Silence Mean Consent? Some Courts Have Found That It Does Not (at Least for Purposes of Sales Under Section 363(f))* dated July 22, 2015 on the Weil Bankruptcy Blog.
14. *See [Un]signed, Sealed, Delivered: Is It Still Yours?* dated July 9, 2015 on the Weil Bankruptcy Blog.
15. 789 F.3d 197 (D.C. Cir. 2015).
16. 791 F.3d 1140 (9th Cir. 2015).
17. *See A Word from the Ninth Circuit: Substantial Consummation Is Not the Final Word!* dated July 13, 2015 on the Weil Bankruptcy Blog.
18. *See Equitable Mootness on Life Support. The Third Circuit Further Pares Back the Abstention Doctrine in One2One Communications* dated August 3, 2015 on the Weil Bankruptcy Blog.
19. No. 13-3410, 2015 WL 4430302 (3d Cir. 2015).
20. *See Puhlease, It's a Lease: Bankruptcy Court Upholds Agreements as True Leases Entitled to Section 365(h) Protections* dated July 14, 2015 on the Weil Bankruptcy Blog.
21. *See Debt or Equity? Which Circuit? Recent Cases on Equitable Recharacterization* dated July 15, 2015 on the Weil Bankruptcy Blog.
22. *See Tenth Circuit Declares "No Recharacterization Without Justification"* dated July 30, 2015 on the Weil Bankruptcy Blog.
23. 789 F.3d 1139 (10th Cir. 2015).
24. 380 F.3d 1292 (10th Cir. 2004).
25. *See Bankruptcy Court Reinforces the Notion That Counting Number of Eligible Creditors Commencing an Involuntary Case Really Counts* dated July 23, 2015 on the Weil Bankruptcy Blog.
26. No. 14-70661, 2015 WL 4116862, *slip op*. (Bankr. S.D. Tex.

July 7, 2015).

27. *See Same Dollars, Different Treatment: Tenth Circuit Holds That Distributions From a Retirement Plan Do Not Fall Within the Colorado State Law Exemption Statute* dated July 16, 2015 on the Weil Bankruptcy Blog.
28. 791 F.3d 1182 (10th Cir. 2015).
29. *See Blurred Lines: Seventh Circuit Keeps Alive Claims Based Upon Law Firm's Alleged Failure to Advise on Degrees of Business Risk* dated July 21, 2015 on the Weil Bankruptcy Blog.
30. *See SDNY Sides with Fifth Circuit and the UNCITRAL Model Law when Granting Recognition to OAS S.A. et al.* dated July 27, 2015 on the Weil Bankruptcy Blog.
31. *See SDNY Holds That Austrian Financing Subsidiary Has Its Center of Main Interests in Brazil* dated July 28, 2015 on the Weil Bankruptcy Blog.
32. *See SDNY Takes Narrow View of Chapter 15's Public Policy Exception* dated August 5, 2015 on the Weil Bankruptcy Blog.
33. *See The Cure: Eleventh Circuit Entitles Lender to Default Rate Interest* dated August 4, 2015 on the Weil Bankruptcy Blog.
34. No. 14-11106, 2015 WL 4170215 (11th Cir. July 13, 2015).
35. *See Why Won't the Courts Apply the Plain Language of Section 1141(c)? Second Circuit Misses the Chance to Get It Right in Northern New England Telephone Operations* dated August 6, 2015 on the Weil Bankruptcy Blog.
36. *See Two New Decisions Appear to Support Lien Stripping (Under Certain Conditions),* dated August 14, 2015 on the Weil Bankruptcy Blog.
37. 533 B.R. 292 (B.A.P. 9th Cir. 2015).
38. No. 08-04530-8-DMW, 2015 WL 4187060, *slip op*. (Bankr. E.D.N.C. July 10, 2015).
39. *See It's All or Nothing: Delaware District Court Says Debtor Cannot Pick and Choose From Bundle of Related Agreements!* dated August 10, 2015 on the Weil Bankruptcy Blog.
40. *See SDNY Bankruptcy Court Says Claims Against Insurer Need Not Be "Inextricably Intertwined" with Insurer's Relationship with Debtor to Fall Within Scope of Channeling Injunction* dated August 11, 2015 on the Weil Bankruptcy Blog.
41. *See What Marblegate Can Teach Us About the Protections Available to Minority Noteholders in an Out-of-Court Restructuring* dated August 12, 2015 on the Weil Bankruptcy Blog.
42. No. 14-Civ-8584 (KPF), 2015 WL 3867643 (S.D.N.Y. June 23, 2015).
43. No. 15-cv-1561 and 15-cv-4634 (SAS), 2015 WL 2330761, *slip op*. (S.D.N.Y. Aug. 27, 2015).
44. *See Judge Scheindlin Rules in Caesars that Trust Indenture Act Bars "Core" Impairments; Certifies the Issue to the Second Circuit OR What's the Deal with the Caesars Parent Guarantee Litigation? [PART I]* dated August 31, 2015, and *Judge Scheindlin Rules in Caesars that Trust Indenture Act Bars "Core" Impairments; Certifies the Issue to the Second Circuit OR What's the Deal with the Caesars Parent Guarantee Litigation? [PART II]* dated September 1, 2015 on the Weil Bankruptcy Blog.
45. *See Known or Unknown? Third Circuit Questions Standing in New Century Appeal* dated August 18, 2015 on the Weil Bankruptcy Blog.
46. *See Chesapeake Remand Decision Sets Damages at Make-Whole Price and Offers Food for Thought on Bankruptcy Litigation Strategy* dated August 20, 2015 on the Weil Bankruptcy Blog.
47. *See Ordinary" Doesn't Always Mean "Often": Tenth Circuit Holds That First-Time Transaction Can Qualify for the Ordinary Course of Business Exception Under Section 547* dated August 21, 2015 on the Weil Bankruptcy Blog.
48. *See Back to School Basics: Attorneys Should Confirm Their Address Information Is Correct and Monitor Their Case Docket* dated August 17, 2015 on the Weil Bankruptcy Blog.
49. No. 15-00104, 2015 WL 4331889, *slip op*. (Bankr. D.C. July 15, 2015).

If you would like more information about the topics raised in this Weil Bankruptcy Blog, please speak to the author(s) or to a member of the Bankruptcy Blog editorial board:

Debra A. Dandeneau Partner, New York	debra.dandeneau@weil.com	+1 212 310 8541
Stephen Youngman Partner, Dallas	stephen.youngman@weil.com	+1 214 746 7758
Ronit J. Berkovich Partner, New York	ronit.berkovich@weil.com	+1 212 310 8534