BUSINESS BANKRUPTCY COMMITTEE NEWSLETTER

August 2017

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Useful Links

Important Dates

Business Law Section Annual Meeting
September 14-16, 2017
Chicago, IL

"Business Bankruptcy Committee: The World's Largest Organization of Bankruptcy Restructuring Lawyers" The Business Bankruptcy Committee looks forward to seeing you at the ABA Business Law Spring Meeting in New Orleans, Louisiana from April 6 to April 8, 2017. We have a dynamite lineup of interesting and informative programs for bankruptcy and business law practitioners. See the programs below, after the breaking news article on the latest opinion from the Supreme Court.

Business Law Section Annual Meeting

COMING UP: 2017 Business Law Section Annual Meeting
September 14-16, 2017
Chicago, Illinois
Sheraton Grand Chicago & Towers and The Gleacher Center

Thursday, September 14, 2017
2:00 p.m. - 4:00 p.m.
Room 204, Second Floor
Gleacher Center

Program: Public/Private Partnerships - From Infrastructure to Restructure
Presented by: Business Bankruptcy
Co-Sponsoring Committees: Government Affairs Practice, International Coordinating, Project Finance and Development

Program Chair:
Henry Kevane; Partner; Pachulski Stang Ziehl & Jones LLP; San Francisco, CA
Program Moderator:
Margaret Anderson; Partner; Fox Swibel Levin & Carroll LLP; Chicago, IL
Program Materials Coordinator:
Carla Potter; Associate; Cassels Brock & Blackwell LLP; Toronto, ON

Speakers:
Dylan Foo; Principal, Head of Infrastructure Equity Americas; AMP Capital Investors; New York, NY
Mitchell Holzrichter; Partner; Mayer Brown LLP; Chicago, IL
Alison Manzer; Partner; Cassels Brock & Blackwell LLP; Toronto, ON Kent Rowey; Partner; Allen & Overy LLP; New York, NY
Lois Scott; President; Epoch Advisors LLC; Chicago, IL
George Zakam; Managing Director; Northleaf Capital Partners (Canada) Ltd.; Toronto, ON

Public Private Partnerships are gaining in importance for the development and refurbishing of infrastructure. This session will examine the life-cycle of the "PPP" based project - from concept to approval to legislative authority to development, finance, operationalization and then to failure and restructuring.

Thursday, September 14, 2017
4:00 PM - 5:00 PM
Ohio, Meeting Room
Level Sheraton

Business Bankruptcy Committee Meeting and National Conference of Bankruptcy Judges
October 8-11, 2017
Las Vegas, NV

Business Law Section Spring Meeting
April 12-14, 2018
Orlando, Florida

Kay Standridge Kress
Chair, Committee on Business Bankruptcy
kressk@pepperlaw.com

Editorial Board

Program: Governance Issues of Distressed Companies Joint Subcommittee Meeting
Presented by: Business Bankruptcy & Corporate Governance

Meeting Co-Chairs:
Brett Amron; Bast Amron, LLP; Miami, FL
Rolin Bissell; Partner; Young Conaway Stargatt & Taylor, LLP; Wilmington, DE
J. William Boone; Partner; James Bates Brannan Groover LLP; Atlanta, GA
K. Tyler O'Connell; Landis Rath & Cobb LLP; Wilmington, DE

This will be a report of the results of the multi-jurisdictional survey and a roundtable discussion of recent decisions/developments, including the Marblegate case and related cases.

Thursday, September 14, 2017
4:00 PM - 5:30 PM

Program: Success for Public Private Partnerships
Presented by: Project Finance and Development
Co-Sponsoring Committees: Business Bankruptcy, Government Affairs, International Business Law

Program Chair:
Alison Manzer; Partner; Cassels Brock & Blackwell LLP; Toronto, ON
Moderator:
Julie Roin; Professor; University of Chicago; Chicago, IL
Program Materials Coordinator:
Carla Potter; Associate; Cassels Brock & Blackwell LLP; Toronto, ON

Speakers:
Arthur Cohen; Attorney; Haynes and Boone LLP; Washington, DC
Mariah DiGrino; DLA Piper; Chicago, IL
Charles Newman; Partner; Cassels Brock & Blackwell LLP; Toronto, ON

This is the second part of a two-part track with the related session - Public/Private Partnerships - From Infrastructure to Restructure. Successful Public Private Partnerships have key factors that lead to success. The panel will review the characteristics of this project development and finance structure to identify, explain and give best practices -- zoning, public authority, revenue and payment assurance, community and economic support and key terms for the base agreements.

Friday, September 15, 2017
8:00 AM - 10:00 AM
Room 206, Second Floor Gleacher Center

Program: Restructuring Limited Liability Companies - In and Out of Bankruptcy
Presented by: Business Bankruptcy
Co-Sponsoring Committees: LLCs, Partnerships and Unincorporated Entities

Program Chair:
Henry Kevane; Partner; Pachulski Stang Ziehl & Jones LLP; San Francisco, CA
Program Materials Coordinator:
Bradford Englander; Partner; Whiteford Taylor & Preston, LLP; Falls Church, VA

Speakers:
Jay Adkisson; Partner; Riser Adkisson LLP; Newport Beach, CA
Hon. Stacey Meisel; United States Bankruptcy Judge; United States Bankruptcy Court, District of New Jersey; Newark, NJ
Victor Morales; Partner; McElroy, Deutsch, Mulvaney & Carpenter, LLP; Denver, CO
Daniel Sheridan; Shareholder; Stark & Stark; Lawrenceville, NJ

The panel will discuss several unique issues associated with creditor claims against limited liability companies and limited liability company interests, including important considerations when organizing LLCs and drafting LLC operating agreements, lending to LLCs or to LLC members collateralized by LLC membership interests, non-consensual creditor claims and remedies, including charging orders, and restructuring LLCs in Chapter 11 reorganizations.

Friday, September 15, 2017
10:30 AM - 12:30 PM
Superior, Meeting Room Level Sheraton

Program: Smarter, Faster, Cheaper Corporate Legal Services
Presented by: Corporate Counsel
Co-sponsoring Committees: Antitrust Law, Audit Responses, Bankruptcy Court Structure and Insolvency Process, Business and Corporate Litigation, Business Bankruptcy, Business Financing, Business Law Education, Consumer Fina

Program Chair and Moderator:
Robert Haig; Partner; Kelley Drye & Warren LLP; New York, NY
Program Materials Coordinator:
Robert Haig; Partner; Kelley Drye & Warren LLP; New York, NY

Speakers:
Douglas Barnard; Senior Vice President, General Counsel and Secretary; CF Industries Holdings, Inc.; Deerfield, IL
Suzanne Bettman; Chief Administrative Officer and General Counsel; LSC Communications, Inc.; Chicago, IL
Robert Bostrom; Senior Vice President, General Counsel and Corporate Secretary; Abercrombie & Fitch Co.; New Albany, OH
Jodi Caro; General Counsel, Chief Compliance Officer and Corporate Secretary; Ulta Beauty, Inc.; Bolingbrook, IL
Kathleen Cronin; Senior Managing Director, General Counsel and Corporate Secretary; CME Group Inc.; Chicago, IL
Angelique David; Chief Operating Officer and General Counsel; The Ziegler Companies, Inc.; Chicago, IL Kimberly Taylor; Vice President & General Counsel; The University of Chicago; Chicago, IL

This program will help business lawyers do their jobs better and faster. The program will focus on improving the quality and maximizing the value of legal services for corporate clients. The panelists will discuss significant challenges which delivery of cost-effective corporate legal services presents and will show business lawyers how to select and implement strategies which address those challenges.

Is It the Cake or the Ingredients? Plan Confirmation May Not Eliminate *Stern* Issue for Third-Party Releases

By Robert W. Miller

How many times have we all heard the phrase, "It's baked into the plan?" Some courts and commentators have characterized the plan and the confirmation process as sufficient to eliminate any *Stern* issues present in the individual plan provisions. Just like baking a cake changes the characteristics of the various ingredients, the plan confirmation alters the character of the plan provisions. A recent decision by the United States District Court for the District of Delaware focused on the ingredients rather than the cake in holding that *Stern* issues presented by third-party releases are not eliminated by their status as provisions in a chapter 11 plan. In *Opt-Out Lenders v. Millennium Lab Holdings II, LLC (In re Millennium Lab Holdings, LLC)*, 2017 U.S. Dist. LEXIS 39385, 2017 WL 1032992, Bankr. L. Rep. (CCH) P83087 (D. Del. Mar. 20, 2017), Judge Leonard Stark

analyzed the intersection of three of bankruptcy law's most unsettled concepts: the constitutional authority of bankruptcy judges under Article III of the Constitution, non-debtor third-party releases and equitable mootness. In denying the appellee's motion to dismiss on equitable mootness grounds, Judge Stark held that bankruptcy judges do not possess the constitutional authority to enter final confirmation orders providing non-debtor third-party releases of *Stern* claims. Judge Stark's decision rejected the reasoning applied by an earlier case from the United States Bankruptcy Court for the District of Massachusetts that the plan confirmation process could allow a bankruptcy judge to issue a third-party release. The impact of this decision in certain jurisdictions could be immense as the utility of non-debtor third-party releases could be eliminated.

In *Millennium*, the debtors' proposed chapter 11 plan provided for the release of RICO and common law fraud claims against non-debtor third parties in return for a $325 million contribution to the debtors' reorganization. The plan provided no ability for parties to "opt out" of the releases and it permanently enjoined parties from prosecuting claims against the same third parties. The bankruptcy court overruled objections to the third-party releases and confirmed the debtors' plan. Following the appeal by certain lenders who had sued the parties to be released under the plan, the debtors sought to dismiss the appeal as equitably moot. Judge Stark recognized that he could not determine whether the appeal was equitably moot until he determined whether the bankruptcy judge possessed the constitutional authority to enter the confirmation order forming the basis for the appeal.

Judge Stark's analysis relied heavily upon the Supreme Court's decision in *Stern v. Marshall*, 564 U.S. 462 (2011). In *Stern*, the Supreme Court concluded that bankruptcy judges do not possess the constitutional authority to enter final judgments on certain claims even though they possess subject matter jurisdiction over such matter under 28 U.S.C. § 157's list of "core proceedings." The mismatch between the constitutional authority and statutory authority arises from the status of bankruptcy judges as Article I judges, rather than Article III judges. Article III judges are shielded from the other political branches by certain pay and retention protections that are not afforded to Article I judges. Due to the importance of these protections in ensuring the separation of power and checks and balances, in general, only an Article III judge can enter a final judgment on "a suit at the common law, or in equity, or admiralty." As a result, *Stern* established a disjunctive test to determine whether a bankruptcy judge possesses constitutional authority to enter a final judgment over a certain matter: (i) does the claim stem from the bankruptcy itself or (ii) will the claim necessarily be determined as part of the claims allowance process. *Id*. at 499. If a matter satisfies neither parts of the test, but is a core proceeding, it is a *Stern* claim. The Supreme Court has subsequently answered some of the questions left unanswered by *Stern*. First, it confirmed that bankruptcy judges could issue proposed findings of fact and conclusions of law to adjudicate *Stern* claim. *Exec. Bens. Ins. Agency v. Arkison*, 134 S. Ct. 2165 (2014). Additionally, litigant consent or forfeiture can also allow a bankruptcy judge to issue a final judgment on a *Stern* claim. *Wellness Int'l Network, Ltd. v. Sharif*, 135 S. Ct. 1932 (2015).

According to Judge Stark, the release of the claims against the non-debtors as part of the confirmation of the debtor's plan satisfied neither part of *Stern*'s test. The actions to be released - common law fraud and RICO claims - were non-bankruptcy claims against non-debtors. The claims would not implicate the claims allowance process and did not stem from the debtor's bankruptcy. Indeed, Judge Stark recognized the equivalence between the relevant claims and other non-bankruptcy tort and contract claims that Supreme Court has categorized as *Stern* claims. Finally, the third-party release of the claims was equivalent to a final judgment on the merits against the appellants because it would have the same result: the elimination of the ability to obtain a remedy based on the claims.

Does the incorporation of *Stern* claims into a plan convert them into claims within

bankruptcy judges' constitutional authority? On one hand, the opinion in *In re Charles Street African Methodist Episcopal Church of Boston*, 499 B.R. 66 (Bankr. D. Mass. 2013), allowed a third-party release based on the rationale that the plan process transforms a *Stern* claim into a claim subject to final adjudication by a bankruptcy judge. In *Charles Street*, the bankruptcy court viewed the released claims as part and parcel of the confirmation proceeding, a proceeding unique to bankruptcy. *Id*. at 99. As a result, the release stemmed from the bankruptcy itself and could be part of a final confirmation order issued by a bankruptcy judge. On the other hand, in *Millennium*, Judge Stark was unmoved by character of the releases as plan provisions and categorized the claims as *Stern* claims irrespective of their inclusion in the debtor's plan. As he summarized: "If Article III prevents the Bankruptcy Court from entering a final order disposing of a non-bankruptcy claim against a non-debtor outside of the proof of claim process, it follows that this prohibition should be applied regardless of the proceeding (i.e., adversary proceeding, contested matter, plan confirmation)." *Millennium*, 2017 U.S. Dist. LEXIS 39385, at *35-36.

Adding a further wrinkle, Judge Stark also rejected that he could provide *de novo* review of the third-party releases provisions to cure any constitutional infirmities. The failure of the bankruptcy court to make any findings on the merits of the released clams precluded *de novo* review. Although the release would have the same effect as a determination on the merits, no determination on merits was made by the bankruptcy court. A review of the release by the district court would similarly fail to make a determination on the merits, and the appellants would still not have received an Article III adjudication of their *Stern* claims. As a result, Judge Stark denied the motion to dismiss and remanded the matter to the bankruptcy court to clarify its ruling regarding its constitutional authority, make proposed findings of fact and conclusions of law on merits of the claims, or strike the claims from the confirmation order.

The ramifications of Judge Stark's opinion are potentially enormous. In jurisdictions where non-consensual non-debtor third-party releases are allowed, this opinion threatens their very existence. If a determination on the merits of the claims is required - even in the guise of proposed findings of fact and conclusions of law - the utility of the releases disappears. Why try to obtain a release if the only way to get a release is to win on the merits? Moreover, does this decision open previously confirmed non-debtor third-party releases to collateral attack based upon a lack of constitutional authority? Although forfeiture based on a failure to raise such arguments would likely limit collateral attacks, they are certainly more likely to succeed following *Millennium*.

Energy Bankruptcy CLE at the Spring Meeting

By Michael D. Rubenstein

On April 7, 2017, at the Business Law Section's Spring Meeting, the Business Bankruptcy Committee in conjunction with the Energy Business and Environmental Committees presented Drilling Down: The Oil & Gas Industry and Bankruptcy Collide. The panelists were: (i) Louis M. Phillips of the Kelly Hart & Pitre law firm's Baton Rouge office, from which he leads the firm's bankruptcy practice, and who was previously the Chief United States Bankruptcy Judge for the Middle District of Louisiana; (ii) Deborah Williamson, an experienced restructuring practitioner of the San Antonio office of Dykema Cox Smith, and the author of *When Gushers Go Dry, The Essentials of Oil & Gas Bankruptcy*; and (iii) Jeff Jones, a managing director of Blackhill Partners, who has experience as an investment banker and as a restructuring advisor who has advised both public and private companies across a myriad of industries. I was privileged to serve as the program's moderator.

Our goal as a panel was twofold. First, we wanted to introduce bankruptcy practitioners to the unique issues and terminology one finds in the oil and gas business. Second, we wanted to identify and discuss the problems that can arise in the restructuring of a business in this industry. While every industry category brings its own challenges to restructuring, the oil and gas business stands alone in many ways. The assets that underlie these businesses have their own unique body of law and are extraordinarily volatile from a valuation perspective. At the same time, the oil and gas business is highly regulated. The combination of unique legal issues and intensive regulation presents an interesting and challenging prospect when an energy business enters Chapter 11.

To ensure that everyone in the room had a common base of knowledge, we began with a discussion of basic industry terminology. This discussion began with an identification of the three main sectors of the oil and gas business: Upstream: the exploration and production phase; Midstream: the transportation, processing, and storage phase; and Downstream: the manufacturing, refining, and marketing phase. Having identified these phases of the business, we moved on to an identification of the likely players in an energy Chapter 11. While some of the players are the same as one would find in any complex reorganization, there are those that are unique to the oil and gas business. In addition to the debtor, equity holders, lenders, and trade creditors, one routinely sees contract counterparties, derivative participants, lessors, owners of royalty interests, parties to joint operating agreements, owners of working interests, and a plethora of regulatory agencies.

The identification of case participants leads to a basic question of mineral law: the nature of one's interest in minerals. These interests include:

- Mineral Interest: typically a property interest for what is in the ground, created by an instrument filed in the real property records office.
- Royalty Interest: a property interest held by the lessor in an oil and gas lease, which entitles the lessor to a share of the production revenues free of costs of production.
- Working Interest (operating or non-operating): synonymous with "cost bearing interest." A percentage ownership interest in a lease that grants the owner the exclusive right to explore for and extract hydrocarbons.
- Overriding Royalty Interest (ORRI): a non-operating interest carved out of the working interest, which gives the holder an entitlement to a percent of the proceeds of production, free of capital costs.
- Net Revenue Interest (NRI): property interest in the proceeds of production held by the lessee under an oil and gas lease, free of production costs, after ORRIs and royalties are paid.

We noted that this listing of types of interests was not exhaustive.

Of course, much of the foregoing is simply a discussion of legal concepts. However, understanding oil and gas reorganizations requires more than an understanding of the legal framework. One also needs to understand a bit about geology and petroleum engineering in order to grasp the concepts at hand. These concepts were certainly beyond the expertise of the panel, but a brief overview was necessary and touched on the types of drilling (directional and horizontal); hydraulic fracturing; and reservoir engineering. The latter topic was of the most interest to the restructuring professionals in attendance because the nature of the reserves has direct input into asset valuation. Thus, we discussed the various categories of reserves: proved (and the subcategories of PDP, PDNP, and PUD), unproved, probable, and possible. We then provided a brief overview of the method by which these reserves are valued.

With that background, we then dove into recent experiences of energy and production companies being reorganized in Chapter 11. In 2014 there had been five (5) E&P restructurings, with only one having assets of more than $150 million. However, in 2016 and the first quarter of 2017 there were ninety-nine (99) cases,

with nineteen (19) of those having assets of more than $750 million. But while the number of cases has risen significantly, the time these companies spend in bankruptcy has dropped substantially. This is a result of advisors being hired earlier and more cases involving prepackaged plans and plan sales.

These cases, regardless of size, present recurring issues. The first issue involves the question of whether "dedication" of mineral reserves, typically in a midstream transportation agreement, is a covenant running with the land (which ought to survive bankruptcy) or an executory contract (subject to rejection). While this issue has arisen in many cases, almost all have been resolved without a judicial determination. Only the *Sabine Oil & Gas* case resulted in such a decision. *Sabine Oil & Gas Corp. v. HPIP Gonzalez Holdings, LLC (In re Sabine Oil & Gas Corp.)*, 550 B.R. 59 (Bankr. S.D.N.Y. 2016). In that case, a New York bankruptcy court was required to apply Texas law regarding covenants running with the land. *Id*. at 62. Judge Chapman concluded that the dedication was not a covenant running with the land - based in large part on the fact that the agreements dealt with produced hydrocarbons, which as a matter of law, are not real property interests. *Id*. at 66. A lively discussion ensued!

A second issue routinely arises in oil and gas cases: Is a mineral lease an interest in real property or an unexpired lease subject to Section 365 of the Bankruptcy Code. Because the nature of a mineral lease is, at its most fundamental, a question of state law, there is no single answer. The panel noted that the cases break down into a four categories: (A) real property not subject to rejection; *See In re Matter of Topco*, 894 F.2d 727, 740 (5th Cir. 1990); *In re Frederick Petroleum*, 98 B.R. 762, 767 (S.D. Ohio 1989); *In re Heston Oil Company*, 69 B.R. 34, 36 (N.D. Okla. 1986); *In re Hanson Oil Company*, 97 B.R. 468, 470-471 (Bankr. S.D. Ill. 1989); *Natural Gas Pipeline Co. v. Pool*, 124 S.W.3d 188, 192 (Tex. Supr. Ct. 2003); (B) a license to enter on land of exploration purposes; *See In re Frederick Petroleum*, 98 B.R. at 767; *In re Clark Resources, Inc.*, 68 B.R. 358, 360 (Bankr. N.D. Okla. 1986); (C) subject to Section 365 as an unexpired lease; *See In re Aurora Oil & Gas Corporation*, 439 B.R. 674, 677-680 (Bankr. W.D. Mich. 2010); *In re Gasoil, Inc.*, 59 B.R. 804, 806-808 (Bankr. N.D. Ohio 1986) (*citing Harris v. The Ohio Oil Co.*, 57 Ohio St. 118 (1897); *Woodland Oil Co. v. Crawford*, 55 Ohio St. 161 (1896); *Acklin v. Waltermeir*, 19 Ohio C.C. 372, 379 (1899); *Jones v. Wood*, 9 Ohio C.C. 560 (1895)); or (D) subject to Section 365 as an executory contract; *See In re J.H. Land & Cattle Company*, 8 B.R. 237 (Bankr. W.D. Okla. 1981). And from that point, it gets more complicated because out on the Outer Continental Shelf, we have federal law layered on state law (or, perhaps, it is the other way around). Under the OCS Lands Act, federal law applies on the Outer Continental Shelf. 43 U.S.C. §1333 (a)(1). However, there is no established body of federal mineral law. So, the OCS Lands Act provides that the law of the adjacent state serves as surrogate federal law. 43 U.S.C. §1333 (a)(2)(A). Thus, the question: Is an offshore oil & gas lease real property, a lease, or an executory contract? The answer, after much lively debate, was: Who knows? First, you have to determine which state is adjacent. While that might seem simple, no President has ever issued the definitive guidance called for in the OCS Lands Act. In the absence of that guidance, the jagged and eroding coastline of the Gulf Coast provides a poignant example of the difficulty of applying this simple legal construct to the real world. One also has to consider the position of the United States-the mineral lessor on the OCS. The stated position of the government is that federal law governs and that OCS leases are subject to Section 365 as a matter of federal law. *See*, *e.g.*, United States' Response to Plaintiff's Motion for Summary Judgment, *NGP Capital Resources Company v. ATP Oil & Gas Corp., Inc.*, Adversary No. 12-03443, (Docket No. 82 at p. 3), Bankr. S.D. Tex (filed March 4, 2013). While no court has yet adopted this position, the prospect of not having a body of state mineral law applicable to the OCS was unsettling to the entire panel.

To emphasize the significance of the federal role in energy bankruptcies, the panel then turned to the issue of decommissioning liability. Not only do oil and

gas bankruptcies involve assets presenting unique valuation issues, those very same assets have a long tail of liabilities. Whether onshore or offshore, on private or public land, the mineral lessee has an obligation to plug and abandon wells and remove facilities. While this obligation exists regardless of location, the issue has profound significance in the offshore context where the risk of environmental harm is pronounced and the cost of decommissioning is very high. The panel discussed the changing regulatory environment and the need to address residual liability in any asset sale.

Finally, with time quickly running out, the panel turned to the issue of bankruptcy asset sales in the oil and gas context. These sales can and do occur under both Section 363 of the Bankruptcy Code and the Chapter 11 plan process. This topic was well beyond the time remaining (and, in fact, the entire time allotted for the program). But the panel provided an overview of the process of selling assets and the advantages, as well as the disadvantages, of plan sales versus those conducted under Section 363 of the Bankruptcy Code.

In two hours, this panel managed to cover a great deal of ground. Given that the program began at 8:00 a.m. in the City of New Orleans, we were quite pleased with the attendance. It was a privilege to participate. The slide deck is available on the ABA's website through this **link**.

The Role of the United States Trustee and the Pension Benefit Guaranty Corporation in Recent Bankruptcy Cases

By Alex Dugan

U.S. Trustee's Role

A recent Chapter 11 case in the Bankruptcy Court for the Northern District of Illinois*, In re Caesars Entertainment Operating Company*, Case No. 15-01145 (Bankr. N.D. Ill. 2015) highlights tension between the United States Trustee (UST) intended role "to act as a watchdog" and the parties' best efforts to resolve bankruptcy litigation. Caesars Entertainment Operating Co. (the "Debtor") filed for bankruptcy on January 15, 2015. After two years of contested litigation, the Debtor obtained agreement among its major creditor groups to support a plan that would release the non-debtor parent and two private equity firms in exchange for a $5 billion contribution to assist the Debtor's transition out of bankruptcy. These firms purchased the Debtor in 2008 for $30 billion and, shortly thereafter, began shifting properties and other assets out of the Debtor's portfolio and into other subsidiaries. An independently appointed bankruptcy examiner found that some of these pre-bankruptcy transfers may support claims of constructive or actual fraud-indicia of the potential ability to avoid and recover transfers for the benefit of the Debtor's estate.

Despite the support of the vast majority of its creditors, the UST filed a brief objection to the Chapter 11 plan on November 21, 2016 [Docket No. 5726] and a more an extensive objection on December 22, 2016 [Docket No. 6145]. Specifically, the UST objected to language in the plan that provided for a broad third-party release. The UST argued that Seventh Circuit precedent required liability releases to be narrowly tailored and the plan's proposed releases were too broad. The UST was particularly concerned that the third-party release would result in "blanket immunity" for the nondebtor parent and private equity firms.

While the UST noted that the Seventh Circuit had joined the Second, Third, Fifth, Sixth and Eleventh Circuits in permitting releases of non-debtor third-parties to varying degrees, the UST concluded that Seventh Circuit precedent did not permit such a broad third-party release as the one contemplated in the proposed chapter 11 plan. For example, the UST noted that under the plan in *In Specialty Equipment Companies, Inc.*, 3 F.3d 1043 (7th Cir. 1993), creditors who obtained

or voted against the Plan were deemed not to have granted the releases. No similar "opt-out" provision was provided on the proposed Chapter 11 plan. [Docket No. 6145, p. 10]. The UST also cited *Airadigm Communs., Inc. v. FCC (In re Airadigm Communs., Inc.)*, 519 F.3d 640 (7th Cir. 2008), 519 F.3d 640 (7th Cir. 2008) for its tailored release, which retained a willful misconduct carveout. Again, the UST noted that such a carveout was not proposed in the Debtors' Chapter 11 plan. [Docket No. 6145, p. 12.] Although, this is not surprising given the bankruptcy examiner's findings concerning the questionable pre-bankrutpcy transactions. Finally, the UST referenced *In re Ingersoll, Inc.*, 562 F.3d 856 (7th Cir. 2009), noting that courts may approve third party releases only if they are: (i) narrowly tailored; (ii) essential to the Plan as a whole; (iii) do not amount to blanket immunity; (iv) relate only to claims arising out of or in connection with the reorganization; and upon a finding (v) that each third party being released would not have participated without the release; and (vi) that each third party's participation is essential to the Plan's success. [Docket No. 6145, p. 16].

In sum, the UST argued that even if the Debtor made an adequate showing that the third party Release was essential to the Plan or its success, in the absence of evidence to support the additional factors under *Ingersoll* that inform the Court's decision, the Debtor has not carried its burden for confirmation. Specifically, "the release is overbroad, reaches beyond the jurisdiction of this Court and amounts to blanket immunity for the CEC Released Parties. In addition, the Third Party Release calls for numerous creditor parties to be released, such as the consenting parties to RSA's, without the requisite showing of necessity." [Docket No. 6145, p. 17.]

Ultimately, the Court confirmed the Chapter 11 plan on January 17, 2017, following a mutual resolution of the UST's objection. [Docket No. 6334.] Although the issues raised in *Caesars* were ultimately resolved, this case provides a warning of how the UST may be monitoring third party release language to ensure that it is not "overbroad".

Pension Benefit Guaranty Corporation's Role in Bankruptcy Cases

Governmental authorities often have a direct financial interest in restructurings. When they do, their own interpretations of statutes or regulations relevant to their interests may carry significant weight. In the case of *Pension Ben. Guar. Corp. v. Durango Ga. Paper Co. (In re Durango Ga. Paper Co.)*, No. 02-21669, 2017 Bankr. LEXIS 160 (U.S. Bankr. S.D. Ga. Jan. 18, 2017), Judge Dalis recently held that ERISA and its regulations control the calculation of the Pension Benefit Guaranty Corporation's ("PBGC") claim because there was no conflict between ERISA and the Bankruptcy Code and no qualification of ERISA by the Bankruptcy Code. The PBGC had filed a claim against Durango Georgia Paper Company (the "Debtors"). Thereafter, the PBGC filed a Motion for Allowance of its claim, which was reviewed as a motion for summary judgment on the amended and restated objection to the claim by the Debtors. At issue was the amount of PBGC's claim for unfunded liabilities arising from the termination of the pension plan sixteen months after the Debtors' Chapter 11 filing. The Liquidating Trustee and PBGC conceded that PBGC had a valid, non-priority, general unsecured claim; however, the parties disagreed about the amount and, more specifically, the method by which the claim should be calculated.

Judge Dalis relied upon the Supreme Court's teachings in *Raleigh v. Ill. Dep't of Revenue*, 530 U.S. 15, 20 (2000) for its authority on the calculation of the claim: "Creditors' entitlements in bankruptcy arise in the first instance from the underlying substantive law creating the debtor's obligation, subject to any qualifying or contrary provision of the Bankruptcy Code." The bankruptcy court noted that it was undisputed that ERISA was the underlying substantive law that created the claim and required that the Valuation Regulation be used to determine the amount of the claim. *See* 29 U.S.C. 1301(a)(8)(A)-(b). Therefore, the question of whether the Valuation Regulation was either contrary to or qualified by the Bankruptcy Code was dispositive in deciding how the claim was

calculated.

Judge Dalis disagreed with the methodology used by several circuit courts in opinions decided prior to *Raleigh*, specifically those courts which used the prudent investor standard. Those courts found that the bankruptcy court had the authority to decide the valuation method and Section 502(b) of the Bankruptcy Code required discounting PBGC's claims to present value. *See In re LTV Corp. v. PGC (In re Chateaugay Corp.*), 126 B.R. 165, 175 (Bankr. S.D.N.Y. 1999), aff'd, 130 B.R. 690 (S.D.N.Y. 1990), vacated, 17 Empl. Benefits Cas. (BNA) 1102 (S.D.N.Y. 1993) ("[C]laims for a series of cash payments in the future should be discounted to present value by a discount factor which when prudently invested would allow the obligations to be met as they become due.")

According to Judge Dalis, the more recent and better reasoned cases view claims such as PGBC's to be a present right granted by statute to recover an amount determined under ERISA, instead of a stream of future payments for which the debtor is liable. *Durango*, 2017 Bankr. LEXIS 160, at *7 (citing *In re U.S. Airways Group, Inc.*, 303 B.R. 784, 793 (Bankr. E.D. Va. 2003) ("Here, both the debtor's liability to the PBGC and the amount of the liability are not only creatures of statute, but of the same statute.")). Accordingly, the Valuation Regulation was not contrary to or qualified by Section 502(b) of the Bankruptcy Code. "First, the [c]laim is not a claim for future payments; it is an obligation that is enforceable now. Second, the PBGC was authorized by statute to determine the amount of the Claim, and its determination under the Valuation Regulation is binding on the Debtors and therefore on this Court." *Id*. at *8-9.

The Liquidating Trustee also argued that the Valuation Regulation conflicts with the Bankruptcy Code's requirements that the amount of the claim be determined as of the petition date. However, the court disagreed with this interpretation, holding that "[a]s of the petition date, the PBGC had an unliquidated contingent claim that under the substantive law of ERISA became fixed as to liability and amount...sixteen months later." *Id*. at *10.

The court also rejected the Liquidating Trustee's argument that the Valuation Regulation was contrary to Section 1123(a)(4) of the Bankruptcy Code requiring that a Chapter 11 plan provide the same treatment for each claim or interest in a particular class. Essentially, the Liquidating Trustee argued that treating the PBCG like any other general unsecured creditor meant valuing the claim under the "prudent investor" standard. However, the Court disagreed, citing *US Airways*, 303 B.R. at 794 ("So long as all claims are determined in accordance with applicable nonbankruptcy law, there cannot be any genuine issue of disparate treatment.").

In the wake of *Durango*, uncertainty about whether courts will require calculation of the PGBC's claim in future cases under the Valuation Regulation pursuant to ERISA or the "prudent investor" standard will continue.

It's A Long Way to Uganda . . . Or Is It?

By Hon. Elizabeth S. Stong

Kampala, Uganda is a long way from New York City. That was my first thought when I was invited by the Uganda Registration Services Bureau to participate as one of two judicial experts in "Insolvency Week," a multidisciplinary workshop designed to educate judges, lawyers, government officials, commercial bankers, and other stakeholders about Uganda's new insolvency law. It's a long way in miles - more than seven thousand, or about a third of the way around the world. It's far in time zones - in East Africa, the time is eight hours ahead of Eastern Time in the United States, so as the business day ends on the shores of Lake Victoria, it's just getting started in Brooklyn. And it's a long trip - with no direct

flights from JFK, or any other United States airport, it's necessary to connect, and one of the most convenient routes entails changing planes in Amsterdam and making a stopover in Rwanda.

But what an opportunity - to support the process of giving a second chance to an enterprise facing financial difficulties through a reorganization, saving jobs, business relationships, and going-concern value, paying creditors, promoting entrepreneurship - all with the participation of all of the stakeholders in that process and with the support of the government entities charged with implementing the relevant laws. So of course, I said yes.

The planning process began immediately. The URSB contemplated five full days of programs and workshops during Insolvency Week - an extraordinary commitment of time and resources. The program included a two-day Colloquium on insolvency law in Uganda, and that was where I and Justice Alastair Norris of the United Kingdom, together with Ugandan judges and lawyers, would lead the discussions. The Colloquium's theme was "Enhancing Stakeholder Awareness on Insolvency," and the objectives included developing a culture of business revival and rescue as opposed to liquidation.

The venue was outstanding and historic too - the Munyonyo Commonwealth Resort, on ninety acres of manicured grounds on the shores of Lake Victoria, reputedly the setting for conferences of the British Commonwealth countries in years past. The participants were similarly outstanding, with a breadth of experience and expertise from Uganda, Kenya, and other countries in the region, from the public and private sector, and representing the business sectors whose interests could be affected by the success or failure of a company's restructuring.

Lake Victoria is stunningly beautiful. The calls of the birds began before dawn, and they were loud and lyrical and exotic. I rose early in order to prepare, and just as I would in New York, I went for a run to organize my thoughts - except that instead of running along New York harbor, I ran through the grounds and along Lake Victoria. I saw large flocks of enormous cranes and other birds, including one that looked like a pelican and stood at least four feet tall. On the lake, there were men in large flat wooden boats, fishing with big nets. Uganda straddles the Equator, and Kampala is located at less than one degree North latitude - so the seasons change little, and the sun rises within minutes of the same time year-round. Sunrise and sunset seem to look and feel different at the Equator. Much more pleasant than a late November run in New York! Next was breakfast, where the offerings were a mix of the very familiar (coffee, toast, eggs, yogurt) and the quite unfamiliar (fruits I have never seen before, ox kidneys in a stew).

The Colloquium began with a welcome from the Registrar General. The Registry has a very interesting and important role in the Ugandan government and economy, as it maintains official records of countless types, including company registrations, receiverships, trademarks, patents, copyrights, and other business-oriented matters. But it also maintains the records of daily life, including births, deaths, adoptions, marriages, and the like, and as the Registrar observed, it was not so long ago that a birth certificate was considered something of a luxury.

The next speaker was a representative of the Supreme Court of Uganda, and he similarly emphasized the importance of our work to the courts and the economic development of the country. Even on the ride from the airport in Entebbe to Munyonyo, it was evident that energy and opportunity abounded - construction sites were frequent, open-air markets were filled with individuals and families, music and conversation were lively. With laws and procedures that would encourage entrepreneurs and investors alike, and courts that were transparent and trusted, economic opportunity could blossom for businesses from the very smallest microenterprise to the large company.

It was not easy to be the next speaker. I had worked hard to prepare, and yet I found myself wondering what my twenty years as a business litigator and thirteen

years as a United States bankruptcy judge could possibly have to offer to my new Ugandan friends. Both their challenges and their opportunities were of a greater magnitude than anything I had dealt with in my practice or my court. I spoke for my allotted hour, and yet it seemed to pass by in minutes. I spoke about our courts, and our "second-chance" bankruptcy law. I described its roots in our Constitution, where the Founders directed Congress in Article I "To establish an uniform Rule of Naturalization, and uniform Laws on the subject of bankruptcies throughout the United States." And I described how it works today, where companies have the opportunity to restructure and pay their creditors, all in the context of a judicially-supervised reorganization.

I spoke about the importance of three central aspects of the judge's role, including transparency, responsiveness, and value preservation. I explained my own view of the importance of transparency for a court, including a court dealing with businesses and families in financial distress, including that it can reestablish communications among the parties and confidence in the prospects of the reorganization. I described the need for responsiveness, both to keep a case moving forward and to set an example for the participants. And I emphasized the practical significance of value preservation, and ultimately, where possible, value creation. Much of what happens in a restructuring, and in the resolution of most business disputes, comes down to preserving the value for the benefit of the parties and solving the problem, whether by a decision at trial, a settlement process, or some other path. I explained how in my experience as a lawyer and as a judge, I had learned over and over again that courts and judges could, and perhaps should, play a key role in each of these areas.

We returned to these themes over and over again during the balance of the workshop, and they led to much common ground. We considered the different tools of debt restructuring, we worked through hypothetical scenarios of companies in insolvency proceedings, and we assessed options from the perspective of each stakeholder, including the company and its owners, the workers, the secured and trade creditors, and the tax authorities. We spoke candidly about the challenges for the court and all of the parties when there simply are not enough funds to meet the short-term demands of a situation. So many of the issues that we identified had common roots, and similar resolutions. The opportunity to preserve the value in a business relationship or an enterprise is precious, and fragile. Poor communication makes every business problem worse. Courts may have a window of opportunity - though perhaps a very small one - at the beginning of a case to shift the dynamics of a business dispute from contentious to constructive. What I see in my cases in New York seemed not so different from what the judges, lawyers, business people, and government officials see in their cases in Uganda.

Somewhat unexpectedly, three additional reflections also resonated throughout our work together. As I related them, I acknowledged that they came both from my head and from my heart, and perhaps also from my gut. The first is that it may be one of the greatest privileges of judicial office, and one of the best case management tools, to treat every lawyer and every party - no matter who they are or how they conduct themselves - absolutely as well as you can, and absolutely as well as they have ever been treated. The second is simply that a rising tide raises all boats - I pointed to Lake Victoria as I offered this observation. And the third, to which we returned over and over again, is that in reorganizing an enterprise, large or small or in between, it is helpful to think about the idea that nobody wins unless everyone wins, at least a little bit.

So, is it a long way from New York to Uganda? Maybe so, by most conventional metrics. And it sure looks far on the map in my chambers. But what I learned from the judges and lawyers in Kampala is that we share common goals, opportunities, and challenges. Our courts and bar come from different traditions, and have different caseloads, but we do much of the same work, in the same ways, with the same objectives. Our good days are good for many of the same reasons, and our

hardest days are difficult because of many of the same obstacles. As I look back, and hope to return to Kampala someday to continue the work that we started, I wonder whether maybe New York and Uganda aren't so far apart after all

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