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STRAUSS HAUER & FELD LLP
Attorneys at Law

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BANKRUPTCY UPDATE

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FREE AND CLEAR ASSET SALES THROUGH BANKRUPTCY CODE 363

DOES THE CLEAR CHANNEL DECISION SIGNAL A PARADIGM SHIFT FOR SENIOR SECURED CREDITORS?

Clear Channel Outdoor, Inc. v. Knupfer (In re PW, LLC)

A debtor's ability to sell assets free and clear of interests under Bankruptcy Code Section 363 has long been a boon to debtors seeking to maximize an asset's value by stripping the asset of encumbrances that might otherwise have made the asset less attractive to buyers in a sale under state law. This benefit has been called into question by the Bankruptcy Appellate Panel for the Ninth Circuit Court of Appeals (the 'BAP') in *Clear Channel Outdoor, Inc. v. Knupfer (In re PW, LLC)* ('*Clear Channel*').[1] In its opinion, the BAP raised substantial doubts about (i) the ability of a credit-bidding senior secured creditor to acquire assets of a debtor through a sale of assets under Bankruptcy Code Section 363 free and clear of a non-consenting junior secured creditor's lien, and (ii) the extent of the protection that Bankruptcy Code Section 363(m) and the mootness doctrines provide a credit-bidding senior secured creditor from reversal on appeal of the free and clear nature of the sale.

As we have noted in this publication previously,[2] asset sales outside of a plan of reorganization are an increasingly popular means for a debtor to sell off assets quickly in order to maximize value by selling the assets as a going concern or before market forces can devalue the asset. Often the purchaser is a senior secured creditor who may be willing to fund the debtor's bankruptcy proceeding in order to purchase such assets by bidding its claim as most or all of the sale consideration. In so doing, the secured creditor can obtain

[1] 391 B.R. 25 (B.A.P. 9th Cir. 2008).

[2] *See* June 2008 Bankruptcy Update, discussing the Supreme Court's decision in *In re Piccadilly Cafeterias, Inc*., 555 U.S. __ (2008) Slip Op. 07-312 (June 16, 2008), restricting state sales or transfer tax exemptions for asset sales outside of a plan of reorganization.

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the asset free and clear of encumbrances, under Bankruptcy Code Section 363(f), and thereby acquire 'clean' title that might not otherwise be available in a sale conducted under state law.

The debtor in the case, PW, LLC ('PW'), owned prime real estate in southern California that was encumbered by a senior secured claim, in excess of $40 million, held by secured creditor DB Burbank ('DB'), and a junior lien, in the amount of about $2.5 million, held by Clear Channel Outdoor, Inc. ('CCO'). Problems with the development of the property ultimately led to the bankruptcy and the appointment of a Chapter 11 trustee. DB worked with the trustee to develop a process to consolidate and sell PW's real estate free and clear of all claims and encumbrances. At the conclusion of a sale supervised by the bankruptcy court, DB was the highest bidder, credit-bidding the entire amount of its debt as the purchase price for the property, plus some cash to cover the trustee's administrative costs. Over the objection of CCO, the bankruptcy court approved the sale free and clear of all liens, including the junior lien of CCO.

On appeal by CCO, the BAP concluded that the bankruptcy court's application of Bankruptcy Code Section 363(f) was unsupported and reversed the decision with respect to the transfer free and clear of CCO's lien. Further, the BAP found that, notwithstanding the fact that CCO did not seek to stay the sale on appeal, principles of mootness were inapplicable to the stripping of CCO's lien.

With respect to the free and clear nature of the sale, the BAP focused on two subsections of Section 363(f), each of which do permit sales free and clear of liens.

First, the BAP took a literal reading of Section 363(f)(3), finding that it requires the price of the property to be sold to exceed the aggregate value of all liens on the property. Under this interpretation of the section, if the face amount of the liens on PW's property was approximately $42.5 million, DB's purchase price would have needed to be $42.5 million + $1 in order to receive free and clear protection, notwithstanding the fact that the property was admittedly worth far less (the highest competing bid was approximately $25 million). Practically speaking, this interpretation appears to make subsection (3) only available to overcollateralized senior secured creditors and provides additional protection to junior secured creditors who hold claims that are 'out of the money.'

Second, the BAP interpreted Section 363(f)(5), which permits a sale free and clear of liens if there is a legal or equitable proceeding wherein the junior secured creditor could be compelled to accept *less* than a full money satisfaction of its secured interest and have its lien stripped. DB asserted that the Bankruptcy Code's provisions for the 'cramdown' of a plan of reorganization over a secured creditor's objection qualified as a legal or equitable proceeding within the meaning of Section 363. The BAP disagreed and remanded the proceedings to the bankruptcy court for determination of whether such a proceeding is, in fact, available. It is notable that the BAP read into the section the word 'less,' rather than adopting the interpretation of several other courts that have found that the section only requires a 'payment' of the junior secured creditor's interest.

DB also argued that the appeal was moot, insofar as the sale had closed and could not be unwound. Again, the BAP disagreed, holding that principles of constitutional and equitable mootness did not apply. The BAP also limited the breadth of Section 363(m), which specifically protects an asset sale from reversal or modification on appeal barring a stay of such sale pending appeal, by finding that the section only applies to reversal of the sale itself, but not to the free

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and clear or lien-stripping aspects of the sale. Thus, the BAP ruled that the sale and transfer of title of PW's property could not be revisited, but the stripping of CCO's lien could be reversed on appeal.[3]

The *Clear Channel* decision is important because it undercuts a major motivating factor for secured creditors to pursue 363 sales: that the senior secured creditor will acquire assets free and clear of junior liens. If the *Clear Channel* decision is endorsed in other jurisdictions[4], the growing trend of credit bids by senior secured creditors outside of a plan context could be significantly dampened. Moreover, the ability of Chapter 11 debtors to sell their assets quickly in such transactions outside of a plan context in order to preserve both jobs and the going concern value of their businesses likewise could be compromised. Finally, in a more indirect way, secured lending could become more expensive for borrowers.

To view the *Clear Channel Outdoor, Inc. v. Knupfer* opinion, please click here.

For further information respecting this issue, please contact—

Stephen B. Kuhn
212.872.1008
skuhn@akingump.com
Corporate Group

Scott L. Alberino
202.887.4027
salberino@akingump.com
Financial Restructuring Group

[3] In *dicta*, the BAP noted that as a 'sophisticated' lender, DB should have known of the inherent risk of appeal in relying upon Section 363(f) to strip CCO's lien.

[4] The parties in *Clear Channel Outdoor, Inc. v. Knupfer* have settled, and no further appeal will be pursued.

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SWAP AGREEMENT SAFE HARBOR PROVISION PROTECTS PREJUDGMENT ATTACHMENT FROM PREFERENCE ATTACK

IN RE CASA DE CAMBIO MAJAPARA S.A. DE C.V.

Prepetition transfers of estate property may be avoided as preferential if made within 90 days of the commencement of a bankruptcy case. That general rule holds true for prejudgment attachments that effectively grant a security interest in collateral not previously encumbered in favor of the attaching creditor. If the prejudgment attachment is obtained in connection with a swap agreement, however, will that transfer qualify for protection under the 'safe harbor' provisions of Section 546(g) of the Bankruptcy Code, which exempt swap agreements from the automatic stay? In a case of first impression, the United States Bankruptcy Court for the Northern District of Illinois, in *In re Casa de Cambio Majapara S.A. de C.V.*,[5] answered that question in the affirmative. The court held that orders for prejudgment attachment obtained prepetition by the counterparty to a swap agreement based on the debtor's alleged breach of the agreement were transfers made in connection with a swap agreement and were not subject to avoidance as preferential.

Approximately three months before the debtor filed for Chapter 11, the debtor and Wachovia had entered into a series of foreign exchange agreements. Wachovia delivered the Euros which it had agreed to deliver, but the debtor failed to deliver the dollars it was obligated to deliver. Consequently, Wachovia filed actions in state and federal court alleging that the debtor had breached the agreements and sought prejudgment relief. Both courts granted Wachovia orders of attachment. Two months later, the debtor filed its Chapter 11 petition.

Shortly thereafter, the debtor filed an adversary complaint against Wachovia, requesting that the court declare both prejudgment attachments avoidable preferences under Bankruptcy Code Section 547(b). Wachovia responded by asserting an affirmative defense based on Bankruptcy Code Section 546(g) and filed a motion for summary judgment on the same grounds. Bankruptcy Code Section 546(g) provides that the trustee may not avoid a transfer that might otherwise be preferential under Bankruptcy Code Section 547 if the transfer is made pursuant to a swap agreement entered before the commencement of the case.

The debtor argued that Section 546(g) did not apply because the prejudgment attachments were not issued 'in connection with' the swap agreements, as required by the statute, but, rather, were issued in connection with Wachovia's *ex parte* statements that the debtor was going to fraudulently conceal or transfer assets in order to hinder or delay its creditors. The court examined the 2005 amendments to Section 546(g) relating to the phrase 'in connection with' and determined that Congress has broadened the safe harbor's application. The court stated:

> [t]he section now has a broader application because it only requires that the transfer be 'under ***or*** in connection with any swap agreement' rather than under a swap agreement ***and*** in connection with a swap agreement. . . . [T]he reach of the statute was broadened when Congress decided to make transfers 'under' ***or*** 'in connection with' a swap agreement subject to the safe harbor provision. This intention is clear in light of the fact that Congress changed 'under ***and*** in connection with' to 'under ***or*** in connection with,' not only retaining the phrase 'in connection with,' but making it disjunctive to 'under.'

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[5] *Casa de Cambio Majapara S.A. de C.V. v. Wachovia Bank, N.A. (In re Casa de Cambio Majapara S.A. de C.V.),* 390 B.R. 595 (Bankr. N.D. Ill. 2008).

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The court stated that the debtor's premise that the attachments could only be 'in connection with' one subject was false. 'To the contrary,' the court stated, 'this court concludes that the prejudgment attachments were made 'in connection with' both the swap agreements, which furnish the ultimate basis for the debtor's liability to Wachovia, and the allegations justifying the prejudgment attachment remedy.' The court continued, '[m]oreover, even if the attachments were not obtained based on the merits of the case, they would still be 'in connection with' the swap agreement because the actions taken by Wachovia stem from the failure of those transactions.'

The debtor also argued that the prejudgment attachments were not transfers for purposes of Section 546(g). The debtor also contended that the legislative intent of Section 546(g) shows that prejudgment attachments were not the type of transfers that Congress intended to protect under the safe harbor. The court declined to consider legislative intent, finding instead that the language of Section 546(g) is 'clear and unambiguous.' The court found that the plain language of Section 546(g) states that the debtor 'may not avoid a transfer, made by or to (or for the benefit of) a swap participant or financial participant, under or in connection with any swap agreement and that is made before the commencement of the case.' The court also found that the term 'transfer' is broadly defined in Section 101(54) and includes prejudgment attachments. Finally, the court noted that, by asserting that the attachments were transfers in the adversary complaint seeking to void them, the debtor had admitted that the attachments were transfers, thereby defeating its own argument.

Relying on straightforward statutory interpretation, the court determined that the orders for prejudgment attachment obtained by Wachovia were transfers protected by Section 546(g) and, thus, not subject to avoidance under Section 547(b). Therefore, the court granted Wachovia's motion for summary judgment.

To view the *In re Casa de Cambio Majapara S.A. de C.V.* opinion, please click here.

For further information respecting this issue, please contact—

Peter J. Gurfein
310.552.6696
pgurfein@akingump.com
Financial Restructuring Group

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THE DEVIL IS IN THE DETAILS

PLAN MUST EXPRESSLY RETAIN SPECIFIC CAUSE OF ACTION OR CLAIM IS LOST

Dynasty Oil and Gas LLC v. Citizens Bank (In re United Operating)

Plans of reorganization routinely contain provisions providing for the preservation of claims of the estate, often to be prosecuted by a post-confirmation litigation trust or by a creditors committee. A recent Fifth Circuit decision, *In re United Operating*,[6] has called into question how detailed such plan provisions must be in order for the claim to be preserved for prosecution post-confirmation.

In *United Operating*, debtor Dynasty Oil and Gas, LLC ('Dynasty') owned several oil and gas properties that had been out of production since before the commencement of the Chapter 11 cases. Citizens Bank ('Citizens'), Dynasty's largest creditor, moved the court to appoint an operator to bring Dynasty's properties back into production. The court appointed Wildcat Energy ('Wildcat') to operate the oil and gas wells, and Citizens was authorized to pay Wildcat's fees and expenses out of a debtor-in-possession account.

The bankruptcy court subsequently confirmed a plan that provided for the sale of all of Dynasty's assets to Saber Resources ('Saber') for $2.5 million. The plan specified that Dynasty would not be revested with title to any estate assets at confirmation because Saber was purchasing essentially all of Dynasty's assets. Notwithstanding the fact that the plan did not revest assets in the 'reorganized' debtor, the plan did provide that Dynasty and the creditors committee retained limited powers to pursue some claims on behalf of the estate. More specifically, the plan contained a blanket reservation of 'any and all claims' arising under the Bankruptcy Code and specifically reserved other types of claims under the Bankruptcy Code, such as breach of fiduciary duty and negligence.

After the plan was confirmed, the creditors committee filed a lawsuit alleging state law and Bankruptcy Code claims against Citizens and Wildcat. The complaint alleged, among other things, that Wildcat completed unnecessary work on various wells, and that Citizens wrongfully paid for the work using the debtor-in-possession's bankruptcy account. The court dismissed the state law claims under Rule 12(b)(6), and also dismissed Wildcat from the suit. The remaining claims arising under the Bankruptcy Code were settled.

Thereafter, Dynasty filed another action in Texas state court naming Citizens, Wildcat and their individual representatives as defendants. The second action included claims for the completion of unnecessary work on the wells, for failure to complete necessary work and for misrepresentations. The case was subsequently removed to the District Court and was referred to the bankruptcy court. The bankruptcy court concluded that Dynasty's claims in the second action were barred by the resolution of the first action and granted dismissal on the basis of *res judicata* and collateral estoppel. On appeal, the District Court affirmed the bankruptcy court's decision on both grounds and Dynasty appealed to the Fifth Circuit.

The Fifth Circuit Court of Appeals decided that the case turned on a more fundamental issue, holding that Dynasty, as a reorganized debtor, did not have standing to pursue claims based upon pre-confirmation management or mismanagement of estate assets. In beginning its analysis, the Fifth Circuit noted that Dynasty, as a debtor in

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6 *Dynasty Oil and Gas LLC, v. Citizens Bank (In re United Operating, LLC),* 540 F.3d 351 (5th Cir. 2008) *("United Operating").*

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possession, had the power to pursue claims on behalf of the estate. Upon plan confirmation, however, the estate ceased to exist, and Dynasty lost its status as a debtor in possession. Notwithstanding the loss of standing, the court noted that, in some cases, the Bankruptcy Code permits a reorganized debtor to bring a post-confirmation action on a claim belonging to the debtor or the debtor's estate, but only if the plan of reorganization *expressly* provides for the claim's retention and enforcement by the debtor. The court noted that the ability of a debtor to enforce a claim once held by the estate is limited to that which has been retained in the plan.

When preserving a claim, the court remarked that the plan must expressly retain the right to pursue such actions and such reservation must be specific and unequivocal. If a debtor does not make an effective reservation of its right to pursue the claim, the claim is lost due to the confirmation of the plan. According to the Fifth Circuit, '[t]his is a logical consequence of the nature of a bankruptcy, which is designed primarily to 'secure prompt, effective administration and settlement of all debtor's assets and liabilities within a limited time.'' Reserving specific causes of action puts creditors on notice of claims that the debtor may wish to pursue post-confirmation. This allows creditors to evaluate the plan in light of such reservations before they vote to approve the plan.

The Fifth Circuit held that Dynasty's blanket reservation of bankruptcy claims failed to preserve the claims that were brought against the appellees. The court provided that, '[i]f Dynasty had wanted to bring a post-confirmation action for maladministration of the estate's property during the bankruptcy, it was required to state so clearly in the plan.' Because Dynasty did not specifically preserve those claims, they were deemed lost, and the post-confirmation debtor and committee did not have standing to assert those claims.

The Fifth Circuit's holding effectively places the burden on plan proponents to identify with specificity litigation to be preserved under a plan of reorganization. Accordingly, future plan proponents would be wise to conduct the appropriate level of due diligence with respect to potential claims of the debtors or otherwise risk losing valuable estate assets.

To view the *Dynasty Oil and Gas LLC v. Citizens Bank (In re United Operating)* opinion, please click here.

For further information respecting this issue, please contact—

Charles R. 'Chuck' Gibbs
214.969.4710
cgibbs@akingump.com
Financial Restructuring Group

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SECURED CREDITOR'S ENTITLEMENT TO THE BENEFIT OF ITS BARGAIN

PAYMENT OF SALE PROCEEDS IN A CODE SECTION 363 SALE DOES NOT CURE DEFAULTS

General Electric Capital Corp. v. Future Media Productions, Inc.

Asset sales under a plan of reorganization sometimes are sufficient to pay secured creditors in full. When that happens, such payments will cure prior defaults, in which event the secured creditor will not be entitled to be paid interest at the default rate. Should the result be any different if the asset sale proceeds become available to pay the secured creditor *during* the case, and not under a plan of reorganization? The answer is 'Yes,' there is a difference, which entitled the creditor in *General Electric Capital Corp. v. Future Media Productions, Inc.*[7] to assert a right to be paid at the default rate and to be paid its legal fees and costs, to the extent that state law and its credit agreement provided for such payments.

General Electric Capital Corp. ('GECC') and Future Media Productions, Inc. (the 'Debtor') were parties to a loan and security agreement that consisted of a $10.5 million term loan and a $5 million revolver. The loan agreement included standard and default interest rates. Obligations under the loan agreement were secured by a perfected, first priority security interest in substantially all of the Debtor's assets. Less than a year after execution of the loan agreement, the Debtor was in default under the agreement, and, close to a year following its default, the Debtor filed a Chapter 11 petition in the United States Bankruptcy Court for the Central District of California. The Debtor negotiated a stipulation with GECC, pursuant to which, GECC would receive a full recovery on its claim, including default interest, in exchange for the Debtor's right to use GECC's cash collateral to finance the Debtor's wind-down of its operations and preparation of the assets for sale.

The official committee of unsecured creditors objected to the Debtor's agreement with GECC, asserting that payment of the secured creditor's claims from the sale proceeds should be considered payment in full, thereby curing any default, as the Ninth Circuit had found in *In re Entz-White Lumber and Supply, Inc.*[8] In *Entz-White*, the Ninth Circuit held that an oversecured creditor is not entitled to interest at the default rate when its claim is paid in full, pursuant to a Chapter 11 plan of reorganization. The committee thought this rule should apply equally to asset sales under Bankruptcy Code Section 363 that occur during the pendency of the Chapter 11 case. The bankruptcy court determined that GECC was entitled only to the non-default interest rate, pursuant to *Entz-White,* and was not entitled to attorneys' fees or costs, because the court upheld the committee's objection, thereby making the committee, and not GECC, the prevailing party in that litigation. GECC appealed.

The Ninth Circuit analyzed the bankruptcy court's decision by looking at three factors: (i) whether the rule established in *Entz-White* was applicable; (ii) how the bankruptcy court should evaluate the contractual default interest rate on remand if *Entz-White* was not applicable; and (iii) whether GECC was entitled to attorneys' fees and costs pursuant to Bankruptcy Code Section 506(b).

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7 536 F.3d 969 (9th Cir. 2008).

8 *Great Western Bank & Trust v. Entz-White Lumber and Supply, Inc. (In re Entz-White Lumber and Supply, Inc.),* 850 F.2d 1338 (9th Cir. 1988) *("Entz-White").*

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Addressing the first factor, the Ninth Circuit found that *Entz-White* was not applicable to the case at bar. Distinguishing the cases cited by the bankruptcy court[9] as cases about 'cure,' the Ninth Circuit stated that, because the sale at issue occurred pursuant to Bankruptcy Code Section 363 and outside the context of a Chapter 11 plan, *Entz-White* and subsequent case law addressing the applicable interest rate in light of cure amounts were inapplicable. Relying on *Travelers Cas. & Sur. Co. of Am. v. Pac. Gas & Elec. Co.*,[10] the Ninth Circuit stated that the applicable rule for determining whether GECC was entitled to the default interest rate was whether the Bankruptcy Code contained any qualifying or contrary law that would limit GECC's recovery. Finding no such law, the Ninth Circuit remanded the matter to the bankruptcy court for a determination of the propriety of the default interest rate in accordance with the terms of the agreement between GECC and the Debtor.

Having found that *Entz-White* was not applicable, the Ninth Circuit stated further that, on remand, the bankruptcy court should apply the presumption of allowability for the contracted-for default rate 'provided that the rate is not unenforceable under applicable nonbankruptcy law.' The Ninth Circuit recognized this rule as the rule applied in several other jurisdictions, rejecting GECC's argument that remand was unnecessary because there was no evidence that the two percent default rate provided for in GECC's credit agreement was unreasonable.

Finally, the Ninth Circuit addressed the issue of GECC's attorneys' fees and costs. The bankruptcy court had not ruled on the issue because it had determined that GECC was not the 'prevailing party' in respect of the committee's objection. However, when the Ninth Circuit determined that remand was appropriate for issues related to determination of the applicable interest rate, remand regarding GECC's claim for attorneys' fees and costs was also appropriate, because, as the Ninth Circuit stated, 'GECC may prevail on the merits…,' upon remand, thus qualifying for reimbursement of attorneys' fees and costs.

The *GECC* case clarifies that '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 provisions of the Bankruptcy Code,' and clarification of that compensation pursuant to a plan of reorganization and compensation pursuant to a sale of assets should be treated differently.

To view the *General Electric Capital Corp. v. Future Media Productions, Inc.* opinion, please click here.

For further information respecting this issue, please contact—

Philip C. Dublin
212.872.8083
pdublin@akingump.com
Financial Restructuring Group

[9] The bankruptcy court cited two cases: *In re 433 South Beverly Drive*, 117 B.R. 563 (Bankr. C.D. Cal. 1990) and *In re Cases Blanca Project Lenders, L.P.*, 196 B.R. 140 (B.A.P. 9th Cir. 1996).

[10] 127 S. Ct. 1199, 1204-05 (2007).

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LITIGATING CLAIMS IN THE U.S. AGAINST DEBTORS IN FOREIGN BANKRUPTCY PROCEEDINGS

LITIGATION CAN PROCEED TO JUDGMENT IN THE UNITED STATES, BUT COLLECTION MAY ONLY BE MADE IN FOREIGN BANKRUPTCY PROCEEDINGS

In re Parmalat Securities Litigation

In *In re Parmalat Securities Litigation*,[11] the Second Circuit addressed the issue of just how much jurisdictional control existed in a U.S. court over assets of a foreign debtor involved in an insolvency proceeding in its home jurisdiction. The court determined that it could address the rights of the parties, but not the remedies. The court then referred the litigants to their home jurisdiction to enforce rights determined by courts in the United States.

Parmalat, an Italian corporation with a global presence in dairy and other food businesses, was the subject of one of the biggest corporate scandals in history, when, in 2003, an €8 billion hole was discovered in Parmalat's accounting records. Following further revelations, including a press release by Bank of America indicating that €3.95 billion in a Parmalat subsidiary's bank account was a forgery, Parmalat and some of its subsidiaries (collectively, 'Old Parmalat') filed for bankruptcy protection under Italy's newly created Marzano law.

Immediately thereafter, purchasers of Old Parmalat's debt and equity securities (the 'U.S. Plaintiffs') filed securities fraud class action lawsuits in the United States District Court for the Southern District of New York against Old Parmalat and Grant Thornton, LLP, Old Parmalat's accounting firm. Old Parmalat's newly appointed Extraordinary Commissioner (roughly analogous to a Chapter 11 trustee in the U.S.) petitioned the United States Bankruptcy Court for the Southern District of New York under Section 304 of the U.S. Bankruptcy Code, which has since been superseded by Chapter 15 of the U.S. Bankruptcy Code, to enjoin actions against Old Parmalat in United States courts.[12] Former Section 304, which allowed companies in foreign bankruptcy proceedings to file a United States bankruptcy case and request a stay of attempts to collect in the United States, instructed courts to fashion relief 'guided by what will best assure an economical and expeditious administration' of the foreign bankruptcy in the interest of comity and 'just treatment of all' claims.

Meanwhile, in the Italian bankruptcy proceeding, all of Old Parmalat's assets and liabilities[13] were transferred to a new entity, Parmalat, SpA ('New Parmalat'). When the U.S. Plaintiffs sought to amend their complaint to add New Parmalat as a defendant, New Parmalat objected and moved for the District Court to extend the protection of the stay to New Parmalat. The District Court denied the motion and held that the U.S. Plaintiffs could proceed to litigate their claims against New Parmalat. The District Court reassured New Parmalat that, even if the U.S. Plaintiffs were to obtain a judgment, the judgment could only be collected if the Italian court chose to enforce it.

[11] *Bondi v. Capital & Fin. Asset Mgmt. S.A. (In re Parmalat Sec. Litig.),* 535 F.3d 87 (2d Cir. 2008).

[12] 11 U.S.C. § 304(c) (repealed 2005).

[13] In contrast to the standard procedure in the bankruptcy system in the United States, the Italian Marzano law mandates that the new entity assume all the legal liabilities of the former bankrupt and act as an administrator for claims.

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On appeal at the Second Circuit, New Parmalat argued that the District Court's refusal to extend the stay to protect New Parmalat was inconsistent with both "just treatment of all claimholders" and "comity." The Second Circuit did, however, agree substantially with the District Court that leaving the enforcement (or not) of any judgment against New Parmalat to the Italian courts was a sufficient measure of deference and comity. Furthermore, as New Parmalat had proceeded on its own to litigate its claims against Grant Thornton, it would be consistent with judicial economy to allow claims from the same set of facts to be resolved (but not collected) in the same proceeding. Finally, the Second Circuit was convinced that allowing resolution of the claims in the United States made sense because

> [t]he governing law is that of the United States, and the frauds alleged were conducted in English. If the Securities Fraud Action were to be litigated in Italy some time in the future, the [Italian] Court would confront a foreign legal and regulatory scheme to which (we are informed) there is no Italian analog, a large number of documents in a foreign language, and (no doubt) conflicting expert affidavits on what American securities law requires.

In light of the difficulties apparent in resolving the claims in the Italian court, the Second Circuit held that, while it could not say whether or not allowing the securities fraud litigation in the United States to proceed before the District Court would best assure an economical and expeditious administration of the Old Parmalat bankruptcy estate, it was not an abuse of discretion for the District Court to allow the proceedings to continue.

As noted above, Section 304, which dealt with cases ancillary to foreign insolvency proceedings, has been repealed and replaced with the more comprehensive Bankruptcy Code Chapter 15. The Second Circuit's interest in comity, deference to foreign proceedings and just treatment of all claimants, however, still applies to future cases, which will be governed by Chapter 15. The new Chapter 15, specifically Sections 1519 and 1520, provides more detailed guidance for representatives of foreign bankrupts and creditors seeking relief in U.S. courts, and it explicitly applies the protections of the automatic stay (Section 362) to the estates of foreign bankruptcies once they are recognized in U.S. courts.

To view the *Bondi v. Capital & Fin. Asset Mgmt. S.A. (In re Parmalat Sec. Litig.)* opinion, please click here.

For further information respecting this issue, please contact—

Lisa G. Beckerman
212.872.8012
lbeckerman@akingump.com
Financial Restructuring Group

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AKIN GUMP
STRAUSS HAUER & FELD LLP
Attorneys at Law

CONTACT INFORMATION

If you have questions about these topics, please contact any of the lawyers listed below:

Editor in Chief

Peter J. Gurfein ....310.552.6696 .... pgurfein@akingump.com .... Los Angeles

Managing Editor

Philip C. Dublin ....212.872.8083 .... pdublin@akingump.com ....New York

Contributing Editors

David M. Dunn ....202.887.4124 .... ddunn@akingump.com .... Washington, D.C.

Patrick J. Ivie ....310.728.3326 .... pivie@akingump.com .... Los Angeles

Christina M. Moore..........................310.229.1082 .... cmoore@akingump.com .... Los Angeles

Brian M. Rothschild.........................310.728.3734 .... brothschild@akingump.com..................... Los Angeles

Sara J.L. Wahl ....214.969.2845 .... swahl@akingump.com ....Dallas

Tracy Southwell, *Paralegal* ....310.728.3029 .... tsouthwell@akingump.com...................... Los Angeles

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