HOT TOPICS IN CHAPTER 11

Hon Barbara J. Houser
U.S. Bankruptcy Court, Northern District of Texas – Dallas Division

Hon Mark X. Mullin
U.S. Bankruptcy Court, Northern District of Texas – Fort Worth Division

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13th Anniversary
Bankruptcy Bench Bar Conference 2019
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Barbara Houser is the Chief United States Bankruptcy Judge in the Northern District of Texas. She received her undergraduate degree from the University of Nebraska with high distinction in 1975 and her doctor of laws from Southern Methodist University School of Law in 1978. She then joined Locke, Purnell, Boren, Laney & Neely in Dallas and became a shareholder there in 1985. In 1988 she joined Sheinfeld, Maley & Kay, P.C. as the shareholder-in-charge of the Dallas office and remained there until she was sworn in as a United States Bankruptcy Judge in 2000. While at Sheinfeld she led the firm's representation of clients in a variety of significant, national chapter 11 cases.

Judge Houser, who lectures and publishes frequently, is a past chairman of the Dallas Bar Association's Committee on Bankruptcy and Corporate Reorganization, is a member of the Dallas, Texas and American Bar Associations, and is a fellow of the Texas and American Bar Foundations. She served as a contributing author to Collier on Bankruptcy for many years and taught Creditors' Rights as a Visiting Professor at the SMU Dedman School of Law.

She was elected a fellow of the American College of Bankruptcy in 1994. In 1996, she was elected a conferee of the National Bankruptcy Conference, an organization of nationally recognized experts in bankruptcy. In 1998, the National Law Journal named her as one of the fifty most influential women lawyers in America. After becoming a bankruptcy judge in January, 2000, she joined the National Conference of Bankruptcy Judges and served as its President in 2009-2010. She has received a number of prestigious awards including: (i) the Distinguished Alumni Award for Judicial Service from the SMU Dedman School of Law in February, 2011, (ii) the William L. Norton Jr., Judicial Excellence Award in October, 2014, and (iii) the Distinguished Service Award from the Alliance of Bankruptcy Inns of the American Inns of Court in October 2016. Judge Houser currently serves as a member of the Executive Board of the SMU Dedman School of Law and is an officer and member of the Executive Committee of the Board of Directors of the American Bankruptcy Institute. In March 2017, Chief Justice John Roberts appointed her to serve as a member of the Board of Directors of the Federal Judicial Center, the education and research arm of the Third Branch. In June 2017, she was appointed to serve as the leader of a five federal-judge mediation team in the Title III proceedings under PROMESA for the Commonwealth of Puerto Rico and four related governmental instrumentalities.

Hon. Mark X. Mullin

The Hon. Mark X. Mullin was appointed to the United States Bankruptcy Court, Fort Worth division on September 18, 2015. He received his B.S.B.A. degree in accounting from Creighton University in 1979 and his J.D. from St. Mary's University School of Law in 1986. Prior to attending law school, Judge Mullin held CPA licenses in Nebraska and Texas and was employed by the international accounting firm of Peat, Marwick, Mitchell & Co. (n/k/a KPMG). After graduating from law school in 1986, Judge Mullin joined the Dallas, Texas office of Haynes and Boone, LLP where he became a member of the Bankruptcy and Business Restructuring practice group where he continued to practice law with the firm until September 17, 2015.

Judge Mullin has served in many leadership roles in local and national legal organizations, including serving as President of the Bankruptcy Section of the Dallas Bar Association, President and Executive Committee Member of the Hon. John C. Ford American Inn of Court, and Education Director and Co-Chair of the Secured Credit Committee of the American Bankruptcy Institute. Judge Mullin was also named as a 2010 honoree inducted into the DFW Serjeants of the Inn.

WILLKIE FARR & GALLAGHER LLP

ATTORNEY BIOGRAPHY

PRACTICE

Jennifer Hardy is a partner in the Business Reorganization & Restructuring Department of Willkie Farr & Gallagher LLP in Houston. Ms. Hardy advises and represents clients with respect to all aspects of financial distress across a wide array of sectors. Ms. Hardy has represented debtors, financial institutions and strategic purchasers, among others, in connection with chapter 11 reorganizations and liquidations, including significant experience in both prenegotiated and prepackaged chapter 11 proceedings. Ms. Hardy also advises clients regarding other insolvency matters including workouts and out of court restructurings. Ms. Hardy frequently appears in court to advocate on behalf of clients in chapter 11 matters.

Ms. Hardy advised on the chapter 11 case of Colt Defense, which was named “Distressed M&A Deal of the Year ($250M to $500M)” at the 2017 M&A Advisor Turnaround Awards and “Upper Mid-Market Turnaround of the Year” at the 2016 Turnaround Atlas Awards. In 2015 and 2019, she was selected as *Super Lawyer Rising Star*.

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EDUCATION

New York University School of Law
JD, 2007
The University of Texas at Austin
BA, 2003

BAR ADMISSIONS

Texas, 2015
New York, 2008

Ronald Silverman

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Ron Silverman is co-head of the firm's U.S. Business Restructuring and Insolvency practice group. He represents banks and financial institutions, hedge and private equity funds, and other sophisticated investors involved in restructurings, rescue financings, distressed M&A, and insolvencies.

Ron has a broad background in international restructurings, having completed restructurings in dozens of countries across the globe. He has led some of the most significant Chapter 15 cases in connection with cross-border restructurings, and wrote the Chapter 15 primer for a leading treatise.

Ron's range of experience is diverse but includes comprehensive knowledge of energy restructurings involving the power, oil and gas, solar, wind, and mining areas. Ron is also involved in restructurings related to China. He led the landmark ABI Beijing Insolvency & Restructuring Symposium in Beijing.

Ron was also the Vice President for International Affairs of the American Bankruptcy Institute and serve on the board of directors of INSOL International. Previously, Ron served as an adjunct professor at the University of Connecticut School of Law. He taught a seminar on international insolvency while maintaining his private practice.

Representative experience

- Representing the MexCAT ad hoc bondholder group in respect of the US$6bn of bonds issued by the Mexico City Airport Trust.
- Representing the indenture trustee in the cross-border restructuring proceedings of Singapore-based Noble Group.
- Representing the official committees of unsecured creditors in the Delaware and Missouri cases of Abengoa, a multinational renewable energy company with over US$9bn in debt.

Practices

Business Restructuring and Insolvency

Infrastructure, Energy, Resources, and Projects

Capital Markets

Industries

Energy and Natural Resources

Financial Institutions

TMT

Real Estate

Diversified Industrials

Areas of focus

Insolvency Litigation

Creditor Representation in Restructurings and Insolvencies

Debtor Representation in Restructurings and Insolvencies

Distressed Asset Management, Refinancing, and Restructuring

High Yield

Oil and Gas: Exploration and Production

Mining and Resources: Sales and Trading

Hotels and Leisure

Cross-border Restructuring and Insolvency

Education and admissions

Education

J.D., University of Connecticut, 1991

B.A., with honors, Trinity College, 1988

- Representing the ad hoc bank group in the US$2bn Singapore restructuring proceedings of the Hyflux Group.
- Representing a leading hedge fund in the Chapter 15 case of Supercanal.
- Advising a major global financial institution in the US$6bn Canadian, U.S., and Colombian restructuring of PEPCO, Colombia's largest oil and gas E&P company.
- Representing a major creditor on the official committee of unsecured creditors in the Chapter 11 proceedings of multinational oil and gas drilling provider Seadrill.
- Advising the indenture trustee for US$450m of bonds issued by Indonesian coal company Berau Capital in respect of its Singapore/U.S. Chapter 15 proceedings.
- Advising US$850m DIP facility lenders and credit bid acquirer in the Chapter 11 case of ATP, a Gulf of Mexico, North Sea, and offshore Israel E&P company.
- Representing People's Republic of China Zhejiang Topoint Photovoltaic Co. in its U.S. Chapter 15 proceedings.
- Representing significant stakeholder in the Baha Mar dual U.S. Chapter 11 - Bahamas Provisional Liquidation cross-border cases of the US$3.5bn resort.
- Representing Evergreen Solar, as debtor, in connection with its Delaware Chapter 11 case and sale to a Chinese purchaser.
- Advising the bondholders in the multinational restructuring proceedings, including the Chapter 15 case, of multinational solar company Suntech.
- Representing the largest lender to C.S. Mining LLC, a major western U.S. mining company, in connection with its Chapter 11 restructuring case.
- Advising the bondholders in the €1.2bn Chapter 15 restructuring of European telecoms company Wind Hellas.
- Advising the bondholders in the €350m Chapter 15 restructuring of European telecoms company Invitel.

Awards and rankings

Elite Dealmaker - New York, *IFLR1000*, 2019

Restructuring and Insolvency, Highly Regarded - New York, *IFLR1000*, 2019

Restructuring and Insolvency, *Who's Who Legal*, 2017-2019

Bankruptcy and Creditor-Debtor Rights/Insolvency and Reorganization Law, *Best Lawyers*, 2006-2019

Bar admissions

New York

District of Columbia

Connecticut

Memberships

Member, American Bankruptcy Institute

Member, American Bar Association

Member, Connecticut Bar Association

Member, Executive Board of Directors and Vice President International Affairs, American Bankruptcy Institute

Member, INSOL International

Member, International Bar Association

Member, New York Bar Association

Member, The World Bank Global Task Force on Effective Insolvency and Creditor/Debtor Regimes

Past Chair, INSOL International Technical Research Committee

Past Chair, International Committee of the American Bankruptcy Institute

Court admissions

U.S. District Court, District of Connecticut

U.S. District Court, Eastern District of New York

U.S. District Court, Southern District of New York

Hot Topics in Chapter 11

JENNIFER HARDY, WILLKIE FARR & GALLAGHER LLP (HOUSTON)

HON. BARBARA J. HOUSER, NDTX

HON. MARK X. MULLIN, NDTX

RONALD SILVERMAN, HOGAN LOVELLS (NEW YORK)

U.S. Trustee Fees

Quarterly Fees Increase

- **The Bankruptcy Judgeship Act of 2017**

  - Amended 28 U.S.C. §1930(a)(6)(B)
    - "During each of the fiscal years 2018 through 2022, if the balance in the United States Trustee System Fund as of September 30 of the most recent fiscal year is less than $200,000,000, the quarterly fee payable for a quarter in which **disbursements equal or exceed $1,000,000** shall be the lesser of 1 percent of such disbursements or $**250,000**."
    - From a maximum of $30,000 in UST Fees to $250,000. A **833%** increase.

Quarterly Fee Statutory Scheme

- 28 U.S.C. §1930(a)(6)(A)
  - What qualifies as "**disbursements?"**
    - ***In re Danny's Markets, Inc.,* 266 F.3d 523, 526 (6th Cir. 2001)**
      - ***Disbursements*** are "all payments to third parties directly attributable to the existence of the bankruptcy proceeding."
    - ***In re Celebrity Home Entm't Inc.,* 210 F.3d 995, 998 (9th Cir. 2000)**
      - ***Disbursements*** are an "expansive term that captures 'all payments.'"
    - ***In re Jamko, Inc.,* 240 F.3d 1312, 1315-16 (11th Cir. 2001)**
      - Holding post-confirmation quarterly fees include **all** post-confirmation disbursements
    - ***In re Pars Leasing, Inc.,* 217 B.R. 218 (W.D. Tex. 1997)**
      - Holding disbursements include not only the debtor-in-possession's cash disbursements, but also payments made by third parties for the benefit of the debtor-in-possession
    - ***In re R & K Fabricating, Inc.,* 2013 WL 5493161, at *3-4 (Bankr. S.D. Tex. Sept. 30, 2013)**
      - Holding disbursements include both payments under a plan and "all other amounts paid out by a reorganized debtor"
    - **Congress has never defined**

In Re Buffets, LLC, et al.,

- 2019 WL 518318 (Bankr. W.D. Tex. February 8, 2019).
- ***The Amendment to § 1930(a)(6) created non-uniform bankruptcy law***
  - UST Program (48 states) v. Bankruptcy Administrator (BA) program (North Carolina and Alabama)
  - The increase in UST quarterly fees did *not* immediately apply to BA districts.
    - The increase began applying to BA districts in Oct. 2018, nine months after the effective date in UST districts.
- ***The § 1930(a)(6) amendment should not be applied retroactively.***
  - There is a statutory presumption **against** retroactively applying statutes
  - the new UST fee of $250,000 per quarter **should not** be applied to pending cases with a confirmed plan when the statute became effective and the fees became effective.

Enforcement of Make-Whole Provisions

Second Circuit Case Law (AMR & Momentive)

- ***Is the make-whole enforcement under applicable state law?***
  - Actual damages are difficult to estimate at the time of the contract
  - Amount of liquidated damages "not plainly disproportionate to the possible loss"
    - Present value of the future interest discounted at Treasury Rate have been upheld

- ***Is the credit document clear that the make-whole is intended to be due in a bankruptcy?***
  - Courts have held that payment upon acceleration is not a "prepayment" because the maturity date of the loan has been moved forward.
  - So the acceleration clause must specifically state that the make-whole is due upon an automatic acceleration.

- ***Make-whole considered a liquidated damages provision and not "unmatured interest" which is barred by the Bankruptcy Code***

Third Circuit Case Law (EFH)

- ***Acceleration Provision does not need to reference Optional Redemption Provision to be enforceable***
  - Disagreed with Second Circuit case law that payment upon an acceleration is not an "optional redemption"
  - A debtor in bankruptcy has the option of reinstating debt and paying it upon its contractual terms

- ***If Optional Redemption provision upheld***
  - Distinguished between "*prepayment*" as a payment before maturity, and "*redemption"* which can occur at maturity.

Ultra Petroleum Case

Ultra Petroleum Chapter 11 Plan

- Ultra Petroleum becomes solvent after the filing due to natural gas pricing increases

- Primary tension in the case between OpCo creditors and structurally subordinated HoldCo creditors
  - $2.46 billion unsecured OpCo funded debt
  - $1.3 billion unsecured HoldCo funded debt

- Going concern value for confirmation purposes estimated between **$5.5 billion** to **$6.25 billion**
  - OpCo funded debt to be paid in full in case under the Plan with new financings and equity raise
  - HoldCo Notes and HoldCo Equity received equity and right to participate in equity rights offering

Ultra Petroleum Chapter 11 Plan

- Plan "unimpaired" OpCo creditors so they could not vote, but did not provide for payment of the contractual make-whole and only allowed post-petition interest at the federal judgment rate, not at the default contract rate
  - $201 million make-whole
  - $186 million post-petition default interest

- The Debtors stipulated with the OpCo creditors that issues relating to post-petition interest and payment of the make-whole amount would be determined after confirmation

- **Judge Marvin Isgur confirmed the Debtors' plan on March 14, 2017.**

Ultra Petroleum Acceleration Provision

Section 12.1 Acceleration of the Master Note Purchase Agreement:

- "Upon any Notes becoming due and payable under this Section 12.1, whether automatically or by declaration, **such Notes will forthwith mature and the entire unpaid principal amount of such Notes, plus (w) all accrued and unpaid interest thereon (including, but not limited to, interest accrued thereon at the Default Rate), (x) any applicable Make-Whole Amount determined in respect of such principal amount (to the full extent permitted by applicable law),** (y) any applicable prepayment premium (to the full extent permitted by applicable law), and (z) any LIBOR Breakage Amount determined in respect of such principal amount, **shall all be immediately due and payable, in each and every case without presentment, demand, protect or further notice, all of which are hereby waived** . . . The Company acknowledges, and the parties hereto agree, that each holder of a Note has the right to maintain its investment in the Notes free from repayment by the Company (except as herein specifically provided for) and that the provision for payment of a Make-Whole Amount, prepayment premium or LIBOR Breakage Amount by the Company, if any, in the event that the Notes are prepaid or accelerated as a result of an Event of Default, is intended to provide compensation for the deprivation of such right under such circumstances."

Ultra Bankruptcy Court Opinion

- ***Bankruptcy Court:***
  - The make-whole amount was an enforceable liquidated damages clause under New York law
  - Failure to pay the make-whole and contract rate interest, even if otherwise disallowed by the Bankruptcy Code, would render those claims impaired by the plan under § 1124(1)
  - For creditors to be unimpaired, interest should be paid at the default contract interest rate. The "legal rate" in § 726(a)(5) is not applicable to unimpaired claims.
  - The Court did not rule on whether § 502(b)(2) barred make-wholes because the Court found § 1124(1) applies regardless
  - The cash was distributed to the OpCo creditors, subject to clawback, to avoid continued default interest accrual
- ***But Fifth Circuit Reversed***

Ultra Fifth Circuit Opinion

- **The Fifth Circuit vacated the Bankruptcy Court's decision and remanded the case for further proceedings**
- Main holdings:
  - Disallowance under the Bankruptcy Code does not result in impairment under the bankruptcy plan for purposes of§1124(1) (*Plan v. Code Impairment)*
  - Section 502(b)(2) bars make-wholes as unmatured interest, however, remanded to determine if the pre-Code solvent-debtor exception survived enactment of section 502(b)(2) of the Bankruptcy Code
  - Acceleration provision in the Note Agreement constitutes an *ipso facto* clause so the make-whole did not come due, and was therefore unmatured
  - Section 726(a)(5) does not apply to unimpaired claims, so must look outside the Code to determine the amount of post-petition interest to which OpCo creditors were entitled (if any)

Ultra Fifth Circuit Opinion

- Fifth Circuit did not need to determine 502(b)(2) issue since it was not determined at bankruptcy court level
- No other Circuit court has come to this conclusion
- Other Circuits have disallowed make-wholes when the contracts were not specific enough, so their decisions could be contracted around

Next Steps

- Contrary to the Second & Third Circuits, Fifth Circuit might nullify make-wholes out of hand without regard to the contract language

- OpCo creditors filed an Application for rehearing *on banc* [*which is currently pending*]

- ***Secured vs. Unsecured?***
  - Section 502(b)(2) generally bars unmatured interest on unsecured or under-secured claims
  - In contrast, under Section 506(b) if a claim is over-secured, "interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement or State statute under which such claim arose" will be allowed

Cross-Border Insolvency

Chapter 15: Who may be a Chapter 15 Debtor?

- ***Does 11 U.S.C. §109(a) apply to Chapter 15 eligibility?***
  - Statutes
    - 11 U.S.C. § 1502(1)
    - 11 U.S.C. § 109(a)
    - 11 U.S.C. § 103

Chapter 15: Who may be a Chapter 15 Debtor?

- Case Law
  - ***Drawbridge Special Opportunities Fund LP v. Barnet (In re Barnet),*** 737 F.3d 238 (2d. Cir. 2013)
    - Pursuant to § 103, Chapter 1 including Section 109(a), applies to Chapter 15 proceedings. Accordingly, foreign proceedings will **only** be recognized under Chapter 15 if a foreign debtor is domiciled or has a business or assets in the U.S. in satisfaction of §109(a)
  - ***In re Bemarmara Consulting A.S.,*** Case No. 13-13037 (Bankr. D. Del. Dec. 17, 2013)
    - Court does not agree with Second Circuit regarding applicability of § 109(a) to Chapter 15 and believes there is a "strong likelihood that the Third Circuit, likewise, would not agree with that decision."
  - ***In re Glob. Ocean Carriers, Ltd.,*** 511 B.R. 361, 372-73 (Bankr. S.D.N.Y. 2014)
    - A Chapter 15 debtor may transfer a retainer or other property to the U.S. to satisfy debtor property requirement under § 109(a).

Chapter 15: Who may be a Chapter 15 Debtor?

- Case Law continued:
  - ***In re Forge Group Power Pty. Ltd.,*** 2018 WL 827913 (N.D. Cal. Feb. 12, 2018).
    - Bankruptcy Court denied recognition of Australian liquidation proceeding on the basis that a small and likely declining undrawn legal retainer held in a California bank account was not sufficient to satisfy § 109(a); District Court vacated the order denying the petition and remanded the case to determine whether the retainer was property of the debtor's estate.
  - ***In re Berau Cap. Resources Pte. Ltd.,*** 540 B.R. 80, 83-84 (Bankr. S.D.N.Y. 2015)
    - Bond indenture with NY choice of law provision and NY forum selection clause constitutes intangible property located in NY under NY law sufficient to support § 109(a) property requirement.
  - ***In re Avanti Communication Group PLC.,*** 582 B.R. 603, 613 (Bankr. S.D.N.Y. 2018)
    - Retainer and indenture governed by NY law both satisfy the "property in the United States" requirement for § 109(a) eligibility

New Rules for Cross-Border Bankruptcy cases in the S.D. of Tex.

- *Guidelines for Communication and Cooperation Between Courts in Cross-Border Insolvency Matters,* adopted Jan. 31, 2019 by General Order 2019-2

Puerto Rico Update

Retail Filings (quick hits)