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BUSINESS REORGANIZATION & RESTRUCTURING DIGEST

Business Reorganization & Restructuring Digest focuses on exploring recent legal developments, trends and emerging issues in notable North American, European and cross-border restructurings.

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10 Things to Know Before Investing in Distressed Energy

With the precipitous decline in oil prices over the past six months, coupled with generally weak natural gas prices and the unprecedented levels of high yield debt placed on energy companies in recent years — such that, according to Forbes, energy companies constitute approximately 15% of the high yield bond market — the energy industry has already begun to see an increase in restructurings and workouts. Cash-strapped and highly-leveraged producers with limited access to further credit present attractive distressed investment opportunities. But as energy prices, and the value of high yield energy bonds, remain depressed, investors must pay close attention to, and should develop a nuanced understanding of, oil and gas finance, and the unique intersection between the oil and gas industry and bankruptcy law. Ten industry-specific challenges and considerations related to oil and gas company insolvencies and/or bankruptcy are discussed below.

ONE: CONSIDER THE RAMIFICATIONS OF RESERVE-BASED LENDING

The prevalence and principles of reserve-based lending ("RBL") for exploration and production ("E&P") companies could serve to exacerbate the liquidity crunch precipitated by sudden reductions in oil and gas prices. RBL facilities rely on the value of proved oil and gas reserves to determine the availability a borrower has under its credit facility. This commodity price environment creates a whipsaw for producers. While a producer's borrowing base will likely be reduced based on the decline in oil prices (irrespective of the quality of its reserves), the producer's borrowing base will also be reduced if the producer foregoes the drilling of new wells (and, by extension, the development of new reserves that would otherwise operate to increase the borrowing base) in order to conserve cash and because new drilling is otherwise uneconomic. As such, the very factor that causes a reduction in a producer's borrowing base often operates to prevent the producer from bolstering it.

Notably, RBL borrowing bases are typically revised (or, "redetermined") by RBL lenders based on the lenders' internal proprietary "price deck" with little or no recourse available to borrowers (e.g., typically the redetermination is effected in the lender's discretion and the borrower lacks the ability to object to the redetermination or obtain a "second opinion"). Such redeterminations typically occur on a bi-annual basis, once in the fall and once in the spring. While many industry experts believe that the lenders are proving, and will continue to prove, more forgiving than they could be in the determinations this spring, those same experts predict lenders will prove less forgiving beginning this fall. Therefore, many E&P companies will see their borrowing bases redetermined, and potentially drastically reduced, in the near future. The effects of a redetermination on an ailing E&P company can be substantial. First, even if the amount drawn under the facility does not exceed the borrowing base following the redetermination, capex budgets would be further slashed based on the reduction in availability, stalling planned drilling and development plans and triggering concerns regarding lease expirations, especially in resource plays. Reductions in availability also have the potential to force distressed asset sales and cause cash flow reductions that trigger compliance issues with financial covenants in RBL or other credit facilities, requiring lender waivers or restructurings. Moreover, if a borrowing base is reduced below outstanding borrowings, resulting in a borrowing base deficiency, the borrower may be required to repay the deficiency, often in installments and often within short-term windows.

TWO: UNDERSTAND THE ABILITY TO INCUR NEW LIENS

In the face of looming liquidity crises, E&P companies may increasingly look to take advantage of lenient permitted lien provisions in certain E&P high yield indentures. Investors should focus on the lien covenants in high yield indentures, and any applicable intercreditor agreements, to determine whether the E&P company has the option of either exchanging unsecured bonds for bonds with a security interest, or raising new capital by layering new secured debt ahead of unsecured (or second lien) bonds. In addition, E&P companies may be permitted to engage in royalty-related financings such as production payment or overriding royalty transactions without granting prohibited liens or otherwise breaching loan covenants.

THREE: THE MANY FRAGMENTS OF OIL AND GAS INTERESTS

Rights in the oil and gas produced from a given well may have been fractionalized and distributed among several, if not dozens, of parties. But types of oil and gas interests, and their treatments in bankruptcy, will vary depending on individual state law, and the type of interest that has been granted. Certain common oil and gas interests include (1) *mineral interests*, the fee simple ownership of the oil and gas under a property, (2) *working interests*, the exclusive right to explore, drill and produce oil and gas from a mineral interest, (3) *royalty interests*, the right to a share of gross production from a mineral interest, free of development costs, (4) *net profits interests*, the right to a share of net profits earned from production from a mineral interest, and (5) *production payments*, a share of the production from a mineral interest, which is free of the costs of production, but which is typically of limited duration.

Working interests are typically created by an oil and gas lease, whereby an E&P company receives the exclusive right to drill from the holder of the mineral interests. The holder of the mineral interests typically retains a landowner royalty interest and receives a share of the gross production, free of development costs. Other royalty interests – such as "overriding royalty interests" ("ORRIs"), along with net profits interests ("NPIs") and production payments – can be carved out from the producers' working interests for purposes that include funding exploration and drilling.

In 1994, the Bankruptcy Code was amended to provide a safe harbor for production payments that were conveyed by the debtor pre-petition. A properly structured production payment, whether a volumetric production payment or a dollar-denominated production payment, should constitute a property interest that is separate and apart from the debtor's bankruptcy estate as a matter of bankruptcy law. In addition, as a matter of state law, properly structured ORRIs and NPIs should likewise constitute interests that were sold by the debtor to the holder thereof and that are

separate and apart from the debtor's bankruptcy estate. As such, the holder of a properly structured production payment, ORRI or NPI should continue to receive royalty payments notwithstanding the debtor's bankruptcy — and the debtor's assets would be sold subject to, rather than free and clear of, the production payment, ORRI or NPI in a 363 sale.

However, as was the case in the ATP bankruptcy, for example, there is some risk that, in a bankruptcy, a debtor would challenge a particular instrument as a disguised financing rather than a true sale of a property interest. See In re ATP Oil & Gas Corp., 2014 Bankr. LEXIS 33 (Bankr. S.D. Tex. Jan. 6, 2014) (denying motion for summary judgment seeking a ruling that transactions, characterized as ORRIs, constituted real property conveyances). If the instrument is recharacterized as a disguised financing, the holder's status could be converted to that of an unsecured creditor in a bankruptcy. This risk can be mitigated by properly structuring the interest that is actually conveyed and granting the holder of the interest a mortgage that secures, among other things, the holder against the risk of recharacterization.

Recoveries of prepetition amounts owed to interest holders may also hinge on state law. While interest holders are often treated as general unsecured creditors in a bankruptcy, holders in certain states may obtain statutory lien rights as protection of their right to recover royalty and production payments. In addition, it is possible that a court would find that funds held by a debtor arising from production proceeds that are subject to royalty interests are held in a constructive trust for interest holders, and therefore that such funds are not property of the debtor's estate.

FOUR: EXECUTORY NATURE OF OIL AND GAS LEASES

As discussed above, oil and gas leases are made between the holder of mineral interests and an E&P company, whereby the holder of the mineral interests conveys a "working interest" — or exclusive right to drill, explore and produce for a limited duration — to the E&P company. It is important to note that, despite being termed a "lease," oil and gas leases will in many cases *not* be considered an executory contract or an unexpired lease governed by section 365 of the Bankruptcy Code.

Whether an oil and gas lease is considered a conveyance of a fee simple interest in real property, or, instead, an executory contract or an unexpired lease for purposes of section 365, hinges on how the interests being conveyed are characterized under state law. While state law varies on this topic, in many jurisdictions, including Texas, an oil and gas lease creates a real property interest, and thus, cannot be assumed or rejected in bankruptcy. See Terry Oilfield Supply Co., Inc. v. Am. Sec. Bank., N.A., 195 B.R. 66, 73 (S.D. Tex. 1996). In other states, however, where oil and gas leases are deemed to convey personal property interests, such leases can be subject to section 365. See In re J.H. Land & Cattle Co., 8 B.R. 237, 239 (Bankr. W.D. Okla. 1981) (oil and gas lease is subject to section 365 under Kansas law). Further, whether or not oil and gas leases with the federal government for production in, for example, the Outer Continental Shelf are executory is an even murkier issue and the likelihood that a debtor would be inclined to reject a deepwater Gulf of Mexico lease could be greater than in the onshore context given the potential size of plugging and abandonment obligations associated with a particular lease.

As a practical matter for a debtor E&P company, whether or not an oil and gas lease is considered an executory contract could drastically affect the debtor's claims profile. In the event a lease is considered an executory contract, the debtor would be required to decide whether to assume or reject the contract, potentially giving rise to hefty cure costs in an assumption, but only to an unsecured rejection damages claim against the debtor in the event of a rejection. That said, so long as a particular lease holds value for the estate, the debtor (or trustee) should not be incentivized to reject a particular lease.

FIVE: REVERSIONARY INTERESTS IN OIL AND GAS LEASES

Regardless of whether an oil and gas lease constitutes an executory contract or a real property conveyance, oil and gas leases typically include reversionary provisions that could have implications for an E&P debtor's ongoing operations. For example, a debtor's failure to pay royalties, or a debtor's failure to continue to produce, may trigger reversionary rights notwithstanding the Bankruptcy Code's imposition of the automatic stay and general bar against *ipso facto* clauses, causing the E&P debtor to lose its working interests. As a result, an E&P debtor may

seek to obtain authority, as a first day matter, to make prepetition and postpetition royalty payments, and may also be compelled to continue to drill one or more wells to avoid losing a valuable lease — even when liquidity is otherwise constrained.

SIX: BEWARE OF THE POTENTIAL FOR STATUTORY LIENS

Many oil-producing states afford specific protections, including the provision of statutory liens, to parties such as oilfield services providers and holders of mineral interests. In certain instances, these statutory liens have the potential to prime even liens held by secured creditors.

For example, when a midstream oil and gas services company — a company that purchases oil or gas from an upstream producer and delivers it (via trucks or pipelines) to downstream purchasers — fails to pay for oil or gas that it purchased, in certain states, statutory liens in favor of royalty and working interest owners attach to the unpaid-for oil and gas. In some states (like Texas and Oklahoma), such liens are treated like purchase money security interests or automatically perfected superpriority liens, meaning that when a bankruptcy is filed, such interest holders must be paid first from oil and gas collateral before other secured creditors of the midstream company, even if UCC financing statements were never filed.

Other parties that may receive the benefit of statutory liens include vendors and suppliers who provided labor and equipment to E&P companies to drill and produce wells. These mechanic's and materialmen's ("M&M") liens are created by state law and their perfection requirements and scope vary on a state-by-state basis. While filings are typically required to perfect M&M liens, section 362(b)(3) of the Bankruptcy Code allows such filings to be made after the petition date, despite the automatic stay. In addition, most state M&M lien statutes allow perfection to "look back" to the time that work began or supplies were delivered, in some cases to the time that the M&M claimant first provided work or materials for the well. Because of this, depending on the specific state law regime, it may be possible for an M&M claimant to perfect a security interest (even after a bankruptcy filing) that primes a competing prepetition perfected security interest.

SEVEN: KNOW THE NUANCES OF JOINT OPERATING AGREEMENTS

Joint operating agreements ("JOAs"), which are common in the oil and gas industry, typically govern the relationship among multiple working interest co-owners of oil and gas leases. JOAs generally appoint one party as the "operator" that is responsible for, among other things, contracting with service providers and conducting operations on leases included within the JOAs "contract area." In a bankruptcy context, JOAs are typically considered executory contracts for Bankruptcy Code purposes, see In re Wilson, 69 B.R. 960, 963 (Bankr. N.D. Tex. 1987). This means that they must be either rejected, or assumed in full, with any outstanding unpaid obligations "cured" upon exit from bankruptcy (or possibly sooner).

A JOA typically requires each non-operator to fund its pro rata costs of production, but with no control over day-to-day costs or operations, which could disadvantage struggling E&P non-operators if their interests diverge from those of the operator. Currently, many cash-strapped non-operators are unable to keep up with authorizations for expenditure ("AFEs") being delivered by operators (e.g., cash calls made by operators for purposes of drilling new wells). While the non-operators are not obligated to participate in new drilling operations, the consequences of an election not to participate typically include a temporary (and in some cases permanent) forfeiture of interests in production from the new well. In some cases, a non-operator's non-consent election could also cause the non-operator to forfeit all interests in the applicable drilling unit and adjacent sections, which would limit the non-operator's ability to participate in follow-on drilling in a promising area. While non-operators have an election to participate in new drilling, once the election to participate is made, it is essentially irrevocable and the non-operator is obligated to pay operating expenses associated with wells in which it owns an interest. With respect to payment obligations under a JOA that a non-operator fails to satisfy, it is important to note that the JOA often provides the operator with lien rights on the non-operator's interest that, if created prior in time and not subordinated to a lender's liens, could provide the operator with a lien priority that trumps that of a secured lender. In addition, the non-operators under a JOA are typically provided with reciprocal lien rights on

the operator's interests in the contract area to secure the non-operators against payment failures by the operator. For these reasons, it is imperative that any investor evaluating an investment in an oil and gas producer that is a party to JOAs conduct extensive JOA-related diligence in connection with the evaluation of that investment.

Separate issues arise in insolvent scenarios involving the JOA operator. The JOA provides that the operator is deemed to resign if, for example, it becomes insolvent. The JOA may provide for the appointment of an interim operating committee to control operations during an operator's bankruptcy, and may also provide that the operator can be immediately removed in the case of a default — meaning the operator loses a potentially valuable stream of income from operating fees upon removal. If a borrower that is an operator loses its status as operator, the value of the borrower's interest will likely be reduced as well and the risks to the lender will likely be increased, given the fact that, as a practical matter, the operator under a JOA typically controls the pace and plan of development.

EIGHT: BECOME FAMILIAR WITH FARMOUT AGREEMENTS

Another agreement common in the E&P industry is a farmout agreement (also sometimes called participation agreements or joint development agreements), whereby the owner of an oil and gas lease (the "farmor") transfers all or part of the working interest in that lease to another party (the "farmee"), typically to promote the development of the lease because the farmee possesses greater liquidity or technical expertise. Section 541(b)(4)(A) carves out such interests from the bankruptcy estate. Thus, farmout agreements are not executory contracts, and interests in oil and gas that have been transferred via farmout agreements are excluded from property of the debtor's estate and such agreement cannot be "rejected" by a debtor to bring the transferred interests back into the estate. Importantly, many oil and gas producers currently faced with the prospect of losing leases absent near-term drilling, or suffering further borrowing base reductions in the absence of reserve growth, are entering into transactions that feature farmout or other joint development arrangements. In many cases, these producers will need to seek the approval of their lenders before entering into these arrangements.

NINE: PLUGGING AND ABANDONMENT LIABILITY MAY BE SIGNIFICANT

While drilling in the United States often occurs onshore on private property, the U.S. federal government also features prominently in offshore oil and gas development in the Outer Continental Shelf ("OCS"). The Bureau of Safety and Environmental Enforcement ("BSEE") oversees the operational safety and environmental protection for the exploration and development of offshore oil and gas on the OCS. According to BSEE, approximately 3,000 active production platforms exist on the OCS with over 40% of those facilities more than 25 years old. Under federal guidelines that have grown more complicated and draconian since the Macondo incident in 2010, any well on the OCS is expected to be plugged no later than three years, and decommissioned no later than five years, after becoming idle. Over the past decade, an average of 130 production platforms have been decommissioned each year. Decommissioning an offshore platform generally entails the plugging of all wells and severing of well casings, cleaning and removal of all production and pipeline risers, and removal of the platform from its foundation and its disposal. Relevant state laws also provide for similar plugging and abandonment requirements for onshore drilling. Importantly, as a general matter, plugging and abandonment obligations arise as soon as a particular well is drilled, though the obligation to conduct the plugging and abandonment activities does not arise until after the well has ceased producing.

Such plugging and abandonment requirements can be costly, with costs falling to the E&P company operating the well. However, a bankruptcy filing may not provide much, if any, relief from these obligations. Notwithstanding the fact that section 554 of the Bankruptcy Code empowers debtors to abandon property while in bankruptcy, courts have held that an E&P company cannot abandon property with outstanding unplugged wells in contravention of law, even when performing on plugging and abandonment obligations will exhaust the estate's resources. See, e.g., Texas v. Lowe (In re H.L.S. Energy Co.), 151 F.3d 434, 438 (5th Cir. 1998) (citing Midlantic Nat'l Bank v. New Jersey Dep't of Envtl. Protection, 474 U.S. 494, 507, 106 S.Ct. 755, 88 L.Ed.2d 859 (1986)). In addition, courts have held that claims for plugging and abandonment arising postpetition are entitled to administrative priority status in a bankruptcy, see, e.g., id. at 438-39, however, the status afforded to such claims arising prepetition remains unsettled.

TEN: STRUCTURED MIDSTREAM ARRANGEMENTS CAN CREATE COMPLICATIONS

The rapid development of upstream oil and gas assets triggered by the shale boom and the discovery of emerging resource plays created a pressing need for midstream infrastructure. In some oil and gas plays, such as the Bakken, even as oil infrastructure was developed, gas infrastructure lagged behind, triggering a great deal of flaring and waste. A tremendous amount of capital investment was (and remains) required for purposes of developing midstream infrastructure. In many cases, producers sought to avoid the balance sheet impact associated with traditional bank debt and instead entered into structured midstream arrangements pursuant to which infrastructure development was essentially financed by master limited partnerships ("MLPs") and funds under long-term contracts. These long-term contracts typically featured a dedication by the producers of their oil and gas leases to the midstream infrastructure for an extended period of time such that the producer would not be permitted to utilize third party infrastructure in lieu of the developer's infrastructure. In addition, these long-term contracts included minimum volume commitments, take-or-pay (i.e., ship-or-pay) or cost-of-service structures pursuant to which the developer was "paid back" based on a payment schedule that was sculpted to provide the developer with a rate of return on its investment. If in any relevant period, the producer failed to pay midstream fees (e.g., gathering fees charged on a volumetric basis) that, in the aggregate, equaled the applicable payment obligation for such period, then the producer would be required to make a true-up payment to the developer in an amount equal to the shortfall. In most cases, the developer did not obtain a security interest on the producer's assets to secure these payment obligations, but in some cases these payment obligations are backstopped by other credit support (e.g., a letter of credit) or the developer has the right to demand other credit support if the producer is in financial distress. These structured arrangements expose developers to both reserve risk and the credit risk of the producer. In the current distressed climate, these developers face greater risk. The reserve risk is exacerbated by a reduction in drilling activity and the credit risk is exacerbated by the economic distress triggered by the decline in oil prices.

An investor should carefully evaluate the midstream arrangements of any oil and gas company, including the impact of a filing on these midstream arrangements. A producer may be incentivized to reject a structured midstream agreement to avoid payment obligations associated with mounting shortfall payments given that development is unlikely to continue at the rate that was modeled when the agreement was executed. However, if the upstream oil and gas assets would likely be stranded if the agreement was rejected, the incentive to reject the midstream agreement could involve a more complicated analysis. A bankruptcy could lead to a fight over whether a dedication survives bankruptcy notwithstanding a rejection of the underlying agreement or whether a structured midstream agreement should be restructured in light of the drastic change in circumstances of the producer. There is little available precedent that would guide a bankruptcy court faced with these facts and circumstances.

CONCLUSION

The current climate of distress in the oil and gas industry follows hard on the heels of arguably the most prolific boom in the United States oil and gas industry. The capital that has been and remains invested in the oil and gas industry is substantial and much of that capital has recently become exposed to risks that seemed remote a short time ago. These risks and high stakes have, in turn, created attractive investment opportunities that come with their own set of risks. In order to evaluate and mitigate these risks, investors should become well versed in matters unique to oil and gas finance and bankruptcies and remain keenly focused on the manner in which many of these risks play out in the context of current and upcoming oil and gas restructurings.

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Madoff Trustee Seeks Supreme Court Review of Second Circuit's Decision Shielding Customer Payments from Avoidance

Madoff trustee and amici curiae *ask the Supreme Court to review a Second Circuit decision that blocks the trustee from clawing back fictitious profits paid to customers based on a broad interpretation of section 546(e) of the Bankruptcy Code.*

On December 8, 2014, the United States Court of Appeals for the Second Circuit ruled in *Picard v. Ida Fishman Revocable Trust (In re Bernard L. Madoff Investment Securities LLC)*[1] (the "Decision") that SIPA trustee Irving H. Picard (the "Trustee") could not recover prepetition withdrawal payments made to Madoff's customers aside from actual fraudulent transfers made within two years of the petition date. Relying on the broad language of the applicable provisions of the Bankruptcy Code, the Second Circuit held that the stockbroker safe harbor of section 546(e) shields these payments from recovery by the Trustee even though no securities were actually purchased or sold.

On March 17, 2015, the Trustee filed a petition for *certiorari* that seeks Supreme Court review of the Decision (the "Trustee's Petition"). The Trustee's Petition argues that the "stockbroker defense" of section 546(e) should not apply where no securities were ever purchased and the securities markets were never affected. On April 16, 2015, four *amicus curiae* briefs were filed in support of the Trustee's Petition. The *amici's* briefs echo the Trustee's Petition, but also focus on the importance of the Decision to the Madoff case as well as future Ponzi scheme cases. The Supreme Court will likely decide toward the end of this term whether it will grant the Trustee's Petition and consider this significant issue.

A. Background

Before potential customers could invest with Bernard L. Madoff Investment Securities LLC ("BLMIS"), they were required to execute several documents (the "Account Documents") that authorized BLMIS to open and maintain customer accounts and to buy, sell and trade securities and options for the customer's account. In reality, BLMIS conducted no securities or options trading on its customers' behalf. Instead, BLMIS fabricated account statements showing fictitious securities trading activity and profits, and made all customer deposits and withdrawals from a single commingled checking account.

In December 2008, Madoff's scheme was exposed, and the Trustee was appointed for BLMIS. The Trustee commenced recovery actions against hundreds of BLMIS customers who had withdrawn funds from Madoff's scheme. Asserting both actual and constructive fraudulent transfer claims as well as preference claims, the Trustee sought to claw back these withdrawal payments so they could be distributed ratably for the benefit of all BLMIS customers. Certain defendants to these avoidance actions argued that the "stockbroker" defense of section 546(e) shielded their withdrawals from their BLMIS customer accounts from avoidance by the Trustee.

B. The Second Circuit's Application of Section 546(e)

Section 546(e) of the Bankruptcy Code provides, in relevant part, that a trustee may not avoid a transfer that is a "settlement payment," made by a "stockbroker," or a transfer that is made by a "stockbroker" in connection with a "securities contract."

On appeal before the Second Circuit, the Trustee principally argued that the customer payments could not qualify as a "settlement payment" or a "transfer in connection with a securities contract" because BLMIS never actually completed the securities transactions contemplated by its customer agreements.[2]

The Second Circuit first addressed whether the Account Documents that BLMIS entered into with its customers qualified as a "securities contract" under section 741(7) of the Bankruptcy Code, which defines a "securities contract" as:

(1) **a contract for the purchase, sale** or loan **of a security** . . . or . . . option to purchase or sell any such security . . . ;

(7) any other agreement or transaction that is **similar to** an agreement or transaction referred to in this subparagraph . . . ;

(10) a **master agreement** that provides for an agreement or transaction referred to in clause (1) [or] . . . (7). . . ; or

(11) any security agreement or arrangement . . . related to any agreement or transaction referred to in this subparagraph,

1. 773 F.3d 411 (2d Cir. 2014).

2. The parties did not dispute that BLMIS qualified as a "stockbroker."

including any guarantee or **reimbursement obligation** by or to a stockbroker . . . . (emphasis added).

Relying on the "extraordinary breadth" of this definition, the Second Circuit found that the Account Documents were securities contracts, ruling that the Account Documents qualified as "a contract for the purchase, sale or loan of a security" because the customers' deposits and withdrawals "originated with" and "could not have been possible but for" the relationship created by the Account Documents.[3] The Second Circuit refused to read "a purchase and sale requirement" into the express language of sections 741(7) and 546(e), in part because doing so would undermine the customers' expectations. Ultimately, the Second Circuit concluded that allowing the Trustee to claw back "millions, if not billions of dollars from BLMIS clients — many of whom are institutional investors and feeder funds" — would likely cause the very "displacement" in the securities markets that section 546(e) was designed to avoid.[4]

The Second Circuit next turned to the question of whether the customer withdrawals were made "in connection with" a securities contract. The Second Circuit stated that the "low bar" set by section 546(e) for this requirement merely required that a transfer be "related to" or "associated with" a securities contract, even if the agreements were either irrelevant to the payments or the payments were unauthorized.[5] Thus, the Second Circuit held that the customer withdrawals were made "in connection with" the Account Documents even though these payments were fraudulently made from the fictitious profits of a Ponzi scheme whose actions breached the Account Documents.

As an alternative basis for applying section 546(e), the Second Circuit concluded the customer withdrawals were protected from avoidance as "settlement payments,"[6] a term that has been construed broadly to apply to "the transfer of cash or securities made to complete [a] securities transaction." In making this ruling, the Second Circuit focused on the fact that the customers *intended* BLMIS to liquidate securities to meet their withdrawal request "even if the broker may have failed to execute the trade and sent . . . cash stolen from another client."[7]

Finally, the Second Circuit rejected the Trustee's argument that "to allow customers to retain the fictitious profits Madoff arbitrarily bestowed on them amounts to give legal effect to his fraud."[8] The Trustee argued that doing so would undermine the Second Circuit's prior decision in *In re BLMIS*, 654 F.3d 229 (2d Cir. 2011). There, the Second Circuit rejected the argument that each BLMIS customer's "net equity" should be calculated using its fictitious account statements — i.e., as one judge quipped, that "the fund should pay out in respect of each investor whatever amount Madoff made up chewing on his pencil and looking at the ceiling"[9] — because it would effectively legitimize Madoff's underlying fraud.

Although the Trustee's argument was "compelling,"[10] the Second Circuit nevertheless ruled that it was obliged to respect the balance Congress struck in enacting section 546(e) of providing for finality for securities transactions while permitting a trustee to pursue avoidance actions based on actual fraudulent transfers pursuant to section 548(a)(1)(A).

C. The Trustee's Petition for Certiorari and the Amicus Briefs

The Trustee's Petition for *certiorari* argues that section 546(e)'s "stockbroker defense" should not shield BLMIS' transfers since no securities were ever purchased or sold by BLMIS. The Trustee's Petition also criticizes the Second Circuit's holding that transfers made by BLMIS were "settlement payments" and that the Account Documents were "securities contracts" merely because customers believed BLMIS was buying and selling securities on their behalf. To stress the importance of this issue, the Trustee noted that the Decision prevents him from avoiding and recovering approximately $2 billion and "calls into question" his ability to avoid and recover approximately $2 billion more.

Four *amicus curiae* briefs were filed in support of the Trustee's Petition by the following parties: (a) the National

3. 773 F.3d 411, 417-19.
4. *Id*. at 420.
5. *Id*. at 422.
6. Section 741(8) defines "settlement payment" as a "preliminary settlement payment, a partial settlement payment, an interim settlement payment, a settlement payment on account, a final settlement payment, or any other similar payment commonly used in the securities trade."
7. 773 F.3d 411, 422.
8. *Id*. at 423.
9. Transcript of Oral Argument at 18, In *re BLMIS*, No. 10-2378 (2d Cir. Mar. 3, 2011).
10. 773 F.3d 411, 423.

Association of Bankruptcy Trustees (the "NABT"); (b) certain law professors; (c) certain "net loser" customers of BLMIS; and (d) the liquidator and foreign representative of Fairfield Sentry Limited, a large "feeder fund" that invested in BLMIS. Broadly speaking, the *amici* each argue that section 546(e)'s legislative history makes clear that Congress' intent in enacting the section was to prevent the negative ripple effects that could occur in the securities markets should completed securities transactions be unwound. Since BLMIS never purchased or sold any securities and there was no impact on or risk to the securities markets, *amici* claim that the Decision improperly applies section 546(e) in a way Congress never intended.

More specifically, the NABT *amicus* brief argued that the Second Circuit's "overbroad interpretation" of section 546(e) would improperly prevent bankruptcy trustees from unwinding other types of transactions where the securities markets were never implicated. The brief of the "net losers" stressed the inequity of preventing the Trustee from recovering their investments in BLMIS from the net winners (who withdrew more from BLMIS than they deposited), while the Fairfield Sentry liquidator similarly stressed the practical impact of the Decision on its customers. Finally, the law professors' *amicus* brief urged an interpretation of section 546(e) that only applies section 546(e) to cases where a trustee's avoidance powers "plausibly threaten" to cause the failure of an actual securities transaction.

The respondents' brief on *certiorari* is due on May 18, 2015. It is expected that the justices of the Court will consider the Trustee's Petition toward the end of the current term, which ends in June.

D. Observations

The Decision extends the "very broad" reach of the section 546(e) safe harbor to cases where securities were never actually purchased, such as Ponzi schemes, so long as customers had an expectation that securities were being purchased. It should be noted, however, that because section 548(a)(1)(A) is not shielded under section 546(e), trustees are not barred from recovering actual fraudulent transfer payments made "with actual intent to hinder, delay, or defraud" creditors. Such avoidance actions under section 548(a)(1)(A) are limited to transfers occurring two years before the petition date. Nevertheless, the Second Circuit's interpretation of section 546(e) undoubtedly forecloses a trustee's ability to take advantage of preference and constructive fraudulent transfer actions under the Bankruptcy Code and avoidance actions under state law (which may contain longer statutes of limitations).[11]

It remains to be seen whether the Court grants *certiorari*, but, as noted by the Trustee and the *amici curiae*, multiple courts in prior decisions have expressed reluctance to extend the protections of the Bankruptcy Code's safe harbors to the Ponzi scheme context or where fraud or other illegitimate activities were implicated.[12] Given the importance of this issue to a variety of stakeholders in both the Madoff case and other cases,[13] the Trustee's Petition could indeed be granted by the Supreme Court, which would hear the case next term. Moreover, Congress could always choose to take action to amend the statute, even if the Court declines to grant *certiorari*. For the moment, however, the Decision is a roadblock for the Trustee that prevents him from recovering at least $2 billion on behalf of BLMIS customers.

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11. In *Madoff*, the dismissal of the state law claims means that the Trustee will be limited to recovering transfers made within two years of the petition date under section 548(a)(1), instead of the six-year claw back period under New York's fraudulent conveyance law.

12. *See, e.g., In re Slatkin,* 525 F.3d 805 (9th Cir. 2008); *Wider v. Wooton*, 907 F.2d 570 (5th Cir. 1990) (section 546(e) did not apply since Ponzi scheme operator was not a "stockbroker" and applying section 546(e) would lend judicial support to Ponzi schemes by rewarding early investors at the expense of later victims); *Kippermann v. Circle Trust FBO (In re Grafton Partners LP)*, 321 B.R. 327 (BAP 9th Cir. 2005); cf. *Jackson v. Mishkin (In re Adler, Coleman Clearing Corp.)*, 263 B.R. 406 (S.D.N.Y. 2001) (payments by stockbroker engaged in criminal conduct were not settlement payments because they were not "commonly used in the securities trade").

13. The *amicus* brief of the "net losers" noted that the Securities and Exchange Commission prosecuted 402 Ponzi schemes from 1990 to 2012. *See* Brief of Certain "Net Loser" Customers as *Amici Curiae* Supporting Petitioners at 4 n.6.

EUROPE

Refinancing and Restructuring of German Mittelstandsanleihen (“Minibonds”)

According to public sources, between 2015 and 2019 (and peaking in 2018) approximately €6.9 billion of debt issued under around 145 German “*Mittelstandsanleihen*” (SME bonds, also known as “Minibonds”) will require refinancing. Many issuers are expected to struggle to refinance their Minibonds, particularly due to perceived creditworthiness issues and the fact that many issuers were unable to secure financing from traditional sources at the time of original issue.

This anticipated refinancing wall may well provide interesting investment opportunities for distressed investors. The purpose of this article is to provide a brief overview of the German Minibond market and related investment and restructuring issues.

1. Background

German Minibonds have been issued since 2010 when German stock exchanges started to open new trading segments with lower entry standards to enable small and mid-cap companies to obtain financing from the capital markets. This was in reaction to the financial crisis and had the effect of opening up alternative funding sources to companies beyond that available from traditional credit institutions.

The first such Minibond trading segment was “Bondm” of the Stuttgart Stock Exchange. According to the rating agency *Scope Ratings*, 188 Minibonds have been issued since 2010, with a relatively low average maturity of 5.2 years. Most have been issued on an unsecured basis and without any covenants.

Individual investors in particular were attracted by the new Minibonds perhaps due to: (1) the use of the German word “*Mittelstand*”, which suggests solidity, reliability and credibility, (2) the popular brand names of issuer companies, irrespective of their credit ratings, and (3) attractive coupons (up to 11.5% per annum).

Many such investors disregarded, or did not even appreciate, the risks attaching to Minibond issuers, including: (1) the poor economic standing of many issuers, such as low equity ratios and EBITDA losses (reflected in correspondingly low ratings, such as “BB” and below for more than two-thirds of issuers), (2) questionable business strategies, and (3) insufficient financial reporting.

To compound matters, the new trading segments, with their low entry standards, allowed for no (or at least reduced) liability of arranging banks and book-runners in respect of information made available in a prospectus. This is in contrast to regulated markets where statutory provisions ensure that advisers and institutions involved in a securities issuance may be held liable by investors. Some commentators have suggested that given such reduced liability, banks and rating agencies may have acted less diligently in the process for a Minibond issuance than in other cases.

2. Refinancing a Minibond upon maturity may become difficult

In 2013 and 2014, a significant number[1] of Minibond issuers became insolvent[2] with often very adverse consequences for investors.[3] Some issuers were unable to meet their coupon payment obligations (and a few issuers failed to even make the first coupon payment) whereas others suffered significant ratings downgrades.

Currently, the Minibond market is almost dormant as many investors are highly cautious. Minibonds are currently known as “*Ramschanleihen*” (junk bonds). Further issuer insolvencies are likely, and even those issuers who are able to meet their ongoing payment obligations may struggle to refinance upon maturity. Consequently, many issuers may need to be restructured, whether inside or outside formal insolvency proceedings.

1. According to Scope Ratings: 29.
2. Notable examples include: MT-Energie, Mifa, MS Deutschland, Windreich, Strenesse and Rena.
3. For example: (i) the WGF insolvency plan provides for a maximum distribution of 52% to be paid to bond creditors (including approximately 10,000 private investors), and (ii) in the Zamek proceedings, the administrator has announced that the distribution to unsecured creditors at the holding company level (which issued the Minibond) will not exceed 1% of the total claim amounts.

Where the issuer is not distressed, Minibonds may be refinanced by various means, notably including loans, capital increases and/or issuance of new bonds.[4] However, distressed issuers may need to look for alternative sources of funding, such as from alternative lenders. If refinancing opportunities are not available, or are not likely to be available upon maturity, issuers are well advised to initiate a restructuring process at an early stage and in any event well in advance of the maturity date. That is because the restructuring of a German bond will usually take longer than other financial restructuring processes. In particular and more so than in other restructurings, a German bond restructuring will require a credible turnaround concept and open communication with bondholders who must be involved as soon as possible (bondholders should ideally appoint a joint representative, even at the early stages when turnaround measures are under discussion). Sufficient liquidity and negotiating time is also essential, as well as careful preparation, because numerous bondholder meetings can be summoned throughout the process.

3. Restructuring of a German bond outside of a formal insolvency process

The German Bond Act 2009 ("SchuldVG 2009") introduced the principle of majority decision-making for German law-governed bonds issued after 5 August 2009, but only if the terms of such bonds refer to and incorporate the relevant provisions of the SchuldVG 2009.[5] Consequently, for such bonds, bondholder resolutions can be passed by a specified voting majority of 75% for certain key decisions[6] (unless a higher voting threshold is set by the bond terms) provided that in a first creditors' meeting, creditors representing 50% of the outstanding bonds are present or, in a second meeting (i.e., where the first meeting has failed through lack of quorum) creditors representing 25% of the outstanding bonds are present.[7]

A "joint representative" (*gemeinsamer Vertreter*) of the bond creditors may be appointed under the bond terms. If the bond terms do not appoint a joint representative, he/she may be elected by bondholders. A joint representative's function is to: (1) represent bondholders' interests, for example, in restructuring negotiations, and (2) make decisions with binding effect for all bondholders, if specifically authorized to do so.

In the context of bond restructuring pursuant to the SchuldVG 2009, issues that commonly arise in terms of bondholder decision-making and joint representation include: (1) achieving the quorum for the first and (if applicable) second creditors' meetings in circumstances where the identity of all bondholders is often unknown, especially in the case of Minibonds where a high proportion are often held by individuals, and (2) the risk of minority bondholders challenging the resolutions taken by the majority.

4. Bond restructuring in an insolvency scenario

There is currently some legal uncertainty as to whether the restructuring of a bond issued by an insolvent issuer should be governed by the provisions of the SchuldVG 2009, or by the provisions of the *Insolvenzordnung* (the "German Insolvency Code").

The better argument is likely to be the latter, and as there is no binding court decision yet available on this matter, it would, with a view to taking a cautious approach, be advisable to follow the German Insolvency Code (in which case the SchuldVG 2009 is only relevant for the purposes of the election of a joint representative to attend on behalf of bondholders any creditors' meeting summoned by the insolvency court).

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4. For example: (1) DIC Asset AG (Minibond repaid early with proceeds from issuance of a new bond over €125m in the Prime Standard of the Deutsche Börse, which is subject to higher transparency requirements), and (2) Dürr AG (Minibond repaid early with proceeds from issuance of an unrated Euro-Bond over €300m). Other issuers had to accept less favorable conditions, such as: (1) KTG Agrar (exchange against new Minibond with five years longer term and 50 bps higher coupon), and (2) Eyemaxx Real Estate (issued a new Minibond with a higher coupon of 8% instead of 7.875%).

5. Previously, for most German law governed bonds, 100% bondholder consent was required to make majority decisions binding on all bondholders. For pre-2009 issue bondholders, the prevailing legal view is that such bondholders may opt-in to the SchuldVG 2009 provisions by a 75% majority decision.

6. For example: a deferral or reduction of interest payments, a deferral of principal, a debt to equity swap (subject to shareholder consent), a change of the debtor/issuer and a subordination of bondholder claims.

7. Notable examples include: (1) AEG Power Solutions (€100 million bondholders agreed, by a 99.96% vote in the second creditors' meeting, to a haircut comprising a debt for equity swap for 50% of bondholder claims plus a new €50 million bond of five year term secured by the issuer's subsidiaries and including an increasing coupon, together with a new money capital increase of €4 million and an operational restructuring), (2) Deutsche Forfait AG (bondholders voted in the second creditors' meeting to approve a company proposed restructuring plan that included a significant coupon reduction, subject to certain bondholder requested modifications to reduce the scale of the coupon reduction, and a debt for equity swap).

The *Insolvenzplan* ("Insolvency Plan") provisions of the German Insolvency Code nevertheless enable bond restructurings to take place via majority decision-making. The Insolvency Plan is based on a turnaround concept for the debtor company's business and describes the sacrifices and/or contributions to be made by all relevant stakeholders (such as a "haircut" to be applied to creditors' claims). The Insolvency Plan is submitted and agreed in the course of regular insolvency proceedings or self-administration proceedings (*Eigenverwaltung*) and does not itself constitute a specific type of proceedings (unlike, e.g., Chapter 11 of the US Bankruptcy Code).

For the purposes of voting on an Insolvency Plan, creditors are divided into classes whereby creditors with similar economic interests are grouped together. In particular, if bondholders have elected a joint representative, bondholders might be grouped together in a separate class to other unsecured creditors. Approval of an Insolvency Plan requires a voting majority of 50% (in number and by value) in each class. As such, dissenting creditors may be crammed down if the requisite majority vote in favor of the Insolvency Plan. However, class consent may be replaced by a decision of the insolvency court if, among other things, the relevant class creditors are not worse off under the Insolvency Plan than in regular insolvency proceedings. Measures approved in an Insolvency Plan can, for example, include a debt to equity swap that can be imposed against the will of the existing shareholders even if such shareholders voted as a separate class and a majority of such shareholders voted against the plan.

The key differences between the German Insolvency Code Insolvency Plan and the requirements of the SchuldVG 2009 are that in an Insolvency Plan: (1) decisions are taken by a simple majority, (2) all creditors have a vote, not only bondholders, and (3) allocation to classes is subject to a certain amount of discretion in favor of the person submitting the Insolvency Plan.

5. Outlook on the German Minibond market

Future insolvencies of Minibond issuers may further put off investors and thereby sound the death knell for Minibonds. On the other hand, insolvencies may be seen as being indicative of an effective selection process leading to a "survival of the fittest" situation. There have also been some attempts to revive the Minibond market. For example, the Dusseldorf Stock Exchange has closed the specific Minibond segment, and Minibonds are now issued in the prime market and subject to the applicable entry standards thereto. To facilitate risk assessment for investors, the securities are also allocated to clearly delineated risk classes. In addition, the *Best Practice Guide* of Deutsche Börse provides for stricter minimum requirements regarding the issuer's economic situation, risk classes and rating and requires more transparency.

However, irrespective of such positive measures, further insolvencies have occurred, and "good" issuers tend to take advantage of other financing instruments (such as the institutional bond market). In addition: (1) higher entry standards are not yet established and would not be met by most of the new issuers in any event, and (2) hard covenants are not yet established (or remain weaker than the relevant recommendations). To quantify the effect of such matters, in 2014 there were only 13 issuances with a total volume of €715m (compared with 39 issuances in 2013 with a total volume of €1.97bn).

However, many experts still consider that there remains a need for Minibond financing in the German market (both from an issuer and investor perspective) and certain key advantages of Minibond financing remain, including: (1) for issuers, less dependency on institutional lenders, and (2) for investors, investment opportunities that may provide greater returns than the low interest rates currently available in the market.

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London Calling: Pre-Pack Administrations and Progress of the European Cross Border Insolvency Regulation Reforms

We report below on recent developments regarding pre-pack administrations, and the current status of the proposed amendments to the European Cross Border Insolvency Regulation.

Recent developments regarding pre-pack administrations

Pre-pack administrations ("pre-packs") are a frequently used, trusted and valuable English restructuring tool whereby certain assets (including entire businesses) may be sold as part of a transaction with an administrator that is negotiated and agreed upon in advance and completes immediately upon the administrator's appointment. Pre-packs have been successfully implemented both domestically within the UK and in European cross-border restructurings (where it has been possible to effect a prior shift of a debtor's centre of main interests ("COMI") to England and Wales).

Supporters of pre-packs argue, amongst other things, that pre-packs maximise the value achievable on the sale of businesses and assets in circumstances where a formal and drawn out insolvency process leading up to a subsequent sale may be highly value-destructive.

However, over recent years, the public and media perception of pre-packs has become increasingly negative, and pre-packs have been viewed, particularly by unsecured creditors, as undesirably secretive and lacking transparency. In many cases, public perception has been further affected by the fact that many pre-pack sales are made to connected parties (e.g., the existing management team).

Pre-packs have also been the direct focus of governmental scrutiny, which culminated in the "*Graham Review into Pre-Pack Administration*" published by accountant Teresa Graham CBE in June 2014 (the "Graham Review").[1] One of the more notable recommendations made in the Graham Review was that, in cases of proposed pre-pack sales to connected parties, details of the proposed deal be voluntarily disclosed to a "pre-pack pool" of experienced business people who should opine on the deal.

Following publication of the Graham Review there was little known about the proposed structure of the pre-pack pool, how it would operate and who would be members of it. However, recently, a "pre-pack pool steering group" (made up of representatives of the Chartered Institute of Credit Management, British Property Federation, Institute of Directors, Association of Business Recovery Professionals (R3), Insolvency Practitioners Association and others) has sent an open letter to the Business Secretary[2] to report that they had made good progress in the formation of the proposed pre-pack pool and that "many applications" from "highly experienced business people" to become pool members had been received. High level details of how the pre-pack pool will function on an operational basis are still awaited, although the steering group's letter confirms that an independent organisation is likely to be set up to run the pool and will be overseen by a mixture of professional bodies, creditor representative groups and insolvency regulators. The letter also confirms that the steering group expects the pool to accept its first cases later this spring.

The pre-pack pool recommendations made in the Graham Review were intended to be voluntary in the first instance, although Teresa Graham expressed hope in her report that the UK Government would legislate accordingly should the market fail to adopt the recommendations. Accordingly, the Small Business, Enterprise and Employment Act 2015 (which was approved on 26 March 2015) includes enabling legislation which could facilitate future legislative regulation of pre-pack sales to connected parties by permitting the Secretary of State to make regulations to require the approval of, or provide for the imposition of requirements or conditions by, creditors, the court or such other person as the regulations may specify in relation to pre-pack sales to connected parties. The explanatory notes to this Act[3] explicitly confirm that the intention of such provisions is to enable the delivery of the voluntary reforms recommended in the Graham Review in the event that the market fails to adopt them.

1. https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/317438/Graham_review_report_-_June2014final.docx

2. Available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/411540/PPP_letter_to_SoS_060315.pdf.

3. http://www.publications.parliament.uk/pa/bills/cbill/2014-2015/0011/en/15011en.pdf

In part, the gathering criticism of pre-packs may be symptomatic of what is an apparent public, media and governmental frustration with English corporate insolvency law following a string of relatively high-profile retail sector and public facing business failures over the past few years. Very recently, the collapse and administration of the delivery firm City Link drew criticism from a joint Business, Innovation and Skills and Scottish Affairs Committee report with regard to the treatment of employees and contractors in cases of insolvency. The report even went so far as to argue that the secured creditor in that case was morally responsible for the difficulties facing City Link employees and suppliers.[4] Similarly, one MP was reported to have said in relation to the pre-pack administration of the clothing retailer USC that the pre-pack "may have been legal but…certainly isn't moral."[5]

Given the growing negativity and apparent willingness of government committees to investigate high profile business failures it remains to be seen what further regulation may be imposed in this area in the event that the market fails to implement voluntary reform as recommended by the Graham Review and/or to the Government's satisfaction. If regulations are imposed in this area, as envisaged by the enabling provisions of the Small Business, Enterprise and Employment Act 2015, it will be very interesting to note the extent to which such regulations go beyond the scope of the voluntary recommendations set out in the Graham Review and how restrictive they may be. As regards complex cross-border restructurings and the potential regulation of pre-pack sales to connected parties, practitioners and market participants will hope that some distinction may be made between pre-packs used in a domestic insolvency context following a business failure and pre-packs used as a surgical tool to implement a complex cross-border restructuring strategy. Whatever the outcome, we are confident that market participants will continue to adapt and innovate to ensure the continued viability of the English pre-pack administration procedure.

4. http://www.publications.parliament.uk/pa/cm201415/cmselect/cmbis/928/928.pdf at paragraph 62

European Cross Border Insolvency Regulation

For the last 13 years, the European Cross Border Insolvency Regulation (Council Regulation (EC) No 1346/2000 on insolvency proceedings, the "ECIR") has been used in cross border restructurings and a body of supporting case law has emerged. The application of the ECIR was required to be reviewed on the tenth anniversary of it coming into force, and consequently, a number of amendments were proposed by the European Commission in December 2013.

On 13 April 2015, the European Commission reported that it has accepted the amendments to the ECIR proposed by the Council following political agreement on the revised text in December 2014. This paves the way for the European Parliament to adopt the revised ECIR at the second reading stage in May or June 2015.

As widely reported, the draft revisions encompass a number of issues. Most notably, the proposed reforms include:

1. the extension of the ECIR to include pre-insolvency and non-liquidation procedures. Helpfully, English schemes of arrangement have not so far been included within the scope of the revised ECIR. Had schemes been included, it would have required a full-scale COMI shift to be undertaken in order for a foreign debtor to avail itself of an English scheme, whereas, at the moment, a debtor need demonstrate only a "sufficient connection" to England and Wales in order to establish jurisdiction to propose a scheme;

2. a COMI registered office look-back period will be introduced whereby the presumption that a debtor company's COMI is at the place of its registered office will not apply where the debtor company has relocated its registered office within the three months prior to the request for the opening of insolvency proceedings. This provision has the stated aim of preventing fraudulent or abusive forum shopping and contrasts to the current position whereby COMI is assessed solely at the date of filing of an application to open insolvency proceedings. Other factors to demonstrate a COMI shift having taken place will therefore need to

5. As reported by the Guardian on 25 March 2015 (article available at http://www.theguardian.com/business/2015/mar/25/sports-direct-backstreet-outfit-mps-parliamentary-inquiry)

be demonstrated. Helpfully, the European Parliament's previous suggestion (to have a three month look-back period whereby the COMI would be where the debtor conducted the administration of its interests *on a regular basis at least three months prior* to the opening of insolvency proceedings) has been dropped;

3. debtors and creditors will have a right to challenge a determination to open main proceedings in a particular member state, which, in a non-consensual scenario, raises the potential for creditors to challenge COMI determinations. This could frustrate expedited debt restructurings; and

4. the revised ECIR includes the new concept of 'group coordination proceedings' whereby a single group coordinator will coordinate insolvency proceedings opened in multiple member states in relation to corporate groups. This will involve the creation of a "group coordination plan" featuring appropriate measures in relation to the group insolvency. However, the precise purpose of such group coordination proceedings is somewhat unclear, especially given that the group coordination plan will not legally bind local insolvency representatives and (it appears) court approval for the plan will not be required. It is also clear that only the improved *coordination* of group proceedings will be provided for, and that there will be no "substantive consolidation" of group insolvency proceedings into a single set of proceedings.

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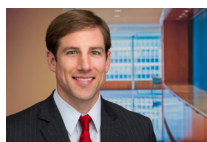

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