Bankruptcy +
Restructuring

Riskier Times for Secured Lenders, Derivative Traders, and Distressed Debt Investors? A Synthesis of Six Significant Bankruptcy-Related Developments

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Bankruptcy-related developments during the first half of this year have sent shock waves through the secured lending, derivative, and distressed debt trading communities. Several notable decisions may significantly affect the way these entities operate and calculate risk, and result in changes to standard documentation. Until recently, a proposed overhaul of Bankruptcy Rule 2019 threatened to discourage distressed debt investors, including hedge funds, from participating in bankruptcy proceedings as part of an ad hoc committee or group. Close monitoring of these developments remains critical for entities seeking to mitigate risk.

It is premature to predict the potential long-term effects these developments may have, given the bankruptcy appeals and Congressional approval processes. But in the short term, lenders, traders, and distressed debt investors can draw lessons from the following six developments:

1. Secured lenders may no longer enjoy a right to credit bid their debt in the event a debtor seeks to sell their collateral under a Chapter 11 plan after the Philadelphia Newspapers[2] and Palco[3] decisions;
2. "Reverse waterfall" or reversal of payment priority provisions common in structured finance transactions may no longer be enforceable against debtors after the Lehman/Dante decision;[4]
3. Swap market participants may—despite what their transaction documents provide—have difficulty exercising any prepetition contractual right of setoff absent mutuality against a debtor after the Lehman/Swedbank decision;[5]
4. Distressed debt investors, including hedge funds, should track the enactment of proposed amendments to Bankruptcy Rule 2019 to confirm that the rule will not require disclosure of investors' purchase price and date of claim acquisition (except in limited circumstances), and will exempt administrative agents under credit agreements;[6]
5. Distressed claims purchasers seeking to purchase debt solely as a means of securing a blocking position and taking control of a debtor and its strategic assets may be unsuccessful and deemed to have a condemnable "ulterior motive" after the DBSD decisions;[7] and
6. Prepetition lenders may face significant challenges in bankruptcy cases where debtors seek to reinstate their loans at prepetition rates, while deleveraging through a plan of reorganization, after the Charter Communications[8] and Spectrum Brands[9] decisions.

The following includes a general overview of these developments, their potential broader impacts, and best practices for strategically addressing attendant risks.

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A BEWARE SECURED CREDITORS: DON'T COUNT ON CREDIT BIDDING YOUR COLLATERAL UNDER A PLAN ASSET SALE

Asset sales in bankruptcy typically occur under Section 363 of the Bankruptcy Code, not pursuant to a plan. Section 363(k) of the Bankruptcy Code permits secured lenders holding "allowed claims" to credit bid at auctions and to offset their entire allowed claim against the purchase price of the property to be sold if they are the successful bidder. It also permits the court to preclude credit bidding "for cause."[10] Through credit bidding, a secured creditor can bid the debt it is owed instead of putting up cash at a sale of its collateral. The secured creditor community has traditionally viewed the right to credit bid as a valuable mechanism to ensure that collateral is not undervalued at auction.

Section 1129(b)(2)(A) of the Bankruptcy Code lists three ways a plan may be deemed "fair and equitable" and crammed down over a secured creditor's objection; the second involves section 363(k). The first option involves a secured creditor's retention of the liens securing its claim and receipt of deferred cash payments totaling at least the allowed amount of the claim with a value equal to or greater than the value of the claimholder's interest in the collateral. Under the second option, the "fair and equitable" requirement is met where a plan provides for the sale of a secured creditor's collateral, subject to section 363(k) (i.e., credit bidding), free and clear of the secured creditor's liens, with such liens to attach to the proceeds of sale and with such liens to receive certain specified treatment. The third option requires that a secured creditor receive the "indubitable equivalent" of its secured claim.[11]

The issue arising under both the *Philadelphia Newspapers* and *Palco* cases was whether a debtor could conduct a sale of the secured creditors' collateral under a plan while precluding the secured creditors from credit bidding so long as the secured creditors received the "indubitable equivalent" of their claims. The statutory issue was whether the second option under section 1129(b)(2)(A) provided the exclusive method of selling assets under a plan in a cram-down scenario, or whether any of the three options would suffice for confirmation of a plan as "fair and equitable" under the Bankruptcy Code.

"...SECURED CREDITORS SHOULD ADJUST THEIR EXPECTATIONS AS EARLY AS THE LOAN ORIGINATION STAGE AND CONSIDER THE RISK THAT THEIR UNDERLYING COLLATERAL COULD BE SOLD IN A PLAN ASSET SALE ABSENT THEIR OPPORTUNITY TO CREDIT BID."

On March 22, 2010, in a 2-1 decision, the United States Court of Appeals for the Third Circuit affirmed the district court's approval of proposed bid procedures in *Philadelphia Newspapers*, which precluded secured lenders from credit bidding in an asset sale pursuant to a "cram down" plan. Under *Philadelphia Newspapers*, a debtor selling its assets free and clear of a secured creditor's liens under a Chapter 11 plan does not have to provide the secured creditor with the right to credit bid its secured claim, even though a secured creditor typically enjoys this right in virtually all section 363 sales. Specifically, the court held that the debtors could preclude credit bidding so long as the plan provided the secured creditors with the "indubitable equivalent" of their secured claims. The holding in *Philadelphia Newspapers* is consistent with last year's decision of the United States Court of Appeals for the Fifth Circuit in *Palco*.

In a robust dissent, Judge Ambro, a former bankruptcy practitioner, explained that the second option under section 1129(b)(2)(A) provided the exclusive means by which a debtor can cram down a plan over a secured creditor's objection where the plan proposes to sell its collateral free and clear of its liens. An asset sale in a cram down plan cannot, according to Judge Ambro, be "free and clear" of liens unless secured creditors are permitted to credit bid at a sale. Among other things, Judge Ambro noted that precluding a lender from credit bidding its secured claim eliminates a significant participant from the auction process and limits the amount of control that a lender can exert over the disposition of its collateral.

Lessons Learned/Best Practices

In light of *Philadelphia Newspapers* and *Palco*, secured creditors should adjust their expectations as early as the loan origination stage and consider the risk that their underlying collateral could be sold in a plan asset sale absent their opportunity to credit bid. The new degree of uncertainty faced by secured creditors may translate into a higher cost of borrowing or, in some cases, a refusal by secured creditors to lend. These risks are particularly apparent if a debtor's bankruptcy case is filed in either the Third or Fifth Circuits.

As a result of these decisions, debtors may have newfound leverage over recalcitrant secured creditors. Just the threat of a plan sale might be enough for some secured creditors to concede during plan negotiations, but to the extent they can argue that a sale plan without credit-bidding rights also does not satisfy the "indubitable equivalent" test, secured creditors may still be able to preserve their right to credit bid in a plan "cram down" scenario. To protect themselves in the interim, secured creditors may push for more "quick" asset sales under section 363 where they generally have the right to credit bid and exercise leverage over the sale process.

BEWARE SWAP MARKET PARTICIPANTS: THE "SAFE HARBOR" PROVISIONS MAY NOT BE AS "SAFE" AS YOU THOUGHT

Ensure Your Swap Agreement Contains All Relevant Provisions; Otherwise, Your Agreement Might Not be "Safe-Harbored"

The "safe harbor" provision contained in section 560 of the Bankruptcy Code permits swap counterparties to liquidate, terminate, accelerate, or setoff payments notwithstanding the automatic stay or so-called ipso facto clauses that seek to modify or terminate the relationship of contracting parties as a result of one party's bankruptcy filing.[12] Section 560 protects a non-defaulting swap participant's rights to terminate solely because of the insolvency or financial condition of the debtor and the commencement of the bankruptcy case.[13]

Relying in part on section 560, BNY Corporate Trustee Services Ltd. ("BNY")— as trustee under a principal trust deed entered into between BNY's predecessor and Dante Finance Public Limited Company ("Dante")—argued in the *Lehman/Dante* matter that (i) a provision reversing the payment priority (or "reverse waterfall provision") upon an event of default attributable to the commencement of a bankruptcy case by any party, such that Perpetual Trustee Company Limited ("Perpetual"), as noteholder, maintained priority over Lehman Brothers Special Financing Inc. ("LBSFI") regarding amounts otherwise payable to LBSFI;[14] and (ii) a provision modifying the calculation of an amount payable upon the early redemption of a note ("Condition 44"), each of which were triggered in the event LBSFI defaulted under a related swap agreement, were both enforceable as part of an integrated "swap agreement." Therefore, BNY maintained, each qualified for "safe harbor protection" under section 560. Each of these provisions was contained in a series of supplemental trustee deeds for two series of credit-linked synthetic notes issued by Saphir, a special purpose entity created by Lehman Brothers International (Europe). Notably, neither provision appeared in any swap agreement, schedule, or confirmation between LBSFI and Dante.

> **" . . . SWAP PARTICIPANTS CAN MITIGATE RISK . . . BY DIRECTLY INCORPORATING ALL PRIORITY REVERSAL PROVISIONS, RELATED CONDITIONS, AND ANY IPSO FACTO PROVISIONS GENERALLY INTO [THEIR] ISDA DOCUMENTATION."**

On January 25, 2010, the Bankruptcy Court for the Southern District of New York issued a controversial memorandum decision holding that investors in the Dante collateralized debt obligation ("CDO") transaction could not enforce the reverse waterfall provision against LBSFI.[15] The bankruptcy court also deemed the provisions contained in the note transaction documents (apart from the swap agreements among LBSFI and Dante) purporting to modify LBSFI's right to a priority distribution solely as a result of any party's chapter 11 filing to be unenforceable ipso facto clauses,[16] and held that any action to enforce such provisions would violate the automatic stay.[17]

Upon closer inspection, each of supplemental trustee deeds governing the notes referenced a swap agreement among LBSFI and Dante, but the swap agreements—including the relevant master agreement, confirmation, and schedules standardized by the International Swaps and Derivatives Association Inc. ("ISDA")[18]—failed to reference either supplemental trustee deed, the reverse waterfall provision, or Condition 44.[19] Judge Peck stated, "the provisions at issue dictate the means by which the proceeds of each [s]wap [a]greement will be distributed, but do not comprise part of the [s]wap [a] greement themselves."[20]

Because the reverse waterfall and Condition 44 provisions were not contained within the four corners of the applicable swap agreements, Judge Peck held that section 560, which deals specifically with "safe-harbored" "swap agreements" and otherwise permits the operation of ipso facto clauses, did not apply.

Lessons Learned/Best Practices

The import of *Lehman/Dante* on derivative trading may not be as troublesome as it seems. The result may very well have been different if the reverse waterfall provision and Condition 44 were contained directly in the swap agreements. The bankruptcy court would then have had to engage in a rigorous analysis of section 560's applicability, as opposed to finding that the "safe harbor" provision was facially inapplicable.

Adding an additional wrinkle to the analysis, the same priority of payment issue continues to be litigated in parallel legal proceedings brought by Perpetual against BNY under a principal trust deed entered into between BNY's predecessor and Dante in the UK. On November 6, 2009, the English appellate court unanimously upheld a lower court's decision finding that the reverse waterfall and Condition 44 provisions were enforceable under English Law. Currently on appeal, the Supreme Court in the UK. has tentatively scheduled arguments for March 2011. Once an order is entered in the U.S. bankruptcy case, BNY has indicated its intention to appeal the bankruptcy court's ruling. To date, Judge Peck has not entered an order confirming his ruling.

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In the interim, it is unclear to what extent the *Lehman/Dante* decision might affect the judgment of rating agencies and to what extent any downgrades by such agencies will ultimately affect the liquidity in the market for secured notes. Despite the difficulties presented by tightening liquidity and conflicting rulings, swap participants can mitigate risk and increase the likelihood of safe-harbor protection by directly incorporating all priority reversal provisions, related conditions, and any ipso facto provisions generally into a swap participant's ISDA documentation.

Mutuality Is Required To Effect Setoff, Regardless of the "Safe Harbor" Provisions

A traditional setoff in bankruptcy, as defined by section 553(a) of the Bankruptcy Code, involves the offset of mutual, valid, and enforceable prepetition debts between the same parties in the same capacities — i.e., a prepetition debt owing by a creditor ("Party A") to a debtor ("Party B") against a prepetition claim of Party A against Party B.[21] The requisite elements of a section 553 setoff are met where: (i) the creditor holds a claim against the debtor that arose before the commencement of the case; (ii) the creditor owes a debt to the debtor that also arose before the commencement of the case; (iii) the claim and debt are mutual; and (iv) the claim and debt are each valid and enforceable.[22] Setoff, in effect, elevates an unsecured claim to secured status, to the extent that the debtor has a mutual prepetition claim against the creditor.[23] Section 553 does not define "mutual." The most common use of "mutual" includes the requirement that the prepetition claim and debt be owed by and among the "same parties" and that the parties be acting in the same "capacity."[24]

On May 5, 2010, the Honorable James M. Peck of the U.S. Bankruptcy Court for the Southern District of New York held in *Lehman/Swedbank*[25] that the Bankruptcy Code's safe harbor exceptions contained in sections 560 and 561 do not permit setoff where the mutuality requirements of section 553(a) of the Bankruptcy Code have not otherwise been satisfied.[26] Swedbank AB ("Swedbank"), the nondebtor counterparty to a series of swap agreements standardized by the ISDA (collectively, the "ISDA Master Agreements"), was therefore ordered to immediately release a post-petition administrative freeze placed on the Debtor's general deposit account and return to the Debtor all funds deposited subsequent to the Debtor's bankruptcy filing.[27]

"NONDEBTOR COUNTERPARTIES SHOULD TREAD VERY CAREFULLY WHEN TAKING ANY ACTION THAT AFFECTS PROPERTY OF A BANKRUPTCY ESTATE AND BE WARY OF RELYING ON ANY SETOFF PROVISIONS CONTAINED IN THEIR ISDA DOCUMENTATION THAT MAY TRIGGER UPON AN EVENT OF DEFAULT."

Swedbank and the Debtors had a longstanding business relationship. Prior to Lehman Brothers Holding, Inc.'s ("LBHI") bankruptcy filing, (i) Swedbank was a party to four ISDA Master Agreements with Lehman entities; (ii) LBHI served as a guarantor in connection with those agreements; (iii) LBHI maintained a deposit account with Swedbank in Stockholm, Sweden (the "Swedbank Account"); and (iv) LBHI was a party to an ISDA Master Agreement with Swedbank. A provision in this ISDA Master Agreement granted Swedbank a right of setoff upon the occurrence of an event of default.

LBHI filed bankruptcy on September 15, 2008, triggering certain events of default under the ISDA Master Agreements, and resulting in, according to Swedbank, termination payments of approximately $13.9 million owing from LBHI to Swedbank. Upon the bankruptcy filing, the Swedbank Account contained 2,140,897.40 Swedish Krona (approximately $283,191.27 based on the current conversion rate).[28] Shortly after the bankruptcy filing, Swedbank placed an administrative freeze on the Swedbank Account, thereby preventing LBHI from withdrawing funds from the account, but nonetheless allowing additional funds to be deposited into the account. Swedbank informed LBHI that it intended to set off the indebtedness purportedly owed to Swedbank against the funds contained in the Swedbank Account.

By November 12, 2009, as a result of post-petition deposits, the Swedbank Account contained approximately $11.7 million. Arguing that Swedbank had no right to offset the funds in the Swedbank Account and that the administrative freeze violated the automatic stay, the Debtors filed a motion for entry of an order enforcing the automatic stay and compelling Swedbank to turn over the funds in the Swedbank Account.

The court granted the Debtors' motion for an order enforcing the automatic stay and compelling payment to LBHI of approximately $9.7 million, representing the funds that were deposited in the Swedbank Account subsequent to LBHI's bankruptcy filing. The court specifically rejected Swedbank's argument that the "safe harbor" provisions of the Bankruptcy Code created an exception to the mutuality requirement with respect to setoffs under section 553(a).

According to the decision, the requirement that a claim and debt be mutual in order to exercise a right of setoff is "an axiomatic

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principle of bankruptcy law."[29] All parties agreed that mutuality was lacking because LBHI's indebtedness to Swedbank arose prepetition, yet the funds in the Swedbank Account were deposited post-petition. Nonetheless, while mutuality is a statutory requirement of any setoff under section 553 of the Bankruptcy Code, Swedbank argued that "this seemingly fatal flaw does not matter" because mutuality is not explicitly required by the "safe harbor" provisions of the Bankruptcy Code.[30] Swedbank maintained that the "safe harbor" provisions "implicitly override the mutuality requirement"[31] of section 553(a) because they provide that a creditor's "contractual right" to offset shall not be "stayed, avoided, or otherwise limited . . ." and because these sections do not explicitly refer to the mutuality requirement of section 553. Swedbank argued, therefore, that the requirement of prepetition mutuality was irrelevant when dealing with setoff under safe-harbored derivative contracts.[32]

The court rejected Swedbank's reading of the "safe harbor" provisions on a number of grounds, holding that "mutuality is baked into the very definition of setoff"[33] and that the "silence of the safe harbor provisions with respect to the mutuality requirement of section 553(a)" did not provide a basis for the court to "read an exception into the statute."[34] In the court's view, Swedbank confused the language used in the "safe harbor" provisions with the common phrase "notwithstanding any other provision of law."[35] While "notwithstanding" clauses have been interpreted to supersede all other laws, the text of the "safe harbor" provisions merely "renders the automatic stay inapplicable in the context of safe harbored contracts—the central purpose of the safe harbor provisions—and does not eliminate the mutuality requirement of section 553(a)."[36]

Furthermore, the court stated: "Congress enacted sections 560 and 561 well after section 553 had become established as the statutory basis for permitting setoff in bankruptcy and with full knowledge of that section's mutuality requirement."[37] Accordingly, if Congress had intended to create an exception to mutuality, "it would have done so explicitly."[38] To further support its holding, the court examined the legislative history relating to the safe harbor provisions and concluded that "the enactment of sections 560 and 561 has done nothing to alter the mutuality requirement found in section 553(a)."[39]

Swedbank has appealed the decision to the United States District Court for the Southern District of New York.

Lessons Learned/Best Practices

If the *Lehman/Swedbank* decision is ultimately upheld, nondebtor counterparties will face additional risk when offsetting post-petition funds against a debtor's prepetition indebtedness. Even though the *Lehman/Swedbank* decision dealt specifically with traditional setoff, to the extent the "safe harbor" provisions keep the strict requirements of section 553(a) intact, its holding applies equally to triangular or cross-affiliate setoff, which typically involves the setoff of a debt owing from Party A to Party B against a debt of Party B owing to an affiliate of Party A, rather than directly to Party A.[40] In either case, at least one court has stated that the "safe harbor" provisions do not cover setoff for non-mutual obligations.

Nondebtor counterparties should tread very carefully when taking any action that affects property of a bankruptcy estate and be wary of relying on any setoff provisions contained in their ISDA documentation that may trigger upon an event of default. Not only is there is a risk of disgorgement for post-petition deposits identified as arising under a swap agreement,[41] but in some cases, a violation of the automatic stay could result in court-imposed sanctions.[42]

C

BEWARE DISTRESSED DEBT TRADERS: MONITOR DEVELOPMENTS ON BANKRUPTCY RULE 2019 AND NOTE THE HIGHER STAKES FOR "LOAN-TO-OWN"

Proposed Bankruptcy Rule 2019, As Originally Proposed, Raised the Stakes for Participation In a Bankruptcy Case

Distressed debt investors, hedge funds, and equity holders have played an active role in many large Chapter 11 cases in recent years, often through membership in unofficial or "ad hoc" committees. Often such committees are formed to represent the interests of subordinate debt tranches or minority lending groups. These groups frequently hire their own financial advisors and bankruptcy counsel, who file pleadings on matters directly affecting their economic stake. Through their collective action, these groups can alter the dynamics on any given issue and, in some cases, gain critical leverage over the reorganization process.

Debtors and other parties-in-interest have sought to restrict the role of these committees by requiring members to make numerous disclosures under Bankruptcy Rule 2019 ("Rule 2019"),[43] including, among other things, the dates members acquired their interests and the price paid for such interests. In at least three bankruptcy cases, this strategy has been successful,[44] but in at least three other cases, informal committees have prevailed by arguing against the applicability of Rule 2019.[45] Apart from this split in judicial authority, the active involvement of investor groups in bankruptcy cases—just prior to recent revisions to proposed Rule 2019 discussed below—stood to significantly change as part of the original proposal of the Judicial Conference Committee on Rules of Practice and Procedure (the "Rules Committee").

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The Originally Proposed Rule 2019

The proposed amendments to Rule 2019(a) sought to broaden the disclosure requirement to apply to "every entity, group, or committee that consists of or represents more than one creditor or equity security holder." The Rules Committee Note explains that "[i]n addition to an entity that represents more than one creditor or equity security holder, the Amendment extends the Rule's coverage to committees that consist of more than one creditor or equity security holder. It also applies to a group of creditors or equity security holders that act in concert to advance common interests, even if the group does not call itself a committee."[46]

As applied, the expansive definition of "disclosable economic interest" would have mandated disclosure of "any claim, interest, pledge, lien, option, participation, derivative instrument, or any other right or derivative right that grants the holder an economic interest that is affected by the value, acquisition, or disposition of a claim or interest."[47] The verified statement under Proposed Rule 2019 would have required disclosure of an entity's: (i) name and address; (ii) nature and amount of, and if directed by the court, the amount paid for, each disclosable economic interest held in relation to the debtor as of the date the entity was employed or the group or unofficial committee was formed; and (iii) the date when each disclosable economic interest was acquired, unless acquired more than one year before the petition was filed.[48] Proposed Rule 2019(e) would have also given the bankruptcy court the power to determine any violations under the proposed Rule, including the imposition of appropriate sanctions for any violation.

Updates from the Advisory Committee

On May 27, 2010, the Advisory Committee on Bankruptcy Rules (the "Advisory Committee") issued a report to the Standing Committee on Rules of Practice and Procedure (the "Standing Committee") regarding proposed Rule 2019. The Advisory Committee unanimously recommended substantial revisions to proposed Rule 2019, which if approved, will address many of the concerns voiced by the distressed debt trading and larger insolvency community, including disclosure of investors' purchase price and date of claim acquisition.[49] Generally, some the proposed changes by the Advisory Committee include: (i) deleting the required disclosure of the purchase price; (ii) deleting the required disclosure of the date of acquisition (except in limited circumstances, and then on a quarterly and yearly basis); (iii) exempting administrative agents under credit agreements; and (iv) exempting groups composed entirely of insiders or affiliates.[50]

If the Standing Committee approves the Advisory Committee's report, the proposed amendments and new rules, as revised by the Advisory Committee, will be submitted to the Rules Committee for approval and submission to the Supreme Court. If approved, proposed Rule 2019 would become effective on December 1, 2011.[51]

Lessons Learned/Best Practices

In light of the distressed debt community's backlash against Rule 2019 (as originally proposed) and the subsequent unanimous response by the Advisory Committee, perhaps the biggest lesson ultimately lies in the importance of effective advocacy, led primarily in this case by two leading trade organizations: the Loan Syndications and Trading Association and the Securities Industry and Financial Markets Association.[52]

Although the provisions of Rule 2019 as originally proposed forced distressed investors to carefully reevaluate, in each instance, the benefits and burdens associated with participating in a bankruptcy case, the Advisory Committee's recommendations serve to quell many, if not all, of the market's underlying concerns. Should the Advisory Committee's recommendations be enacted, the active participation of ad hoc committees in bankruptcy cases will likely remain the same, or become even greater, thereby potentially increasing the participation of the same investors who often, in an effort to maximize value for their constituents, are aggressive advocates of alternative plan structures and provide options for debtor-in-possession and exit financing.

By furthering the role of ad hoc committees in bankruptcy cases, Rule 2019 (including changes proposed by the Advisory Committee) will also prevent debtors from extracting concessions from distressed investors based on their knowledge of the price paid by an investor for their claim. This result not only serves to level the debtor/creditor playing field, but also encourages an efficient bankruptcy process through the participation of all stakeholders.

Despite Their Popularity, Not All Loan-To-Own Strategies Succeed

One way distressed investors may seek to acquire a troubled business is by purchasing the company's senior secured debt. By holding a first lien position, distressed investors can often influence a Chapter 11 case and maintain significant leverage over a debtor's plan.

In some cases, this investment strategy succeeds. For example, approximately three years ago, in his *In re Granite Broadcasting Corp.*[53] decision, the Honorable Judge Allan L. Gropper of the United States Bankruptcy Court for the Southern District of New York helped vindicate the loan-to-own strategy by confirming a plan of reorganization that ceded control of the debtor to a hedge fund—its primary secured lender—despite objections to the plan by preferred equity holders, a competing restructuring proposal, hotly contested valuation issues, and allegations that the plan provided a "sweetheart deal" to the debtor's CEO.

But loan-to-own strategies may not be

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upheld in all situations. In *DBSD I*, the bankruptcy court granted the debtors' motion, under section 1126(e) of the Bankruptcy Code, to designate and disqualify the votes of DISH Network Corporation ("DISH"), which had just purchased and was the sole holder of the debtors' first lien debt.[54] DISH became involved in the bankruptcy case after the debtors had proposed a plan of reorganization. Thereafter, DISH bought all of the debtors' first lien debt, at par, seeking by its acquisition, "to acquire control of this strategic asset."[55] Through an affiliate, DISH also purchased the debtors' second lien debt, a fulcrum security that the plan proposed to convert to equity.[56] Finally, on the eve of the plan confirmation hearing, DISH sought to terminate exclusivity and obtain permission to file its own plan.[57]

The bankruptcy court held that DISH's acquisition of first and second lien debt was as a strategic investor seeking to obtain a blocking position and control the bankruptcy process. According to Judge Gerber, DISH "made its investment in this chapter 11 case, and has continued to act, not as a traditional creditor seeking to maximize its return on the debt it holds, but as a strategic investor, 'to establish control over this strategic asset.'"[58] Citing *In re Allegheny Int'l, Inc.*,[59] the bankruptcy court noted that DISH had become a creditor late in the game and had paid 100 cents on the dollar for its debt — "*paying* the price for which most other creditors could only hope."[60] Thus, the court inferred that DISH acted "not to maximize the return on its claim, acquired only a few weeks earlier, but to advance an 'ulterior motive' condemned in the case law," and to "use voting to advance the effort to take control."[61]

In conclusion, Judge Gerber ruled that DISH's votes to reject the plan should be disqualified.[62] Overruling DISH's

"THE KEY FOR DISTRESSED INVESTORS IS NOT TO OVERREACH . . ."

objection, Judge Gerber approved DBSD's bankruptcy plan. The bankruptcy court's decision was then affirmed by the United States District Court for the Southern District of New York and is currently on appeal to the United States Court of Appeals for the Second Circuit.

Lessons Learned/Best Practices

DBSD I should give distressed debt investors pause, not only because it illustrates the type of loan-to-own strategy one court was unwilling to tolerate, but more generally in terms of its stance against what it termed "overly-aggressive" and "egregious" creditor conduct.[63] Judge Gerber goes so far as to encourage Congress "to modify the Code to authorize Bankruptcy Judges to designate creditor votes for overly-aggressive and other egregious conduct even when creditors are acting to increase returns on long positions."[64] What Judge Gerber's comments on supposed aggressive creditor behavior portends for the distressed debt trading world remains to be seen.

DBSD I should not, however, be interpreted as an impassible roadblock to loan-to-own strategies. If DISH had purchased the first and second lien debt prior to the formation of a plan, or even below par, the case may have been decided differently. The key for distressed investors is not to overreach and to ensure that actions surrounding the acquisition of distressed debt are geared towards maximizing recoveries on a long position, and minimizing the likelihood that a court will conclude that their goals are the ulterior motives of blocking, control, and torpedoing a plan on the eve of confirmation.

D — BEWARE PREPETITION SECURED LENDERS: CRAM-UPS UNDER A PLAN OF REORGANIZATION MAY IMPACT YOUR ABILITY TO EXTRACT ADDITIONAL VALUE IN CHAPTER 11 CASES

In the years preceding the recent recession, credit facilities were often highly favorable to borrowers, containing very reasonable interest rates, moderate default provisions, limited borrower covenants and other beneficial terms. Following the credit crisis, certain loans have been identified by borrowers as valuable assets for those seeking to reorganize. Accordingly, debtors in several recent Chapter 11 cases have sought to deleverage a portion of their balance sheet while reinstating favorable loans through "cram up" Chapter 11 plans of reorganization.

The Bankruptcy Code allows debtors to propose Chapter 11 plans of reorganization that reinstate prepetition obligations (including senior credit facilities) regardless of acceleration provisions contained in the agreements.[65] A plan of reorganization can cure defaults and render a claim unimpaired. Where a class of claims is unimpaired and the debt reinstated, the class is deemed to accept the plan and cannot vote to accept or reject the plan. Because it is precluded from casting a dissenting vote and blocking confirmation of the plan, such class is considered "crammed-up" in connection with its reinstated claim. This can be a discouraging result, and secured lenders who are party to credit agreements with what they consider to be below market interest rates and terms should be aware that borrowers may attempt to utilize the "cram-up" process in order to preserve favorable debt in their capital structures.

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On November 17, 2009, in *Charter Communications*,[66] Judge Peck confirmed a plan of reorganization that reinstated a senior secured loan over the objections of the senior lenders. Charter Communications, Inc. ("Charter"), the country's fourth largest cable operator, attempted to restructure through a pre-arranged bankruptcy, which the court described as "perhaps the largest and most complex prearranged bankruptcies ever attempted, and in all likelihood…among the most ambitions and contentious as well."[67] Charter had initially reached out to certain noteholders in order to negotiate a debt for equity exchange through the Chapter 11 plan. As a component of the plan, Charter proposed to reinstate nearly $12 billion of senior debt,[68] arguing that such reinstatement would leave the senior lenders unimpaired and entitled to payment in full under the credit agreement.[69] The senior secured lenders objected to plan confirmation and maintained that (i) the claims could not be reinstated because of the existence of various prepetition defaults; and (ii) confirmation of the plan would result in a change of control default that would violate covenants in the credit facility.[70] After a contentious trial and fact-specific examination of the terms of the relevant credit agreement, Judge Peck ruled that the debtors could reinstate the debt under the terms of the prepetition credit facility and that no defaults existed that would impair the senior secured lenders. The result amounted to a difference of approximately $500 million per year that the debtors would have had to pay in increased interest.

A similar situation occurred in the case of *Spectrum Brands*,[71] where the debtors sought to confirm a plan of reorganization and reinstate a $1.4 billion secured credit agreement, pay other secured claims and general unsecured claims in full, and refinance noteholder claims with 80% of new equity and 20% of new notes.[72] Spectrum Brands ("Spectrum") is a global consumer products company. As in *Charter Communications*, the reinstatement litigation in *Spectrum Brands* was a highly contested, fact-intensive undertaking that required the court to consider differing interpretations of the credit agreement at issue. In their objection to the plan, the secured lenders argued that (i) the debt-for-equity proposed in favor of the noteholders constituted an impermissible refinancing under the credit agreement; and (ii) the plan resulted in a prohibited change in control due to the transfer of equity interests to the noteholders.[73] The Spectrum debtors contended that the lenders were simply seeking to exploit these technical defaults for monetary gain they would enjoy though default interest rates.[74] Ultimately, after extensive document production, depositions and preparation and filing of expert reports, the parties reached a settlement midway through the contested *Spectrum Brands* confirmation hearing that enabled the debtors to confirm a fully consensual plan.[75]

Lessons Learned/Best Practices

The recent willingness of bankruptcy courts to entertain and approve the strategic usage of "cram-ups" in the context of pre-arranged or pre-negotiated plans of reorganization in the face of alleged incurable defaults, may very well encourage more debtors to attempt this strategy. However, as demonstrated in *Charter* and *Spectrum Brands*, if the stakes are high enough, this strategy will likely result in significant litigation, as lenders fight for additional value and debtors attempt to reduce the costs of restructuring and protect exit value. In litigations like those in *Spectrum Brands and Charter Communications*, bankruptcy courts will engage in fact-intensive inquiries, including scrutinizing relevant credit agreements, and analyzing bankruptcy and non-bankruptcy law (such as securities law) as well as the parties' past practices in order to determine whether reinstatement is appropriate.

Lenders should take a close look at their outstanding credit agreements, the financial state of their borrowers, and the particular terms of the credit agreements in order to be prepared for these potential challenges in the event a borrower seeks to reinstate their loan through a "cram-up" in Chapter 11.

E | CONCLUSION

Against the backdrop of one of the most volatile and challenged financial environments in recent history, the six bankruptcy and restructuring developments discussed herein serve as cautionary tales for the secured lending, derivative, and distressed debt trading communities. Overall, the decisions—many from the country's most influential bankruptcy courts—tilt the playing field in favor of debtors, potentially giving them more leverage in the asset sale, swap termination, loan-to-own, and reinstatement of debt contexts. Indeed, the "safe harbor" related developments may already be affecting market expectations regarding the enforceability of ISDA agreement provisions — agreements that derivative traders have traditionally relied on to manage their credit and related risk in the derivative markets.

The extent to which these developments serve as a harbinger for other bankruptcy decisions or proposed rulemaking remains unclear. In the meantime, the secured lending, derivative, and distressed debt trading communities should continually monitor developments, assess the level of risk each development presents, and promptly employ a sensible risk mitigation strategy.

Awards

Legal 500

The Bankruptcy and Restructuring Group was recognized by *The Legal 500* in its recent directory. The write-up cited the comments of clients who described the team as "responsive and creative in their advice," and described co-chair Gary Lee as "practical and responsive – he takes the time to ensure that he understands what we are seeking to achieve."

Burton Awards

The article "SemCrude, Setoff, and the Collapsing Triangle: What Contract Parties Should Know," by Norman Rosenbaum, Alexandra Steinberg Barrage, and Jordan Wishnew, published by *Pratt's Journal of Bankruptcy Law*, received a Distinguished Writing Award at The Burton Awards for Legal Achievement, in a ceremony held at the Library of Congress on June 14, 2010. (See photo on the right)

American Lawyer

Morrison & Foerster was ranked on the 2010 A-List of *The American Lawyer* magazine. This marks the seventh consecutive year that the firm has been ranked. The A-List ranks the top 20 law firms "that best embody what it means to be a success in the legal community" and is considered to be *The American Lawyer*'s most prestigious ranking.

In the Press

"THE BREAKFAST CLUB, Scenes from the Mesa Air beauty contest"

The American Lawyer, April 1, 2010

The winner of the contest was **Brett Miller** of **Morrison & Foerster**, who previously represented the creditors of Skybus Airlines. Miller, a veteran of the Chrysler LLC, General Motors Corporation, and Lehman Brothers beauty contests, says, "I think there were more lawyers at Mesa than at the other three combined."

Miller walked away with the sign-in sheet with business cards stapled to it from lawyers at all 27 firms who appeared – an unusual souvenir from an unusual day.

"A New Flight Plan"

The Arizona Republic, June 27, 2010

"That changes the dynamics (of a case) when you are operating with your own cash as opposed to a lender's money," said **Lorenzo Marinuzzi,** a partner with **Morrison and Foerster**, which represents Mesa's unsecured creditors committee. Members include regional jet manufacturers Bombardier and Embraer and the Air Line Pilots Association, which represents Mesa's pilots.

Things are often more acrimonious when there is a bank or other outside lender keeping tabs on its money, he said.

Marinuzzi said there have been no surprises in the case but calls it a difficult one.

"This is a challenging case in an industry that is almost always challenging to begin with," he said. "There's just not a demand for this kind of flying at the rates currently being paid."

Photo by Carrie Buell. www.carriebuell.com

Authors Jordan Wishnew, Alexandra Steinberg Barrage and Norman Rosenbaum at the Burton Awards dinner.

In the Community

Humanitarian Aid to Haiti

Bankruptcy associate Erica Richards, with associate Anne-Carmene Almonord and pro bono counsel Jennifer Brown, traveled to Haiti in May as members of delegations undertaking humanitarian legal work in the wake of the January 12 earthquake. The first of these delegations focused on obtaining information regarding the nature and extent of sexual violence occurring against women and girls in the camps, and the second delegation identified appropriate candidates for humanitarian parole applications. Information obtained during these trips is now being used by these attorneys (in collaboration with other firms and organizations) to pursue legal remedies that will assist Haitians struggling to survive the brutal living conditions that prevail in the hundreds of internal displacement camps scattered throughout Port-au-Prince.

In June, Erica Richards then traveled to Geneva to assist with the presentation of testimony before the United Nations Human Rights Council regarding the delegations' findings in the camps. A full report on the delegations' findings is being prepared for release, and a petition seeking precautionary measures is currently being drafted for presentation before the Inter-American Commission on Human Rights.

Erica Richards listens as the prepared testimony of camp resident and grassroots organizer Malya Villard-Apollon is presented to the UN Human Rights Council.

Karen Ostad Elected to Lead Iranian American Bar Association

Partner Karen Ostad was elected president of the Iranian American Bar Association (IABA) for a one-year term. Ostad is the IABA's first woman president. With more than 1,500 members and chapters throughout the country, the IABA is one of the largest and most active minority bar associations in the United States. As the national voice of the Iranian American legal profession, the IABA is a non religious, independent professional organization that promotes programs to assist lawyers and judges in their work, provides continuing legal education, seeks to educate and inform the Iranian-American community and the community at large about important legal issues, and strives to publicize and promote the achievements of Iranian American lawyers and other legal professionals.

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1 Norman S. Rosenbaum is a partner in the Bankruptcy and Restructuring Group of Morrison & Foerster LLP in its New York office. Mr. Rosenbaum has extensive experience representing creditors and debtors in transactional, litigation, and advisory work relating to Chapter 11 cases and non-bankruptcy workouts. Alexandra Steinberg Barrage is Of Counsel in Morrison & Foerster LLP's Washington, D.C. office. Her practice focuses on bankruptcy and distressed debt trading. David Capucilli is an associate in the Bankruptcy and Restructuring Group of Morrison & Foerster's New York office.

News of the Department

Tony Princi Joins the Team

We are pleased to announce that seasoned bankruptcy partner Anthony Princi joined the firm in February, 2010. New of his arrival was covered in the February 24, 2010 issue of *Bankruptcy Law 360*:

"The opportunities to help clients develop and navigate their restructuring and bankruptcy strategies in today's marketplace are immense. It's an exciting time to be joining Morrison & Foerster's highly regarded bankruptcy and restructuring practice," Princi said.

"We are thrilled to have Tony join our team. As we expand our bankruptcy and restructuring practice, particularly in New York, the center of the restructuring world, adding an attorney of his caliber and experience is an important step in our growth plans," Larren Nashelsky, co-chair of Morrison & Foerster's bankruptcy and restructuring practice, said.

"His expertise on creditor-side restructurings and experience representing financial institutions, including hedge funds and private equity funds, as well as ad hoc committees, broadens our practice capabilities and client base," Nashelsky said.

2 *In re Philadelphia Newspapers, LLC*, No. 09-4266 (3d Cir. March 22, 2010)(hereinafter "*Philadelphia Newspapers*").

3 *Bank of N.Y. Trust Co., N.A. v. Official Unsecured Creditors' Comm. (In re Pacific Lumber Co.)*, 584 F.3d 229 (5th Cir. 2009)(hereinafter "*Palco*").

4 *In re Lehman Brothers Holdings Inc. (Lehman Brothers Special Financing Inc. v. BNY Corporate Trustee Services Limited)*, 422 B.R. 407 (Bankr. S.D.N.Y. 2010)(hereinafter "*Dante*").

5 *In re Lehman Brothers Holdings Inc.*, Case No. 08-13555, 2010 Bankr. LEXIS 1260 (Bankr. S.D.N.Y. May 5, 2010)(hereinafter "*Swedbank*").

6 Proposed Bankruptcy Rule 2019 defines "disclosable economic interest" as "any claim, interest, pledge, lien, option participation, derivative instrument, or any other right or derivative right that grants the holder an economic interest that is affected by the value, acquisition, or disposition of a claim or interest." *See* http://bankruptcy.cooley.com/uploads/file/August%20 2009%20Proposed%20BK_Rules_Forms_ Amendments.pdf

7 *In re DBSD North America, Inc.*, 421 B.R. 133 (Bankr. S.D.N.Y. 2009)(hereinafter "*DBSD I*"), *aff'd*, *Dish Network Corp. v. DBSD N. Am., Inc. (In re DBSD N. Am., Inc.)*, 2010 U.S. Dist. LEXIS 33253 (S.D.N.Y. Mar. 24, 2010)(hereinafter "*DBSD II*", together with *DBSD I*, the "DBSD decisions").

8 *In re Charter Communications*, *et al.*, 419 B.R. 221 (Bankr. S.D.N.Y. 2009) (hereinafter "*Charter Communications*").

9 *In re Spectrum Jungle Labs Corp.*, *et al.*, Case No. 09-50455 (RBK) (Bankr. W.D. Tex. 2009) (hereinafter "*Spectrum Brands*").

10 11 U.S.C. § 363(k).

11 11 U.S.C. § 1129(b)(2)(A)(i)-(iii)).

12 The "safe harbor" provisions were strengthened and expanded in 2005 under the Bankruptcy Abuse and Prevention and Consumer Protection Act of 2005. For example, section 560 was expanded to cover the liquidation and acceleration of swap agreements:

The exercise of any contractual right of any swap participant . . . to offset or net out any termination values or payment amounts arising under or in connection with the termination, liquidation, or acceleration of one or more swap agreements shall not be stayed, avoided, or otherwise limited by operation of any provision of this title or by order of a court or administrative agency in any proceeding under this title.

11 U.S.C. § 560.

13 *Id.* at 421.

14 The transaction documents governing the notes stipulated that they were subject to English law.

15 *In re Lehman Brothers Holdings Inc. (Lehman Brothers Special Financing Inc. v. BNY Corporate Trustee Services Limited)*, 422 B.R. 407 (Bankr. S.D.N.Y. 2010).

16 Ipso facto clauses are contract clauses that seek to modify or terminate the relationships of contracting parties to the filing of a bankruptcy petition, and are generally held to be unenforceable. *See id.* at 415 (internal citations omitted).

17 *Id.* at 420-21.

18 *Id.*

19 *Id.* at 421.

20 *Id.*

21 11 U.S.C. § 553(a).

22 *In re Steines*, 285 B.R. 360, 362 (Bankr. D. N.J. 2002); *see also Scherling v. Hellman Elec. Corp. (In re Westchester Structures)*, 181 B.R. 730, 739 (Bankr. S.D.N.Y. 1995)(noting that mutuality is found only when the debts / credits exist between "the same parties, standing in the same capacity.").

23 *See* 11 U.S.C. § 506(a).

24 *See SemCrude*, 2009 WL 68873, *6 ("The overwhelming majority of courts to consider the issue have held that debts are mutual only if "they are due to and from the same persons in the same capacity.")(citations omitted).

25 *In re Lehman Brothers Holdings Inc.*, No. 08-13555 (JMP), 2010 Bankr. Lexis 1260 (Bankr. S.D.N.Y. May 5, 2010) (hereinafter, "*Lehman*"). The Lehman entity Lehman Brothers Holdings Inc. shall be referred to herein as "LBHI" or the "Debtor" (LBHI, together with its affiliated debtors, the "Debtors").

26 *Id.* at *13.

27 *Id.* at *27.

28 The conversion of this amount was not provided in the opinion. All other conversion amounts referenced herein are based on the conversion amounts cited in the opinion.

29 *Lehman* at *16.

30 *Id.* at *14.

31 *Id.* at *17.

32 *Id.*

33 *Id.* at *19.

34 *Id.* at *16.

35 *Id.* at *20.

36 *Id.*

37 *Id.* at *20-21.

38 *Id.* at *21.

39 *Id.* The court also rejected Swedbank's argument that Congress intentionally removed the mutuality requirement relating to automatic stay exceptions in the Bankruptcy Code. Swedbank pointed to amendments to the Financial Netting Improvement Act of 2006 that substituted the phrase "mutual debt and claim" in certain subsections of section 362(b) with the phrase "any contractual right" in arguing that Congress eliminated the mutuality requirement from the safe harbor exceptions to the automatic stay. The court viewed such amendments as "technical" and, looking to the legislative history surrounding the amendments, declined to read such amendments as "authority for so fundamental a change in creditor rights." *Id.* at *25.

40 *See* Collier on Bankruptcy, ¶ 553.03[3][b] at 553-28 (15th ed. rev. 2009).

41 The *Lehman/Swedbank* decision is careful to note that its holding does not cover a right of setoff with respect to funds in a general deposit account that is not identified as arising under a swap agreement. The Lehman bankruptcy court will be considering this issue in a separate setoff dispute between LBHI and Bank of America, N.A. *See In re Lehman Brothers Holdings Inc.*, 2010 Bankr. Lexis 1260, at *10, n.12.

42 Although courts are not unanimous on this point, certain courts have held that remedies for actual damages, and where appropriate, punitive damages under section 362(k) of the Bankruptcy Code are applicable both to individual and corporate debtors. *See, e.g., In re Atl. Bus. & Cmty. Corp.*, 901 F.2d 325, 329 (3d Cir. 1990)(although former § 362(h) of the Code refers to individual, it is also applicable to corporate debtor); *Budget Serv. Co. v. Better Homes of Va. Inc.*, 804 F.2d 289, 292 (4th Cir. 1986)(same); *In re APF Co.*, 264 B.R. 344, 358-59 (Bankr. D. Del. 2001)(same); *but see In re Chateaugay Corp.*, 920 F.2d 183, 185-86 (2d Cir. 1990)(bankruptcy court may impose sanctions pursuant to former § 362(h) only for natural persons).

43 Currently, Rule 2019 provides that any "committee" representing creditors in a bankruptcy proceeding must file a verified Rule 2019(a) statement and publicly disclose: (i) the name and address of the creditor or equity security holder; (ii) the nature and amount of the claim or interest and the time of acquisition thereof unless it is alleged to have been acquired more than one year prior to the filing of the petition; (iii) a recital of the pertinent facts and circumstances in connection with the employment of the entity . . . ; and (iv) . . . the amounts of claims or interests owned by the entity, the members of the committee or the indenture trustee, the times when acquired, the amounts paid therefor, and any sales or other disposition thereof. *See* http://bankruptcy.cooley.com/uploads/file/August%202009%20Proposed%20BK_Rules_Forms_Amendments.pdf. If a court determines that a committee has failed to make these required disclosures, the court may refuse to permit the committee to be heard further or to intervene in the bankruptcy case, in addition to invalidating any actions taken by the committee. *Id.* at Rule 2019(b).

44 *See, e.g., Rule 2019 Order, In re Accuride Corp.*, Case No. 09-13449, (Bankr. D. Del. Jan. 22, 2010) (Shannon, J.)(ordering ad hoc noteholder group to comply with Bankruptcy Rule 2019 by filing a full and complete Rule 2019 statement and prohibiting further participation in bankruptcy cases pending compliance with Rule 2019) *; see also In re Washington Mutual, Inc.*, 419 B.R. 271 (Bankr. D. Del. 2009)(entities constituting noteholders group were subject to Rule 2019 and were compelled to provide certain disclosures; *In re Northwest Airlines Corp.*, 363 B.R. 701 (Bankr. S.D.N.Y. 2007) (committee required to comply with Rule 2019's disclosure requirements).

45 *See, e.g., In re Philadelphia Newspapers, LLC*, 442 B.R. 553, 563 (Bankr. E.D. Pa. 2010) (plain meaning of Rule 2019 renders it inapplicable to steering group consisting of lenders holding a majority of the debtors' outstanding secured debt); *In re Premier Int'l Holdings*, 423 B.R. 58 (Bankr. D. Del. 2010)(informal, ad hoc committee of bondholders not appointed by the United States Trustee or by order of the court, and had no authority to represent any persons other than themselves, did not qualify as a "committee" and did not have to file Rule 2019 statement); *In re Scotia Dev., LLC*, Case No. 07-20027, 2007 WL 1192137 (Bankr. S.D. Tex. April 20, 2007)(noteholder group was not a "committee" within meaning of Rule 2019 and therefore not subject to rule's disclosure requirements).

46 *See* Proposed Bankruptcy Rule 2019(b) at http://bankruptcy.cooley.com/uploads/file/August%202009%20Proposed%20BK_Rules_Forms_Amendments.pdf.

47 *Id.* at Proposed Bankruptcy Rule 2019(a).

48 *Id.* at 2019(c)(2)(A)-(C).

49 *See* http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/Overview/STCommitteeMtg061410.aspx

50 *See Report to Standing Committee by Bankruptcy Rules Advisory Committee*, Memorandum dated May 27, 2010, at 7-8 found at http://www.lsta.org/WorkArea/showcontent.aspx?id=10462

51 *See* http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/PendingRules.aspx

52 *See id.* at 5.

53 *In re Granite Broadcasting Corp.*, 369 B.R. 120 (Bankr. S.D.N.Y. 2007).

54 *DBSD I*, 421 B.R. at 134.

55 *Id.*

56 *Id.* at 135.

57 *Id. at 137.*

58 *Id.*

59 118 B.R. 282 (Bankr. W.D. Pa. 1990)(Cosetti, J.) (hereinafter "*Allegheny*").

60 *DBSD I*, 421 B.R. at 135.

61 *Id.* at 140.

62 *Id.* at 143.

63 *Id.* at 142.

64 *Id.*

65 Section 1123(a) of the Bankruptcy Code provides that a plan "shall . . . provide adequate means for the plan's implementation, such as . . . curing or waiving any default" and section 1123(b) provides that a plan "may leave unimpaired any class of claims . . . or of interests."

66 *In re Charter Communications*, *et al.*, 419 B.R. 221 (Bankr. S.D.N.Y. 2009) (hereinafter "*Charter Communications*").

67 *Id.* at 230.

68 The *Charter Communications* plan also sought to deleverage approximately $8 billion of debt.

69 *Charter Communications*, 419 B.R. at 243.

70 *Id.*

71 *In re Spectrum Jungle Labs Corp.*, *et al.*, Case No. 09-50455 (RBK) (Bankr. W.D. Tex. 2009) (hereinafter "*Spectrum Brands*").

72 *See* Joint Plan of Reorganization for Spectrum Jungle Labs Corporation, et al., Debtors, at Article 3.3, Case No. 09-50455 (RBK) (Bankr. W.D. Tex. 2009) [Docket No. 564].

73 *See* Senior Secured Lenders' Objection to First Proposed Disclosure Statement With Respect to Joint Plan of Reorganization of Spectrum Jungle Labs Corporation, Et Al., Debtors, at P. 19-20, Case No. 09-50455 (RBK) (Bankr. W.D. Tex. 2009) [Docket No. 400].

74 *See* Debtors' Memorandum of Law in Support of Confirmation of the Debtors' Joint Plan of Reorganization, and Response to the Term Lenders' Objections to the Plan, at page 2, Case No. 09-50455 (RBK) (Bankr. W.D. Tex. 2009) [Docket No. 786]

75 *See, e.g.*, Second Modification to Joint Plan of Reorganization of Spectrum Jungle Labs Corporation, et al., Debtors, Case No. 09-50455 (RBK) (Bankr. W.D. Tex. 2009) [Docket No. 979]

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