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The Terrible *TOUSAs*: Opinions Test the Patience of Corporate Lending Practices

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INTRODUCTION

Another bankrupt company hardly makes news in this economy; a case built on liens, loans, and lawsuits does not strike a chord of the extraordinary. The bankruptcy case of troubled homebuilder TOUSA, Inc. ("TOUSA")[1], however, is not one for the mundane. The case itself is a testament to the economic crisis that has gripped the country since 2007. Indeed, the facts—methodically analyzed under a judicial microscope—percolated from the unprecedented burst of the housing bubble. TOUSA (the parent corporation) entered into a rather complicated financing arrangement to fund a litigation settlement stemming from a failed joint venture.[2] Under the settlement agreement, TOUSA agreed to pay the various joint-venture lenders more than $421 million. In order to finance the settlement, TOUSA obtained a $200 million first-lien facility[3] and a $300 million second-lien facility from a group of new lenders.[4] TOUSA's subsidiaries served as co-borrowers (with their parent) under the new loan agreements despite the fact that they were not

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[1] Official Comm. of Unsecured Creditors of TOUSA, Inc. v. Citicorp N. Am. Inc. (*In re* TOUSA, Inc.), 422 B.R. 783 (Bankr. S.D. Fla. 2009) [hereinafter *TOUSA I*].

[2] *Id.* at 786–87.

[3] Typically, the first-lien debt facility is generally a working capital loan that consists of a revolving-loan facility, sometimes paired with a term loan. First-lien lenders generally require a first-priority lien on the borrower's assets that puts them ahead of any other creditors on the borrower's assets. *Id.* at 789. Second-lien lenders are next in line after the first-lien lenders. *Id.*

[4] *Id.* at 789.

defendants to the joint-venture litigation.[5] TOUSA and the subsidiaries (the "Conveying Subsidiaries") secured the new financing with a lien on substantially all of their assets, and the financing closed on July 31, 2007.[6]

Had this been an ordinary company obtaining financing in ordinary times, probably little else would have come of this arrangement. But TOUSA was a homebuilder, and this massive transaction closed just weeks before the housing bubble began to implode in 2007. By January 2008, TOUSA and most of its subsidiaries had filed for bankruptcy.[7] Shortly thereafter, the TOUSA Committee of Unsecured Creditors (the "Committee") initiated a lawsuit to "claw back"[8] the loan proceeds related to the joint-venture settlement. In July 2009, Judge John Olson presided over a thirteen-day trial in the bankruptcy court for the Southern District of Florida. In October 2009, he released his 182-page opinion, concluding that: (1) the Conveying Subsidiaries were insolvent both before and after the closing of the joint-venture settlement, which; (2) left the Conveying Subsidiaries with unreasonably small capital; and (3) did not provide those subsidiaries with reasonably equivalent value in exchange for incurring the obligations and granting the liens.[9]

In addition, the court noted that a savings clause built into the financing agreement and aimed at insulating the lenders from subsequent fraudulent-transfer actions was invalid and provided no protection to the new lenders that had received first and second liens on the Conveying Subsidiaries' assets (the "New Lenders").[10] The opinion also contained a meticulous discussion of the

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[5] *Id.* at 787.

[6] *Id.* at 789.

[7] *Id.* at 801. Although the cases were jointly administered for convenience, the bankruptcies of the individual entries were not substantively consolidated. *See generally TOUSA I.* Substantive consolidation "treats separate legal entities as if they were merged into a single survivor left with all the cumulative assets and liabilities." *In re* Owens Corning, 419 F.3d 195, 205 (3d Cir. 2005).

[8] *Id.* at 787. In bankruptcy cases, the power to recover property for the estate is vested in either the trustee or, in chapter 11 cases, the debtor-in-possession. 11 U.S.C. § 548 (2006). In chapter 11 business bankruptcies, the bankrupt company is referred to the debtor in possession as it attempts to reorganize its debts. *Id.* § 1101(1). Consequently, the debtor-in-possession (as represented by counsel) may initiate an avoidance action. The debtor-in-possession is not omnipotent, however. If the debtor-in-possession exhibits "fraud, dishonesty, incompetence, or gross management," a trustee may be appointed to replace the debtor-in-possession. *Id.* § 1104(a)(1). Additionally, the bankruptcy court may allow the committee of unsecured creditors to pursue actions on behalf of the bankrupt estate since any recovery maximizes the amount of assets available to the general creditor pool. *See, e.g.*, Official Comm. of Unsecured Creditors of Cybergenics Corp. *ex rel.* Cybergenics Corp. v. Chinery, 330 F.3d 548, 554 (3d Cir. 2003) (permitting the committee of creditors to pursue a derivative suit on behalf of the estate); *see also*11 U.S.C. §1109(b).

[9] *Id.* at 786.

[10] *Id.* at 863–64.

expert testimony in the case and the events surrounding the decline and near-epic failure of the real estate market during the time that the transaction took place.[11] Consequently, the court avoided the obligations incurred and the liens granted by the Conveying Subsidiaries and required the joint-venture lenders to return more than $400 million of the loan proceeds that they had received in the settlement of the joint-venture litigation.[12]

Various commentaries (from scholars and practitioners to a cadre of lending groups) cast the opinion as radical and overreaching in most, if not all, respects.[13] Predictably, the old and New Lenders appealed to the District Court for Southern District of Florida.[14] Because of the various defendants involved, and a voluminous record, the District Court split the issues among two judges and heard oral argument in a joint session. Judge Alan Gold handled the appeal relating to the old lenders (who were ordered to disgorge the $421 million in joint-venture settlement proceeds), while another appeal (involving the New Lenders who financed the settlement) was directed to Judge Adalberto Jordan.[15]

While some expected Judges Jordan and Gold to issue their opinions simultaneously, in February 2011, Judge Gold released the first in what is likely to be a series of *TOUSA* appellate opinions. The result was nearly (if not equally) as shocking as *TOUSA I*. Judge Gold's ruling ("*TOUSA II*"), reversed the bankruptcy court on every major issue, and, in a rather extraordinary procedural punch, quashed the bankruptcy court's opinion instead of

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11 *Id.* at 790–839.

12 *Id.* at 887.

13 Jo Ann J. Brighton, *TOUSA: Do Lenders Have the Responsibility to Protect Borrowers From Their Own Bad Judgment?*, 29 AM. BANKR. INST. J., 2010, at 18, 18; Arthur F. Coon and Kristin B. Peer, *The TOUSA, Inc. Bankruptcy Decision: Anatomy and Implications of a Landmark Creditors Rights Case*, 1, http://www.clta.org/for-members/LegalCenter/article_tousa-MillerStarr_2010.pdf.

14 The Southern District of Florida takes a unique approach to bankruptcy appeals. The district court has limited the number of district court judges presiding over bankruptcy appeals to three judges. This approach effectively created a mini-Bankruptcy Appellate Panel to "ensure that the judge hearing the appeal will have some interest and experience in reviewing bankruptcy appeals." Jessica D. Gabel and Samuel R. Maizel, *Bankruptcy Appeals Manual: Winning Your Bankruptcy Appeal, Second Edition*, AM. BANKR. INST., 2010, at 143.

15 Besides the fraudulent transfer claims, the Committee also brought claims against the first- and second-lien term lenders to avoid certain tax refunds as unlawful preferences under 11 U.S.C. § 547. All appeals relating to the first- and second-lien term lenders on appeal were before Judge Jordan. *See In re* TOUSA, Inc., No. 10-60017-CIV/GOLD, 2011 WL 522008, at *15 n.33 (S.D. Fla. Feb. 11, 2011) *rev'g in part TOUSA I*, 422 B.R. 783 (Bankr. S.D. Fla. 2009) [hereinafter *TOUSA II*]. A separate appeal from a different underlying bankruptcy proceeding was transferred to Judge Federico Moreno because it involves "distinct legal questions of Delaware law on the fiduciary duties of corporate officers and directors." *Id* .at *3.

remanding the case back to the bankruptcy court to enter new factual and legal findings consistent with the District Court opinion.[16] In his ruling, Judge Gold also harshly criticized the bankruptcy court for adopting many of the Committee's post-trial submissions in the *TOUSA I* opinion.[17]

This Article examines the two decisions (*TOUSA I* and *TOUSA II*) for their legal analyses and macro-lending[18] implications. It traces the factual background of the case, compares and contrasts the legal reasoning behind the opinions, and it also considers the case's inevitable turn in the 11th Circuit.[19]

I. FROM BOOM TO BUST TO BANKRUPTCY

A. The Overview

TOUSA and its subsidiaries designed, constructed, marketed, and sold residential real estate developments and the homes eventually built within those developments.[20] The sequence of events that preceded TOUSA's bankruptcy began in June 2005.[21] In short, Homes LP (a wholly-owned subsidiary of TOUSA) formed a joint venture with a third party to acquire certain homebuilding assets in Florida (the "Transeastern Joint Venture").[22] To finance the acquisition, a group of lenders (the "Transeastern Lenders") funded approximately $560 million to the joint venture, and TOUSA provided a carveout and completion guarantee of the obligations under the Transeastern loan.[23] Unfortunately, the Transeastern Joint Venture proved to be a losing proposition. As 2006 drew to a close, the Transeastern Lenders sued both the joint venture and TOUSA for defaulting under the credit agreement. The

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16 *Id.* at *52.

17 *Id.* at *21–22.

18 Macro-lending is a term arrived at by the author and inspired by micro-lending organizations that loan very small amounts of money to impoverished and resourced challenged entrepreneurs under the theory that the tiny loan may lead to a successful business and repayment of that debt. The loan recipients are often referred to as "fledgling" entrepreneurs because of the sink-or-swim nature of small business ideas. *See, e.g.*, THE HORIZON FOUNDATION, *Sustaining Charitable Projects Thru Microlending*, http://www.horizonsfoundation.com/micro-lending.html (last visited on Feb. 20, 2011). In contrast, macro-lending features large-scale loans to struggling businesses (more akin to distressed lending) that function to rebound the company and sometimes its industry at a macro-economic level. Thus, macro-lending situations include loans to carmakers to stave off the collapse of the Detroit automotive industry and homebuilders like TOUSA to soften the burst of the housing bubble.

19 A very anticipated appeal among bankruptcy scholars.

20 *TOUSA I*, 422 B.R. 783, 787 (Bankr. S.D. Fla. 2009).

21 *Id.* at 787–88.

22 *Id.* at 787

23 *Id.* at 788.

Transeastern Lenders sought repayment of the Transeastern loans and attempted to enforce the guarantees provided by TOUSA.[24]

With the prospect of costly litigation looming, the parties agreed to a settlement in early 2007. The terms of the settlement included a payment of more than $420 million to the Transeastern Lenders.[25] To finance this arrangement in June 2007, TOUSA entered into $500 million first lien and second credit facilities in with the New Lenders.[26] As a condition precedent to the settlement, TOUSA pledged substantially all of its assets and required its subsidiaries to provide secured guarantees for the first- and second-lien obligations.[27]

An important piece to the subsequent bankruptcy litigation rested on the fact that none of the Conveying Subsidiaries had been partners in the Transeastern Joint Venture, nor had they guaranteed the Transeastern Joint Venture's debt to the Transeastern Lenders.[28] Yet, these entities became obligated for the payment of these new loans and granted liens on substantially all of their assets to fund the settlement.[29]

By January 2008, less than six months after the settlement, TOUSA and its subsidiaries filed for chapter 11 bankruptcy protection in the Southern District of Florida.[30] Acting on behalf of TOUSA's estate, the Committee instituted an adversary proceeding against the New Lenders to avoid the $500 million in liens granted by TOUSA's subsidiaries as fraudulent transfers.[31] The Committee also sued all the lenders who participated in the settlement financing, including the Transeastern Lenders who received the proceeds of the transaction.[32]

Judge Olson presided over a relatively lengthy trial.[33] In an extensive opinion, the bankruptcy court concluded that the settlement proceeds that

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24 *Id.* at 789.
25 *Id.* at 786.
26 *Id.* at 786–87.
27 *Id.* at 789–90.
28 *Id.* at 787. Equally important is the fact that the bankruptcies of the TOUSA entities—for various reasons—were not substantively consolidated.
29 *Id.* at 789–90.
30 *Id.* at 787.
31 *Id.* at 786.
32 *Id.* at 787.
33 *Id.* at 786.

repaying the Transeastern Lenders[34] and the underlying liens securing the proceeds amounted to constructive fraudulent transfers. The bankruptcy court concluded that TOUSA was insolvent prior to the July 31 Transaction, and that the Transeastern Lenders failed to investigate diligently TOUSA solvency before accepting the settlement proceeds.[35] The court further found, in dicta, that the "savings clauses" contained in the agreements—intended to shield the lenders from claims that the July 31 Transaction sunk TOUSA into insolvency—were invalid; consequently, the lenders were unable to seek the shelter of their contractual safe harbors.[36]

B. *The Boom*

In its heyday, TOUSA grew rapidly through a series of acquisitions.[37] By the end of 2004, TOUSA was the thirteenth largest homebuilder in the United States.[38] TOUSA and its subsidiaries expanded their portfolios beyond the design, building, and marketing of residential real estate, and moved into title insurance and mortgage brokerage services.[39] After 2004, to facilitate its rapid

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34 The Transeastern Lenders consisted of a squadron of credit lenders who engineered the financing of the Joint Venture including: 3V Capital Master Fund Ltd.; Atascosa Investments, LLC; Aurum CLO 2002-1 Ltd.; Bank of America, N.A.; Bear Stearns Investment Products Inc.; Black Diamond CLO 2005-1; Burnet Partners, LLC; Centurion CDO 10, Ltd.; Centurion CDO 8, Limited; Centurion CDO 9, Ltd.; Centurion CDO II, Ltd.; Centurion CDO VI, Ltd.; Centurion CDO VII, Ltd.; Centurion CDO XI, Ltd.; Deutsche Bank Trust Company Americas; Distressed High Yield Trading Ops. Fund Ltd; Eaton Vance Credit Opportunities Fund; Eaton Vance Floating-Rate Income Trust; Eaton Vance Grayson & Co.; Eaton Vance Limited Duration Income Fund; Eaton Vance Senior Debt Portfolio; Eaton Vance Senior Floating-Rate Trust; Eaton Vance Senior Income Trust; Eaton Vance VT Floating-Rate Income Fund; Farallon Capital Institutional Partners II, L.P.; Farallon Capital Institutional Partners III, L.P.; Farallon Capital Institutional Partners, L.P.; Farallon Capital Offshore Investors II, L.P.; Farallon Capital Offshore Investors, Inc.; Farallon Capital Partners, L.P.; Flagship CLO III; Flagship CLO IV; Flagship CLO V; Gleneagles CLO Ltd; Goldman Sachs Credit Partners, L.P.; Grand Central Asset Trust, CED Series; Grand Central Asset Trust, HLD Series; Grand Central Asset Trust, SOH Series; Hartford Mutual Funds, Inc., on behalf of The Hartford Floating Rate Fund by Hartford Investment Management Company, their Sub- Advisor; Highland CDO Opportunity Fund, Ltd.; Highland Credit Opportunities CDO Ltd.; Highland Floating Rate Advantage Fund; Highland Floating Rate LLC; Highland Legacy Limited; Highland Offshore Partners, L.P.; Jasper CLO, Ltd.; JPMorganChase Bank, N.A.; Liberty CLO, Ltd.; LL Blue Marlin Funding LLC; Loan Funding VII, LLC; Merrill Lynch Credit Products, LLC; Ocean Bank; The Quadrangle Master Funding Ltd.; Riversource Floating Rate Fund; Rockwall CDO, Ltd.; Sequils-Centurion V, Ltd.; Silver Oak Capital, LLC; Stedman CBNA Loan Funding LLC; The Foothills Group, Inc.; Tinicum Partners, L.P.; Van Kampen Dynamic Credit Opportunities Fund; Van Kampen Senior Income Trust; Van Kampen Senior Loan Fund; and Wells Fargo Bank, N.A. *See TOUSA II*, No. 10-60017-CIV/GOLD, 2011 WL 522008, at *7 n.16 (S.D. Fla. Feb. 11, 2011).

35 *TOUSA I*, 422 B.R. 783, 858, 872 (Bankr. S.D. Fla. 2009).

36 *Id.* at 863–64.

37 *Id.* at 787.

38 Coon & Peer, *supra* note 13, at 1.

39 *Id.*

growth, TOUSA took on more than $1 billion of unsecured bond debt.[40] TOUSA positioned itself as the obligor on the bond debt, and many of its subsidiaries accepted joint and several liability as guarantors.[41] Those bondholders acquired a senior right to payment from the assets of all of these subsidiaries.[42] As of July 31, 2007 (the closing date of the settlement), the principal outstanding on the bonds approximated $1.061 billion.[43]

C. The Beginning of the Bust

In June 2005, TOUSA announced plans to acquire Transeastern Properties, Inc.[44] The parties structured the acquisition as a joint venture between TOUSA Homes LP, a wholly-owned TOUSA subsidiary, and other entities owned by Transeastern's two majority shareholders, Arthur and Edward Falcone ("Falcone Entities").[45] After the Transeastern acquisition was completed in August 1, 2005, TOUSA became the eleventh largest homebuilder in the United States.[46]

TOUSA and the Falcone Entities funded the Transeastern Joint Venture with $675 million of third-party debt capacity, a $20 million subordinated loan from Homes LP, and $165 million of equity, of which Homes LP contributed $90 million in cash and the Falcone Entities contributed $75 million in property.[47] In addition, a set of carve out guarantees required TOUSA, Homes LP, and the Falcone Entities to indemnify the lenders for any losses incurred due to fraud, material misrepresentation, misappropriation of funds, improper use of insurance proceeds, internal misconduct or waste with respect to the collateral, and/or the borrowers' failure to maintain insurance or pay taxes.[48]

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40 *TOUSA I*, 422 B.R. at 787.

41 *Id.* at 787–88.

42 *Id.* at 787.

43 *Id.*

44 Coon & Peer, *supra* note 13, at 1.

45 *Id.*

46 *Id.* at 2.

47 *TOUSA I*, 422 B.R. at 788. In connection with the Transeastern credit agreements, the Transeastern lenders also obtained three unsecured completion guaranties from TOUSA and Holmes LP, as well as three unsecured carve-out guaranties from TOUSA, Holmes LP, and the Falcone entities. *Id.* at 788.

48 Coon & Peer, *supra* note 13, at 2 n.4 ("The Completion Guarantees made TOUSA and Homes LP liable to pay certain project costs of development already in process at the time of the acquisition, in the event the Transeastern JV failed to do so. Under this guarantee, TOUSA and Homes LP were also liable for satisfaction of any mechanics' liens."). A carve out guaranty (also known as a "bad boy" guaranty) is employed where a loan is non-recourse except on occurrence of the specified events the lender wishes to discourage—such as bankruptcy, false representations, or financial reporting, the wrongful transfer of collateral, or misappropriation of rents, security deposits, reserve accounts or insurance proceeds. *Rick L.*

Although the Transeastern Joint Venture initially showed promise, the momentum of a housing market in freefall would eventually swallow any success.[49] From decreased buyer demand to devastating storms in the Gulf region, the housing industry began to crumble, and TOUSA could not escape the coming chaos.[50] In May 2006, TOUSA announced that its previous projections for Transeastern deliveries that year should be decreased by approximately 20%.[51] In June 2006, TOUSA also announced that its 2006 second-quarter sales would be down 25–40% as compared to the second-quarter 2005 sales.[52] Finally, TOUSA announced revised, lower annual-net-income guidance for 2006 and indicated that it continued to expect difficult market conditions for the foreseeable future.[53]

On a separate course of disaster, customers began to cancel their sales contracts. With the rising number of canceled contracts, Transeastern compiled new financial projections in September 2006.[54] The newly revised projections indicated that future sales and deliveries could not support the Transeastern Joint Venture's existing capital structure and that the joint venture would soon be in default of the Transeastern Loans.[55] Deutsche Bank, the Administrative Agent for the Transeastern Lenders, sent letters dated October 31, 2006, and November 1, 2006, to TOUSA and Homes LP demanding payment under the Transeastern Guaranties.[56] In November 2006, the Transeastern Joint Venture's management concluded that the joint venture would not have the ability to continue as a going concern under its current debt structure and announced that it would write off $143.6 million of its investment in the Transeastern Joint Venture.[57]

On November 28, 2006, TOUSA and Homes LP filed a complaint against Deutsche Bank in Broward County, Florida, seeking a declaratory judgment

Knuth, The Commercial Loan Guaranty—Types & Techniques, UTAH BAR J., (July 16, 2008), http://webster.utahbar.org/barjournal/2008/07/the_commercial_loan_guaranty_t.html.

49 *TOUSA I*, 422 B.R.at 783, 788.

50 *Id*; *see, e.g.*, *Long-Term Impact of Katrina Seen on Housing, Note Experts*, KITCHEN & BATH DESIGN NEWS, (Nov. 1, 2005), http://www.allbusiness.com/construction/construction-materials-components/10577901-1.html.

51 Disclosure Statement of the Debtor TOUSA, Inc. at 32, *TOUSA I*, 422 B.R 783 (Banlr. S.D. Fla. 2009) [hereinafter "TOUSA Disclosure Statement"].

52 *Id.*

53 *Id.*

54 *Id.*

55 *Id.*

56 *TOUSA I*, 422 B.R. 783, 788 (Bankr. S.D. Fla. 2009).

57 *Id.*

that their liability had not been triggered under the completion guarantees or the carve-out guarantees.[58] For its part, Deutsche Bank brought its own suit against TOUSA and Homes LP in New York state court, in December 2006, claiming breaches of the carve-out guarantees and completion guarantees against TOUSA and Homes LP.[59]

D. The July 31 Transaction

By Spring 2007, the parties to the dueling Transeastern Joint Venture litigations (the Florida declaratory action and the NY breach of contract action) entered global settlement discussions.[60] In June 2007, TOUSA publicly announced that it had reached an agreement with Deutsche Bank to settle all disputes regarding its liability for the failed Transeastern Joint Venture.[61] The global settlement also resolved certain claims between TOUSA and the Falcone Entities.[62] The settlement agreement was finalized and executed on July 31, 2007 (the "July 31 Transaction").[63]

In order to finance this settlement, TOUSA amended its existing $800 million revolver with Citicorp by reducing the available credit to $700 million.[64] This enabled TOUSA to obtain two new secured loans, one for $200 million and one for $300 million.[65] The term loan credit agreements for each

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58 *Id.* at 789.

59 Deutsche Bank Trust Co. Americas v. Technical Olympic USA, Inc. and TOUSA Homes LP, No. 06/604118 (N.Y. Sup. Ct. Aug. 2, 2007); Deutsche Bank Securities Inc. v. Technical Olympic USA, Inc., EH/Transeastern, LLC, and TE/TOUSA Senior, LLC, No. 600974/07 (N.Y. Sup. Ct. Aug. 2, 2007).

60 Coon & Peer, *supra* note 13, at 2.

61 TOUSA Disclosure Statement, *supra* note 51, at 34 ("Under the Global Settlement, the senior Transeastern lenders received $422.8 million in cash including interest and the Senior and Junior Mezzanine Debt was satisfied for $153.75 million (plus legal fees and expenses) in the form of the following consideration: Subordinated Notes ($20 million); convertible preferred stock (with a liquidation preference of $117.5 million); and warrants to purchase common stock (valued at $16.25 million). In exchange, Deutsche Bank released TOUSA and Homes LP from all claims relating to the Transeastern JV, including all claims relating to the carve out and completion guarantees. Certain of the Debtors also acquired all of the assets of the Transeastern JV as part of the settlement.

62 *Id.* ("[T]he parties agreed that Falcone would give up its equity interest in the Transeastern JV, and the Transeastern JV would surrender its interest in most of its optioned properties owned by Falcone. In addition, TOUSA agreed to indemnify Falcone for any third party claims relating to the Carve-Out Guarantees and release Falcone from a covenant not to compete.").

63 *TOUSA I*, 422 B.R. at 789.

64 Coon & Peer, *supra* note 13, at 3.

65 *Id.* In connection with the amended revolver and new loans, TOUSA and its subsidiary co-borrowers were required to pledge substantially all of their assets as security, and they mortgaged substantially all of their homebuilding assets in favor of Citicorp and the other lenders. The result was that while TOUSA's

loan required, among other things, that the funds be used to pay the Transeastern Lenders.[66] The transaction's similarity to the mythological character Hydra (multiple heads at odds with each other) is in part the source of the diametric conflict between *TOUSA I* and *TOUSA II*.

After settling the Transeastern Joint Venture lawsuits, TOUSA poured its efforts and resources into its core homebuilding business.[67] The economy, however, had already begun to fracture and in the third quarter of 2007, TOUSA was unable to warrant its solvency as required under the terms of the amended revolver.[68] On November 15, 2007, the New York Stock Exchange suspended TOUSA's listing for failure to maintain common stock standard listing requirements.[69]

E. The Bankruptcy

By the end of January, 2008, the continued decline in the homebuilding industry, together with growing liquidity concerns, led TOUSA and most of its subsidiaries to file a voluntary petition for relief under chapter 11 of the Bankruptcy Code.[70] On July 14, 2008, the Committee filed its adversary proceeding.[71] The Committee sought to avoid the liens and obligations in the amount of $500 million granted by the Conveying Subsidiaries to the New Lenders less than 6 months before their bankruptcy filings in January 2008.[72] The Committee also sought to recover from the Transeastern Lenders the $420 million paid in settlement proceeds, as fraudulent transfers.[73]

In a telling manner of things to come, the trial took place in Miami during thirteen sweltering days in July and August 2009.[74] It consisted of nearly twenty live witnesses, fifty percipient witness deposition transcripts, numerous

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subsidiaries themselves had no liability to the Transeastern Lenders, all of their assets were nonetheless pledged to secure the new term loans funding the settlement. *Id.*

[66] *TOUSA I*, 422 B.R. at 789.

[67] Coon & Peer, *supra* note 13, at 4.

[68] *Id.* Often, revolving lines of credit require that a company maintain its solvency (i.e., balance of assets to liabilities) at a certain level and provide verification of such to the lender.

[69] *Id.*

[70] *Id.*; *see also* TOUSA Disclosure Statement, *supra* note 51, at 35.

[71] TOUSA Disclosure Statement, *supra* note 51, at 35.

[72] *TOUSA I*, 422 B.R. 783, 789 (Bankr. S.D. Fla. 2009).

[73] *Id.* The Committee also sought to avoid as preferential the grant of a security interest in a $207 million tax refund to lenders of the new loans used to finance the July 31 transaction. The appeal related to the preference action under 11 U.S.C. § 547(c).

[74] Coon and Peer, *supra* note 13, at 4.

expert witness deposition transcripts, and thousands of pages of exhibits.[75] On October 13, 2009, the Bankruptcy Court issued its 182-page opinion.[76]

F. The Opinion

TOUSA I first concluded that the Conveying Subsidiaries were insolvent at the time of the July 31 Transaction, that the transaction rendered them even more insolvent, with unreasonably small capital, and unable to pay their debts as they matured.[77] As a result, the liens were avoided as fraudulent transfers, and the settlement proceeds were ordered to be recovered for the benefit of the estate.[78]

In the end, Judge Olson found that $403 million of the $421 million paid to Transeastern lenders was a fraudulent transfer and ordered that these funds be disgorged.[79] He also ordered that all of the $500 million in liens granted by the Conveying Subsidiaries be avoided.[80] Finally, he ordered the lenders to pay the Committee's attorneys' fees and expenses and for the debtors' estate be "reimbursed" for the decline in value of the assets upon which the avoided liens had been granted.[81]

G. The Appeal

The lenders appealed the bankruptcy court's decision as to its factual findings and legal conclusions.[82] As explained in the introduction of this Article, *TOUSA II* reversed and quashed the portion of *TOUSA I's* order related to Transeastern Lenders. While the district court scorched and burned the bankruptcy court's order, it arguably took the most offense with what it

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75 *Id.*

76 *Id.*

77 *TOUSA I*, 422 B.R. at 790.

78 *Id.* at 786. The court went on to hold that the interest in the tax refund given as security to the new loan lenders was perfected within the preference period (11 U.S.C. § 547(b)), at the time when the debtors were insolvent, and would enable the lenders to receive more than they would in a chapter 7 liquidation. *Id.* at 856. Therefore, the security interest in the tax refund was also to be avoided, and those portions of it which were paid out to the lenders as part of a cash collateral stipulation were ordered to be recovered. *Id.* at 786. The court held that the pledged $207 million tax refund was an improper preference. *Id.*

79 Coon & Peer, *supra* note 13, at 6.

80 *TOUSA I*, 422 B.R. at 886.

81 Coon & Peer, *supra* note 13, at 6–7.

82 *Id.* at 7.

characterized as the bankruptcy court's wholesale adoption of the Committee's proposed findings.[83]

Generally, on appeal, a bankruptcy court's findings of fact will be accorded deference by the reviewing court. On the other hand, conclusions of law receive *de novo* review.[84] To disturb a holding, the appellate court must conclude that the bankruptcy court's factual findings were "clearly erroneous."[85] A finding is clearly erroneous "when the record lacks substantial evidence to support the factual findings such that an appellate court's review of the evidence results in a firm conviction that a mistake has been made."[86]

In *TOUSA II,* the district court quashed the bankruptcy court's order in an absolute and final style. In its opinion the District Court chastised the bankruptcy court for incorporating certain proposed findings of facts submitted by the Committee, noting that the action amounts to "an abandonment of the duty and the trust that has been placed in the judge."[87] Some circuits take exception to the "clearly erroneous" standard of review where the bankruptcy court "merely adopt[s] in full" the prevailing party's version of the facts.[88] When those circumstances arise, the standard of review for findings of fact by the bankruptcy court is one of "special scrutiny" rather than the more deferential "clearly erroneous" standard.[89]

In the Eleventh Circuit, however, courts are less inclined to depart from the "clearly erroneous" standard.[90] The Supreme Court has adopted a view that findings will not be rejected out-of-hand when they are the product of more than just the judge's work. In fact, the findings will stand when supported by evidence.[91] On appeal, however, the district court covered its bases by

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[83] *TOUSA II,* No. 10-60017-CIV/GOLD, 2011 WL 522008, at *17 (S.D. Fla. Feb. 11, 2011).

[84] Gabel & Maizel, *supra* note 14, at 50.

[85] *TOUSA II,* 2011 WL 522008, at *20.

[86] *Id.* (citations omitted).

[87] *Id.* at *21 (quoting U.S. v. El Paso Nat'l Gas Co., 376 U.S. 651, n.4 (1964)).

[88] Gabel & Maizel, *supra* note 14, at 50 (citations omitted). In the Ninth Circuit, a bankruptcy court's findings, if merely adopted in full from the findings of fact by the prevailing party, are subject to "special scrutiny." Alvernaz Farms, Inc. v. Bank of Cal. (*In re* T.H. Richards Processing Co.), 910 F.2d 639, 643 n. 2 (9th Cir. 1990); Sealy, Inc. v. Easy Living, Inc., 743 F.2d 1378, 1385 n. 3 (9th Cir. 1984).

[89] Gabel & Maizel, *supra* note 14, at 50.

[90] Lykes Bros., Inc. v. U.S. Army Corps of Eng'rs, 64 F.3d 630, 634 (1995) (concluding that the clear error standard of review of factual findings does not change when district court adopts verbatim the findings of one of the parties, but practice is strongly disapproved).

[91] U. S. v. El Paso Natural Gas Co., 376 U.S. 651, 656 (1964). The majority articulated that findings of fact "though not the product of the workings of the district judge's mind, are formally his; they are not to be rejected out-of-hand, and they will stand if supported by evidence." *Id.* The dissent further elaborated that

articulating at each turn that the bankruptcy court's findings were not supported by the evidence.[92] Moreover, in an unfiltered fashion, the district court hurled the specter of ethical misconduct by emphasizing that the bankruptcy court's use of the Committee's proposed factual findings violated established Supreme Court and Eleventh Circuit precedent, in addition to guidelines provided to new federal judges.[93]

The move to quash *TOUSA I* (as related to the Transeastern Lenders), however, is one not only reserved for the most extraordinary of cases, but also appears to be the rarest of resolutions. A review of bankruptcy appeals reveals fewer than five reported decisions where an order was quashed. The more common (and perhaps more defensible on appeal) approach is to remand the case to the bankruptcy court.[94] But given his determination as to the facts, Judge Gold concluded that when the "record allows but one resolution of the factual issues, remand is unnecessary."[95] It is difficult to imagine how the requisite skepticism inherent in a review of factual findings that adopt those suggested by a prevailing party could rise to the level of quashing an opinion in total and border on judicial censure. After all, "every truth has two sides; it is as well to look at both, before we commit ourselves to either."[96] That debate, however, is better saved for the Eleventh Circuit, while the meatier questions over "reasonably equivalent value," avoidability of transfers, and lender due diligence are the primary focus of this Article.

"[f]indings of fact should, of course, be the product of the conscientious and independent judgment of the district judge. Nevertheless, if they are supported by evidence, they are not rendered suspect simply because the trial court, as here, has accepted in toto the findings proposed by one side or the other." *Id.* at 662–63 (Harlan, J. dissenting).

92 *TOUSA II,* No. 10-60017-CIV/GOLD, 2011 WL 522008, at *28 (S.D. Fla. Feb. 11, 2011).

93 *Id.* at *21. Here, the district court cited to the perils of "ghostwriting" opinions, a caution famously noted in *In* re Colony Square, Co., 819 F.2d 272, 274–76 (11th Cir. 1987).

94 *See, e.g,, In re* Pardee, 218 B.R. 916 (9th Cir. BAP 1998) (affirming bankruptcy court's decision despite harmless error on collateral issue).

95 *TOUSA II,* 2011 WL 522008, at *22 (citations omitted).

96 Aesop, *The Mule*, in AESOP'S FABLES (620–560 BC). In addition, remand would be entirely possible and appropriate especially since practice permits remand and reassignment to another judge. *See* United States v. Remillong, 55 F.3d 572, 577–78 n. 12 (11th Cir.1995) (identifying three factors that inform a decision whether to reassign a case upon remand: "(1) whether the original judge would have difficulty putting his previous views and findings aside; (2) whether reassignment is appropriate to preserve the appearance of justice; (3) whether reassignment would entail waste and duplication out of proportion to the gains realized from reassignment").

II. ANATOMY OF THE FRAUDULENT TRANSFERS

A. 11 U.S.C. 548—Fraudulent Transfers and Obligations

During the bankruptcy litigation, the Committee sought to avoid the transfers pursuant to 11 U.S.C. § 548, which outlines when a transfer or obligation incurred by the debtor will be considered fraudulent and gives the trustee the power to avoid such transfers.[97] Section 548 provides that fraudulent transfers may be avoided if the trustee (or, in TOUSA's case, the Committee) demonstrates that the transfer was either actually or constructively fraudulent.[98] Specifically, § 548(a)(1) states:

> **(a) (1)** The trustee may avoid any transfer (including any transfer to or for the benefit of an insider under an employment contract) of an interest of the debtor in property, or any obligation (including any obligation to or for the benefit of an insider under an employment contract) incurred by the debtor, that was made or incurred on or within 2 years before the date of the filing of the petition, if the debtor voluntarily or involuntarily—
>
> > **(A)** made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted; or
> >
> > **(B)**
> >
> > > **(i)** received less than a reasonably equivalent value in exchange for such transfer or obligation; and
> > >
> > > **(ii)**—
> > >
> > > > **(I)** was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation;
> > > >
> > > > **(II)** was engaged in business or a transaction, or was about to engage in business or a transaction, for which any property remaining with the debtor was an unreasonably small capital;
> > > >
> > > > **(III)** intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured; or
> > > >
> > > > **(IV)** made such transfer to or for the benefit of an insider, or incurred such obligation to or for

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97 *TOUSA I*, 422 B.R. 783, 787 (Bankr. S.D. Fla. 2009).

98 11 U.S.C. § 548(a)(1)(A) (2006) (actual fraud); *id.* § 548(a)(1)(B) (constructive fraud).

> the benefit of an insider, under an employment contract and not in the ordinary course of business.[99]

The issues at trial centered on the two-prong test for "constructive fraud" articulated in § 548(a)(1)(B), which is more difficult to prove than § 548(a)(1)(A)'s actual fraud provision.[100] In order to exercise these powers, the Committee needed to prove, in relevant part, that the transfer at issue involved a property interest of the debtor.[101] In *TOUSA II*, the court indirectly noted that the Bankruptcy Code lacks a definition of "property," but thought that *TOUSA I*'s reliance on the dictionary definition of "property" was misplaced.[102] Whether the transfer involves the property of the Debtor is a finding of fact that is subject to review only for clear error (although the district court here employed a more rigorous review).[103]

For the court to hold the Transeastern Lenders liable for receiving the settlement proceeds, the Conveying Subsidiaries needed to have an interest in the $421 million. In *TOUSA II*, the district court reversed the bankruptcy court's finding that the transfer involved the Conveying Subsidiaries' property because it viewed those entities as having no control over the funds from the outset. In *TOUSA I*, the Committee demonstrated that the transfer of settlement proceeds involved property belonging to the Conveying Subsidiaries by a preponderance of the evidence.[104] The bankruptcy court found that standard satisfied based on evidence presented at trial. Nonetheless, reading *TOUSA I* and *TOUSA II* side-by-side on the control issue demonstrates two different conclusions drawn from substantially the same facts and even the same case law.

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99 *Id.* § 548(a)(1).

100 Richard Squire, *Shareholder Opportunism in a World of Risky Debt*, 123 HARV. L. REV. 1151, 1206 (2010) (defining constructive fraud as debtor conduct that is objectively likely to make creditors worse off).

101 *TOUSA II*, No. 10-60017-CIV/GOLD, 2011 WL 522008, at *23 (S.D. Fla. Feb. 11, 2011) ("The Transeastern Lenders correctly point out that Section 548 applies only to a transfer 'of an interest of the debtor in property.' The threshold question under this provision is whether each transfer was in fact property of the debtor. For purposes of Section 548, the fraudulent conveyance claimed against the Transeastern Lenders applied only to "property" the Conveying Subsidiaries had in the New Loan proceeds which were transferred by TOUSA to the Transeastern Lenders in settlement of the antecedent debt." (citations omitted)).

102 *Id.* at *31–32.

103 *See In re* Chase & Sanborn Corp., 813 F.2d 1177, 1180 (11th Cir. 1987) (implying that the determination that funds are a debtor's property is a factual finding); *see also In re* Gutpelet, 137 F.3d 748, 752 (3d Cir. 1998) (subjecting "bankruptcy court's finding that the [d]ebtor had an interest in the [ ][p]roperty" to review for clear error).

104 *In re* Am. Way Serv. Corp., 229 B.R. 496, 525 (Bankr. S.D. Fla. 1999).

B. Diagnosing Control Issues

Both *TOUSA I* and *TOUSA II* devote a large amount of attention to the role that control plays in finding a requisite property interest subject to a fraudulent transfer action. Both opinions rely upon the Eleventh Circuit decision *In re Chase & Sanborn Corp.*,[105] but each interprets the import of that case differently. In *TOUSA I*, the bankruptcy court rejected the Transeastern Lenders' attempt to infer that control is "an essential element of any property interest."[106] Noting the various examples of interests in property that do not "encompass control of the disposition of the property," the bankruptcy court found the Transeastern Lenders' arguments unpersuasive.[107] By contrast, the district court found control to be a paramount consideration to the question of property interest and criticized what it perceived to be the bankruptcy court's decline down a slippery slope. This would force a broader control test to

> negate the paradigmatic example of a fraudulent transfer, in which the owner of an insolvent corporation transfers corporate funds to a personal account for his personal use. In that situation, the owner, rather than the corporation, may exercise de facto control over the disbursement of the corporate funds to his own account, but no one would suggest that the owner's control negates the corporation's legal and equitable interest in the funds.[108]

Ultimately, the bankruptcy court concluded that the estates of the Conveying Subsidiaries were diminished by the payments to the Transeastern Lenders "because the Conveying Subsidiaries— which were not liable for any debt to them—received no value from the release of the Senior Transeastern Lenders' claims against others."[109]

The bankruptcy court further observed that any "control" requirement would run counter to the statutory definition of "transfer."[110] While "property" is not defined in the Code, the term "transfer" encompasses a broad definition

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105 *In re Chase & Sanborn Corp.*, 813 F.2d at 1180.

106 *TOUSA I*, 422 B.R. 783, 873 (Bankr. S.D. Fla. 2009).

107 *Id.* at 873–74.

108 *TOUSA II*, No. 10-60017-CIV/GOLD, 2011 WL 522008, at *24 (S.D. Fla. Feb. 11, 2011). The bankruptcy and district courts also disagreed on the application of the earmarking doctrine, which in practice is a defense better suited to preference actions. The bankruptcy court explained that the earmarking doctrine was inapplicable because the doctrine is "invoked when the transaction, viewed in its entirety, merely replaces one creditor with another, and does not diminish the value of the estate." *TOUSA I*, 422 B.R. at 874 n. 57 (citations omitted).

109 *TOUSA I*, 422 B.R. at 844.

110 *Id.*

that includes, "each mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with (i) property; or (ii) an interest in property."[111] Moreover, the bankruptcy court emphasized that a fraudulent transfer may occur irrespective of whether the debtor acts "voluntarily or involuntarily."[112] To the bankruptcy court, these definitions demonstrated that the Conveying Subsidiaries could own an interest in the settlement proceeds even if they had "no power to prevent some other party from transferring the property."[113]

The Conveying Subsidiaries' control over the funds that went to the Transeastern Lenders is necessary to avoid the transfer under § 548(a)(1)(B). Simply put, a debtor cannot give away what it does not own; there would be no transfer of a debtor's property. The district court vehemently disagreed with this interpretation. It reversed, holding that the terms of the July 31 Transaction and the "totality of the circumstances" surrounding the settlement and related loans were clear: (1) the proceeds were to be repaid to the Transeastern Lenders, and (2) the Conveying Subsidiaries never had any control over the proceeds the loans.[114] Consequently, once the district court determined that the Conveying Subsidiaries lacked any "interest" in such proceeds, then any subsequent payment of loan proceeds to the Transeastern Lenders in satisfaction of TOUSA's debt could not be a fraudulent transfer.[115] In other words, the district court found the easiest answer: if the Conveying Subsidiaries had nothing to give, then they could expect nothing in return.

The district court billed the facts as "undisputed" evidence of no control. It viewed the initial transfer as a transfer of liens from TOUSA (and the Conveying Subsidiaries) to the New Lenders who then exercised full legal control over the liens, thereby removing the Transeastern Lenders from the equation.[116] This is an oversimplified conclusion, but by the same token, the bankruptcy court perhaps overextended the largesse of the Conveying Subsidiaries' control. The latter result may be as much a case of lopsided pleading (an aggressive Committee asking for too much and an over-confident lender assuming too much) as one of judicial overcorrection (a bankruptcy court placing the parties back to where they were as if the July 31 Transaction

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111 *Id.* (citing 11 U.S.C. § 101(54)(D) (2006)).

112 *Id.* (citing 11 U.S.C. § 548(a)(1)).

113 *Id.* at 783.

114 *TOUSA II*, No. 10-60017-CIV/GOLD, 2011 WL 522008, at *24–25 (S.D. Fla. Feb. 11, 2011).

115 *Id.* at *25.

116 *Id.* at *24.

had never existed). To have the last word on the topic, the district court clearly stated that scolded the bankruptcy court for "compound[ing]ed its error in not applying the 'control test' by relying on the Bankruptcy Code's definition of 'transfer' and fraudulent transfers as including 'involuntary' and 'indirect transfers.'"[117] One might question the unwritten message from a district court advising a bankruptcy court *not* to look at the Bankruptcy Code for the definition of key statutory terms.

C. *The Devil is in the Details—of a Transfer*

Even though the bankruptcy court found that it could avoid the transfer of the settlement proceeds to the Transeastern Lenders under § 548, it alternatively held that § 550 of the Bankruptcy Code could be used to hold the Transeastern Lenders liable for the transfers as entities "for whose benefit" the Conveying Subsidiaries transferred the liens to the New Lenders. In doing so, the bankruptcy court coupled the various avenues of recovery to achieve a more complete satisfaction, which generally is permissible under the Bankruptcy Code.[118] Nonetheless, this approach invokes the tangled interplay of §§ 548 and 550, for which the Bankruptcy Code does not serve as the poster child of clarity. In *In re International Administrative Services, Inc.*,[119] the Eleventh Circuit permitted a bankruptcy trustee to pursue avoidance actions against subsequent transferees of the debtor's property without first chasing down the initial transfer.[120] This alone falls into step with the Bankruptcy Code, but the Eleventh Circuit expanded the ambiguities in the statute to permit the trustee to leapfrog prior transferees and sue the subsequent transferees first.[121]

TOUSA I, expanding on this already broad precedent, not only avoided the transfer of liens under §§ 544 and 548, but also ordered the Transeastern Lenders pursuant to § 550 to disgorge payments that they received related to the transfers.[122] The bankruptcy court required each set of defendants to relinquish the benefits obtained from the July 31 Transaction. This avenue of relief is somewhat tenuous. It created an almost quixotic leap that permitted the

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117 *Id.* (citing 11 U.S.C. §§ 101(54)(D), 548(a)(1)).

118 Jessica D. Gabel and Patricia A. Redmond, *Clutching a Home-Run Recovery from a Shortstop Transferree and the Single-Satisfaction Umpire*, 28 AM. BANKR. INST. J., 2009, at 18, 18; *see also In re* Prudential of Florida Leasing Inc., 478 F.3d 1291 (11th Cir. 2007).

119 *In re* Int'l Admin. Servs. Inc., 408 F.3d 689 (11th Cir. 2005) [hereinafter "IAS"].

120 *Id.* at 707–08.

121 *Id.*

122 *TOUSA I*, 422 B.R. 783, 887 (Bankr. S.D. Fla. 2009).

Committee to recover transferred property even when the "composite elements of that value must come from more than one transferee."[123] Just because the Transeastern Lenders were the last stop on the money train, it does not make them the transferee or "entity for whose benefit the transfer was made."[124]

Indeed, *IAS* allowed the trustee to skip the hassle of avoiding the transfer to the initial transferee. The case did not, however, change the fact that the initial transfer must still be an avoidable one in order to reach the subsequent transferee directly. But while the bankruptcy court in *TOUSA I* may have given § 550(a) some extra legs to run on, it did not, as the district court intoned, turn § 550 into a super-statute that lays waste to all suspect transfers.

The district court found "the bankruptcy court's overly broad interpretation of [§] 550(a)" to be one that "erroneously neglect[ed] to analyze the specific text of that provision." The bankruptcy court's interpretation of § 550(a) was broad, but the district court's analysis also lost the thrust of the *IAS* decision. *IAS* adopted a more "pragmatic and flexible approach to avoiding transfers."[125] In explaining its reasoning, the Eleventh Circuit stated:

> [I]f the Bankruptcy Code conceives of a plaintiff suing independently to avoid and recover, then bringing the two actions together only advances the efficiency of the process and furthers the protections and forgiveness inherent in the bankruptcy laws. The cornerstone of the bankruptcy courts has always been the doing of equity, and in situations such as this, where money is spread throughout the globe, fraudulent transferors should not be allowed to use § 550 as both a shield and a sword. Not only would subsequent transferees avoid incurring liability, but they would also defeat recovery and further diminish the assets of the estate. An opposite result would foster the creation of similar enterprises, for creditors would design increasingly complex transactions, with the knowledge that more transfers decrease the likelihood of a successful avoidance action. Moreover, the increased cost in litigation and the delays associated with prolonged investigations would only contribute to a debtor's shrinking estate.[126]

The district court focused on the three types of entities from whom a trustee may recover an avoidable transfer: (1) an initial transferee, (2) an entity for whose benefit the initial transfer was made, and (3) a subsequent transferee. It

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123 *Id.* at 884 (quoting Burtrum v. Laughlin (*In re* Laughlin), 18 B.R. 778, 781 (Bankr. W.D. Mo. 1982)).

124 11 U.S.C. § 550(a)(1) (2006).

125 *IAS*, 408 F.3d at 707.

126 *Id.* (citations omitted).

was undisputed that the Transeastern Lenders never received any portion of the lien interest that the Conveying Subsidiaries granted to the New Lenders, so they could not be considered initial or subsequent transferees. The district court further rejected the notion that the Transeastern Lenders could be considered entities for whose benefit the transfers were made just because they had received some of the proceeds of the new loans.

While the district court reached the right result in terms of the Transeastern Lenders, it also sold § 550 short as much as the bankruptcy court stretched it. The district court interpreted § 550(a) as a provision that dictates a single recovery. Under this analysis, anything more would result in double-dipping (i.e., the debtor gets back more than what was given away). In the TOUSA bankruptcy, the avoidance of the liens *and* recovery of the settlement proceeds were the only two slices in a nearly $1 billion pie. In order to get both slices, the Committee needed to demonstrate separately that each was an avoidable transfer. The district court, however, saw the liens and the settlement proceeds as being the same slice of a roughly $500 million pie, and the Committee could not take the same slice twice.

The district court noted that, in the typical case, § 550(a) is meant to capture "the benefit to a guarantor by the payment of the underlying debt of the debtor."[127] The district court found that the bankruptcy court's analysis of § 550(a) in this case would drastically and improperly expand that Section's scope. Therefore, it ultimately rejected the Committee's attempt to collapse the granting of the liens and payment of the Transeastern Loans into a single transaction as against the weight of the evidence and inconsistent with positions that the Committee took on other issues at trial.[128] This finding was factually plausible, but legally myopic. Still, the district court may have reached a result consistent with the Bankruptcy Code since § 550(a) cannot bring back that which cannot be avoided. In that case, the bankruptcy court's finding that the Transeastern Lenders were the transferee or "entity for whose benefit the transfer was made" is an issue that would require more proof upon remand, but the district court eliminated that option.

D. The Search for Reasonably Equivalent Value

The core of the district court's opinion—as least as it pertains to the merits of the fraudulent transfer action—is housed in analysis of "reasonably

[127] *TOUSA II*, No. 10-60017-CIV/GOLD, 2011 WL 522008, at *94 (S.D. Fla. Feb. 11, 2011).
[128] *Id.* at 98.

equivalent value." Here, in a rather gratuitous maneuver, Judge Gold treaded on Judge Jordan's territory with the New Lender appeal. But the district court felt duty-bound to address reasonably equivalent value as a threshold matter to the entire unwinding of the July 31 Transaction. Perhaps Judge Gold entertained the issue because of his frustration with what he viewed as a weak but winning argument under § 550(a)(1) to recover the settlement proceeds from the Transeastern Lenders.

The first prong in establishing constructive fraud under § 548(a)(1)(B) is whether the debtor "received less than reasonably equivalent value in exchange for such transfer or obligation."[129] Section 548(d)(2) defines value as "property, or satisfaction or securing of a present or antecedent debt of the debtor, but does not include an unperformed promise to furnish support to the debtor or to a relative of the debtor."[130] The statute however, does not provide a definition of "reasonably equivalent value" and that phrase has been relegated to a case-by-case determination.[131] Courts have steered away from using a hard-line or mathematically precise determination of reasonably equivalent value, and *TOUSA II* quickly focused on that detail.[132]

Receiving something less than the actual market value of the assets transferred can be sufficient, provided that the values exchanged do not shock the conscience.[133] This creates unpredictability among the bankruptcy courts, and cases decided in different contexts invariably lead to different results.[134] In quashing the order in *TOUSA I* as to the Transeastern Lenders, *TOUSA II* found that the payment to the Transeastern Lenders could not be avoided as a fraudulent transfer because the factual record established that the Conveying Subsidiaries received "reasonably equivalent value" in exchange for providing secured guarantees in the form of "indirect economic benefits."[135] Such "benefits" included the ability to avoid defaults of over $1.5 billion of senior

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129 11 U.S.C. § 548(a)(1)(B).

130 *Id.* § 548(d)(2).

131 *In re* Abramoff, 92 B.R. 698, 703 (Bankr. W.D. Tex. 1988)

132 *TOUSA II*, 2011 WL 522008, at *32, 37; *see generally* Jack Williams, *Fallacies of Contemporary Fraudulent Transfer Models as Applied to Intercorporate Guaranties: Fraudulent-transfer Law as a Fuzzy System*, 15 CARDOZO L. REV. 1403 (1994). *TOUSA II* also devoted some discussion to the bankruptcy court's determination that the lenders acted in bad faith. *TOUSA II*, 2011 WL 522008, at *48. This Article addresses the good faith defense more fully in Part V.A.

133 Williams, *supra* note 132, at 1442.

134 *In re* Fargo Biltmore Motor Hotel Corp., 49 B.R. 782, 788 (Bankr. D.N.D. 1985).

135 *TOUSA II*, 2011 WL 522008, at *36–37.

loans and bonds owed by TOUSA (guaranteed by the Conveying Subsidiaries) and the resulting ability to continue business operations.[136]

1. TOUSA I and the Missing Value

Transactions involving three or more parties in which a debtor's property is transferred in exchange for consideration passing to a third party present special difficulties in determining whether reasonably equivalent value has been received by the debtor.[137] These transactions often take place in the form of intercorporate guarantees.[138] There are three types of intercorporate guarantees: downstream, cross-stream, and upstream.[139] In order to finance the July 31 Transaction, TOUSA needed an upstream guarantee whereby its subsidiaries would guarantee the parent company's debts.[140] For a transaction to survive a fraudulent transfer attack, the debtor must have received a specific and quantifiable economic benefit which preserves the debtor's net worth.[141] On one hand, this bar can be a difficult hurdle to overcome in proving an upstream guarantee is not a fraudulent transfer because the debtor does not usually receive a "direct benefit" from the transfer of assets or obligation incurred.[142]

On the other hand, some courts have held that the debtor need not receive reasonably equivalent value directly.[143] The debtor may receive reasonably equivalent value, or some part thereof, through a benefit conferred upon a third party.[144] Courts adopted the "indirect benefit doctrine" partially to satisfy the requirement that a guarantor must receive a direct flow of capital to avoid a finding of a fraudulent transfer that would be "inhibitory of contemporary financing practices."[145] "[Even] when there has been no direct economic

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136 *Id.*

137 *In re* Ear, Nose and Throat Surgeons of Worcester, Inc., 49 B.R. 316, 320 (Bankr. Mass. 1985).

138 Williams, *supra* note 132, 1417–18.

139 *Id.* at 1419.

140 *TOUSA II*, 2011 WL 522008, at *3, 35.

141 *In re* Burbank Generators, Inc., 48 B.R. 204, 207 (Bankr. C.D. Cal. 1985).

142 Examples of "direct benefits" would be actual receipt of money and/or property or debt relief. Telefest, Inc. v. VU-TV, Inc., 591 F. Supp. 1368, 1378 (D.N.J. 1984); Goveart v. Capital Bank (*In re* Miami Gen. Hosp., Inc.), 124 B.R. 383, 393 (Bankr. S.D. Fla. 1991).

143 *See* Rubin v. Mfr's. Hanover Trust Co., 661 F.2d 979, 991 (2nd Cir. 1981) ("although 'transfers solely for the benefit of third parties do not furnish fair consideration, the transaction's benefit to the debtor need not be direct and may come through a third party.'" (quoting Klien v. Tabatchnik, 610 F.2d 1043, 1407 (2d Cir. 1979))).

144 *Id.*

145 *In re* Image Worldwide Ltd., 139 F.3d. 574, 578 (7th Cir. 1998) ("[upstream]-guarantees are often needed because of the unequal abilities of interrelated corporate entities to collateralize loans").

benefit to a guarantor, some courts performing a fraudulent transfer analysis have been increasingly willing to look at whether a guarantor received indirect benefits from the guarantee . . . ."[146] Nonetheless, this flexibility has its limitations: proving reasonably equivalent value in upstream guarantees can, at best, be challenging, and often amounts to an expensive and losing battle because "a court will not recognize an indirect benefit unless it is fairly concrete."[147]

The bankruptcy court first found that TOUSA's subsidiaries did not receive a direct benefit from the obligations they incurred to finance the July 31 Transaction.[148] The court emphasized that despite being co-borrowers on a loan to settle a lawsuit for which they were not defendants, the Conveying Subsidiaries received none of the proceeds of the loans they became obligated to repay.[149] More to the point, the Conveying Subsidiaries received no value in the form of debt relief, received no net value from the acquisition of homebuilding inventory, and received no value in the form of tax benefits.[150]

Because the Conveying Subsidiaries did not receive any direct benefit from the value they had been given, the burden then shifted to the defendants to produce evidence that "the debtors indirectly received sufficient, concrete value."[151] Therefore, the defendants in TOUSA had to prove that the Conveying Subsidiaries received substantial indirect benefits that would amount to reasonably equivalent value.[152] In order to prove that, the defendants argued that "[TOUSA] and its subsidiaries operated as a single business enterprise, benefiting significantly from centralized operations."[153] That structure, the AS argued, enabled the entities to "share an identity of interests," which created reasonably equivalent value in the direct consideration that the TOUSA family received.[154]

The defendants argued that a "[f]ailure to resolve the Transeastern Litigation would have created a default under the revolver and blocked the

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146 *Id.*
147 *Id.*
148 *TOUSA I*, 422 B.R. 783, 844 (Bankr. S.D. Fla. 2009).
149 *Id.*
150 *Id.* at 844–45.
151 *Id.* at 866.
152 *Id.* at 845 (explaining the defendants' arguments).
153 In the defendant's Post-Trial Memorandum, the defendant asserted that TOUSA and its Subsidiaries should be viewed as a single entity. *See* Post-Trial Memorandum of Defendant at 60, *TOUSA I*, 422 B.R. 783 (Bankr. S.D. Fla. 2009)
154 *Id.* The consideration being the settlement of the joint venture litigation.

Conveying Subsidiaries' access to the letters of credit and operating cash."[155] Furthermore, the defendants argued that "the July 31 Transaction benefitted the Conveying Subsidiaries by adding the Transeastern assets to the borrowing base for the [r]evolver, thereby increasing the amount of money that the Conveying Subsidiaries and other TOUSA entities could borrow."[156]

The bankruptcy court, however, rejected that argument.[157] Instead, it concluded that the Conveying Subsidiaries could "have dealt with a possible [r]evolver default by transitioning to an alternative source of financing."[158] Furthermore, in response to the argument that a benefit resulted from the increased amount of money available to the subsidiaries, Judge Olson held that "there [was] no evidence that the Conveying Subsidiaries' cash requirements exceeded the capacity of the pre-transaction borrowing base."[159] Consequently, the bankruptcy court held that the defendants failed to establish that the benefits reached a reasonably equivalent value for the Conveying Subsidiaries.[160]

TOUSA I and *TOUSA II* have different takes on the TOUSA family structure, and therefore disagree as to whether the proper fraudulent transfer analysis occurs at the subsidiary level.. *TOUSA I* treated the TOUSA group more like individual entities, whereas *TOUSA II* refers to the TOUSA entities as one enterprise or group (a single organism) throughout the opinion.[161] Anticipating the factual gaps, the defendants argued that the July 31 Transaction as a whole created value by producing a "synergy"[162] between TOUSA and its subsidiaries.[163] The indirect benefits asserted by the defendants included the improvement of the day-to-day business operations of the subsidiaries as a result of the transaction, and the forestalling of the bankruptcy of TOUSA, which would have deprived the subsidiaries of a variety of services

155 *Id.*

156 *TOUSA I*, 422 B.R. 783, 847–48 (Bankr. S.D. Fla. 2009).

157 *Id.* at 847.

158 *Id.*

159 *Id.* at 848.

160 *Id.*

161 *TOUSA II*, No. 10-60017-CIV/GOLD, 2011 WL 522008, at *14, 33, 39 (S.D. Fla. Feb. 11, 2011).

162 *Id.* at 35; *see also* Mellon Bank, N.A. v. Metro Commc'ns., Inc., 945 F.2d 635, 647 (3rd Cir. 1991) ("The Banks cite what appears to be legitimate and reasonable expectation that the affiliation of these two corporations, TCS and Metro, would produce a strong synergy.").

163 *TOUSA I*, 422 B.R. 783, 845 (Bankr. S.D. Fla. 2009). This argument seems inapposite to the district court's holding that the transactions were separate and improperly treated as one for purposes of a fraudulent transfer analysis. *See TOUSA II*, 2011 WL 522008, at *28–29, 33.

provided by TOUSA's corporate offices, such as access to a centralized cash-management system and group purchasing arrangements.[164]

The bankruptcy court rejected the argument, holding that business "synergies" do not establish value under § 548(d)(2)(A) because they do not constitute "(1) property (2) received by the debtor (3) in exchange for the obligation or transfer."[165] Applying this test, the court first found that "many of these business 'synergies' do not constitute 'value' under § 548 because they are not 'property.'"[166] Next, the bankruptcy court held that § 548 makes clear that reasonably equivalent value must be received by the same "debtor" that incurred the relevant obligation or made the relevant transfer.[167] Finally, the court found that because these subsidiaries had enjoyed these "synergies" long before the July 31 Transaction ever occurred, the benefits were not "in exchange for the obligation or transfer."[168]

This is a defensible conclusion given that the bankruptcy cases (while jointly administered) were not substantively consolidated. A substantive consolidation would have required (for all intents and purposes) the bankruptcy court to treat TOUSA as one large indivisible enterprise.[169] In the absence of such treatment, the bankruptcy court could rightly examine the effect that the July 31 Transaction had on the individual TOUSA components. Since the bankruptcies were not substantively consolidated, the bankruptcy court looked to the value of consideration received as compared to the value given by the debtor to determine whether the debtor received less than reasonably equivalent value.[170] The value of the synergy obtained is difficult to quantify in dollars without the aid of expert witnesses.[171] The bankruptcy court had no basis to evaluate the synergy value because the defendants did not

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164 *TOUSA I*, 422 B.R. at 846–47.

165 *Id.* at 869.

166 *Id.* at 868.

167 *Id* at 867–68.

168 *Id.* ("The Conveying Subsidiaries enjoyed all of these benefits long before the July 31 Transaction and there is no evidence that they would have lost these benefits in the event of a TOUSA bankruptcy.").

169 "Substantive consolidation" usually results in "pooling the assets of, and claims against, [ ] two entities; satisfying liabilities from the resultant common fund; eliminating inter-company claims; and combining the creditors of the two companies for purposes of voting on reorganization plans." *In re* Augie/Restivo Baking Co., 860 F.2d 515, 518 (2d Cir. 1988). The doctrine is used "sparingly" because it "vitally affect[s] [the] substantive rights" of creditors. *Id.*

170 *See* Barber v. Golden Seed Co., Inc., 129 F.3d 382, 387 (7th Cir. 1997); Mellon Bank, N.A. v. Metro Commc'ns., Inc., 945 F.2d 635, 648 (3rd Cir. 1991); Rubin v. Mfr's. Hanover Trust Co., 661 F.2d 979, 993 (2nd Cir. 1981).

171 *See Barber*, 129 F.3d at 387; *Mellon Bank*, 945 F.2d at 648; *Rubin*, 661 F.2d at 993.

present a fact or expert witness to value the indirect benefits. Consequently, the lack of evidence left the bankruptcy court to find that the benefits were not reasonably equivalent to the value given.[172]

Courts require that the defendant demonstrate that the transfer was in fact made for reasonably equivalent value. Whether the value must be numerically quantifiable in terms of direct (monetary) or indirect (avoiding bankruptcy) benefits is unsettled. The majority of courts follow a quantification test for reasonably equivalent value, while other courts have held that quantification of the indirect benefits is not necessary in order to find that reasonably equivalent value was given.[173] These latter courts have held that § 548(a)(2)(A) does not require tangible value or a monetary equivalent when answering the question of whether reasonably equivalent value has been given in return for the transfer.[174] Nonetheless, tangible or intangible, the benefits need *some* valuation, and the *TOUSA I* court held that irrespective of whether the benefits were legally cognizable, or if considered individually or as a whole, they still fell short of reasonably equivalent value.[175]

Even more to the point (and apparently more vexing to the district court), *TOUSA I* found that the interest in the property dovetailed into the

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[172] *TOUSA I*, 422 B.R. 783, 869 (Bankr. S.D. Fla. 2009).

[173] Courts have been willing to consider indirect benefits received by a debtor, but those benefits must be relatively concrete. Harker v. Ctr. Motors, Inc. (In re *Gerdes*), 246 B.R. 311, 314 (Bankr.S.D.Ohio 2000); *see also* Leibowitz v. Parkway Bank & Trust Co. (*In re* Image Worldwide, Ltd.), 139 F.3d 574, 578 (7th Cir.1998) (to constitute reasonably equivalent value for payment of an alleged fraudulent transfer, any indirect benefit must be "fairly concrete"); SPC Plastics Corp. v. Griffith (*In re* Structurelite Plastics Corp.), 224 B.R. 27, 31 (6th Cir. BAP 1998) (finding that the speculative value of indirect benefits like the opportunity to acquire additional loans or new managerial talent does not constitute fair consideration); Clark v. Sec. Pac. Bus. Credit (*In re* Wes Dor, Inc.), 996 F.2d 237, 243 (10th Cir.1993) ("To the extent indirect benefits could be considered . . . the Bank fails to point to any evidence quantifying the amount of such benefits."); Stillwater Nat'l Bank and Tr. v. Kirtley (*In re* Solomon), 299 B.R. 626, 638 (10th Cir. BAP 2003) (without quantification, indirect benefits are not "value," under constructive fraudulent transfer law); Pummill v. Greensfelder, Hemker & Gale (*In re* Richards & Conover Steel, Co.), 267 B.R. 602, 613 (8th Cir. BAP 2001) ("If the benefits are indirect, they must be 'fairly concrete.'"); Official Comm. of Unsecured Creditors of Crystal Med. Prods., Inc. v. Pedersen & Houpt (*In re* Crystal Med. Prods., Inc.), 240 B.R. 290, 300 (Bankr.N.D.Ill.1999); Coan v. Fleet Credit Card Servs., Inc. (*In re* Guerrera), 225 B.R. 32, 36 (Bankr.D.Conn.1998) (stating that to constitute "reasonably equivalent value" for alleged fraudulent transfer in payment of third party's debt, "any indirect benefit received must be 'fairly concrete.' "). *But see Mellon Bank*, 945 F.2d at 647 ("[t]he ability to borrow money has considerable value in the commercial world. To quantify that value, however, is difficult. Quantification depends upon the business opportunities the additional credit makes available to the borrowing corporation and on other imponderables in the operation or expansion of its business.").

[174] *See* Matter of Moses, 59 B.R. 815, 818 (Bankr. N.D. Ga. 1986); *In re* Missionary Baptist Found. of Am., Inc., 24 B.R. 973, 979 (Bankr. N.D. Tex. 1982).

[175] *TOUSA I*, 422 B.R. at 869.

consideration of reasonably equivalent value (discussed, *infra*, Part III.D.).[176] The bankruptcy court determined that the Conveying Subsidiaries had a property interest in the loan proceeds, but by the same token, the value of that property was "minimal" because the Conveying Subsidiaries involuntarily entered into a "contractual commitment that the borrowed funds would be paid to others, principally the [] Transeastern Lenders."[177]

2. *TOUSA II* Locates Reasonably Equivalent Value

Initially, it would appear that the bankruptcy and district courts found common ground as to the de minimis nature of the property interest belonging to the Conveying Subsidiaries. Indeed, the district court determined that if the Conveying Subsidiaries had any interest in the proceeds of the loans, such interest was "minimal."[178] In reviewing reasonably equivalent value, however, the district court departed from the bankruptcy court's determination that the minimal value could not be a reasonably equivalent one. Instead, the district court agreed with the arguments of the Transeastern Lenders that the Conveying Subsidiaries received reasonably equivalent value for any transfer of their minimal interest in the proceeds, because repayment of the Transeastern Loans eliminated the potential cross-default under the $1 billion bond debt that would result from an adverse judgment in the Transeastern litigation.[179] Consequently, minimal interests would suffice for reasonable equivalent value under the district court's interpretation.

In particular, the district court concluded that

> eliminating the threat of these claims against the Conveying Subsidiaries' parent, and indirectly against each of them, constituted an enormous economic benefit to these subsidiaries in terms of their viability as going concerns and their continued access to financing through the TOUSA parent, which, in turn, allowed them, for a period of time, to continue to pay interest to the bondholders, the very creditors at issue.[180]

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[176] *Id.* at 874 ("[T]here is no inconsistency in the Committee's claim that the Conveying Subsidiaries had a property interest in the proceeds of the term loans and the Committee's simultaneous claim that the Conveying Subsidiaries did not receive reasonably equivalent value from the First and Second Lien Lenders.").

[177] *Id.*

[178] *TOUSA II*, No. 10-60017-CIV/GOLD, 2011 WL 522008, at *27–28 (S.D. Fla. Feb. 11, 2011).

[179] *Id.* at *36

[180] *Id.* at *38.

Simply put, the district court ruled that indirect economic benefits to a corporate group—the single organism approach—should factor into reasonably equivalent value (i.e., adequate consideration) for purposes of a fraudulent transfer analysis under § 548 of the Bankruptcy Code.[181]

In *TOUSA II*, the district court took issue with the bankruptcy court's analysis of the "value" (or lack thereof) received by the Conveying Subsidiaries from the July 31 Transaction.[182] The district court stressed that the bankruptcy court's reasoning was a blemish on the face of the judiciary—unsupported by either applicable case law or legislative history.[183] The district court staunchly disagreed with the bankruptcy court's finding that the Conveying Subsidiaries could not have received meaningful "value" as part of the July 31 Transaction, because as the bankruptcy court found, the Conveying Subsidiaries did not receive direct and identifiable "property" of a quantifiable value.[184]

TOUSA II scolded the bankruptcy court for looking to the dictionary definition of "property" (which defines the word to include "some kind of enforceable entitlement to some tangible or intangible article"), when considering the term in the context of a fraudulent transfer.[185] The district court did acknowledge (although it made little difference) that the definition of "property" is absent from the Bankruptcy Code; curiously, however, it failed to acknowledge that the use of dictionary definitions is proper when no such definition exists in the Code.[186] Indeed, both the Supreme Court and the Eleventh Circuit have endorsed the use of and relied upon a dictionary for the definitions of statutory terms.[187]

Nonetheless, *TOUSA II* held that the narrow definition applied to "value" by the bankruptcy court was clearly erroneous and constituted reversible error because the applicable case law and legislative history indicated that "indirect,

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181 *Id.*

182 *Id.* at *31.

183 *Id.*

184 *Id* at *30–31.

185 *Id* at *31.

186 *See, e.g.*, Bank of Am. Nat. Trust and Sav. Ass'n v. 203 North LaSalle Street P'ship, 526 U.S. 434, 460 (U.S. 1999) (J. Thomas, concurring) (using the Random House Dictionary for the definition of "on account of").

187 Holywell Corp. v. Smith, 503 U.S. 47, 53 (U.S. 1992) (using Webster's Third New International Dictionary for the definition of "assignee"); Hamm v. James (*In re* James), 406 F.3d 1340, 1343 (11th Cir. 2005) (citing the Merriam-Webster Online Dictionary and noting that "[i]n determining the ordinary meaning of statutory terms, we often find guidance in dictionary definitions").

intangible and prospective future economic benefits" can constitute "value" for purposes of a fraudulent transfer analysis.[188] *TOUSA II* adopted the Transeastern Lenders' position that the value flowing to an integrated corporate family should include indirect benefits that preserve the net worth and ongoing business operations of the corporate family.[189]

In applying its definition of "value" to the analysis of the July 31 Transaction, the district court determined that the settlement of the Transeastern Litigation conferred reasonably equivalent "economic benefits" on the Conveying Subsidiaries by enabling the debtor as a whole (i.e., the parent and its Conveying Subsidiaries) to avoid defaulting on obligations in excess of $1.5 billion.[190] The district court emphasized (and re-emphasized) the integrated nature of the TOUSA family (or "enterprise" as the district court put it, perhaps channeling the image of a Mafia family enterprise).[191] In short, TOUSA found that the value provided by the July 31 Transaction simply was TOUSA's ability to continue teetering on the brink of bankruptcy rather than plunging head first—which it ultimately did six months later.[192] Thus, *TOUSA II* held that, under these circumstances, "no further proof of 'quantification' was required to establish reasonably equivalent value," as these were "precisely the kind of benefits that . . . are not susceptible to exact quantification but are nonetheless legally cognizable under [§] 548" of the Bankruptcy Code.[193]

The difference in opinion here seems to be one that likely will find its way to the Eleventh Circuit. On the one hand, the circumstances of TOUSA do not fit the situation where indirect benefits from a guarantee are found to constitute reasonably equivalent value. Courts that uphold cross-stream guarantees generally do so when the transaction strengthens the viability of the corporate group.[194] In this case, though, it is difficult to assess if the parent and the Conveying Subsidiaries benefitted mutually from the loan.

At best, the settlement kept the company hooked up to another six months of life support. By the time the July 31 Transaction took place, the TOUSA parent was in dire financial straits while the Conveying Subsidiaries were

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188 *TOUSA II*, 2011 WL 522008, at *35–36.
189 *Id.*
190 *Id.*
191 *See id.* at *2, *5, *9, *16, *36, and *39.
192 *Id.* at *36.
193 *Id.* at *40.
194 *In re* Image Worldwide, Ltd., 139 F.3d 574, 581 (7th Cir. 1998).

arguably solvent.[195] So, by virtue of the July 31 Transaction, it is plausible that the Conveying Subsidiaries kept the parent out of bankruptcy by bankrupting themselves. Courts have held that "[t]his shift of risk from the creditors of the debtor to the creditors of the guarantor is exactly the situation that fraudulent transfer law seeks to avoid when applied to guarantees."[196] Therefore, it could be that the Conveying Subsidiaries received an indirect benefit from the transaction, but yet did not receive reasonably equivalent value. If that is the case, then the harsh rebuke handed down by *TOUSA II* is unnecessarily hostile.

TOUSA II further contraverted *TOUSA I*'s reasoning by noting that the bankruptcy court improperly shifted the burden of proving reasonably equivalent value to the defendants, which ran contrary to the district court's notion of Eleventh Circuit precedent that requiring "the burden of proving lack of reasonably equivalent value . . . [to rest] on the party challenging the transfer."[197] It is perhaps a stretch to say that the burden was shifted. Rather, the focus was on the *calculation* of reasonably equivalent value, which generally forces both sides (not just the plaintiff) to present some numbers, especially when the case carries so-called "indirect benefits."[198] In order for the bankruptcy court properly to assess reasonably equivalent value, "[t]he value of consideration received must be compared to the value given by the debtor."[199] Although calculating "direct" benefits (such as an investment of cash that yields a cash return) is easier, the math becomes more difficult when benefits are "indirect."[200]

Nonetheless, "[t]hese indirect economic benefits must be measured and then compared to the obligations that the bankrupt incurred."[201] In that context then, the bankruptcy court in *TOUSA I* had to decide whether value had been transferred, and thus it rightly "examine[d] all aspects of the transaction and carefully measure[d] the value of all benefits and burdens to the debtor, direct

195 *TOUSA I*, 422 B.R. 783, 793 (Bankr. S.D. Fla. 2009).

196 *In re Image Worldwide*, 139 F.3d at 581–82.

197 *TOUSA II*, 2011 WL 522008, at *26.

198 This determination depends on the circumstances of each case and not on a fixed mathematical formula. *See* Barber v. Golden Seed Co., Inc., 129 F.3d 382, 387 (7th Cir. 1997); *In re* R.M.L., Inc., 92 F.3d 139, 145 (3d Cir. 1996). Fair market value is one factor a bankruptcy court may consider. Whether a bankruptcy court uses proper methodology in assessing value is an issue of law reviewed de novo. *In re* Dunham, 110 F.3d 286, 289 n. 11 (5th Cir. 1997).

199 Mellon Bank, N.A. v. Metro Commc'ns., Inc., 945 F.2d 635, 647 (3d Cir. 1991).

200 *Id.*

201 *Id.*

or indirect."[202] Of course, the bankruptcy court may have found an incorrect calculation to be more persuasive, but that is insufficient to warrant a charge of burden shifting. Instead, the real issue is that the bankruptcy court seemed to raise the bar of due diligence that an old lender (such as the Transeastern Lenders) must perform before accepting a repayment (the settlement proceeds) that is funded by new lenders (the first- and second-lienholders). The district court delivered a solid one-two punch when it found reasonably equivalent value and then sanctimoniously bench-slapped the bankruptcy court for putting the onus of diligence on vulnerable lenders.

Despite the fact that the bankruptcy court was more than heavy-handed with TOUSA's lenders, it was also refreshing that the lenders could not escape with the "it sounded like a good idea at the time" defense. But, the district court found fault in what it thought was the bankruptcy court playing Monday morning quarterback. *TOUSA II* characterized the bankruptcy court's review of the July 31 Transaction "through the lens of retrospection" as grievous error because, in the district court's view, the bankruptcy court failed to evaluate reasonably equivalent value "as of the date of the transaction."[203] Claiming that the bankruptcy court only resorted to hindsight to evaluate the July 31 Transaction is misplaced. Transactions do not exist in a vacuum. Bankruptcy courts must look to the circumstances surrounding the transaction— including that the July 31 Transaction may have been a catalyst for TOUSA's precipitous fall into bankruptcy.[204]

These polarized opinions as to reasonably equivalent value stem from the fact that the two courts had different views on TOUSA's corporate structure. However, a discrepancy appears to arise in *TOUSA II* where the court treats the company as one, behemoth corporate organism, but then it later treats the July 31 Transaction as multiple compartmentalized transactions.[205] *TOUSA II* held that the bankruptcy court erred by analyzing reasonably equivalent value at the level of the Conveying Subsidiaries as opposed to the corporate family. The district court also faulted the bankruptcy court for commingling the transactions—that is lumping them into one larger transaction for purposes of

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[202] *In re* Richards & Conover Steel Co., 267 B.R. 602, 612 (8th Cir. BAP 2001); Christians v. Crystal Evangelical Free Church (*In re* Young), 82 F.2d 1407, 1414 (8th Cir. 1996).

[203] *In* re Richards & Conover Steel Co., 267 B.R. at 612; *In re Young*, 82 F.2d at 1414.

[204] *See, e.g.*, *In re* Matter of Zedda, 103 F.3d 1195, 1206 (5th Cir. 1997) ("Whether a transfer is made for a reasonably equivalent value is, in every case, largely a question of fact. As such, considerable latitude must be allowed to the trier of facts, for in each case that determination depends entirely on the peculiar facts and circumstances.")

[205] *See supra* Part III.A.

bootstrapping § 550 liability onto § 548 liability.[206] While the latter criticism may be valid, *TOUSA II* is not immune to questionable analysis.

The district court found that the transfer referred to in § 550 must be the same transfer that is avoided under § 548.[207] *TOUSA II* determined that the transfer at issue was properly the transfer of liens to the term-loan lenders rather than the transfer of funds to the Transeastern Lenders. As a result, the district court found that the bankruptcy court erred by attempting to collapse each aspect of the July 2007 Transaction into one larger transfer for avoidance purposes when only the transfer of liens was potentially avoidable as a fraudulent conveyance.[208] It is doubtful that the bankruptcy court treated the transaction as it did merely for the sake of convenience. At worst, it was a misapplication of law that touts a "more pragmatic and flexible approach" to § 550 and other theories of recovery for fraudulent transfer actions,[209] but it is nonetheless imprecise on how to do so.

If the bankruptcy court is to be faulted for handling the July 31 Transaction as one large deal among multiple parties to settle one lawsuit, then the district court equally could be faulted for taking a piecemeal approach to the transaction. Even the defendants argued that, on a whole, the transaction benefitted the Conveying Subsidiaries. Bankruptcy case law is not absolute with regard to complex transactions.[210] In general, bankruptcy determinations among the district courts tend to be inconsistent and unpredictable, with little clarity as to what qualifies as precedent as opposed to merely persuasive authority.[211] It is difficult to reconcile the district court's determination that TOUSA is *one entity* for the purpose of *receiving* benefits, and then later treat the July 31 Transaction as among *multiple entities* in terms of transferring value *away*.

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206 *TOUSA II*, No. 10-60017-CIV/GOLD, 2011 WL 522008, at *44–46 (S.D. Fla. Feb. 11, 2011).

207 *Id.* at *45.

208 *Id.*

209 *IAS*, 408 F.3d at 707.

210 *See e.g.*, Morse Operations, Inc. v. Goodway Graphics of Va. (*In re* Lease-A-Fleet, Inc.), 155 B.R. 666, 676 (Bankr. E.D. P a. 1993) ("Each of the circular financial transactions between the parties in issue must therefore be 'collapsed' into one transaction to appreciate their impact upon the Debtor. When each circle of cash is viewed as a single transaction, it is clear that the same monies simply passed through from [parent] to Debtor to the [affiliate].").

211 Gabel & Maizel, *supra* note 14, at 50.

By its terms and application, "the concept of 'reasonably equivalent value' does not demand a precise dollar-for-dollar exchange."[212] *TOUSA I* did not have to hurdle an impossible wall to reach a conclusion that the Conveying Subsidiaries received little to nothing in return at the actual time of the July 31 Transaction, other than the (arguably) value of the cessation of the Transeastern lawsuit.[213] The bankruptcy court did, in fact, hold a thirteen-day trial.[214] It seems less than "clearly erroneous" that, even given the value of removing the cloud hanging over the parent, it still "would have to be deeply discounted to reflect [TOUSA parent's] precarious financial situation at the time" the July 31 Transaction was made.[215] TOUSA's ability to repay the loans was tied directly to its ability to improve profitability. If the company succeeded, both the Conveying Subsidiaries and the parent company would prosper. Conversely, if either parent or subsidiary failed, the other would go down with it.

This does not change the fact, however, that TOUSA had essentially pledged the value of the company against itself, which meets the statutory definition of "presumptive insolvency."[216] The bankruptcy court was in the best position to determine that the "promises were built on sand and delivered after the fact," and could not, therefore, "present a 'reasonably equivalent value.'"[217] So it seems that the district suffered from a case of the Goldilocks Syndrome: *TOUSA I* conceived of the transaction in terms too large (one mammoth transaction) and then conceived of the fraudulent transfer analysis in terms too small (at the subsidiary level). It would be grand if *TOUSA II* stepped in and got it all just right, but more realistically, both courts got some parts right and some parts wrong. Ideally, the bankruptcy court would be able need to make additional findings as to whether TOUSA is a common enterprise and whether the July 31 Transaction is a divisible one. Unfortunately, these issues likely will be batted around in further appeals.

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212 Advanced Telecomm. Network, Inc. v. Allen (*In re* Advanced Telecomm. Network, Inc.), 490 F.3d 1325, 1336 (11th Cir. 2007) (citing Henderson v. Andrews (*In re* Perry Cnty. Foods, Inc.), 313 B.R. 875, 895 (Bankr. N.D. Ala. 2004 (citations omitted))).

213 *TOUSA I*, 422 B.R. 783, 866 (Bankr. S.D. Fla. 2009).

214 *Id.* at 786.

215 *See In re Advanced Telecomm. Network*, 490 F.3d at 1337.

216 *TOUSA I*, 422 B.R. at 862; *see* 11 U.S.C § 101(32) (2006).

217 *In re Advanced Telecomm. Network*, 490 F.3d at 1337.

III. LINGERING ISSUES IN MACRO-LENDING, DISTRESSED FINANCING, AND SPECULATIVE INVESTING

While the district court proved to be thorough in its criticisms of *TOUSA I*, there are lingering issues that *TOUSA II* did not address.[218] With two other appeals pending before Judges Jordan and Moreno (covering issues not addressed in Judge Gold's opinion), and the inevitable appeal of *TOUSA II* up the ladder to the Eleventh Circuit, these issues will resurface. They extend beyond the tale of TOUSA and its financial predicaments. History has a tendency to repeat itself. Centuries before the spectacular failures of Lehman Brothers, AIG, WaMu and Wachovia, Fannie and Freddie were Semper Augustus and the Viceroy. Coveted more than any other commodity or investment, these two odd fellows were rare tulip varietals.[219] These simple flowers served as the catalyst for "Tulipomania," a time during the Dutch Golden Age when contract prices for the newly introduced tulip bulbs soared to astonishing levels and then suddenly collapsed to a mere pittance.[220] Tulipomania peaked in February 1637, when certain bulbs were selling for more than ten times the annual income of a skilled laborer.[221]

The burst of the housing bubble in 2007 mirrors Tulipomania and so many other subsequent bubbles. Even in 2011—more than three years after TOUSA filed for bankruptcy—the effects of the housing bust still ripple through the economy with foreclosures hovering at record levels.[222] As industries clamor for survival, the credit markets clutch funds in tight fists and probably will not

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[218] *TOUSA II* only addressed the underlying January 31 Transaction as it affected the Transeastern Lenders. Other appeals are pending as to (1) the first- and second-lien lenders and (2) certain underlying fiduciary obligations. *See supra* note 15.

[219] Charles Mackay, MEMOIRS OF EXTRAORDINARY POPULAR DELUSIONS 142–44 (1841). There are many parallels between the advent of Tulipomania and the speculative housing bubble of 2006. The Dutch government, in an attempt to encourage investment in merchant fleets, legally changed all tulip buying contracts to tulip options contracts, limiting the potential liability of speculative investors to less than 4% of the amount invested. Earl A. Thompson, *The Tulipmania: Fact or Artifact*, 130 PUB. CHOICE 99, 102 (Jan. 2007). This led to an explosion in tulip prices as buyers, acting in rational self-interest, bought up these artificially cheap options and then reacted to rising tulip prices by exercising them. *Id.* Similarly, a number of U.S. government policies, including tax incentives, artificially low interest rates, and the dangling possibility of a bail-out, led banks and individuals acting in self-interest to overinvest in the market. Brian Doherty, *The Housing Boom and Bust*, REASON MAGAZINE, May 20, 2010. Thus, the problems presented represent not the madness of crowds, but rather the tragedy of the commons. *See also* Thompson, *supra* note 219, at 102.

[220] Mackay, *supra* note 219, at 139–53.

[221] Thompson, *supra* note 219, at 103.

[222] *See* Kathleen M. Howley, *U.S. Loans in Foreclosure Tie Record as Lenders Delay Seizures*, BLOOMBERG, Feb. 17, 2011, *available at* http://www.bloomberg.com/news/2011-02-17/u-s-loans-in-foreclosure-tie-record-as-lenders-delay-seizures.html.

loosen the purse strings anytime soon (despite capital markets' praise for *TOUSA II*). From the macro-lending perspective: funding, loan opportunities, and credit availability are awash in the calculus of risk. Whether a fledgling industry or a conglomerate survives depends on the ability to swim through the morass of complex loans and risky debt. Bubbles will come and go, but the issues below seem to predominate and endure.

A. The Relevancy of Insolvency

With the ambiguities and assumptions involved in the "reasonably equivalent value" prong of § 548 in an upstream guarantee,[223] the majority of the thirteen-day trial instead revolved around the second prong of the constructive fraud test: insolvency.[224] More specifically, the plaintiffs focused on proving that TOUSA "was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation."[225] "Courts analyze solvency with three main tests[:] the balance sheet test, the cash flow test, and the adequate capital test."[226] "The 'balance sheet' test of insolvency (11 U.S.C. § 548(a)(1)(B)(ii)(I)) requires proof that the sum of the debts of a [debtor] is greater than the fair value of that [debtor]'s property."[227] The adequate capital test "asks whether a [debtor] has sufficient capital to support operations in the event that performance is below expectations."[228] The cash flow test analyzes whether the debtor is able to pay its debts as they mature.[229] Interestingly, *TOUSA II* makes but a few mentions of the insolvency prong of the case, and none of them discuss the issue or conclusions in detail.[230] In some ways, insolvency—a core tenant of a fraudulent transfer analysis—was irrelevant to the district court's holding. Perhaps the Eleventh Circuit will give it more credence.

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223 Generally, upstream guarantees are vulnerable to fraudulent transfer liability. Transfers by a debtor that operate solely or principally to benefit an affiliated entity will constitute fraudulent transfers when the other elements of a fraudulent transfer are present. *See generally* Rubin v. Mfr's. Hanover Trust, 661 F.2d 979 (2nd Cir.1981); *In re* Holly Hill Medical Center, Inc., 44 B.R. 253 (Bankr.M.D.Fla.1984).

224 *TOUSA I*, 422 B.R. 783, 802–44 (Bankr. S.D. Fla. 2009); *see also* 11 U.S.C. § 548(a)(1)(B)(i) (2006).

225 11 U.S.C. § 548(a)(1)(B)(ii)(I).

226 Post-Trial Memorandum for Senior Transeastern Lenders at 31, *TOUSA I*, 422 B.R. 783 (Bankr. S.D. Fla. 2009) (No. 08-10928).

227 *TOUSA I*, 422 B.R. at 858.

228 *Id.* at 862.

229 *Id.*

230 *See generally*, *TOUSA II*, No. 10-60017-CIV/GOLD, 2011 WL 522008 (S.D. Fla. Feb. 11, 2011).

1. *The Balance Sheet Test*

The bankruptcy court found TOUSA to be insolvent under the balance sheet test, requiring proof that the debtor's sum of debts is greater than the fair value of that debtor's property, as presented by the Committee's experts.[231] Using two "well-accepted methods of valuation,"[232] the court found that "each Conveying Subsidiary's debts exceeded the fair value of its assets . . . both before and after the July 31 Transaction."[233] Under the first method of valuation, the bankruptcy court determined that the "total enterprise value" compared with the company's debts "demonstrated that TOUSA was insolvent on a consolidated basis and that each of the Conveying Subsidiaries was insolvent as well."[234] Under the second method, "the Committee's real estate expert[] determined the fair value of the [Conveying Subsidiaries' homebuilding assets as of July 31, 2007."[235] "[T]he Committee's accounting expert[] incorporated those values to construct balance sheets for each Conveying Subsidiary. The results show[ed] that each Conveying Subsidiary's debts exceeded the fair value of its assets on July 31, 2007, both before and after the July 31 Transaction."[236] This, of course, raises the likelihood of TOUSA spiraling into the "zone of insolvency," but the district court (and to some extent the bankruptcy court) steered clear of any such discussion.[237]

In response to the Committee's valuation of the TOUSA subsidiaries' assets, the defendants first "filed a motion before trial to exclude the expert testimony . . . regarding the valuation of the Debtors' real-estate assets as unreliable under *Daubert v. Merrell Dow Pharm. Inc.* . . . ."[238] *Daubert* (and Federal Rule of Evidence 702) requires a court to weigh the reliability of

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[231] *TOUSA I*, 422 B.R. at 858–62.

[232] The court's opinion goes into much detail in its analysis of the various experts and their valuations, both in terms of substance and credibility. *Id.*

[233] *Id.* at 859.

[234] *Id.*

[235] *Id.*

[236] *Id.*

[237] *Id.* at 839. Historically, the "zone of insolvency" is a concept created when a company enters a time of financial distress, and the fiduciary duties of the board of directors expands. Courts have held that fiduciary duties to creditors arise upon a corporation's "insolvency-in-fact," rather than when a party institutes formal bankruptcy proceedings. *See* Geyer v. Ingersoll Publ'ns Co., 621 A.2d 784, 787 (Del. Ch. 1992). There is also the concept of "deepening insolvency," which holds that a defendant may be liable for "deepening insolvency" where the defendant's conduct, either fraudulently or even negligently, prolongs the life of a corporation thereby increasing the corporation's debt and exposure to creditors. Pennsylvania has joined the growing list of jurisdictions recognizing this doctrine. *See* Official Comm. of Unsecured Creditors v. R.F. Lafferty & Co., Inc., 267 F.3d 340, 349–50 (3rd Cir. 2001).

[238] *TOUSA I*, 422 B.R. at 859.

proposed testimony before it can be admitted.[239] Although they are neither exclusive nor exhaustive, the factors vary depending on the subject, and a court may consider whether the method can and has been tested, whether it "has been subjected to peer review and publication," whether it has a "known or potential rate of error," and finally, whether it has gained "general acceptance" within the relevant scientific community.[240] The defendants' motion argued that the Committee's real estate expert was "unqualified because he [was] not a licensed appraiser and his opinions [were] unreliable."[241] The bankruptcy court disagreed, however, and found each of the Committee's real estate experts' valuation methods acceptable under *Daubert*.[242] In addition, the court also found it "inconsequential that [the expert was] not a licensed appraiser . . . ."[243]

The defendants also offered their own expert witnesses.[244] One expert proposed that "the solvency analysis in this case must be examined on a 'common enterprise' basis."[245] The defendants believed that TOUSA and its subsidiaries operated as one larger entity and should therefore be treated as such.[246] The bankruptcy court discounted this "common enterprise" approach on two premises.[247] First, "the evidence clearly shows that TOUSA could, and did, rely on the separateness of individual legal entities when it served its best interests. Testimony from many TOUSA employees confirmed that TOUSA routinely recognized the distinctions among its individual subsidiaries."[248] This relationship "was similar to the typical relationship between corporate parents and subsidiaries."[249] Second, § 548 "requires consideration of whether 'the debtor' was insolvent and, because each of the Conveying Subsidiaries is a separate and distinct 'debtor,' each must be considered separately."[250] In *TOUSA I*, this statutory interpretation of § 548 raised questions regarding the future use of the "common enterprise" defense to prove solvency in

239 Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 592–95 (1993); FED. R. EVID. 702 (2010).
240 *Daubert*, 509 U.S.at 592–95.
241 *TOUSA I*, 422 B.R. at 823.
242 *Id.*
243 *Id.*
244 *Id.* at 831.
245 *Id.* at 833.
246 *Id.* at 861.
247 *Id.* at 833–34.
248 *Id* at 834.
249 *Id.*
250 *Id.* at 861.

intercorporate guaranty transactions. In *TOUSA II*, the defense was resurrected.[251]

2. Unreasonably Small Capital Test and Cash Flow Test

The unreasonably small capital test "asks whether a [debtor] has sufficient capital to support operations in the event that performance is below expectations."[252] To complement this analysis, the bankruptcy court examined contemporaneous market evidence and held that TOUSA had been insolvent at the time of the July 31 Transaction.[253] Much to the district court's chagrin, the bankruptcy court's analysis focused largely on the facts surrounding the case, including "the deterioration of the real estate market in the months leading up to the closing."[254] While the district court disagreed with the relative nature of hindsight employed by the bankruptcy court in *TOUSA I*, the market evidence indicated that TOUSA had some inkling of the severity of the downturn: the negative effect on TOUSA's operating results, the downgrade in rating by ratings agencies, and the drop in TOUSA's stock and bond prices.[255] Clearly, the bankruptcy court rejected this ostrich-like approach: sticking one's head in the ground and ignoring the coming financial Armageddon.

The bankruptcy court also examined the negative internal assessments by TOUSA's management and its auditors who requested a pre-petition going-concern opinion because of TOUSA's inability to satisfy its loan-revolver covenants.[256] In this blend of the unreasonably small capital and cash-flow analyses (the latter examining whether the debtor is able to pay its debts as they mature), the court determined that this evidence established that the July 31 Transaction would leave TOUSA without any breathing room if the economy continued to underperform as well as an inability to meet financial obligations as they matured.[257] "Because the parent company was left with unreasonably small capital to operate its business, [its] [s]ubsidiaries also were left with unreasonably small capital."[258] Furthermore, the court found that the "evidence of balance sheet insolvency [was] also proof that the Conveying

[251] *TOUSA II*, No. 10-60017-CIV/GOLD, 2011 WL 522008, at *25 (S.D. Fla. Feb. 11, 2011).
[252] *TOUSA I*, 422 B.R. at 862.
[253] *Id.* at 790.
[254] Brighton, *supra* note 13.
[255] *TOUSA I*, 422 B.R. at 790–92.
[256] *Id.* at 792–99.
[257] *Id.* at 799.
[258] *Id.*

Subsidiaries had unreasonably small capital."[259] This particular piece of *TOUSA I* caused a kerfuffle among distressed lenders that parachute in when a company hits the skids. It effectively put the onus on them to amplify their due diligence procedures before entering into such transactions.[260] In other words, the bankruptcy court determined that TOUSA had no business entering into the loans, and the lenders should have known that. *TOUSA II*, on the other hand, gave the lenders a pass by removing that burden.[261]

3. *Ability to Pay Debts as They Become Due*

The final test for insolvency is whether the debtor will be able to pay its debts as they mature.[262] This prong of § 548 is met if it can be shown that the debtor made a transfer or incurred an obligation with knowledge that subsequent creditors would likely not be paid as their claims matured.[263]

> While the statute suggests a standard based on subjective intent, the courts have held that the intent requirement can be inferred where the facts and circumstances surrounding the transaction show that the debtor could not have reasonably believed that it would be able to pay its debts as they matured . . .[264]

The bankruptcy court held that TOUSA and, more particularly, the Conveying Subsidiaries, failed this insolvency test based on the evidence surrounding the July 31 Transaction, including the testimony and contemporaneous documents of members of TOUSA's senior management; the analyses provided by the Committee's experts; the evidence of the market pricing of TOUSA's debt; and, TOUSA's actual inability to meet its financial obligations shortly after the July 31 Transaction.[265] The bankruptcy court also noted that listening to the lenders' experts reminded it of "the fable of the blind man describing an elephant."[266] But the district court was persuaded that the TOUSA intercompany accounts were an irreconcilable "pile of tangled spaghetti," that demonstrated the need for a holistic fraudulent transfer analysis

259 *Id.* at 862.

260 *Id.*

261 *TOUSA II*, No. 10-60017-CIV/GOLD, 2011 WL 522008, at *49 (S.D. Fla. Feb., 2011).

262 *TOUSA I*, 422 B.R. at 862.

263 *Id.* at 859 (citing WRT Creditors Litig. Trust v. WRT Bankr. Litig. Master (*In re* WRT Energy Corp.), 282 B.R. 343, 415 (Bankr. W.D. La. 2001)).

264 *Id.* at 862–63 (citing *WRT Creditors Litig. Trust*, 282 B.R. at 415).

265 *Id.* at 863.

266 *Id.* at 838 n. 33.

(as opposed to the subsidiary-level analysis employed by the bankruptcy court).[267]

IV. SOLVENCY OPINION

One of the more potent aspects of the July 31 Transaction was one that the district court did not feel obliged to discuss. In June 2007, TOUSA required a solvency opinion from Alix Partners.[268] After a large investor raised an alarm about TOUSA bonds, the administrative agent on the new loans demanded that a solvency opinion be provided before the closing of the July 31 Transaction.[269] These opinions are routine in such transactions, but the level of due diligence applied can be remarkably low due to the increased pressure for a favorable opinion that keeps the transaction moving forward.[270]

The court rejected the credibility of the TOUSA solvency opinion for three reasons.[271] First, the commitment letter "required a solvency opinion from a nationally recognized, independent financial advisory firm that ha[d] substantial experience in providing solvency opinions in connection with transactions similar to the Transaction[] contemplated hereby."[272] But, because "Alix had not provided a solvency opinion for a homebuilder since before 2005," it had an "apparent lack of experience."[273] The bankruptcy court also criticized Alix for relying on the financial projections provided by TOUSA's management without conducting an independent review of the historical accuracy of those numbers.[274] Moreover, the opinion only evaluated TOUSA as a consolidated body, as opposed to an independent analysis of the subsidiaries.[275] Finally, the bankruptcy court emphasized the most damning evidence: that the solvency opinion was contracted on a contingency fee arrangement.[276]

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267 *TOUSA II*, No. 10-60017-CIV/GOLD, 2011 WL 522008, at *42 n.54 (S.D. Fla. Feb., 2011).

268 *TOUSA I*, 422 B.R. at 840.

269 *Id.* at 839.

270 *See e.g.*, Nancy Czaplinski et al., *Solvency Opinions: What Borrowers and Lenders Need to Know*, AM. APPRAISAL (2010), http://www.american-appraisal.us/userfiles/file/Solvency%20Opinions_FINAL_07082010.pdf.

271 *TOUSA I*, 422 B.R. at 839–43.

272 *Id.* at 839 (internal quotation marks omitted).

273 *Id.*

274 Jeffrey Rothschild, In re TOUSA, Inc.*: Implications for Solvency Opinion Providers*, MCDERMOTT, WILL & EMERY (Nov. 3, 2009), http://www.mwe.com/index.cfm/fuseaction/publications.nldetail/object_id/35b50a74-8ea8-4869-a95c-f676bd55db36.cfm.

275 *TOUSA I*, 422 B.R. at 839.

276 *Id.*

> TOUSA agreed to pay $2 million if Alix ultimately opined that TOUSA would be solvent immediately following the July 31 Transaction; but if Alix could not so opine, TOUSA would pay Alix only its time charges and reimburse its costs. These ultimately amounted to less than half of the $2 million fee which was paid.[277]

The bankruptcy court was persuaded by both the conflict of interest and the fact that Alix expected to provide a favorable opinion only five days after being retained.[278] *TOUSA I* should be a word of caution to solvency opinion providers; it highlights that opinion providers should carefully vet these issues when they are structuring their fee arrangement in the early stages of such engagements—and *TOUSA II*'s silence on the issue may well indicate that this is an issue (as opposed to so many others) on which the two courts agree.[279]

A. A Good Faith Defense (of the Duty of Due Diligence)

The relative considerations of good and bad faith are fundamental issues in fraudulent transfer actions.[280] Coupled with the "reasonably equivalent value" criterion for constructive fraud under § 548, *TOUSA I* rejected the Transeastern Lenders' good faith defense under § 548(c).[281] Conversely, the district court determined that the bankruptcy court clearly erred in finding that the Transeastern Lenders acted in bad faith because the bankruptcy court had improperly imposed a "patently unreasonable and unworkable" legal duty on the Transeastern Lenders to investigate the internal refinancing structure of TOUSA and its subsidiaries before they accepted the settlement payment.[282]

The district court castigated this increased due diligence standard and held that the bankruptcy court erred as a matter of law in seeking to "pose an unfair burden on creditors to investigate all aspects of their debtors and the affiliates of those debtors before agreeing to accept payments for valid debts owed."[283] Although the district court concluded that a heightened duty to investigate was

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277 *Id.* at 839–40.

278 Rothschild, *supra* note 274.

279 *Id.*

280 *See generally In re* Jacobs, 394 B.R. 646 (Bankr. E.D.N.Y. 2008).

281 *TOUSA I*, 422 B.R. at 869 (explaining that § 548(c) of the Bankruptcy Code (and similar provisions of equivalent state laws) provides a defense for a transferee who has received the transfer "in good faith" and "for value"); *see also* 11 U.S.C. § 548(c) (2006) (indicating that, for purposes of fraudulent transfer actions, "value" includes "satisfaction . . . of a present or antecedent debt"); Bear, Stearns Sec. Corp. v. Gredd (*In re* Manhattan Inv. Fund), 397 B.R. 1, 17 (Bankr. S.D.N.Y. 2007) (noting that good faith is a far more fact-intensive inquiry from an objective perspective).

282 *TOUSA II*, No. 10-60017-CIV/GOLD, 2011 WL 522008, at *48 (S.D. Fla. Feb. 11, 2011).

283 *Id.* at *50.

not supported by applicable law, the objective measure of good faith under § 548(c) is less certain in practice.

Under § 548(c) of the Bankruptcy Code, a transferee or obligee "that takes for value and in good faith has a lien on or may retain any interest transferred or may enforce any obligation incurred, as the case may be, to the extent that such transferee or obligee gave value to the debtor in exchange for such transfer or obligation."[284] Knowledge by the transferee of the insolvency of the debtor at the time of the transfer may refute a claim of good faith on the part of the transferee. Also, a transferee does not act in good faith when he has sufficient knowledge to (at least) place him on inquiry notice of the debtor's possible insolvency.[285]

When examining the transferee's knowledge of the debtor's insolvency, the good faith test requires an examination of the objective facts, such as what the transferee should have known, or what a reasonably prudent person in the transferee's position would have known.[286] Moreover, courts have generally held that it is not necessary to show that the transferee had actual fraudulent intent, though fraudulent intent on the part of the transferee would clearly establish the lack of good faith.[287]

Applying this standard in *TOUSA I*, the bankruptcy court concluded that the lenders and their agent, Citi, had more than sufficient knowledge of TOUSA's insolvency based on publicly available information.[288] As a result, the bankruptcy court determined that Citi should have foreseen the severity of the market downturn and recognized the risks.[289] In a lengthy discussion, the court detailed the indicators of a crashing housing market that had occurred prior to the July 31 Transaction.[290] These indicators included a March 2007 "Special Comment" by Moody's stating "that its outlook on the homebuilding

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[284] 11 U.S.C. § 548(c); *see also* Rinn v. Fraidin (*In re* Fraidin), 257 B.R. 437, 440 (Bankr. D. Md. 2001).

[285] Enron Corp. v. Bear, Stearns & Co., Inc. (*In re* Enron Corp.), 2005 WL 3832053, at *19 (Bankr. S.D.N.Y. 2005).

[286] *Id.*

[287] Durkin v. Shields (*In re* Imperial Corp. of Am.), No. 92-1003-IEG (LSP), 1997 U.S. Dist. LEXIS 20943, at *13–14 (S.D. Cal. Aug. 14, 1997) ("While the Bankruptcy Code does not define 'good faith,' courts generally consider whether the transferee objectively knew or should have known of the debtor/transferor's fraudulent purpose."); Armstrong v. Ketterling (*In re* Anchorage Marina, Inc.), 93 B.R. 686, 693 (Bankr. D. N.D.1988) ("Transferees are not acting in good faith when they have knowledge sufficient to put them on at least inquiry notice of the debtor's possible insolvency.").

[288] *TOUSA I*, 422 B.R. 783, 795–97 (Bankr. S.D. Fla. 2009).

[289] *Id.* at 796.

[290] *Id.*

industry, which had been 'cautiously negative' in the summer of 2006, was 'more assertively negative' from the fall of 2006 to the present."[291] In addition, "numerous analysts, ratings agencies[,] and market participants recognized that TOUSA was deeply troubled."[292] For example, in May 2007, "Debtwire reported that TOUSA bondholders had warned that the company would be entering the 'zone of insolvency' if it took on the new financing to settle with the Transeastern Lenders," and "ratings agencies Moody's and Standard & Poor's both downgraded their ratings of TOUSA bonds in contemplation of the July 31 Transaction, concluding that TOUSA was 'not likely' to be able to meet its financial obligations."[293]

Once a transferee is determined to be on inquiry notice of the debtor's insolvent status, the transferee must demonstrate that it exercised a reasonable amount of due diligence in determining the legitimacy of the transfer.[294] In *TOUSA I*, the bankruptcy court was not only critical of the lack of due diligence performed by Citi before finalizing the transaction, but it also continued even further to find that Citi's actions equated to negligence.[295] In particular, Citi "failed to uncover the privately-held views of TOUSA's senior management, which were considerably more pessimistic than TOUSA's projections used to support the July 31 Transaction."[296] According to the bankruptcy court, if Citi had been more precise in its investigation, then Citi could have found evidence of insolvency, such as the Strategic Alternatives memo in which TOUSA's CEO, Antonio Mon, observed that the July 31 Transaction would leave TOUSA "[o]ver-leveraged" and at risk of "crashing and burning" even if it could successfully execute its de-leveraging plan.[297] Yet, such statements apparently failed to give the lenders much pause.

While there appeared to be information available that would indicate potential problems with the loan, some critics have assailed the good faith standard used in *TOUSA I* as being broad and burdensome.[298] Specifically, one such critic noted that the most important lesson from the decision is that:

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291 *Id.* at 791.
292 *Id.* at 851.
293 *Id.* at 796.
294 *See, e.g.*, Armstrong v. Ketterling (*In re* Anchorage Marina, Inc.), 93 B.R. 686, 693 (Bankr. D. N.D.1988).
295 *TOUSA I*, 422 B.R. at 796.
296 *Id.* at 796–97.
297 *Id.* at 798–99 (internal quotation marks omitted).
298 Brighton, *supra* note 13.

> [L]enders should be on notice that courts may now be examining past transactions with the benefit of 20/20 hindsight and the reality of the current economic climate, resulting in the view that the lenders' actions should be held not only to greater scrutiny, but also to perhaps a lower standard to impose liability.[299]

The decision was also criticized for its finding that Citi's officers should have realized the severity of the housing market downturn, which effectively would require the officers to look into a "crystal ball."[300] *TOUSA II* certainly agreed with the criticism that *TOUSA I* inflated lenders' duties to fortune teller levels.[301]

Regardless of the debate over duties and due diligence, the question of whether a lender should have recognized (and acted upon) the likelihood of a severe downturn in the market is an intensely factual inquiry. *TOUSA II* suggested that despite Citi's vast resources and numerous financial analysts, it lacked the ability to forecast the swift decline of the economy. Perhaps the missing link was not a crystal ball, but instead a bit of common sense. From Tulipomania to the Texas oil rush, a bubble's burst is both inevitable and unexpected. A loan given, with what seemed like reckless indifference to the viability of the debtor and its subsidiaries as a going concern, suggests that a lender could choose to ignore the obvious.

The signs pointing towards a harsh decline in the housing market were documented and began gaining recognition within the industry by early 2006.[302] Applying an objective standard, the court opined that the lender should be expected to take notice of these signs before lending to a struggling company within a rapidly declining industry.[303] Objectively, lenders in housing and other industries could be on the same notice.

The bankruptcy court opined that a reasonably prudent person in the transferee's position would have likely reacted to such bleak projections by conducting a more thorough investigation that may have uncovered the "crash and burn" projections by TOUSA's internal management.[304] The court noted that such an investigation would have also cast doubt over the continuing

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299 *Id.*
300 *Id.* at 72.
301 *TOUSA II*, No. 10-60017-CIV/GOLD, 2011 WL 522008, at *50 (S.D. Fla. Feb. 11, 2011).
302 *TOUSA I*, 422 B.R. at 791.
303 *Id.* at 798.
304 *Id.* at 799.

validity of the projections provided to them by TOUSA.[305] Regardless of *TOUSA II's* attempt to restore order to the lending universe, *TOUSA I* may still be a lesson to lenders: earnest and thorough investigation of a borrower's financial state may reduce the exposure to a charge of negligence (or willful blindness) in similar transactions. Moreover, lenders should realize that favorable solvency opinions may not discharge the need for further investigation. The bankruptcy court viewed the requirement of a solvency opinion in TOUSA's case as "excessive cleverness, rather than hard-headed, honest analysis of the economic reality."[306]

The bankruptcy court would not accept the solvency opinion to be proof of actual solvency for a number of reasons. Rather than focusing on the inaccuracy of the opinion, however, the court seemed to imply that the manner in which Citi requested and followed up with this opinion did not show good faith because it was merely an attempt by Citi to allow the transaction to move forward while protecting its own interests with as little true analysis as possible.[307] Another layer of caution to lenders: a mere solvency opinion on its own will not protect a lender when it would have been reasonable to perform a deeper analysis in light of the circumstances.

Of course, allegations of bad faith bring corollary allegations of "unclean hands" on the part of the debtor. A chief criticism of the *TOUSA I* decision was that the debtor was not held responsible in any way for its poor decision to enter into the July 31 Transaction.[308] While the bankruptcy court noted that "[TOUSA was] dangerously overleveraged," it did not ascribe any culpability to the borrower for taking on the debt.[309] The court did not entertain the debate as to whether the lenders took advantage of the borrower, who likely was a sophisticated player in the transaction. Therefore, the question presented is whether in situations such as this, lenders should be penalized because the borrower, its owners, and its fiduciaries may not have executed good business judgment.[310]

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305 *Id.* at 839–44.

306 *Id.* at 870 n.56.

307 *Id.* at 839–40.

308 Andrea Saavedra, *Legitimate Protection from Parental Abuse or Just Another Blame Game?*, WEIL, GOTSHAL & MANGES LLP BANKRUPTCY BLOG (Nov. 3, 2010), http://business-finance-restructuring.weil.com/fiduciary-duties/legitimate-protection-from-parental-abuse-or-just-another-blame-game/.

309 *TOUSA I*, 422 B.R. at 792.

310 Saavedra, *supra* note 308.

This Article does not attempt to answer that question, but it is one that a lender and its attorneys must consider. In reality, business owners (whether a sole proprietorship or global corporation) will generally have a more optimistic view of their chances of survival:

> [D]irectors of [wholly-owned, financially troubled] corporations could find themselves trapped between Scylla and Charybdis when facing a decision that may render the subsidiary insolvent or when making a decision when the subsidiary is potentially already insolvent. If the directors act in favor of the parent, they risk violating their fiduciary duties to the subsidiary and its creditors. If the directors act in favor of the subsidiary and its creditors, they risk violating their fiduciary duties to their only shareholder, the parent. Most actions taken in favor of the subsidiary would be protected by the business judgment rule, as disinterested transactions taken in good faith, and most actions taken in favor of the subsidiary would be interested transactions and not be so protected. Thus, the law currently encourages directors of [wholly-owned, financially troubled] corporations to question the judgment of its parent and incur costly transactions costs in its dealings with its parent in an effort to avoid liability.[311]

As a result, lenders generally stand in a better position to make an impartial decision regarding a loan transaction. Lenders should, therefore, be prepared to shoulder most of the burden. While *TOUSA I* stops short of reigniting the flames of the "deepening insolvency" debate, the implied responsibility might expose lenders to the same vulnerabilities and consequences that led to the outcome of *TOUSA I*.[312] Same results, different means.

B. Validity of Savings Clauses

Although *TOUSA II* quashed *TOUSA I* up to the limit of its jurisdiction, pieces of the *TOUSA I* decision remain in flux. In dicta, the bankruptcy court questioned the validity of "savings clauses" in loan documents, possibly reducing their value in financing.[313] The court rejected the defendant's argument that the savings clause was valid for the reason that it protected *both* parties (TOUSA and the lenders).[314] This ruling has been received by the

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311 J. Haskell Murray, *"Latchkey Corporations" and their Parents: Fiduciary Duties in Wholly Owned, Financially Troubled Or Insolvent Subsidiaries* (Feb. 2011) (on file with the author).

312 N. Am. Catholic Educ. Programming Found., Inc. v. Gheewalla, 930 A.2d 92, 99, 103 (Del. 2007).

313 Mark G. Douglas, *TOUSA Ruling Bad News for Savings Clauses*, JONES DAY (Nov.–Dec. 2009) http://www.jonesday.com/tousa-ruling-bad-news-for-the-savings-clause-11-30-2009/.

314 *TOUSA I*, 422 B.R. at 863.

lending community with a mixture of shock and dismay.[315] The savings clause portion of *TOUSA I* is dicta (the bankruptcy court held that TOUSA was already insolvent prior to the agreement with the clause). Nonetheless it could be relevant on appeal if the chronology of insolvency becomes an issue.

As a general rule, prebankruptcy contract provisions that waive fraudulent transfer liability are not effective in bankruptcy.[316] For instance, prebankruptcy waivers preventing a party from entering bankruptcy are rarely enforced because they deprive the debtor of an opportunity for a fresh start, one of the central policy aims of bankruptcy.[317] For example, waivers of the automatic stay are enforced only sporadically. Some courts decline to enforce them,[318] others consider them as a factor in deciding whether to lift the stay under § 362(d),[319] and still others hold them to be per se enforceable.[320]

Savings clauses can protect debtors and creditors from the vagaries of bankruptcy. They limit the amount that can be clawed back from a guarantor as a fraudulent transfer by reducing the contractual obligation to a smaller amount, which allows the debtor to remain solvent.[321] Consider a case in which a transfer of ten dollars would render the transferor insolvent, thus creating a fraudulent transaction. Here a savings clause would operate automatically to reduce the contractual obligation to $9.99. Without the savings clause, the transaction is vulnerable to claw back.

The *TOUSA I* holding has garnered particular attention because it effectively admonished the lenders for playing fast and loose with the

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315 Douglas, *supra* note 313.

316 Kupetz v. Wolf, 845 F.2d 842, 844 (9th Cir. 1988).

317 *See* Fallick v. Kehr (*In re* Fallick), 369 F.2d 899, 904 (2d Cir. 1966) ("We agree... that an advance agreement to waive the benefits of the [Bankruptcy] Act would be void."); Freeman v. Freeman (*In re* Freeman), 165 B.R. 307, 312 (Bankr. S.D. Fla. 1994) ("Provisions in a property settlement agreement that obligations thereunder are non-dischargeable in bankruptcy are not specifically enforceable and in themselves are not binding."); Carbia v. Clark (*In re* Carbia), 113 B.R. 761, 763 (Bankr. S.D. Fla. 1990) (holding that a property settlement purporting to render dischargeable a lump sum payment is invalid as against public policy).

318 *See In re* Pease, 195 B.R. 431, 433 (Bankr. D. Neb. 1996).

319 *See* Mass. Mut. Life Ins. Co. v. Shady Grove Tech Ctr. Assocs. (*In re* Shady Grove Tech Ctr. Assocs.), 227 B.R. 422, 425 (Bankr. D. Md. 1998) ("Waivers of rights are inherently suspect. The party seeking to enforce [t]he [w]aiver must demonstrate that under the specific facts of the case, the public policy encouraging workout agreements overcomes the policy in favor of affording the debtor the respite accorded by the automatic stay in bankruptcy. ").

320 *See generally Kupetz*, 845 F.2d at 842; *see also In re* Cheeks, 167 B.R. 817, 820 (Bankr. D.S.C. 1994).

321 David W. Morse, *Legal Issues In Leveraged Acquisitions: From the Lender's Perspective*, 1781 PLI/CORP 325, 382 (2010).

Bankruptcy Code vis-à-vis a savings clause (even though such provisions are routine in lending contracts).[322] *TOUSA I* reined in the savings clause provisions present in each of the first- and second-lien term loan agreements in the July 31 Transaction. Those clauses provided:

> Each Borrower agrees if such Borrower's joint and several liability hereunder, or if any Liens securing such joint and several liability, would, but for the application of this sentence, be unenforceable under applicable law,[323] such joint and several liability and each such Lien shall be valid and enforceable to the maximum extent that would not cause such joint and several liability or such Lien to be unenforceable under applicable law, and such joint and several liability and such Lien shall be deemed to have been automatically amended accordingly at all relevant times.[324]

The bankruptcy court held that these savings clauses were unenforceable. More importantly, the court implied that savings clauses might be generally unenforceable.[325]

The bankruptcy court examined the savings clauses under contract law and found them to be unenforceable on two grounds. First, each savings clause purported to "reduce obligations after accounting for all other obligations."[326] This resulted in a circular problem in which "the value of *A* can be determined only after knowing the value of *B*; but the value of *B* can be determined only after knowing the value of *A*."[327] Because of this interaction between the two clauses, "liabilities under the term loans are *inherently* indeterminate," and therefore unenforceable.[328]

Second, in what could best be characterized as passing dicta, the bankruptcy court went beyond the specific facts of the case and held that the use of savings clauses to "contract around the core provisions of the Bankruptcy Code" was invalid.[329] Indeed, bankruptcy courts frown upon contractual attempts to cut the arms off of the Bankruptcy Code.[330] The bankruptcy court stated that the reasoning behind § 548 was to "ensure that

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322 *Id.* at 382–83.

323 Here, applicable law is fraudulent transfer law.

324 *TOUSA I*, 422 B.R. 783, 863 n.49 (Bankr. S.D. Fla. 2009).

325 *Id.* at 863–65.

326 *Id.* at 864.

327 *Id.*

328 *Id.*

329 *Id.* at 863–64.

330 *See e.g.*, Waner v. Maxwell (*In re* Waner Corp.), 146 B.R. 973, 976 (Bankr. N.D. Ill. 1992).

those who saddle insolvent businesses with new obligations or liens must provide reasonably equivalent value in return, or face the avoidance of the transaction."[331] If enforced, the clauses would swallow the portion of § 548(a)(1)(B)(I) that wipes clean transfers from insolvent firms that garner less than reasonably equivalent value.[332] The clauses would also nullify the limits that § 548(c) places on the ability of good faith transferees to retain property "to the extent that such transferee or obligee gave value to the debtor in exchange for such transfer or obligation."[333]

The bankruptcy court was troubled by the bubble-wrap features of the savings clauses: they "come into play if and only if the transaction would otherwise be avoided, *i.e.*, if the transferee has not provided reasonably equivalent value to an otherwise-insolvent debtor."[334] Thus, even if the transaction *should* arrive to the bankruptcy court in a broken condition, the bubble wrap of a savings clause insulates a lender from liability. For that reason, the court emphasized that the only purpose that a savings clause serves "is to ensure that the transferee can preserve its claim to every last penny of the debtor's remaining assets without providing reasonably equivalent value," to the detriment of other creditors in the case.[335] Based on this, the bankruptcy court concluded that "the savings clauses are a frontal attack on the protections that [§] 548 provides to other creditors," and they were "entirely too cute to be enforced."[336]

In an amicus brief filed in the *TOUSA I* appeals, the Loan Syndications and Trading Association ("LSTA") argued that the court's decision has the potential to affect the way lenders do business going forward.[337] This pessimism over a *TOUSA-effect* on credit markets is a shared attitude: "Lenders unable to rely on savings clauses to minimize avoidance exposure may be reluctant to extend credit in a market that is already tight."[338] Despite the doomsday scenarios, credit is hard to come by regardless of anything a

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331 *TOUSA I*, 422 B.R. at 864.

332 *Id.*

333 *Id.*

334 *Id.*

335 *Id.*

336 *Id.*

337 *See* Brief for Loan Syndications and Trading Association as Amicus Curiae, *TOUSA II*, No. 10-60017-CIV/GOLD, 2011 WL 522008 (S.D. Fla. 2011) ("Penalizing the Lenders here will only hurt other commercial borrowers who seek rescue financing because the lenders in such situations will need to price their loans to reflect the risk of being re-cast as guarantors—or worse, refuse to provide rescue financing altogether."); *see also* Douglas, *supra* note 313.

338 Douglas, *supra* note 313, at 4–5.

bankruptcy court in Florida says. It is plausible that lenders likely will insist upon alternative forms of credit enhancement to supplant upstream guarantees infested with savings clauses.[339] As one commentator noted, "[n]one of these ideas are as attractive as the 'magic bullet' of a savings clause—but the [TOUSA] court, at least, doesn't believe in magic."[340] This could be discouraging news for companies currently struggling to line up debtor-in-possession financing in order to restructure or reorganize their businesses.[341]

C. Lender Liability for Diminution in Lien Value

One last interesting conclusion deserves further mention. In *TOUSA I*, the bankruptcy court held that "[t]he Conveying Subsidiaries [were] also entitled to recover the diminution in value of the liens that [had] occurred since the transfer."[342] The court's holding relied on § 550 of the Bankruptcy Code, which permits recovery for the benefit of the estate of "the property transferred, or, if the court so orders, the value of such property . . . ."[343] Courts "have consistently held that [this section] 'is designed to restore the estate to the financial condition that would have existed had the transfer never occurred.'"[344] The bankruptcy court reasoned that because the liens had diminished in value, the Conveying Subsidiaries could only be returned to their original position by collecting the difference as well as avoiding the liens.[345]

In order to provide support for its position, the bankruptcy court relied on *In re American Way Service Corp.*,[346] in which transferred property had declined in value and the estate was entitled to receive the entire value at the time of the transfer.[347] *TOUSA I* cited no cases in which the transferee was liable for the diminished value of an avoided lien rather than recovered tangible property.[348] The lack of published opinions or other decisional authority could make this issue a focus on appeal.[349]

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339 *Id.*

340 John C. Weitnauer, *TOUSA and Its Consequences*, *in* COMMERCIAL REAL ESTATE FINANCING: STRATEGIES FOR CHANGING MARKETS AND UNCERTAIN TIMES 1507, 1515 (2010).

341 *See* Douglas, *supra* note 313.

342 *TOUSA I*, 422 B.R. at 883.

343 *Id.* at 881 (quoting 11 U.S.C. § 550(a) (2006)).

344 *Id.* (quoting Bakst v. Wetzel (*In re* Kingsley), 518 F.3d 874, 877 (11th Cir. 2008)).

345 *Id.* at 885.

346 *Id.* at 883.

347 *See* Feltman v. Warmus (*In re* Am. Way Serv. Corp.), 229 B.R. 496, 530–32 (Bankr. S.D. Fla. 1999).

348 *Id.* at 531–33

349 *See* Senior Transeastern Lenders' Post-Trial Memorandum at 8–14, *TOUSA I*, 422 B.R. at 783 (No. 08-10928-JKO).

In the post-trial memorandum, the defendants argued that "[c]ourts recognize that avoidance and recovery are distinct concepts . . . . Indeed, recovery is only available when avoidance alone is inadequate."[350] This is an accurate statement, and remedies available to a debtor or trustee may be limited based on the property interest that has been transferred,[351] but this is a conclusion at which bankruptcy courts arrive based on the facts presented by the case, including whether there are accessible assets to support recovery in addition to avoidance. It need not be an either/or proposition.[352] Bankruptcy courts have held that when the interest transferred is a non-possessory interest such as a lien, the only remedy available is avoidance and "no recovery is possible under § 550."[353] In fact, the concept of recovery itself conveys the notion that a possessory interest in property exists.[354] This is because when a non-possessory interest in property is avoided, nothing remains to be recovered.[355]

Two recent decisions by the Tenth Circuit Bankruptcy Appellate Panel denied recovery following an avoided mortgage.[356] The Tenth Circuit held that "[w]here . . . the [t]rustee avoids only a non-possessory transfer of a lien interest, the preservation of that lien interest for the benefit of the estate is sufficient to place the estate in exactly the same position it would have been in, but for the granting of the lien."[357] Allowing recovery of the diminution in value "appears to assume that, had the voidable transfer not been made, the . . . collateral would not have depreciated in value."[358] Other courts "throughout the country have reached the same conclusion."[359]

The defendants argued that in addition to going outside the purpose of § 550, the court would also violate the single-satisfaction limitation inherent in

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350 *Id.* at 8 (citation omitted).

351 *Id.*

352 *See* Gabel & Redmond, *supra* note 113, at 91–92.

353 Post-Trial Memorandum, *supra* note 349, at 9 (quoting Yoppolo v. Liberty Mortg. (*In re* Morgan), 276 B.R. 785, 792 (Bankr. S.D. Ohio 2001)).

354 *Id.* (citing *In re Morgan*, 276 B.R. at 792).

355 *Id.*

356 *See* Post Trial Memorandum, *supra* note 349, at 9–11; *see also* Rodriguez v. DaimlerChrysler Fin. Servs. Ams. LLC (*In re* Bremer), 408 B.R. 355 (B.A.P. 10th Cir. 2009) (consolidating two lower court decisions on appeal: *Rodriguez v. DaimlerChrysler Fin. Servs. Ams. (In re Bremer)*, 392 B.R. 873, 875 (Bankr. D. Colo. 2008), and Rodriquez v. Drive Fin. Servs. LP (*In re* Trout), 392 B.R. 869 (Bankr. D. Colo. 2008)).

357 Post Trial Memorandum, *supra* note 349, at 10; *see also In re Bremer*, 408 B.R. at 358 (citing *In re Trout*, 392 B.R. at 871 and *In re Bremer*, 392 B.R. at 875).

358 Post Trial Memorandum, *supra* note 349, at 10; *see also In re Bremer*, 392 B.R. at 875 n.3; *In re Trout*, 392 B.R. at 872 n.3.

359 Post Trial Memorandum, *supra* note 349, at 11–12.

§ 550(d) by permitting recovery after avoidance of a lien.[360] As detailed above, this is permissible in bankruptcy—depending upon, of course, the facts of the case.[361] In the 2008 case of *In re Sickels*, the court concluded that "[a]voidance of a lien constitutes a complete recovery for the bankruptcy estate. . . . By avoiding the lien, the bankruptcy estate now holds the property . . . just as the [d]ebtors did prior to granting the [lien]."[362] As a result, if the trustee were also awarded a judgment in the amount of the loan, the trustee would collect twice on the avoided lien.[363]

In *TOUSA*, however, there were multiple transfers that precipitated one complex macro-transaction, borne of both liens and payments.[364] It is difficult (but not impossible) to claw back the whole pie in this case. *TOUSA I* gave back the whole pie, and received a staunch reprimand for doing so. In some ways, *TOUSA I* reached the equitable result while *TOUSA II* reached the legal result. Nonetheless, both courts demonstrate some flawed reasoning in reaching their results. The defendants further argued that the debtors continued to have access and use of their assets after granting non-possessory liens to the New Lenders.[365] Strictly avoiding the liens as fraudulent transfers would have restored the debtors to their pre-transfer position. In addition, the majority of relevant case law appears to preclude recovery beyond the avoidance of the liens.

CONCLUSION

The *TOUSA I* and *II* opinions give bankruptcy practitioners and scholars a large amount of material to digest. It may be argued that the analyses of either *TOUSA I* or *TOUSA II* are flawed in reason, but one would be hard pressed to demonstrate a lack of meticulous detail in either opinion. Both opinions attempt the laudable goal of correcting a perceived wrong, but the two courts' takes on fraudulent transfer analysis will no doubt be the primary issue before the Eleventh Circuit. The district court's opinion evokes a "belly of the beast" model where the analysis must start and finish at the hub of the corporate group and the benefits that flow from it. On the other hand, the bankruptcy

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360 *Id.* at 12–14.

361 *See* Gabel & Redmond, *supra* note 118, at 91–92.

362 Post Trial Memorandum, *supra* note 349, at 13 (quoting Schnittjer v. Linn Area Credit Union (*In re* Sickels), 392 B.R. 423, 427 (Bankr. N.D. Iowa 2008)).

363 *Id.*

364 *See id.* at 11–14.

365 Post Trial Memorandum, *supra* note 349, at 14.

court focused on the extremities and whether damaged appendages (bankrupt subsidiaries) would handicap the corporate body beyond repair.

From precedence to dicta, *TOUSA*'s reach cuts a wide path beyond the pure bankruptcy issues of fraudulent transfer methodology. For example, in the context of expert witnesses, the court determined that the presence of a conflict renders the opinion inadequate and unreliable.[366] When there is a bonus paid to arrive at a particular answer, the expert's credibility is compromised if not destroyed.[367] *TOUSA I* is unwavering in its conclusion that a reliable opinion must be based on reliable methodology from a reliable expert,[368] but the surrounding facts seem to dilute what would otherwise be a strict adherence to *Daubert* and Federal Rule of Evidence 702.[369]

At a more macro level, the implication that *TOUSA* has turned distressed lending inside out is at least a mild exaggeration.[370] Even critics agree that "[t]he court's finding that upstream guarant[ees] provided by [wholly-owned] subsidiaries were fraudulent transfers is not all that surprising."[371] Because upstream guarantees do not give direct consideration to the subsidiary providing the guarantee, a common outcome is a finding that the subsidiary did not receive reasonably equivalent value in the transaction.[372] The most apparent cause of angst among secured lenders is that liens securing $500 million in bank loans were avoided in *TOUSA I*. Such an outcome is the source of a lender's worst nightmare.[373]

Nonetheless, the disastrous impact of *TOUSA I* may be nothing more than a red herring, and any true effects have yet to be revealed beyond the instant

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366 John C. Weitnauer, *Valuation Questions Raised by TOUSA*, AM. BANKR. INST. J., Mar. 2010, at 38, 39.

367 *Id.*

368 *Id.* at 39, 76.

369 In *TOUSA II*, the district court found it suspect that while the bankruptcy court rebuked the defendants' financial expert, one of the Committee's experts (who testified at great length) "was not licensed or certified as an appraiser or expert in real estate valuation in any state." *TOUSA II*, No. 10-60017-CIV/GOLD, 2011 WL 522008, at *17 n. 37 (S.D. Fla. Feb. 11, 2011). The contingency bonus paid to the defendants' expert drew the bankruptcy court's ire, but the potential lack of qualifications by the Committee's expert seemed to receive a free pass. Objectivity and threshold qualifications are related concepts and it seems that the results (from a theoretical standpoint) should be the same for both experts. Either exclude both or admit both and let the testimony and challenges go toward the weight as opposed to the admissibility of the opinions.

370 *See, e.g.*, Douglas, *supra* note 313.

371 Brighton, *supra* note 13, at 72.

372 *Id.*

373 Douglas E. Deutsch & Meghan Towers, *Top Business Bankruptcy Cases of 2009*, AM. BANKR. INST. J.,Mar. 2009, at 40, 41.

case. Before *TOUSA II*, only a scant number of cases cited *TOUSA I* and not for any of its more controversial holdings.[374] Prior to *TOUSA I*, lenders often included savings clauses in the applicable loan documents.[375] Without the use of savings clauses as a safety net for exposure to fraudulent transfers, lenders may impose tighter standards and require alternative assurances to extend credit in the current market.[376] On the other hand, the tight credit market may make any *TOUSA*-related lender apprehension a nullity given the general reluctance to lend in the current economy.

The overall effect of *TOUSA I* and *II* may, however, be limited to macroeconomic lending situations involving distressed companies. In the current financial climate, the "distressed" label is not an uncommon one. For these companies, liquidity remains elusive, and access to cash or credit comes with numerous restrictions. Whether similarly restrictive loan structures will permeate otherwise normal lending practices remains uncertain. But that consequence is more likely to be catalyzed by the impending financial reform rather than the *TOUSA* opinions.

Beyond loan structures and expert opinions, this decision may also affect the manner in which lenders perform due diligence in preparation for loan transactions.[377] Solvency opinions should be prepared by independent consultants to replace management projections that may no longer be trusted as reliable.[378] At the least, it now seems incumbent upon lenders to perform rigorous reviews of guarantors' financial conditions. Various scenarios must be considered, the most important of which is perhaps whether the guarantee would render the entity insolvent. To ameliorate the specter of *TOUSA*, lenders may implement caps on liability.[379] In any event, this decision—whether upheld or reversed—will continue to reverberate in both the lender and debtor arenas.

While it was predictable that *TOUSA I* would receive a haircut on appeal, Judge Gold's decision to buzz it bald with a chainsaw seems extreme in light of the extensive factual record and applicable law. To quash and gut the

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[374] *See* Rodriguez v. Drive Fin. Servs., L.P. (*In re* Trout), 609 F.3d 1106, 1112 (10th Cir. 2010); Hagan v. Goldstein (*In re* Goldstein), 428 B.R. 733, 736 (Bankr. W.D. Mich. 2010).

[375] *TOUSA I*, *TOUSA I*, 422 B.R. 783, 863 (Bankr. S.D. Fla. 2009)..

[376] Douglas, *supra* note 313.

[377] Brighton, *supra* note 13, at 73.

[378] *Id.*

[379] Steven G. Horowitz, *Current Issues for Commercial Real Estate Lenders*, *in* COMMERCIAL REAL ESTATE FINANCING: STRATEGIES FOR CHANGING MARKETS AND UNCERTAIN TIMES 157, 162 (2010).

opinion may invite (unnecessarily) inconsistent determinations of solvency, reasonably equivalent value, and good faith within complex bankruptcy cases. By releasing institutional lenders from the standard of objective good faith and due diligence when they act contrary to the long term interests of the market and the companies to which they lend, *TOUSA II* might encourage a return to the laissez-faire lending practices at the root of so many bubbles. Regardless, the case brings buckets of issues from the well of corporate self-destruction. In a decade hardly starved for complicated issues in bankruptcy, the Eleventh Circuit may find TOUSA an unwelcome feast. At bare minimum, the ongoing *TOUSA* appellate saga is a plate of plenty.