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The Corporate Bankruptcy Panel: Hot Chapter 11 Issues

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CORPORATE BANKRUPTCY PANEL

HOT CHAPTER 11 PLAN ISSUES

Scott Alberino[*]
The Honorable Judith Fitzgerald[**]
Scott Greenberg[***]
Gary Marsh[****]

MR. ZISHOLTZ: Thank you, Dean Schapiro, for those remarks. We're going to kick things off now with our corporate panel. I'd like to introduce our moderator, Gary Marsh. Gary is a partner in the Atlanta office of McKenna Long & Aldridge. He focuses on bankruptcy, workouts, and debtor/creditor law. Gary graduated *cum laude* from American University and received his J.D. here at Emory University School of Law. Gary has published scholarly articles on stalking horse bidders and reopening of bankruptcy auctions, and serves as an adjunct faculty member here at Emory University School of Law. He serves on our Advisory Board and as Chair of the Southeastern Bankruptcy Law Institute. Thanks for joining us, Gary.

MR. MARSH: Thanks, Jeremy. It's my honor to be here again at Emory University School of Law. I wanted to introduce my distinguished panel. To my right is Judge Judith Fitzgerald. Judge Fitzgerald has been a bankruptcy judge for twenty-five years, so my guess is she's seen it all and done it all. She's a bankruptcy judge in the Western District of Pennsylvania. She sits by designation in Delaware and the Virgin Islands. That's not too shabby there. And she's on the Board of the American Bankruptcy Institute. She's a Fellow in the American College of Bankruptcy and she lectures frequently on bankruptcy evidence and litigation topics.

To her right is Scott Greenberg, another Emory Law grad, class of 2002. Scott was recently named by *Turnarounds & Workouts* as one of the Outstanding Young Restructuring Lawyers. He graduated with honors from Emory University School of Law and was Order of the Coif. Scott Greenberg is a partner at Cadwalader, Wickersham & Taft in New York.

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To his right is Scott Alberino. Scott Alberino is a partner at Akin Gump in D.C., another graduate of Emory Law, so you've got an almost-all-Emory panel. Scott graduated with honors from Emory University School of Law in 2000. Before moving to D.C., he was a judicial extern for Judge Massey. After he graduated, he clerked for Judge Mullins, who is here today, and he learned quite a bit from Judge Mullins.

One quick disclaimer. We're going to talk about three hot chapter 11 topics. Nothing we say is binding on us or our clients. Particularly for the judge, nothing she says is binding on how she might rule on these issues were she presented with an actual case with facts and arguments. This is an academic environment, and we're going to have a discussion about these topics. We're going to talk about *In re Washington Mutual, Inc.* [*WaMu*]. Scott Greenberg's going to lead us through that. We're going to talk about the *In re Tribune Co.* case. Scott Alberino is going to lead us through that, and, time permitting, structured dismissals.

In our preparation discussions, it's become clear to me we have two sophisticated, high-powered chapter 11 bankruptcy lawyers who are aggressive and innovative and are trying to stretch the Bankruptcy Code to suit their clients' needs. Judge Fitzgerald is fighting hard to interpret the Bankruptcy Code and Rules, and make sure Congress is permitting what it is that Scott and Scott are trying to do. With that, I'll turn it over to Scott Greenberg to start on *WaMu*. And we thought about, after each topic, taking questions. So when he's done with *WaMu*, if any of you have questions, we could take some then, then do *Tribune*. That might make it more lively. So with that, Scott, thanks.

MR. GREENBERG: Thanks, Gary, and good morning, everyone. Thank you for having us. It's nice to be back and see so many familiar faces. Just before I get into *WaMu* and Hot Chapter 11 Plan Issues, I wanted to share just a little bit of background. Other than trying to be a catchy title, we picked these two cases and the issue of structured dismissals because, as practitioners, these are recent decisions of which we're really dealing with the ramifications. When you're dealing with your clients and either preparing for chapter 11 or you're in chapter 11, you'd be surprised how in touch your clients are with these decisions and the ramifications they have on the way that they act. So you're going to hear a lot of back-and-forth today, and we've had a couple of prep sessions. I think we've already seen it with the judge, where you're going to see the practitioner's view of the world and then the judge's view of the world because we're faced with very different approaches to things. We have to deal

with the client, and as Gary alluded to, we're trying to reach a certain result. Ultimately, the judge is the one that has to deal with the rule of law and interpreting that law. There's often a tension there in reaching that right result. So I think these were two good cases and hopefully the panel will prove interesting.

I wanted to start off with *WaMu*.[1] I think it's worth spending a few minutes just running through the facts for everyone's benefit. It's a long decision. I'm not so sure everyone has had the opportunity to read it. So just by way of background, WaMu filed in Delaware in September of 2008 during the height of the financial crisis. Upon the filing, the FDIC was appointed as the receiver in the case and quickly sold WaMu's assets to JPMorgan [JPM] for approximately $1.9 billion. It's a common theme in a lot of the financial cases that played out. We were involved in Bear Stearns and had sold JPMorgan prior to the filing. Obviously, Lehman Brothers was a couple of months later, so not an unfamiliar set of facts.

Upon this happening, WaMu and JPM quickly ended up in litigation about the appropriateness of the FDIC seizure and the subsequent sale of the WaMu assets. In March of 2009, about eight or nine months into the case, the parties started to enter into settlement negotiations to try to settle their disputes and resolve the litigation. As part of that settlement negotiation between JPM, the debtors, and the FDIC, there were also certain hedge funds involved in the settlement negotiations. Specifically as it relates to the decision, there were four hedge funds that held both bonds and convertible securities—I'll just refer to them collectively as the Noteholders—that were party to these negotiations and entered into "confis," or confidentiality agreements, as part of the settlement negotiations.

Just by way of background, that's often how this plays out. The lawyers who are involved, and your clients to the extent they, as we often say, "get under the tent" or start actually participating in the negotiations directly (versus just the lawyers being party to the negotiations), they have to sign a confidentiality agreement because they're getting information that otherwise is not available to the public.

JUDGE FITZGERALD: In other words, inside information.

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[1] *In re* Washington Mutual, Inc., 442 B.R. 314 (Bankr. D. Del. 2011).

MR. GREENBERG: Correct. That much we can agree on. In any event, the negotiations included, among other things, as is often the case, term sheets exchanged back-and-forth, and the parties negotiated material terms in the term sheet. Sometimes just counsel was participating in the negotiations, and at other times, the Noteholders themselves participated. As a practitioner, this is common to me, but just to explain: a lot of times in these cases the debtors and the senior lenders, etc., have their counsel and usually have a financial advisor as well. A lot of times it's just us negotiating with the other lawyers. Quite frankly, your clients will say to you, "I don't want to know. Anything that's material, nonpublic information—don't tell me. I'm trusting you to go out. You know what my goal is; now you go execute it." And the reason they don't want to know that is because as soon as they get that information, they're now restricted from trading. They can't trade the securities, and it becomes illiquid. They become locked in. And especially nowadays with our hedge fund clients, being illiquid is the last thing they want to do.

JUDGE FITZGERALD: Can I interrupt at this point? Isn't that really where maybe we have our first—I'll call it "disagreement"—for purposes of today's discussion? Because isn't it up to the particular creditor, in this case a hedge fund, to segregate out its trading desk from the rest of its operations? And to the extent that it has inside information that would prohibit it from trading under SEC rules, but not necessarily under bankruptcy court rules. Isn't it up to that individual entity to figure out how to satisfy the law?

MR. GREENBERG: I think that's right. That may work in a big institution like a JPM or a Citibank, where you have a trading desk and screening walls, and it's very easy to break up the information or flow of information, so your traders have no contact with the guy that's under the tent negotiating the deal. The institution has been doing it for twenty years; they're comfortable. The problem is there are a lot of hedge funds where they have $10, $20 billion under management, and there are six or seven people working there.

JUDGE FITZGERALD: If there's more than one, can't you set up that wall? It's not physically impossible to do it. It's just that they don't want to. They don't want to incur the cost based on the risk that they intend to take. It's a cost of doing business, isn't it?

MR. GREENBERG: I don't know that it's that they don't want to. I think a lot of people, quite frankly, the guys that run these hedge funds and own these hedge funds, are concerned about the 20/20 sight afterward and whether or not what they did was appropriate. And I think, again, at least from my clients,

I've never heard, "I don't want to set up a screen." But I think they're always worried, especially in light of cases like *WaMu*, that what they did wasn't enough, and that, ultimately, they're somehow going to get hit with some kind of SEC violation after the fact. And, in today's marketplace, I think there was an article yesterday in the [*Wall Street*] *Journal* about a bunch of new SEC investigations of hedge funds. They're leery. It's their livelihood. It's their business, and I think they get concerned. So I think there's a tension there. What's enough?

JUDGE FITZGERALD: So isn't there a new business opportunity for lawyers to start figuring out how to help their hedge fund clients establish the nondisclosure walls so that in the future there will actually be a pattern and practice established, and then the cost should not be so significant?

MR. GREENBERG: I think that's right, and I think that that's kind of what you're seeing right now.

JUDGE FITZGERALD: Point one.

MR. ALBERINO: Hold on a second. I'm not sure if I agree with that. I think the issue and what you have to understand is, in a lot of the large public company cases that are out there these days, where you have a Black Rock or a Goldman Sachs, large asset managers that have institutionalized compliance, it's easy for them to go ahead and establish an ethical wall and for enforcement agencies like the SEC to assume that wall is credible. When you have a $10 billion hedge fund with twenty employees, all of whom sit in a room smaller than this [auditorium], even though they have set up the wall, have all the files and paperwork internally, and have tried to separate computer systems, twenty people sitting around the room are going to talk. I think there's a credibility issue associated with some of these smaller firms setting up ethical walls, even though they *can* do it because I think the steps to do it are fairly well established. There's case law dealing with establishing trading laws for committee members dating back to *Federated*,[2] where you can say if you do X, Y, and Z, there's a presumption that that wall is established. But there's a credibility gap, given the fact that these are small shops and have reputations for being aggressive. I think by their nature, they're distressed hedge funds—vulture funds that will come in, buy cheap, and then swoop in and take activist positions. At the end of the day, I don't think anyone on the enforcement side will take them seriously when they say, "Hey, we set up that ethical wall."

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[2] *In re* Federated Dep't Stores, Inc., No. 1-90-00130, 1991 WL 79143 (Bankr. S.D. Ohio 1991).

But at the same time, from the practitioner's perspective, the debtor wants to get a deal done; stakeholder advisors want to get a deal done. How do we negotiate a complex deal like *WaMu* where you have billions of dollars of cash deposits from JPM? You have billions of dollars of tax refunds that need to be allocated. Who are the advisors to try to cut that deal and present it? Because ultimately, as an advisor, I always like to say that it's a great plan, but I don't vote. So if you want to bring the people who vote to the table so that you know you're not spinning your wheels on a deal, what's that fine line in terms of bringing them close enough to the negotiation to know you're heading in the right direction, and pursuing a path that ultimately might prove viable, versus negotiating completely in the dark without any stakeholder input or guidance so that millions of dollars of estate resources are spent on professional fees pursuing, and documenting a deal that doesn't stand a chance of ever getting adequate stakeholder support from those who vote?

JUDGE FITZGERALD: I think creative lawyers are pretty good with assessing hypothetical circumstances and presenting clients with hypotheticals. You make offers in a criminal side to the United States Attorney's Office all the time. What if my client were able to say X, Y, and Z? I think it's not quite the same because of the securities impact, I appreciate that, but I think there are still mechanisms by which you can get close to what counsel believes is an appropriate terms sheet because, as Scott indicated, you do know what your client's goals are so you are able to at least get to the minimum, the beginning of a settlement, and then approach your client with respect to something. I don't know if that was the issue, though, in *WaMu*, because I think if I let—maybe I interrupted Scott too soon. If we let him get through it, I don't think the issue came up quite in that fashion.

MR. GREENBERG: Right. Let me quickly rattle through the rest of the facts because I think we've jumped to a lot of what we're going to talk about. So in any event, the Noteholders started to get involved in the settlement negotiations, and basically this is common practice, each time the Noteholders were involved, they became restricted. Restricted just means you cease trading because you're entitled to material, nonpublic information, or they created ethical walls within their firm, which is what Judge Fitzgerald was referring to.

Pursuant to the confi in *WaMu* specifically, the debtors were supposed to disclose all the material nonpublic information or cleanse the holders. Just again, to explain, cleansing is at some point in time you enter into a confi with the debtors and it says, "I, Noteholder, am going to be under the tent. I'm

going to enter into negotiations with you, but I also want to know that you're going to release this information in a public forum of some sort," whether it's through a public filing with the SEC or, if you're not a public company, maybe upon the actual filing of the case. It all gets filed with the bankruptcy court. There's different ways to cleanse, but the idea is that once that information is now out in the public domain, you're no longer privy to material, nonpublic information, and you can re-engage in trading in the securities if you want to.

So they had similar provisions in the *WaMu* confi, and basically what happened was the debtors, while they disclosed what they thought was the material, nonpublic information, they never disclosed, among other things, the term sheets that were traded between the parties in the back-and-forth of the negotiation, or the fact itself that settlement negotiations had been ongoing and who were party to those negotiations. So post-confi period, once the confi was terminated and this information was supposedly cleansed, the Noteholders began to actively trade in the securities again.

A global settlement was reached between all parties in March of 2010, and that settlement became baked into the plan of reorganization. This ultimately all shook out at confirmation when WaMu and the debtors went to confirm their plan of reorganization, and confirmation was ultimately denied. There were other reasons why confirmation was denied, but for purposes of today's discussion, there were a couple of arguments made by the Equity Committee in *WaMu* that Judge Walrath in Delaware agreed with. One was allegations about the Noteholders and that they were trading in securities while they were in receipt of this confidential information. They also argued for equitable disallowance because the Noteholders purchased and sold the securities with the benefit of material, nonpublic information. Judge Walrath didn't ultimately make a finding of whether they committed securities violation, but she gave the court standing to pursue the claim. She thought there was a colorable claim there and ultimately denied confirmation.

The two key findings: one, Judge Walrath found that the Committee had standing because the Noteholders became temporary insiders—we'll talk a little bit about this—of the debtors upon receiving confidential information, and because they were permitted to partake in the negotiations that led to the basis of the plan. And the Court also found that the Equity Committee presented a colorable claim that the Noteholders acted recklessly in their use of the material, nonpublic information, and ultimately denied confirmation.

So I think we could now get into where there is some probable difference of opinion. I want to start with the preface because I think we had this conversation on the phone last week. At least what I'm arguing for, and I think Mr. Alberino would agree with me, I don't think any of our clients believe that they're allowed or supposed to or should have some right to trade on material, nonpublic information. The issue that has arisen from this case is what is material, nonpublic information and what exactly needs to be disclosed. The idea that you have to disclose and cleanse the holders through releasing financials, other reporting and inside information that's otherwise not in the public domain. I think we all accept that as a fact. If you're getting information that gives you a better grasp of the company's financials and where things are headed, and that's not out in the public domain, then clearly you have material, nonpublic information. But Judge Walrath in her decision, when you read it, said that the fact that settlement negotiations themselves were taking place was material, nonpublic, and was never disclosed to the public, and the term sheets that went back-and-forth—Scott and I are doing a deal right now. We must've traded 600 term sheets during the course of this deal. Those term sheets themselves should've been disclosed. And I think that's where, as practitioners, we step back and say, "Well, wait a minute." I don't know that that works from a practical perspective. And if you're telling me that this is now the precedent, and that kind of level of detail needs to be disclosed in every case, I can tell you I have a lot of clients that are going to say, "You know what? Go cut the deal yourselves. I'm not taking that risk that I'm going to get bit, that I somehow was trading on material, nonpublic information, because you as the lawyers didn't properly disclose the actual term sheets."

And that just brings me back to a third point, which I think I missed. There was also an argument in the *WaMu* case about whose duty it is to disclose that information. The way the confis typically work is, if I'm representing a lender or a noteholder, it's the debtor that needs to disclose that information. Whether it be a public company or what-have-you, the debtor will file an 8K, or they'll file the relevant documents when they're in bankruptcy. So the Noteholders argue, "Look, Judge, the debtor was supposed to disclose this information. Why am I being punished?" And the Judge basically went back to them and said, "Look, you as a temporary insider had a fiduciary obligation to all your other holders," and, she uses that terminology, "You can't put that fiduciary obligation on the debtor. That was your fiduciary obligation and therefore you're saddled with the ramifications of the debtor not disclosing what you thought would otherwise cleanse you."

JUDGE FITZGERALD: On the fiduciary obligation side, I'm not sure that I agree that, because you are involved in settlement discussions and that happens to be a financial enterprise that is publicly traded, that makes you a temporary insider for bankruptcy definitional purposes. It very well may, for SEC purposes, with respect to the trading. That much I agree with, but I'm not sure that you have a different fiduciary duty if what you're doing is attempting to settle your own liability or credits, whatever it's going to be.

But if what you're doing is negotiating a plan, then perhaps you do have some duty with respect to the class in which you sit, especially if you control the class, and maybe that's where there is some ambiguity in the opinion perhaps, as to how it's going to play out. But I can't disagree that it is the debtor's obligation initially—after all, the debtor is in control of the enterprise—to make that public disclosure. But why didn't the creditors check it first? If in fact the obligation is to disclose to the public the information that was formerly not disclosed, your clients are all traders. They know how to access public information. Why didn't they look before they traded and see if it was out there? Or why didn't they contact the debtor and say, "Hey, did you do this yet?"

MR. GREENBERG: Obviously, I was not involved in *WaMu*, but I think the problem is, some of the things that Judge Walrath, in her opinion, said should've been disclosed, probably my guess from practice and from what I typically see in confis, wasn't contemplated [that] they would be disclosed.

JUDGE FITZGERALD: Is part of this problem—and I don't know the answer, just raising the question—the fact that these discussions came up entirely postpetition? Had they come up prepetition, I think you're looking maybe at a different standard. But postpetition, you have a whole host of different creditors and obligations and rights and relationships among those creditors that may not have existed prepetition. So I wonder whether on its facts—and this is going to be a theme I'm going to keep citing today—on its facts, perhaps this case has to be somewhat limited in its application to something that arises postpetition. For purposes of the question you're asking, isn't there a difference between disclosing the fact that you're negotiating and disclosing the term sheets?

MR. GREENBERG: There may be. I agree with you on the prepetition/postpetition distinction. I think, just stepping back from a practical perspective, if I'm representing a company prepetition and, for example, a publicly traded company, the fact that I am in negotiations with my lenders and

noteholders, etc., getting out in the public domain too early, the stock market will quickly reflect that information and you'll see the stock price reflect the fact that they're in workout negotiations. And so I think there's a problem there. When I started my career I was involved in *WorldCom* and *Enron* and other cases. That information, if it leaked out to the market six months earlier when we were preparing these companies to file for bankruptcy, who knows how things would have played out? When we were involved in Bear Stearns—I can talk about it now—but we were getting ready to file them for bankruptcy over a weekend and got a deal done to sell them to JPMorgan Chase; if it leaked out that we had been in negotiations, the market would've quickly reflected that.

JUDGE FITZGERALD: Well, I think that can happen postpetition in publicly traded companies, too. At least in one of my asbestos cases, particularly every time the debtor would announce that they were close to a deal, the stock price shot up every single day. So I think it can have a positive impact as opposed to a negative impact as well.

MR. GREENBERG: I agree. I think the takeaway, and maybe we'll turn to *Tribune* unless Scott has anything to add after this is, there's a tension now. And the tension is, as lawyers, as practitioners, we can, and it's our job to, go out and negotiate the best deal for our clients with the company and bring it as far as we can, so to speak. But oftentimes, to get the ball over the finish line, you need your clients to weigh in on material terms. You need the principals at the table. And usually in practice, your clients actually do not want to be involved because they have other things going on. They have a day job. They don't want to be involved in every negotiation, and they don't want to be on every fourteen-hour conference call. But when we get to the finish line, often, we need to get them under the tent, so to speak, and our clients—I have a deal I'm doing right now. It's the same counterparty that was involved in *WaMu*. It's also in Delaware and our steering committee is about eight members. Only two members of the steering committee were willing to get restricted and come under the tent and negotiate the deal with the prospect that they would be cleansed. The rest, either for other reasons, weren't interested or were just too nervous about the practical implications of things like *WaMu*. So my takeaway as a practitioner is, I'm really, literally, on a daily basis now dealing with the ramifications and the ambiguity I think that's been caused by the decision.

JUDGE FITZGERALD: Scott had, maybe to end this, a suggestion for a practical way perhaps to make sure that the debtor is carrying out its obligation. Maybe you should discuss that.

MR. ALBERINO: Well, I think this has been going on for a while, but I think it's something that, for whatever reason, the funds that were involved in this case, what they should have done is more fully negotiated their nondisclosure agreements (NDA) in this case to give them the ability to cleanse, to self-publish that the company fell down, [and] didn't fulfill its publication obligation. There are ways in which we, as restructuring advisors, serve a screening purpose for our clients, going back to the issue of how does a deal get cut and negotiated with a company where you have a bunch of stakeholders that don't want to be restricted from trading because they don't want to be illiquid, but they want to make sure that the company is behaving appropriately and moving in the right direction on the restructuring. So what we typically do, and a lot of restructuring firms will do, when you're on the creditors' side in a case involving public securities, is to have an [NDA] negotiated with the company that gives you the ability to screen information, that schedules out specific information in the form of press releases—this term sheet is being amended to the NDA so that if you fail to disclose it, I can disclose it within 24 hours through a press release issued by the noteholder or by my ad hoc group or whatever type of entity we're representing in that case.

But there's another point I want to make here on *WaMu,* and I think it's reflective of the fact that, just given the current restructuring environment, the deals that used to be cut with debtors that were in bankruptcy tended to be cut by official committees, and you would have official committees where the significant holders that wanted that seat at the table in *WaMu* would trade being illiquid for sitting on a committee, perhaps getting a trading order in place so they could try to erect that ethical wall to allow the trading desk to continue to trade while they sat on the committee. But given the credibility issue that we discussed earlier where you have smaller funds with not many employees where the prospect of an ethical wall being respected is perhaps slim, these types of institutions don't want to get restricted and sit on committees anymore. So *Washington Mutual* is a perfect example of what I call the committee of indentured trustees, none of whom vote, none of whom can really push an agenda—

MR. GREENBERG: All of whom want to be indemnified.

MR. ALBERINO:—All of whom always want to be indemnified. But the reality is, when you have committees comprised of non-stakeholders, just trustees, that requires the company to reach out to people that can actually deliver votes to try to figure out what direction they want to take the case in. So I think *WaMu* is just a good example of the lack of desire among large institutional creditors these days to sit on committees because it doesn't serve their business objectives, their investment strategy. They just don't want to be illiquid. They don't want to be tied up, but that was always the path. So given the fact that funds don't want to sit on committees anymore, and I think part of what was driving this decision was, you funds, all of you should've just sat on the committee. If you wanted to cut the deal, you should've either gotten permanently restricted like a real committee member, negotiated the deal. You were the biggest beneficiary of the deal, but you wanted it both ways. I think part of the reaction here from the judge was a bit of a slap-down to the funds for trying to have it both ways.

And the other interesting thing is, don't pick a fight with an equity committee advised by Susman Godfrey, some of the leading securities lawyers in the country, who don't normally practice in the bankruptcy realm. When you bring in folks that are, say, outside the restructuring community and they bring their litigation world view, and in particular Susman Godfrey's securities perspectives, they were going to raise issues that perhaps if Cadwalader was representing an equity committee, it may not have been pursued as aggressively. So I think there was a kind of a perfect storm here: bad facts, funds that didn't want to sit [and] were trying to have it both ways, and an equity committee counsel well-schooled in securities law issues and looking for leverage, which Judge Walrath gave them.

JUDGE FITZGERALD: I just wanted to do one follow-up, too. The *WaMu* plan was eventually confirmed because the parties agreed to a settlement, and the committee that was charged with the responsibility for investigating all of these alleged insider deals settled. And I'm wondering to a certain extent whether that wasn't good strategy on behalf of that committee, too.

MR. ALBERINO: That was exactly their strategy. That was exactly their strategy.

MR. MARSH: Let's see if the audience has any questions on *WaMu* before we quickly turn to *Tribune*. Does anybody have any questions for the panelists? If you have one, just raise your hand. There's one.

[Inaudible question from audience]

MR. GREENBERG: I'll repeat the question. I don't know if everyone heard it. I think basically the gist was, in a situation where our clients basically say to us, "No, I'm not going to get restricted and participate in settlement negotiations," and defer that to the lawyers to get done, how do we as lawyers and practitioners protect ourselves in the event that, for example, the client is not happy with the ultimate result? I think my answer is, practically speaking, at some point in time—usually how it works is, if you're representing senior lenders, there's under the credit documents, there's, let's call it 51% of the lenders can direct the agent to enter into negotiation to, among other things, settle the claims. There are a host of things. Certain things require 100%, which puts you in a whole different world. But I think as lawyers eventually, we take it as far as we can, and then we present it to the client, say, on the verge.

I had a case that filed the last week [of] December, and right at the finish line, we kind of brought it to the client and said, "This is the 'global settlement.' We're going to file a term sheet with the court on day one. It *will* disclose all these terms. You need to sign off and give us your consent." So that's one way. You kind of do it right at the precipice of when there really is no restriction because they're literally going to get cleansed the next day, because there's some kind of public filing. And the other way, quite frankly, is if you're not doing a 363 sale, if you're doing a plan of reorganization, they're going to have to vote themselves. So they're going to have the opportunity to either vote for or against the plan of reorganization, and that's ultimately something that's still within their control. So they may be upset with you if you cut a deal. No matter how good of a deal you cut, your clients always could've done a better job. That much I've learned.

MR. ALBERINO: This is funny. This is kind of interesting just because this is bankruptcy and the weird world in which we operate. One of my partners is representing an ad hoc committee in the *Ambac Assurance* holding company case up in New York and they recently announced a big settlement. The most interesting part about that deal was he couldn't talk to any of our clients. A group got organized, eight bond holders that were unhappy with what the official committee and the company was doing in connection with settlement negotiations with the IRS. They hired us as an ad hoc committee but said, "Listen, I'm hiring you guys because I want you to cut a deal. None of us want to get restricted. None of us want to know what's going on, but call the

company, tell them you're working for us. Go cut a deal." And our partner spent eight months working on cutting a deal where there was no advisor. It was just legal, Akin Gump tax lawyers, restructuring lawyers working with the company and the IRS, and they never saw it until the company filed the settlement papers. And it's just interesting to me. You're not used to working in situations where you have a client, but really, who's your client when you have a bunch of noteholders that don't surface? They'll talk to you and tell you what they want, but you're in listen-only mode with your clients. That was just a kind of interesting wrinkle in—

JUDGE FITZGERALD: You can always blame the big, bad bankruptcy judge, too, because the "S" word—the settlement word—is something that bankruptcy judges really like because it eliminates appeals. Generally, after the deals are cut, it ends up being more beneficial to the creditors and the estate as a whole. And so to the extent the judge is forcing you into some sort of negotiation, there's always a person who isn't you that you can blame for what's happening in the structure of the case.

MR. GREENBERG: And just one last point, which is, stepping back from it, practically speaking, you have some deals where you have secured—different deals are different. Capital structures are hard; capital structures are easy. But you have certain deals where you have a big holder of the paper, and that holder alone owns greater than 51%, and they may just want to go at it by themselves. And they cut the deal that's best for them, and they kind of say to the other 49%, this is the premium that I paid for in buying my control position. So you often have a client that will cut a deal that is in its best interest, and then, lo and behold, you file that deal, you direct the agent to enter into that settlement, and the other 49% come out of the woodwork. So it's a rare deal nowadays where you literally have 100% of the senior debt that is advising and under the tent and gives you the go ahead. As lawyers, we're often cutting deals that are not supported by the entire group.

JUDGE FITZGERALD: And two of the most recent cases I've had, had exactly that circumstance, where 80% of the noteholders did in fact agree and 20% didn't, so they cut a deal among themselves that could satisfy the 20% dissenting, so that the deal could actually get done in the bankruptcy court. So that's another thing that sometimes happens.

MR. MARSH: Let's turn to *Tribune*[3] now because we're going to run out of time. So, Scott, why don't you lead us through *Tribune*.

MR. ALBERINO: Turn the page to another interesting case. I'm sure most of you are probably familiar with the facts. I don't need to go into a ton of background, but this was the battle between the activist hedge fund represented by Akin Gump, so of course these are my own personal views, not the views of the firm.

This was a case where you had one activist fund and a group of other funds that were coordinating with that, competing against the company to confirm a plan in this case. Both plans provided for the reorganization of the company with a key difference: the plan supported by the company, the lenders, and the creditors committee settled about $10 billion of LBO-related causes of action; the Noteholder plan did not. It preserved those claims and provided for the prosecution of those claims going forward, with recoveries ultimately to inure to the benefit of the various stakeholder groups.

Both plans proceeded down dual confirmation tracks. The litigation was enormous. This was competing plan litigation of the highest degree, and ultimately the judge had to rule. He ruled that neither plan was confirmable for a host of reasons. One of the reasons for him denying confirmation of both plans was particularly notable, and that deals with the issue of § 1129(a)(10) of the Bankruptcy Code.[4]

For those of you who aren't familiar with § 1129(a)(10), for a plan to be confirmed, you have to satisfy numerous mandatory confirmation requirements under § 1129(a). Section (a)(10) provides that for a plan to be confirmed, you need to have an impaired accepting class approve the plan if you ultimately want to proceed down the cramdown path.[5] As most plans have to rely upon the cramdown mechanism under § 1129(b) to get confirmed, it's of great importance to create and to generate that impaired accepting class so you ultimately can invoke cramdown to get your plan confirmed.

There were a number of cases that dealt with this issue of § 1129(a)(10) and whether that requirement is evaluated on what's called either a "per-debtor basis" or a "per-plan basis." What was particularly interesting about this case is [what happened] when both plans went out for solicitation. In the debtors'

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3 *In re* Tribune Co., 464 B.R. 126, 134–35 (Bankr. D. Del. 2011).

4 11 U.S.C. § 1129(a)(10) (2006).

5 See *id.*

plan, I believe only 39 out of 111 classes actually voted to accept the plan or had an impaired accepting class. In the Noteholder plan, there were only 3 impaired accepting classes out of 111 voting classes. It was notable that the company would go out of their way to actually raise this as an objection to the Noteholder plan, given the fact that that same objection ultimately would render their plan unconfirmable if sustained. But Judge Carey, as he indicated in his little parable at the beginning of his opinion,[6] both of them shall perish, because for them, they both just wanted to ultimately destroy each other's plan. And that's ultimately what Judge Carey wound up doing through his opinion.

This is an interesting issue because I think this is one of the first published opinions to deal squarely with the body of law that had been developing on allowing debtors to move to cramdown where they did not have impaired accepting classes for all debtors in a multidebtor case. There were decisions out of Pennsylvania,[7] relied upon by *Enron*[8] and were also cited in the *Charter* case out of the Southern District of New York[9] that gave some credence and breathed life into this notion that if you are in a multidebtor case, you don't need that impaired accepting class at every level because the judge should evaluate it on a per-plan basis. The Noteholders, the debtor, Tribune and the other stakeholders that were supporting that plan threw up their hands and said, "This is ridiculous. You have three impaired accepting classes out of 111 classes. How are you going to allow a creditor holding $47 million of claims in an action involving more than $10 billion in claims to satisfy this requirement and invoke § 1129(b) cramdown standards and to move forward with their plan?"

On top of that, in both plans, there was language in the plans that expressly disclaimed substantive consolidation. Both plans said they were predicated on separate estates and separate debtors, and they essentially tied the court's hands with respect to evaluating the cases on a substantive consolidation basis and evaluating whether there was any means for him to imply the procedural kind of fiction of deemed consolidation to find a way to avoid this § 1129(a)(10) issue.

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6 *In re Tribune Co.*, 464 B.R. at 134–35.

7 *See, e.g.*, Quigley Corp. v. Karkus, No. D9-1725, 2009 U.S. Dist. LEXIS 41296 (E.D. Pa. May 15, 2009); *In re* SGPA, Inc., No. 1-01-02609, 2001 Bankr. LEXIS 2291 (Bankr. M.D. Pa. Sept. 28, 2001).

8 *In re* Enron Corp., No. 01-16034 (AJG), 2004 Bankr. LEXIS 2549 (Bankr. S.D.N.Y. July 15, 2004).

9 JPMorgan Chase Bank, N.A. v. Charter Commc'ns Operating, LLC (*In re* Charter Commc'ns), 419 B.R. 221 (Bankr. S.D.N.Y. 2009).

So with the issue joined, he had to decide, and on the statutory analysis, he came down on the side that § 1129(a)(10) was unambiguous, referencing § 102, which are the rules of construction of the Bankruptcy Code.[10] Section 102(7) references the fact that the singular means the plural.[11] In applying that rule of construction, the judge looked at [subsection] (a)(10) and said, "This requirement has to be met with respect to every debtor in a multidebtor case. So therefore, for the 111 *Tribune* debtors, this plan cannot be confirmed as currently constructed unless there's an impaired accepting class at every debtor entity or creditors at those levels are unimpaired."

I think for creditors looking at this case, this was an important vindication for creditor rights. It also follows, I think, the *Owens Corning* substantive consolidation decision out of the Third Circuit,[12] which again was another case considered a vindication for creditor rights and respecting the legal separateness of these estates.

That said, it did raise a host of practical issues for the *Tribune* debtors. It also raises issues for practitioners that are dealing with multidebtor cases where, (i) you may not have the ability to gain support of an impaired accepting class at a level, or (ii) you may have problems with creditor apathy where you don't have people who are impaired that are showing up to vote. Because when you look at § 1129(a)(10), it refers to affirmative acceptance.

So there were a few different things that came out of the opinion where the judge was struggling to find a way to get this thing confirmed. One of the interesting issues that he raised was this whole notion of, can you satisfy § 1129(a)(10) through this fiction of deemed acceptance? There are a handful of cases. I think it's the *Ruti-Sweetwater* case where the judge, recognizing the practical difficulties of a creditor having to get accepting classes where creditors are just sitting on their hands and don't vote, said, "If you go out and you disclose the fact that if you don't vote, we're going to deem you to accept. We'll essentially acknowledge that the no-vote was a deemed acceptance."[13] And if it's publicized, if it's in all the notices, perhaps that will fly, and it also flew in *Adelphia*.[14] In this case, they never went down that path on the notice

10 *In re Tribune Co.*, 464 B.R. at 183.

11 11 U.S.C. § 102(7).

12 *In re* Owens Corning, 419 F.3d 195, 210-11 (3d Cir. 2005).

13 *See* Heins v. Ruti-Sweetwater, Inc. (*In re* Ruti-Sweetwater, Inc.), 836 F.2d 1263 (10th Cir. 1988).

14 *See In re* Adelphia Commc'ns. Corp., 368 B.R. 140 (Bankr. S.D.N.Y. 2007).

requirements, and at the same time, they also, like I said, disclaimed substantive consolidation throughout the plans.

So I think the judge's hands were tied through the plan, given the fact that there was no substantive consolidation. There was no deemed acceptance attempt on the part of the debtor here to deal with the fact that there were numerous creditors that just were not going to vote at any of these debtor levels. And ultimately we as practitioners and Judge Fitzgerald on the bench has to deal with the notion of, in a multidebtor case, am I now going to be besieged with creditors in these cases raising § 1129(a)(10) issues at confirmation, and am I going to start seeing § 1129(a)(10) arguments preceding confirmation, whether at dismissal stages, stay relief stages, or conversion stages? Because if this opinion is to be taken for its word, it'll be incumbent upon any creditor, especially secured creditors and also large unsecured creditors, to raise this argument at an early stage to try to potentially convert a case, or get a case dismissed. I think there was actually a case out of Delaware recently, the *Jameson Inns* bankruptcy, or at least a related case to that, where Judge Walrath, relying upon this *Tribune* decision, wound up dismissing a case on the basis of "debtor hasn't shown me how they're going to create an impaired accepting class here, so the case is over."[15]

On a practical level, when you're at the planning stage now, when you're preparing to put companies into bankruptcy, there used to be a notion, "Okay, we've got to go through a bunch of the requirements. We need to evaluate best interest. I need to make sure I have an impaired accepting class at some level. I need to make sure at the end of the day I can satisfy cramdown." But I have to say a lot of practitioners, just for practical reasons, were not focused on looking at debtor entities on a case-by-case basis to determine, well, where's my impaired accepting class at this subsidiary four levels down and three levels over that has no operations and that was acquired by this company twelve years ago as part of an intellectual property acquisition.

JUDGE FITZGERALD: See, I don't think this decision is at all surprising, based on the fact that the debtor said there was to be no consolidation of these estates. Section 541 of the Bankruptcy Code that defines property of the estate is very clear. It starts off, "Upon the commencement of a case, an estate is

[15] *See In re* JER/Jameson Mezz Borrower II, LLC, 461 B.R. 293 (Bankr. D. Del. 2011).

created that consists of all the debtor's property."[16] Even in consumer cases, where we allow husbands and wives to file one case, there are separate estates that we jointly administer, but they are not substantively consolidated; they are simply jointly administered. And I think in this kind of a circumstance where the plan proponents specified that they did not want any type of consolidation. You're looking at each individual estate, and I think you have to meet the confirmation standards. This case, however, at least in my experience, is almost unique. I don't know that I've ever seen a case with multiple debtors that hasn't had at least deemed consolidation before. So I go back to what I said before. I think this case has to be confined to the types of facts that were here.

And I also think that there may be a cure, a fix to this problem, even within this kind of structure, if you are able to take the dissenting creditor and separately classify that creditor's claim, which you may be able to do if that creditor has interests in one debtor's estate that other creditors don't have. So you may be able to create your impaired class that will not accept the plan and create an impaired class that will accept the plan, even without the substantive consolidation, if you have the right facts. But I agree with you, Scott, that that is definitely a planning issue that you need to address at the outset of the case. But how often do your clients walk in the door and say, "Oops, don't consolidate me, not even for voting purposes. I don't want anything to do with my subsidiaries and my parent company. We're in this together, but we're all separate while we're in here." It just doesn't happen that often. That's not the way the businesses are structured for the most part.

MR. ALBERINO: Well, I think as a matter of practicality, it's not often, for example, in a case like *Tribune* where you have a disclosure statement filed with 111 different projections, different liquidation analyses, and different valuations. It creates a huge evidentiary burden for the company, and it creates a significant expense, an unnecessary expense one would argue, for the estate.

MR. GREENBERG: I was just going to add, I think the only ones that benefit from that, quite frankly, are the lawyers and the financial advisors. The fees that are generated and the amount of work and diligence that's required, if you have a case with 100 debtors and do a case-by-case liquidation, best interests, I mean—the only one that benefits is the professionals, quite frankly. And we'll

[16] *See* 11 U.S.C. § 541(a) ("The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held: . . . .").

get into it later, but a lot of our cases right now are what we call administratively insolvent. They could barely afford the cost of the bankruptcy to begin with.

JUDGE FITZGERALD: But they *chose* that structure. They didn't have to choose that structure. They *chose* the structure. So if you make the choice, why don't you live with the consequences of that choice? I guess that's where I'm losing the tenor of the discussion. I don't know the reason for it. Maybe because Tribune's business was so diversified and maybe it was necessary in the structure of this case not to substantively consolidate or to deem consolidated. But I was raising the example of *Federal Mogul* and *W. R. Grace*. These cases filed with 156 stateside subsidiaries and, I don't know, 111 foreign subsidiaries, and there wasn't an issue that came up along this line because the creditors all appreciated the fact that, given the intermixing of the assets and liabilities and the cash management systems in place and how the business structure itself operated, that you couldn't unscramble the egg. So I still think that it's a matter of choice, and if this is the route you want to go, then I think you live with what § 1129(a)(10) says. Although, I guess I want to raise the issue of: is § 1129(a)(10), as Judge Carey seemed to suggest, unambiguous?

MR. ALBERINO: That was going to be my point. I think there are plenty of policy reasons why it makes sense to not apply [subsection] (a)(10) the way Judge Carey interpreted it, but as a matter of law, you have to look at it and interpret it. Judge Carey's ruling rests upon the fact that he ruled that the statute was unambiguous on its face.

JUDGE FITZGERALD: It's two lines long, so there aren't a lot of words to it.

MR. ALBERINO: There are not a lot of words, but go back, open up [subsection] (a)(10) and try to apply the rule of construction and tell me the ten different ways that you come back from reading that statute. I think there's an argument and I think that there is probably some creative lawyers out there that may want to push the envelope a bit, Judge Fitzgerald, on the issue of whether this is or is not ambiguous because (i) you have the policy reasons, but, (ii) as a matter of law, if you get past that and you apply Judge Carey's admonition to go through the other provisions of the Code and interpret the statute holistically, it is contemplated in the Code that there will be jointly administered cases, that joint plans can be filed by debtors.

And what I take away from this is, when I look at [subsection] (a)(10), is it a substantive right or is it a procedural right? The purpose of the provision is essentially to allow a debtor to get to cramdown. It's called "the gateway to cramdown." And the purpose of cramdown, as we know, is to allow the company that's restructuring to find a way to essentially corral its dissenting creditors to facilitate the restructuring. So in a case where the debtor has at least generated some support at different levels among its debtor enterprise and where creditors still have the benefits of cramdown protections, and to insure their rights are not being trampled upon, and the fact that they have the best interest test to insure that they're receiving more than they would receive in a liquidation, as a substantive matter, although cramdown has been triggered, in terms of their substantive state law rights, are we really trampling upon them from a bankruptcy perspective?

JUDGE FITZGERALD: Well, they've been given a bankruptcy right, which is to vote as an impaired class. So I'm not convinced that it is just a procedural tool. I think it's a bankruptcy right and a standard for confirmation that the plan has to meet. I think if there is ambiguity in the multidebtor context, the issue may be what does the word "plan" mean. Does it apply individually to each debtor, or does it apply overall to the plan, which is what the court has before it for confirmation as to all of the entities who have proposed that plan and all the creditors who are dealt with in the plan? So it's a little difficult to say that the word "plan" in a bankruptcy context is ambiguous because we all know what it is, but maybe in this specification of § 1129(a)(10), *maybe* I could hear some argument along the ambiguity line.

MR. ALBERINO: And *Tribune* was probably the wrong case to make that argument, where at the end of the day, and as the company and the stakeholders pointed out, $47 million of claims trying to cramdown $10 billion of debt in front of it. Probably not the best fact pattern if you want to pursue the argument that [subsection] (a)(10) should be applied on a per-plan basis, so it was a bad set of facts.

JUDGE FITZGERALD: And I think the point you make about the evidentiary burden and the expense and the cost if you have to prepare a case to show why all 215 debtor estates should have their separate plan confirmed even though it's now filed as one document without any kind of deemed consolidation to it, that could indeed tie up a bankruptcy court for a very long time because even with a deemed consolidation, these cases can take weeks sometimes when the issues are significant. So I agree that the evidentiary

burden may be astronomical, but I think the solution to it is either to figure out how to impair that dissenting creditor separately or to deem the case consolidated for purposes of voting and distribution.

MR. ALBERINO: I know there are a lot of judges here in the audience, but here's a question: In light of *Tribune*, when disclosure statements come before the court for approval in a multidebtor case, even though there's no objection, say, from any of the stakeholder groups, will courts be more inclined to kind of push the company to say this is not a substantive consolidation plan, there's no deemed consolidation, it's multidebtor; why haven't you broken out the [subsection] (a)(7) analysis for me? Why haven't you broken out my feasibility analysis through separate projections? Why are you presenting the evidence that's going to support the solicitation materials on a consolidated basis where, under [subsection] (a)(10), I need to evaluate this on a case-by-case basis?

MR. GREENBERG: Is there adequate information?

JUDGE FITZGERALD: But most of the plans are already filed along with the disclosure statement and give you that information already. I still think *Tribune*, why it had that language in that said that there was no consolidation of any type, again, I don't know, but most plans simply do not do that, and they say that they will be deemed consolidated for voting and distribution purposes. So everybody knows up front that that's the standard by which the debtor is going forward. And I think under those circumstances, the way § 1129(a)(10) has worked historically, it will continue to work in the future. But I think if you have these kind of odd circumstances, you're stuck with the choice you make.

MR. ALBERINO: Do you think there's something to be said about the fact that the court had approved the solicitation materials as containing adequate information, and materials were prepared on a consolidated basis?

JUDGE FITZGERALD: Didn't it? I mean, how did you get the confirmation if that didn't happen?

MR. ALBERINO: If the materials were approved by the bankruptcy court at the disclosure statement level with financial information, analyses prepared on a consolidated basis, to then turn around in confirmation and advise the company that this information needed to be presented on a case-by-case basis, given [subsection] (a)(7), (a)(9), was there any prejudice to the parties there? Was that inconsistent by Judge Carey?

JUDGE FITZGERALD: Well, maybe the issue is that you can't really prepare your confirmation case until you get the objections in. And so if there is no objection, you probably don't need to worry so much about presenting the evidence for all 215 debtors because no one's objecting to that fact and most courts are, I think, going to be willing, either for the proffer or whatever evidentiary submission the particular court uses, to accept that as to each individual debtor, especially if the debtors are doing consolidated reporting, financial statements, cash management, they may not even have done the true-up for their intercompany claims in many instances.

MR. ALBERINO: That's an exercise that costs millions upon millions of dollars.

JUDGE FITZGERALD: So I think it's not a very practical approach, but again, it's the one they chose.

MR. GREENBERG: Part of it's on the debtors.

MR. MARSH: We only have about two minutes. Scott Greenberg, can you give us a couple of pearls of wisdom on structured dismissals, what that is and why we need it.

MR. GREENBERG: I think the two of us can because we're about to face one. These last two cases we've been talking about really deal in the nice old world of plans of reorganizations, but I think the reality is, especially kind of post-GM, Chrysler, and some of the other kind of high profile 363 sales you've seen and have become in vogue in the cover of the *Wall Street Journal*, a lot more cases and a lot of the cases I'm working on have resulted in 363 sales.

What's a 363 sale? Essentially it's a way to effectuate a sale of substantially—in most cases substantially—all the assets of the company outside of a plan of reorganization. There are standards for proving to the court why you should be doing this outside of the plan of reorganization. But more importantly, with two minutes of window, without going into that, the question becomes, okay, and Scott and I just had a hearing last week on a 363 sale that was approved where my clients were the senior secured lenders. They credit bid their debt. They took substantially all the assets of the estate, pending a typical closing, but what's left behind? Scott's still debtor's counsel and there's still an estate. There's still a chapter 11 estate that's pending in front of the judge and we've taken all the assets and the value out of the estate and there's what I'll refer to as the carcass that's still left in the bankruptcy court and you still have to do something with that. There's still a case there pending.

Maybe I'll let Scott get into it so he can tell me what he's going to do with the carcass in our case. But the reality is, the issue that comes up, I referred to it before, is administrative insolvency. What does that mean? It basically means that to confirm a plan under § 1129, you need to pay your administrative creditors in full in cash. And what happens is, I take all the assets as the lender out of the estate and I go on my merry way with the business and there's a lot of administrative expense left in the estate. And one big example is counsel's fees. That's an administrative expense of the estate. There's millions and millions of dollars of claims remaining in the estate. I might not be able to confirm either a chapter 11 plan or a liquidating plan because I can't meet the standards of § 1129. So what am I left to do?

MR. ABLERINO: Well, a structured dismissal, it's really an alternative to converting these administratively insolvent cases to chapter 7. As Scott said, you have all these upside-down capital structures these days, can't confirm plans but you still have stakeholders that probably are working in cooperation with their senior lenders and other creditor groups to try to cut deals that are beneficial to the estate. And as the representative of a company that's in bankruptcy, the preference always is finality. You want the process to come to a conclusion. The prospect of converting the case, having a trustee appointed to essentially poke around, re-examine transactions by the company and basically try to interfere with what was done during the bankruptcy case—

JUDGE FITZGERALD: Or beforehand by way of avoidance actions.

MR. ALBERINO:—the way, the prospect of that, it doesn't serve the purpose of finality that the debtor's counsel and the debtor itself would be looking for at the end of these cases. So a structured dismissal, although it's been around for years, it's just occurring with increasing frequency, and I think it hit the limelight recently when the U.S. Trustee's Office came out with an article essentially outlining their policy objection to the use of structured dismissals of bankruptcy cases.[17]

First, structured dismissals are out there because companies like them. Debtors like them. It allows you through the court's § 105 powers to have the court impose certain conditions and approve certain things in connection with dismissal of a case under § 1112.[18] You can provide for—

[17] *See* Nan Roberts Eitel, T. Patrick Tinker, & Lisa L. Lambert, *Structured Dismissals, or Cases Dismissed Outside the Code's Structure?*, AM. BANKR. INST. J., Mar. 2011, at 20.

[18] 11 U.S.C. § 1112.

JUDGE FITZGERALD: Which conditions are not in § 1112.

MR. ALBERINO: Nor are they expressly prohibited—

JUDGE FITZGERALD: Right.

MR. ALBERINO:—by § 1112.

JUDGE FITZGERALD: I'm advocating the U.S. Trustee's position as opposed to these two today.

MR. ALBERINO: But there are many precedents where courts have approved dismissals providing for certain releases and exculpatory language that you would more typically see through a chapter 11 plan. There are claims reconciliation procedures that may not comply exactly with the Code that are designed to resolve claims in a manner that hopefully lessens the expense associated with running that claim resolution process. It's also, as seen in the *Armstrong* case from the Third Circuit, a means of trying to do an end run around certain gifting prohibitions that came from decisions in the Second Circuit.[19]

So essentially it allows a company that can't pay its administrative expenses, so therefore it can't satisfy § 1129(a)(9) to confirm a plan, to get some of the benefits and protections out of a chapter 11 plan through this structured dismissal order.

The U.S. Trustee's Office continues to raise objections on a policy basis in courts around the country. We've seen the U.S. Trustee's Office in a lot of cases recently sign off on these deals, so I think the reluctance is waning, and the key issue I think for the U.S. Trustee's Office in cases where we've been working with them on these types of issues is, demonstrate to me that there's nothing else out there. Demonstrate to me that you've either sold all the assets, that there are no other assets, usually in the form of intangibles, that are out there or are worth anything. Show me that you have, if they were worth something, folks that had an interest in the outcome of recovering that claim are signed off as those claims having no value.

So the key issue is, I think, in setting your case up to get a structured dismissal, will be, number one, to the extent you're going the 363 sale route, which most of these cases go, it's 363, then structured dismissal, you want to

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[19] *See In re* Armstrong World Indus., Inc., 320 B.R. 523 (E.D. Pa. 2004), *aff'd*, 432 F.3d 507 (3d Cir. 2005).

make sure in terms of documenting your APA that the intangibles that the U.S. Trustee might be looking for as potential sources of value, are sold to your buyer. Sell your avoidance actions. Sell causes of action that belong to the estate. Make sure the purchaser is giving you a release in the sale order and sale documents for those very claims you're selling to them, and make sure that's all fully disclosed, brought in front of the court and other stakeholders at the 363 sale hearing. Because at the end of the day, if all the cash and hard assets have been distributed and you're left with the intangibles, you sell what you can, you get releases hopefully from your buyer on what you're selling, and at that point, you have a much easier argument to make to the U.S. Trustee's Office that the structured dismissal is "no harm, no foul" because there's nothing out there for a chapter 7 trustee ultimately.

MR. MARSH: Thank you. I think we've used up our time. I want to thank my great panel. I think they did a great job. Scott and Scott are going to avoid Judge Fitzgerald's courtroom I think if they can. They'll be filing in Delaware and New York, as they do. Our panelists will be around for the break, so if you have questions, you can speak to them then.