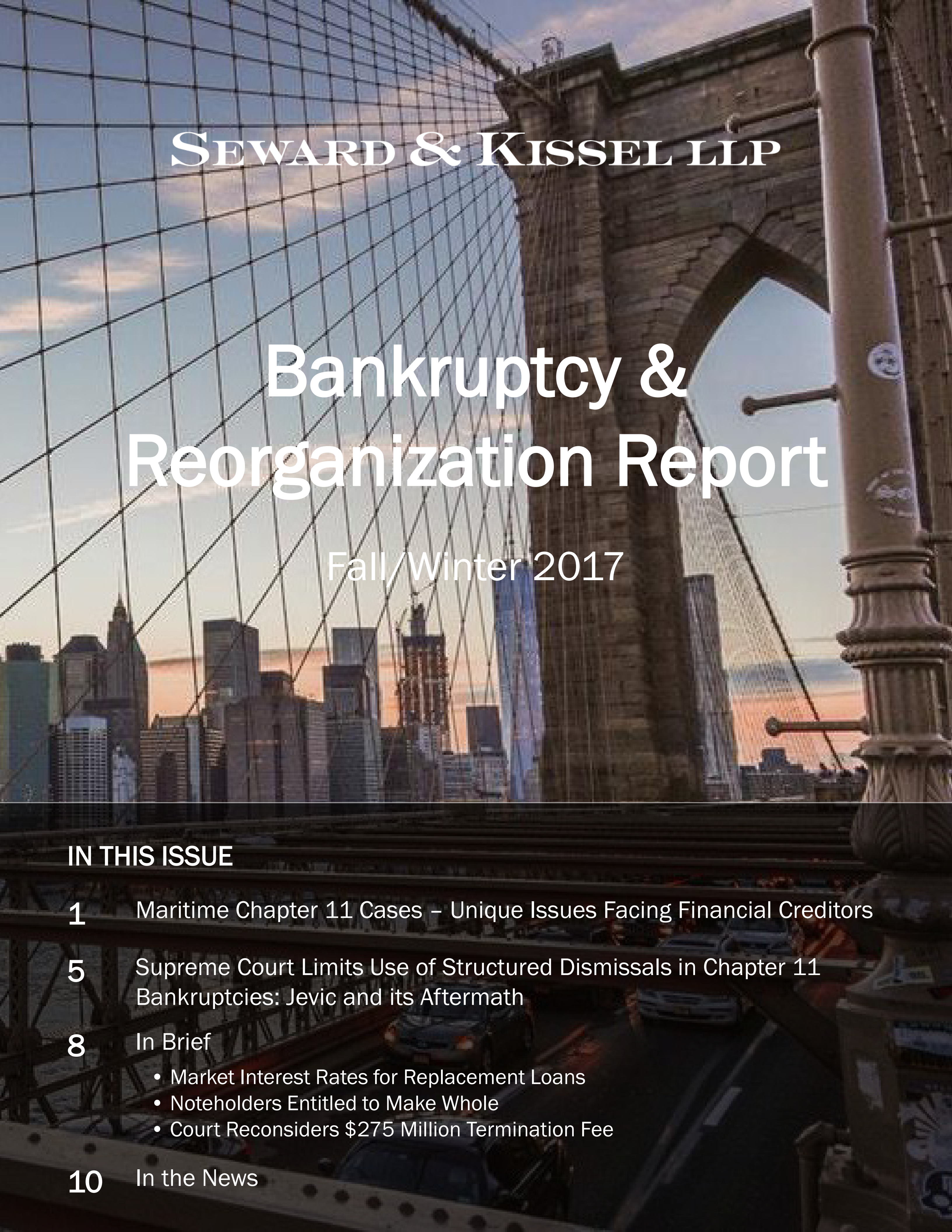

Seward & Kissel LLP

Bankruptcy & Reorganization Report

Fall/Winter 2017

IN THIS ISSUE

Maritime Chapter 11 Cases – Unique Issues Facing Financial Creditors

By Robert J. Gayda

The maritime sector has seen significant recent restructuring activity, which has included a number of U.S. insolvency proceedings. In the past year alone, UltraPetrol (Bahamas) Limited, Toisa Limited, EMAS-Chiyoda, Ezra Holdings, Montco Offshore, GulfMark Offshore, Tidewater Inc., Seadrill Limited, and Pacific Drilling have sought protection under chapter 11 of the U.S. Bankruptcy Code. In addition to this activity, other significant industry players are in various stages of their own restructurings, and may also seek to utilize U.S. insolvency protections.

These cases are a testament to the fact that the Bankruptcy Code is a powerful tool for the prospective debtor. When a maritime concern utilizes the Code to effectuate a deleveraging transaction, it can have a significant impact on a creditor's rights. While each restructuring is unique, there are several "traps" that financial creditors of distressed maritime companies should be aware of -- situations where the application of the Bankruptcy Code may lead to a result that does not match a creditor's expectations. Below we discuss three such instances which we are often asked about, and provide some high-level guidance in dealing with them.

Lien on Charter Payments May Not Be Effective After a Bankruptcy Filing

Secured creditors lending to a vessel owner will generally take a lien on the vessel being financed and a lien on earnings, among other forms of collateral. What may be surprising to a secured creditor unfamiliar with U.S. bankruptcy law is that a lien on earnings may cease to be effective after the bankruptcy filing (i.e., "post-petition"). This can occur by the operation of section 552(a) of the Bankruptcy Code. As a general rule, if a security agreement is entered into prior to filing bankruptcy, property that the debtor acquires after the filing is not the subject of the security interest created by the agreement.

A simple example (outside of the maritime context) would be a security agreement that grants a lien on inventory and all after-acquired inventory of a debtor. While that lien (if properly perfected) is effective against all inventory subsequently acquired by the debtor outside of a bankruptcy, once the debtor seeks bankruptcy protection, section 552(a) would operate to sever that lien, and it would not attach to inventory acquired after the filing. Applied to charter earnings, this means that a security interest granted in charter earnings pre-bankruptcy would not apply to earnings generated post-bankruptcy. Obviously, this could be a significant problem for a secured lender.

There are, however, certain exceptions to the general rule, which are set forth in section 552(b). These exceptions, however, can be difficult to apply, and often lead to litigation. In short, section 552(b) provides that if a secured lender has liens over the debtor's property, as well as a lien on the proceeds, products, offspring, or profits of such property, then the liens are permitted to extend to any such proceeds, products, offspring, or profits acquired by the debtor during the bankruptcy case. In our inventory example, if the secured creditor with a lien on inventory also had a lien on proceeds of that inventory, the lien on proceeds would survive the bankruptcy. Thus, the lender would have a lien on pre-petition inventory, as well as any cash generated selling that same inventory post-petition. Turning again to the maritime situation, would this mean that a lender with a lien on a vessel, proceeds of that vessel, and charter earnings, is protected with respect to post-petition earnings by section 552(b)? It could be argued that the earnings constitute proceeds of the vessel, and therefore are subject to lender's lien. This argument however, has been rejected by the one reported court decision that addressed it, although it was not the main thrust of the decision. In American President Lines, Ltd. v. Lykes Brothers Steamship Co., 216 B.R. 856, 863-864 (

M.D. Fla. 1996), the court held that there was "no doubt that the charter hire payments [could not] be classified as 'proceeds, products, offspring, or profits' within the meaning of those terms used in § 552(b)." The rationale was that the concept of "proceeds" is only implicated when "one asset is disposed of and another is acquired as its substitute." Thus, according to the Middle District of Florida, a vessel would only generate "proceeds" when sold.

There have been subsequent cases (although not dealing with maritime assets) which have cast some doubt on the rationale in *Lykes*, and it appears that some U.S. Circuit Courts may be at odds on the issue (particularly the Fifth Circuit and Ninth Circuit).[1] Accordingly, the argument that charter earnings are proceeds of a vessel may not be completely without hope.

Despite this, a secured maritime lender, if possible, should act to protect its interests before a distressed counterparty files for bankruptcy (and would obviously be best served doing so at loan origination). A lender can do this by taking a security interest in (and assignment of) the charter itself (in addition to earnings), proceeds of the charter, as well as all documents evidencing rights related to the charter. If the lender has a lien on (or assignment of) the charter and the proceeds thereof, it is highly likely that the lender would maintain its security interest in charter payments post-petition. While even this position may be subject to threats, we are not aware of any case where it has been found to be insufficient to protect the benefit of the lender's bargain. [2]

Sale Leaseback Transaction May be Recharacterized as a Financing

"Sale leaseback" transactions are fairly commonplace in the maritime sector. In such a transaction, a vessel owner sells a vessel to a purchaser, and the purchaser then leases the vessel back to seller, typically through a "bareboat" charter arrangement. If the party chartering the vessel under such an arrangement files for chapter 11 protection, the court may be asked to evaluate whether the charter represents a "true" lease or a disguised financing where the purchaser has taken security in the form of an ownership interest. If the bankruptcy court determines that the transaction is a disguised financing, it may deem the vessel to be property of the debtor-charterer, rather than the purchaser. Under such circumstances, the debtor-charterer would be able to retain possession of the vessel without performing its obligations under the relevant charter, and claims by the purchaser against the debtor-charterer would be treated as unsecured claims in the bankruptcy case, which often only receive cents on the dollar.

Accordingly, creditors engaging in sale leaseback transactions need to protect themselves. In the first instance, they must take care in structuring the transaction in order to minimize the chance that it is recharacterized in the event of a charterer bankruptcy. This can be done by avoiding certain hallmarks of disguised financing arrangements that courts generally focus on. These include, but are not limited to, whether the term of the charter is equal to or greater than the remaining economic life of the vessel, and whether the debtor-charterer has an option to renew the charter (or become the owner of the vessel) for no or nominal additional consideration at the expiration of the charter.

[1] Compare In re T-H New Orleans Ltd. P'ship, 10 F.3d 1099, 1106 (5th Cir. 1993) (court upheld lender's lien over post-petition revenues generated by the debtor's operation of its hotel) with In re Bering Trader, Inc., 944 F.2d 500, 502 (9th Cir. 1991) (court noted the distinction between revenues generated through the disposition of collateral and revenues generated through services provided in rejecting lender's claims to post-petition revenues).

[2] However, if the assigned charter terminates any time after the bankruptcy filing, the lender would have no right to an assignment of any new charter (notwithstanding its loan documents), and would be faced with the issues described above about earnings

Additionally, a second protection has recently become available to creditors (at least in the Marshall Islands). Recognizing that a purchaser-lessor in a sale leaseback transaction could be exposed to the result described above, and based on a recommendation by the Maritime Law Association of the United States, the Marshall Islands became the first flag state to adopt a system by which the lessor could file a "backup" mortgage in vessels to which it held title. Under this regime, even in the event that a sale leaseback was recharacterized as a financing, the purchaser-lessor would have a perfected security interest in the vessel, and would be accorded the status of a secured creditor. This would be a significant improvement in position in a U.S. bankruptcy proceeding, as secured creditors are entitled to recover the value of their collateral, rather than just cents on the dollar.

Another interesting issue arises in a more complicated structure, sometimes called a synthetic sale leaseback transaction, where the vessel purchaser finances the purchase of the vessel from the debtor-charterer through a third-party lender. The purchaser grants the third-party lender a security interest in, and mortgage over, the vessel. Where the debtor-charterer files for bankruptcy protection and the lease is recharacterized as a financing, the validity of the mortgage may be called into question. By recharacterizing the transaction as a financing, after all, the owner of the vessel is deemed to be the debtor-charterer, and not the purchaser. Since the mortgage was granted by the purchaser (and not the court-determined vessel owner), is it effective vis-à-vis other creditors? From a purely technical perspective, the mortgage could be considered invalid. Despite this, it is important to note that bankruptcy courts are courts of equity. Thus, if a bankruptcy court were to recharacterize a lease as a financing, it may nevertheless take into account equitable considerations when dealing with the third-party lender, and reform the mortgage so that an "innocent" lender is not unfairly impacted by the recharacterization. Unfortunately, we are not aware of any reported decisions on this issue. Accordingly, lenders in sale leaseback transactions must be vigilant with respect to the terms of the underlying lease. It goes without saying that a third-party lender does not want to rely on a bankruptcy court's equitable powers to salvage a credit.

Stipulated Loss Value Provision in Vessel Sale Leaseback Transaction May be Held to be an Unenforceable Penalty

Even if a sale leaseback transaction is not recharacterized as a financing arrangement, certain other aspects of the transaction may be challenged. Under the Bankruptcy Code, a debtor has a right to assume (maintain and perform) or reject (terminate) executory contracts and unexpired leases (other than those related to real property) up until the time that its chapter 11 plan is confirmed. A contract is an executory contract when both sides have material performance obligations remaining. This power allows debtors to retain favorable contracts while terminating those that are disadvantageous.

Charter-parties have been treated as executory contracts under the Bankruptcy Code. The termination of a charter results in a claim for damages in favor of the non-debtor counterparty. Many charter agreements include a stipulated loss value ("SLV") provision, which sets the amount that the debtor-charterer will pay the owner-lessor upon a casualty or loss, or on default or early termination of the charter.

Courts considering the calculation of damages in the context of the rejection of equipment leases have struggled with whether SLV provisions are enforceable or instead constitute a penalty, unenforceable as against public policy. This has been contested most frequently in the context of aircraft leases, with relatively little guidance in the shipping industry. Recently, however, Judge Brendan Shannon of the U.S. Bankruptcy Court for the District of Delaware ruled that an SLV provision in the Tidewater bankruptcy cases was an unenforceable penalty provision.

In the Tidewater cases, six lessors had asserted claims based on SLV provisions included in their respective sale leaseback transactions. However, five of the six lessors

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that originally asserted these claims settled, leaving Fifth Third Equipment Finance (“Fifth Third”) as the lone holdout. Fifth Third asserted an SLV claim of $94.1 million across five sale-leaseback agreements, while the debtors contended that the lessor’s “expectation damages” claim should be limited to $34 million.[3]

At the hearing, the debtors argued that the SLV provision was intended to provide insurance against a catastrophic loss, not to provide the lessor with a guaranteed profit, and to allow SLV damages would provide a windfall to the lessor. Fifth Third countered that the SLV provision represented a yield maintenance provision, akin to make-whole premiums in bond indentures, which have been permitted in certain situations. Fifth Third also asserted that the provision allows the lessor to get the benefit of its bargain, regardless of what happens in the market, and that actual damages exceeded the SLV so the SLV was not a windfall. Judge Shannon, however, agreed with the debtors that the SLV was an unenforceable penalty. “I find that the proper calculation for the breach damages . . . [is] expectation damages,” Judge Shannon noted.[4]

Clearly, courts are willing to strike down offending SLV provisions, including in the maritime context. Accordingly, it is important to structure an SLV (or other liquidated damages provision) so that it has the greatest possible chance to survive scrutiny. A lessor can maximize its odds by ensuring that the damages provision in question at least bears some reasonable relationship to the lessor’s probable loss. If the provision is plainly disproportionate to potential real damages, a court will likely find it to be an unenforceable penalty, irrespective of other mitigating factors that may exist.

Conclusion

These are just a few examples of “traps” that financial creditors of distressed maritime companies should be aware of. Given the likelihood of significant maritime bankruptcy activity in U.S. courts during the rest of 2017 and beyond, when faced with a distressed maritime credit, financial creditors should reach out to U.S. counsel for guidance. Protective measures taken before a distressed counterparty files can lead to significantly improved positions in the ultimate bankruptcy.

[3] The parties ultimately settled the issue, with the debtors allowing the claim in the amount of $67.5 million.

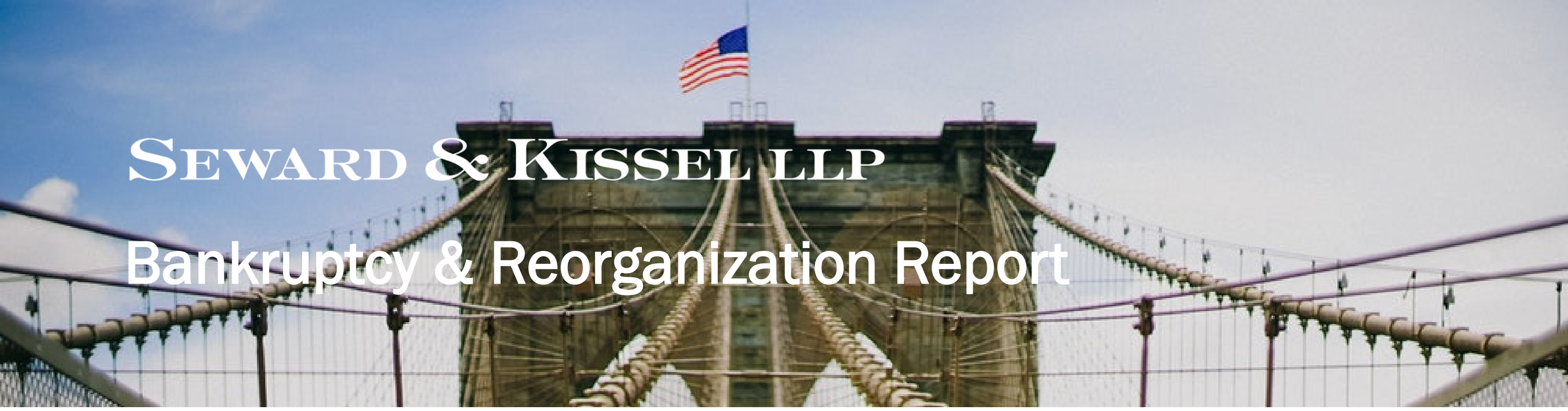
[4] Expectation damages are damages awarded when a party breaches a contract that are intended to put the injured party in the same position it would have been had the breaching party fully performed its contractual duties.

About the Author

Robert J. Gayda

Robert J. Gayda is counsel in Seward & Kissel’s Bankruptcy and Corporate Reorganization Group. Bob has practiced law since 2004, joining Seward & Kissel in 2016. Bob was a secondee in the global restructuring group at The Royal Bank of Scotland plc from 2009-2010. Over the course of his career, Bob has represented a diverse clientele in all aspects of restructuring. This includes creditors’ committees, a court-appointed examiner, lender groups, special committees, investors, and individual creditors in both out-of-court and in-court restructurings.

Some of Bob’s recent representations include acting as counsel for the Official Committee of Unsecured Creditors in the Suniva Inc. chapter 11 case, the Official Committee of Unsecured Creditors in the Gracious Home chapter 11 cases, DVB Bank, as a secured lender in the Toisa Limited bankruptcy cases and DIP lender in the International Shipholding bankruptcy cases, and the special committee in the Ultrapetrol (Bahamas) Limited prepackaged bankruptcy.



Supreme Court Limits Use of Structured Dismissals in Chapter 11 Bankruptcies: Jevic and its Aftermath

By Catherine LoTempio

The challenging economic times of the Great Recession and the creditor-friendly changes to the Bankruptcy Code in 2005 combined to cause practitioners to come up with creative ways to resolve a chapter 11 case that did not involve a plan or conversion to chapter 7. This included the use of "structured dismissals". On March 22, 2017, however, the United States Supreme Court, in *Czyzewski v. Jevic Holding Corp.* ("*Jevic*"), issued a much-anticipated ruling limiting the use of structured dismissals that attempt to end-run around traditional priority rules in chapter 11 cases.[1] The Supreme Court's decision reminds that certain fundamental guidelines, such as "absolute priority," cannot be avoided when formulating chapter 11 exit strategies.

Structured Dismissals

Traditionally, there are three possible conclusions to a chapter 11 bankruptcy: (i) confirmation of a plan of reorganization, (ii) conversion of the case to a chapter 7 liquidation, or (iii) dismissal of the case. Where a case is resolved by dismissal, the Bankruptcy Code provides that the effect of such a dismissal is to restore the parties to the *status quo ante* as if the bankruptcy case were never filed. A bankruptcy court may, however, alter the dismissal's normal consequences by, for example, authorizing distributions of estate funds or approving releases of major parties in the case. This is generally referred to as a "structured dismissal."

Structured dismissals are commonly seen in cases where a debtor has sold substantially all of its assets under section 363 of the Bankruptcy Code or agreed to a settlement that eliminates the need to receive a discharge through a plan. Generally, parties in interest will agree to a structured dismissal in lieu of a chapter 11 liquidating plan to avoid a potentially costly confirmation process or conversion to chapter 7, which would add a new layer of professionals and costs. Not only are structured dismissals more cost efficient, they also allow for a resolution of the case on a much faster timeline than a traditional chapter 11 plan or chapter 7 liquidation, enabling the parties to move on to other pursuits. These benefits of the structured dismissal led to increased utilization.

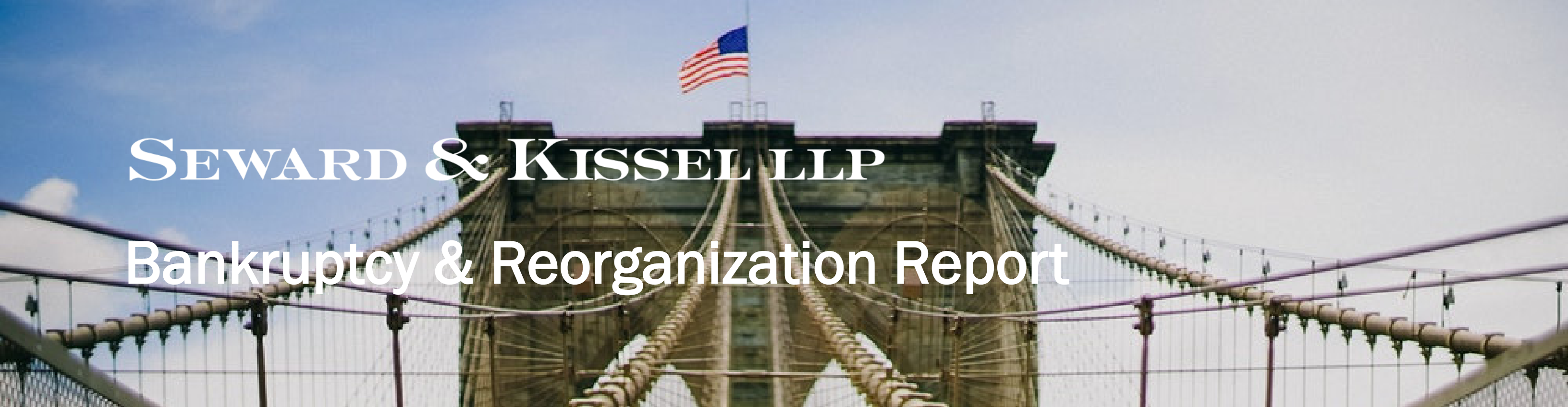
Absolute Priority

At the heart of the Bankruptcy Code, the "absolute priority rule" simply requires that a plan of reorganization provide for the payment of senior creditors ahead of junior creditors. Typically, secured creditors are first in priority, then priority claimants (such as administrative expense claimants), followed by unsecured creditors, with equity taking last. This priority system is considered to be fundamental to the operation of the Bankruptcy Code and was "designed to enforce a distribution of the debtor's assets in an orderly manner . . . in accordance with established principles rather than on the basis of the inside influence or economic leverage of a particular creditor.[2]"

In practice, the absolute priority rule limits collusion, and prevents certain classes of creditors from teaming up to squeeze out other creditors. While both chapter 11 plans and chapter 7 liquidations are governed by the absolute priority rule, because "structured dismissals" are not explicitly contemplated by the Bankruptcy Code, they are not explicitly subject to the Bankruptcy Code's priority scheme.

1 580 U.S. __, 137 S. Ct. 973 (2017).

2 H.R. Rep. No. 103–835, p. 33 (1994).



The *Jevic* Decision

In *Jevic*, the Supreme Court considered whether a bankruptcy court can approve a structured dismissal that provides for distributions that do not follow priority without the consent of affected creditors. The case involved Jevic Transportation Corporation, a trucking company headquartered in New Jersey that filed for chapter 11 protection in 2008, owing $53 million to its secured creditor and $20 million to tax claimants and general unsecured creditors.

The circumstances surrounding Jevic's bankruptcy filing led to certain lawsuits, which were pursued by Jevic's creditors. Ultimately, the Jevic estate representatives agreed to settle claims relating to the earlier leveraged buyout of the company. The settlement provided for a structured dismissal of the chapter 11 case and a distribution of $3.7 million in cash. This cash was to be distributed to pay tax claims and other administrative expenses, with the balance distributed on a pro rata basis to general unsecured creditors. The proposed distribution scheme did not provide for any payment to former employees of the company, who held priority wage claims against the company (and were involved in litigation against the secured lender). Importantly, under the Bankruptcy Code, the wage claims would be entitled to priority over general unsecured claims. Accordingly, the wage claimants objected to the approval of the settlement, arguing that the proposed dismissal would violate the Bankruptcy Code's priority rules.

The bankruptcy court overruled their objection, reasoning that the priority rules did not bar settlement approval since the payments would be made under a dismissal rather than a plan. Both the District Court for the District of Delaware and the Third Circuit Court of Appeals affirmed.

The Supreme Court reversed, holding that the structured dismissal approved by the bankruptcy court was impermissible. The Supreme Court found that the Bankruptcy Code did not permit, and Congress did not intend, a structured dismissal to act as a "backdoor"

The Supreme Court reversed, holding that the structured dismissal approved by the bankruptcy court was impermissible. The Supreme Court found that the Bankruptcy Code did not permit, and Congress did not intend, a structured dismissal to act as a "backdoor" means to achieve a nonconsensual priority-violating final distribution otherwise prohibited in chapter 11 plans and chapter 7 liquidations. Unlike the Third Circuit, which approved the structured dismissal on the basis of a "rare case" exception where sufficient reasons for disregarding priority are demonstrated, the Supreme Court's holding was absolute and refrained from creating an exception that threatened to swallow the rule. Specifically, the Court held that bankruptcy courts "may not approve structured dismissals that provide for distributions that do not follow ordinary priority rules without the consent of affected creditors."

Notably, the Supreme Court did not hold that *all* priority violating distributions were impermissible. Indeed, the Supreme Court distinguished the impermissible priority-violating distributions under a structured dismissal from the generally permissible priority-violating distributions approved at earlier stages of a bankruptcy case. For example, the Court recognized instances where bankruptcy courts have approved "first-day" wage orders that permit payment of employees' prepetition wages, "critical vendor" orders that allow payment of essential suppliers' prepetition invoices, and "roll-ups" that allow payments on lenders' prepetition claims where the lenders continue to provide financing to a debtor. According to the Court, such distributions are generally found to "enable a successful reorganization and make even the disfavored creditors better off." Unlike these examples, the Court noted that priority-violating distributions under a structured dismissal are attached to a final distribution and do not foster Bankruptcy Code-related objectives.

Implications

The Supreme Court's *Jevic* decision sets a strict standard regarding structured dismissals—absent creditor consent, priority-violating distributions are impermissible. However, despite the Court's "no exception" stance where a chapter 11 case is resolved via a structured dismissal, it appears that the Court has created a line between permissible priority-violating interim distributions and impermissible priority-violating final distributions.[3] Where a proposed distribution that does not follow ordinary priority rules is not "attached to a final distribution," it will be up to the bankruptcy court to determine whether the distribution fosters an important bankruptcy objective. It is in this gray area where the case law has begun to develop.

Since the March decision, at least two courts faced with *Jevic*-like priority-skipping settlements have been compelled to follow the Supreme Court's precedent where the courts determined that final distributions were likely implicated. For example, in *In re Fryar*, a Tennessee bankruptcy court refused to approve a settlement (outside of the dismissal context) that would have authorized a priority-skipping distribution.[4] The bankruptcy court held that because the debtor was unlikely to reorganize, the settlement was akin to a *sub rosa* plan or a precursor for conversion or dismissal where a priority-skipping final distribution is impermissible. Shortly thereafter, in *In re Constellation Enterprises*, a Delaware bankruptcy court refused to approve a settlement that would have provided for the formation of a litigation trust for the benefit of general unsecured creditors, but would have left other creditors with higher-priority claims with little or nothing under the trust's rules.[5] Like the *Fryar* court, the *Constellation* court assumed that the case was going to be dismissed or converted shortly and therefore held that the priority-skipping distribution was not supported by a reorganization purpose.

On the other hand, bankruptcy courts continue to approve inter-creditor settlements that appear to fall outside of *Jevic's* reach where the courts have determined that priority-skipping facets are supported by a reorganization objective. For example, in *In re Nuverra Environmental Solutions, Inc.*, a Delaware bankruptcy court confirmed a chapter 11 plan that provided for a distribution to to otherwise out-of-the-money unsecured creditors by way of a "gift" from the secured creditors.[6] In confirming the plan, the bankruptcy court noted not only is the concept of gifting permissible in the Third Circuit, but that *Jevic* decision was not applicable because, unlike the structured dismissal in *Jevic*, the debtors' plan in *Nuverra* contemplated reorganization and an ongoing business. At least two other bankruptcy courts, in *In re Short Bark Industries*[7] and *In re Adeptus Health Inc.*[8], have also approved priority-skipping "gifting" settlements, finding that such settlements were supported by reorganization purposes and were therefore not impermissible under *Jevic*.

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[3] The Supreme Court's decision does not address whether the consent of an affected creditor necessary to permit a priority-skipping final distribution needs to be express, or whether it may be implied from the creditor's conduct. Thus, the scope of creditor consent required under Jevic may be ripe for litigation.

[4] Case No. 16-13559 (SR) (Bankr. E.D. Tenn. Apr. 25, 2017).

[5] Case No. 16-11213 (CSS) (Bankr. D. Del. May 16, 2017).

[6] Case No. 17-10949 (KJC) (Bankr. D. Del. Aug. 24, 2017).

[7] Case No. 17-11502 (KG) (Bankr. D. Del. Sept. 11, 2017).

[8] Case No. 17-31432 (SGJ) (Bankr. N.D. Tex. Sept. 27, 2017).

About the Author

Catherine LoTempio

Catherine LoTempio is an associate in the Bankruptcy and Reorganization Group. She received a B.A., cum laude, from College of the Holy Cross and a J.D., cum laude, from Wake Forest University School of Law.

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IN BRIEF

Market Interest Rates for Replacement Loans

In October, the Second Circuit Court of Appeals ruled that a debtor is required to provide its creditors with market interest rates on any replacement loans issued under a nonconsensual plan of reorganization if an efficient market rate can be ascertained. The decision overturns a 2014 ruling from a New York bankruptcy court that confirmed a plan of reorganization that provided objecting noteholders with replacement notes at below market rates. Under the "cramdown" provisions of the Bankruptcy Code, a court may approve a bankruptcy plan over the objection of a secured creditor as long as under the plan the creditor retains its liens and is entitled to receive the full present value of its claim over time. The bankruptcy court in In re Momentive Performance Materials Inc. determined that the "cramdown" provisions of the Bankruptcy Code did not require market factors to be taken into account when determining the appropriate interest rate. Instead, the bankruptcy court applied a "formula approach" that started with the prime rate, and then adjusted the rate up or down depending on the risk factors associated with the particular debtor. The Second Circuit, however, disagreed with this approach, noting that "where . . . an efficient market may exist that generates an interest rate that is apparently acceptable to sophisticated parties dealing at arms-length, . . . such a rate is preferable to a formula improvised by a court." The Second Circuit's ruling is good news to lenders, who in recent years have faced threats of being "crammed down" at below market interest rates. *In re MPM Silicones, LLC*, Case No. 15-1682 (2d Cir. Oct. 20, 2017) (ECF No. 256).

Noteholders Entitled to Make-Whole Premium

In September, a Texas bankruptcy court ruled that holders of notes issued under a Note Purchase Agreement ("NPA") were entitled to make-whole premiums payable upon acceleration of the notes following a default under the NPA. The language giving rise to the make-whole premium was unambiguous and clearly provided for payment of such amounts following a bankruptcy filing, which is in contrast to the language analyzed in prior make-whole decisions. Given their limited options, the debtors, instead, objected to the payment of the make-whole premium as either (1) unmatured interest barred by section 502(b) of the Bankruptcy Code or (2) liquidated damages that are unenforceable under governing New York law. The bankruptcy court, however, held that section 502(b) of the Bankruptcy Code was not implicated because the debtors chose to classify the noteholders' claims as unimpaired and thus were required to pay all state law claims, including the make-whole premium, in order to discharge the applicable debt. In addition, the bankruptcy court held that the make-whole premium did not amount to impermissible liquidated damages because the debtors failed to prove that damages resulting from prepayment were readily ascertainable at the time the parties entered into the NPA or that payment of the make-whole premium was "conspicuously disproportionate" to the foreseeable damages resulting from prepayment. The bankruptcy court's decision provides comfort to creditors that if their right to a make-whole payment is explicitly triggered by a bankruptcy filing, their make-whole claims will be paid if their claims are treated as unimpaired under a debtor's chapter 11 plan. *In re Ultra Petroleum Corp., et al*, Case No. 16-32209 (Bankr. S.D.T.X., Sept. 21, 2017) (ECF. No. 1569).

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IN BRIEF

Delaware Bankruptcy Court Reconsiders, and Ultimately Disallows, $275 Million Termination Fee

The U.S. Bankruptcy Court for the District of Delaware handed down a significant decision in the Energy Future Holdings Corp. ("EFH") bankruptcy cases on October 3, 2017, granting the reconsideration of a year-old order approving a termination fee of $275 million (the "Fee"). The Court, in approving reconsideration and ultimately disallowing the Fee, stated that it took the "extraordinary step" of reconsideration because it had a fundamental misapprehension of critical facts at the time of approval, which led to an incorrect application of the legal standard. The Court stated that its "misunderstanding was based upon imprecise and incorrect testimony…incomplete responses by Debtors' counsel to questions by the Court and conspicuous and unhelpful silence by the beneficiary of the Termination Fee….However, the ultimate responsibility for the Court's mistake lies with the Court itself. The Court simply missed the critical nuance between when the Termination Fee would be payable and when it would not be." This decision could give potential purchasers of distressed assets cause for concern, as it calls into question the reliability of a court's approval of a break-up fee and could give a voice to future dissenting creditors that want to object to such fees after the fact. This decision may be limited to its facts, however, as the EFH cases, and the merger itself, were extraordinarily complicated. In any case, the decision does show that full disclosure of material terms of any deal is imperative, and that bankruptcy courts require transparency.

Bankruptcy & Reorganization Practice Group

If you have any questions or comments about this Newsletter, please feel free to contact any of the attorneys in our Bankruptcy & Reorganization Group listed below.

Partners

John R. Ashmead
+1.212.574.1366
ashmed@sewkis.com

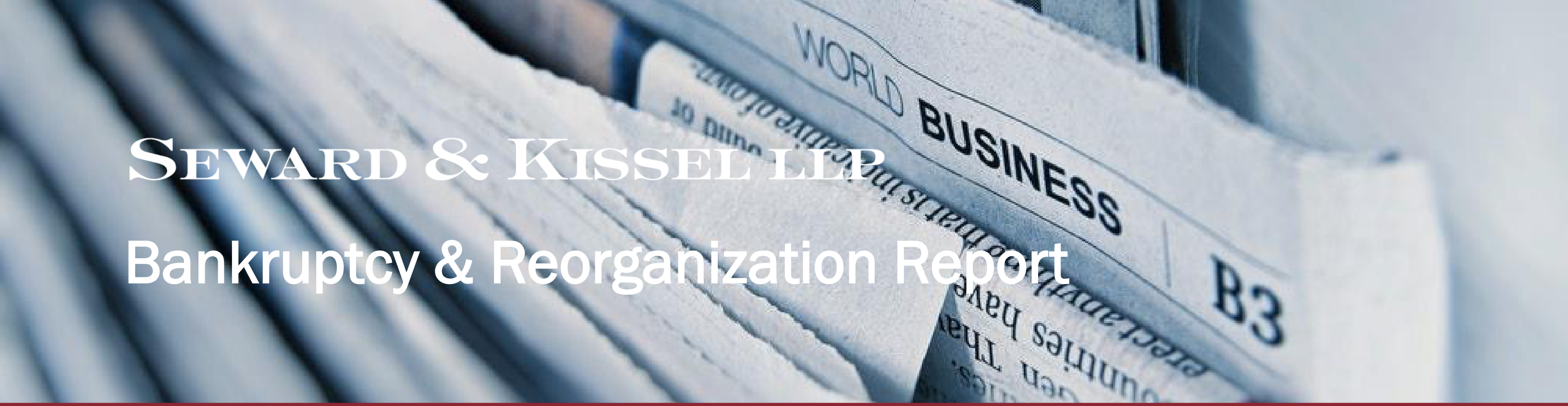
Ronald L. Cohen
+1.212.574.1515
cohen@sewkis.com

Counsel

Arlene R. Alves
+1.212.574.1204
alves@sewkis.com

Robert J. Gayda
+1.212.574.1490
gayda@sewkis.com

Seward & Kissel LLP
One Battery Park Plaza
New York, NY 10004
Tel: +1.212.574.1200
Fax: +1.212.480.8421



IN THE NEWS

- ✓ Two separate teams of Seward & Kissel lawyers represent DVB Bank and Danish Ship Finance, each a prepetition secured lender, in the Toisa Limited bankruptcy cases, filed on January 29, 2017 in the bankruptcy court for the Southern District of New York.

- ✓ Seward & Kissel represents the Official Committee of Unsecured Creditors in the Suniva Inc. bankruptcy case, filed on April 17, 2017 in the bankruptcy court for the District of Delaware. Suniva Inc. is a petitioner in an unprecedented case under Section 201 of the 1974 Trade Act, which has been featured in the press worldwide, including in Bloomberg, the Washington Post, and the New York Times, among other notable publications.

- ✓ Partner John Ashmead will participate on a panel at the American Bankruptcy Institute's 2017 Winter Leadership Conference in Palm Springs, CA. His panel is titled, "Two if by Sea: Maritime Industry Insolvencies."

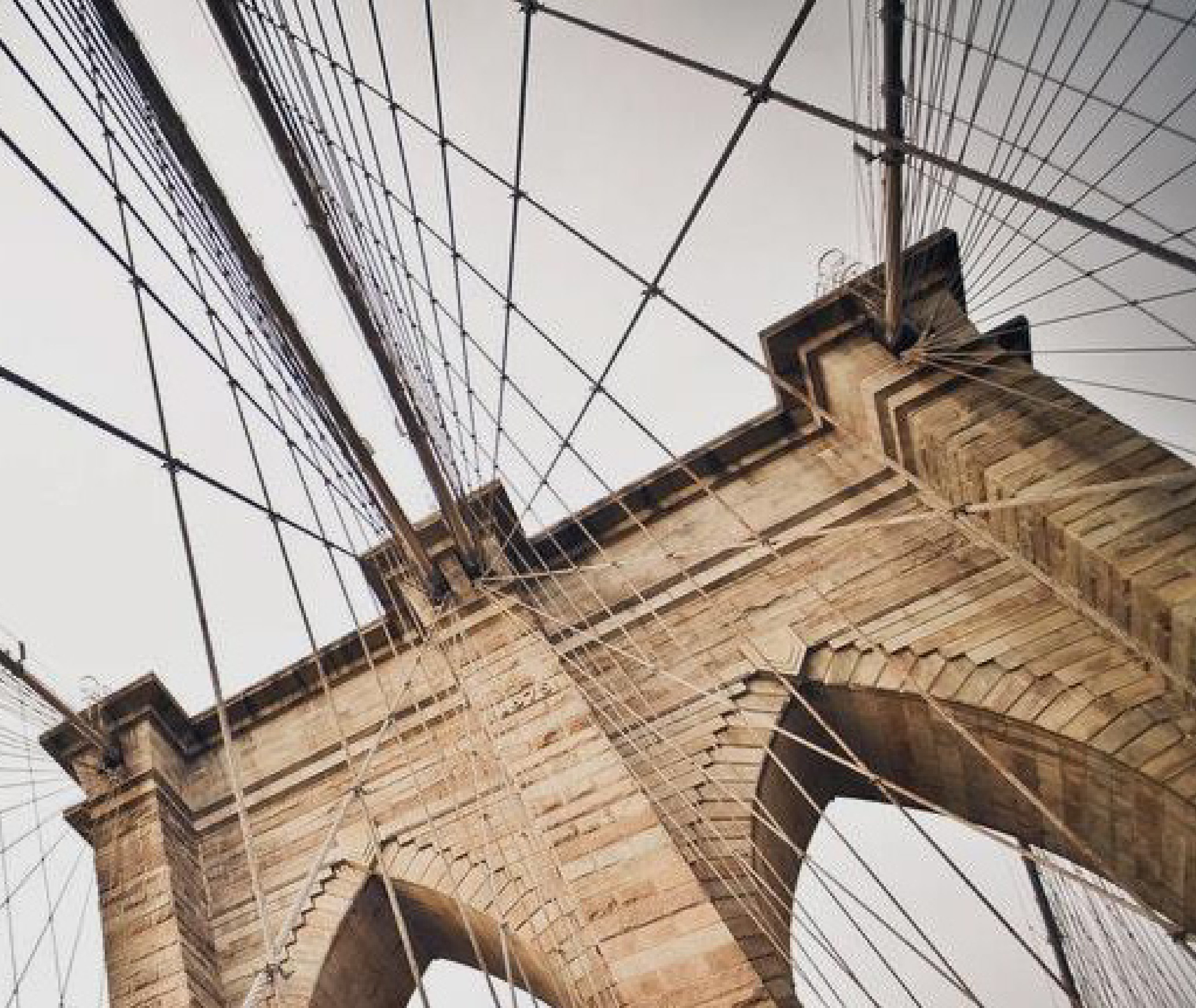
- ✓ Partner John Ashmead is quoted and the Firm mentioned in a Reorg Research article published on May 3, 2017, which is titled, "Offshore Companies Restructuring Debt Instead of Amending and Extending Are Better Positioned to Drive Consolidation."

- ✓ Partner John Ashmead participated on a panel at Marine Money's 7th Annual Houston Offshore Finance Forum, held on May 3, 2017. His panel was titled, "Restructuring the Offshore Sector: Noteworthy Cases and Trends"

- ✓ Partner Kalyan Das spoke on a panel on multi-jurisdictional insolvency situations organized by the International Insolvency Institute, held on June 20, 2017. His panel was titled, "International Insolvency – Working Together and Thinking About the Future"

- ✓ Partners John Ashmead and Michael Timpone and Counsel Robert Gayda co-authored an article in the October/November 2016 edition of Marine Money Magazine titled, "Chapter 11: A Restructuring Tool for Foreign Shipping Companies."

- ✓ Partner John Ashmead and Counsel Robert Gayda were listed in Super Lawyers 2017 New York - Metro Edition.



SEWARD & KISSEL LLP

New York
One Battery Park Plaza
New York, NY 10004
212-574 201200
212-480-8421 (fax)

Washington, D.C.
901 K Street, NW
Washington, D.C. 20001
202-737-8833
202-737-5184 (fax)

www.sewkis.com