

ON THE NATURE OF THE TRANSFERRED BANKRUPTCY CLAIM

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Creditors can sell their claims¹ against bankrupt companies.² Selling a claim allows a creditor to convert into cash a claim that may not be paid for years and is unlikely ever to be paid in full.³ By selling its claims, a

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1. The Bankruptcy Code definition of a claim is a broad one and includes any "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." 11 U.S.C. § 101(5)(A) (2009). The definition of a claim also includes any "right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured." 11 U.S.C. § 101(5)(B) (2009). This article focuses on the transfer of claims asserted against Chapter 11 debtors. Claims can also be transferred in cases brought under other Chapters of the Bankruptcy Code, such as Chapters 7 and 13. *See* cases cited *infra* note 40.

2. *See* Harvey R. Miller, *Chapter 11 in Transition—From Boom to Bust and Into the Future*, 81 AM. BANKR. L.J. 375, 389-90 (2007) ("The trading of distressed debt claims . . . started slowly and after the 1991 amendment of the Bankruptcy Rules that enhanced the free trading of claims and the subsequent obligation imposed upon financial institutions to liquefy bad loans, claims trading grew exponentially to the point that in many reorganization cases, a substantial portion of the creditor body changed from month to month.").

3. *See* Thomas Donegan, *Covering the "Security Blanket": Regulating Bankruptcy Claims and Claim-Participations Trading Under the Federal Securities Laws*, 14 BANKR. DEV. J. 381, 384 (1998) ("Indeed, the unsecured creditor will collect its pro rata distribution, if any, only at the end of the proceeding and the court's confirmation of the plan. This

creditor can obtain some immediate value out of overdue debts and write at least a portion of its losses off its books.⁴

Claim purchasers buy with the hope of ultimately receiving more than they spend. Consequently, a prospective purchaser will offer to pay a discounted price for a claim that reflects its assessment of the time value of money and of expected returns on the claim at the end of the bankruptcy process.⁵ Some purchasers are simply arbitraging, which is to say that they are investing with an eye towards receiving a distribution on claims in cash or readily liquidated property in excess of the purchase price.⁶ Other purchasers have more sophisticated motives. Some purchasers seek to acquire the claims that they anticipate will be satisfied in the form of equity in the reorganized debtor, referred to as “fulcrum securities.”⁷

confirmation may come two or three years after the proceedings have commenced. Because of the automatic stay against collection efforts during the case's pendency, being able to sell claims provides unsecured creditors “with an opportunity to convert their claims into cash which may be needed to pay expenses.” (citations omitted); Glenn E. Siegel, *Introduction: ABI Guide to Trading Claims in Bankruptcy Part 2 ABI Committee on Public Companies and Trading Claims*, 11 AM. BANKR. INST. L. REV. 177, 177 (2003) (“Perhaps nothing has changed the face of bankruptcy in the last decade as much as the newfound liquidity in claims. Under the old form of bankruptcy, creditors could not expect a distribution, if any, on account of their claims until the end of the case Now, in almost every size case, there is an opportunity for creditors to exit the bankruptcy in exchange for a payment from a distressed debt trader”); *see also In re Kmart Corp.*, 359 F.3d 866, 869 (7th Cir. 2004) (noting that 2,330 of Kmart’s suppliers were paid in full pursuant to the critical vendor order reversed on appeal, while 45,000 Kmart creditors eventually received about 10¢ on the dollar, mostly in the form of stock in the reorganized Kmart); *see generally* Lynn M. LoPucki & Joseph W. Doherty, *Bankruptcy Fire Sales*, 106 MICH. L. REV. 1, 26-27 (2007) (comparing delay in payout to creditors in cases with and without asset sales authorized prior to confirmation of plan of reorganization).

4. *See* Chaim J. Fortgang & Thomas Moers Mayer, *Trading Claims and Taking Control of Corporations in Chapter 11*, 12 CARDOZO L. REV. 1, 4-5 (1990) (“[A] prepetition creditor or shareholder may not be able to establish a tax loss for its claim or stock until the claim or stock can be sold or a plan is confirmed. The availability of a market for claims and stock allows a creditor or shareholder to sell its claim or stock in order to utilize the tax loss at a time most favorable to it while maximizing the sale proceeds in a free trading market.”).

5. *See id.* at 5 (“First, the postpetition investor bets that the plan of reorganization will yield creditors or stockholders more than the price the investor paid for its claims or stock. Second, the postpetition investor bets that such a plan of reorganization will be confirmed and consummated before the investor’s cost of carrying the investment—the time value of money—consumes whatever profit the investor hopes to make on the discount.”).

6. *See* James H.M. Sprayregen, Roger J. Higgins & Jonathan Friedland, *Chapter 11: Not Perfect, but Better than the Alternative*, 24 AM. BANKR. INST. J. 1, 61-62, n.29 (2005) (“This generalization is not meant to disregard those market participants who arbitrage trade and similar unsecured claims by purchasing them with the prospect of receiving a recovery (usually in cash or easily liquidated property) greater than the purchase price.”).

7. *See, e.g.*, Simeon Gold & Daniel Holzman, *Shopping for Distressed Companies*, METRO. CORP. COUNSEL, Feb. 2008, at 42 (“If a purchaser desires to strengthen its position in the acquisition of an entire company under a plan of reorganization, there are steps it can

Other investors seek to acquire claims with an eye towards buying a bankrupt company's assets.⁸ Credit bidding⁹ allows a holder of a claim that is secured by a lien to "use its claim as currency" if the assets of the bankrupt company are sold pursuant to section 363 of the Bankruptcy Code.¹⁰ An investor can buy a secured claim at a discount and then bid the full face value of the claim¹¹ to try to acquire assets that are for sale.¹²

By buying a stake in the debtor's bankruptcy proceedings, claim purchasers obtain the right to be heard at proceedings arising during various stages in the life of the bankruptcy¹³ and to weigh in on proposed

take. The purchaser can acquire a stake in the 'fulcrum' securities of the bankrupt seller (i.e., those obligations of the seller that, based on the likely valuation of the seller's business by the bankruptcy court, are likely to receive equity in the reorganized business.); see also Michelle M. Harner, *Trends in Distressed Debt Investing: An Empirical Study of Investors' Objectives*, 16 AM. BANKR. INST. L. REV. 69, 82 (2008) (citing study results illustrating firm propensities to pursue exchanges of debt for equity).

8. A Chapter 11 debtor may sell all or substantially all of its assets prior to the proposal of a plan of reorganization pursuant to Bankruptcy Code section 363(b). See *In re Lionel Corp.*, 722 F.2d 1063, 1071 (2d Cir. 1983) (requiring a good business reason for such sales); see also 2 BANKRUPTCY DESK GUIDE § 15:40 (Thomson West 2009) (collecting and comparing standards across federal circuits for bankruptcy court approval of sales of all or substantially all of debtor assets).

9. Bankruptcy Code section 363(k) creates a right to credit bid, by providing: At a sale under subsection (b) of this section of property that is subject to a lien that secures an allowed claim, unless the court for cause orders otherwise the holder of such claim may bid at such sale, and, if the holder of such claim purchases such property, such holder may offset such claim against the purchase price of such property. 11 U.S.C. § 363(k) (2009); see also 2 WILLIAM L. NORTON, JR. & WILLIAM L. NORTON, III, *NORTON BANKRUPTCY LAW & PRACTICE* § 44:32 (3d ed. 2009) ("An entity with an interest in property being sold free and clear of such interest may bid for the property unless the court, for cause, orders otherwise. If that entity is the high bidder, under Code § 363(k), it may offset the value of its interest against the property's purchase price.").

10. Corinne Ball, *Distressed Mergers and Acquisitions: Credit Bidding as an Effective Tool*, 232 N.Y. L.J., Corporate Update, Sept. 30, 2004.

11. See, e.g., *In re SubMicron Systems Corp.*, 432 F.3d 448, 459-60 (3d Cir. 2006) ("It is well settled among district and bankruptcy courts that creditors can bid the full face value of their secured claims under § 363(k).").

12. See Ball, *supra* note 10 (discussing the importance of credit bidding as a consideration in the context of a going concern sale under Section 363).

13. See 11 U.S.C. § 1109(b) (2009) ("A party in interest, including the debtor, the trustee, a creditors' committee, an equity security holders' committee, a creditor, an equity security holder, or any indenture trustee, may raise and may appear and be heard on any issue in a case under this chapter."). For example, claim traders looking to expedite returns on their investments may use the right to be heard conferred by Bankruptcy Code section 1109(b) to support a piecemeal sale of the debtor. See *Circuit City Unplugged: Why Did Chapter 11 Fail to Save 34,000 Jobs?: Hearing Before the Subcomm. on Commercial and Administrative Law of the H. Comm. on the Judiciary*, 111th Cong. 13-14 (2009) (testimony of Harvey R. Miller, Senior Partner, Weil, Gotshal, & Manges, LLP), available at <http://judiciary.house.gov/hearings/pdf/Miller090311.pdf> ("Distressed debt traders and hedge funds have different objectives than those of vendor/suppliers. They are motivated by quick and sizeable returns on their investment. Because their entry price usually is much

plans of reorganization¹⁴ in order to advance their interests.¹⁵

The practice of claims trading is “as old as the Republic.”¹⁶ The authors of one of the seminal articles about modern claims trading have traced the American practice to the year 1790:

The first recorded instance of American fiduciaries trading claims against insolvent debtors predates all federal bankruptcy laws and goes back to 1790. The insolvent “debtors” were several of the initial thirteen states, and the “claims” were the debt securities issued by the states—mostly Northern states—during the Revolutionary War to pay both the colonies’ soldiers and the farmers and merchants who had supplied them. The “fiduciaries” were “the founding fathers”—members of the First Congress of the United States. Those Congressmen and their friends purchased the states’ debt securities at ten and twenty-five cents on the dollar at the same time as they were considering legislation to have the new federal government assume liability and pay the securities 100 cents on the dollar from the proceeds of the sale of public lands.

James Madison objected to this breach of public trust. He introduced legislation which would have paid soldiers and other original holders of the securities 100 cents on the dollar while paying speculators and other subsequent holders of the securities only the highest prevailing market price. The balance of payments on the speculators’ securities was to go to their original holders. But Madison’s bill was rejected by the House of Representatives: of the sixty-four members of the House, twenty-nine had purchased securities at a discount.¹⁷

The rights associated with transferred claims continue to matter over

lower than the face amount of the acquired debt, they are more apt to favor the sale and dismemberment of a debtor, if it will yield faster and greater recoveries based upon the costs of purchasing claims. Unless they are extending loans to own the debtor, a process that gained some favor in the mid-2000s, there is little or no interest in the rehabilitation of the debtor.”).

14. For example, claims purchasers can vote down a debtor’s proposed plan of reorganization to maximize distributions paid out on their claims. See Kevin J. Coco, *Empty Manipulation: Bankruptcy Procedure Rule 2019 and Ownership Disclosure in Chapter 11 Cases*, 2008 COLUM. BUS. L. REV. 610, 615 (2008) (“It is these active investors who, because they have the ability to shut down a debtor’s ability to reorganize, present the greatest threat to the active rehabilitation and reorganization of debtors, which are the two primary goals of Chapter 11.”).

15. For ease of reference, the opening paragraphs of this article refer to sellers and purchasers, rather than assignors and assignees. One district court has drawn a distinction between the consequences of effectuating a claim trade through a sale rather than via an assignment. See discussion *infra* Part I.C.

16. Fortgang & Mayer, *supra* note 4, at 26.

17. *Id.* at 25-26.

two hundred years later because of how tempting transferring claims is to creditors hungry for cash and how easily claims can be transferred¹⁸ to eager investors.¹⁹ In the Information Age, bankruptcy claims are traded through websites like www.secondmarket.com.²⁰ Reporting the record-setting²¹ fourth quarter of 2008, SecondMarket anticipates the “continuing

18. Although a creditor can readily find an investor to which to transfer its bankruptcy claims, transfer documentation usually does not allow the creditor to wash its hands of the claims or to stop participating in the debtor’s bankruptcy proceedings. The documentation may, for example, require the claim transferor to take back the claims or to repay the transferee for the impaired portion of the claims if the debtor challenges the claims. *See, e.g.*, Lisa Gretchko, *How to Analyze a Claim-Transfer Agreement*, AM. BANKR. INST. J., Mar. 24, 2005, at 24, 64 (analyzing how a claims trader buys claims from an unsecured creditor). Additionally, as discussed *infra* Part II, at least one bankruptcy court has held that to the extent that the debtor assumes the contract(s) underlying the claims, the debtor’s counterparty—not the transferee—will negotiate cure amounts with, and receive cure payments from, the debtor. Also, pursuant to Chapter 5 of the Bankruptcy Code, a debtor can sue a creditor to seek the return of transfers made to the creditor prior to or following the bankruptcy filing. *See, e.g.*, 11 U.S.C. §§ 547(b), 548(a), 549(a) (authorizing the avoidance of certain transfers). Such suits frequently include a cause of action seeking disallowance of any claims asserted by the creditor pending return of the challenged transfers. *See* 11 U.S.C. § 502(d) (“Notwithstanding subsections (a) and (b) of this section, the court shall disallow any claim of any entity from which property is recoverable under section 542, 543, 550, or 553 of this title or that is a transferee of a transfer avoidable under section 522(f), 522(h), 544, 545, 547, 548, 549, or 724(a) of this title, unless such entity or transferee has paid the amount, or turned over any such property, for which such entity or transferee is liable under section 522(i), 542, 543, 550, or 553 of this title.”); *infra* Part I.A.

19. *See, e.g.*, Argo Partners, <http://www.argopartners.net> (last visited May 17, 2009) (“Argo Partners is an investment firm that specializes in purchasing potential future cash flows of distressed, often bankrupt, entities”); Cash for Claims, <http://riversideclaims.com> (last visited Mar. 10, 2009) (advertising that people with a valid claim against a corporation can “[g]et[] cash quickly”); Creditor Liquidity Asset Management, LLC, <http://www.creditorliquidity.com> (last visited May 17, 2009) (“Creditor Liquidity . . . provides creditors an opportunity to receive a cash payment for its bankruptcy claim in advance of the conclusion of the Chapter 11 case.”); Liquidity Solutions Inc., <http://www.liquiditysolutions.com> (last visited Apr. 10, 2009) (“Liquidity Solutions . . . provides cash for paper assets that ordinarily are illiquid.”); Madison Liquidity Investors, <http://www.madisonliquidity.com/bankruptcy.html> (last visited May 17, 2009) (“Madison Liquidity Investors provides a cash option that allows you to partially collect on your receivables, . . .”).

20. *See* SecondMarket, <http://www.secondmarket.com/about/> (last visited May 17, 2009) (“SecondMarket is the largest centralized marketplace and auction platform for illiquid assets, such as . . . bankruptcy claims . . .”). While all claim holders are invited to sell their claims through SecondMarket, only “accredited investors” can buy claims through the site. *See* SecondMarket, <http://www.secondmarket.com/forms/buyers.php> (last visited May 17, 2009) (requiring prospective buyers to provide “Certification of Accreditation”). Bankruptcy claims can also be traded by using the services of Administar Services Group LLC. *See* Bankruptcy Administration Solutions, <http://www.administarllc.com/bankruptcy-claims-trading-distressed-investing.asp> (last visited May 17, 2009) (“Administar helps . . . investors buy and sell claims in bankruptcy cases.”).

21. *See* *SecondMarket Business Update Q4 2008* at 1, <http://www.secondmarket.com/pdf/224.pdf> (last visited Apr. 5, 2009) (“We had another

strong interest on the buy-side”.²²

SecondMarket’s new claims trading platform²³ has been discussed in connection with the trading of claims asserted in multi-billion dollar cases. *Reuters* reported on September 25, 2008 that SecondMarket would begin “trading bankruptcy claims created by the Lehman Brothers Holdings Inc. Chapter 11 filing” and observed that “[w]ith \$639 billion in assets and more than 100,000 creditors, the Lehman Brothers bankruptcy is the largest in the U.S. to date.”²⁴ On February 26, 2009, tax experts suggested that investors in the \$65 Billion Ponzi scheme orchestrated by Bernard Madoff²⁵ should consider selling their claims in the SIPA liquidation proceedings of Bernard L. Madoff Investment Securities LLC²⁶ through SecondMarket to establish a theft loss deduction on their taxes.²⁷

Soon after SecondMarket launched its site, a similar European marketplace, IlliquidX, was launched at the European Distressed Credit Investing Conference by a company based in the United Kingdom.²⁸

record quarter and another record year. We nearly quadrupled our revenue while, at the same time, maintaining profitability”).

22. *Id.* at 3.

23. SecondMarket launched its website in 2008. *Id.* at 1.

24. *SecondMarket to Trade Lehman Bros. Bankruptcy Claims: Adds Bankruptcy Industry Veterans to Bankruptcy Claims Trading Business*, REUTERS, Sept. 25, 2008, <http://www.reuters.com/article/pressRelease/idUS138828+25-Sep-2008+BW20080925>; see also Chelsea Emery, *Lehman Creditors Can Now Trade Their Claims*, SECONDMARKET PRESS ROOM, Sept. 25, 2008, <http://www.secondmarket.com/press-article/lehman-creditors-can-now-trade-their-claims.html> (“SecondMarket, which provides a marketplace for illiquid assets, said on Thursday it will begin trading bankruptcy claims created by the Lehman Brothers Holdings Inc. Chapter 11 filing.”); Linda Sandler, *Lehman Fuels \$3 Billion Market in IOUs for Toner, Consulting*, BLOOMBERG, Sept. 25, 2008, http://www.bloomberg.com/apps/news?pid=email_en&refer=us&sid=akk7HGbIfmRE (“The Lehman Brothers Holdings Inc. bankruptcy may be the fuel that lifts Barry Silbert’s four-year-old business[, SecondMarket,] to the next level.”).

25. See Diane B. Henriques, *Madoff Will Plead Guilty; Faces Life for Vast Swindle*, N.Y. TIMES, Mar. 11, 2009, at A1 (“Bernie L. Madoff is facing life in prison for operating a vast Ponzi scheme that . . . consumed billions of dollars of other people’s money.”).

26. *Securities Investor Protection Corp. v. Bernard L. Madoff Investment Securities LLC*, SIPA Liquidation, Adv. Pro. No. 08-01789 (Bankr. S.D.N.Y. filed December 11, 2008).

27. See 26 C.F.R. § 601.105 (2009) (discussing theft losses deductions available to investors in enterprises discovered to be criminally fraudulent Ponzi schemes); Melissa Hoffmann Lajara, *NYSSCPA Panel Talks Madoff Tax Treatment*, NYSSCPA.ORG E-ZINE, Feb. 26, 2009, <http://www.nysscpa.org/ezine/ETPArticles/ML22609a.htm> (stating that “‘one of the most basic pieces’ of recovery . . . is the theft loss deduction” and mentioning SecondMarket as a place where theft loss can be exactly determined).

28. See Simona Franciosi, *IlliquidX, The Illiquid Asset Trading Platform has been Launched in Europe*, <http://www.illiquidx.com/news/news1.php> (last visited May 17, 2009) (“IlliquidX, the illiquid asset trading platform, has been launched at European Distressed Credit Investing conference on the 13th of March 2009, in London”); see generally *The Platform and How it Works*, <http://www.illiquidx.com/platform.php> (last visited May 17, 2009) (describing IlliquidX’s platform).

IlliquidX's claims trading platform includes "[s]cheduled and unscheduled claims . . . [p]erforming or nonperforming healthcare receivables . . . VAT receivables and other trade claims."²⁹ The launches of the SecondMarket and IlliquidX claims trading platforms reflect a continuing appetite for both interstate and international claims trading.³⁰

The Bankruptcy Code does not regulate the transfer of claims.³¹ Federal Rule of Bankruptcy Procedure 3001(e)³² requires disclosure of certain kinds of claim transfers³³ but does not impose any substantive

29. IlliquidX, <http://www.illiquidx.com/pagina.php> (last visited Apr. 24, 2009).

30. Claims trading outside of American bankruptcy courts is beyond the scope of this article. The authors welcome comparative perspectives from those familiar with the practice of claims trading in the European Union and elsewhere.

31. See Thomas Donegan, *Covering the "Security Blanket": Regulating Bankruptcy Claims and Claim-Participations Trading Under the Federal Securities Laws*, 14 BANKR. DEV. J. 381, 389 (1998); Herbert P. Minkel, Jr. & Cynthia A. Baker, *Claims and Control in Chapter 11 Cases: A Call for Neutrality*, 13 CARDOZO L. REV. 35, 101 (1991) ("The Bankruptcy Code is silent on the question of claims trading."); see generally 11 U.S.C. § 101 *et seq.* (2009) (the Bankruptcy Code).

32. Federal Rule of Bankruptcy Procedure 3001(e) provides:

(1) Transfer of claim other than for security before proof filed

If a claim has been transferred other than for security before proof of the claim has been filed, the proof of claim may be filed only by the transferee or an indenture trustee.

(2) Transfer of claim other than for security after proof filed

If a claim other than one based on a publicly traded note, bond, or debenture has been transferred other than for security after the proof of claim has been filed, evidence of the transfer shall be filed by the transferee. The clerk shall immediately notify the alleged transferor by mail of the filing of the evidence of transfer and that objection thereto, if any, must be filed within 20 days of the mailing of the notice or within any additional time allowed by the court. If the alleged transferor files a timely objection and the court finds, after notice and a hearing, that the claim has been transferred other than for security, it shall enter an order substituting the transferee for the transferor. If a timely objection is not filed by the alleged transferor, the transferee shall be substituted for the transferor.

FED. R. BANKR. P. 3001(e)(1)-(2); see *id.* at 3001(e)(3)-(5) (concerning transfers of claims for security and procedural requirements for objections).

33. The Rule does not apply, for example, to transfers of debt instruments created through participations and syndications. See Kevin J. Coco, *Empty Manipulation: Bankruptcy Procedure Rule 2019 and Ownership Disclosure in Chapter 11 Cases*, 2008 COLUM. BUS. L. REV. 610, 618 n.37 (2008) ("[I]t is rare to see a Rule 3001(e) filing for either bank loans or bond debt [, which are both typically participated.]"); Robert D. Drain & Elizabeth J. Schwartz, *Are Bankruptcy Claims Subject to the Federal Securities Laws?*, 10 AM. BANKR. INST. L. REV. 569, 578 n.42 (2002) ("Rule 3001(e) never applied to participations . . ."). Also, the Rule does not expressly impose a notice requirement when claim holders transfer the economic interests in their bankruptcy claims, not the claims themselves, via derivative instruments like credit default swaps. See, e.g., Henry T. C. Hu & Bernard Black, *Equity and Debt Decoupling and Empty Voting II: Importance and Extensions*, 156 U. PA. L. REV. 625, 730-35 (2008) (discussing "empty crediting" by holders

restrictions on claims trading.³⁴ As a result, bankruptcy courts have had to rule on issues arising out of claims trading with limited statutory guidance. Bankruptcy courts presiding over cases in which claims were traded have confronted a host of issues including: imposing disclosure obligations;³⁵ preventing conflicts of interest on creditors' committees³⁶ and bad faith voting on reorganization plans;³⁷ and preserving the beneficial tax consequences of net operating losses.³⁸

Although the practice of claims trading can introduce complications into Chapter 11 proceedings that would not arise otherwise, it is not unlawful.³⁹ Indeed, appellate courts have validated challenged bankruptcy

of credit default swaps); *Corporate Bankruptcy: Burning Down the House*, THE ECONOMIST, Mar. 20, 2009, at 5, available at 2009 WLNR 5332126 (discussing Lyondell's Chapter 11 filing).

34. See FED. R. BANKR. P. 3001(e) advisory committee's note to 1991 Amendments ("[Subsection (e) was] amended to limit the court's role to the adjudication of disputes regarding transfers of claims. . . . This rule is not intended either to encourage or discourage postpetition transfers of claims or to affect any remedies otherwise available under nonbankruptcy law to a transferor or transferee such as for misrepresentation in connection with the transfer of a claim.").

35. See, e.g., *In re Northwest Airlines Corp.*, 363 B.R. 704 (Bankr. S.D.N.Y. 2007) (concerning disclosure obligations of *ad hoc* equity committees under Federal Rule of Bankruptcy Procedure 2019).

36. See Robert P. Enayati, *Undermining the Trading Wall: The BAPCPA's Affront on the Creditors' Committees' Duty of Confidentiality in Chapter 11 Bankruptcies*, 21 GEO. J. LEGAL ETHICS 703 (2008) (explaining that trading walls within a given entity can prevent a conflict of interests); Michael P. Richman & Jonathan E. Aberman, *Creditors' Committees Under the Microscope: Recent Developments Highlight Hazards of Self-Dealing*, AM. BANKR. INST. J., SEPT. 26, 2007, AT 22 (discussing how a few recent cases concerning conflicts of interest highlight the need for the highest fiduciary duty).

37. See, e.g., *In re Allegheny, Inc.*, 118 B.R. 282, 290 (Bankr. W.D. Pa. 1990) (designating votes cast in bad faith); Frederick Tung, *Confirmation & Claims Trading*, 90 NW. U. L. REV. 1684, 1745-54 (1996) (discussing *Allegheny* and the good-faith requirement).

38. See Jean Morris, *Imposition of Transfer Limitations on Claims and Equity Interests During Corporate Debtor's Chapter 11 Case to Preserve the Debtor's Net Operating Loss Carryforward: Examining the Emerging Trend*, 77 AM. BANKR. L.J. 285 (2003); Carianne Basler & Michelle Campbell, *Savvy Claims Purchasers Must Avoid Pitfalls*, AM. BANKR. INST. J., June 25, 2006, at 26 ("[Courts have helped debtors safeguard] . . . net operating losses . . . to offset against future tax liabilities . . .").

39. Some investments in pending proceedings are prohibited by the doctrine of champerty. Champerty is "[a] bargain between a stranger and a party to a lawsuit by which the stranger pursues the party's claim in consideration of receiving part of any judgment proceeds; it is one type of 'maintenance,' the more general term which refers to maintaining, supporting, or promoting another's litigation." BLACK'S LAW DICTIONARY 231 (6th ed. 1990). The restrictions of champerty come to mind because institutional investors buy bankruptcy claims with the understanding that litigation over the amount, classification, and correct debtor designation for the transferred claims may arise through the omnibus claim objection process. Indeed, sophisticated claims traders incorporate indemnities into claim transfer documentation to protect against objectionable claims. See Gretchko, *supra* note 18 (analyzing the process of claims transfers for unsecured creditors and the incentives of the

claim trades, even in the absence of the filing of the notice of transfer required by Federal Rule of Bankruptcy Procedure 3001(e).⁴⁰

But what is the nature of the transferred bankruptcy claim? Does the transfer of a bankruptcy claim somehow transform it? Can the transferee of a bankruptcy claim obtain a claim with rights superior to the transferor's? Does the manner in which a claim is transferred change the answer to these questions? What rights can be transferred as part of a claim trade? Are all of the rights to payment arising out of the receivables underlying a bankruptcy claim transferred when a claim is transferred? Can contingent reimbursement rights be transferred?

The answers to these, and related questions, impact the claims administration process in the many Chapter 11 cases in which claims are traded and affect distributions to creditors and other constituencies of bankruptcy estates who are not parties to the trades. The answers to these

claim purchasers). The filing of waves of objections is endemic to the claim administration process in large Chapter 11 cases. *See* FED. R. BANKR. P. 3007(c)–(f) (setting forth requirements for omnibus objections); FED. R. BANKR. P. 3007 advisory committee's note to 2007 amendments ("The rule also is amended to authorize the filing of a pleading that joins objections to more than one claim. Such filings present a significant opportunity for the efficient administration of large cases, but the rule includes restrictions on the use of these omnibus objections to ensure the protection of the due process rights of the claimants."); *see also* Michelle Campbell, Carianne Basler & Kerri Lyman, *The Travelers Effect*, 26 AM. BANKR. INST. J. 28, 29 (2007) ("In a typical case, the claims-reconciliation process works like this: (1) the schedules of assets and liabilities are filed; (2) a bar date is set; (3) creditors file claims; (4) perhaps the court adopts specialized claim-objection procedures specially tailored to fit the needs of the case; (5) the debtors and their advisors begin reconciling the claims to accounts payable; (6) the debtor files some omnibus claim objections, settles some claims and litigates others; and (7) creditor recovery scenarios are developed for plan purposes."). Negotiations over reduction and reclassification of claims often take place while claims are noticed for litigation under the debtor's claim objection procedures order. *See, e.g.*, Joint Stipulation And Agreed Order Compromising And Allowing Proofs Of Claim Numbers 6672 And 10380 (Contrarian Funds, LLC And MeadWestvaco Corporation), *In re Delphi Corp.*, Chapter 11 Case No. 05-44481 (Bankr. S.D.N.Y. Sept. 25, 2008) (referencing settlement agreement entered into by the parties while the Twenty-First Omnibus Claims Objection was pending). Still, claims trading is apparently not barred by champerty. *See* FED. R. BANKR. P. 3001(e) (providing notice requirements for claim transfers); *see also Elliott Assocs., L.P. v. Banco de la Nacion and Republic of Peru*, 194 F.3d 363 (2d Cir. 1999) (holding that the investor was not precluded from seeking damages for non-payment of distressed foreign sovereign debt by the doctrine of champerty even when the debt was bought with the intention of bringing suit to collect it).

40. *See, e.g., In re Kreisler*, 546 F.3d 863 (7th Cir. 2008) (reversing equitable subordination of \$900,000 claim purchased for \$16,500 by entity formed by Chapter 7 debtors in order to purchase claims against their own bankruptcy estates, although no notice of transfer had been filed pursuant to Federal Rule of Bankruptcy Procedure 3001(e)); *accord In re Burnett*, 306 B.R. 313 (B.A.P. 9th Cir. 2004) (holding that transferee of claims asserted against Chapter 13 debtors need not disclose amounts paid to transferor to acquire claims and reversing disallowance of transferred claims), *aff'd*, 435 F.3d 971 (9th Cir. 2006).

questions also affect the flow of billions of dollars⁴¹ among distressed debt traders and the documentation of trades.

This article sets out some recent rulings concerning the nature of transferred bankruptcy claims. Some rulings issued in the bankruptcy proceedings that followed the notorious collapse of Enron, which are discussed in Part I below, have made their way into articles,⁴² while the remainder of the rulings seem to have flown under the radar. We write in order to highlight uncertainties inherent in bankruptcy claims trading, many of which can be addressed in the documentation of trades. We also share the rulings we have encountered in our practices so that judges ruling on claims trading issues have the benefit of each other's insights and so that lawmakers can consider whether there is a need for statutory guidance.

I. Does the Nature of a Transferred Bankruptcy Claim Remain the Same No Matter Whose Hands it is in or Can the Transferee Hold a Claim with Rights Superior to the Transferor's?

This remains an open question. There are conflicting rulings by Bankruptcy and District Courts in the Second Circuit arising out of the bankruptcy proceedings of Enron and Ames Department Stores. Before describing the rulings, we offer thumbnail sketches of claim disallowance and equitable subordination of claims and an overview of the debate concerning how these concepts affect transferred claims.

41. See Michelle M. Harner, *The Corporate Governance & Public Policy Implications of Activist Distressed Debt Investing*, 77 *FORDHAM L. REV.* 703, 713 n.36 (2008) (explaining that there is an increase in activist distressed debt investors in both the United States and the United Kingdom that is changing the dynamic of and creating new challenges for corporate restructuring).

42. See, e.g., Kenneth M. Miskin, *Attention Claim Traders: A Claim in the Hands of a Transferee is Subject to § 502(d) Disallowance*, 34 *AM. BANKR. INST. J.*, Oct. 25, 2006, at 1 (explaining how the Enron bankruptcy court erroneously failed to conduct a thorough "plain meaning" analysis of §502(d), resulting in judicial focus on the claim rather than the holder of an avoidable transfer); Lawrence Kotler, *Claim Purchasers Beware: No Good-Faith Defense to Equitable Subordination*, 22 *BANKR. INST. J.*, Feb. 25, 2006, at 1 (warning practitioners to include standard representation and warranty provisions in the forms to purchase and sell distressed debt as a result of the "Enron Opinion"); Jennifer Witherell Crastz, *Can a Claims Purchaser Receive Better Rights (or Worse Rights) than its Transferor in a Bankruptcy?*, 29 *CAL. BANKR. J.* 365, 371-73 (2007) (discussing the creation of a new conundrum created by the district court in the Enron bankruptcy by turning its decision on an analysis of the previously interchangeable sale versus assignment terminology); Andrew H. Sherman, *Can the Enron Claims Trading Issues Be Avoided?: Should You Consider Acquiring a Distribution Right?*, *BANKR. STRATEGIST* (L.J. Newsletters), March 2007 (providing an investment strategy for claim purchasers to help them avoid subjection to later attack and subordination of a claim, a precedent set by the holding of *In re Enron Corp.*).

A. Thumbnail Sketch of Claim Disallowance Based on Receipt of Voidable Transfers

Under Bankruptcy Code section 502(d), a bankruptcy claim is subject to disallowance if the claimant receives property that is recoverable by the bankruptcy estate. Once the claimant pays what it owes, the claim is no longer subject to disallowance on this basis.⁴³ Section 502(d) “precludes entities which have received voidable transfers from sharing in the distribution of the assets of the [bankruptcy] estate unless and until the voidable transfer[s] ha[ve] been returned to the estate.”⁴⁴ The most common voidable transfers are preferences and fraudulent transfers.⁴⁵

Basically,⁴⁶ through a preference action, a debtor in possession⁴⁷ may seek to claw back transfers (including transfers of money) that it made while insolvent, on or within the 90 days before the filing of its bankruptcy

43. See 11 U.S.C. § 502(d) (2009) (“Notwithstanding subsections (a) and (b) of this section, the court shall disallow any claim of any entity from which property is recoverable under section 542, 543, 550, or 553 of this title or that is a transferee of a transfer avoidable under section 522(f), 522(h), 544, 545, 547, 548, 549, or 724(a) of this title, unless such entity or transferee has paid the amount, or turned over any such property, for which such entity or transferee is liable under section 522(i), 542, 543, 550, or 553 of this title.”)

44. *In re Mid Atl. Fund, Inc.*, 60 B.R. 604, 609 (Bankr. S.D.N.Y. 1986).

45. See 11 U.S.C. §§ 547(b), 548(a) (2009) (respectively, the preference and fraudulent transfer provisions of the Bankruptcy Code).

46. A more extensive discussion of preferences and fraudulent transfers is beyond the scope of this article. Much has been written about the elements of and defenses to preference and fraudulent transfer actions. For more detailed discussions, see David B. Young, *Preferences & Fraudulent Transfers*, 895 PLI/Comm 713 (2007); Hon. William H. Brown, Dennis J. Connolly, David A. Lander, and Timothy M. Lupinacci, *2007 Norton Bankruptcy Law Seminar Materials: Advanced Issues in Avoidance*, available at <http://www.nortoninstitutes.org/07SeminarMaterials/07Avoidance/M07-AvoidanceIssuesTOC.html> (last visited April 9, 2009).

47. The Bankruptcy Code authorizes trustees to claw back preferential and fraudulent transfers. See, e.g., 11 U.S.C. §§ 547(b), 548(a) (2006). In Chapter 11 cases in which a trustee is not appointed, the bankrupt company is a “debtor in possession” and has the rights and powers of a trustee, including the ability to bring actions seeking the avoidance and recovery of voidable transfers. See 11 U.S.C. § 1107(a) (2009) (setting forth rights and powers of debtors in possession); *In re Century Brass Products, Inc.*, 22 F.3d 37, 39 (2d Cir. 1994) (holding that two-year limitations period for trustee to bring avoidance proceeding also applies to debtor in possession). This article refers to avoidance actions by debtors and debtors in possession because its focus is on claim trades in Chapter 11 cases and trustees are rarely appointed in Chapter 11 cases. See Harner, *supra* note 41, at 730. See generally 11 U.S.C. § 1104(a) (2009) (setting forth the limited circumstances under which a court should appoint a Chapter 11 trustee). We note, for the sake of completion, that some courts have held that creditors committees can be granted derivative standing to bring avoidance actions when the trustee or debtor in possession refuse to initiate suit. See, e.g., Official Comm. of Unsecured Creditors of Cybergenics Corp. ex rel. Cybergenics v. Chinery, 330 F.3d 548 (3d Cir. 2003) (recognizing power of bankruptcy courts to authorize creditor committees to sue derivatively to recover property for the benefit of the estate).

petition (or in the case of transfers to an insider, within a year of the bankruptcy filing) provided that the transfers were made to or for the benefit of a creditor and for or on account of an antecedent debt. The challenged transfers must also have allowed the creditor to receive more than it would have received in a hypothetical chapter 7 liquidation.⁴⁸

Preference law reaches back over a defined period prior to bankruptcy and restructures transactions so as to level out the overall treatment received by similar creditors. This does not imply that the transfers [made prior to the bankruptcy filing that are] avoided to accomplish this leveling were immoral or improper when made. Rather, they are avoided because their effect contravenes bankruptcy law concepts as to the economic effects sought in a distribution of assets or income.⁴⁹

Furthermore, through a fraudulent transfer action, which is more complicated, a debtor can undo transfers and obligations made with an actual intent to hinder, delay, or defraud creditors or for which less than reasonably equivalent value was received at a time when the debtor was or would soon be insolvent.⁵⁰ The reachback periods vary depending on the nature of the fraudulent transfer⁵¹ and whether state or federal law is invoked.⁵² If a challenged transfer is voided (on the basis that it constitutes either a preference or fraudulent transfer), it can be recovered from not only the initial transferee, but also those who received a transfer of the property from the transferee.⁵³

48. See 11 U.S.C. § 547(b) (2009); see also 11 U.S.C. § 547(c) (2009) (setting forth defenses), 11 U.S.C. § 547(f) (2009) (creating a presumption of insolvency).

49. 4 WILLIAM L. NORTON, JR. & WILLIAM L. NORTH, III, *NORTON BANKRUPTCY LAW & PRACTICE* § 66:1 (3d ed. 2009).

50. See 11 U.S.C. § 548 (2009).

51. See *id.*

52. See 11 U.S.C. § 544(b)(1) (2009) (allowing trustees and debtors in possession to invoke state law by providing that “[e]xcept as provided in paragraph (2), the trustee may avoid any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is voidable under applicable law by a creditor holding an unsecured claim that is allowable under section 502 of this title or that is not allowable under section 502(e) of this title.”). Under New York law, for example, the statute of limitations for fraudulent conveyance claims is six years. See N.Y. C.P.L.R. § 213(8) (McKinney 2009) (“[A]n action based upon fraud; the time within which the action must be commenced shall be the greater of six years from the date the cause of action accrued or two years from the time the plaintiff or the person under whom the plaintiff claims discovered the fraud, or could with reasonable diligence have discovered it.”); *In re Borriello*, 329 B.R. 367, 372 (Bankr. E.D.N.Y. 2005) (citing *Island Holding, LLC v. O’Brien*, 775 N.Y.S.2d 72 (2d Dep’t 2004)) (“An action under New York law to set aside a fraudulent conveyance is governed by the six-year statute of limitation [sic] for actions grounded in fraud, commencing at the time of the conveyance.”). New York State law is cited by way of example of a state law on fraudulent conveyances. The application of choice of law principles to avoidance actions, including fraudulent conveyance actions, is beyond the scope of the article.

53. See 11 U.S.C. § 550(a) (2009) (authorizing suits against “immediate” and “mediate”

B. Thumbnail Sketch of Equitable Subordination of Claims

Pursuant to Bankruptcy Code section 510(c)(1), a court may “under principles of equitable subordination, subordinate for purposes of distribution all or part of an allowed claim to all or part of another allowed claim or all or part of an allowed interest to all or part of another allowed interest.”⁵⁴ The Bankruptcy Court for the Eastern District of New York recently described equitable subordination as a remedy “available when (1) the claimholder engaged in inequitable conduct, (2) the misconduct caused injury to the creditors or conferred an unfair advantage on the claimholder, and (3) equitable subordination is consistent with bankruptcy law.”⁵⁵

Neither the disallowance nor the equitable subordination provisions of the Bankruptcy Code expressly reference holders of transferred bankruptcy claims. Debtors have invoked these provisions to challenge transferred claims on the basis that claims subject to disallowance and equitable subordination should not be washed by the mere act of transfer. Debtors thereby try to prevent claim traders, who can protect themselves through warranties and indemnities, from profiting at the expense of creditors of bankruptcy estates who are unable to protect themselves. Claim transferees counter that, as third parties acting in good faith, their claims are beyond the reach of the disallowance and equitable subordination provisions of the Bankruptcy Code. Among other things, they argue that their claims should not be tainted by the conduct of the claim transferors and that allowing their claims to be tainted will have a chilling effect on distressed debt trading.⁵⁶

C. Attempts to Disallow and Subordinate Claims Asserted By Transferees Against the Enron Debtors

After the infamous collapse of Enron and the ensuing bankruptcy filings, the Enron debtors filed a complaint alleging multiple causes of action against Enron’s former lender banks, including various Citigroup

transferees); *see also* 11 U.S.C. § 550(d) (2009) (limiting recovery in instances in which multiple parties are sued to a single satisfaction).

54. 11 U.S.C. § 510(c)(1) (2009). Under 11 U.S.C. § 510(c)(2) (2009), a court may “order that any lien securing such a subordinated claim be transferred to the estate.”

55. *In re Copperfield Investments, LLC*, 401 B.R. 87, 95 (Bankr. E.D.N.Y. 2009) (citing 80 Nassau Assocs. v. Crossland Fed. Sav. Bank (*In re Nassau Assocs.*), 169 B.R. 832, 837 (Bankr. S.D.N.Y. 1994)).

56. For a summary of the competing positions, see *In re Enron Corp.*, 333 B.R. 205, 215-16 (Bankr. S.D.N.Y. 2005) (setting forth competing positions with respect to equitable subordination of transferred claims); *In re Enron Corp.*, 340 B.R. 180, 188-90 (Bankr. S.D.N.Y. 2006) (setting forth competing positions with respect to disallowance of transferred claims).

entities and others (the “MegaComplaint”).⁵⁷ In the MegaComplaint, Enron sought a recovery from “the banks and investment banks that bear substantial responsibility for the stunning downfall of what was once the seventh largest corporation in the United States” based on a “multi-year scheme to manipulate Enron’s financial statements and misstate its financial condition.”⁵⁸ The MegaComplaint sought, among other things, to avoid and recover multiple allegedly preferential and fraudulent transfers arising from challenged transactions entered into with Citigroup entities.⁵⁹ In addition, the MegaComplaint called for the disallowance and equitable subordination of all claims asserted by the defendants, including the named Citigroup entities.⁶⁰ Enron also sought to disallow and equitably subordinate claims that had been transferred by the various defendants.⁶¹

Enron subsequently filed a wave of complaints against the claim transferees (the “Transferee Litigation”).⁶² The complaints sought disallowance and equitable subordination of the claims asserted by the transferees on the basis that the claims would have been subject to disallowance and equitable subordination if the Enron lender banks holding the claims as of the date of Enron’s bankruptcy filings had not transferred them.⁶³

The District Court granted leave to file interlocutory appeal after the complaints were met with unsuccessful motions to dismiss.⁶⁴ By the time the District Court ruled on the merits of the appeal, all of the Transferee Litigation had settled except the litigation targeting the \$5,000,000 claim held by Citigroup’s transferee Springfield Associates, LLC.⁶⁵ A Citigroup

57. See Reorganized Debtors’ Fourth Amended Complaint for the Avoidance and Return of Preferential Payments and Fraudulent Transfers, Equitable Subordination, and Damages, Together with Objections and Counterclaims to Creditor Defendants’ Claims, *Enron Corp. v. Citigroup Inc.*, No. 01-16034 (Bankr. S.D.N.Y. Jan. 10, 2005) [hereinafter *MegaComplaint*].

58. *MegaComplaint*, *supra* note 57, at ¶ 1.

59. See *id.*, at counts 1 – 4 (detailing allegedly improper transfers and dealings).

60. See *id.*, at counts 5, 72, and 73 (related counts).

61. See *id.*, at count 73 (related counts).

62. See, e.g., Amended Complaint for the Disallowance and Equitable Subordination of Claims Against the Reorganized Debtors Formerly Held by Citigroup Inc. or its Affiliates, *In re Enron Corp.*, 379 B.R. 425, 429, No. 01-16034 (Bankr. S.D.N.Y. Jan. 27, 2005) [hereinafter *MegaDefendant Transferee Complaint*]; see *In re Enron Corp.*, 379 B.R. 425, 429 (S.D.N.Y. 2007) (discussing the Transferee Litigation).

63. See *In re Enron Corp.*, 379 B.R. at 429-30 (describing the Transferee Litigation).

64. See *In re Enron Corp.*, No. 01-06134, 2006 WL 2548592 (S.D.N.Y. Sept. 5, 2006) (District Court’s Opinion and Order granting leave to file interlocutory appeal). See generally *In re Enron Corp.*, 333 B.R. 205 (Bankr. S.D.N.Y. 2005) (Bankruptcy Court opinion on equitable subordination of transferred claims); *In re Enron Corp.*, 340 B.R. 180 (Bankr. S.D.N.Y. 2006) (Bankruptcy Court opinion on disallowance of transferred claims).

65. See *In re Enron Corp.*, 379 B.R. 425, 430 (Bankr. S.D.N.Y. 2007) (deciding the merits of the interlocutory appeal).

entity held the challenged claim, based on a revolving credit agreement, at the time of Enron's bankruptcy filing; the Citigroup entity subsequently transferred the claim to a Deutsche Bank entity, which then transferred the claim to Springfield.

In a published decision, *In re Enron Corp.*, 379 B.R. 425 (S.D.N.Y. 2007), the District Court vacated the Bankruptcy Court orders before it, ruled that a transferred claim can be subject to disallowance and equitable subordination if it is transferred through an assignment, but not if it is transferred through a sale, and remanded the matter for further consideration.⁶⁶

The District Court's Enron ruling is unusual for at least two reasons. First, it is unusual in that it draws a distinction between the consequences of transferring a claim through a sale, as opposed to an assignment, that neither the parties that appealed to the District Court nor the *amici curiae* thought carried any significance.⁶⁷

Commentators do not appreciate the distinction either. According to

66. *See id.* at 448-49. Springfield unsuccessfully sought leave to appeal the ruling to the United States Court of Appeals for the Second Circuit. *See In re Enron Corp.*, 2007 WL 2780394 (S.D.N.Y. 2007). Ultimately, whether the claim of the transferee could be disallowed or equitably subordinated was never tried because, as part of a global settlement, Enron, various Citigroup entities, and others agreed that the claim would be allowed. *See* Global Settlement Agreement, dated as of April 4, 2008, Section 2.2 (execution copy available on Enron's website, at http://www.enron.com/media/EXECUTED_GSA_WITH_LIVE_SIGNATURES.pdf) (hereinafter, the "Global Settlement Agreement"). The Global Settlement Agreement also addressed the treatment of another set of transferred claims that the Enron debtors challenged outside of the Transferee Litigation. Citibank and a special purpose entity named Delta Energy Corp. transferred the challenged claims to certain other MegaComplaint defendants via credit default swaps that were triggered by Enron's bankruptcy filings. *See In re Enron Corp. Securities Litigation*, MDL-1446, Civil Action No. H-05-1191, Yosemite Securities Trust I et al. v. Citibank, N.A., Citigroup, Inc. & Delta Energy Corp., dated August 18, 2006 (claim transferees' complaint against claim transferors).

67. *See* Memorandum in Support of Motion by Springfield Associates, LLC to Modify Order and Judgment for Certification of Interlocutory Appeal, *In re Enron Corp.*, Nos. 06 Civ. 7828 (SAS), 07 Civ. 1957 (SAS), 2007 WL 3314379 (S.D.N.Y. Sept. 7, 2007) ("and the Court's Decision, which provided an additional theory that had been advocated by neither appellants, appellee, nor any of the *amici curiae*, further underscores the substantial grounds for difference of opinion on the issues."); Statement of *Amici Curiae* the Securities Industry and Financial Markets Association, the International Swaps and Derivatives Association, and the Loan Syndications and Trading Association in Support of Motion by Springfield Associates, LLC to Modify Order and Judgment for Certification of Interlocutory Appeal, *In re Enron Corp.*, Nos. 01-01634 (AJG), 06-07828 (SAS), 2007 WL 3316977 (S.D.N.Y. Sept. 19, 2007) ("*amici* respectfully submit that the Decision's distinction between a 'sale' and an 'assignment'—a distinction that *amici* did not fully appreciate until the Decision issued—is not legally relevant to the analysis. Indeed, Enron has already asserted in this case that whether a transfer 'was a sale rather than an assignment . . . is irrelevant as a matter of law.' (Enron's post-argument letter to the Court, ¶ 4 (August 9, 2007).)").

Norton Creditors' Rights Handbook:

The District Court for the Southern District of New York recently held that equitable subordination will be effective against a transferee when received by pure assignment, operation of law, or subrogation but will be generally ineffective against a purchaser who takes by way of a sale. The court never explains the difference between an assignment and a sale, and the case law does not bear out the distinction.⁶⁸

The practitioners agree. One observed:

It is hard to come up with examples of something that is an "assignment" but not a sale. A sale is a form of assignment involving consideration, but that is obviously not the distinction that [the District Court] was making. [The Court] discusses the presence of an indemnity, but since it was clear that Springfield had received an indemnity, that could not have been the controlling factor, either--otherwise, [the Court] would have concluded that Springfield had received an assignment and would not have remanded the case for determination of whether the transfer was an assignment or a sale.⁶⁹

Another practitioner writing about the decision observed:

This recent district court opinion is a significant development in

68. WILLIAM L. NORTON, III & ROGER G. JONES, NORTON CREDITORS' RIGHTS HANDBOOK § 8:8 (2008); accord Professor Stephen L. Sepinuck, *Joint Review Committee for Article 9 of the UCC Meeting Notes for October 3-5, 2008*, 5 THE EAGLE 9 NEWSLETTER UCC DIV., Issue 1, Winter 2009, at 26-27, available at http://www.eagle9.com/newsletters/newsletter_5_1.pdf (Apr. 5, 2009):

Issue: Whether the *Enron* debt trading case, distinguishing between a "sale" and an "assignment" of a loan, should be addressed in the Official Comments.

Explanation: In connection with claims trading the question sometimes arises as to whether the obligor on a debt may assert claims and defenses against the transferee of the claim. Traditionally this issue has been analyzed by considering whether the transferee qualifies as a holder in due course (in the case of a claim embodied in a negotiable instrument) or other good faith purchaser for value (in the case of other claims), in which case the obligor generally may not assert claims and defenses against the transferee. In addressing this issue with respect to the bankruptcy rights of a transferee, the court in *In re Enron Corp.*, 379 B.R. 425 (S.D.N.Y. 2007), by interpreting several cases under state law, has articulated a distinction between "assignments" and "sales." According to the court, a claim of a transferee who takes by sale is not subject to equitable subordination or disallowance under the Bankruptcy Code, while a claim that is taken by assignment is subject to these disabilities. No such distinction appears in the Uniform Commercial Code. The Official Comments might confirm that, when the term "assignment" is used in the Uniform Commercial Code, the term includes a sale and is not distinct from a sale. Cf. Official Comment 26 to § 9-102.

The Committee decided not to address this issue.

69. Kathy L. Yeatter, *Judicial Vagaries and their Potential Impact on the Valuation of Distressed Debt: Reasonable Minds Can Differ as to What it all Means*, 26 AM. BANKR. INST. J. 50, 51-52 (2007) (attributed to Robin Phelan).

the area of claim purchasing. Unfortunately, the distinction created by the *Enron* decision has created much confusion for claims purchasers. While the district court went a long way to support the claims trading industry in terms of shielding buyers from liability for creditor misconduct, the district court created a new conundrum for the claims trading industry by turning its decision on the sale versus assignment analysis - terms that the financial world has always used interchangeably. Thus, certain trade associations have sought resolution of this issue by a higher court. Until then, practitioners may want to review the district court case before structuring their claims purchases to maximize protections offered a transferee of a claim under the district court's analysis.⁷⁰

The second unusual aspect of the *Enron* rulings is that, although the litigation attracted a lot of attention when it was pending,⁷¹ it appears that sophisticated claims traders have not incorporated the resulting sale/assignment distinction into transaction papers for claim transfers. Claims are still being transferred pursuant to documentation referencing an assignment.⁷²

70. Jennifer Witherell Crastz, *Can a Claims Purchaser Receive Better Rights (or Worse Rights) than its Transferor in a Bankruptcy?*, 29 CAL. BANKR. J. 365, 373 (2007); see also Lawrence J. Kotler, *Are Equitable Subordination and Disallowance Under 11 U.S.C.A. § 502(d) Attributes of a Claim or Personal Disabilities of the Claimant - An Analysis of Enron Corp. v. Springfield Associates, L.L.C.*, 17 J. BANKR. L. & PRAC. 2 ART. 2 (2008) ("While the District Court rectified many of the issues that were raised by the Bankruptcy Court's earlier decisions, its distinction between a sale versus an assignment of the claim has caused significant concern in the claims trading arena, especially since many purchase agreements use the words 'sale' and 'assignment' interchangeably. Hopefully, this issue will be squarely addressed, but, in light of the District Court's denial of interlocutory relief of its opinion, this will have to wait until another day.").

71. For example, the Securities Industry and Financial Markets Association, the International Swaps and Derivatives Association, and the Loan Syndications and Trading Association filed a Statement in support of the transferee's attempt to take the issues up to the Second Circuit. See Statement of *Amici Curiae* the Securities Industry and Financial Markets Association, the International Swaps and Derivatives Association, and the Loan Syndications and Trading Association in Support of Motion by Springfield Associates, LLC to Modify Order and Judgment for Certification of Interlocutory Appeal, *In re Enron Corp.*, 2007 WL 3316977 (S.D.N.Y. 2007) (No. 01-16034) (supporting a transferee's attempt to take issues up to the Second Circuit).

72. See, e.g., Notice of Transfer of Claim Other than for Security, *In re Delphi Corp.*, No. 05-44481 (Bankr. S.D.N.Y. Sept. 10, 2007) (filing a claim transfer agreement titled "Assignment of Claim" as part of the Notice); Notice of Transfer of Claim Other than for Security, *In re Delphi Corp.*, No. 05-44481 (Bankr. S.D.N.Y. Oct. 9, 2007) (filing a claim transfer agreement titled "Assignment of Claim" as part of the Notice).

D. Attempts to Disallow Claims Asserted By Transferee Against the Ames Debtors

In the bankruptcy proceedings of Ames Department Stores, a dispute arose over whether the claim transferor's receipt of preferences precluded the claim transferee from receiving a distribution on account of transferred administrative expense claims. The Bankruptcy and District Courts ruled that the transferee could not be paid for its administrative expense claims until the preferences were disgorged.⁷³

The disputes in *Ames* and *Enron* differ in two significant ways. First, in *Ames* there were no allegations of misconduct against the initial holder of the claims; the *Ames* debtors only sought disallowance of claims based on receipt of preferences and did not seek equitable subordination in the alternative as the debtors did in *Enron*. Second, the claims at issue in *Enron* were for bank debt incurred *prior* to Enron's bankruptcy filing, while the claims at issue in *Ames* were administrative expense claims⁷⁴ based on goods provided by a vendor *following* Ames' bankruptcy filing.

At issue in *Ames* was the allowance of two claims totaling \$393,000 transferred by Ames' vendor, G & A Sales, Inc. to claims trader ASM Capital, L.P..⁷⁵ Ames sued G & A Sales, seeking to avoid and recover preferences, and obtained a default judgment in the amount of \$825,138. G & A Sales filed a Chapter 11 bankruptcy proceeding and never satisfied the judgment.⁷⁶ The Bankruptcy Court found that it was "highly unlikely that Ames will recover on the judgment, or any material part of it."⁷⁷ The Court concluded that, as a result, the G & A Sales claims transferred to ASM Capital would be disallowed pursuant to Bankruptcy Code section 502(d).⁷⁸ The Court observed that ASM Capital could avoid this result "by ASM's making an economically disadvantageous payment for the amount for which G & A is liable to Ames."⁷⁹

The Bankruptcy Court also held that Bankruptcy Code section 502(d) "applies to *all* claims," i.e., claims that accrue both before and after

73. Decision and Order on Motion for Entry of Supplemental Order Denying Request for Allowance and Payment of Administrative Expense Claim, and Compelling Payment of Reclamation Claim, *In re Ames Department Stores, Inc.*, No. 01-42217 (Bankr. S.D.N.Y. Dec. 1, 2006) [hereinafter *Ames Bankruptcy Court Ruling*]; ASM Capital, L.P. v. Ames Department Stores, Inc. (*In re Ames Department Stores Inc.*), No. 1:07-cv-00219 (S.D.N.Y. Mar. 2, 2007) [hereinafter *Ames District Court Ruling*].

74. See generally 11 U.S.C. § 503(b) (2009) (providing for allowance of administrative expense claims).

75. *Ames Bankruptcy Court Ruling*, *supra* note 73, at 2-3.

76. *Id.* at 7-8.

77. *Id.* at 8.

78. See *supra* Part I-A (discussing claim disallowance based on receipt of voidable transfers).

79. *Ames Bankruptcy Court Ruling*, *supra* note 73, at 10..

the bankruptcy filing of the entity against which they are asserted.⁸⁰ The District Court affirmed the decision on appeal.⁸¹ Neither the Bankruptcy Court nor the District Court rulings differentiated between claim transfers via sale versus assignment.⁸²

E. State of the Law in the Southern District of New York in Light of the Conflicting Rulings

While prior rulings on an issue can be persuasive, neither bankruptcy court nor district court decisions are binding in the Second Circuit. The next time the issues addressed in *Enron* and *Ames Department Stores* come up, the trial and appellate courts may choose to follow the bankruptcy court's decisions in *Enron*, the bankruptcy and district court decisions in *Ames* (which are in the same vein), the rationale of the district court decision in *Enron*, or pursue a different route entirely.

As the Bankruptcy Court for the Southern District of New York has explained: "The authorities are in agreement that a decision issued by a single bankruptcy judge in a multi-judge bankruptcy court is not binding on the other bankruptcy judges. Indeed, the decision of a single district judge in a multi-judge district has been held not to be binding on the bankruptcy court. Thus, in this district, which has both a multi-judge bankruptcy court and a multi-judge district court, only decisions of the Second Circuit Court of Appeals are controlling."⁸³

Until either the Second Circuit or the United States Supreme Court rules on whether a transferred claim is subject to disallowance or equitable subordination based on the conduct of the holder of the claim as of the bankruptcy filing, the issue will remain open in the Southern District of New York, which continues to attract the largest and most complex Chapter 11 filings.⁸⁴ Therefore, it is unclear whether a bankruptcy claim

80. *Id.* at 3-4.

81. *Ames District Court Ruling*, *supra* note 73; *see also In re Ames Department Stores, Inc.*, No. 07-1063-mb (2d Cir. May 8, 2007 and June 5, 2007) (denying leave to appeal to the Second Circuit).

82. *See Ames Bankruptcy Court Ruling*, *supra* note 73; *Ames District Court Ruling*, *supra* note 73.

83. *In re 400 Madison Avenue Ltd. Partnership*, 213 B.R. 888, 890 n.2 (Bankr. S.D.N.Y. 1997) (internal citations omitted). *See Weber v. U.S.*, 484 F.3d 154, 158 n.1 (2d Cir. 2007) (noting that bankruptcy lawyers have expressed concern over lack of binding precedent). *See generally Philip White Jr., Precedential Effect of Bankruptcy Court, Bankruptcy Appellate Panel, or District Court Bankruptcy Case Decisions*, 8 A.L.R. FED. 2D 155 (2006) (discussing the issue of precedential effect of legal rulings by the lower federal bankruptcy courts on other bankruptcy courts).

84. *See, e.g., In re General Motors Corporation*, No. 09-50026 (Bankr. S.D.N.Y. 2009); *In re Chrysler, LLC*, No. 09-50002 (Bankr. S.D.N.Y. 2009); *In re Lehman Brothers Holdings Inc.*, No. 08-13555 (Bankr. S.D.N.Y. 2009); *In re Delta Air Lines, Inc.*, No. 05-

can receive better treatment in the hands of a transferee than it would have received in the hands of the transferor.

II. Are all of the Rights to Payment Arising Out of the Receivables Underlying a Claim Transferred When a Claim is Transferred?

The answer is apparently, no, according to last year's bench ruling by the bankruptcy court presiding over the Chapter 11 proceedings of Delphi Corporation and its affiliates.

The ruling arose in the context of an unsuccessful motion filed by claim transferees Argo Partners, Inc., ASM Capital, Avenue Capital Management, LLC, Contrarian Capital Management, LLC, Hain Capital Group, Longacre Master Fund, Ltd., and Sierra Liquidity Fund, LLC (collectively, the "Ad Hoc Trade Committee") that sought, among other things, the ability to respond to cure notices sent out by the debtors and to have cure payments sent directly to the claim transferees.⁸⁵ The cure notices provided Delphi's views on the amounts the Delphi debtors owed each supplier and had to pay in order to assume supply contracts. These payments were necessary because Bankruptcy Code section 365 requires that debtors cure defaults in order to assume executory contracts.⁸⁶

The Delphi debtors had mailed cure notices to some of their counterparties to supply agreements, many of which had transferred their claims to members of the Ad Hoc Trade Committee; the debtors also mailed notices to each of the transferee Ad Hoc Trade Committee members.⁸⁷ Delphi opposed the motion, arguing that, while the members of the Ad Hoc Trade Committee were holders of assignments of accounts receivable, they were not assignees of the underlying supply contracts. Delphi argued that, as a result, the Ad Hoc Trade Committee members could neither respond to the cure notices with competing views of amounts

17923 (Bankr. S.D.N.Y. 2006); *In re Worldcom, Inc.*, No. 02-15533 (Bankr. S.D.N.Y. 2002).

85. See Motion for Order (I) Extending Deadline for Submission of Cure Notices, (II) Approving the Cure Notices Executed by Movants with Respect to their Claims, and (III) Directing the Debtors (A) to Reconcile Cure Claims with Corresponding Claims, and (B) to Make Cure Claim Distributions Directly to Movants, *In re Delphi Corp.*, No. 05-44481 (Bankr. S.D.N.Y. Jan. 9, 2008), [hereinafter *Ad Hoc Trade Committee Motion*].

86. See Debtors' Response to Ad Hoc Trade Committee's Motion for Order (I) Extending Deadline for Submission of Cure Notices, (II) Approving Cure Notices Executed by Movants with Respect to their Claims, and (III) Directing Debtors (A) to Reconcile Cure Claims with Corresponding Claims, and (B) to Make Cure Claim Distribution Directly to Movants at ¶ 14, *In re Delphi Corp.*, No. 05-44481, (Bankr. S.D.N.Y. Jan. 10, 2008) [hereinafter *Debtors' Response to Ad Hoc Trade Committee Motion*] (citing 11 U.S.C. § 365(b)(1)(A)).

87. See *Debtors' Response to Ad Hoc Trade Committee Motion*, *supra* note 86, at ¶¶ 2-3.

owed nor receive cure payments directly from the debtors.⁸⁸

The interplay between claim and cure that underlies the dispute in Delphi's bankruptcy proceedings can sometimes be complex. A claim reflects a creditor's view of the total amount a debtor owes it as of the date the bankruptcy petition is filed.⁸⁹ A creditor may have several contracts with a debtor. If so, the claim should reflect the total amount owing and amounts owed under each of the various contracts.⁹⁰ In order to continue to receive benefits under a contract after emerging from bankruptcy, a debtor must cure defaults, compensate its counterparty for losses resulting from defaults, and provide adequate assurance of future performance under the contract.⁹¹ Because a claim can reflect amounts owing under multiple contracts, and a debtor may pick which contracts it will assume and cure defaults under only those contracts, cure amounts and claim amounts only equal in instances where the creditor filed claims reflecting defaults under each contract, and every contract underlying a claim is assumed by the debtor.

From a claim transferee's perspective, the amount of a cure payment is important because it can reduce the amounts owing to the transferee under a claim. Transferees are also concerned about where the debtor sends the cure payment because, if the debtor sends the payment to the original holders of transferred claims, the transferees have to take steps to obtain the cure payments, notwithstanding that their transfer documents give them the right to receive all payments made on account of the receivables underlying the claims.⁹² In Delphi's case, the claim transferees were also concerned about who was authorized to respond to the cure notices because the notices allowed Delphi's counterparties to receive cure payments either in the form of cash or in the form of equity in the reorganized Delphi.⁹³

After considering the competing arguments advanced by the debtors and the transferees, the Bankruptcy Court presiding over Delphi's Chapter 11 proceedings denied the transferees' motion. The Court was more

88. See *Debtors' Response to Ad Hoc Trade Committee Motion*, *supra* note 86, at ¶¶ 13, 14 & 16 (explaining that cure payments were neither owed nor could they be responded to).

89. See Bankruptcy Forms Manual, B 10 Proof of Claim Form, http://www.uscourts.gov/rules/BK_Forms_Pending_2008/B_010_1208v4.pdf (last visited Sept. 25, 2009) (proof of claim form).

90. See *id.* at 2, Nos. 1,7 (requiring creditors to indicate the total amount owed to them and attach documentation or a summary when filing a proof of claim).

91. See 11 U.S.C. § 365(b)(1) (2009) (concerning assumption and rejection of executory contracts and unexpired leases).

92. Transcript of Hearing at 50, *In re Delphi Corp.*, Chapter 11 Case No. 05-44481 (Bankr. S.D.N.Y. Sept. 25, 2008).

93. *Debtors' Response to Ad Hoc Trade Committee Motion*, *supra* note 86, ¶¶ 22-23, n.2.

concerned about facilitating the cure process and the relationship between the debtor and its counterparties than it was about the relationship created between the claim transferors and their transferees under the claim transfer agreements. The Bankruptcy Court concluded that the relief sought by the Ad Hoc Trade Committee was contrary to the terms of the solicitation order it had entered, which governed the cure notice process, and ruled:

All right. I think that the relief you're seeking here is relief that, as [Debtors' counsel] says, is contrary to the [solicitation procedures] order. And that order was on, I believe, ample notice. It also, and as importantly, is relief that I think is not merely a procedural correction of an error or relief that would have no material effect on the debtors or other parties in interest. The main reason for that conclusion is that I think it depends -- granting the relief would depend on me overlooking the primary relationship here, in fact the only relationship here, that the debtor has, which is with its contract counter party, who are obviously ongoing trade suppliers and vendees who are important to the debtor's ongoing business. And under Section 365, they are the ones who really need to deal with the cure notice, because it's not just a cure notice. It's an assumption notice that lays out and reminds the contract parties -- counter parties, of their rights under Section 365, which are not limited to insisting upon cure. I believe that your clients, as a very function of the assignment agreement which they entered into, know who these people are and could have, and I believe as you say they have, contacted them and given them what your clients believe are their obligations under your clients' agreements with those people. But those aren't three-party agreements. The debtor is not a party to those agreements. And if they don't do what they're supposed to do under your agreements, you have rights against them. I don't know what those obligations are and what those rights are because they're not in the record.⁹⁴ But I believe that, again, as I said earlier, contrary to when I signed this order to show cause, this is not an instance where the debtor is just being difficult about a deadline or a procedure and trying to prevent the real party in interest from having its wishes set forth; but rather would have the debtor change the relationship with its contract parties and get in the middle of your relationship with them. And they're really two separate relationships.⁹⁵

94. At a subsequent hearing, in which claim transfer agreements between various members of the Ad Hoc Trade Committee and Delphi's counterparties *were* part of the record before the Court, the Court nonetheless concluded that Delphi need not send the cure payments directly to the claim transferees. Transcript of Hearing at 200-02, *In re Delphi Corp.*, Chapter 11 Case No. 05-44481 (Bankr. S.D.N.Y. Sept. 25, 2008).

95. Transcript of Hearing, *supra* note 92, at 98-99.

The ruling in Delphi's bankruptcy proceedings underscores that a transferee risks that its claim will be reduced, in whole or in part, by a process that the Court determines should take place between the debtor and its counterparties. As such, this ruling shows that not all of the rights to payment arising out of the receivables underlying a transferred bankruptcy claim can be transferred with the claim.

III. Can a Creditor Transfer Contingent Reimbursement Rights When it Transfers its Bankruptcy Claims?

Apparently, yes. In *In re M. Fabrikant & Sons*,⁹⁶ the Bankruptcy Court ruled that the Chapter 11 debtors' original lenders had lost their rights to be reimbursed for attorneys' fees and expenses because they transferred their indemnification rights when they transferred their bankruptcy claims and security interests to the debtors' new lenders. The dispute arose in connection with confirmation of the debtors' Chapter 11 plan, which did not provide for payment of "substantial legal fees and expenses" incurred and "estimated future fees and expenses" to be incurred by the debtors' original lenders for matters including the defense of litigation brought by the unsecured creditors' committee after the claims were transferred.⁹⁷ The original lenders had transferred via assignment "all claims (including 'claims' as defined in Bankruptcy Code Section 101(5)), suits, causes of action, and any other right of Seller or any Prior Seller, whether known or unknown . . . arising under or in connection with the Credit Documents or the transactions related thereto or contemplated thereby."⁹⁸

The Bankruptcy Court held that the original lenders' reimbursement rights had been transferred with the claims in light of the broad Bankruptcy Code definition of "claim."⁹⁹ The Court went on to reject the balance of the arguments advanced by the original lenders in support of their objections to plan confirmation, including the argument that contingent reimbursement rights are not assignable.¹⁰⁰

The ruling left the original lenders in a position where they could not seek reimbursement for legal fees and expenses, incurred or to be incurred, either through the debtors' plan or through counterclaims in the litigation brought by the creditors' committee.¹⁰¹ As such, the ruling emphasizes the

96. *In re M. Fabrikant & Sons, Inc.*, 385 B.R. 87 (Bankr. S.D.N.Y. 2008).

97. *Id.* at 89-90 & 94-96.

98. *Id.* at 95.

99. *Id.* at 95, 98; *see supra* note 1 (discussing the Bankruptcy Code's broad definition of a "claim").

100. *M. Fabrikant, supra* note 96, at 96-101.

101. *Id.* at 98-99.

need for creditors who hold contingent reimbursement rights to negotiate carve-outs when they transfer their claims for repayment of debt.

CONCLUSION

Neither legislation nor the courts have yet crystallized the nature of the transferred bankruptcy claim. One's perspective on the nature of the transferred bankruptcy claim seems to depend on what one is trying to do with it. Claims-trading advocates view bankruptcy cases as creating a "distressed claims-trading market."¹⁰² From this perspective, it would be ideal to have bankruptcy claims transferred, with all of the rights enjoyed by the initial claim holders, but free of defects such as susceptibility to disallowance and equitable subordination. On the other hand, from the perspective of debtors and courts handling the claims administration process and related litigation, it makes sense that a transferee of a claim in a bankruptcy should obtain no *more* than could the creditor into whose shoes it steps. The *Delphi* Bankruptcy Court has gone a step further. Acting out of concern for the cure process, the court ruled that a transferee could get *less* from the bankruptcy estate than could the transferor.

The issue of what returns are appropriate for debts purchased at a discount was all over the headlines earlier this year.¹⁰³ Hedge funds purchased Chrysler bonds at a discount prior to the automaker's bankruptcy filing and refused to accept returns of about a third of the face value of the bonds proposed by the U.S. government.¹⁰⁴ President Obama accused the hedge funds of being "speculators" who forced Chrysler into bankruptcy by

102. See, e.g., Jeffrey D. Saferstein & Penny Dearborn, *Equitable Subordination: Good-Faith Transferees Beware*, 25 AM. BANKR. INST. J. 46, 73 (2006) (anticipating that the *Enron* bankruptcy court's purported disregard for traditional principles of equitable subordination would become a serious potential disruption to the distressed claim-trading market).

103. See, e.g., Neil King Jr. & Jeffrey McCracken, *U.S. Forced Chrysler's Creditors to Blink*, WALL ST. J., May 11, 2009, at A1 available at <http://online.wsj.com/article/SB124199948894005017.html> (covering President Obama's announcement that Chrysler could face a disorderly bankruptcy or even liquidation); Zachery Kouwe, *The Lenders Obama Decided to Blame*, N.Y. TIMES, April 30, 2009, available at <http://www.nytimes.com/2009/05/01/business/01hedge.html>; Liz Moyer, *Hedge Fund Chief Hits Back at Obama*, FORBES.COM, May 5, 2009, <http://www.forbes.com/2009/05/05/chrysler-obama-bonds-business-wall-street-asness.html>; Steven Mufson & Tomoeh Murakami Tse, *In Chrysler Saga, Hedge Funds Cast as Prime Villain: Firms Say They Were Right to Hold Out*, WASH. POST, May 1, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/04/30/AR2009043004141.html>; Ann Woolner, *Chrysler's Greedy Hedge Fund Holdouts Get It Right*, BLOOMBERG.COM, May 6, 2009, <http://www.bloomberg.com/apps/news?pid=20601039&sid=azVYi8YEXsAc> (discussing the issue with respect to Chrysler and its creditors).

104. Mufson & Tse, *supra* note 103.

holding out for an “unjustified tax-payer funded bailout.”¹⁰⁵ The hedge funds’ response was that their investments were entitled to priority under well-established bankruptcy law and that they were obligated to seek returns reflecting their stakeholders’ rights.¹⁰⁶ Competing views over what constitutes an appropriate return on investments in distressed debt will no doubt be heard again as the economic downturn leads to continued investments in companies that have either sought bankruptcy protection or are teetering on the brink.

Given the great public interest in the outcome of the restructuring of financially distressed companies, and the billions at stake for investors in distressed debt both within and without bankruptcy, the case law on the claims trading issues discussed in this article and related issues will continue to evolve. Stay tuned as lawmakers either intervene or leave it to the courts to rule on issues as they come up.

105. *Id.*

106. *Id.*