CASE SUMMARIES FOR FEBRUARY 11, 2015 INN OF COURT PRESENTATION

I. The Chancery Court Takes an Updated Look at the Scope of the Business Judgment Rule and Fiduciary Duties.

***Quadrant Structured Products Co., Ltd. v. Vertin*, et. al,**
C.A. No. 6990-VCL (Del. Ch. Oct. 1, 2014)

In this lengthy opinion following a tortured procedural history, Vice Chancellor Laster was presented with a challenge to specific transfers of Athilon Capital Corp. ("Athilon"), a credit derivative product company, by one of its debt securities holders, Quandrant Structured Products Co., Ltd ("Quadrant"). In doing so, Quadrant raised issues of fiduciary duties to creditors of a faltering company. The opinion responded to defendants motion to dismiss.

Athilon's business model required that it maintain a AAA/Aaa credit rating. To do so, Athilon had to have a limited business purpose and follow specific operating guidelines. The business purpose set forth in Athilon's charter restricted its business to "guaranteeing or providing other forms of credit support for the obligations of its subsidiaries" and related activities. (Slip Op. at 2). The main subsidiary at issue in the case was Athilon Asset Acceptance, whose charter restricted that company's business to "transactions judged ... to be credit default swaps" and related business. *Id.* As to the operating guidelines, both Athilon and its subsidiary Athilon Asset Acceptance were to limit business activities, impose constraints on their operations, establish ratings categories for the debt obligations covered by the credit swaps, restrict the company to investing in short-term, low-risk stocks, and a variety of other restrictions.

As part of its business, Athilon Asset Acceptance, the subsidiary of Athilon, was involved in two credit swaps concerning mortgage-backed securities which Athilon later unwound to the tune of $48 million and $320 million. Termination of these swaps ate over half of Athilon's committed capital. The situation became more dire when due to changes in the market, such as the bankruptcy of Lehman Brothers, financial institutions no longer entered into credit swaps, rendering Athilion and its subsidiary Athilon Asset Acceptance no longer able to engage in the only business they were permitted to pursue by their charters and operating guidelines. This caused the two companies to lose their AAA/Aaa credit ratings, which, under the operating guidelines, forced Athilon into runoff. During this time, EBF & Associates, LP ("EBF") gained control over Athilon by purchasing Athilon's now deeply discounted securities and placed several individuals on the Athilon board. Quadrant purchased debt securities issued by Athilon in 2011 after EBF took control.

Athilon's financials as of September 2011, after Quadrant purchase its debt securities, indicate that Athilon carried $600 million in debt with assets valued (based on sale value) of

$426 million. Against this backdrop, Quadrant argues that EBF used Athilon's assets to benefit EBF through the EBF-placed board members. Specific allegations include that EBF-placed board members vote to continue to pay interest on Junior Notes because such payments benefit EBF and that payments for service fees to ASIA, a company indirectly owned and controlled by EBF, were excessive.

Quadrant's claims required the court to determine if Quadrant, as a creditor, had standing to pursue a claim for breach of fiduciary duty. In determining this, Vice Chancellor Laster provides an instructive review of the status of fiduciary duty law while a company is either insolvent or nearly so. A solvent corporation owes fiduciary duties to its stockholders, as they are the residual claimants. Conversely, an insolvent corporation owes fiduciary duties to creditors, as they are the residual claimants. Vice Chancellor Laster noted the change in direction from the previous dicta found in *Credit-Lyonnais Bank Nederland, N.V. v. Pathe Communications Corp.*, 17 Del. J. Corp. L. 1099, 1055 n.55 (Del. Ch. Dec. 30, 1991). The court's decision and writing in *Credit-Lyonnais* had led to a belief that a corporation may owe duties to creditors when operating in the vicinity of insolvency. "Such directors will recognize that in managing the business and affairs of a solvent corporation in the vicinity of insolvency, circumstances may arise when the right (both the efficient and the fair) course to follow for the corporation may diverge from the choice that the stockholders (or the creditors, or the employees, or any single group interested in the corporation) would make if given the opportunity to act."

Further opinions of the Court of Chancery, including now Chief Justice Strine's opinion in *Product Resources Group, LLC v. NCT Group, Inc.*, 863 A.2d 772 (Del. Ch. 2004), moved to clarify this concept. In so doing, the Chief Justice made clear that directors of an insolvent corporation were still to act to maximize the value of the company, but should they breach their duties in doing so, creditors would have standing to assert the company's derivative claims. He opined that there may be certain circumstances that would permit a specific creditor to assert claims against directors for taking action that frustrated that specific creditor's claims.

The court in *North American Catholic Educational Programming Foundation v. Gheewalla,* 930 A.2d 92 (Del. 2007), built on this foundation to make clear that creditors of an insolvent corporation could sue derivatively, but had no rights to assert direct claims for breach of fiduciary duties against corporate directors, and noted that creditors of a solvent corporation could not assert direct claims either. Ergo, creditors never have standing to allege direct claims against directors.

Vice Chancellor Laster synthesized this line of cases to hold that "the fiduciary duties that creditors gain derivative standing to enforce are not special duties to creditors, but rather the

fiduciary duties the directors owe to the corporation to maximize its value for the benefit of all residual claimants." (Slip Op. at 20).

Thus, to assert standing, creditors would have to plead insolvency, which it may do by showing a disparity between assets and liabilities.

Because creditors have derivative claims, Vice Chancellor Laster examined whether the statutory requirements of demand excusal/refusal and contemporaneous ownership needed to be met. After examining the relevant statutes at length, the court ruled that standing to sue for creditors depends on two inputs: creditor status and corporate insolvency. Thus, a creditor may bring claims for actions that took place prior to the insolvency, but may have to meet the demand futility requirement.

The court went on to review the alleged fiduciary duty breaches in this matter by applying the business judgment rule. In this matter, because Quadrant claimed issue with specific transfers and involved controlled directors, the court held that it had sufficiently stated a claim. The burden then flipped to the defendants to establish that the failure to defer interest (*e.g.,* the payment of interest) on the junior notes which benefitted EBF was entirely fair. The court held similarly for the payment of excessive fees to EBF controlled ASIA.

However, the court held that it was not required that a company's board of directors change focus from attempting to maximize profit to winding down affairs for the benefit of creditors. Quoting the *Trenwick* opinion, the court stated "[e]ven when the firm is insolvent, directors are free to pursue value maximizing strategies, while recognizing that the firm's creditors have become its residual claimants." (Slip Op. at 39, citation omitted). Vice Chancellor Laster balanced that thought with the holding in *Product Resources* which noted that the efficient liquidation may be the best method to meet the legitimate needs of creditors. "Here too the business judgment rule would protect a board's decision to pursue an efficient liquidation." *Id.* The court ruled that the complaint failed to provide sufficient allegations concerning claims related to a riskier investment approach.

As to claims for fraudulent transfer, based on the non-deferral of interest on the Junior notes (held by EBF) and the payment of excessive fees to ASIA, the court looked to the Delaware Uniform Fraudulent Transfer Act. The court ruled that Quadrant's pleadings were sufficient. The opinion also addressed certain claims concerning dividends.

II. Bankruptcy Opinions

In re Tropicana Entm't, LLC, 520 B.R. 455 (Bankr. D. Del. 2014)

Tropicana Entertainment LLC and related entities filed for chapter 11 (the "Debtors"). Two entities that were controlled by the CEO of the debtors' parent company filed motions for allowance of immediate payment of administrative expenses against the Debtors. The unsecured creditors' committee objected to such allowance.

A chapter 11 plan was ultimately confirmed and it created a litigation trust to pursue certain causes of action against insiders. The litigation trustee filed a complaint against the CEO of the debtors' parent company and against both the entities that filed administrative expense motions. The complaint alleged, among other things, breach of fiduciary obligations, aiding and abetting breach of fiduciary obligations, and breach of the covenant of good faith. The defendants filed a motion to dismiss the complaint.

An interesting aspect of the court's disposition of the motion to dismiss was its discussion of whether the breach of fiduciary duty suit was core or non-core. Generally, breach of fiduciary duty claims are non-core proceedings that do not arise under title 11. However, two of the entities the litigation trustee filed a complaint against filed administrative claims with the debtors' estate and objections were filed thereto. The court found that the breach of fiduciary duty claims were core matters under § 157(b)(2)(B) because resolving the litigation trustee's causes of action required a determination of the allowance of the defendants' administrative expense claims. The court noted that even if the matter was non-core, it still retained the power to enter an order on the motion to dismiss.

In re Direct Response Media, Inc., 466 B.R. 626 (Bankr. D. Del. 2012)

In this case, a Chapter 7 trustee brought an adversary proceeding against, among others, the debtor's directors and officers. The complaint alleged, among other things, breach of fiduciary duty and aiding abetting breach of fiduciary duty.

The court led off its fiduciary duties discussion with an analysis of the internal affairs doctrine. The internal affairs doctrine provides that only the state of incorporation has the power to regulate a corporation's internal affairs. The court followed the case authority which resoundingly teaches that claims for breaches of fiduciary duties are central to a corporation's internal affairs. Because Delaware was the company's state of incorporation, Delaware law controlled.

The defendants argued that the trustee's breach of fiduciary duty claims were time-barred. Delaware has a three year statute of limitations for breach of fiduciary duty claims. Causes of action commonly accrue in Delaware when the wrongful act occurs. The Bankruptcy Code, however, under § 108(a) provides for a two-year extension of the statute of limitations from the filing of the bankruptcy petition if the limitations period has not already expired before the filing of the petition. The court held that § 108(a)'s extension was inapplicable to some of the trustee's claims because the limitations period expired before the petition date.

In re Midway Games Inc., 428 B.R. 303 (Bankr. D. Del. 2010)

A creditors' committee filed an adversary proceeding against debtor's former directors and controlling shareholders and brought claims for, among other things, breach of fiduciary duty and aiding abetting breach of fiduciary duty. The gravamen of the complaint alleged that the defendants either approved or acquiesced in a $90 million loan and a $40 million factoring agreement that resulted in the debtor incurring substantial debt when the defendants should have sought alternative financial arrangements, such as filing for bankruptcy or an out-of-court restructuring. The defendants filed motions to dismiss.

The court examined decisions from the Delaware Supreme Court, Court of Chancery, and other Delaware bankruptcy courts discussing "deepening insolvency" as a cause of action. The court remarked that the case law is clear that such a cause of action does not exist in Delaware. Directors do not breach their fiduciary duties when they take actions to prolong the corporation's viability even if the company is facing insolvency; the law is "settled that directors do not have a duty to creditors of an insolvent corporation to abandon the effort to rehabilitate the corporation in favor of creditors' interests." *In re Midway*, 428 B.R. at 316. The court considered the committee's breach of duty of care claims to be a dressed up deepening insolvency cause of action and accordingly dismissed the claims.

In re USDigital, Inc., 443 B.R. 22 (Bankr. D. Del. 2011)

A Chapter 7 trustee filed an adversary proceeding against debtor's directors and alleged, among other things, breach of fiduciary duty, aiding and abetting breaches of fiduciary duty, and corporate waste. In the main case, the trustee alleged that the defendants breached their duty of care by failing to monitor the financial affairs of the debtor and breached their duty of loyalty by causing the debtor to use its operating funds for the start-up costs of Infinidi Media. The defendants filed a motion to dismiss the complaint and argued that the funds to start Infinidi Media were valid expenditures and the trustee failed to plead sufficient facts.

The court reviewed Delaware case law on breach of fiduciary duties and focused part of its discussion on whether the trustee had standing to bring these causes of action. In Delaware, when a corporation is insolvent fiduciary duties inure to the benefit of creditors. Relying on *North American Catholic Educational Programming Foundation Inc. v. Gheewalla*, 930 A.2d 92 (2007), the court observed that regardless of whether a company is insolvent or solvent, creditors may not assert direct claims for breach of fiduciary duty against directors. But if a company is insolvent, creditors have standing to assert derivative claims. The court concluded that the chapter 7 trustee had standing and did not have to satisfy the typical derivative suit requirements because the trustee is the sole representative of the estate.

II. No Action Clauses in Trust Indentures Should Be Strictly Construed.

Quadrant Structured Products Co. v. Vertin, No. 338, 2012, 2013 WL 5962813 (Del. Nov. 7, 2013) *certified question accepted*, 22 N.Y.3d 1008 (2013) and *certified question answered*, 23 N.Y.3d 549 (2014).

In this recent case, the Delaware Supreme Court certified to the New York Court of Appeals the question of whether a "no-action" clause prevented individual holders from bringing claims relating to the securities. The no-action clause in question did not expressly bar claims of holders arising under the securities, but instead barred claims arising out of the indenture. The New York Court of Appeals strictly construed the contractual language involved and found that, absent specific language in the clause barring individual holders' claims arising from the securities, holders were not barred from asserting them.

Athilon Capital Corp. ("Athilon") sold credit default swaps and other derivative products to financial institutions. Quadrant Structured Products Co. ("Quadrant"), along with other investors, purchased notes issued by Athilon. In connection with the issuance of the notes, Athilon entered into trust indentures with trustees. These indentures described Athilon's duties, as well as the rights of the securityholder in the event of default. The indentures contained "no-action" clauses, which provided:

> No holder of any Security shall have any right by virtue or by availing of any provision of this Indenture to institute any action or proceeding at law or in equity or in bankruptcy or otherwise upon or under or with respect to this Indenture..." unless certain conditions were first met (i.e., notice of default must first be given to trustee, holders of the majority of notes must request that the trustee initiate action and offer to indemnify the trustee, and trustee must fail to take action after 60 days, etc.).

By 2008, Athilon had undertaken $50 billion in credit default risk, far exceeding its $700 million in capital reserves. In October 2011, Quadrant brought claims in the Delaware Court of Chancery against Athilon and its parent company asserting, *inter alia*, claims for breach of fiduciary duty, fraudulent transfer, breach of implied covenant of good faith and fair dealing, tortious interference with contractual relations, and civil conspiracy in connection with notes it had purchased from Athilon. Quadrant further alleged that Athilon paid interest on its parent company's junior notes, to the detriment of Quadrant's senior notes, despite an agreement that mandated deferral of these payments.

The Delaware Court of Chancery dismissed Quadrants's complaint based on the indentures' no-action clauses. Quadrant appealed to the Delaware Supreme Court, which remanded the case, ordering the Court of Chancery to analyze the significance under New York law of the differences between the no-action clauses contained in two cases relied on by Athilon, *Feldbaum v. McCrory Corp.*, 1992 WL 119095 (Del.Ch. June 1, 1992) and *Lange v. Citibank, N.A.*, 2002 WL 2005728 (Del.Ch. Aug. 13, 2002), and the no-action clause contained in the Athilon indentures. The Chancery Court found that the no-action clause in the Athilon

indentures was different and only prevented actions where the securityholder claimed a right based on a provision in the indenture.

The Delaware Supreme Court then certified the following two questions of New York law to the New York Court of Appeals:

> "(1) A trust indenture no-action clause expressly precludes a security holder [,] who fails to comply with that clause's preconditions, from initiating any action or proceeding upon or under or with respect to 'this Indenture,' but makes no reference to actions or proceedings pertaining to 'the Securities.' The question is whether, under New York law, the absence of any reference in the no-action clause to 'the Securities' precludes enforcement only of contractual claims arising under the Indenture, or whether the clause also precludes enforcement of all common law and statutory claims that security holders as a group may have.
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> (2) In its Report on Remand ..., the Court of Chancery found that the Athilon no-action clause, which refers only to 'this Indenture,' precludes enforcement only of contractual claims arising under the Indenture. The question is whether that finding is a correct application of New York law to the Athilon no-action clause"

***Quadrant Structured Products Co. v. Vertin*, No. 338, 2012, 2013 WL 5962813, at *5 (Del. Nov. 7, 2013).**

The New York Court of Appeals held that: (1) no-action clauses of trust indentures, which do not refer to claims arising under "the Securities," do not apply to such claims; and (2) the no-action clauses in the case at bar did not apply, in absence of default, agreeing with the Delaware of Court of Chancery's Report on Remand.

The Court of Appeals strictly construed the contractual language in the indentures and found that the agreement clearly evidenced the intent of the parties to bar actions only arising under the indentures -- and not with respect to "the Securities" in general. The term "Securities" was defined in the indentures, yet not included in the no-action provision. On the other hand, the term "Securities" was used in another provision of the agreement permitting the indenture trustees to initiate suits for "default in respect of the series of Securities."

The Court of Appeals harmonized its ruling with prior rulings by the Delaware Court of Chancery in *Feldbaum* and *Lange.* In each of those cases, the Chancery Court held that the no-action clauses in question barred individual claims of holders because the clause specifically referenced claims arising out of the securities.

The Court of Appeals was not persuaded by Defendants' argument that the parties intended for the no-action clause to bar all claims, noting that "[t]his is no argument at all, for

under our law where the language of the contract is clear we rely on the terms of the document to give effect to the parties' intent".

***RBC Capital Markets, LLC v. Education Loan Trust IV and U.S. Education Loan Trust IV, LLC,* Civil Action No. 6297-CS (Dec. 6, 2011) (not reported in A.3d)**

In this case, Plaintiff, RBC Capital Markets, LLC ("RBC") brought suit against the Defendants as a holder of auction rate notes issued under an Indenture of Trust (the "Indenture"). Plaintiff claimed that the Issuer caused the Trust to pay millions of dollars in excessive fees, which were unauthorized and allegedly reduced the amount of interest payments made to Plaintiff and other noteholders. Plaintiff contended that it was entitled to sue under a statutorily mandated section of the Indenture that gives any noteholder an "absolute and unconditional" right to receive payment of principal and interest on its notes and "to institute suit for the enforcement of any such payment" if the Trust fails to make principal or interest payments when due. Defendant argued that the section (i) does not apply to RBC's claims, and (ii) that the suit is barred by the Indenture's no-action clause – namely, a standard provision that imposes certain requirements on noteholders before they can bring suit under the Indenture (including making demand on the indenture trustee.

The Delaware Chancery Court considered this question under New York law (which governed the Indenture) and concluded that the no-action clause did apply to RBC's claims. The Court agreed that RBC did have an unconditional right to sue for interest payments on its notes that have not been made as due under the Trust Indenture Act. However, here, RBC's claims are not that the Defendants failed to timely make interest payments, rather RBC's claims are that the Defendants breached the Indenture by causing the Trust to make excessive fee payments, which caused lower interest payments to be made then had the Trust paid the appropriate level of fees. The Court found this to be an improper end run around the purposes of the no-action clause and contrary to New York law. In considering this issue on a motion to dismiss, the Court determined that "if a noteholder plaintiff must prove an independent contractual breach, such as the one that RBC must prove here, in order to show that the interest payments made to it were lower than they should have been, the no-action clause applies to the plaintiff's claims." *RBC Capital Markets,* at 8. In its opinion, the Court focused on the essential purpose of these provisions, namely to balance noteholders' rights with the avoidance of lawsuits that do not have the support of most noteholders. Moreover, no-action clauses ensure that any remedy obtained by noteholders for violation of the trust indenture will be shared equally. Because the remedy sought by RBC was derivative of proving an independent wrong – rather than a direct violation of the interest provision – RBC was required to follow the procedures mandated by the no-action clause.

***Akanthos v. Capital Mgmt., LLC v. CompuCredit Holdings Corp.,* 677 F.3d 1286 (11th Cir. 2012)**

In this case, the appellants (a corporation and its directors and officers) appealed to the Eleventh Circuit a decision from the Northern District of Georgia that denied their motions to dismiss claim brought by appellee noteholders under the Uniform Fraudulent Transfers Act on

the basis that a no-action clause in trust indentures that governed the corporation's notes was inapplicable to the claims.

The Eleventh Circuit ultimately ruled that the language of the no-action clause controlled and barred the noteholders from bringing the action. The Court found that there was no persuasive reason to deviate from the rule that no-action clauses barred fraudulent conveyance claims in the absence of allegations of trustee misconduct. The no-action clause at issue identified two exceptions, which were not applicable.

The clause at issue in this case stated that a noteholder cannot "pursue any remedy with respect to this Indenture or the Securities" unless the noteholder falls within one of two exceptions. On appeal, the Eleventh Circuit was faced with the question whether noteholders who do not fall within a stated exception to the no-action clause may nonetheless bring fraudulent transfer claims against the issuer of the securities and its directors and officers. The Plaintiffs brought claims under the UFTA against a company which was in financial distress but nonetheless issued a dividend to shareholders (a majority of whom were insiders) and planned to spin off the company's most profitable business. The Plaintiffs further argued that the company was operating on the brink of insolvency and was acting in such a manner as to endanger the ability to pay the notes to Plaintiffs when they ultimately would come due. In its ruling, the Court cited to *Feldman v. McCrory Corp.,* 1992 Del. Ch. LEXIS 113 (Del. Ch. June 1, 1992) in which the Delaware Chancery Court rejected a similar argument regarding a fraudulent conveyance action and held that "'[t]he clause in question bars all action 'with respect to' the indenture or the securities. A fraudulent conveyance action is such an action.'" *Id.* (citing to *Feldman,* 1992 Del. Ch. LEXIS 113 at *7); *see also Lange v. Citibank,* N.A., 2002 Del. Ch. LEXIS 101, at *6-7 (Del. Ch. Aug. 13, 2002). In its opinion, the Court acknowledged certain situations where courts have abrogated the general rule that no-action clauses are generally applicable, including when a trustee has a conflict of interest or other unwillingness to pursue a remedy for trust beneficiaries. The Court disregarded the Plaintiffs arguments that their ownership of a majority of the notes should serve as grounds to refuse to apply the no-action clause. The Court rejected this argument where the Plaintiff noteholders had not satisfied all of the pre-conditions to the trustee demand exception to the no-action clause. As none of the exceptions applied to the instant case – namely, the trustee demand exception, the right to payment exception, or the judicial exception for trustee misconduct, there was no basis to deviate from the plain action of the no-action clause which barred the suit.

III. Unintentional Release of Liens

Official Committee of Unsecured Creditors of Motors Liquidation Company v. JPMorgan Chase Bank, N.A. (In re Motors Liquidation Co.)

A. Introduction

The provisions of Delaware's version of the Uniform Commercial Code (the "UCC") state that if a "secured party of record authorizes the filing [of a termination statement],"[1] then the filing is "effective"[2] upon the filing of a termination statement with the

[1] 6 DEL. C. § 9-509(d)(1).

filing office."[3] At that time, "the statement to which the termination statement relates ceases to be effective."[4] In other words, a termination statement filed without authorization is ineffective.

But what does it mean to "authorize" the filing of a termination statement? Specifically, is consent (even mistaken consent) to the filing of a termination statement sufficient, or must the secured party actually intend to release the collateral identified in the termination statement? This is the precise issue litigated in *Official Committee of Unsecured Creditors of Motors Liquidation Company v. JPMorgan Chase Bank, N.A. (In re Motors Liquidation Co.)*, and is an issue of immense consequence to all secured creditors.

B. Facts

1. Independent Financing Transactions

The case involves two distinct and wholly unrelated financing transactions entered into by General Motors ("GM") – a synthetic lease financing transaction (the "Synthetic Lease") and a separate term loan facility (the "Term Loan"). Pursuant to the Synthetic Lease, GM obtained $300 million in financing from a syndicate of financial institutions, and granted security interests in certain real estate. Pursuant to the Term Loan, GM obtained $1.5 billion in financing from a different syndicate of financial institutions, and granted security interests on its fixtures and equipment at forty-two facilities through the United States. JPMorgan Chase Bank, N.A. ("JPM") served as the administrative agent and secured party of record for both transactions.

The security interests of the Synthetic Lease lenders and the Term Loan lenders were each perfected by the filing of separate UCC-1 financing statements. Financing statements securing the Synthetic Lease collateral were filed in the counties in which the underlying real estate was located and with the Delaware Secretary of State. The principal financing statement securing the Term Loan collateral (the "Main Term Loan UCC-1") was filed in Delaware, where GM was incorporated.

2. Termination of the Synthetic Lease

In late 2008, GM sought to terminate the Synthetic Lease following repayment. Following a public lien search, GM's counsel erroneously identified the Main Term Loan UCC-1 as one of the financing statements to be terminated in connection with the process of unwinding the Synthetic Lease transaction, and drafted a termination statement to terminate the Main Term Loan UCC-1 upon the closing of the transaction (the "Main Term Loan Termination Statement"). JPM's counsel reviewed, but did not object to, the draft documents from GM's counsel, including the Main Term Loan Termination Statement. In fact, accordingly to JPM, no one at GM, GM's counsel, or JPM's counsel ever noticed the error, even though individuals at each organization reviewed the filing before the closing. It is also assumed from the opinions that JPM itself reviewed the termination statement and knowingly approved of its filing. Following the closing, in October 2008, GM's counsel caused the Main Term Loan Termination

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[2] 6 DEL. C. § 9-510(a).
[3] 6 DEL. C. § 9-513(d).
[4] *Id.*

Statement to be filed, erroneously, along with the termination statements for the Synthetic Lease financing statements.

3. GM's Bankruptcy[5]

The mistake went unnoticed until GM filed for bankruptcy in June 2009, at which time JPM's then counsel informed the Official Committee of Unsecured Creditors (the "Committee") that the Main Term Loan Termination Statement had been inadvertently filed in connection with the Term Loan collateral. Although JPM's counsel provided an affidavit from GM's counsel who had been in charge of the Synthetic Lease termination, to the Committee explaining that the filing of the Main Term Loan Termination Statement was in error and, therefore, unauthorized and ineffective, the Committee commenced an adversary proceeding[6] seeking a determination that, despite the error, the Main Term Loan UCC-1 was nonetheless terminated, and thus rendered JPM on par with the other GM unsecured creditors.

On cross-motions for summary judgment, the bankruptcy court ruled in JPM's favor on various grounds, including that JPM had not empowered GM's counsel to act as its agent in releasing the Term Loan UCC-1 in the sense that it had only authorized GM's counsel to file an accurate termination statement releasing the security interests properly related to the Synthetic Lease transaction.[7] Specifically, the bankruptcy court found that, because neither JMP nor GM intended the legal consequences of the Main Term Loan Termination Statement, the Main Term Loan Termination Statement filing was not authorized and therefore was not effective to terminate the Main Term Loan UCC-1.[8] The bankruptcy court then certified the case for direct appeal to the United States Court of Appeals for the Second Circuit.

4. The Second Circuit Appeal

On appeal, the parties offered competing interpretations of UCC § 9-509(d)(1), which provides that a UCC-3 termination statement is effective only if "the secured party of record authorizes the filing." Specifically, while each of the parties agreed that to be effective, a termination statement must be authorized, they vigorously disputed whether JMP authorized the filing in question. In their papers, JPM and the secured lenders argued that the Main Term Loan Termination Statement was not "authorized" because neither JPM nor GM intended to terminate the Main Term Loan UCC-1, and GM's counsel was granted authority only as to the Synthetic Lease and the termination of the security interests related thereto. The Committee argued that the relevant question was not whether JPM *intended* to terminate the Main Term Loan UCC-1, but whether it *authorized the filing* of the Main Term Loan Termination Statement, which JPM did by consenting to its filing.

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[5] United States Bankruptcy Court for the Southern District of New York, Case No. 09-50026-reg.

[6] United States Bankruptcy Court for the Southern District of New York, Adv. Proc. No. 09-00504-reg.

[7] Official Comm. of Unsecured Creditors of Motors Liquidation Co. v. JPMorgan Chase Bank, N.A. (In re Motors Liquidation Co.), 486 B.R. 596, 606 (Bankr. S.D.N.Y. 2013).

[8] *Id.*

Upon review, the Second Circuit recognized that the appeal presented two closely related questions. First, what precisely must a secured lender of record authorize for a UCC-3 termination statement to be effective, *i.e.*, what is it that the UCC requires a secured lender to authorize. More specifically, the Second Circuit stated that the bankruptcy court's analysis – focusing solely on GM's counsel's authority as agent for JPM – overlooked the threshold question of: what constitutes "authorization" to terminate a financing statement under Delaware UCC law, *i.e.*, is it enough that a secured creditor review and knowingly approved a termination statement for filing, or must the secured creditor intend to terminate the security interest that is listed on the termination statement?[9] As this question seemed likely to recur and presented a significant issue of Delaware state law, the Second Circuit certified this question to the Delaware Supreme Court as a question of first impression.

The second question – whether JPMorgan granted the relevant authority – the Second Circuit reserved for itself, explaining that "[t]he Delaware Supreme Court's clarification as to the sense in which a secured party of record must authorize a UCC-3 filing will enable [it] to address … whether JPMorgan in fact provided that authorization."[10]

5. The Delaware Supreme Court's Decision

Specifically, the Second Circuit certified the following question of law to the Delaware Supreme Court:

> **Under UCC Article 9, as adopted into Delaware law by Del. Code Ann. tit. 6, art. 9, for a UCC-3 termination statement to effectively extinguish the perfected nature of a UCC-1 financing statement, is it enough that the secured lender review and knowingly approve for filing a UCC-3 purporting to extinguish the perfected security interest, or must the secured lender intend to terminate the particular security interest that is listed on the UCC-3?**[11]

The Delaware Supreme Court, in a decision filed on October 17, 2014, answered the certified question, explaining that if the secured party of record authorizes the filing of a UCC-3 termination statement, then that filing is effective regardless of whether the secured party subjectively intends or understands the effect of the filing. Specifically, the Delaware Supreme Court held that pursuant to the "unambiguous" language of the statute, a termination statement is effective if the secured party "authorizes", *i.e.*, reviews and approves, its filing.[12] Contrary to JPM's arguments, the UCC contains no requirement that a secured party that authorizes a filing subjectively intends or otherwise understands the effect of the plain terms of its own filing, *i.e.*, it does not require that the secured party actually intend to terminate the specific security interest. Instead, for a termination statement to become effective under § 9-509 and thus to have the effect

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[9] *In re Motors Liquidation Co.*, 755 F.3d 78 (2d Cir. 2014).
[10] *Id.* at 86-87.
[11] *Id.* at 86.
[12] *In re Motors Liquidation Co.*, No. 325, 2014 (Del. Oct. 17, 2014). A copy of the decision by the Supreme Court of the State of Delaware is attached hereto.

specified in § 9-513 of the Delaware UCC, it is enough that the secured party authorizes the filing to be made, which is all that § 9-510 requires.

The Delaware Supreme Court further noted that adopting JPM's argument would relieve a party of the consequences of its mistaken filing, eliminate any incentive to ensure the accuracy of the financing statement and undermine the UCC's bedrock policy of fostering ease and transparency in commercial transactions because it would require time-consuming and costly litigation to determine whether a secured creditor actually intended to terminate its financing statement. Significantly, consistent with the question certified by the Second Circuit, the Delaware Supreme Court assumed that JPM itself reviewed and knowingly approved of the filing of the Main Term Loan Termination Statement.

6. The Second Circuit Decision

The case then returned to the Second Circuit for decision on the question reserved -- Did JPMorgan authorize the filing of the UCC-3 termination statement that mistakenly identified for termination the Main Term Loan UCC-1? In its opinion, decided on January 21, 2015,[13] applying traditional principles of agency law, the Second Circuit held that "[f]rom [the] facts it is clear that although JPMorgan never intended to terminate the Main Term Loan UCC-1, it authorized the filing of a UCC-3 termination statement that had that effect[]" and, therefore, GM's Counsel had "actual authority" to file the Main Term Loan Termination Statement. Specifically, the Second Circuit found that JPMorgan's and its counsel's repeated manifestations to GM's counsel "show that JPMorgan and its counsel knew that, upon the closing of the Synthetic Lease transaction, [GM's counsel] was going to file the termination statement that identified the Main Term Loan UCC-1 for termination and that JPMorgan reviewed and assented to the filing of that statement. Nothing more is needed."[14]

C. Conclusion

Although the Delaware Supreme Court's decision is only binding with respect to the interpretation of Delaware UCC law, because a large majority of companies are organized under, and governed by, Delaware laws, the impact of the decision will be far-reaching. Moreover, because the UCC is a uniform statute, state courts outside of Delaware faced with a similar issue may well look to the Delaware Supreme Court's decision for guidance in interpreting its own state's UCC law. As such, all potential creditors are reminded that due diligence should extend beyond a mere public lien search for termination statements. In addition, always check and re-check termination statements and confirm with the secured party that they have read, and understand, what exactly is being released.

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[13] *Official Comm. of Unsecured Creditors of Motors Liquidation Co. v. JP Morgan Chase Bank, N.A. (In re Motors Liquidation Co.)*, No. 13-2187 (2d Cir. Jan. 21, 2015). A copy of the Second Circuit's decision is attached hereto.

[14] *Id.*, slip op. at 14.

IV. A COMPARISON OF RESTRUCTURING ALTERNATIVES

As insolvency professionals, we are all familiar with the various options under chapter 7 and chapter 11 of the Bankruptcy Code, 11 U.S.C. § 101 *et seq.* for our financially troubled clients. However, we may be less familiar with the various Delaware statutory options which are also available. The below chart attempts to compare options for dissolution under federal bankruptcy law and Delaware law.

Comparison of Federal Bankruptcy Law and Options for Dissolution Under Delaware State Law

Method	Bankruptcy	Assignment for Benefit of Creditors	Corporate Dissolution	Receiver
Initiation/Process	A case may be initiated under voluntary or involuntary procedures.[15] A voluntary case is commenced by the filing of a petition for relief under the relevant chapter. An involuntary petition is commenced by the filing of a petition for relief by three or more entities meeting certain requirements or, if less than 12 creditors, then by a creditor meeting	An entity wishing to use ABC must file with the Court of Chancery an inventory or schedule of the estate or effects to be assigned. The entity must also file an affidavit that the estate or effects filed with the Chancery Court is a full and complete inventory or all the estates and effects to the best of his or her knowledge.[17]	At a meeting of the corporation's Board of Directors ("BOD"), every corporation may sell, lease, or exchange all or substantially all of its property and assets which the BOD deems expedient and in the best interest of the corporation when it obtains authorization by a majority of the outstanding stock of corporation, which are entitled to vote.[18] The BOD may abandon the proposed sale, lease, or exchange without further action by the stockholders or members	The Court of Chancery, on the application of any creditor or stockholder of the corporation, may appoint one or more persons to be receivers of and for the corporation. The receiver takes charge of the corporation's assets, estate, effects, business and affairs, and collects the outstanding debt's claims, and property due and belonging to the corporation.[20]

[15] 11 U.S.C. § 301, 3030

	certain requirements.[16]		but must adhere to any third party contractual obligations.[19]	
Actors	The case may be administered by either a Trustee or a Debtor in Possession. A trustee must have an office in the judicial district where the case is pending, may sue or be sued, and may be removed for cause.[21] The election of a trustee in Chapter 7 and its duties are set forth fully in sections 702, 704, and 783. A trustee may be appointed in a	After an inventory or schedule of the estate or effects to be assigned is filed with the Court of Chancery the court shall appoint two disinterested and competent persons to appraise the estate assigned and return it to the office of the Register in Chancery of the county in which the inventory of the assignee were filed. The appraisers shall receive compensation for their services.[22] The Court of Chancery may remove an assignee upon cause being shown.[23]	Board of Directors, or a Liquidating Trustee	The receiver has the power to prosecute and defend, in the name of the corporation, all claims or suits and do all other acts which might be done by the corporation which may be necessary or proper.[24] The receiver shall file in each county of Delaware, within 20 days from the date of their qualification, a certified copy of the order of their appointment and evidence of their qualification.[25]

[17] 10 *Del. C.* § 7381.
[18] 8 *Del. C.* § 271.
[20] 8 *Del. C.* § 291.
[16] *Id.*
[19] 8 *Del. C.* § 271(b).
[21] 11 U.S.C. § 303(g), 321, 323, 324.
[22] 10 *Del. C.* § 7382.
[23] 10 *Del. C.* § 7386.
[24] 8 *Del. C.* § 292.
[25] 8 *Del. C.* § 292.

	chapter 11 case for cause under section 1104, otherwise the rights and duties of a debtor in possession are set forth in 1107.			
Bond	After notice and a hearing, the court may require a creditor in an involuntary bankruptcy to file a bond to indemnify the debtor for an amount the court later sets.[26] Otherwise, the trustee, upon appointment, must file a bond.[27]	After two disinterested and competent persons appraise the estate, the assignee shall give bond being not less than the total amount of the inventory and appraisement of the estate assigned.[28]	silent	silent
Schedules/Inventory	Section 521 requires the debtor to file a list of creditors, schedule of assets, liabilities, current income and expenditures and a statement of financial affairs,	The assignee shall render an account of the assignee's trusteeship every year from the date of the assignee's bond, until the trusteeship is closed and final account rendered and approved. The assignee shall provide notice to all persons in interest of the annual account	No requirement to file schedules or inventory. If the elective procedures of 8 Del. C. § 280 are followed, a creditor may seek discovery and may request information similar to that which would be in schedules or	The receiver shall file in the officer of the Register in Chancery a full and complete itemized inventory of all the assets of the corporation which shows their nature and probable value. The receiver must also account for all debts

[26] 11 U.S.C. § 303(e).
[27] 11 U.S.C. § 322.
[28] 10 *Del. C.* § 7383.

	among other details. Small business bankruptcy debtors must also file information concerning profitability, the approximation of cash receipts and disbursements over a "reasonable period."[29]	when it is filed with the Court of Chancery.[30]	an inventory.	due from and to it.[31]
Notice	Section 342 sets forth the method of notice to be provided to creditors upon commencement of a case.	Upon the opening of an account under the Voluntary Assignment Statute, the Court of Chancery will direct the manner of notice of the account to be made to creditors via court order. [32]	If the elective procedures of 8 Del. C. § 280 are followed, the corporation must mail notice to creditors and contract parties. The corporation also would be required to post notice of dissolution in a publication once a week for two consecutive weeks in a newspaper of general circulation in the county where the last registered agent was located and in the county where the corporation's	The notice required to be given to stockholders and creditors shall be given by the Register in the Court of Chancery.[34]

[29] 11 U.S.C. § 308.
[30] 10 *Del. C.* § 7385(a)-(b).
[31] 8 *Del. C.* § 294.
[32] 10 *Del. C.* § 7385.

			principal place of business is located.[33]	
Claim Processing	Proofs of Claim may be filed by either a creditor or by the debtor/trustee.[35] Such claims are deemed allowed unless objected to, at which time the court will determine the amount of the claim, unless the claims fall within restrictions under section 502. Secured status of claims may be determined by section 506. Claims are paid in priority order subject to section 507. Interest on claims may be determined by sections 506 and	Certain listed security interests are perfected when attached to the Chancery Court filing.[36]	If the elective procedures of 8 Del. C. § 280 are followed, the corporation would give notice of dissolution to all persons having a claim against the corporation. This notice shall state: (1) that any claim must be presented to the corporation and include sufficient information reasonably to inform the corporation of the claim; (2) the mailing address to which such claim must be sent; (3) the date the claim must be received which shall not be earlier than 60 days from the date notice was given; (4) that the claim will be barred if a claim is not received; (5) that	All creditors shall make proof, under oath, of their respective claims against the corporation and file it with the office of the Register in Chancery in which the proceeding is pending. If creditors fail to do so, within the time limit or by order of the Court of Chancery, then they are barred from participating in the distribution of the assets of the corporation.[40] The Register in the Court of Chancery, after the expiration of the fixed time for filing claims, shall notify the receiver of the filing of the claims, and the receiver, within 30 days of receiving the notice, shall inspect the claims and shall notify the

[34] 8 *Del. C.* § 293.
[33] 8 Del. C. § 280(a)(1). For a corporation having $10,000,000 or more in total assets, during any time of the dissolution process, the corporation must also post notice of dissolution at least once in all editions of a daily newspaper with a national circulation. *Id.*
[35] 11 U.S.C. § 501.
[36] 6 *Del. C.* § 9-309.
[40] 8 *Del. C.* § 295.

	511.		distributions to other persons may be made without further notice; and (6) the total aggregate amount of all distributions made by the corporation for each of the three years prior to the dissolution date.[37] The corporation also, if it elects to follow Section 280, would be required to give notice of the dissolution to persons with contractual claims contingent upon the occurrence or nonoccurrence of future events and request that such persons present claims in accordance with the terms of the notice.[38] A corporation shall: (1) pay all claims made, which are not rejected; (2) post the security offered and not rejected; (3) post any security	creditors whose claims are disputed. [41] Any creditor whose claims have been disputed shall appeal in whole or in part to the Court of Chancery within 30 days after receiving notice from the receiver.[42]

[37] 8 *Del .C.* § 280(a)(1)(a)-(f).
[38] 8 *Del .C.* § 280(b)(1).
[41] 8 *Del. C.* § 296(a).
[42] 8 *Del. C.* § 296(b).

			ordered by the Court of Chancery; and (4) pay or make provision for all other claims that are mature, known, and uncontested or that have been finally determined to be owing by the corporation or such successor entity.[39]	
Payment to Professionals	A trustee may be compensated based on schedules laid out by section 326 and may employ professionals with court approval subject to section 327 as may committees. Additionally, a trustee may be compensated for time spent as an attorney or an accountant.	silent	silent	Before making distributions of the assets of the corporation to the creditors or stockholders, the Court of Chancery shall allow a reasonable compensation to the receiver for their services, costs, and expenses.[43] Employees of the corporation who have unpaid wages, not exceeding 2 months, shall be paid prior to any other debt or debts of the corporation.[44]
Avoidance of Claims and Transfers	A trustee or debtor in possession's avoidance powers	When a creditor is given preferential treatment or given more than their portion of the	Fraudulent transfers may be avoided by creditors provided by 6 *Del. C.* §	Fraudulent transfers may be avoided by creditors provided by 6 *Del. C.* §

[39] 8 *Del. C.* § 281(a).
[43] 8 *Del. C.* § 298.
[44] 8 *Del. C.* § 300.

	concerning preferences and fraudulent transfers are set forth in sections 547 and 548, limited by section 546.	debt, such transaction shall be deemed fraudulent and absolutely void. Anyone makes such a fraudulent assignment shall be forever deprived of the benefit of any insolvent law of the State of Delaware.[45]	1301, *et. seq.*	1301, *et. seq.*

[45] 10 *Del. C.* § 7387.