JENNER&BLOCK

Recent Developments in Bankruptcy Law, April 2024

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2.1 Fraudulent Transfers

2.1.a **Section 546(e) safe harbor applies to private LBOs and preempts state voidable transaction law.** In an LBO, an acquisition vehicle acquired the debtor's stock with funds borrowed under a bridge loan from a bank. Less than a month later, the acquirer paid off the bridge loan with the proceeds of two new loans to the debtor and the acquirer. When the debtor failed two years later, the trustee brought an action against the bridge lender and the acquirer's parent, as a beneficiary of the payoff, to avoid and recover the payoff. Section 544(b) permits the trustee to avoid a transfer avoidable by an actual creditor under applicable nonbankruptcy law, and section 550(a) permits recovery of an avoided transfer from the transferee or a beneficiary of the transfer. The applicable law, the Uniform Voidable Transactions Act, permits avoidance of a transfer made for less than reasonably equivalent value when the transferor was insolvent and permits recovery of an avoidable transfer from the transferee or a beneficiary. Section 544(a) grants the trustee the rights and powers of, and the power to avoid any transfer avoidable by, a hypothetical judicial lien creditor. Section 546(e) prohibits the trustee from avoiding a transfer made by or to a financial institution in connection with a securities contract. The bridge lender, a bank, is a financial institution. A "securities contract" includes "an extension of credit for the clearance or settlement of securities transactions" and does not exclude privately held securities or apply only to securities traded on a public market. Therefore, the initial stock purchase agreement and the bridge loan were securities contracts. "In connection with" is to be read broadly. Because the refinancing was related to the original transaction, it was made in connection with the securities contract. Accordingly, section 546(e) prohibited the trustee from avoiding and recovering the payoff from the new lender. Although the UVTA permits a creditor to recover an avoidable transfer, section 546(e) made the transfer here not avoidable. Federal law preempts state law when state law would interfere with the federal scheme. In this case, applying state law would upset the bankruptcy distribution scheme that Congress enacted. Therefore, the trustee could not use nonbankruptcy law to evade the section 546(e) prohibition. *Petr v. BMO Harris Bank N.A.*, 95 F. 4th 1090 (7th Cir. 2024).

2.1.b **A Ponzi scheme receiver may sue to avoid a fraudulent transfer but not for torts committed by the scheme.** A receiver was appointed for a Ponzi scheme enterprise, comprising several related and commingled entities. The receiver sued the commodity broker who handled the debtors' accounts to avoid and recover fraudulent transfers and to recover damages for the broker's torts. A Ponzi scheme receiver has standing to avoid and recover the scheme's fraudulent transfers because the corporate entities; the individuals who controlled them acted adversely to the corporations' interests, and once they are removed by the receiver, the entities regain standing to sue to recover fraudulently transferred funds. However, the receiver does not have standing to sue the broker for torts in which it participated to the detriment of the corporations, because the corporations were not separate and distinct from the Ponzi scheme. *Wiand v. ATC Brokers Ltd.*, ___ F.4th ___, 2024 U.S. App. LEXIS 6547 (11th Cir. Mar. 19, 2024).

2.2 Preferences

2.2.a **"Ordinary business terms" preference defense depends on terms in the defendant's industry.** The trustee sued to avoid and recover a preference. The payments were consistent with payment terms in the defendant's industry, but not in the debtor's different industry. Section 547(b)(2) provides a defense for payments made according to ordinary business terms. The

relevant business terms are the defendant's industry's terms, because whether the defendant is operating in the ordinary course of business depends on how the defendant and others in its industry, not how the debtor and others in its industry, operate. Therefore, because the payments were consistent with the defendant's usual business terms, the court denies relief to the trustee. *Pidcock v. Sturm Ruger & Co., Inc. (In re ASPC Corp.)*, ___ B.R. ___, 2024 Bankr. LEXIS 800 (Bankr. S.D. Ohio Mar. 29, 2024).

2.2.b **Substitution of defrauded secured creditor is not a transfer of property of the estate.** The debtor defrauded a factor with phony receivables. The creditor and the debtor found a new creditor to take over the defrauded creditor's position, which the new creditor did by transferring payment directly to the old creditor in exchange for the phony accounts. A preference is a transfer of an interest of the debtor in property that meets certain other requirements. "An interest of the debtor in property" should be construed the same as under section 541(a)(1), as property that would have become property of the estate if the debtor had not transferred it before bankruptcy. Here, neither the funds the new creditor used to pay the old creditor nor the accounts the old creditor transferred to the new creditor were property of the debtor—the debtor had no interest in them and control over their disposition. And the transfers between the old and new creditors did not diminish the property that came into the estate upon the bankruptcy filing. Therefore, the trustee could not avoid the payment from the new creditor to the old creditor as a preference or as a fraudulent transfer, which similarly applies only to transfers of an interest of the debtor in property. *Mann v. LSQ Funding Grp., LLC*, 71 F.4th 640 (7th Cir. 2023).

2.2.c **A preference action sounds in tort, not contract.** The trustee sued to recover a preference. He sought attachment of the defendant's assets to secure payment of any judgment. Under applicable state law, an attachment is available only for an action based on contract, not on tort. Here, the action was based on violation of a statutory duty, not on a violation of the creditor's contract with the debtor. Such an action is by its nature a tort action. Therefore, the court denies the attachment motion. *Avery v. Gia Phu Garment Fashion Co. (In re Kody Branch of Calif., Inc.)*, 657 B.R. 120 (Bankr. C.D. Cal. 2024).

2.3 Postpetition Transfers

2.4 Setoff

2.5 Statutory Liens

2.6 Strong-arm Power

2.6.a **Security interest in postpetition revenues does not survive chapter 9 case as "proceeds" or "special revenues".** The municipal debtor adopted prepetition ordinances authorizing bond issues, which provided for a lien as governed by operative documents in revenues the city was to receive from a gaming facility in the city. A "security interest" is a lien created by consent, whether or not authorized by statute. A "statutory lien" is a lien imposed by statute on specified circumstances or conditions. The two terms are mutually exclusive. Although the city adopted ordinances to authorize the liens on the gaming revenues, the liens are security interests, because they were consensual. Under section 552(b), a security interest continues in a debtor's postpetition receipts only to the extent that they are proceeds, products, rents, or profits of petition-date collateral. Proceeds are whatever is collected or distributed on account of collateral. The debtor's present right to receive contingent future payments does not constitute property or collateral, and the future payments are not collected or distributed on account of collateral, so the payments received in the future do not constitute proceeds that section 552(b) protects. Section 928 protects a security interest in postpetition receipts of special revenues, which include excise taxes imposed on particular activities or transactions. Here, because the gaming revenues are charged only to casinos in exchange for the right to operate, they are fees, not taxes, so section 928 does not protect any security interest in the postpetition receipts. *City of Chester v. PHCC LLC (In re City of Chester)*, 655 B.R. 555 (Bankr. E.D. Pa. 2023).

2.7 Recovery

3. BANKRUPTCY RULES

4. CASE COMMENCEMENT AND ELIGIBILITY

4.1 Eligibility

4.1.a **The Bankruptcy Clause does not impose a jurisdictional requirement of insolvency or financial distress.** The debtor was the product of a divisional merger under Texas law. It assumed all its predecessor's asbestos liabilities and a limited amount of its predecessor's assets and obtained a support agreement from its new affiliate, which was hopelessly solvent. Because of the support agreement, the debtor was likely not insolvent and did not suffer financial distress. The Constitution authorizes Congress to adopt "uniform Laws on the subject of Bankruptcies." The only limitation in the authorization is that the law be uniform. Although the term "bankruptcy" might have represented a very limited concept at the time of the Constitution's adoption, Congress has frequently expanded the nature of bankruptcy proceedings, eligibility, and their effect, and the courts have uniformly upheld the expansions, never finding that the subject of bankruptcies is limited to the laws in effect in 1789. The courts have said the subject of bankruptcies is the relationship between a debtor and creditors, and neither pre-Constitutional English and colonial law nor any federal bankruptcy law ever imposed either an insolvency or financial distress requirement. Moreover, although the concept of insolvency is clear enough in the abstract, determining insolvency and when it occurs creates substantial uncertainty, and the concept of "financial distress" is almost completely undefined. If insolvency or financial distress were a requirement for a court's jurisdiction, a case might need to be dismissed if the debtor or the estate became solvent during the case or if it were later determined, based on recoveries, that the debtor was solvent on the petition date. Therefore, insolvency or financial distress is not a constitutional requirement for use of the bankruptcy laws. *In re Bestwall LLC*, ___ B.R. ___, 2024 Bankr. LEXIS 415 (Bankr. W.D.N.C. 2024).

4.1.b **Future rent under an unexpired lease does not disqualify a debtor from proceeding under subchapter V.** The debtor's long-term lease had total rent obligations over the life of the lease of substantially more than $7.5 million. After filing its chapter 11 petition, the debtor elected to proceed under subchapter V. Its schedules reflected debts of approximately $5.7 million. Filed proofs of claim, including the landlord's claim, brought the total debt to over $10 million. A debtor is eligible to proceed under subchapter V only if its noncontingent, unlquidated debts do not exceed $7.5 million. A court may determine the amount of debts from the schedules and proofs of claim. A debt is noncontingent if liability does not depend on the future occurrence of an event and is liquidated if the amount is easily ascertainable. Here, the scheduled and proofs of noncontingent, liquidated claims exceed $7.5 million, making the debtor ineligible to proceed under subchapter V. But the court also addresses the liability under the lease. An unexpired lease is both an asset and a liability. Considering only the future payment obligations under the lease ignores the lease's aspect as an asset. In addition, the future lease obligations' allowability depend on whether the debtor in possession rejects the lease and on the determination of a damage claim, which is subject to a limitation under section 502(b)(6). Therefore, future lease obligations generally should not be considered in determining subchapter V eligibility. *In re Zhang Med. P.C.*, 655 B.R. 403 (Bankr. S.D.N.Y).

4.2 Involuntary Petitions

4.3 Dismissal

5. CHAPTER 11

5.1 Officers and Administration

5.1.a **A non-creditor's actual knowledge of a chapter 11 case does not substitute for formal notice.** A victim of the debtor had sued the debtor prepetition and settled. The victim also sued an individual associated with the debtor, resulting in a judgment in the victim's favor. He settled that claim by taking an assignment from the defendant of all the defendant's rights and claims against the debtor's insurer. The victim sued the insurer during the debtor's chapter 11 case. The debtor and the insurer filed a suggestion of bankruptcy in that action, and all parties agreed to stay the proceeding pending further order of the trial court. The debtor confirmed a plan that created a settlement fund for the debtor's victims and enjoined all persons from pursuing claims against the debtor's insurers. The settlement fund trustee brought an action in the bankruptcy court to enjoin the victim's action against the insurers. Bankruptcy Rule 3016(c) and Rule 2002(c)(3) require a plan and disclosure statement and notice of a confirmation hearing to describe in specific and conspicuous language any injunction proposed in the plan. Although unknown creditors and others are not necessarily entitled to specific notice, a plan injunction is effective against a known noncreditor only if the noncreditor has received proper notice of the plan and the confirmation hearing. Actual knowledge of the chapter 11 case by itself does not suffice. Here, the victim did not receive proper notice, so the plan injunction is not effective, and the court refuses to enforce the injunction to stay the victim's action against the insurer. *In re BSA*, ___ B.R. ___, 2024 Bankr. LEXIS 635 (Bankr. D. Del. Mar. 11, 2024).

5.2 Exclusivity

5.3 Classification

5.4 Disclosure Statement and Voting

5.4.a **Courts denies approval of a lock-up without plan terms.** The debtor negotiated a deal with an aircraft lessor to restructure the lease and address prepetition defaults. The agreement included a lock-up—an agreement to vote for any plan that was not inconsistent with the deal—once a disclosure statement was approved. Section 1125 prohibits solicitation of plan acceptances before court approval of a disclosure statement containing adequate information about the plan. However, it does not prohibit plan negotiation and agreement on plan terms, with an agreement to accept a plan that contains those terms. Such agreements typically follow extensive negotiations, supported by information exchanges, of plan terms. Where the agreement relates only to a specific debt or contract without reference to a complete plan, a lock-up can deprive the counterparty of the necessary information to evaluate whether to accept a plan that has not yet been developed. Moreover, such an agreement can effectively deprive other creditors of their ability to negotiate and vote on a plan, as a pre-arranged vote gives the debtor one impaired accepting class to satisfy section 1129(a)(10)'s requirement, possibly disenfranchising other creditors at an early stage in the case. Based on these considerations, the court approves the settlement agreement as within the DIP's business judgment but denies approval of the lock-up provision in the agreement. *In re Gol Linhas Aéreas Inteligentes S.A.*, ___ B.R. ___, 2024 Bankr. LEXIS 959 (Bankr. S.D.N.Y. April 22, 2024).

5.5 Confirmation, Absolute Priority

5.5.a **Court approves plan "toggle" without new solicitation.** The debtor's plan provided two alternative scenarios, one of which required regulatory approval, failing which, the other would be implemented. The debtor was unable to obtain regulatory approval and so sought bankruptcy court approval to pursue the other path. Section 1127 governs plan modification after confirmation. But that section is not implicated where the plan itself provides for the alternative treatment. Therefore, the court approves the debtor proceeding with the alternative treatment. *In re Celsius Network LLC*, 656 B.R. 327 (Bankr. S.D.N.Y. 2023).

5.5.b **Section 523(a) nondischargeability applies to corporate debtors proceeding under subchapter V.** The creditor claimed the subchapter V corporate debtor's obligation to the creditor was incurred by fraud or false pretenses. Section 1192 provides a subchapter V debtor with a discharge of all debts "except any debt of a kind specified in section 523(a)," which contains exceptions to discharge only of an individual debtor. Because section 1192 refers to debts *of a kind* specified in section 523(a), the kind of debtor (individual or corporate) is irrelevant, and the exceptions apply to a corporate debtor in subchapter V. *Avion Funding, L.L.C. v. GFS Indus., L.L.C. (In re GFS Indus., L.L.C.)*, ___ F. 4th ___, 2024 U.S. App. LEXIS 9317 (5th Cir. Apr. 17, 2024).

6. CLAIMS AND PRIORITIES

6.1 Claims

6.2 Priorities

6.2.a **Postpetition back pay award for prepetition services is not entitled to administrative expense priority.** Before bankruptcy, the claimants had sued the debtor and obtained a judgment for back pay. Section 503(b)(1)(A)(ii) grants administrative expense priority to a claim for "wages and benefits awarded pursuant to a judicial proceeding or a proceeding of the National Labor Relations Board as back pay attributable to any period of time occurring after commencement of the case under this title, as a result of a violation of federal or state law by the debtor, without regard to the time of the occurrence of unlawful conduct on which such award is based or to whether any services were rendered," The first underlined phrase makes clear that administrative priority applies only to claims for back pay for postpetition periods. The second underlined phrase does not undermine that reading, even though it renders consideration of the timing of the unlawful conduct irrelevant. What matters is the time the services were rendered or to which the pay applies. In addition, the court has discretion not to determine whether a claim is entitled to administrative expense priority if the claimant has not yet received a judicial or NLRB award. *Abraham Giménez Plaintiff Grp. v. Dep't of Transp. & Pub. Works (In re Fin. Oversight & Mgmt. Bd.)*, 92 F. 4th 355 (1st Cir. 2024).

7. CRIMES

8. DISCHARGE

8.1 General

8.1.a **Underwriter may not enforce indemnification obligation against liquidating trust asserting creditors' claims.** An underwriter sold the debtor's bonds. The underwriting agreement required the debtor to indemnify the underwriter for any misstatements in the offering materials. After the debtor failed and filed chapter 11, it confirmed a liquidating plan that created a liquidation trust and enjoined all persons who held claims from asserting any setoff or recoupment right against any obligation due to the debtors or its successor. A year after confirmation, creditors who asserted claims against the underwriter assigned them to the liquidating trustee, who sued the underwriter, who then asserted setoff and recoupment under the indemnity as a defense. Although the underwriter was not given notice of the chapter 11 case, it had actual knowledge and therefore was bound by the plan and the injunction, to which it had not objected. The injunction prohibited the underwriter's assertion of the indemnity claims. Moreover, the underwriter could not have asserted the indemnity claims against the creditors who assigned their claims to the trust or to the trust, which is a separate entity from the debtor and not liable for any of its debts. Therefore, the plan properly prohibits the underwriter from asserting setoff or recoupment against the trust. *Raymond James & Assoc., Inc. v. Jalbert (In re German Pellets La., L.L.C.)*, 91 F. 4th 802 (5th Cir. 2024).

conceivably have an effect on the debtor's rights, liabilities, or options. The bankruptcy court here had jurisdiction under all three prongs, because the issue of a guarantee of fees incurred in a chapter 11 case can arise only in such a case, the substantive rule governing the allowance and payment of fees contained in section 330 of title 11, and the proceeding was related to the case because the estate remained liable for the fees, and the guarantor's failure to pay would increase the estate's liability. Therefore, the court denies the motion to alter or amend the judgment. *Double Diamond Distrib., Ltd. v. Garman Turner Gordon LLP (In re U.S.A. Dawgs, Inc.)*, 657 B.R. 98 (9th Cir. B.A.P. 2024).

11.2 Sanctions

11.3 Appeals

11.3.a **An order converting a chapter 11 case to chapter 7 is final and appealable.** The debtor and its principal appealed the bankruptcy court's order converting the debtor's chapter 11 case to chapter 7. Only final orders are appealable. A bankruptcy case consists of many proceedings involving distinct disputes, so appellate courts take a broader view of appealability than in an ordinary civil action. A conversion motion is resolved in a proceeding separate from other proceedings in the case, and the conversion order terminates the proceeding and eliminates all rights and obligations of the debtor in chapter 11. As such, it is a final order and is appealable. *Cal. Palms Addiction Recovery Campus, Inc. v. Vara (In re Cal. Palms Addiction Recovery Campus, Inc.)*, 87 F. 4th 734 (6th Cir. 2023).

11.4 Sovereign Immunity

12. PROPERTY OF THE ESTATE

12.1 Property of the Estate

12.1.a **Noneconomic LLC rights become property of the estate.** The debtor was a 25% member, with director election voting rights, of a Delaware LLC. After it filed its chapter 11 petition, the majority member amended the LLC agreement to eliminate the debtor's voting and management rights, while preserving its economic rights. Section 541(a)(1) provides that all interests of the debtor in property become property of the estate upon the filing of the petition. State law determines a debtor's petition-date property rights, while federal law determines the scope of the bankruptcy estate. Delaware law provides that upon a voluntary bankruptcy filing, an LLC member ceases to be a member of the LLC. Because managerial and voting rights are legal or equitable interests in property, the Delaware statute directly conflicts with section 541(a)(1), and the interests become property of the estate upon the petition date. Therefore, the majority member's action did not deprive the debtor or the estate of the managerial and voting rights. *In re Envision Healthcare Corp.*, 655 B.R. 701 (Bankr. S.D. Tex. 2023).

12.2 Turnover

12.3 Sales

12.3.a **Section 363(m) is alive and well.** The bankruptcy court authorized a sale of oil and gas leases free and clear of any subrogation claims of sureties who had guaranteed the debtor's decommissioning obligations. The buyer testified that the "free and clear" provision was vital to the sale. The sureties appealed and sought a stay pending appeal, which was denied. Section 363(m) provides that the validity of a sale is not affected by an order reversing or modifying the order authorizing the sale unless the court stays the sale pending appeal. In *MOAC Mall Holdings LLC v. Transform Holdco LLC*, 598 U.S. 288 (2023), the Supreme Court held that section 363(m) is not jurisdictional, may be waived, and does not limit other relief that does not affect the validity of a sale. The ruling does not deprive section 363(m) of its force. A sale term that is integral to the sale may not be reversed or modified because reversing or modifying that term would affect the validity of the sale. Here, the relief the sureties sought would have affected the validity of the sale,

because the relief challenged the "free and clear" term that was vital to the sale. The mere request for a stay pending appeal does not affect the analysis, because the statute refers only to an actual stay, not a request for a stay. Therefore, the court dismisses the appeal. *Swiss Re Corp. Solutions America Inc. v. Fieldwood Energy III, L.L.C. (In re Fieldwood Energy III, L.L.C.)*, 93 F. 4th 817 (5th Cir. 2024).

13. TRUSTEES, COMMITTEES, AND PROFESSIONALS

13.1 Trustees

13.1.a ***Barton* doctrine prevents debtor in possession from suing a state court receiver**. A state court receiver seized property belonging to a debtor, who later filed a chapter 11 case and sought turnover. The receiver delayed; he ultimately turned over most but not all of the property. The debtor in possession sued the receiver in bankruptcy court for turnover, stay violation, and conversion. Under *Barton v. Barbour*, 104 U.S. 126 (1881), a federal court lacks jurisdiction over an action against a receiver that has been brought without leave of the court appointing the receiver. Here, the DIP did not obtain leave of the state court to sue. Rather, the DIP claims that the *ultra vires* exception to the *Barton* doctrine—the receiver may be sued if he acts outside his authority—applies to permit the action. The exception is to be narrowly construed and applies only where the receiver seizes property that is not subject to the receivership, not to an action that is intentional, unlawful, or even criminal. Here, the delay and refusal to turn over assets that were properly the subject of the receivership order did not constitute *ultra vires* acts. Therefore, the court dismisses the DIP's action against the receiver. *Berleth v. Preferred Ready-Mix, LLC (In re Preferred Ready-Mix, LLC*), ___ B.R. ___, 2024 U.S. Dist. LEXIS 59199 (S.D. Tex. April 1, 2024).

13.1.b **Subchapter V trustee may obtain a retainer.** The subchapter V debtor's plan confirmation was delayed. The debtor was current on operating expenses, but the subchapter V trustee had incurred fees that had not been paid. The plan provided for full payment but did not specify a source. The trustee moved to require the debtor to set aside funds to cover his fees. A subchapter V trustee has a duty to "ensure the debtor commences making timely payments" under a plan. Although a subchapter V debtor in possession has rights and powers of a trustee, those rights and powers are not exclusive. Under section 363(b), a trustee has the authority to use property of the estate outside the ordinary course of business. A subchapter V trustee may exercise that authority if there is a good business reason. Accordingly, the trustee may direct funds be set aside for all administrative expenses, on a pro rata basis, not just for the trustee's fees. *In re Roe*, ___ B.R. ___, Case No. 23-32077 (Bankr. D. Ore. Jan. 18, 2024).

13.2 Attorneys

13.3 Committees

13.3.a **Committee may pursue derivative action against Delaware LLC debtor's officers.** The Committee claimed that the Delaware LLC debtor's principals, who were both LLC managers and officers, breached their fiduciary duties to the LLC by self-dealing. They sought derivative standing to bring the action for the benefit of the estate. Under Delaware law, an LLC may exculpate its members and managers from any claims for breach of fiduciary duty, and creditors may not sue LLC managers or members derivatively on behalf of the LLC. However, under *Official Comm. of Unsecured Creditors of Cybergenics Corp. ex rel. Cybergenics Corp. v. Chinery*, 330 F.3d 548 (3d Cir. 2003), a bankruptcy court may grant derivative standing to a committee to pursue actions on behalf of the estate that the debtor in possession unjustly refuses to pursue. Such authority differs from a derivative action under state law and is governed solely by bankruptcy law principles. Thus, breaking with three prior Delaware bankruptcy court decisions that denied derivative standing based on state law, the court grants the committee standing. However, because of the LLC agreement's exculpation provision, the court permits the action to proceed against the principals only to the extent that they were acting in their capacity as officers,

not as members or managers. *In re Pack Liquidating, LLC*, ___ B.R. ___, 2024 Bankr. LEXIS 241 (Bankr. D. Del. Feb. 2, 2024).

13.3.b **Equity committee may appeal dismissal order.** Over the equity committee's objection, the bankruptcy court dismissed the case. The committee appealed. Although chapter 11 contains provisions for the appointment and rights and duties of a committee, it contains no provision for the termination of a committee, unlike the provisions for the termination of a trustee's appointment in section 1105. Therefore, the committee does not automatically dissolve upon the dismissal of the case. As the committee may oppose dismissal in the bankruptcy court, so may it pursue an appeal from a dismissal. *Official Committee Of Equity Securities Holders v. Integrated Nano-Technologies, Inc.*, ___ B.R. ___, 2024 U.S. Dist. LEXIS 38504 (W.D.N.Y. Mar. 5, 2024).

13.4 Other Professionals

13.5 United States Trustee

14. TAXES

15. CHAPTER 15—CROSS-BORDER INSOLVENCIES

15.1.a **Court recognizes Hong Kong scheme proceeding of China-based Cayman Islands company.** A major Chinese real property company's holding company was incorporated in the Cayman Islands but conducted no business there. Its office and all holding company operations, which consisted mainly of issuing debt, but none of the subsidiary property companies, were in Hong Kong. It issued both Chinese-law governed debt from the subsidiaries and New York and English-law governed debt from the holding company. The holding company obtained sanction of a scheme in Hong Kong and sought recognition of the scheme proceeding in the United States. A court may recognize a foreign proceeding under chapter 15 as a foreign main proceeding if the debtor has its center of main interests (COMI) in the foreign proceeding's jurisdiction. Courts have discretion in determining COMI, but one of the key factors is "where the debtor conducts its regular business, so that the place is ascertainable by third parties." Here, the debtor had no presence, operations, establishment, or personnel in China or the Cayman Islands, only in Hong Kong, so the court determines that the debtor's COMI is Hong Kong and recognizes the Hong Kong scheme proceeding. *In re Sunac China Holdings Ltd.*, 656 B.R. 715 (Bankr. S.D.N.Y. 2024).

15.1.b **Foreign proceeding for foreign branch of U.S. bank is ineligible for chapter 15 recognition.** The U.S. chartered bank had a Cayman Islands branch, which was not a separate legal entity. After the bank went into liquidation, depositors in the Cayman Islands branch obtained the appointment of liquidators in a Cayman winding-up proceeding, who then sought recognition of the Cayman proceeding in the U.S. under chapter 15. Chapter 15 does not apply to "a proceeding concerning an entity … identified by exclusion in section 109(b)." Section 109(b) renders a domestic bank and a foreign bank that has a U.S. branch ineligible for relief under title 11. Because the Cayman Islands branch has no separate legal existence outside of the bank, which was ineligible to be a debtor under title 11, chapter 15 does not apply to a foreign proceeding concerning the branch. *In re Silicon Valley Bank (Cayman Islands Branch)*, ___ B.R. ___, 2024 Bankr. LEXIS 427 (Bankr. S.D.N.Y. Feb. 22, 2024).

15.1.c **In U.S. action against a foreign debtor, the court should extend comity to parallel foreign proceeding that treats creditors equitably.** A U.S. plaintiff sued a Singapore debtor in New Jersey while a Singapore insolvency proceeding was pending. A U.S. court should extend comity to the foreign proceeding if the U.S. case is parallel to the foreign proceeding and the foreign debtor makes a prima facie showing the foreign law shares the U.S. policy of equal distribution and authorizes a stay of the creditor's action. A case is parallel if it is "related to" the foreign proceeding that is ongoing and would affect the foreign proceeding. If these initial requirements are met, then the court must apply a four-part test: Whether the foreign proceeding is in a duly

authorized tribunal; provides for equal treatment of creditors; would not be inimical to the U.S.'s equality policy; and the plaintiff would not be prejudiced. These factors are non-exhaustive; the overarching consideration if whether extending comity would be prejudicial to the interests of the United States. The appellate court remands for findings on these factors. *Vertiv, Inc. v. Wayne Burt PTE, Ltd.*, 92 F. 4th 169 (3d Cir. 2024).