JONES WALKER

E*ZINES
December 2002 Vol. 7

Bankruptcy, Restructuring, and Creditors-Debtors Rights
www.joneswalker.com
bankruptcy@joneswalker.com

ADMIRALTY & MARITIME
ANTITRUST & TRADE REGULATION
AVIATION
APPELLATE LITIGATION
BANKRUPTCY, RESTRUCTURING & CREDITORS-DEBTORS RIGHTS
BUSINESS & COMMERCIAL LITIGATION
COMMERCIAL LENDING & FINANCE
CONSTRUCTION
CORPORATE & SECURITIES
EMPLOYEE BENEFITS, ERISA, & EXECUTIVE COMPENSATION
ENERGY
ENVIRONMENTAL & TOXIC TORTS
ERISA, LIFE, HEALTH & DISABILITY INSURANCE LITIGATION
GAMING
GOVERNMENT RELATIONS
HEALTH CARE LITIGATION, TRANSACTIONS & REGULATION
INTELLECTUAL PROPERTY & E-COMMERCE
INTERNATIONAL
LABOR RELATIONS & EMPLOYMENT
MEDICAL PROFESSIONAL & HOSPITAL LIABILITY
MERGERS & ACQUISITIONS
PRODUCTS LIABILITY
PROFESSIONAL LIABILITY
PROJECT DEVELOPMENT & FINANCE
PUBLIC FINANCE
REAL ESTATE: LAND USE, DEVELOPMENT & FINANCE
TAX (INTERNATIONAL, FEDERAL AND STATE)
TELECOMMUNICATIONS & UTILITIES
TRUSTS, ESATES & PERSONAL PLANNING
VENTURE CAPITAL & EMERGING COMPANIES
WHITE COLLAR CRIME

GOD TAKES CARE OF DRUNKS AND FOOLS

- Author, Matthew J. Landreau, Associate, and
Editor, Nan Roberts Eitel, Partner

In *Jimmy Swaggart Ministries v. Hayes (In re Hannover Corp.)*, 2002 WL 31415694, (5th Cir. 2002), the Fifth Circuit, agreeing with the bankruptcy court and reversing the district court, ruled that under the good faith defense of 11 U.S.C. § 548 (c) to a fraudulent conveyance action: "(1) call options do indeed have value, (2) their values are to be determined at the time of origination, and (3) a transferor's practical inability to exercise his option is irrelevant to its valuation under § 548(c)."

The debtors in *Hayes* are several corporations created and controlled by one member, Sam J. Recile, to develop a shopping mall. In pursuit of that project, the debtors entered into an option agreement ("option agreement") with Jimmy Swaggart Ministries ("JSM") for the purchase of a 68 acre tract of land. The stipulated purchase price was $11,250,000, and for two years, the debtors made payments totaling $2,435,000 while they attempted to obtain financing. Debtors did not ultimately purchase the property.

Approximately two years after entering into the option agreement with JSM, the receiver for the debtors filed a voluntary Chapter 11 bankruptcy petition, and the receiver was appointed as trustee. In the interim between the option agreement and filing for bankruptcy, the debtors engaged in numerous questionable transactions. The debtors began offering prospective investors short-term, double-your-money-back promissory notes to finance their project. The debtors' nominal party to the option agreement changed frequently, and payments to JSM began to be made on a weekly, sometimes daily, basis, with some of those payments being made in cash and sometimes with counter-signed third-party checks. Finally, in the year before filing for bankruptcy, the debtors came under SEC investigation, and Recile was ultimately convicted and served time in prison.

In February of 1994, the trustee filed an action in bankruptcy court seeking to avoid $2,472,500 in pre-petition payments made to JSM. After a lengthy bench trial, the bankruptcy judge ruled in favor of JSM. On appeal, the district court reversed, but the Fifth Circuit reversed the district court. The Fifth Circuit never ruled whether the transfers at issue were fraudulent and, instead, confined its decision to whether the transferee properly availed itself of the good faith defense under 11 U.S.C. § 548 (c), questions of first impression in the Fifth Circuit.

ADMIRALTY & MARITIME
ANTITRUST & TRADE REGULATION
AVIATION
APPELLATE LITIGATION
BANKRUPTCY, RESTRUCTURING & CREDITORS-DEBTORS RIGHTS
BUSINESS & COMMERCIAL LITIGATION
COMMERCIAL LENDING & FINANCE
CONSTRUCTION
CORPORATE & SECURITIES
EMPLOYEE BENEFITS, ERISA, & EXECUTIVE COMPENSATION
ENERGY
ENVIRONMENTAL & TOXIC TORTS
ERISA, LIFE, HEALTH & DISABILITY INSURANCE LITIGATION
GAMING
GOVERNMENT RELATIONS
HEALTH CARE LITIGATION, TRANSACTIONS & REGULATION
INTELLECTUAL PROPERTY & E-COMMERCE
INTERNATIONAL
LABOR RELATIONS & EMPLOYMENT
MEDICAL PROFESSIONAL & HOSPITAL LIABILITY
MERGERS & ACQUISITIONS
PRODUCTS LIABILITY
PROFESSIONAL LIABILITY
PROJECT DEVELOPMENT & FINANCE
PUBLIC FINANCE
REAL ESTATE: LAND USE, DEVELOPMENT & FINANCE
TAX (INTERNATIONAL, FEDERAL AND STATE)
TELECOMMUNICATIONS & UTILITIES
TRUSTS, ESATES & PERSONAL PLANNING
VENTURE CAPITAL & EMERGING COMPANIES
WHITE COLLAR CRIME

11 U.S.C. § 548(c) provides transferees a good faith defense to a debtor's suit alleging an actually or constructively fraudulent transfer. Obviously, the burden of proof is on the transferee, and to avail itself of this defense, the transferee must demonstrate that it took value in good faith and that it gave value.

The Fifth Circuit noted that the Bankruptcy Code does not define "good faith" and that there is little agreement among courts on the legal standard that should apply. The Fifth Circuit cautioned against propounding a broad rule regarding "good faith" under section 548(c), particularly given the varying circumstances in which such a defense may be advanced. Rather, the court focused on the transferee's state of mind, including what level of knowledge or notice the transferee must have and what duty of inquiry is imposed on the transferee. Moreover, must the transferee have knowledge of the debtor's insolvency, fraudulence, or both, and to what degree?

Applying the clear error standard, the Fifth Circuit found that the bankruptcy court's conclusions regarding JSM's state of mind were entitled to great deference. The court found that "JSM had no way of knowing that the debtors were insolvent," especially because those transfers were made to an unaffiliated third-party during an arms-length transaction. Both courts further agreed that, although JSM was under a "duty of inquiry," upon being alarmed by newspaper articles concerning the debtors and the SEC investigation, JSM undertook its own investigation whereby it was assured by the district court that it could continue receiving payments under the option agreement. Hence, JSM was deemed to have acted in "good faith."

The court next turned its attention to whether JSM "gave value." Again, the Fifth Circuit noted that it had not previously had the opportunity to rule on determinations of value under section 548(c). It then adopted its "approach to the review of trial court determinations of 'reasonably equivalent value' under § 548(a)(2)" and noted that such valuations are "largely a question of fact, as to which considerable latitude must be allowed to the trier of the facts."

The court posed the question of law as follows: "Does a transferee's sale of short-term call options to a party unable to exercise them have 'value' under § 548(c)"? Although the court acknowledged the skepticism with which courts may greet promises of future support as valuable, it nevertheless declared that section 548 "easily encompasses as 'value' the present exchange of cash for a right to buy or sell property at a future point in time." Any decision otherwise would ignore "the economic realities of options mar-

JONES WALKER

E*ZINES
December 2002 Vol. 7

Bankruptcy, Restructuring, and Creditors-Debtors Rights
www.joneswalker.com
bankruptcy@joneswalker.com

ADMIRALTY & MARITIME
ANTITRUST & TRADE REGULATION
AVIATION
APPELLATE LITIGATION
BANKRUPTCY, RESTRUCTURING & CREDITORS-DEBTORS RIGHTS
BUSINESS & COMMERCIAL LITIGATION
COMMERCIAL LENDING & FINANCE
CONSTRUCTION
CORPORATE & SECURITIES
EMPLOYEE BENEFITS, ERISA, & EXECUTIVE COMPENSATION
ENERGY
ENVIRONMENTAL & TOXIC TORTS
ERISA, LIFE, HEALTH & DISABILITY INSURANCE LITIGATION
GAMING
GOVERNMENT RELATIONS
HEALTH CARE LITIGATION, TRANSACTIONS & REGULATION
INTELLECTUAL PROPERTY & E-COMMERCE
INTERNATIONAL
LABOR RELATIONS & EMPLOYMENT
MEDICAL PROFESSIONAL & HOSPITAL LIABILITY
MERGERS & ACQUISITIONS
PRODUCTS LIABILITY
PROFESSIONAL LIABILITY
PROJECT DEVELOPMENT & FINANCE
PUBLIC FINANCE
REAL ESTATE: LAND USE, DEVELOPMENT & FINANCE
TAX (INTERNATIONAL, FEDERAL AND STATE)
TELECOMMUNICATIONS & UTILITIES
TRUSTS, ESATES & PERSONAL PLANNING
VENTURE CAPITAL & EMERGING COMPANIES
WHITE COLLAR CRIME

kets." Thus, the court ruled, the value of an investment for purposes of section 548(c) is determined at the time of purchase, including options. Accordingly, although the option later became worthless, the basic nature of "all speculative financial instruments" is for the value of an option to "change over time depending on the value of the underlying property." Moreover, section 548(c) looks at value from the perspective of the transferee, *i.e.*, how much the transferee gave, not how much the transferee gained.

In addition to the fraudulent conveyance claims, the trustee also brought a revocatory action under Louisiana Civ. Code art. 2036. Thus, the court considered whether the option agreement was made in the "regular course of [the debtor's] business," a defense to revocatory actions under La. Civ. Code art. 2040. The Louisiana Supreme Court has stated that "[a] sale made to one not a creditor must be considered as one made in the ordinary course of business, if made for an adequate consideration in cash." *Hirsch v. Fudickar*, 9 So. 2d 742, 744 (1891). The Fifth Circuit found the transfers to be within the ordinary course of business because the debtors received adequate consideration for their payments, the debtors formed this contract in the role of real estate developer, and JSM was not a creditor of any of the debtors' numerous corporations.

TRADEMARK LICENSEES AT RISK IN LICENSOR'S BANKRUPTCY

- Authors, Michael T. Perry, and A. Justin Ourso, III, Partners
Editor, Nan Roberts Eitel, Partner

The Bankruptcy Court for the Northern District of California has ruled that Bankruptcy Code section 365(n) does not apply to rejected trademark licenses, and that, following a debtor-licensor's rejection of an executory trademark licensing agreement, the trademark licensee has no right to use the licensed trademark. *In re Centura Software Corp.,* 2002 Bankr. LEXIS 960 (Bkrtcy.N.D.Cal. 2002).

The license agreement at issue gave the licensee the exclusive right to market and sell the debtor-licensor's software under the licensor's trademarks in certain parts of Europe. Because the licensee failed to pay a portion of the licensing fee, the debtor terminated and rejected the license agreement. Thereafter, the licensee filed an adversary proceeding to contest the termination and to seek recognition of its rights under section 365(n) notwithstanding the rejection.

ADMIRALTY & MARITIME
ANTITRUST & TRADE REGULATION
AVIATION
APPELLATE LITIGATION
BANKRUPTCY, RESTRUCTURING & CREDITORS-DEBTORS RIGHTS
BUSINESS & COMMERCIAL LITIGATION
COMMERCIAL LENDING & FINANCE
CONSTRUCTION
CORPORATE & SECURITIES
EMPLOYEE BENEFITS, ERISA, & EXECUTIVE COMPENSATION
ENERGY
ENVIRONMENTAL & TOXIC TORTS
ERISA, LIFE, HEALTH & DISABILITY INSURANCE LITIGATION
GAMING
GOVERNMENT RELATIONS
HEALTH CARE LITIGATION, TRANSACTIONS & REGULATION
INTELLECTUAL PROPERTY & E-COMMERCE
INTERNATIONAL
LABOR RELATIONS & EMPLOYMENT
MEDICAL PROFESSIONAL & HOSPITAL LIABILITY
MERGERS & ACQUISITIONS
PRODUCTS LIABILITY
PROFESSIONAL LIABILITY
PROJECT DEVELOPMENT & FINANCE
PUBLIC FINANCE
REAL ESTATE: LAND USE, DEVELOPMENT & FINANCE
TAX (INTERNATIONAL, FEDERAL AND STATE)
TELECOMMUNICATIONS & UTILITIES
TRUSTS, ESATES & PERSONAL PLANNING
VENTURE CAPITAL & EMERGING COMPANIES
WHITE COLLAR CRIME

Section 365 of the Bankruptcy Code governs the assumption or rejection of executory contracts in bankruptcy. Rejection of a contract results in the debtor being deemed in breach, leaving the non-debtor party with a general unsecured claim as if the contract had been breached prepetition. Section 365(n), however, affords an "intellectual property" licensee greater protection, permitting the licensee to use the licensed property even after the debtor-licensor rejects the license agreement. Thus, under section 365(n), a licensee can either treat the rejection as a breach and file a prepetition claim for damages or retain its rights under the agreement despite the rejection. Under the latter option, although the licensee can retain its rights under the agreement, the licensee has no right to seek future performance from the licensor. Section 365(n) was added to the Code by the Intellectual Property Bankruptcy Protection Act of 1988 ("IPBPA"), the primary impetus of which had been the decision in *Lubrizol Enterprises, Inc. v. Richmond Metal Finishers, Inc.*, 756 F.2d 1043 (4th Cir. 1985). In *Lubrizol*, the Fourth Circuit held that a bankruptcy court should not weigh equitable considerations in considering the debtor's rejection request and permitted the rejection of a technology licensing agreement.

Before *Centura*, at least one bankruptcy court had used section 365(n) in its rationale for decision. In *In Re Ron Matusalem & Matusa of Florida, Inc.*, 158 B.R. 514 (Bankr. S.D. Fla. 1993), the court declined to approve rejection of a franchise and related agreements, including a trademark licensing agreement. The *Centura* court, however, distinguished the Florida decision because the underlying rationale of that case was that the debtor had filed its bankruptcy in bad faith for the purpose of rejecting the agreements.

The *Centura* court found that, under the statute's plain language, section 365(n) does not apply to trademark licenses. Section 365(n) only affords special post-rejection rights to a licensee if the rejected license is one of "intellectual property." Bankruptcy Code section 101(35A) states that "'intellectual property' means" a "(A) trade secret, (B)invention, process, design, or plant protected under title 35, (C) patent application, (D) plant variety, (E) work of authorship protected under title 17, or (F) mask work protected under chapter 9 of title 17." Because the statute uses the term "means," rather than "includes," it limits the protected classes of intellectual property and does not protect licensee's of a rejected trademark license. The court noted that its ruling was consistent with the legislative history, which stated that the statute did not address the rejection of executory trademark licenses.

The legislative history is significant. The court was correct that the

ADMIRALTY & MARITIME
ANTITRUST & TRADE REGULATION
AVIATION
APPELLATE LITIGATION
BANKRUPTCY, RESTRUCTURING & CREDITORS-DEBTORS RIGHTS
BUSINESS & COMMERCIAL LITIGATION
COMMERCIAL LENDING & FINANCE
CONSTRUCTION
CORPORATE & SECURITIES
EMPLOYEE BENEFITS, ERISA, & EXECUTIVE COMPENSATION
ENERGY
ENVIRONMENTAL & TOXIC TORTS
ERISA, LIFE, HEALTH & DISABILITY INSURANCE LITIGATION
GAMING
GOVERNMENT RELATIONS
HEALTH CARE LITIGATION, TRANSACTIONS & REGULATION
INTELLECTUAL PROPERTY & E-COMMERCE
INTERNATIONAL
LABOR RELATIONS & EMPLOYMENT
MEDICAL PROFESSIONAL & HOSPITAL LIABILITY
MERGERS & ACQUISITIONS
PRODUCTS LIABILITY
PROFESSIONAL LIABILITY
PROJECT DEVELOPMENT & FINANCE
PUBLIC FINANCE
REAL ESTATE: LAND USE, DEVELOPMENT & FINANCE
TAX (INTERNATIONAL, FEDERAL AND STATE)
TELECOMMUNICATIONS & UTILITIES
TRUSTS, ESATES & PERSONAL PLANNING
VENTURE CAPITAL & EMERGING COMPANIES
WHITE COLLAR CRIME

omission of trademark licenses was not only significant but also intentional. As the licensee argued, the legislative history on the 1988 enactment included language that, in deferring any inclusion of trademark licenses (which exclusion was endorsed by groups such as the International Trademark Association), Congress's intent was "to allow the development of equitable treatment of the [trademark] situation by the bankruptcy courts." *Senate Report No. 100-505, 100th Cong. 2d Sess.* But the *Centura* court was not sympathetic to the licensee's attempt to rely on that history in urging a weighing of the relative equities, holding that, because the statutory language was unambiguous, resort to the legislative history to clarify or expand the applicable rule was inappropriate. The court observed that the licensee could have contested the rejection but had no special rights following court approval of the rejection.

Although some commentators on the *Centura* decision have called it a case of first impression, it is merely the latest in a series of decisions holding that, because trademarks were excluded from the definition of "intellectual property" in the IPBPA, trademark licensees do not have the protection of section 365(n) as amended by the IPBPA. Despite the apparent harshness of the vulnerability of trademark licensing agreements to rejection without special protection for the licensee, the licensor's interest in full exploitation of its trademark rights to facilitate rehabilitation appears to outweigh, in the bankruptcy context, the prejudice to the licensee, at least after the rejection of the agreement.

The *Centura* court, however, counseled licensees on how they might persuade a court to consider the equities. "[B]ecause § 365(n) governs intellectual property rights post-rejection and it explicitly excludes trademarks, in order to protect their entire bundle of rights, licensees...'must assert their rights early in the case, before the franchisor [licensor] receives court approval of its rejection decision (footnote omitted).' The licensees must at that time persuade the bankruptcy court to weigh the equities and not to reject the agreement because its trademarks are integrally linked to other intellectual property." *Id.* at 30. Note that the court only indicated equitable consideration as a possibility when the trademark rights are integrated with other intellectual property protected under the Act. In a proper case, however, a trademark licensee should be able to argue equitable considerations before the rejection of a licensing agreement, as in *In re Ron Matusalem,* even if the licensing agreement is simply a trademark licensing agreement that does not license other intellectual property, such as a trade secret or software.

JONES WALKER

E*ZINES
December 2002 Vol. 7

Bankruptcy, Restructuring, and Creditors-Debtors Rights
www.joneswalker.com
bankruptcy@joneswalker.com

ADMIRALTY & MARITIME
ANTITRUST & TRADE REGULATION
AVIATION
APPELLATE LITIGATION
BANKRUPTCY, RESTRUCTURING & CREDITORS-DEBTORS RIGHTS
BUSINESS & COMMERCIAL LITIGATION
COMMERCIAL LENDING & FINANCE
CONSTRUCTION
CORPORATE & SECURITIES
EMPLOYEE BENEFITS, ERISA, & EXECUTIVE COMPENSATION
ENERGY
ENVIRONMENTAL & TOXIC TORTS
ERISA, LIFE, HEALTH & DISABILITY INSURANCE LITIGATION
GAMING
GOVERNMENT RELATIONS
HEALTH CARE LITIGATION, TRANSACTIONS & REGULATION
INTELLECTUAL PROPERTY & E-COMMERCE
INTERNATIONAL
LABOR RELATIONS & EMPLOYMENT
MEDICAL PROFESSIONAL & HOSPITAL LIABILITY
MERGERS & ACQUISITIONS
PRODUCTS LIABILITY
PROFESSIONAL LIABILITY
PROJECT DEVELOPMENT & FINANCE
PUBLIC FINANCE
REAL ESTATE: LAND USE, DEVELOPMENT & FINANCE
TAX (INTERNATIONAL, FEDERAL AND STATE)
TELECOMMUNICATIONS & UTILITIES
TRUSTS, ESATES & PERSONAL PLANNING
VENTURE CAPITAL & EMERGING COMPANIES
WHITE COLLAR CRIME

BANKRUPTCY COURT CANNOT COMPEL ARBITRATION OF DEBTOR'S CORE CLAIMS

- Author, Genevieve M. Hartel, Associate
Editor, Nan Roberts Eitel, Partner

In *Gandy v. Gandy* (*In re Gandy)*, 299 F.3d 489 (5th Cir. 2002), the Fifth Circuit reviewed the bankruptcy court's refusal to compel arbitration of a Chapter 11 debtor-in-possession's adversary claims. Following its decision in *Matter of National Gypsum Co.*, 118 F.3d 1056 (5th Cir. 1997), the Fifth Circuit held that the bankruptcy court properly exercised its discretion and declined to compel arbitration of the debtor's core claims.

Gandy originated as the debtor's pre-bankruptcy state court suit challenging aspects of a limited partnership's asset liquidation. In the state court suit, the debtor sued her partners and others for breach of fiduciary duty, negligence, fraud, constructive trust, and breach of contract. On defendants' motion, the state court entered an order compelling arbitration of the debtor's claims. That afternoon, the debtor filed for bankruptcy. She immediately removed the state court action to the bankruptcy court, filed a separate adversary proceeding against the state court defendants, and had the two matters consolidated. Additionally, the debtor amended her complaint to include causes of action to avoid transfers under sections 544, 548, and 550 of the Bankruptcy Code, as well as claims for civil conspiracy, insider fraud, and substantive consolidation. The defendants asked the bankruptcy court to compel arbitration of the debtor's claims, and the bankruptcy court denied defendants' motion.

Ultimately affirming the bankruptcy court's decision, the Fifth Circuit began by addressing the relationship between the Federal Arbitration Act, 9 U.S.C. §§ 1, *et seq*., and the Bankruptcy Code. In particular, the court noted that the Federal Arbitration Act seeks to foster arbitration by making agreements to arbitrate valid, irrevocable, and enforceable. And it stressed that the Bankruptcy Code's goals include centralizing the resolution of purely bankruptcy issues, protecting creditors and reorganizing debtors from piecemeal litigation, and empowering the bankruptcy court to enforce its own orders.

Evaluating these possibly conflicting goals, the Fifth Circuit restated its holding in *Gypsum Co.*, 118 F.3d 1056, that the bankruptcy court lacks discretion to refuse to compel arbitration of arbitrable, *non-core* matters. The Fifth Circuit confirmed, however, the bankruptcy court's discretion to de-

ADMIRALTY & MARITIME
ANTITRUST & TRADE REGULATION
AVIATION
APPELLATE LITIGATION
BANKRUPTCY, RESTRUCTURING & CREDITORS-DEBTORS RIGHTS
BUSINESS & COMMERCIAL LITIGATION
COMMERCIAL LENDING & FINANCE
CONSTRUCTION
CORPORATE & SECURITIES
EMPLOYEE BENEFITS, ERISA, & EXECUTIVE COMPENSATION
ENERGY
ENVIRONMENTAL & TOXIC TORTS
ERISA, LIFE, HEALTH & DISABILITY INSURANCE LITIGATION
GAMING
GOVERNMENT RELATIONS
HEALTH CARE LITIGATION, TRANSACTIONS & REGULATION
INTELLECTUAL PROPERTY & E-COMMERCE
INTERNATIONAL
LABOR RELATIONS & EMPLOYMENT
MEDICAL PROFESSIONAL & HOSPITAL LIABILITY
MERGERS & ACQUISITIONS
PRODUCTS LIABILITY
PROFESSIONAL LIABILITY
PROJECT DEVELOPMENT & FINANCE
PUBLIC FINANCE
REAL ESTATE: LAND USE, DEVELOPMENT & FINANCE
TAX (INTERNATIONAL, FEDERAL AND STATE)
TELECOMMUNICATIONS & UTILITIES
TRUSTS, ESATES & PERSONAL PLANNING
VENTURE CAPITAL & EMERGING COMPANIES
WHITE COLLAR CRIME

cline to compel arbitration of *core* matters if compelling arbitration would conflict with the Bankruptcy Code's purpose. The court then reviewed the facts and claims before it to assess whether the debtors' claims were core matters, and, if so, whether compelling arbitration of those claims would conflict with the Bankruptcy Code's purpose.

The court analyzed debtor's claims and found that they were all core claims under 28 U.S.C. § 157. It noted that the debtor's claims in the adversary proceeding derived exclusively from the trustee's "strong arm powers" under Bankruptcy Code § 544, that is, the trustee's ability to avoid a transfer that an unsecured creditor could have avoided under applicable state law. In addition, the court acknowledged that the debtor sought to avoid the debtor's fraudulent transfers under Bankruptcy Code § 548 and sought to recover the transferred property or its value under Bankruptcy Code § 550. Reiterating its holding in *National Gypsum*, the court stated that claims under Bankruptcy Code §§ 544, 548, and 550 exist for the benefit of creditors of the bankruptcy estate, and, where such claims exist, "the importance of the federal bankruptcy forum provided by the Code is at its zenith."

In concluding that the debtor's §§ 544, 548, and 550 claims were core matters, the Fifth Circuit rejected defendants' argument that the claims were not core because some of the claims involved the debtor's pre-petition legal or equitable rights. The court acknowledged that the debtor's amended complaint involved non-bankruptcy contractual and tort issues. But the Fifth Circuit reasoned that debtor's core claims predominated because, by seeking bankruptcy relief, the debtor became a debtor-in-possession vested with the right and ability to deal with her contracts and property in a manner that would have been impossible but for her bankruptcy filing.

Having resolved that the debtor's claims were core claims, the Fifth Circuit next assessed whether compelling arbitration of those claims would conflict with the purposes of the Bankruptcy Code. The court noted not only that the debtor's claims were derived from the Bankruptcy Code, but also that resolving the debtor's claims would implicate matters central to the purposes and policies of the Bankruptcy Code, that is, the expeditious and equitable distribution of the assets of the debtor's estate.

For instance the court underscored that, in connection with the debtor's claims, the bankruptcy court had already entered a temporary restraining order against further transfers of certain assets to offshore trusts. In light of this fact, the bankruptcy court's expertise and power–including its compulsory jurisdiction, contempt powers, and ancillary jurisdiction with re-

ADMIRALTY & MARITIME
ANTITRUST & TRADE REGULATION
AVIATION
APPELLATE LITIGATION
BANKRUPTCY, RESTRUCTURING & CREDITORS-DEBTORS RIGHTS
BUSINESS & COMMERCIAL LITIGATION
COMMERCIAL LENDING & FINANCE
CONSTRUCTION
CORPORATE & SECURITIES
EMPLOYEE BENEFITS, ERISA, & EXECUTIVE COMPENSATION
ENERGY
ENVIRONMENTAL & TOXIC TORTS
ERISA, LIFE, HEALTH & DISABILITY INSURANCE LITIGATION
GAMING
GOVERNMENT RELATIONS
HEALTH CARE LITIGATION, TRANSACTIONS & REGULATION
INTELLECTUAL PROPERTY & E-COMMERCE
INTERNATIONAL
LABOR RELATIONS & EMPLOYMENT
MEDICAL PROFESSIONAL & HOSPITAL LIABILITY
MERGERS & ACQUISITIONS
PRODUCTS LIABILITY
PROFESSIONAL LIABILITY
PROJECT DEVELOPMENT & FINANCE
PUBLIC FINANCE
REAL ESTATE: LAND USE, DEVELOPMENT & FINANCE
TAX (INTERNATIONAL, FEDERAL AND STATE)
TELECOMMUNICATIONS & UTILITIES
TRUSTS, ESATES & PERSONAL PLANNING
VENTURE CAPITAL & EMERGING COMPANIES
WHITE COLLAR CRIME

spect to possible foreign proceedings–were better suited to resolving the debtor's claims than the expertise and power of an arbitrator. In addition, the court noted that one defendant had filed a proof of claim in the bankruptcy. The proof of claim, the court stated, invoked special bankruptcy rules concerning objections to claims, estimation of claims, and the rights afforded a claimant to the distribution of the assets of the estate. Likewise, the court noted that the debtor's request for substantive consolidation involved an extreme remedy allowed only under the Bankruptcy Code.

In light of these considerations, the court ruled that the bankruptcy court properly exercised its discretion in declining to compel arbitration of the debtor's core claims. The court also affirmed the bankruptcy court's decision refusing to compel arbitration of any of the debtor's claims, even the non-core claims. In so doing, the court refused to segregate the debtor's claims and to compel arbitration of the non-core matter, noting that parallel proceedings would be inefficient, lead to inconsistent results, and subject the parties to incompatible obligations.

Remember that these legal principles may change and vary widely in their application to specific factual circumstances. You should consult with counsel about your individual circumstances. For further information regarding these issues, contact our Bankruptcy practice group:

R. Patrick Vance
Jones Walker
201 St. Charles Ave., 49th Fl.
New Orleans, LA 70170-5100
ph. 504.582.8194
fax 504.589.8194
email pvance@joneswalker.com

Bankruptcy, Restructuring, & Creditors-Debtors Rights Practice Group

BRAD J. AXELROD
JEFFREY M. BAUDIER
MATTHEW T. BROWN
NAN ROBERTS EITEL
ELIZABETH J. FUTRELL
GENEVIEVE M. HARTEL
CORINNE G. HUFFT
MATTHEW J. LANDREAU
ROBIN D. MCGUIRE
R. LEWIS MCHENRY
MICHAEL T. PERRY
TARA RICHARD
CARL D. ROSENBLUM
CLAIBORNE P. TANNER
R. PATRICK VANCE

To subscribe to other E*Zines, visit www.joneswalker.com/news/ezine.asp