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Equitable Subordination v. Debt Recharacterization

By Wendy M. Simkulak

Recent court decisions have drawn significant distinctions between the once closely related concepts of equitable subordination and debt recharacterization. In *Sender v. Bronze Group, Ltd. (In re Hedged-Investments Associates, Inc.)*, 380 F.3d 1292 (10th Cir. 2004), the U.S. Court of Appeals for the Tenth Circuit outlined the differences between the two remedies.

Recharacterization allows courts to use their equitable powers to recognize the true substance of a transaction and to treat a "loan" as an equity investment if the facts indicate that the loan was actually a capital contribution. Equitable subordination, as outlined in 11 U.S.C. § 510(c), is the subordination of a claim of a creditor whose conduct has caused injury to other parties or has afforded the creditor an unfair advantage over other creditors. Thus, recharacterization is based on a factual inquiry into the substance of the transaction, whereas equitable subordination is largely based on the behavior of the parties involved.

The court of appeals held that factors to be reviewed in determining whether to recharacterize debt as equity include: (1) the names given to the certificates evidencing the indebtedness; (2) the presence or absence of a fixed maturity date; (3) the source of payments; (4) the right to enforce payment of principal and interest; (5) participation in management flowing as a result; (6) the status of the contribution in relation to regular corporate creditors; (7) the intent of the parties; (8) "thin" or adequate capitalization; (9) identity of interests between the creditor and stockholder; (10) the source of interest payments; (11) the ability of the corporation to obtain loans from outside lending institutions; (12) the extent to which the advance was used to acquire capital assets; and (13) the failure of the debtor to repay on the due date or to seek a postponement.

Hedged-Investments Associates, Inc. (HIA) was a stock investment Ponzi scheme, which operated for 13 years before it collapsed in 1990. In 1986, during the fund's heyday, the Bronze Group, Ltd. (Bronze Group), a limited partnership constituted by certain corporations' pension trusts, advanced funds to HIA in the aggregate amount of $1.83 million. HIA's obligations to the Bronze Group were secured by a security interest in certain of HIA's trading accounts with Kidder Peabody. The Bronze Group loans carried a floating interest rate that guaranteed a minimum rate of 15 percent, plus additional interest matching the rate of any greater HIA earnings, minus a 4 percent annual fee, terms which were substantially the same as the terms HIA was then offering to its equity investors.

Many of the members of the Bronze Group had previously been members of a similar partnership called BGL Associates (BGL). Although BGL was not a limited partner of HIA, certain of BGL's accounts were managed by another company run by James Donahue, who not only also ran HIA, but commingled BGL's funds with HIA's funds. Upon learning of this commingling, BGL withdrew its funds from Donahue's control and BGL was itself dissolved. Subsequently, certain of the former members of BGL formed the Bronze Group, whose initial loan to HIA was in the same amount ($900,000) as the amount formerly invested by Donahue on behalf of BGL. After HIA collapsed, certain of HIA's limited partners and investors sought to have the Bronze Group's secured loan recharacterized as an equity investment or, alternatively, equitably subordinated to the claims of other creditors.

The court rejected the appellant-investors' argument that because the terms of the loan documents were very similar to those of the limited

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partnership agreement signed by the debtor's equity investors, the loan should be recharacterized as an equity contribution. Specifically, the court found that the parties intended for the transaction to be a loan and that the documents evidenced such an intent, as the lender had the right to enforce payment of principal and interest and did not receive management control.

As for equitable subordination, the court listed three factors to be considered: (1) inequitable conduct on the part of the claimant sought to be subordinated; (2) injury to the other creditors of the debtor, or unfair advantage to the claimant resulting from the claimant's conduct; and (3) consistency with the provisions of the Bankruptcy Code. The court first noted that the allowance of equitable subordination absent a finding of inequitable conduct is a narrow exception that is only applicable to tax penalty claims. Thus, holding that a claim cannot be equitably subordinated without a finding of inequitable conduct, the court identified three kinds of inequitable conduct: (1) fraud, illegality, and breach of fiduciary duties; (2) undercapitalization; or (3) the claimant's use of the debtor as a mere instrumentality or alter ego. If the claimant is an insider or fiduciary, there need only be a showing of unfair conduct and a degree of culpability. Otherwise, there must be a showing of egregious conduct tantamount to fraud, misrepresentation or spoliation.

> "[R]echaracterization is based on a factual inquiry into the substance of the transaction, whereas equitable subordination is largely based on the behavior of the parties involved."

The court found that the lender's failure to conduct reasonable due diligence was not fraud even though the terms of the loan were questionable. It further held that undercapitalization did not rise to the level of gross misconduct where the lenders were unaware of the borrower's precarious financial position at the time of the loan. The court also noted that even if the lender were held to be an insider, its conduct was not unfair because the party seeking to have the claim subordinated did not allege that the lender had an intent to deceive, and there was no evidence that the lender had knowledge of the debtor's fraudulent practices. |||

Narrow Channel: Third Circuit Court Restricts Asbestos Liability Shield for Non-Debtors

By Rudolph J. Di Massa, Jr. and Kevin P. Ray

Companies seek bankruptcy protection for a variety of reasons – they are carrying more debt than they can service; the markets for their products have deteriorated; or, sometimes, their principals have engaged in financial fraud. Moreover, the last one and one-half decades have seen otherwise healthy companies seek chapter 11 bankruptcy protection in an effort to control mass tort liability arising from the exposure to asbestos of their employees, customers and others.

In *In re Combustion Engineering, Inc.*, Nos. 03-3392, 03-3415, 03-3425, 03-3436, 03-3445, 03-3446, 03-3450, 03-3451, 03-3452, 03-3468, 03-3492, 03-3558, 391 F.3d 190 (3d Cir. 2004), the U.S. Court of Appeals for the Third Circuit recently addressed whether, and under what circumstances, a channeling injunction to manage companies' asbestos liability may extend to non-debtors.

Asbestos Liability and the Future Claimants' Dilemma

Generally, with injuries arising out of exposure to asbestos, neither the victim nor the extent of the victim's injury is immediately ascertainable: an extended period of exposure is often followed by a long latency period before the injury manifests. Years – even decades – pass between the initial exposure and the time at which a victim's injury becomes apparent. Companies that used asbestos in their products or manufacturing processes in the 1920s began seeing asbestos-related personal injury lawsuits brought against them in the 1960s. Asbestos-related claims expanded dramatically in

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the 1980s and 1990s. In the context of an asbestos-related bankruptcy case, this latency period results in what is called the "Future Claimants' Dilemma" – the risk that present claims may so overwhelm a company that the company is forced to liquidate, effectively precluding the possibility of any recovery for future claims as they manifest.

In 1994, Congress added § 524(g) to the Bankruptcy Code to address this very specific problem: how best to enable both companies and claimants to handle liabilities and injuries arising from asbestos-containing products. Section 524(g) codified the resolution reached in the *Johns Manville* bankruptcy case. Broadly, § 524(g) provides for the creation of a trust, which is funded by the stock, future earnings and, frequently, contributions from insurance carriers of the reorganizing debtor. All asbestos-related claims against the debtor or against third parties arising out of their relationship with the debtor are channeled into the trust. In connection with the confirmation of the debtor's plan of reorganization, the bankruptcy court enters an injunction prohibiting any asbestos-related claim from being asserted against the debtor (or covered third parties) and requiring that all such claims be asserted instead against (and paid out of) the trust. Section 524(g) protects the reorganizing debtor by shielding it from asbestos liability, but this section is also intended to protect future asbestos claimants whose claims would be ill-served if the company were forced to liquidate: a trust established under § 524(g) is intended to provide an adequately funded corpus from which future claims may be satisfied.

For companies facing mounting and potentially overwhelming asbestos liability, § 524(g) is important not only as a mechanism to permit the company to remain viable and to manage asbestos claims, but also for the protection it provides to several groups of non-debtors, shielding them from asbestos-related liability that may arise due to a relationship the non-debtor had with the debtor. However, courts have disagreed as to whether a channeling injunction may be extended to these non-debtors.

Combustion Engineering, Inc.

For several decades, Combustion Engineering, Inc. ("Combustion Engineering") manufactured steam boilers containing asbestos insulation. As the court observed, "[t]he company was first named as a defendant in an asbestos-related lawsuit in the 1960s, and its asbestos liability increased steadily over the next thirty years." Combustion Engineering sought relief under chapter 11 the Bankruptcy Code, filing its petition on February 13, 2003, with a proposed pre-packaged reorganization plan (the "Plan") that was designed to take advantage of the protections offered by § 524(g). As the court noted, "Combustion Engineering defended asbestos-related litigation for nearly four decades until mounting personal injury liabilities eventually brought the company to the brink of insolvency." As part of the Plan, Combustion Engineering and its parent company, Asea Brown Boveri, Inc. ("US ABB"), sought to shield two non-debtor affiliates of US ABB – ABB Lummus Global, Inc. ("Lummus") and Basic, Inc. ("Basic") – from asbestos liability. The trust was to be funded by contributions from, among others, Combustion Engineering, US ABB, Basic and Lummus.

> "Because § 524(g) expressly contemplates the inclusion of third parties' liability within the scope of a channeling injunction – and sets out the specific requirements that must be met in order to permit inclusion – the general powers of § 105(a) cannot be used to achieve a result not contemplated by the more specific provisions of § 524(g)."

Although the bankruptcy court noted that Basic and Lummus shared certain insurance coverage with Combustion Engineering, the court found that the asbestos liabilities of Basic and Lummus were not otherwise derivative of or related to Combustion Engineering's liability. As a consequence, the bankruptcy court found that a § 524(g) injunction could cover only those liabilities that Basic and Lummus shared with Combustion Engineering (i.e., those resulting from their prior affiliation or other relationship with Combustion Engineering or ownership of Combustion Engineering's assets), but not those that were direct claims against Basic and Lummus only (i.e., their independent liabilities). However, the bankruptcy court held that, although it could not include Basic and Lummus within a channeling injunction under § 524(g), it could, under § 105 of the Bankruptcy Code, issue an equitable channeling

injunction with respect to the affiliates' independent liabilities. The bankruptcy court recommended approval of the Plan, and the district court confirmed the Plan.

An Injunction Under § 105(a) May Not Extend a Channeling Injunction Beyond the Specific Provisions of § 524(g)

In reviewing whether a court may extend a channeling injunction to include non-debtors' independent liabilities that are not derivative of a debtor's liabilities, the court of appeals rejected the lower courts' positions. Reasoning that § 524(g) sets express requirements for a non-debtor to avail itself of the benefits of a channeling injunction, the court of appeals held that a bankruptcy court may not use its general equitable powers under § 105(a) to expand a channeling injunction beyond those requirements.

Section 524(g) provides that the benefits of a channeling injunction may extend to:

> (1) a transferee or successor to the debtor's assets with respect to any claim made on account of that transfer or succession;
>
> (2) lenders to the debtor or trust, with respect to a claim based upon any such loan; and
>
> (3) any third party whose liability arises out of its association with the debtor because of:
>
> > (a) the third party's ownership of a financial interest in the debtor (or an affiliate or a predecessor of the debtor);
> >
> > (b) the third party's involvement in the management of the debtor (or a predecessor of the debtor), or service as an officer, director or employee of the debtor or a related party;
> >
> > (c) the third party's provision of insurance to the debtor or a related party; or
> >
> > (d) the third party's involvement in a transaction changing the corporate structure, or in a loan or other financial transaction affecting the financial condition, of the debtor or a related party.

The court of appeals agreed with the lower courts' determination that Basic and Lummus did not fall within any of the express provisions of § 524(g). Basic's and Lummus's asbestos liability, as the court noted, was not derivative of Combustion Engineering's liability. Indeed, the court found that the relationship between Basic, Lummus and Combustion Engineering was too indirect to support bankruptcy court jurisdiction. While these two companies were affiliates of a common parent company, the court observed that this relationship alone was insufficient to bring asbestos claims against Basic and Lummus within the ambit of a channeling injunction entered in connection with Combustion Engineering's Plan. The court stated that:

> Any corporate relationship between Combustion Engineering, Basic and Lummus derives from the ABB holding company structure and a common parent that is not seeking bankruptcy protection. The record demonstrates that Combustion Engineering, Basic and Lummus are independent corporate entities, with separate and distinct management and operations. Combustion Engineering does not currently own or control non-debtors Basic and Lummus. A corporate affiliation between lateral, peer companies in a holding company structure, without more, cannot provide a sufficient basis for exercising federal subject matter jurisdiction. Such an affiliation could be relevant to the jurisdictional inquiry if supported by factual findings demonstrating that a suit against Basic or Lummus would deplete the estate or affect its administration.

In addition, the court found that no commonality existed between the claims against Basic, Lummus and Combustion Engineering. Indeed, ". . . the asbestos-related personal injury claims asserted against Combustion Engineering, Basic and Lummus [arose] from different products, involved different asbestos-containing materials, and were sold to different markets." Finally, the court rejected the view that sufficient commonality existed because the companies employed "common production sites."

The court also rejected the proposition that § 105(a) could provide an independent basis for issuing a channeling injunction. The court stated that:

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> [h]ere, the Bankruptcy Court relied upon § 105(a) to achieve a result inconsistent with § 524(g)(4)(A). . . . Because § 524(g) expressly contemplates the inclusion of third parties' liability within the scope of a channeling injunction – and sets out the specific requirements that must be met in order to permit inclusion – the general powers of § 105(a) cannot be used to achieve a result not contemplated by the more specific provisions of § 524(g).

Conclusion

Although a bankruptcy court's equitable powers under § 105(a) are extensive, those powers are not unlimited. In fact, courts have consistently held that § 105(a) may be invoked only to achieve the purposes of another section of the Bankruptcy Code. Where, as here, that section establishes a specific procedure or requirement, a bankruptcy court may not use § 105(a) as a basis for deviating from or contravening that more specific provision.

Section 524(g) channeling injunctions remain powerful and important tools for managing asbestos claims, but the U.S. Court of Appeals for the Third Circuit has emphasized the bright line that the Bankruptcy Code draws around the requirement that only claims that are derivative of the debtor's own liability may be the subject of these injunctions. |||

The UFTA's Four-Year Statute of Limitations Doesn't Necessarily Preclude a Remedy

By Rudolph J. Di Massa, Jr. and Sommer L. Ross

Under section 9 of the Uniform Fraudulent Transfer Act (UFTA), a creditor has four years from the date of an alleged fraudulent transfer to bring a cause of action against the transferor. However, the U.S. Court of Appeals for the First Circuit, in *In re Valente*, 360 F.3d 256 (1st Cir. 2004), gave creditors an alternative to the remedies and limitations provided in the UFTA and allowed recovery against transferors under state common law.

The Facts

In re Valente involved a dispute between Fleet National Bank (Fleet) and Paul Valente (Valente). In 1989, Fleet loaned Valente $180,000 in exchange for a lien on Valente's Newport, Rhode Island, property. Valente eventually defaulted on the loan, Fleet instituted foreclosure proceedings, the property was sold at a sheriff's sale and Fleet obtained a deficiency judgment against Valente. The resulting execution order which was filed of record levied the goods, chattels and real estate of Valente, including all real estate located within the town of Middletown, Rhode Island, where Valente owned another parcel of property.

However, on June 30, 1992, approximately one year before the entry of the deficiency judgment, Valente had transferred title to the Middletown property to his son, who paid nothing in exchange for the transfer. At the time, the Middletown property was Valente's primary asset, and it was encumbered by a mortgage (which exceeded the value of the property) and by IRS and Rhode Island state tax liens.

On January 28, 1994, Valente filed a "no asset" petition for relief under chapter 7 of the United States Bankruptcy Code. During Valente's bankruptcy case, the IRS and the state of Rhode Island released their tax liens on the Middletown property. Valente ultimately received a discharge in April 1994.

During and after the bankruptcy proceeding, Valente continued to manage, maintain and live on the Middletown property as if he remained the actual owner. In 1997, Valente leased the property to a third party. Valente signed the lease agreement and collected rents. In April 1999, Valente's son transferred title to the Middletown property back to Valente, for no consideration. Four months later, Valente sold the property. In order to close on the sale, Valente needed to remove Fleet's 1993 lien on the property.

Fleet agreed to release its lien on the condition that $18,000 of the sale proceeds be put into escrow as security for its deficiency claim plus interest. Valente placed the money in escrow and the sale closed. Rather than

authorize the release of the escrow, Valente reopened his bankruptcy case in February 2000 and filed a motion to recover the funds. Valente claimed that he did not own the Middletown property at the time that Fleet's lien was recorded, so that Fleet's lien never attached to the property. He urged, therefore, that Fleet's claim was an unsecured claim in the bankruptcy case, which was discharged in 1994. Valente asked the bankruptcy court to hold Fleet in contempt for attempting to enforce a discharged debt and to order the escrow agent to turn the funds over to him. Fleet responded with its own turnover motion, which was denied by the United States Bankruptcy Court for the District of Rhode Island.

"[T]he UFTA [does] not preempt common law remedies applicable to fraudulent transactions."

Procedural History

Reluctantly, the bankruptcy court found for Valente, holding that because Valente lacked equity in the property when he conveyed it to his son, the conveyance did not constitute a "transfer" of an "asset" under the UFTA. The court further held that even if the conveyance did constitute a transfer under the UFTA, Fleet could not recover because it filed its turnover motion after the UFTA's four-year statute of limitations had expired. Accordingly, the court ordered the escrow agent to turn the funds over to Valente.

On appeal, Fleet argued that the UFTA did not apply because its action was not a suit to recover property that had been fraudulently transferred. Instead, Fleet claimed its turnover motion was aimed at enforcing a lien on the equitable interest that Valente retained in the property after he had transferred legal title to his son for no consideration. The district court rejected this argument and upheld the bankruptcy court's order. Fleet then appealed to the U.S. Court of Appeals for the First Circuit.

The Court's Analysis

The appellate court began with an affirmation of the decision of the bankruptcy court that Fleet could not recover under Rhode Island's codification of the UFTA due to the fact the Middletown property did not qualify as an "asset" as defined in the UFTA, since the property was encumbered beyond its value at the time of the transfer. However, the court found that the bankruptcy court erred in its decision not to look beyond the UFTA to common law remedies.

The court reasoned that Rhode Island's adoption of the UFTA did not preempt common law remedies applicable to fraudulent transactions. In evaluating Fleet's claim, the court focused on three specific issues: 1) whether Valente retained an equitable interest in the transferred property under Rhode Island law; 2) whether Rhode Island common law allows for recovery against such interests; and 3) whether Fleet filed the necessary action within the proper limitations period. The court found in favor of Fleet on all three issues.

First, the court found that Valente did retain an equitable interest in the Middletown property after he transferred it to his son. The court cited several cases, one of which held that "under Rhode Island law, a resulting trust arises where a person makes or causes to be made a disposition of property under circumstances which raise an inference that he does not intend that the person taking or holding the property should have the beneficial interest therein." Then, the court reviewed the facts surrounding Valente's transfer: 1) the transfer was made shortly before Valente filed for bankruptcy because he couldn't afford to keep it any longer; 2) there was no consideration paid by the son; 3) the two men seemed to have an understanding that Valente was going to live in the house and not pay rent; 4) Valente continued to treat the property as his own, as evidenced by the fact he paid all the bills, managed the lease and sale of the property, and continued to run his business on the premises; and 5) the son transferred the property back to Valente without consideration after being informed that Valente wanted to sell it. According to the court, this evidence compelled a finding of a resulting trust, with Valente's son holding legal title in trust for Valente and Valente holding an equitable interest.

Second, the court found that Fleet's recording of its deficiency judgment created a lien on Valente's equitable interest in the Middletown property. Lastly, the appellate court found that Fleet's claim was not time barred because Rhode Island's statute of limitations for fraudulent transactions is ten years. In summary, *In re Valente* is a notable decision due to the emphasis that the First Circuit Court of Appeals placed on state common law and equitable remedies. It will be interesting to see if other courts follow suit. |||

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About Duane Morris Attorneys

Mikel Bistrow and **Chris Celentino**, both of the San Diego office, gave a seminar on November 11, 2004, on "Bankruptcy Taxation" at the 8th Annual Tax and Accounting Institute sponsored by University of California, an event drawing about 200 attendees. On November 11, Mikel also gave a presentation to the Power Sports National Creditor Group on "Trade Groups – Overview of Antitrust Issues." The parties in attendance were the senior credit officers of companies such as Honda, Kawasaki, Yamaha and Harley Davidson.

Kay Catherwood, of the San Diego office, has been elected president of the San Diego Bankruptcy Forum, the leading professional organization for bankruptcy lawyers in San Diego.

Jim Holman, **Joann Moscariello**, **Kevin Ray** and **Margery Reed**, all of the Philadelphia office, presented a seminar in December 2004 on the topic of "Selected Bankruptcy Issues for Insurers to Consider to Minimize the Risks of an Insured's Bankruptcy Filing," which was sponsored by The Insurance Society of Philadelphia.

Skip Di Massa, of the Philadelphia office, is co-chair of the Mid-Atlantic Conference of the American Bankruptcy Institute, which is sponsoring a workshop in August 2005. Skip also is a member of the Steering Committee of the Eastern District of Pennsylvania Bankruptcy Conference.

As the Vice President of Education for the American Bankruptcy Institute, **Neil Olack**, of the Atlanta office, served as program chair for the Winter Leadership Conference in Scottsdale, Arizona, on December 2-5, 2004. The program was attended by more than 750 insolvency professionals, primarily from the United States and Canada. **John Collen**, of the Chicago office, moderated a speaker panel at the Conference, which addressed various residential real estate issues that occur in high net-worth individual bankruptcy cases, including treatment of tenancies by the entireties, partition, compulsory sale of non-bankruptcy co-owner's interests, and extra-territorial recognition of homestead exemptions.

Neil also spoke at the Oklahoma Bar Association's 19th Annual Seminar, on December 10, 2004, on "Deepening Insolvency: The 'Latest' Tort Affecting Professionals and Their Insurers."

Margery Reed, of the Philadelphia office, has been elected a fellow of the American College of Bankruptcy. She will be inducted on March 18, 2005. Other Duane Morris fellows of the College are **John Collen**, **William Katchen**, **Neil Olack** and **David Sykes**.

Margery will be speaking on April 2, 2005, on the "Enforceability of Prepayment Premium Provisions" in a joint program sponsored by the American Bar Association Business Law Section, Business Transactions Subcommittee and Commercial Financial Services, Real Estate Finance Subcommittee at the Spring Meeting in Nashville, Tennessee.

David Stein, of the Newark office, was recently appointed to co-chair the Tax Committee of the American Bankruptcy Institute.

David presented a seminar on "The Intersection of Family Law and Bankruptcy Law" before the Essex County Bar Association on February 24, 2005. |||

About Duane Morris

Duane Morris LLP, among the 100 largest law firms in the U.S., is a full-service firm of approximately 550 lawyers representing clients across the nation and around the world through 18 offices. Lawyers in our Business Reorganization and Financial Restructuring Practice Group work closely with each client, whether debtor, trustee, lender or creditor, to determine appropriate strategies for deriving maximum value from a troubled entity. Clients draw on the firm's extensive reorganization experience gained during its involvement in many of the largest restructurings of the past three decades and the capabilities of a national team of bankruptcy lawyers in jurisdictions across the U.S. | | |

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