

# 23<sup>RD</sup> ANNUAL ADVANCED RESTRUCTURING & PLAN OF REORGANIZATION CONFERENCE

AIRA | Association of  
Insolvency &  
Restructuring Advisors

## 2024 – The Year in Review from the Perspectives of Judges and Attorneys

### Moderators:

Travis G. Buchanan, *Young Conaway Stargatt & Taylor, LLP*

Theresa A. Foudy, *Morrison Foerster LLP*

### Panelists:

Hon. Philip Bentley, *U.S. Bankruptcy Court, S.D.N.Y. (New York, NY)*

Hon. Thomas M. Horan, *U.S. Bankruptcy Court, D. Del. (Wilmington, DE)*

Hon. Michael D. Kaplan, *U.S. Bankruptcy Court, D.N.J. (Trenton, NJ)*

# What Happens After *Purdue*?

# *Harrington v. Purdue Pharma L. P.,*

603 U.S. \_\_\_, 2024 WL 3187799 (June 27, 2024)

- Bankruptcy Code Section 157(b)(5)
- Fed. R. Evid. 706 (court-appointed experts)
- What claims are direct versus derivative?
- What does it mean to be “consensual”?

# Third Circuit Concurs With Fifth And Ninth Circuits On Make-wholes And Solvent Debtors

# *In re Hertz Corp.,*

No. 23-1169, 2024 WL 4132132 (3d Cir. 2024)

## Facts & Procedural History

- In May 2020, Hertz and its affiliated debtors (“Hertz”) filed for chapter 11 bankruptcy protection in the U.S. Bankruptcy Court for the District of Delaware (the “Bankruptcy Court”). The Bankruptcy Court confirmed Hertz’s plan of reorganization (the “Plan”) in June 2021.
- The Plan provided for the full payment of Hertz’s pre-petition debt and left all creditors unimpaired. This pre-petition debt included Hertz’s liability on unsecured bonds maturing biennially from 2022 to 2028 (the “Notes”).

# *In re Hertz Corp.,*

No. 23-1169, 2024 WL 4132132 (3d Cir. 2024)

## Facts & Procedural History (cont'd)

- As to post-petition interest accrued on the Notes, the Plan paid the holders of the Notes (the “Noteholders”) interest at the federal judgment rate (0.15% annually) as opposed to the significantly higher contract rate.
- Moreover, the Plan did not account for payment of the Notes’ make-whole fees (the “Make-Whole Fees”), which compensate the Noteholders for their lost profits when Herz pays off the Notes ahead of schedule.
- The value of contract interest and Make-Whole Fees not paid to the Noteholders was more than \$270 million. The Plan channeled these savings into a cash and equity package for the Hertz stockholders worth about \$1.1 billion.

# *In re Hertz Corp.,*

No. 23-1169, 2024 WL 4132132 (3d Cir. 2024)

## Facts & Procedural History (cont'd)

- In July 2021, the Noteholders filed a complaint in the Bankruptcy Court, claiming they were owed post-petition interest at the contract rate and payment of the Make-Whole Fees.
- The Bankruptcy Court dismissed the Noteholders' claim for interest at the contract rate, holding that the applicable interest rate is the "legal rate," which is the federal judgment rate.
- Moreover, the Bankruptcy Court noted that the "economic substance" of the Make-Whole Fees was interest and held that this claim was barred under 11 U.S.C. §502(b)(2), which prohibits claims for unmatured interest.
- The Bankruptcy Court *sua sponte* certified its ruling for direct appeal to the Third Circuit.

# *In re Hertz Corp.,*

No. 23-1169, 2024 WL 4132132 (3d Cir. 2024)

## Issues

- Does § 502(b)(2)'s prohibition on claims “for unmatured interest” cover make-whole fees?
- Does the Bankruptcy Code as a whole require solvent debtors to pay unimpaired creditors interest accruing post-petition at the contract rate?



# *In re Hertz Corp.,*

No. 23-1169, 2024 WL 4132132 (3d Cir. 2024)

## Holding & Rationale

- The Third Circuit held “§ 502(b)(2) disallows a claim for unmatured interest if it is either definitionally interest or its economic equivalent.” Here, the Make-Whole Fees were both.
- But the Third Circuit also held that, because Hertz was solvent, the Noteholders were entitled to receive contract-rate interest, including the Make-Whole Fees.

***In re Hertz Corp.,***  
No. 23-1169, 2024 WL 4132132 (3d Cir. 2024)  
**Holding & Rationale (cont'd)**

- According to the court, the Make-Whole Fees fit the dictionary definition of interest because “they are ‘compensation’ Hertz committed to pay (upon a contingency) in order to borrow (*i.e.*, use) the Noteholders’ money.” 2024 WL 4132132, at \*7.
- The Make-Whole Fees were also the “economic equivalent” of interest because they were “mathematically equivalent to the unmatured interest the Noteholders would have received had Hertz redeemed the Notes on their Redemption Dates.” 2024 WL 4132132, at \*8.

# *In re Hertz Corp.,*

No. 23-1169, 2024 WL 4132132 (3d Cir. 2024)

## Holding & Rationale (cont'd)

- According to the court, “the absolute priority rule requires creditors’ obligations be paid in full before owners, with junior rights to the business, take anything at all.” As a result, the Bankruptcy Code’s absolute priority rule “can require payment of contract rate interest in solvent debtor cases.” 2024 WL 4132132, at \*14.
- “But while the absolute priority rule can require payment of contract interest in solvent debtor cases, it does not always do so. Rather, it imposes the equitable rate of post-petition interest, whatever that may be.” 2024 WL 4132132, at \*14.
- In this case, where the stockholders received \$1.1 billion in value from Hertz when the plan went effective more than three years ago, “the equities demand the Noteholders recover post-petition interest at the contract rate.” 2024 WL 4132132, at \*14.

# Two Diverging Opinions On Disinterestedness Of Proposed Debtors' Counsel

# *In re Invitae Corp.,*

No. 24-11362 (MBK), 2024 WL 2230069 (Bankr. D.N.J. May 16, 2024)

## Facts & Procedural History

- Invitae Corporation and its affiliates (the “Debtors”) applied for court approval to retain Kirkland & Ellis (“K&E”) as counsel in their chapter 11 proceedings.
- Deerfield L.P. and its affiliates (“Deerfield”) were a current client of K&E’s at the time of firm’s representation of the Debtors. In 2023, K&E billed Deerfield approximately \$1.88 million, which amounted to 0.03% of the firm’s annual revenue.
- Deerfield was the Debtors’ largest secured creditor, holding 79% of the Debtors’ debt.
- K&E did not represent either Deerfield or the Debtors in any prepetition transaction between the parties.
- K&E’s present representation of Deerfield pertained to “matters wholly unrelated” to the Debtors’ chapter 11 bankruptcy.

# *In re Invitae Corp.,*

No. 24-11362 (MBK), 2024 WL 2230069 (Bankr. D.N.J. May 16, 2024)

## Issue

- In light of K&E's representation of Deerfield, did K&E meet the disinterestedness standard within the meaning of section 327(a) of the Bankruptcy Code to be retained by the Debtors as counsel?

# *In re Invitae Corp.,*

No. 24-11362 (MBK), 2024 WL 2230069 (Bankr. D.N.J. May 16, 2024)

## Holding

- Yes, K&E's concurrent representation of the Debtors and Deerfield did not create a conflict that prohibited retention and that K&E was disinterested within the meaning of section 327(a).

# *In re Invitae Corp.,*

No. 24-11362 (MBK), 2024 WL 2230069 (Bankr. D.N.J. May 16, 2024)

## Analysis

- The court explained that, under section 327(a) of the Bankruptcy Code, the Debtors may retain professionals who are “disinterested,” in that they do not have an “interest materially adverse to the interest of the estate.”
- The court analyzed Model Rule of Professional Conduct 1.7, which it described as “complimentary” to section 327, and found that the rule allowed for concurrent representation even where a conflict exists when the affected clients give informed consent.
- The court noted that the “extensive and detailed waivers” included in K&E’s engagement letters “satisfie[d]” the court that both the Debtors and Deerfield gave informed consent and agreed to waive any conflicts.



# *In re Invitae Corp.,*

No. 24-11362 (MBK), 2024 WL 2230069 (Bankr. D.N.J. May 16, 2024)

## Analysis (cont'd)

- Further, noting that the “economic impact” is a consideration that should be taken into account in “gauging material adversity,” the court determined that K&E’s representation of Deerfield was “relatively de minimis” in the context of K&E’s total revenue and thus did not rise to material adversity.
- Finally, the court also briefly discussed “policy considerations,” noting that disqualification of K&E would cause “undue delay and significant additional expense” and be “detrimental” to the estates and creditors.
- Nonetheless, noting that three K&E attorneys who represented Deerfield had billed a collective 3.9 hours in connection with the Debtors’ chapter 11 case, the court directed K&E to “ensure that, going forward, no attorneys working on Deerfield matters perform any work in the Debtors’ bankruptcy case.”

# *In re Enviva Inc.,*

Case No. 24-10453-BFK (Bankr. E.D. Va. May 30, 2024) [Docket No. 653]

## Facts & Procedural History

- Enviva Inc. and its affiliates (the “Debtors”) applied for court approval to retain Vinson & Elkins (“V&E”) as counsel in their chapter 11 cases.
- Riverstone Investment Group, LLC and its affiliates (collectively, “Riverstone”) owned 43% of the Debtors’ common stock, and had two seats on the company’s 13-member board.
- Riverstone was a current firm client of V&E’s at the time of the firm’s representation of the Debtors, and had billed Riverstone approximately \$14 million in 2023, which accounted for 1.4% of the firm’s annual revenue.
- Under the proposed restructuring support agreements to be incorporated into the chapter 11 plan, the Debtors’ management were to receive 3.5% of the equity in the reorganized entities, with warrants for additional equity.

# *In re Enviva Inc.,*

Case No. 24-10453-BFK (Bankr. E.D. Va. May 30, 2024) [Docket No. 653]

## Facts & Procedural History (cont'd)

- V&E argued that its past and present representation of Riverstone was unrelated to the Debtors' restructuring, and that Riverstone and the Debtors had both consented to the simultaneous representation.
- V&E did not have an ethical wall put in place between its representation of the Debtors and its representation of Riverstone.

# *In re Enviva Inc.,*

Case No. 24-10453-BFK (Bankr. E.D. Va. May 30, 2024) [Docket No. 653]

## Issue

- In light of V&E's representation of Riverstone, did V&E meet the disinterestedness standard within the meaning of section 327(a) of the Bankruptcy Code to be retained by the Debtors as counsel?

# *In re Enviva Inc.,*

Case No. 24-10453-BFK (Bankr. E.D. Va. May 30, 2024) [Docket No. 653]

## Holding

- No, V&E's representation of Riverstone rendered it "not disinterested" within the meaning of section 327(a), and therefore the Debtors' application to retain V&E was denied.

# *In re Enviva Inc.,*

Case No. 24-10453-BFK (Bankr. E.D. Va. May 30, 2024) [Docket No. 653]

## Analysis

- The court noted that V&E had a *per se* disqualifying “actual conflict of interest” arising from its representation of Riverstone, as it “cannot be expected to negotiate a Plan that contravenes the interests of its \$14-million-dollar-a-year client” and a chapter 11 plan is a “core function” of the bankruptcy process.
- The court found that an ethical wall is an “impossibility” under the circumstances because a number of V&E attorneys actively worked on both matters.
- The court explained that V&E’s proposed use of co-counsel did not resolve its conflict, because conflicts counsel “cannot be used as a substitute for general bankruptcy counsel’s duties to negotiate a plan.”
- The court distinguished the instant facts to those of *Invitae*, noting that while K&E’s representation of Deerfield amounted to a “relatively *de minimis*” 0.03% of the firm’s annual revenue, V&E’s representation of Riverstone was “46 times more” than the percentage of annual revenue in *Invitae* and is “not . . . *de minimis* in any sense of the term.”

# *In re Enviva Inc.,*

Case No. 24-10453-BFK (Bankr. E.D. Va. May 30, 2024) [Docket No. 653]

## Motion for Reconsideration

- Subsequently, the court denied the Debtors’ motion to reconsider the court’s order denying retention of V&E on three grounds. *See In re Enviva Inc., et al.*, Case No. 24-10453-BFK (Bankr. E.D. Va. July 2, 2024) [Docket No. 792].
- First, the court found that V&E’s proposed “partial ethical wall” did not cure V&E’s conflict when Riverstone remained a “multi-million-dollar client” of the firm. The court also described the ethical wall as “arbitrary” and “insufficient” with respect to identifying timekeepers who had worked on the Riverstone representation.
- Second, the court noted that V&E’s proposal to withhold net profits earned from the Riverstone representation from the firm’s executive committee and partners working on the Debtors’ cases did not address the firm’s “extensive ties” to Riverstone, especially since partners who represented both the Debtors and Riverstone pre-petition “did enjoy some form of compensation” based on Riverstone revenues.

# *In re Enviva Inc.,*

Case No. 24-10453-BFK (Bankr. E.D. Va. May 30, 2024) [Docket No. 653]

## Motion for Reconsideration (cont'd)

- Lastly, the court found inadequate the proposed independent “Plan Evaluation Committee” to be installed on the Debtors’ board, which would supposedly “act as a check of sorts” on the management and V&E, because the board could revoke the Committee’s authority at will, and the Committee was “completely dependent” on the company’s financial advisors.



# Three Major Decisions On Uptier Transactions

# *Robertshaw U.S. Holding Corp. v. Invesco Senior Secured Mgmt. Inc.*

(In re Robertshaw U.S. Holding Corp.), Ch. 11 Case No. 24-90052, Adv. No. 24-03024 (S.D.T.X. June 20, 2024)  
[Adv. Docket No. 351]

## Facts & Procedural History

- In May 2023, Robertshaw US Holding Corporation (“Robertshaw”) engaged in a liability management transaction, commonly known as an “Uptier,” with Invesco Senior Secured Management, Inc. (“Invesco”), and certain other lenders (the “Lender Plaintiffs”), including Bain Capital Credit, LP, Canyon Capital Advisors LLC, and Eaton Vance Management.
- The May 2023 transaction resulted in a new Super-Priority Credit Agreement (the “SPCA”).
- Pursuant to the SPCA, Invesco and the Lender Plaintiffs provided Robertshaw with new money in exchange for new first-out term loans (the “First-Out Term Loans”) and allowed participating lenders holding existing first- and second-lien loans to exchange them for new second-out term loans (the “Second-Out Term Loans”) and third-out term loans.

# ***Robertshaw U.S. Holding Corp. v. Invesco Senior Secured Mgmt. Inc.***

(In re Robertshaw U.S. Holding Corp.), Ch. 11 Case No. 24-90052, Adv. No. 24-03024 (S.D.T.X. June 20, 2024)  
[Adv. Docket No. 351]

## **Facts & Procedural History (cont'd)**

- The SPCA defined “Required Lender” to mean lenders having loans representing more than 50% of the sum of the total outstanding First-Out Term Loans and Second-Out Term Loans.
- A Required Lender had the right under the SPCA to, among other things, amend the SPCA to allow the incurrence of incremental indebtedness, including new term loans under the SPCA, as well as to waive events of default and direct the Administrative Agent in the pursuit of remedies upon an event of default.
- Section 6.01 of the SPCA prohibited Robertshaw’s parent (“Holdings”), and any Holdings’ “Subsidiary” from incurring incremental indebtedness. The limitation contained in Section 6.01 can be waived, amended or modified by the Required Lenders.

# ***Robertshaw U.S. Holding Corp. v. Invesco Senior Secured Mgmt. Inc.***

(In re Robertshaw U.S. Holding Corp.), Ch. 11 Case No. 24-90052, Adv. No. 24-03024 (S.D.T.X. June 20, 2024)  
[Adv. Docket No. 351]

## **Facts & Procedural History (cont'd)**

- If Robertshaw received proceeds from an incurrence of indebtedness prohibited by Section 6.01, Section 2.11 of the SPCA required that 100% of the proceeds received be applied to “mandatory prepayments” on a pro rata basis to the term loans in “direct order of maturity.” Conversely, if Robertshaw received new debt proceeds that did not violate Section 6.01, then it had the right to make “voluntary prepayments” to “any” class of loans “in whole or in part.”
- Around July 2023, Invesco had purchased sufficient debt to become the Required Lender, and between July and November 2023, Invesco and Robertshaw entered into four amendments of the SPCA, which Invesco intended to keep hidden from the Lender Plaintiffs, and which waived certain defaults and permitted for certain additional indebtedness.

# ***Robertshaw U.S. Holding Corp. v. Invesco Senior Secured Mgmt. Inc.***

(In re Robertshaw U.S. Holding Corp.), Ch. 11 Case No. 24-90052, Adv. No. 24-03024 (S.D.T.X. June 20, 2024)  
[Adv. Docket No. 351]

## **Facts & Procedural History (cont'd)**

- The fourth amendment required Robertshaw to start a chapter 11 case by January 2, 2024, and to negotiate, in good faith, a DIP, RSA, and stalking horse purchase agreement with Invesco.
- In December 2023, after inadvertently learning of Invesco's actions, the Lender Plaintiffs entered into a series of transactions with Robertshaw and Robertshaw's equity sponsor, One Rock Capital Partners, LLC ("One Rock"), to thwart Invesco.
- Specifically, Holdings formed a new entity, RS Funding Holdings, LLC ("RS Funding"), to borrow fund from the Lender Plaintiffs and One Rock.
- RS Funding then distributed those proceeds to Robertshaw, which in turn used a portion (but not all) of the proceeds to make voluntary repayments of First-Out Term Loans – which resulted in the Lender Plaintiffs becoming the Required Lenders in place of Invesco.

# ***Robertshaw U.S. Holding Corp. v. Invesco Senior Secured Mgmt. Inc.***

(In re Robertshaw U.S. Holding Corp.), Ch. 11 Case No. 24-90052, Adv. No. 24-03024 (S.D.T.X. June 20, 2024)  
[Adv. Docket No. 351]

## **Facts & Procedural History (cont'd)**

- As Required Lenders, the Lender Plaintiffs executed a fifth amendment ( “Amendment No. 5”) to permit Robertshaw to incur additional debt, which Robertshaw did, and then transferred the funds to RS Funding in order to repay the Lender Plaintiffs and One Rock.
- Less than two weeks later, Invesco sued Robertshaw, the Lender Plaintiffs and One Rock in New York state court, alleging that the prepayments violated the SPCA, because not all the proceeds were used to pay off existing debt nor were they distributed pro rata among all tranches of debt.
- On February 15, 2024, Robertshaw and its affiliates commenced chapter 11 cases, and immediately brought an adversary proceeding for a declaratory judgment on the propriety of the transaction. The bankruptcy court subsequently stayed the New York state court litigation.

# ***Robertshaw U.S. Holding Corp. v. Invesco Senior Secured Mgmt. Inc.***

(In re Robertshaw U.S. Holding Corp.), Ch. 11 Case No. 24-90052, Adv. No. 24-03024 (S.D.T.X. June 20, 2024)

[Adv. Docket No. 351]

## **Issue #1**

- Did either Robertshaw or the Lender Plaintiffs breach the SPCA through the December 2023 transactions? Is Amendment No. 5 valid and enforceable?

## **Holding #1**

- While Robertshaw breached the SPCA by failing to make mandatory prepayments, the Lender Plaintiffs are entitled to a declaration that they did not breach the SPCA and that Amendment No. 5 was valid and enforceable.

# ***Robertshaw U.S. Holding Corp. v. Invesco Senior Secured Mgmt. Inc.***

(In re Robertshaw U.S. Holding Corp.), Ch. 11 Case No. 24-90052, Adv. No. 24-03024 (S.D.T.X. June 20, 2024)

[Adv. Docket No. 351]

## **Analysis for Issue #1**

- The court determined that, based on the definition of a “Subsidiary” in the SPCA, RS Funding was a “Subsidiary,” which was prohibited from incurring additional debt under Section 6.01.
- Because incurring the loan as part of the December 2023 transactions violated Section 6.01, Robertshaw breached Section 2.11 of the SPCA by failing to apply 100% of the proceeds towards mandatory prepayments.
- However, the court disagreed with Invesco that the prepayments had to be made pro rata across all tranches of debt. Thus, even if all the funds were used for mandatory prepayments, the parties could still use them all to repay First-Out Term Loans, which would still deprive Invesco of Required Lender status.



# ***Robertshaw U.S. Holding Corp. v. Invesco Senior Secured Mgmt. Inc.***

(In re Robertshaw U.S. Holding Corp.), Ch. 11 Case No. 24-90052, Adv. No. 24-03024 (S.D.T.X. June 20, 2024)

[Adv. Docket No. 351]

## **Analysis for Issue #1 (cont'd)**

- The court denied Invesco's request for rescission of Amendment No. 5 or other forms of equitable relief, finding that Invesco had an adequate remedy at law in the form of damages for breach of the SPCA.
- Further, the court found that Section 2.11 of the SPCA imposes obligations only on Robertshaw and not on the Lender Plaintiffs,, and therefore the Lender Plaintiffs were entitled to a declaration that they did not breach the SPCA.
- Moreover, as the new Required Lenders, the Lender Plaintiffs were not barred from entering into Amendment No. 5, because the SPCA did not provide a remedy that would render such action null and void even if it was in violation of Section 6.01 or Section 2.11.

# ***Robertshaw U.S. Holding Corp. v. Invesco Senior Secured Mgmt. Inc.***

(In re Robertshaw U.S. Holding Corp.), Ch. 11 Case No. 24-90052, Adv. No. 24-03024 (S.D.T.X. June 20, 2024)

[Adv. Docket No. 351]

## **Issue #2**

- Did One Rock tortiously interfere with the SPCA?

## **Holding #2**

- No, One Rock was entitled to a declaration that it did not tortiously interfere with the SPCA.

# ***Robertshaw U.S. Holding Corp. v. Invesco Senior Secured Mgmt. Inc.***

(In re Robertshaw U.S. Holding Corp.), Ch. 11 Case No. 24-90052, Adv. No. 24-03024 (S.D.T.X. June 20, 2024)

[Adv. Docket No. 351]

## **Analysis for Issue #2**

- The court explained that in order to establish a tortious interference claim, the plaintiff must show that the contract would not have been breached “but for” the defendant’s “intentional” conduct.
- The court found that One Rock did not intentionally procure a breach and its conduct was not the but-for cause for any breach of the SPCA by Robertshaw or by the Lender Plaintiffs, and therefore, a claim of tortious interference could not be established.
- Further, the court noted that a defendant may raise an “economic interest defense” to a tortious interference claim when it “acted to protect its own legal or financial stake in the breaching party’s business.” The court found evidence in the record that One Rock acted to help Robertshaw by providing liquidity to protect its own economic interest.

# ***Robertshaw U.S. Holding Corp. v. Invesco Senior Secured Mgmt. Inc.***

(In re Robertshaw U.S. Holding Corp.), Ch. 11 Case No. 24-90052, Adv. No. 24-03024 (S.D.T.X. June 20, 2024)

[Adv. Docket No. 351]

## **Issue #3**

- Did Robertshaw and the Lender Plaintiffs breach the implied covenant of good faith and fair dealing?

## **Holding #3**

- No, Robertshaw and the Lender Plaintiffs were entitled to a declaration that they did not breach the implied duty of good faith and fair dealing.

# ***Robertshaw U.S. Holding Corp. v. Invesco Senior Secured Mgmt. Inc.***

(In re Robertshaw U.S. Holding Corp.), Ch. 11 Case No. 24-90052, Adv. No. 24-03024 (S.D.T.X. June 20, 2024)

[Adv. Docket No. 351]

## **Analysis for Issue #3**

- The court explained that New York law implies a duty of good faith and fair dealing in every contract to prevent parties from “doing anything which will have the effect of . . . injuring the right of the other party to receive the fruits of the contract.”
- The court noted that there was nothing in the SPCA “specifically imposing duties between lender parties based on payment of debts or incurring new debt.”
- Further, the court emphasized that “no one may claim a breach of the implied duty of good faith and fair dealing” because Invesco itself had engaged in “lender-on-lender acts” through the four previous amendments of the SPCA and the parties had thus “established a baseline of conduct between themselves.”

# ***Wesco Aircraft Holdings, Inc. v. SSD Investments Ltd.***

(In re Wesco Aircraft Holdings, Inc.), Ch. 11 Case No. 23-90611, Adv. No. 23-03091 (S.D.T.X. July 10, 2024) (Transcript of Oral Ruling)

## **Facts & Procedural History**

- In March 2022, Wesco Aircraft Holdings, Inc. (“Wesco”) entered into an “Uptier” liability management transaction (the “2022 Transaction”) with a group of noteholders, including a group led by PIMCO and Silver Point (the “Majority Group”), who, prior to the transaction, held a supermajority of secured notes due 2024 (the “2024 Notes”) and a simple majority of secured notes due 2026 (the “2026 Notes”).
- In order to release the liens securing the 2024 Notes and the 2026 Notes, consent was needed by a supermajority of each tranche, but issuing new debt required only majority consent.
- Because the Majority Group did not own a supermajority of the 2026 Notes, the 2022 Transaction was designed to be executed in a number of “steps” in which the Majority Group first authorized the issuance of \$250 million in new 2026 Notes to itself, which then resulted in the Majority Group obtaining a supermajority position that could authorize release of the liens.

# ***Wesco Aircraft Holdings, Inc. v. SSD Investments Ltd.***

(In re Wesco Aircraft Holdings, Inc.), Ch. 11 Case No. 23-90611, Adv. No. 23-03091 (S.D.T.X. July 10, 2024) (Transcript of Oral Ruling)

## **Facts & Procedural History (cont'd)**

- All of the steps of the 2022 Transaction were approved during a ten-minute closing call on March 28, 2022, and execution copies of all the documents had been distributed in advance of that call.
- First, it was agreed that, with consent from a simple majority of noteholders, Wesco would enter into a third supplemental indenture that authorized the issuance of \$250 million of new 2026 Notes to the Majority Group, which would give them a supermajority position in the 2026 Notes.
- Then, with the consent of a supermajority, Wesco would enter into fourth supplemental indentures, which released all the liens securing the 2024 and 2026 Notes.
- Next, pursuant to an exchange agreement, the Majority Group “up-tiered” their now-unsecured 2024 and 2026 Notes into super-priority new 1L notes, leaving a minority group of 2024/2026 noteholders holding newly unsecured notes.

# ***Wesco Aircraft Holdings, Inc. v. SSD Investments Ltd.***

(In re Wesco Aircraft Holdings, Inc.), Ch. 11 Case No. 23-90611, Adv. No. 23-03091 (S.D.T.X. July 10, 2024) (Transcript of Oral Ruling)

## **Facts & Procedural History (cont'd)**

- In addition, a separate pre-existing tranche of unsecured notes due 2027 (the “2027 Notes”) were also required to consent to the incurrence of the additional \$250 million in debt.
- Carlyle Global Credit Investment Management, L.L.C. (“Carlyle”) was the majority holder of the 2027 Notes and, in exchange for giving their consent, they were permitted to “Uptier” their unsecured 2027 Notes new secured 1.25L notes.
- Wesco’s equity sponsor, Platinum Equity Advisors, LLC (“Platinum”), which controlled the Debtors’ board, also exchanged its own unsecured 2027 Notes for the 1.25L notes, even though Platinum’s vote as a noteholder was not needed to obtain consent for the transaction.
- On June 1, 2023, Wesco and its affiliates commenced chapter 11 cases. That same day, the Debtors brought an adversary proceeding to have all disputes surrounding the 2022 Transaction resolved by the Bankruptcy Court.



# ***Wesco Aircraft Holdings, Inc. v. SSD Investments Ltd.***

(In re Wesco Aircraft Holdings, Inc.), Ch. 11 Case No. 23-90611, Adv. No. 23-03091 (S.D.T.X. July 10, 2024) (Transcript of Oral Ruling)

## **Holding & Analysis for 2026 Notes Indenture**

- The court held that the Third Supplemental Indenture was not effective to authorize the issuance of the additional \$250 million in 2026 Notes, because it violated the 2026 indenture, and thus the 2026 liens were not released and the \$250 million in new money was not secured.
- The court reasoned that, while a simple majority could theoretically authorize additional debt, a supermajority was needed for the new 2026 Notes on these specific facts, because the amendment “had the effect of releasing all or substantially all the collateral” securing the notes.
- Calling what occurred with the allegedly separate “steps” a “Domino Agreement,” the court reasoned that the “execution of the 2022 Transaction became irrevocable once the fully executed transaction documents were possessed by the parties and the funds were released,” at which time “all actions necessary for the effectiveness of the 2022 Transaction had been taken,” all of which “occurred prior to the execution of the third supplemental indenture.”

# ***Wesco Aircraft Holdings, Inc. v. SSD Investments Ltd.***

(In re Wesco Aircraft Holdings, Inc.), Ch. 11 Case No. 23-90611, Adv. No. 23-03091 (S.D.T.X. July 10, 2024) (Transcript of Oral Ruling)

## **Holding & Analysis for 2027 Notes Indenture**

- The court held that the 2022 Transaction was not permitted under the 2027 Notes indenture, because, under Section 3.02 of the indenture, the redemption of less than all of the 2027 Notes was required to be done pro rata, by lot or other similar means, and the “purchase” executed by the uptiering exchange qualified as a transaction in which less than all of the Notes were redeemed, finding that “less than all includes none.”

# ***Wesco Aircraft Holdings, Inc. v. SSD Investments Ltd.***

(In re Wesco Aircraft Holdings, Inc.), Ch. 11 Case No. 23-90611, Adv. No. 23-03091 (S.D.T.X. July 10, 2024) (Transcript of Oral Ruling)

## **Holding & Analysis for 2024 Notes Indenture**

- The court held that the 2022 Transaction was permitted under the 2024 Notes indenture, because the participating holders of the 2024 Notes consented to the 2022 Transaction “by a two thirds’ vote,” which satisfied the consent requirement for such a transaction in the 2024 Notes indenture. Therefore, the court afforded no relief to holders of the 2024 Notes.

# ***Serta Simmons Bedding, LLC v. AG Centre St. P' ship.***

(In re Serta Simmons Bedding, LLC), Ch. 11 Case No. 23-90020, Adv. No. 23-9001 (S.D.T.X. June 6, 2023) [Ch. 11 Docket No. 1045], on appeal to the Fifth Circuit, Case No. 23-20181, awaiting decision following oral argument on July 10, 2024

## **Facts & Procedural History**

- In May 2020, Serta Simmons Bedding, LLC and its affiliates (the “Debtors”) engaged in an “Uptier” liability management transaction with a group of their participating term lenders (the “PTL Lenders”), which “involved the creation of a priority tranche of debt consisting of \$200 million of new money plus \$875 million of exchanged loans with the first lien loans exchanged at 74% and the second lien loans exchanged at 39%” (the “2020 Transaction”).
- The 2020 Transaction needed to comply with a credit agreement the Debtors entered into in November 2016 (the “2016 Credit Agreement”), which provided that the loans could be assigned to “Affiliated Lenders” through “Dutch Auctions open to all Lenders . . . on a pro rata basis” or through “open market purchases.”

# ***Serta Simmons Bedding, LLC v. AG Centre St. P' ship.***

(In re Serta Simmons Bedding, LLC), Ch. 11 Case No. 23-90020, Adv. No. 23-9001 (S.D.T.X. June 6, 2023) [Ch. 11 Docket No. 1045], on appeal to the Fifth Circuit, Case No. 23-20181, awaiting decision following oral argument on July 10, 2024

## **Holding & Analysis**

- After a hearing on March 28, 2023, “the Court granted partial summary judgment declaring that the term ‘open market purchase’ in Section 9.05(g) of the 2016 Credit Agreement was clear and unambiguous, and that the 2020 Transaction constituted an ‘open market purchase’” under that provision.
- The court thus held that the 2020 Transaction was permitted under the 2016 Credit Agreement.
- The court also concluded that the PTL Lenders and the Debtors did not breach the implied covenant of good faith and fair dealing, recognizing that all involved parties were aware of the "looseness" of the 2016 Credit Agreement and its “implications.”
- The court highlighted that the non-participating lenders themselves were looking to do their own liability management transaction using the open market purchase provision in a similar manner as the PTL Lenders, and had acquired significant loan holdings through the secondary market with the intention of doing so.

# Supreme Court Addresses Standing

# *Truck Insurance Exchange v. Kaiser Gypsum Company, Inc.,*

602 U.S. 268 (2024)

## Facts & Procedural History

- Kaiser Gypsum Co. and Hanson Permanente Cement (the “Debtors”) filed for chapter 11 bankruptcy protection after facing thousands of asbestos-related lawsuits.
- Truck Insurance Exchange (“Truck”) was the primary insurer for companies that manufactured and sold products containing asbestos. Pursuant to its contract with the Debtors, Truck was obligated to defend claims and to pay up to \$500,000 per claim.
- The Debtors’ proposed reorganization plan created a channeling injunction and trust under 11 U.S.C. § 524(g). The trust would liquidate and pay any uninsured claims. Holders of insured claims would be able to pursue litigation in the tort system to recover insurance proceeds, with the trust responsible for paying any deductibles or other uninsured claim amounts.
- Truck objected to the Debtors’ proposed plan of reorganization under 11 U.S.C. § 1109(b), arguing that the plan failed to satisfy § 524(g) and the good-faith requirement of § 1129(a)(3).

# *Truck Insurance Exchange v. Kaiser Gypsum Company, Inc.,*

602 U.S. 268 (2024)

## Facts & Procedural History (cont'd)

- The U.S. Bankruptcy Court for the Western District of North Carolina issued proposed findings of fact and conclusions of law. The court rejected Truck's arguments on the merits but also found that Truck was not a "party in interest" under 11 U.S.C. § 1109(b), and therefore did not have standing to object to the proposed reorganization plan, because the plan was "insurance neutral." The plan was "insurance neutral" because it did not increase Truck's prepetition obligations or impair its contractual rights under its insurance policies.
- The U.S. District Court adopted the findings of fact and conclusions of law and confirmed the plan. Truck appealed.
- The Fourth Circuit affirmed on standing grounds, holding that the plan was insurance neutral and thus that Truck was not a party in interest with standing to object.
- Truck filed a petition for certiorari, which the Supreme Court granted.



# *Truck Insurance Exchange v. Kaiser Gypsum Company, Inc.,*

602 U.S. 268 (2024)

## Issue

- Is an insurer with financial responsibility for a bankruptcy claim sufficiently concerned with, or affected by, the proceedings to be a “party in interest” that can raise objections to a reorganization plan?

# *Truck Insurance Exchange v. Kaiser Gypsum Company, Inc.,*

602 U.S. 268 (2024)

## Holding & Rationale

- The Supreme Court reversed the Fourth Circuit’s decision, holding that an insurer with financial responsibility for a bankruptcy claim is a “party in interest” that may raise and be heard on any issue in a Chapter 11 case, including an objection to a proposed plan of reorganization.
- The Court began with the “capacious” text of section 1109(b), which permits any “party in interest” to “appear and be heard on any issue” in a Chapter 11 proceeding. 602 U.S. at 277-78.
- The Court found further support in the history and purpose of 1109(b), explaining that “Congress consistently has acted to promote greater participation in reorganization proceedings” and that “[b]road participation promotes a fair and equitable reorganization process.” 602 U.S. at 279-80.

# *Truck Insurance Exchange v. Kaiser Gypsum Company, Inc.,*

602 U.S. 268 (2024)

## Holding & Rationale (cont'd)

- The Court rejected the doctrine of “insurance neutrality,” which would deny insurers standing to object to a plan that does not impair their contractual rights or alter their quantum of liability.
- According to the Court, the insurance-neutrality doctrine conflated the merits of an objection with the threshold party-in-interest inquiry.
- “Section 1109(b) asks whether the reorganization proceedings might directly affect a prospective party, not how a particular reorganization plan actually affects that party.”

# Delaware Bankruptcy Court Addresses Derivative Standing For LLCs

# *In re Pack Liquidating, LLC,*

658 B.R. 305 (Bankr. D. Del. 2024)

## Facts & Procedural History

- Packable is a Delaware Limited Liability Company that operated as a third-party seller of health and beauty products on online marketplaces in North America.
- Packable filed for bankruptcy following the collapse of a proposed merger. After the unsuccessful merger, the debtors looked to wind down their affairs through a chapter 11 liquidation.
- The Official Committee of Unsecured Creditors alleged that Packable's failure arose, not from the failed merger, but from mismanagement and self dealing by Packable's insiders.
- The Committee brought a motion for derivative standing to pursue the breach-of-fiduciary-duty claims on behalf of the estate.
- The defendants argued that the Committee could not be granted standing because, under the Delaware Limited Liability Company Act, only members of a Delaware LLC (or the company's assignees) may be given derivative standing to act on the company's behalf.

# *In re Pack Liquidating, LLC,*

658 B.R. 305 (Bankr. D. Del. 2024)

## Issue

- Does the Delaware Limited Liability Company Act preclude a bankruptcy court from granting a creditors' committee standing to pursue estate causes of action?

# *In re Pack Liquidating, LLC,*

658 B.R. 305 (Bankr. D. Del. 2024)

## Holding & Rationale

- In *Pack Liquidating*, Judge Goldblatt held that the Delaware Limited Liability Company Act does not preclude a bankruptcy court from granting a creditors' committee standing to pursue an estate cause of action.
- Under the Delaware Limited Liability Company Act (DLLCA), only the members or assignees of a Delaware LLC may be given derivative standing to act on the company's behalf. *See, e.g., CML V, LLC v. Bax*, 28 A.3d 1037 (Del. 2011).
- As a result, before *Pack Liquidating*, several Delaware bankruptcy courts had held that the DLLCA prevented creditors' committees from obtaining derivative standing to pursue estate causes of action in bankruptcy. Judge Goldblatt disagreed.

# *In re Pack Liquidating, LLC,*

658 B.R. 305 (Bankr. D. Del. 2024)

## Holding & Rationale (cont'd)

- The Third Circuit’s *en banc* opinion in *In re Cybergenics* treats the authority to grant a committee derivative standing to pursue an estate claim as one that stems from the Bankruptcy Code rather than state law.
- According to Judge Goldblatt, *Cybergenics* teaches that—
  - “the power to grant committee standing can be implied from the more drastic tools that the Bankruptcy Code grants to a bankruptcy court to ensure that the debtor in possession, as trustee, is fulfilling its fiduciary responsibilities”
  - Sections 1109(b) and 1103(c)(5) (which permit a committee to be heard and to perform services in the interests of its constituents) and section 503(b)(3)(B) (which contemplates an admin claim for a creditor that recovers property for the benefit of the estate) “evinced a Congressional intent for committees to play a robust and flexible role in representing the bankruptcy estate”
  - “The Bankruptcy Code preserves the court’s residual equitable authority, commonly exercised in pre-Code practice, to grant derivative standing.”

*Pack Liquidating*, 658 B.R. at 318–22.
- “Alternatively, even if one were to view the principles of *Cybergenics* and *Bax* as being in conflict, ordinary principles of federal supremacy would require the authority that the Third Circuit found implicit in the Bankruptcy Code to preempt any contrary state law.” *Pack Liquidating*, 658 B.R. at 313.