

THE BANKRUPTCY & REORGANIZATION BULLET REPORT

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- **Shareholders Subject to State Law Clawback Litigation:** According to a New York bankruptcy court, former shareholders of Lyondell Chemical Company who sold their shares in an LBO may be subject to state law fraudulent conveyance claims brought by or on behalf of individual creditors. The court's holding comes despite the Bankruptcy Code's safe harbor provision (§ 546(e)) that prohibits a trustee or debtor in possession from pursuing the same claims on behalf of the estate. The court reasoned that the plain language of § 546(e) only prohibited the estate representative from avoiding such transfers, and it was not clear that Congress intended § 546(e) to preempt state law causes of action brought by or on behalf of individual creditors. *Weisfelner v. Fund 1 (In re Lyondell Chemical Co.)*, 503 B.R. 348 (Bankr. S.D.N.Y. 2014).
- **Court Limits Credit Bid:** Generally, secured lenders have a statutory right to credit bid the full value of their claims when their collateral is sold in bankruptcy. However, a recent Delaware bankruptcy court decision addressed when a lender's right to credit bid may be limited "for cause" under Bankruptcy Code § 363(k). In *Fisker*, the court capped a lender's credit bid to the amount paid for the loan for three reasons: (i) to promote a fair auction because another bidder refused to participate unless the bid was capped, (ii) because the lender's liens were in dispute, and (iii) because the insistence on a shortened sale process had the potential to preclude bids exceeding the lender's full credit bid. Although the decision does not indicate whether any of these factors alone is sufficient cause to limit a credit bid, the case reveals the court's willingness to restrain credit bidding when doing otherwise would chill the sale process. *In re Fisker Auto. Holdings, Inc.*, Case No. 13-13087, 2014 Bankr. LEXIS 230 (Bankr. D. Del. Jan. 17, 2014).
- **Transferee's Claims Subject to Disallowance:** Recently, the United States Court of Appeals for the Third Circuit held that trade claims subject to disallowance in the hands of an original claimant would similarly be subject to disallowance in the hands of an assignee or purchaser of the claims. The court determined that issues of disallowance under Bankruptcy Code § 502(d) for failure to repay an avoidable transfer travel with the claim because § 502(d)'s language focuses on the impairment of *claims*, not *claimants*. This decision is in conflict with the earlier *Enron* decision from the Southern District of New York that held that a claim could be sold free of its infirmities, reasoning that claim disallowance is a claimant-specific disability rather than an attribute of the claim itself. *In re KB Toys Inc.*, 736 F.3d 247 (3rd Cir. 2013).
- **Junior Lender Liable for Preferential Payments:** A California bankruptcy court has recently held that pre-petition payments made to a fully secured senior lender could constitute avoidable preferential transfers to a partially secured junior lender. In order to avoid a transfer as a preference, the transfer must be for the benefit of the creditor. In finding that the pre-petition payments made to the senior lender benefited the junior lender, the court reasoned that by reducing the fully secured claim of the senior lender, the preferential payments effectively increased the amount by which the junior lender was secured "dollar for dollar." Therefore, even though the junior lender never received the preferential payment, the court found that the payment could nevertheless be recovered from either the senior or the junior lender. *In re Vassau*, 499 B.R. 864 (Bankr. S.D. Cal. 2013).

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