

Lender Liability in the US – An Exercise in Finger Pointing

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This article discusses the theories of liability used in the United States against lenders which result in either the avoidance of debt owed to a lender and/or the affirmative recovery of damages from the lender. Applicable defences to lender liability claims are also discussed.

Post-global recession insolvencies have been plagued with significant decreasing enterprise values as well as the proliferation of insolvency proceedings precipitated by various types of fraud. Creditors and insolvency administrators must find new and deeper pockets to supplement their recoveries. One of the players with the deepest pockets and the biggest target on their backs is the lenders. It is a rare US insolvency case where the claims of the lenders are not only scrutinised, but actual threats of litigation are made against the lenders.

Depending upon your customary client base, lender liability in the US is either legalised extortion, used by delinquent borrowers and out of the money creditors to reduce legitimate obligations and obtain a recovery to which they would not normally be entitled, or a body of law designed to protect the rights of borrowers and unsecured creditors who have suffered losses at the hands of greedy lenders who must be punished so as to bring order and legality back into the banking world.

What follows is a brief discussion of some of the theories of lender liability being asserted in the US today. The focus here is on commercial cases. The 2007 financial crisis has resulted in the development of significant lender liability law relating to consumer mortgage origination and collection which is beyond the scope of this article.

General background

Lender liability became popular as a cause of action in the US in the 1980s when a series of court decisions fuelled a boom in lenders being found liable for enforcing repayment terms under loan agreements.¹ ‘Lender liability’ is an umbrella term encompassing

a variety of common law theories based on contract, tort and other common law. There are also state and federal statutory bases for lender liability in certain instances. Courts greatly expanded the theories under which lenders could be held liable and often awarded substantial damages to plaintiffs.

The trend started to reverse in the late 1980s and early 1990s as appellate courts began to evaluate lenders’ actions based on the contracts themselves, even reversing large judgments entered earlier. For example, in *Penthouse International, Ltd v Dominion Federal Savings & Loan Assn*,² the appellate court reversed the trial court judgment in excess of US\$100m for anticipatory breach of commitment to loan against a participant finding the commitment to loan had expired, the borrower could not have timely closed because it could not have met the conditions precedent set out in the commitment letter and the agent lender could not waive the closing conditions on behalf of the participant. In the 1980s and early 1990s, loan structures were comparatively simple and courts began to become less sympathetic to the argument that lenders could be blamed for enforcing contractual remedies just because the borrower’s business had been unsuccessful.

As financing structures became more complex and money became more readily available, lender liability claims made resurgence in the 2000s. Every high profile case seemed to involve some attempt by the debtor company or its unsecured creditors to blame the company’s lenders for its distress. Massive litigation was filed against lenders in a number of the so-called ‘mega cases’ like *Enron*, *Adelphia* and *WorldCom*. Many of these lawsuits settled – but what went unsaid in the press was that the settlements were often for significantly less than

had been sued for – often times amounting to nothing more than nuisance value after the expenditure of significant time and attorneys' fees.

Initially lenders quickly settled cases, avoiding bad publicity. Recently, however, lenders have become more aggressive in defending litigation, resulting in some high profile victories. Courts have also become more sophisticated in analysing the lending contracts as well as the facts to determine if the target lender has really crossed the line between legitimate protection of its debt position and bad acts. The courts have recognised that every business failure does not create legal culpability.

In the current environment, borrowers and impacted third parties are again bringing lender liability claims against banks and other financial institutions under a variety of lender liability theories. In addition, the complexity of modern commercial financial transactions has resulted in different tranches of lenders suing each other. The old 'honour among banks' concept no longer applies, especially given that many of the holders of 'bank debt' are no longer only traditional banks, but include entities such as hedge funds, insurance companies and pension funds.

The purpose of asserting lender liability claims can be threefold: (i) to avoid liability under a credit facility or other financial arrangement; (ii) to divert blame and liability away from management by blaming the lender and seeking an affirmative recovery; and/or (iii) to increase leverage in workout negotiations, enabling out of the money creditors to obtain some recovery. All of these purposes maximise recovery for other constituencies (other creditors, equity) at the expense of the lender against which the claims are being asserted.

Theories of liability

Lender liability causes of action are generally creatures of state law, and can vary from state to state, depending both on the law applicable to the contractual relationship between the borrower and the lender and the location where the relationship or alleged bad acts occurred. In insolvency proceedings involving multinational corporate groups, the analysis can become even more complex with the loan documents governed by the law of one jurisdiction and the actions, events and proceedings governed by the law of other jurisdictions.

Contract theories

The relationship between the lender and the borrower is contractual. A lender may be held liable for breaching

written, oral or implied contracts or agreements. Common breaches of contract claims include:

- Failure to lend after a loan commitment becomes legally binding (*MBank Abilene, NA v LeMaire*, 1989 WL 30995 (Tex Ct App 1989)).
- Failure to extend a loan, honour a modification or forbear from exercising rights and remedies after agreeing to do so (*Alaska State Bank v Fairco*, 674 P.2d 288 (Alaska 1983)).
- Failure to take action required under the loan documents (*Lester v Resolution Trust Corp*, 994 F.2d 1247 (7th Cir 1993)).
- Taking actions to collect the debt or declaring a default when there has not been a default (*Bank One, Texas, NA v Taylor*, 970 F.2d 16 (5th Cir 1992)).
- Loan officer making promises he or she is not authorised to make (*Pipken v Thomas & Hill*, 258 S.E.2d 778 (NC 1979)).

It is a general rule of US jurisprudence that courts will not look to oral evidence outside the contract (loan documents) unless the documents are ambiguous. However, course of conduct between parties can be critical in interpreting a written contract.

All contracts are governed by an implied covenant of good faith and fair dealing.³ Examples of violations of the covenant of good faith and fair dealing have included:

- Refusal to release collateral after a loan has been paid off to force the borrower to also pay off a different loan (*Robinson v McAllen State Bank*, 48 Banking Rep (BNA) 1004 (Tex Dist Ct 1987)).
- Manipulation of the appraised value of collateral to force a default (*Wells Fargo Realty Advisors Funding, Inc v Violi, Inc*, 872 P.2d 1359 (Colo App 1994)).
- An unreasonable or unilateral refusal to advance funds under a line of credit without notice to the borrower (*KMC v Irving Trust Co*, 757 F.2d 752 (6th Cir 1985)).

However, in most instances, it is not a violation of the good faith covenant for a lender to enforce its rights and remedies as written in the contract.⁴ Under New York law (which governs many large commercial lending transactions in the US), the implied covenant of good faith covers any promises which a reasonable person in the position of the promisee would be justified in understanding were included.⁵ The duty of good faith and fair dealing is not without limits in New York, however, and no obligation can be implied that would be inconsistent with other terms of the contractual relationship.⁶ In addition to the implied covenant of good faith and fair dealing, many states have incorporated the good faith requirement into statutes.

Generally, damages for contractual lender liability are limited to compensatory damages. Some courts have permitted the recovery of consequential damages, but punitive damages are normally not recoverable.⁷

Tort theories

The most commonly asserted tort claims against lenders are discussed below.

FRAUD/MISREPRESENTATION

A lender that knowingly makes a misstatement of material fact or knowingly conceals a material fact, which it has a duty to disclose and upon which the borrower or third party plaintiff has relied to its detriment can be held liable.⁸

ECONOMIC DURESS

A lender threatens a borrower with actions the lender does not have a legal right to take or demands more than the borrower is obligated to give. This must be distinguished from a lender threatening to take actions specifically provided to the lender in the loan documents.⁹

NEGLIGENCE

A plaintiff must show the lender owed a duty of care to the plaintiff (whether the borrower or a third party), which the lender breached and such breach was the proximate cause of the plaintiff's injuries. The general rule is that a lender does not owe a duty of care to the borrower when the lender's role in the transaction does not go beyond the scope of its role as a traditional lender. However, a lender may be liable, even if it has no duty to provide certain information, if it chooses to do so, and such action may trigger a requirement to provide additional material information.¹⁰

TORTIOUS INTERFERENCE WITH CONTRACT RIGHTS OR PROSPECTIVE BUSINESS ADVANTAGE

A claim for tortious interference with contractual rights arises when a plaintiff has a valid contract with a third party, the lender knows about the contract and either intentionally induces the party to breach the contract with the plaintiff or prevents the plaintiff from performing the contract, resulting in damages to the plaintiff. Closely related is a claim for interference with a prospective business advantage which requires a showing that a business opportunity existed which the borrower could have taken advantage of and benefited from but for the actions of the lender.¹¹ However, a lender who has a contractual right under its loan documents to take certain actions which may interfere with a contract (such as a right to directly collect receivables upon a default) should not be held liable under these theories.¹²

Other common law theories

If a lender deviates from the traditional lender/borrower relationship, liability can arise. The theories under which a lender can be held liable include the following.

BREACH OF FIDUCIARY DUTY

Generally, a lender does not owe a fiduciary duty to its borrower. However, if the lender takes such actions that the relationship becomes a 'special relationship' based on excessive control or domination, a fiduciary duty may arise. In such instances, the lender will owe greater duties to the borrower than those set out in the loan documents.¹³

INSTRUMENTALITY THEORY

A lender may monitor the business operations of its borrower to protect its risk.¹⁴ However, where the lender exercises such control over the borrower's day to day operations that it becomes, in effect, part of management, the lender can be liable.¹⁵ The type of actions that could trigger liability include putting a lender representative on the borrower's board of directors or directing which payables the borrower may pay and when.

AIDING AND ABETTING BREACH OF FIDUCIARY DUTY

Under the laws of most states, the directors and officers of a corporation owe fiduciary duties to the corporation and its shareholders.¹⁶ In the insolvency arena, it is customary for litigation against a lender to include litigation against the officers and directors of the insolvent company. The allegations are that the officers and directors, in taking or neglecting to take certain actions (including possibly entering into the relationship with the lender itself) have breached their fiduciary duties and duty of care to the company. The parallel cause of action asserted against the lender is that the lender aided and abetted the officers and directors in such breaches. In order to successfully assert a claim for aiding and abetting breach of fiduciary duty, it must be proven that: (i) a fiduciary relationship existed which was breached; (ii) the lender, who was not a fiduciary, knowingly participated in the breach, and that the concerted action of the fiduciary and the lender harmed the company.¹⁷

EQUITABLE SUBORDINATION

Equitable subordination is more of a remedy than a cause of action. If a lender is found to have acted wrongfully to the detriment of other creditors, its claim may be subordinated to the claims of other creditors.¹⁸

RECHARACTERISATION

Recharacterisation is the concept whereby an obligation denominated as debt is treated as equity. The overarching inquiry with respect to recharacterising debt as equity is whether the parties to the transaction intended the loan to be a disguised equity contribution.¹⁹ This intent may be inferred from what the parties say in a contract, from what they do through their actions, and from the economic reality of the surrounding circumstances. Recharacterisation has nothing to do with inequitable conduct, however.²⁰

LENDING IN THE ZONE OF INSOLVENCY/IMPROVIDENT LENDING

In the US, a theory called ‘deepening insolvency’ is sometimes asserted against lenders. As a company slides from solvency to insolvency, there is a point where certain actions by the company and third parties who deal with the company (like lenders) become suspect.

The theory is that the lender participated in the deepening insolvency of the borrower by lending more money when there is no hope of the borrower being able to repay the money. The lender ostensibly protects itself by taking a lien on all the assets of the company, while unsecured creditors who do business with the borrower rely on the fact that the lender has done the transaction as a sign of the financial health of the borrower. The lender collects fees for doing the deal and when the company fails, the company and unsecured creditors are injured.

The cause of action for deepening insolvency or loaning to an entity that is on the cusp of insolvency has been found not to exist in most jurisdictions.²¹ It is neither illegal nor improper to loan money to an insolvent entity in the US. At best, if the factors are present to hold the lender liable under the other theories described above, deepening insolvency is an element of damages.²²

Statutory theories

Lender liability claims may also be based on state or federal statutory law. The Uniform Commercial Code (UCC), which has been adopted in some form in all states, imposes an obligation of good faith on all transactions within its scope, which includes sales transactions, secured transactions, promissory notes and negotiable instruments.²³ Thus, if a contract is within the purview of the UCC, a borrower may sue for breach of good faith notwithstanding the lack of a fiduciary relationship.

No federal statutes deal with lender liability per se. However, if a lender is found to have been in sufficient

control of the business operations of its borrower, it could be found liable under certain tax (see, for example, 26 USC sections 3402, 3505 and 6672) and environmental statutes (see, for example, CERCLA (42 USC sections 9607, 9609)). If a lender is found to have participated in a criminal enterprise of its borrower or in securities fraud it could be found liable under RICO (Racketeer Influenced and Corrupt Organizations Act (18 USC section 1964)) or various federal securities statutes.

Lenders can also be sued under the preference and fraudulent transfer provisions of the US Bankruptcy Code.²⁴ A preference is a transfer made during a statutory period (90 days prior to bankruptcy for a non-insider) on account of an antecedent debt that enables a creditor to receive more than it would receive in a liquidation case. Thus a lender who makes an unsecured loan, and after feeling insecure, takes collateral, can be sued for avoidance of the liens granted if taken within 90 days of the filing of the bankruptcy case.²⁵

A fraudulent transfer is a transfer made by the debtor within a statutory period (two years under the Bankruptcy Code and possibly more under applicable state law) either with intent to hinder, delay or defraud creditors or, while the debtor was insolvent, or became insolvent as a result of the transfer or left the debtor with insufficient capital to pay its debts as they come due.²⁶ Both preferences and fraudulent transfers can be recovered from either the transferee or from a person for whose benefit a transfer was made.²⁷

Defences to lender liability causes of action

Outside of an insolvency proceeding, a lender liability suit would be brought by the borrower or asserted by a borrower defensively against a bank collection action. In US insolvency proceedings, the plaintiff could be the debtor/borrower in the bankruptcy case, the Unsecured Creditors’ Committee in a chapter 11 case, a chapter 7 trustee or a post-confirmation chapter 11 plan trustee. The purpose of the lawsuit can be not only to avoid the debt owed to the lender, but also avoid liens (if any), subordinate the claims of the lender below those of other creditors, and obtain a financial recovery from the lender.

It is important to note that the causes of action belong to the debtor/borrower, regardless of the identity of the plaintiff. Thus they are called derivative causes of action. The creditors of an insolvent corporation have standing to maintain derivative claims against directors on behalf of the corporation for breaches of fiduciary duties.²⁸ While a lender would often be caught up in this litigation, none of these potential plaintiffs has the

legal right or standing to bring causes of action that are owned by individual creditors.

The applicable defences available to a lender may, in some instances, vary depending on the nature of the plaintiff.

Document based defences

The primary 'document based defence' of a lender is to show the lender has, in all respects, complied with the terms of the applicable transaction documents, the rights and obligations set out in the documents have not been modified by any course of dealing between the parties, and the lender has, at all times, acted in good faith. The failure of a lender to comply with its own policies on credit analysis, credit guidelines, loan monitoring and loan documentation can result in liability, even if the lender did nothing wrong towards the borrower.

In pari delicto

In pari delicto is a common law maxim that one wrongdoer cannot sue another wrongdoer for an action in which they both participated. Thus, if the borrower, through its officers and directors who breached their fiduciary duties, took actions which harmed the company, the company cannot sue the lender as a co-conspirator (aider and abettor) in such action.

This defence is used where a lender is being sued under a number of theories discussed above for having acted in concert with the officers and directors of the company.²⁹ In order to defeat the *in pari delicto* defence, the plaintiff must show there were innocent directors who were misled who would have stopped the action or that the action solely benefited the officers and directors without providing any benefit to the company.³⁰

Business judgment rule

The business judgment rule protects a board of directors from being questioned or second-guessed on its conduct of corporate affairs.³¹ The rule creates a rebuttable presumption that in making a business decision, the officers and directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company.³² Usually, the protections of the business judgment rule – which can often be determinative of a case – can only be claimed by disinterested directors whose conduct otherwise meets the tests of business judgment.³³ Self-dealing by

a director abrogates the protections of the business judgment rule.

Lenders usually are sued for aiding and abetting breach of fiduciary duty by officers and directors. The lender can defend against such action by arguing that the officers and directors themselves are protected by the business judgment rule and, therefore, their actions did not constitute a breach of their fiduciary duties or duties of care. The mere fact that a strategy turned out poorly is, in itself, insufficient to create an inference that the officers and directors who oversaw the strategy breached their fiduciary duties.³⁴ If the officers and directors did not breach their fiduciary duties or duties of care, a lender cannot be liable for aiding and abetting.

Statutory defences

The preference and fraudulent transfer statutes contain statutory defences which may be asserted. The defences to preference causes of action are set out in 11 USC section 547(c), and include the defences of ordinary course of business, contemporaneous exchange for new value, and the provision of new value to the debtor. The defences to fraudulent transfer causes of action are set out in 11 USC section 548, and include the defence of reasonably equivalent value.

Further defences are set out in 11 USC section 550 to the extent a lender is a subsequent transferee or a person for whose benefit a transfer was made. Proving the solvency of the debtor at the time of the transaction in question is always a defence to both preference and fraudulent transfer causes of action.

A multinational case worth noting: Parmalat

As stated earlier, a recent trend is that banks have stopped settling and started litigating notwithstanding the expense. While the US is not a 'loser pays' jurisdiction, lenders who have been sued have started asking for affirmative relief against the parties suing them, upping the costs and the risks.

In this regard, the *Parmalat* case bears mentioning, not only because it was a fully tried lender liability lawsuit, but because of its international components. Parmalat was a regional Italian dairy company which over the course of 40 years grew into a global conglomerate. Citibank was one of the financial institutions that assisted Parmalat with its growth strategies. Citibank had a nearly ten-year relationship with the company. Due to several risky transactions conducted by Parmalat's officers and directors, as well as some fraudulent bookkeeping and the admission

that a US\$4bn bank account listed on the company's financial statements did not actually exist, Parmalat was forced into insolvency proceedings in Italy.

Because of Parmalat's size and stature, the Italian government passed an emergency amendment to the Italian bankruptcy law, establishing procedures for restructuring and processing claims against large insolvent companies. Dr Enrico Bondi, who previously had been retained as a consultant, was appointed Extraordinary Commissioner to oversee the reorganisation and administration. A new reorganised Parmalat emerged in 2005.

Bondi sued Citibank in the US, alleging that Citibank had: committed fraud in its dealings with Parmalat; aided and abetted fraud and constructive fraud; made negligent misrepresentations; diverted corporate assets; been unjustly enriched; participated in civil and criminal RICO conspiracies; and failed to disclose Parmalat's deepening insolvency to other creditors. Bondi sought billions of dollars of damages from Citibank for facilitating, covering up and profiting from various alleged improper and illegal transactions and manipulations, notwithstanding that Bondi acknowledged that the officers and directors of Parmalat had actively participated in these activities, as well as prepared false financial statements and books and records.

Citibank not only invoked the *in pari delicto* defence, but affirmatively sued Parmalat for hundreds of millions of dollars it claimed to be owed. The judge heard several cross-motions for summary judgment, but also held a 70-day trial in 2008, hearing thousands of hours of testimony. The result was that Bondi's claims were dismissed because of the *in pari delicto* defence. The court found that all the frauds had been perpetrated by Parmalat's officers and directors over a period of years, and therefore, the company could not allege causes of action against others when it itself had orchestrated and participated in the fraud. The court also was unwilling to apply the adverse interest exception to *in pari delicto* because Bondi could not show that Parmalat had not received any benefit from the actions of its officers and directors. The court then entered a US\$364m judgment in favour of Citibank which was upheld on appeal.³⁵

Citibank petitioned to have the judgment recognised in Italy. On 4 September 2014, the Court of Appeals of Bologna ruled in favour of Citibank holding that the 2008 judgment of the Superior Court of New Jersey is to be fully recognised in Italy. The judgment, with interest, is now at US\$431m. Under applicable Italian law, it is collectible against the new Parmalat.

Preventive measures and risk management

There are certainly instances where lenders are alleged to have acted badly, putting relationships above financial common sense.³⁶ However, most lender liability suits are based on far less incendiary allegations, and can be avoided or easily defended by banks and their risk management teams taking preventive measures.

Banks should periodically review their loan documentation, make sure they are internally consistent, and make sure that loan officers comply with them. Loan documentation and practices should be reviewed in light of current case law, as well as how business is actually conducted and loans are actually administered on a regular basis. Banks lending in the cross-border world should look at more than just the governing law of their loan documents, but also at the law applicable in the countries in which their borrowers operate.

Banks should get appropriate documentation from their borrowers showing board of director review and approval of lending transactions after the board has consulted with appropriate legal and financial advisers. Best practices are for a defaulted loan or a loan to an insolvent or bankrupt borrower to be handled by a new banker (not the original relationship banker) who is specially trained to deal with distressed situations. Relationship bankers may have too much personal 'skin in the game' to effectively deal with a distressed situation, creating lender liability risks where they might not otherwise exist. Sometimes the best defence is a good offence.

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Notes

- 1 See, *KMC v Irving Trust Co*, 757 F.2d 752 (6th Cir 1985) which found lender that terminated loan in accordance with loan agreement but failed to give notice to borrower prior to termination could be liable for lack of good faith; *State National Bank v Farah Manufacturing Co*, 678 SW.2d 661 (Tex App El Paso 1984) which had a large jury award against lender who threatened to terminate loan under a change in management covenant to prevent borrower from rehiring its former CEO (judgment ultimately set aside and case dismissed).
- 2 *Penthouse International, Ltd v Dominion Federal Savings & Loan Assn*, 885 F.2d 963 (2d Cir 1988).

- 3 See, *Alan's of Atlanta, Inc v Minolta Corp*, 903 F.2d 1414 (11th Cir 1990): courts will not recognise separate cause of action for breach of implied covenant of fair dealing until plaintiff establishes a breach of an express provision of the loan agreement.
- 4 For example, see *Needham v Provident Bank*, 110 Ohio App 3d 817 (1996); *Travel Services Network v Presidential Fin Corp*, 959 F Supp 135 (D Conn 1997).
- 5 *Dalton v Educational Testing Service*, 663 N E 2d 289 (NY 1995).
- 6 *Murphy v American Home Prods Corp*, 448 N E 2d 86 (NY 1983).
- 7 See, for example, *Rubin v Pioneer Federal Savings & Loan Assn*, 214 Neb 364 (1983); *Indu Craft, Inc v Bank of Baroda*, 47 F 3d 490 (2d Cir 1995); but see, *Robinson v McAllen State Bank*, 48 Banking Rep (BNA) 1004 (Tex Dist Ct 1987) regarding punitive damages awarded where bank breached duty of good faith resulting in borrower's bankruptcy.
- 8 *Crystal Springs Trout Co v First State Bank*, 732 P 2d 819, *on reh'g*, 736 P 2d 95 (Mont 1987), where lender repeatedly and knowingly misled borrower about status and availability of interim financing, lender was held liable for actual and punitive damages.
- 9 See, for example, *Marine Midland Bank v Cafferty*, 174 A D 2d 932 (1991), dismissing economic duress claim because bank had no duty to provide further loan advances.
- 10 See, *MSA Tubular Products, Inc v First Bank & Trust Co*, 869 F 2d 1422 (10th Cir 1989), lender liable to borrower's supplier for negligently responding to a credit inquiry.
- 11 See, for example, *Fedders North America, Inc v Goldman Sachs Credit Partners, LP (In re Fedders North America, Inc)*, 405 BR 527, 549–51 (Bankr D Del 2009).
- 12 *Felsen v Sole Caf  Mfg Corp*, 24 NY 2d 682 (1969).
- 13 See, for example, *Cowan Brothers, LCC v American State Bank*, 743 NW 2d 411 (SD 2007).
- 14 *Alpine Bank v Hubbell*, 555 F 3d 1097 (10th Cir 2009): no liability where construction loan agreement permitted lender to oversee construction.
- 15 See, for example, *Farah Manufacturing Co*, n1 above; *McFadden v Baltimore Contractors, Inc*, 609 F Supp 1102 (ED Pa 1985); *A Gay Jenson Farms Co v Cargill, Inc*, 309 NW 2d 285 (Minn 1981).
- 16 See, for example, *Guth v Loft*, 5 A 2d 503, 510 (Del 1939).
- 17 *In re Fedders North America Inc*, 405 BR at 543–44.
- 18 *In re Yellowstone Mountain Club, LLC*, 2009 Bankr LEXIS 1158 (Bankr D Mont 2009): court determined that the 'overreaching and predatory lending practices' of Credit Suisse merited subordinating Credit Suisse's secured claim to an unsecured claim; *Adelphia Recovery Trust v Bank of America, NA*, 390 BR 80, 99 (SDNY 2008): subordination claim dismissed for lack of standing because unsecured creditors of the lenders' debtors, as opposed to the debtors in whose stead the trust was suing, had been paid in full.
- 19 *In re SubMicron Systems Corp*, 432 F 3d 448, 455–56 (3d Cir 2006).
- 20 See, *In re AutoStyle Plastics, Inc.*, 269 F.3d 726, 748–49 (6th Cir 2001), discussing the differences between equitable subordination and recharacterisation.
- 21 *Trenwick America Litigation Trust v Ernst & Young*, 906 A 2d 168 (2006).
- 22 See discussion in *In re Fedders North America, Inc*, 405 BR at 549–52.
- 23 UCC s 1-304.
- 24 11 USC ss 547 and 548. See, for example, *In re Fedders North America, Inc*, 405 BR at 544–47.
- 25 11 USC s 547.
- 26 11 USC s 548. See, *SB Liquidating Trust v Preferred Bank (In re Syntax-Brilliant Corp)*, Case Nos 13-1373 and 13-1959 (3d Cir 11 August 2014), discussion of whether lender/transferee must have knowledge of borrower/transferor's intent to hinder delay or defraud creditors to be liable for receipt of a fraudulent transfer.
- 27 11 USC s 550.
- 28 *N Am Catholic Educ Programming Foundation, Inc v Gheewalla*, 930 A 2d 92, 101 (Del 2007).
- 29 See, for example, *Bondi v Citigroup, Inc*, 32 A 3d 1158 (NJ 2011); *Official Committee of Unsecured Creditors v R F Lafferty & Co*, 267 F 3d 340 (3d Cir 2001).
- 30 See, for example, *Bondi*, n 29 above; *CBI Holding Co v Ernst & Young*, 529 F 3d 432 (2d Cir 2008), *cert denied*, 129 S Ct 1988 (2009).
- 31 See, for example, *In re PSE & G Shareholder Litigation*, 801 A 2d 295, 306 (NJ 2002).
- 32 *Gantler v Stephens*, 965 A 2d 695, 705–06 (Del 2009); *In re Healthco Int'l, Inc*, 208 BR 288, 306 (Bankr D Mass 1997).
- 33 But see, *Quadrant Structured Products Company, LTD v Vertin*, CA No 6990-VCL (Del Ch 1 October 2014), a recent case of prestigious Delaware Chancery Court holding that business judgment rule protects risky decisions of interested directors of an insolvent corporation, where actions could have maximised value even though risk fell disproportionately on creditors.
- 34 *Trenwick*, 906 A 2d at 193.
- 35 See *Bondi v Citigroup, Inc*, 32 A 3d 1158 (NJ 2011).
- 36 See, for example, Chaitman, Helen Davis and Lance Gotthoffer, *JP Madoff: An Unholy Alliance Between America's Biggest Bank and America's Biggest Crook*, published at: <http://jpmadoff.com>.