



IWIRC CONNECTION

From the Chair

Beth E. Hansen, UTC Aerospace Systems, IWIRC Chair

Guten tag, Ciao, 今日は, Begroeting, 你好!, Bonjour, Halló, Hola, Konnichiwa, Selamat Pagi, Nǐ hǎo, Grüezi, Hallå! Namaste, Néih hóu, Hello!

What a wonderful array of greetings that represent the myriad of members that now make up IWIRC! Spring has definitely sprung in the Northern Hemisphere and with it (regardless of your hemisphere) new opportunities emerge in our industry as the market improves. More importantly, however, are the new opportunities arising for each and every one of our members to expand and enhance their practice. I continue to hear stories from members that have reached out across countries and oceans for help from fellow members, consistently being met with warmth and assistance. As our practice areas continue to grow and expand, it becomes readily apparent that our world is a lot smaller and more connected than we realize. How fortunate are we to have a network so broad that it literally spans the globe?

Much like the gardens many of us are readying to plant this season, our business relationships also need tending and cultivation to ensure strong, healthy growth. Please take some time to reach out to your fellow members, especially beyond your traditional geography - your lives (and networks) will only be the better for it!

I hope to see many of you at the upcoming Spring Meeting in Washington DC; and I am also looking forward to attending several programming opportunities in Milan, Tokyo and Lisbon, as well as the Leadership Summit in Toronto. I am overwhelmed by the dedication and success of our networks, their founders, their leaders and members and look forward to meeting as many of you as possible in the ensuing months!

connecting women worldwide

International Women's Insolvency and Restructuring Confederation
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Register Today for IWIRC's 13th Annual Spring Meeting!



IWIRC's 13th Annual Spring Program and Founders Awards Wednesday, April 13 and Thursday, April 14, 2016

IWIRC's Programming Committee has planned another fantastic Spring Meeting in the heart of beautiful Washington, DC. We are excited by the educational panels we will offer, and are happy to announce that 3 hours of CLE credit has been requested. We will also be recognizing the recipients of our 2016 Founders' Awards. Finally, to further promote and facilitate networking, included in registration will be a group dinner on Wednesday night for all registered attendees.

Please [click here](#) to register and for more information. We hope to see you there!

Network Corner: Spotlight on the Georgia Network

The IWIRC-Georgia Network was founded in 2001 as an organization to foster and promote networking among women in the restructuring industry in Georgia. Over time, our membership has grown to over 70 members across the state. Our members include dynamic women from diverse professional backgrounds, including judges, lawyers, bankers, turnaround professionals, financial advisors and other restructuring practitioners at all levels of practice. We strive to provide a regular forum for meeting, networking, and exchanging ideas, and to host a variety of different events each year.

This past year was a busy one for IWIRC-Georgia. While we continued to plan a variety of different events for our members, we also focused on expanding our membership and influence by working on different community service projects, partnering with other networks to host regional events, and by working with other local professional organizations to host innovative and interesting educational panels.

Community Involvement

IWIRC continued its community service efforts by partnering with Habitat for Humanity to raise funds to sponsor and construct a home for a working mother and her family. Over seven weeks, nearly 300 women volunteers worked side-by-side with the homebuyer to construct the house. IWIRC-Georgia members rolled up their sleeves and participated in the Atlanta Women's Build in sweltering temperatures in August 2015. This fall, IWIRC-Georgia received a plaque recognizing its efforts at the dedication of the home. Other community events include an interactive good credit badge activity for the Girl Scouts of Georgia and a financial literacy panel with Dress for Success.



IWIRC-Georgia recognized for its participation in Habitat for Humanity's Atlanta Women's Build

Cross-Network Initiatives

IWIRC-Georgia hosts two events annually that are aimed at connecting IWIRC members across networks. The first is a "Dine Around" event organized in connection with the Southern Bankruptcy Law Institute's Annual Seminar on Bankruptcy Law and Rules in March during which IWIRC members can choose to dine in one of two popular restaurants with members from other IWIRC networks attending the conference. Members from the Georgia, Florida, and Kentucky Networks participated in 2015, and the IWIRC-Georgia Network is thrilled to be planning this event for 2016!

For the past several years, the IWIRC-Georgia Network has also organized a luncheon during the ABI Southeast Bankruptcy Workshop that takes place each summer in Amelia Island, Florida. In 2015, the Georgia Network partnered with the Alabama and Carolinas Networks to host the event, which drew attendees from the Georgia, Carolinas, Florida, Delaware, New York, Central Kentucky, Virginia, and Alabama Networks. IWIRC-Georgia is looking forward to hosting this event again in 2016 and we hope to see many of you there!

Cross-Organizational Initiatives

In early 2015, IWIRC-Georgia partnered with the Atlanta Chapter of the Turnaround Management Association for a judge's panel on recent developments in chapter 11. The panel featured Chief Judge Kathy Surratt-States (U.S. Bankruptcy Court, E.D. Mo.), Judge Kevin Carey (U.S. Bankruptcy Court, D. Del.) and **Judge Mary Grace Diehl** (U.S. Bankruptcy Court, N.D. Ga.). The event was a big success and drew a large number of attendees from both organizations. IWIRC-Georgia and TMA are looking forward to putting on another exciting panel this coming March.

For the first time this year, IWIRC-Georgia partnered with the Georgia Association of Women Lawyers ("GAWL") for a judge's panel in February on ethics. The panel featured Bankruptcy Judge Wendy Hagenau (U.S. Bankruptcy Court, N.D. Ga.) alongside Georgia State Court and Superior Court judges and focused on ethical dilemmas in the courtroom. As both organizations are dedicated to enhancing the welfare and development of women in the legal profession in Georgia, IWIRC-Georgia looks forward to more opportunities to partner with GAWL in the future.

Cross-Border Case Study: Obstacles to Cross-Border Recognition in the Baha Mar Case/Northshore Chapter 11 proceedings



Sophia Rolle-Kapousouzoglou

Sophia Rolle-Kapousouzoglou, *LennoxPaton*

In July 2015, the Bahamian Supreme Court dismissed an application seeking recognition of Chapter 11 proceedings filed by Northshore Mainland Services Inc. a US Company and 14 Bahamian Companies ("the Baha Mar Companies").

The Chapter 11 filing arose because the Baha Mar Companies responsible for the development of a \$2.5 billion resort in Nassau, Bahamas were in financial straits. The Resort had missed several scheduled opening dates up to the time of the Chapter 11 filings and the resort was only 97% complete despite the sums already invested in the Resort which is said to be the largest single phase resort development in the Western Hemisphere.

By commencing the Chapter 11 proceedings the Debtors' 14 Bahamian Companies voluntarily submitted to the jurisdiction of the US Courts with the hope of facilitating a restructuring under US law since there was no similar mechanism available under Bahamian law. The likely outcome for the Debtors would be a liquidation of the Bahamian Companies if insolvency proceedings were pursued in The Bahamas.

Effect of Opening the Bankruptcy Proceedings in the US before The Bahamas

Although under Bahamian law a voluntarily submission to the jurisdiction of a US Court could give rise to the companies being subject to the jurisdiction of the US Courts proceedings, the fact that insolvency proceedings had not first been opened in The Bahamas proved to be one of the fatal obstacles to the application for recognition.

As a result, when the application was made for recognition of the Chapter 11 proceedings, the Supreme Court held that the Baha Mar Companies could not seek a stay of proceedings in The Bahamas emanating from Section 362 of the US Bankruptcy Code. The Supreme Court held that the only insolvency proceedings which could give true effect to the principle of modified universality would be unitary insolvency proceedings in The Bahamas.

It was further determined that there is no equivalent to Chapter 11 under Bahamian law by which breathing space can be created or new capital can be injected on terms acceptable to any reasonable lender. Forum shopping was not accepted and a restricted approach was therefore taken. The Bahamian Government subsequently filed applications to wind up the 14 Bahamian Companies who were indebted to the Bahamian Government in the sum of almost \$60 million.

Provisional Liquidators were appointed over the 14 Bahamian Companies on 4 September 2015 and the winding up hearing has yet to be proceeded with.

Dismissal of Chapter 11 Proceedings as against Bahamian Companies Following Refusal of Recognition by Bahamian Courts

In the Bankruptcy Court of the District of Delaware, two separate dismissal motions were filed by CCA Bahamas ("CCA") the lead contractor at the Resort, and CEXIM, the Debtors' secured creditor, while the Debtors filed an objection to

the dismissal motions, as did the Official Committee of Unsecured Creditors.

CCA and CEXIM sought to dismiss the Chapter 11 proceedings on the grounds that (i) the Debtors were not eligible for Chapter 11 in the US under the Bankruptcy Code because all but one of the Debtors were organized under Bahamian law and held few assets in the United States; (ii) CCA argued that the Debtors filed the Chapter 11 proceedings in bad faith or as a litigation tactic to avoid insolvency proceedings in The Bahamas; and (iii) that the best interests of the Debtors and creditors would be better served by dismissal of the cases so that the parties can proceed with insolvency proceedings in The Bahamas, the venue with the most significant contacts and interests in the project, as most stakeholders would expect Bahamian law to apply to any winding up proceedings.

On 15 September 2015, Judge Carey, Bankruptcy Judge in the District of Delaware dismissed the Chapter 11 proceedings in relation to the 14 Baha Mar Companies on the basis, among other things, that the creditors would have expected the Bahamian courts to have jurisdiction over the insolvency proceedings. The Chapter 11 proceedings were permitted to continue with respect to the US Company Northshore Mainland Services Inc. which was the only US Company that was party to the proceedings and incorporated under the laws of the State of Delaware while the other affiliated companies were not. The Chapter 11 proceedings were withdrawn by Northshore on 12 January 2016 following an application by the Debtor after Receivers were appointed over the assets of the Baha Mar Companies on 30 October 2015.

International Cooperation between Foreign Proceedings and Foreign Officeholders in The Bahamas

Under Bahamian Law, the Foreign Proceedings (International Cooperation) Liquidation Rules set out the manner in which the proceedings seeking recognition ought to be commenced, as well as the requirements to accompany an application seeking recognition of a foreign officeholder in relation to restructuring or reorganization related proceedings.



The procedure for recognition of foreign officeholders, and only subsequently foreign proceedings, is provided for in the legislation. It was argued in the Bahamian recognition proceedings that the foreign representative's application was misconceived in seeking to ask the court to recognize the foreign insolvency proceedings as opposed to the authority of the foreign representative appointed in the foreign proceedings. However, a further obstacle to the recognition application is that under Bahamian law a list of relevant foreign countries to whom recognition is intended to extend has yet to be designated.

If recognition was granted to the foreign officeholders the following ancillary

relief may have been obtained which would (a) recognize the right of a foreign representative to act in The Bahamas on behalf of or in the name of the debtor and, in the court's discretion to do so jointly with a qualified insolvency practitioner; (b) enjoining the commencement or staying the continuation of legal proceedings against a debtor; (c) staying the enforcement of any judgment against a debtor; (d) requiring a person in possession of information relating to the business or affairs of a debtor to be examined by and produce documents to its foreign representative; (e) ordering the turnover to a foreign representative of any property belonging to a debtor, and; (f) granting such other relief as it considers appropriate. Although there is an express exclusion which was pertinent to the Baha Mar case that an ancillary order shall not affect the right of a secured creditor to take possession of and realize or otherwise deal with property of the debtor over which the creditor has a security interest. CEXIM, the lender as secured creditor would have been precluded from exercising such a right which would be deemed to be contrary to public policy in contravention of the statute.

Hence, even if the Bahamian court recognized the US insolvency proceedings, it could not grant assistance in the terms sought because it had no inherent power to order assistance which would be tantamount to an injunction of, and amount to interference with the lender's rights. In the US, Chapter 11 provides a means to preserve business operations and is seen as a flexible restructuring tool given that the debtor is able to retain management and debtor-in-possession financing is available, however, the legal system in The Bahamas is based on the English common law principles which lean towards a creditor based system as opposed to debtor-friendly system as is the Chapter 11 mechanism.

The lender as secured creditor was therefore able to appoint receivers over the assets of the Baha Mar Companies and is entitled to enforce its security as it is empowered to do so under the Debenture which is governed by Bahamian law.

Relevant Foreign Countries to Which International Cooperation Extends under Bahamian Law

Another hurdle to the recognition of the Chapter 11 proceedings in The Bahamas was that at the time of the application The Bahamas had not yet designated a list of relevant foreign countries to which the statutory enactment to grant aid to foreign representatives was intended to extend.

Further, the fact that there was no list of countries to whom such assistance could extend appeared to thwart the statutory power. Quite possibly, if the US was on the list, recognition of a foreign representative may have been possible.

Furthermore, the Judge took the view that such assistance was no longer available to foreign officeholders at common law since it had been abrogated by statute. This approach was followed in another case by involving recognition sought by liquidators of Caledonian Bank, a Cayman Bank subject to liquidation proceedings there, in which recognition orders had been obtained in the US, England, Ireland, and Australia but such recognition was thwarted in The Bahamas.

This case provides an example of the treatment of cross-border proceedings and the issues which may arise. Both the US Courts and the Bahamian Courts had an opportunity to fully assess the parameters of their respective legislation

relating to reorganization and insolvency respectively. Though there is no mechanism for reorganization under Bahamian Law, the US Bankruptcy Court seemed to have accepted that in the absence of any likely stakeholder agreement under Chapter 11, the impact that the Chapter 11 proceedings would have on the numerous creditors affected by the process would not necessarily yield a beneficial result. Furthermore, the fact that insolvency proceedings were already pending in The Bahamas with respect to the Bahamian Companies likely played an influential role in determining whether the US Bankruptcy Court should divest jurisdiction over the Bahamian Companies particularly as the Bahamian Courts had already declined recognition of the Chapter 11 proceedings. Further, cooperation between the two courts by way of any protocol to the date of judgment seemed unlikely.

It was also considered that the plan as proposed by the Debtors would leave the treatment of the Bahamian creditors for disposition outside of the US Court which would invite further dispute and litigation. If the US Bankruptcy Court was convinced that denying the dismissal motions would have the effect desired by the Debtors of bringing all parties back to the bargaining table, it may have considered denying the dismissal motions, but the evidence did not reflect that.

However, the US Bankruptcy Court agreed with the ruling of Justice Winder of the Bahamian Supreme Court that many of the stakeholders expected that any insolvency proceedings would take place in The Bahamas and not the United States, and such expectations should be respected.

Conclusion

The UNCITRAL Model Law on cross border insolvency is not in force in The Bahamas although it is in the United States and 22 other countries. The Model Law is based upon the principle that the main proceedings should be where the company's main interests are centered (COMI) starting with the presumption that the registered office is there. If the Model Law was adopted in The Bahamas it would have provided for a different outcome. Secondly, it seems even under Bahamian law due to the fact that the proceedings were not first opened in The Bahamas there were issues with seeking to recognize the Chapter 11 proceedings as the main proceedings and there is no list of relevant foreign countries to whom assistance could be given. The proceedings were commenced in the United States while the registered office, or presumed COMI in the Baha Mar case for the 14 Bahamian Companies was The Bahamas. If however, the main-proceedings in the Baha Mar case were first opened before seeking to enter into Chapter 11 proceedings in the United States, and the US was designated as a relevant foreign country to whom assistance could be granted, quite possibly this case may have provided for a cross-border restructuring outcome.



IWIRC Represents at UNCITRAL

IWIRC Chair, **Beth Hansen** (left), and UNCITRAL Committee Director, **Carren Shulman** (right) represented IWIRC at the UNCITRAL meeting in Vienna, Austria in December.



US Case Study: *In re ICL Holding Co.* Paves the Way for Approval of Section 363 Sales and Payments to Unsecured Creditors Without Regard for the Bankruptcy Code's Priority Scheme

Felice Yudkin, *Cole Schotz P.C.*, and **Rebecca Hollander**, *Cole Schotz P.C.*



Rebecca Hollander



Felice Yudkin

Section 363 of the Bankruptcy Code permits a debtor to sell substantially all of its assets outside of a plan of reorganization. "Sale cases" have become more prevalent in recent years and courts have increasingly relaxed the standards under which 363 sales are approved. The United States Court of Appeals for the Third Circuit recently issued an opinion in *In re ICL Holding Co., Inc.*, 802 F.3d 547 (3d Cir. 2015) that provides yet another path for debtors and secured creditors to utilize the Section 363 sale process to cleanse assets while enhancing the possibility that unsecured creditors may get a return on account of their claims in an otherwise hopeless situation.

In *ICL Holding*, the Third Circuit held that an asset purchaser's payments into segregated accounts for the benefit of general unsecured creditors and professionals, made in connection with the purchase of all of the debtor's assets, are not property of the estate or available for distribution to creditors. The court upheld the bankruptcy court's prior orders that permitted unsecured creditors to receive a recovery and provided for the professionals to be paid in full despite the fact that a \$24 million administrative claim went unpaid.

This decision paves the way for buyers to selectively apportion payments to certain creditors while avoiding the strictures of the Bankruptcy Code's congressionally sanctioned distribution process. It has immense ramifications for Section 363 sales within the Third Circuit as it gives parties the imprimatur to fashion creative sales arrangements to efficiently reorganize distressed assets while liberating them from the traditional burdens of the heavily-regulated bankruptcy process.

A. Background

LifeCare Holdings, Inc., an operator of long-term acute care hospitals, and thirty-four of its subsidiaries entered into bankruptcy in December of 2012, following failed attempts to procure a sale of LifeCare's assets or a restructuring of LifeCare's balance sheet outside of bankruptcy. Prior to filing, LifeCare entered into an asset purchase agreement with its secured lender group which agreed to credit bid \$320 million of the \$355 million secured debt that LifeCare owed it. In addition to their credit bid, the lenders "agreed to pay the legal and accounting fees" for LifeCare and the committee of unsecured creditors and to pay the company's wind-down costs. *Id.* at 550. The secured lenders deposited cash into separate escrow accounts for these purposes. As part of the agreement, the parties decided that "[a]ny money that went unspent had to be returned to [the secured lenders]." *Id.*

This proposal left two major constituents out of the money: the committee of unsecured creditors and the United States government, which stood to reap an administrative claim of approximately \$24 million from the capital gains tax the sale was expected to generate. The secured lenders and the unsecured creditors subsequently reached a settlement agreement whereby the secured lenders agreed to place \$3.5 million in a trust for the benefit of the general unsecured creditors and in exchange the committee agreed to abandon its objections and support the sale. The government's objection remained unresolved.

The bankruptcy court approved both the sale and the settlement, declaring that the escrow and trust fund monies in question were not property of the estate and were therefore not subject to Code-regulated distribution. The government appealed the bankruptcy court's approval of both the sale and the settlement agreement to the district court which affirmed the bankruptcy court's decisions, finding again that the funds in question were not property of the estate.

B. The Third Circuit's Holding

The government appealed the district court decision, bringing the case before the Third Circuit to address whether the bankruptcy court erred in allowing some administrative creditors to take before other similarly situated administrative creditors and whether the bankruptcy court erred in allowing junior creditors to take before senior creditors.

The Third Circuit, however, did not reach either of these questions, focusing instead on two threshold inquiries. First the court determined that LifeCare and the Committee's mootness arguments did not prevent it from hearing the appeal. Second, the court determined that the monies paid to the administrative claimants and the unsecured creditors did not constitute property of the estate such that "even assuming the rules forbidding equal-ranked creditors from receiving unequal payouts and lower-ranked creditors from being paid before higher ranking creditors apply in the § 363 context, neither was violated here." *Id.* at 558.

In response to the government's argument that the settlement funds were "in substance an increased bid for LifeCare's estate," the Third Circuit stated that

although “the secured lenders paid cash to resolve objections to the sale of LifeCare’s assets, the money never made it into the estate” and, furthermore, the money was not “paid at LifeCare’s discretion.” *Id.* at 555. The court continued: “[i]n this context, we cannot conclude . . . that when the secured lender group, using that group’s own funds, made payments to unsecured creditors, the monies paid qualified as estate property.” *Id.* It also noted that the settlement money did not consist of “proceeds from [the secured lenders’] liens, did not at any time belong to LifeCare’s estate, and [would] not become part of its estate even as a pass-through.” *Id.* at 556 (citing *In re TSIC*, 393 B.R. 71 (Bankr. D. Del. 2008)). Lastly, the court disagreed with the government’s contention that the settlement was an “allocat[ion]” of “proceeds derived from the sale,” stating that it would not “elevate form over substance,” referring to the poorly-worded settlement-approval motion, where the evidence before it indicated that the settlement proceeds were not part of the consideration for the sale. *Id.*

The Third Circuit also considered the government’s argument that the escrowed funds were consideration for the sale. Although the court acknowledged that the government’s case was bolstered by drafting flaws in the asset purchase agreement, it found that the agreement itself “ma[de] clear that the secured lender group purchased all of LifeCare’s assets, including its cash, by crediting \$320 million owed by LifeCare to the secured lenders” such that “once the sale closed, there technically was no more estate property” to distribute. *Id.* The court also considered the fact that the sale order provided that any funds remaining in escrow after the professionals were paid would revert to the secured lenders (and the fact that such reversion of funds did indeed take place) as evidence that the escrowed funds were not part of the debtors’ estates. *Id.* The court stated that “as a matter of substance” it was unable to “conclude that the escrowed funds were estate property.” *Id.*

The government has decided against petitioning for a panel rehearing or a rehearing *en banc*, Letter from Bethany B. Hauser to Marcia M. Waldron, Esquire, Clerk, U.S Court of Appeals For the Third Circuit, *In re ICL Holding Co., Inc.*, No. 14-2709 (3d Cir Nov. 23, 2015), so *ICL* is here to stay.

C. The Ramifications of ICL

The ramifications of *ICL* are far-reaching, especially in the Third Circuit. Before *ICL*, LifeCare’s disputes with its administrative and unsecured creditors would have been resolved within the confines of the Code and would quite possibly have required judicial intervention. After the holding in *ICL*, so long as parties take care to ensure that sale- and settlement-related payments never enter the debtor’s estate, that their sale transactions otherwise meet the “sound business purpose” test, *ICL Holding*, 802 F.3d at 551 (citing *In re Montgomery Ward Holding Corp.*, 242 B.R. 147, 153 (D. Del. 1999)), and that their settlement agreements are otherwise “fair and equitable,” *id.* (citing *Protective Comm. for Indep. Stockholders of TMT*



Trailer Ferry, Inc. v. Anderson, 390 U.S. 414, 424 (1968); *Myers v. Martin (In re Martin)*, 91 F.3d 389, 393 (3d Cir. 1996)), parties are allowed to propose Section 363 sales and settlements that prefer certain creditors over others, thus circumventing the Bankruptcy Code's heavily regulated creditor distribution scheme. In particular, an *ICL*-style arrangement could allow debtors and potential purchasers to incentivize professionals to continue working on cases heading toward administrative insolvency or could be used to avoid litigation by aggrieved creditors with deep pockets.

ICL could also be applied to resolve disputes on the path to a structured dismissal. In an August 2015 decision, the Third Circuit reluctantly upheld the use of a structured dismissal that included distributions made outside of the Code's priority scheme in a case where the debtors were faced with a variety of unpalatable routes out of bankruptcy. *Official Comm. of Unsecured Creditors v. CIT Group/Bus. Credit, Inc. (In re Jevic Holding Corp.)*, 787 F.3d 173 (3d Cir. 2015). While the *Jevic* court cabined its holding closely, stating that "bankruptcy courts may, in rare instances like this one, approve structured dismissals that do not strictly adhere to the Bankruptcy Code's priority scheme," *id.* at 180, it is easily distinguishable from *ICL* since in *Jevic* there was no dispute that some of the property subject to distribution was property of the estate. *Id.* at 189 (Sciria, dissenting); Brief of Petitioner-Appellant, *Czyzewski v. Jevic Holding Corp.*, No. 15-649, 2015 WL 7252903 (U.S.), *18 n.4 (3d Cir. Nov. 15, 2015). Read together, *ICL* and *Jevic* indicate that the Third Circuit might approve of a structured dismissal in which distributions made in defiance of the Code's priority scheme are made with moneys from outside of the estate. This opens a world of possibilities for bankruptcy practitioners to consensually wind down bankruptcies through non-traditional means.

In sum, *ICL* grants parties the freedom to shape their bankruptcies from stem to stern. We expect to see its effects reverberate throughout the Third Circuit as practitioners formulate new and creative strategies to appease constituents while sprinting through the bankruptcy process.

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Fun Fact

The Founders awards are named after our 3 founders, **Selinda Melnik**, **Martha Fetner** and **Lauren Ryan** who were all connected to the insolvency industry through different professions and connected by their desire to help other women succeed and flourish in the industry. Selinda is an attorney, Martha is from the banking industry and Lauren is an accountant.

Did you know...

... that all network chairs receive a small token of appreciation from IWIRC for their service? With such a large and worldwide presence, we unfortunately cannot recognize in person each network chair's service, but we do send a glass paperweight thanking them for their time and efforts on behalf of IWIRC. Our network chairs ensure IWIRC's success and the success of our members, so the next time you see one of these current or past leaders, don't forget to thank them!

Secured Creditors Beware: Liability Lurks in Lockboxes



Jill B. Bienstock

Jill B. Bienstock, Cole Schotz P.C.

Lenders and secured creditors often require that debtor-customers direct all receivable collections into a lockbox, hoping to wrangle any available proceeds to apply to their debtors' outstanding debt. In requiring a debtor or its customer to remit payments to a lockbox, however, creditors may be overlooking a potential source of significant liability. A creditor using a lockbox may unwittingly expose itself to greater risk and liability than just a debtor's default if it receives funds that were collected as sales tax on a debtor's goods or services.



As a lender or secured creditor, how do you know if you are at risk? First and foremost, understand your debtor's business and whether its goods or services are taxed. Second, know what the laws provide for in the jurisdiction where your debtor is conducting business – particularly with respect to third-parties that collect or receive sales tax.

By way of example, the State of Texas treats anyone who collects *or receives* money that is collected as a tax as a strict, statutory trustee, holding the collected tax for the benefit of the taxing authority. Recipients and holders of such proceeds may be liable for the full tax amount collected – plus any accrued interest and penalties. See Tex. Tax Code Ann. § 111.016 (2007).

A central issue in determining liability in your jurisdiction may be how your lockbox is structured, as is the case for Texas. If a debtor's customers pay receipts with sales tax directly to a lockbox, in Texas such a creditor is a strict, statutory trustee. If, however, a debtor's customers pay receipts with sales tax first to the debtor and then those funds are transferred to a lockbox, a creditor still risks being liable as a transferee if they have the requisite "knowledge." In determining whether to impose liability on a third-party, Texas courts consider whether the recipient *knew* that it received sales tax funds. Knowledge is not just whether you had actual notice that the receipts contained sales tax funds. Instead, it is an "inquiry notice" standard, which requires a court to consider whether there was sufficient information available to cause you to inquire whether the funds received contained tax receipts. Courts consider a third-party as being on "inquiry notice," and thus having the requisite knowledge to be held liable, where, if you pursued an issue, you would or could have ascertained the truth.

Do you have enough information to be on "inquiry notice?" Lenders and secured creditors often require that debtors provide various periodic reports and/or copies of invoices to monitor the financial health of their operations. As a careful and proactive creditor, you may already have sufficient information to be on "inquiry notice" that you are holding commingled funds in your lockbox.

The case *In re Amber's Stores, Inc.*, 205 B.R. 828 (Bankr. N.D. Tex. 1997), presents an interesting analysis of "knowledge" in the context of lender-liability for receipts commingled in a lockbox with collected sales tax. There, the debtor-vendor in that case received money from its customers (which included collected sales tax) and the debtor then sent the money directly to its secured lender's lockbox; the lender in turn applied the receipts to the debtor's outstanding loan and extended the debtor additional credit. The taxing authority sued the debtor's lender to recover unpaid sales tax that was part of the receipts directed to the lender's lockbox. The court determined that since the debtor first had dominion and control over the funds, and only then transferred them to the lender, that the lender was not a strict statutory trustee. However, the court found the lender could be a trustee who held the tax proceeds for the benefit of the taxing authority. The central issue was whether the lender could assert a good faith transferee defense, which hinged on whether the lender had "inquiry notice" that the lockbox contained collected sales tax. "Inquiry notice" could be attributed even if additional work or due diligence was required to uncover the existence of sales tax in the lockbox. The case ended up before the bankruptcy court on a summary judgment motion and the court ultimately held that there remained an issue of fact as to whether the lender had knowledge about the nature of the funds. Despite the lender's Vice President testifying that he was not aware of whether the debtor had, prior to remittance, segregated out its sales tax and that the debtor had **not asked** the lender to create a separate account to segregate the funds, the court found that there remained a question as to whether the lender was on "inquiry notice" and thus knowledge could potentially be imputed to the lender. Although that case was ultimately settled in advance of trial, it is instructive because of the court's clear analysis of the potential pitfalls facing lenders and secured creditors that use lockboxes without considering their potential exposure. It also highlights the distinction between lenders who receive payments directly from a debtor's customer, which are strict statutory trustees, versus lenders who receive funds from a debtor, after they were collected from a customer, which still risk being deemed transferees potentially liable for the return of funds.

Ultimately, if you receive collected tax directly from a customer, you may be strictly liable for the return of such funds, as is the case in Texas. Even if you receive the funds indirectly, you may have liability for the failed remittance of taxes unless you can establish a lack of knowledge. That may be challenging, however, because jurisdictions, like Texas, may require lenders and secured creditors to first segregate funds to remove trust funds (like taxes) from a mixed account before applying funds on hand to overdrafts or liabilities. See *State Bank v. Valley Wide Elec. Supply Co., Inc.*, 752 SW 2d 661, 665 (Tex. App. 1988); see also *Alon USA, LP v. State*, 222 SW 3d 19, 30 (Tex. App. 2005), *rehearing denied* (2007). Notably, if a lender or creditor is aware that any of the funds it applies to offset an overdraft or prior debt are trust-funds, like taxes, the lender/creditor will lose any asserted immunity. The end result is that it will be treated as a party liable for the collected tax. See *Alon, supra* at 30-31. Many lenders and secured creditors conduct business with debtors located in states other than their own. Creditors should consider the varying statutory requirements and, to the extent they use a lockbox, they should consider how best to segregate out any collected tax to avoid potential exposure.

Network Happenings

Atlantic Canada Network

The Atlantic Canada Network held a very successful and rewarding High Tea Luncheon on December 15. Our members donated and created shoeboxes of donations that we distributed to various women's shelters throughout the city. Although we all agreed we shouldn't quit our day jobs as insolvency practitioners seeing as how our gift wrapping skills left much to be desired! We all agreed that this will be an annual IWIRC Atlantic Canada Network event. It felt so good to give back to women in need.



Florida Network

IWIRC Florida is pleased to announce its 2016-2017 Officers and Directors:

Chair – **Monique D. Hayes** (MIA)
Vice Chair – **Jodi Cooke** (PNS)
Secretary – **Leanne Prendergast** (JAX)
Treasurer – **Shawna Amarnani** (TPA)
Past Chair – **Leyza Blanco** (MIA)

Directors:

Jacqueline Calderin (MIA)
Jennifer Gavrich (ORL)
Barbara Hart (TPA)
Lori Vaughn (TPA)
Nicolette Vilmos (ORL)
Snow Wallace (JAX)

Greater Maryland Network

Women in the Law: A Judicial Perspective

On November 19, 2015, the Greater Maryland IWIRC Network and the University of Maryland Carey School of Law's Women, Leadership & Equality Program sponsored a panel of seven distinguished women judges who discussed their career paths in the legal profession and practical courtroom tips. Although each judge discussed her own unique pursuit of the practice of law, three commonalities were shared by all judges in achieving professional success—persistence, resilience and family support.

The Network was honored to host as panelists: Chief Judge Catherine C. Blake (United States District Court for the District of Maryland), **Chief Judge Nancy V. Alquist** (United States Bankruptcy Court for the District of Maryland and Greater Maryland IWIRC Member), Judge Wendelin I. Lipp (United States Bankruptcy Court for the District of Maryland), Judge Andrea M. Leahy (Maryland Court of Special Appeals), Circuit Administrative Judge Kathleen Gallogly Cox (Circuit Court for Baltimore County, Maryland), Judge Ellen M. Heller (ret.) (Circuit Court for Baltimore City, Maryland), and Judge Lisa A. Hall Johnson (District Court for Prince George's County, Maryland). The panel was moderated by **Lisa Yonka Stevens**, IWIRC Greater Maryland Events Co-Chair.

IWIRC Greater Maryland Holiday Lunch

On December 3, 2015, the Greater Maryland Network hosted its annual Holiday Lunch at McCormick & Schmick's in Baltimore, Maryland. The lunch was well attended and provided a wonderful networking opportunity for our members and time to share holiday cheer with each other.

Bankruptcy Bar Association's Annual Holiday Party

On December 16, 2015, the Bankruptcy Bar Association hosted its annual Holiday Party at The Hotel at Arundel Preserve. The party was well attended by IWIRC members and non-IWIRC members alike. Partygoers had an opportunity to catch-up with old friends and colleagues and make some new ones while toasting to the holidays and the New Year.

IWIRC Volunteers at My Sister's Place Women's Center

The Greater Maryland IWIRC Network generously provided a breakfast of chicken biscuits and fresh fruit to more than 60 homeless women on Tuesday, February 2, 2016 at My Sister's Women's Center in downtown Baltimore. My Sister's Place Women's Center provides a safe haven for women and their children experiencing homelessness. Through a variety of programs, My Sister's Place helps to transform the lives of many women trying to reach stability and self-sufficiency. It offers daily meal services, 3 times daily, 365 days each year. It also offers a day shelter where the women can do laundry, shower, use the phone, and get referrals to overnight shelter. **Laura Bouyea** (Venable), **Kristen Siracusa** (Miles & Stockbridge) and **Lisa Yonka Stevens** (Yumkas, Vidmar, Sweeney & Mulrenin) were on hand to serve the breakfast. Several women came up to personally thank Laura, Kristen and Lisa for the breakfast.

My Sister's Place Women's Center is a comprehensive resource and day shelter for homeless and impoverished women and their children in Baltimore City. In addition to serving three meals a day, My Sister's Place Women's Center also provides access to services such as case management, education, and job training to women in Baltimore City. For more information, you can go to their [website](#). If you are interested in additional volunteer opportunities as My Sister's Place, contact Laura Bouyea at lsbouyea@venable.com.



Kristen, Laura, and Lisa at My Sister's Place Women's Center

Maryland Super Lawyers

The Maryland Super Lawyers and Super Lawyers Rising Stars lists were recently published. The lists had a great IWIRC Greater Maryland showing, as follows:

Maryland Super Lawyers

Maria Ellena Chavez-Ruark (Saul Ewing) for Bankruptcy: Business

Deborah Hunt Devan (NQGRG) for Bankruptcy: Business

Linda Donhauser (Miles & Stockbridge) for Creditor Debtor Rights

Catherine Hopkin (Tydings & Rosenberg) for Bankruptcy: Business
Joyce Kuhns (Offit Kurman) for Bankruptcy: Business

Maryland Super Lawyers – Rising Stars

Corinne Donohue (Yumkas, Vidmar, Sweeney & Mulrenin) for
Bankruptcy: Business

Kristen Siracusa (Miles & Stockbridge) for Creditor Debtor Rights

Congratulations to all those selected!

Hong Kong Network

As we kick off 2016 with our annual Chinese New Year Dim Sum Lunch in Hong Kong, we reflect on the year just gone, which was a very special one as we celebrated ten years of IWIRC in Hong Kong. We organised 11 events during the year with over 600 people in cumulative attendance and below are some of the highlights.

In honour of our 10 year anniversary, on 12 June 2015 the Hong Kong network organised a black tie dinner at the China Club, with 127 guests in attendance. Tables were hosted by a number of firms in the industry and two of the founding members of IWIRC in Hong Kong, **Jacqueline Walsh** and **Aruni Weerasekera**, addressed the gathering with memories of IWIRC's inception in HK and reflections on its growth over the past 10 years. A special thank you to IWIRC International for its support for this event.



Catherine Read (Co-Chair 2015), Justine Lau, Jacqueline Walsh, Eloise Fardon (Co-Chair 2015) and Aruni Weerasekera from the Hong Kong Network in photo above

On 15 October 2015, the Hong Kong Network hosted the first IWIRC Charity Quiz at Bungalow on Wyndham Street, Central sponsored by Linklaters and Maples and Calder. The event was a sell out and we raised a grand total of HK \$25,800, which was donated to the winner's chosen charity, Treats, a Hong Kong charity giving children the chance to live and participate in an accepting and integrated society.



On 28 October 2015, KPMG kindly hosted the Honourable Justice Harris, the Hong Kong Companies Court Judge, who presented a lunchtime technical seminar to 112 attendees and provided an update on cross-border insolvency law, including the aims of such regimes, along with his views on the tools available in Hong Kong to assist in cross-border matters. It was a great insight and rare opportunity to hear the approach and methodology of the Hong Kong Companies Court in the recent cases of *China Medical Technologies, Joint Official Liquidators of A Co v B* and *Joint Administrators of African Minerals Ltd v Madison Pacific Trust Ltd*.



Edward Middleton from KPMG, Catherine Read (Co-Chair 2015), Mr Justice Harris and Yvonne Chong (Co-Chair 2016) in the photo above

We look forward to another successful year for our network and wish you all Kung Hei Fat Choy (Happy New Year) from Hong Kong!

Mountain Desert Network

IWIRC Members Dine in the Desert

On December 3, the Mountain Desert Network hosted a dinner at the Desert Botanical Gardens in Phoenix. The dinner had a dual purpose: to allow IWIRC members from across the country, who had gathered in Phoenix for the ABI's Winter Leadership Conference, to meet and network with each other; and to honor Sheila Smith, IWIRC's 2015 Woman of the Year. The dinner coincided with the first night of the Winter Leadership Conference and was the perfect opportunity to savor good food and make new friends in a relaxed setting. IWIRC members enjoyed a three-course meal, accompanied by wine and excellent conversation, in a desert landscape surrounded by mountains and cacti in the distance. The event was an excellent way to showcase the beauty of the Phoenix area and to honor Sheila before she was officially presented with her award at the Conference the following day.

New Jersey Network

The New Jersey Chapter Hosts a Recruiting Event at a Local Chocolate Factory

The New Jersey Network kicked off the New Year with a recruiting event at Chocolate Works in Livingston where attendees were transformed into would-be chocolatiers for the evening. Once the group's custom-made chocolates had hardened, attendees broke bread next door at Anthony's Coal Fired Pizza. "This event was most enjoyable. It combined some of my favorite things-- chocolate, pizza and IWIRC," said Chief Judge Kathryn Ferguson of the New Jersey Bankruptcy Court. **Judge Stacey Meisel** of the New Jersey Bankruptcy Court was also in attendance, as well as a number of IWIRC members and non-members. New IWIRC member, **Colleen Maker**, who is currently clerking for Bankruptcy Judge Rosemary Gambardella, commented, "As a new attorney, going to networking events can be very intimidating, but the ladies at IWIRC are so welcoming, and the events are always fun and interesting."

IWIRC-NJ Co-Chair **Tara Schellhorn** reported, "This event was a great success. The attendees were given an opportunity to spend time together doing a fun activity and enjoy each other's company over dinner. These types of events are invaluable as they help our members develop and strengthen relationships, which further the mission of IWIRC. We very much appreciate Chief Judge Ferguson and Judge Meisel taking time out of their busy schedules to attend this event and support IWIRC."



New Year, New Board, and Push for New Membership

IWIRC-NJ recently empanelled a new board led by **Tara Schellhorn** of Riker Danzig Scherer Hyland & Perretti and **Nicole Stefanelli** of Lowenstein Sandler. **Meredith Friedman** is serving as Vice Chair/Secretary, **Michelle Morris Aurich** of WithumSmith+Brown is serving as Treasurer, **Kelly Curtin** of Porzio Bromberg & Newman is serving as Director of Membership and Sponsorship, **Sydney Darling** of Connell Foley is serving as Director of Communications and **Margarita Ginzburg** of Day Pitney is serving as Director of Programming. Immediate past co-chairs **Shoshana Schiff** of Trenk, DiPasquale, Della Fera & Sodono and **Terri Freedman** of Freedman Law, also continue to serve on the IWIRC-NJ Board.

Member News



Sarah Frankel

Congratulations to **Sarah Frankel** and the525group. the525group was recognized by the National Law Journal as "Best National Legal Recruiter" and "Best National Legal Outplacement/Career Transition Counseling" in their annual "Best Of" survey. the525group is the first nationally recognized recruiting firm focused exclusively in the restructuring space.



Rebecca Hollander

Cole Schotz P.C. is pleased to announce that **Rebecca Hollander** joined the firm as an associate in the Bankruptcy and Corporate Restructuring Department. Prior to that, Ms. Hollander was a judicial clerk with the Honorable Andrew B. Altenburg, Jr., United States Bankruptcy Judge for the District of New Jersey. The New York office of Cole Schotz P.C. has relocated to 1325 Avenue of the Americas, 19th Floor, New York, NY 10019. Tour the office: <http://coleschotznews.com/cv/c18f8a6064d41eaa2abe1aa4cc4c9cd0a77fcded>



Ali Kelly

Ali Kelly was promoted to Senior Counsel at Liner Law LLP.

Joyce A. Kuhns has joined Offit Kurman as a Principal attorney in the Bankruptcy and Restructuring practice group. Joyce will work in the firm's Baltimore office. Joyce has represented debtors and creditors on billion-dollar bankruptcy and restructuring matters. Her clients include individual lenders, borrowers, equity committees, regulators, and trustees.



Joyce A. Kuhns

Lisa Yonka Stevens (Yumkas, Vidmar, Sweeney & Mulrenin) was promoted to Partner. She will continue working in the firm's Columbia and Annapolis offices. Her practice includes debtor, committee, and trustee bankruptcy work, litigation, and commercial lease negotiation and documentation. Lisa will be a panelist for the upcoming Anatomy of a Commercial Lease: Mock Lease Negotiation on March 9, 2016 from 6-8 p.m. at the Anne Arundel Community College. This CLE program will provide a dynamic mock commercial lease negotiation between counsel for the landlord and counsel for the tenant and will include general business and bankruptcy-specific issues that may arise between the landlord and tenant.



Lisa Yonka Stevens

Kara Rescia and Liz Katz and are pleased to announce that attorney **Denise Shear** has joined our firm as partner and we have changed our firm named effective January , 2016 from Rescia & Katz, LLP to Rescia, Katz & Shear, LLP. Now we are an all-female boutique bankruptcy firm with offices in Northampton, Massachusetts and Enfield, CT. We handle both consumer and business debtor and creditor representation throughout Massachusetts and Connecticut. Denise previously practiced with a Chapter 7 trustee for 16 years and will now be joining IWIRC.



Denise Shear

Angela L. Shortall (Protiviti Inc.) has been named President of the Association of Insolvency and Restructuring Advisors ("AIRA") as of January 1, 2016. AIRA is a nonprofit professional association serving insolvency professionals throughout the industry. AIRA is dedicated to uniting and supporting insolvency professionals by promoting the industry and providing high quality educational programs that, along with its certification program, ensure a standard of excellence within the profession.



Angela L. Shortall

Upcoming Network Activities

Did You Know . . . All IWIRC members are welcome at all IWIRC events around the world? Don't forget to check the event schedule before you travel!

Monday, March 14, 2016

Washington, DC Network
Dessert for Dinner at Co Co. Sala

Wednesday, March 16, 2016

Florida Network
IWIRC Florida Members and Friends Luncheon

Friday, March 18, 2016

Virginia and Washington, DC Networks
IWIRC Social Event following the Chapter 13 Bankruptcy Law Seminar

Tuesday, March 22, 2016

Northeast Ohio Network
The Changing Landscape of Small Business Lending Panel Discussion

Thursday, March 31, 2016

New Jersey Network
IWIRC-NJ Casino Night Co-Hosted with NJTMA Women's Division

Thursday, April 7, 2016

Greater Philadelphia Network
Afternoon Tea at The Dandelion

Wednesday and Thursday, April 13-14, 2016

Washington, DC Network
IWIRC's 13th Annual Spring Conference

Newsletter Submissions

The Newsletter relies on contributions from IWIRC's networks and members. We are always looking for the following content:

- Network events.
- Member news, such as job transitions, promotions, awards, speeches and publications.
- Articles regarding bankruptcy and insolvency topics and/or business and professional development topics.

The Newsletter is published quarterly. Please note the following submission deadlines:

Spring Newsletter – May 5, 2016 submission deadline

Summer Newsletter – August 5, 2016 submission deadline

Fall Newsletter – November 5, 2016 submission deadline

Winter Newsletter – February 5, 2017 submission deadline

To submit news and articles or to make an inquiry regarding the Newsletter, please contact IWIRC's Newsletter Director **Lauren Friend McKelvey**, Odin, Feldman & Pittleman, PC at Lauren.McKelvey@ofplaw.com and 703-218-2135.



Musicians Needed for BANKRUPT TALENT Charity Benefit Event

BANKRUPT TALENT, an annual rock and roll musical benefit founded in 2009 by Randa Karambelas of ToneyKorf Partners, LLC is looking for women in the insolvency field with musical talent to perform at a musical fundraiser on May 11, 2016 at Le Poisson Rouge in New York City, prior to ABI's NY Conference.

For more information about participating in the upcoming BANKRUPT TALENT event, please contact Randa Karambelas at (855) 857-1212 ext 117 or rkarambelas@toneykorf.com.

Check out BANKRUPT TALENT's website at <http://toneykorf.com/giving-back/>.

IWIRC Contacts

If you would like to:

- introduce a new member to IWIRC;
- join IWIRC; or
- volunteer to take on a leadership role within one of our committees

Please contact **Shari Bedker** at 434-939-6002 or info@iwirc.com.

Welcome IWIRC New Members!

December 1, 2015 - March 3, 2016

Linda V. Aron
EisnerAmper LLP
New York, NY

Michela Ashton
Zolfo Cooper
New York, NY

Jalil Asif
Kobre & Kim (Cayman)
Grand Cayman, Cayman
Islands

Tracy Au
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Hong Kong

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Law Clerk to the Hon.
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IWIRC wants to thank all of its sponsors that have committed to IWIRC in 2016 to support its programs, members and mission. If you are interested in sponsoring or supporting IWIRC as a 2016 annual sponsor or one of our events open for event sponsorship please contact Shari Bedker at (434) 939-6002, info@iwirc.com or Carrienne J.M. Basler at (312) 705-3907, cbasler@alixpartners.com.

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Save the Date!

IWIRC's 2016 Leadership Summit Toronto, Canada July 27-29, 2016

The organized events will begin at approximately 5 p.m. on Wednesday and conclude after lunch on Friday around 2 p.m.

A block of rooms has been reserved at the Delta Toronto Hotel at a rate of \$209/night. Please [click here](#) to make your room reservations or call the hotel at 416-849-1200 **by July 6, 2016** and mention "IWIRC" to take advantage of the special rate.

The weekend of July 29-August 1, 2016 is a holiday weekend in Ontario. Toronto is hosting the annual Caribbean Festival that weekend as well. Please book early if you plan to extend your stay in Toronto!

***Please Note: Registration for the Leadership Summit itself is currently CLOSED and will become available after the IWIRC Spring Program in late April 2016. You are encouraged to book your hotel NOW.



connecting women worldwide

International Women's Insolvency and Restructuring Confederation

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