

DECEMBER 2023

Restructuring Department Bulletin

Election of Joe Graham to Partner

Joe Graham was elected partner in the New York office. This year, Joe played a leading role in the chapter 11 cases of Avaya, Benefytt and Diamond Sports. He regularly advises on out-of-court restructurings, bankruptcy litigation and distressed investments. Joe earned his J.D., magna cum laude, and his B.A. from the University of Notre Dame.

Kelley Cornish Inducted into “M&A Advisor Hall of Fame”

The M&A Advisor inducted partner Kelley Cornish into the “M&A Advisor Hall of Fame” as part of the publication’s 2023 M&A Advisor Awards. The awards recognize professionals whose work sets an extremely high standard for dealmaking. Kelley was honored as one of the M&A industry’s most impressive legal professionals at a gala on November 15.

Publication of *Americas Restructuring Review 2024*

Partners Elizabeth McColm and Brian Bolin and associate Mitchell Mengden wrote a chapter in the *Americas Restructuring Review 2024*, published by *Global Restructuring Review*. The chapter, “Investment Fund Activity in U.S. Debt Restructurings,” examines the role private equity and hedge funds play in restructurings and the variety of investment strategies they deploy in distressed situations.

Second Circuit Applies “Transfer-by-Transfer” Approach to Determine Whether Bank Customers Are Financial Institutions Covered by Section 546(e) Safe Harbor

Section 546(e) precludes from avoidance settlement payments made by or to a financial institution in connection with a securities contract. “Financial institution” is defined to include a customer of a bank if the bank is acting as agent for the customer in connection with a securities contract.

The litigation trustee of Nine West Holdings, Inc. brought fraudulent transfer claims arising from Nine West’s leveraged buyout. Three transfers were disputed: two involved Nine West depositing funds with its bank to make payments to Nine West’s shareholders, and one where Nine West paid \$78 million to individual employee shareholders through its payroll program.

The district court held that because the bank acted as Nine West’s agent for one of the three transfers, the bank was Nine West’s agent for every transfer made in connection with the LBO. The Second Circuit rejected this “contract-by-contract” interpretation of “financial institution.” Instead, it applied a “transfer-by-transfer” approach where a customer is a covered “financial institution” only when a bank is acting as its agent for the transaction at issue.

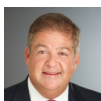
The Second Circuit concluded that section 546(e) applied to Nine West’s transfers to the bank to pay its shareholders because the bank was Nine West’s agent for those transactions, but, for the \$78 million in payroll transfers to individual shareholders, in which the bank undertook “ministerial” actions, the Second Circuit found that section 546(e) did not apply.

The Second Circuit proved unwilling to expand the scope of section 546(e) to insulate every transfer made in connection with an LBO so long as a bank serves as agent for at least one transfer. Instead, a court must look to each transfer to determine when a bank is acting as an agent for its customer. On December 11, 2023, the individual shareholder defendants filed a petition with the Second Circuit for rehearing and rehearing en banc. *See In re Nine W. LBO Sec. Litig.*, 87 F.4th 130 (2d Cir. 2023).

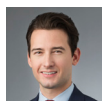
Questions? Please contact any of our Restructuring Partners to discuss these or other topics in greater depth.



Jacob A. Adlerstein
+1-212-373-3142
[Email](#)



Paul M. Basta
+1-212-373-3023
[Email](#)



Brian Bolin
+1-212-373-3262
[Email](#)



Robert A. Britton
+1-212-373-3615
[Email](#)



Kelley A. Cornish
+1-212-373-3493
[Email](#)



Alice Belisle Eaton
+1-212-373-3125
[Email](#)



Brian S. Hermann
+1-212-373-3545
[Email](#)



Christopher Hopkins
+1-212-373-3334
[Email](#)



Kyle J. Kimpler
+1-212-373-3253
[Email](#)



Elizabeth R. McColm
+1-212-373-3524
[Email](#)



Sean A. Mitchell
+1-212-373-3356
[Email](#)



Andrew M. Parlen
+1-212-373-3141
[Email](#)



Andrew N. Rosenberg
+1-212-373-3158
[Email](#)



John Weber
+1-212-373-3656
[Email](#)



Ken Ziman
+1-212-373-3733
[Email](#)