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88 MPH to Confirmation: Landmark Cases That Changed the Ride

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RAILROADS – THE FOUNDATION

Role of Railroads in the Development of U.S. Bankruptcy Law

Professor Douglas Baird explains in his *Elements of Bankruptcy* that the roots of modern chapter 11 law traces its roots to the rise of the railroads in the late nineteenth century. While railroads of course revolutionized American life by, for the first time, creating a national marketplace for American goods, they required extraordinary amounts of capital to build. Laying a mile of track cost about $20,000. By 1860, the private investment in railroads exceeded $1 billion.
Investment in the railroads exploded from the period between the Civil War and the economic downturn of the 1890s. But when the broader economy slowed, much of the railway industry became insolvent.

The issue was that existing law was generally inadequate to permit the restructuring of a railroad in financial distress. The two available legal mechanisms were state insolvency proceedings and federal bankruptcy. Congress, however, had allowed the Bankruptcy Act of 1867 to lapse in 1878, leaving no federal bankruptcy statute at all for most of the late nineteenth century.

State insolvency law was a patchwork, and more fundamentally it couldn't solve the core problem: a railroad was an interstate enterprise whose physical assets — track, rolling stock, terminal facilities — crossed state lines and were subject to the jurisdiction of multiple states simultaneously. A state court receiver in Ohio had no authority over the Tennessee segment of the line. Piecemeal state proceedings would have destroyed the integrated network that was the principal source of the railroad's value.

Foreclosure under state law was equally problematic. The standard remedy for a defaulted mortgage was foreclosure sale, but a foreclosure sale of a railroad's mortgaged property — say, the first-division mortgage covering track from Chicago to St. Louis — would sever that segment from the rest of the system and produce a fraction of going-concern value. The bondholders holding the mortgage were often better off with a reorganized, operating railroad than with the proceeds of a piecemeal sale.

The emergence of the federal equity receivership

Federal courts stepped into this vacuum. The mechanism was the equity receivership. While this had had antecedents in English chancery practice, American courts developed it into something qualitatively new to meet the railroad problem.

The basic structure typically involved a friendly creditor, such as a bondholder who was cooperating with the railroad's management, filing an action in federal court alleging that the railroad was unable to pay its debts and asking for appointment of a receiver to operate the property. Because the railroad operated across state lines, the same receiver could be appointed simultaneously (or in coordinated fashion) by multiple federal courts, giving the receivership national reach. The receiver would then operate the railroad under court supervision while the parties negotiated a plan of reorganization.

Several aspects of this receivership procedure were later to become the standard fare of American corporate reorganization practice.

First, the federal equity court, once it took possession of the railroad's assets, could assert jurisdiction over property in multiple states and displace conflicting state court proceedings. This was legally controversial at the time, as there were countervailing federalism principles. The practical necessity of a federal law that would override contrary state law principles, however, was undeniable. The result was, in effect, a federal insolvency regime for railroads created as a matter of federal common law, without express statutory authorization.

Second, the equity receiver played the role of an active trustee. Unlike an English receiver, who was typically a passive custodian collecting rents, the American railroad receiver continued running the business. This was of course critical. A railroad that stopped operating would lose its value immediately. But as a result, the receiver was necessarily incurring new obligations, such as wages, fuel, and supplies. The Court therefore needed to decide how those obligations ranked against prepetition claims. This is the direct antecedent of the six-month rule and, ultimately, the doctrine of necessity.

Specifically, a key issue faced by the receiver was that trade vendors who were unhappy about being left holding the bag on their prepetition extension of credit would refuse to provide goods (such as fuel) necessary to the running of the railroad during the receivership proceeding. Courts accordingly provided, as a condition of authorizing continued operation of the railroad, that the receiver would pay, ahead of secured creditors and ahead of mortgage bondholders, the unsecured trade debts incurred within approximately the six months before the receivership.

The leading early articulations came from the federal circuit courts in the latter half of the nineteenth century. The Supreme Court gave the doctrine significant legitimacy in *Miltenberger v. Logansport Railway Co.*, 106 U.S. 286 (1882), where it upheld a receiver's payment of operating debts ahead of mortgage claims, reasoning that such payments were essential to preserving the railroad as a going concern and thus inured to the benefit of the secured creditors themselves. The Court framed this in terms of equity jurisdiction: a court that takes control of property for the benefit of all parties can condition that control on ensuring the enterprise remains viable.

Critically, the doctrine was justified not as a windfall to trade creditors but as a benefit to the senior creditors who would otherwise receive a liquidation recovery rather than a going-concern value. The logic was that the payment of the relatively modest trade claims would keep the railroad running, which would ultimately inure to the benefit of secured bondholders sale.

*Third, c*ourts allowed receivers to issue certificates of indebtedness — the predecessor of modern DIP financing — to fund operations during the reorganization. These certificates were granted superpriority status ahead of existing mortgage debt, on the theory that without operating capital the railroad would collapse entirely, leaving even the senior bondholders worse off.

Fourth, to prevent individual creditors from racing to grab assets while the reorganization proceeded, equity courts issued broad injunctions restraining creditors from bringing suits, enforcing judgments, or taking other collection action against the receivership property. This injunction, of course, established the foundation of the modern automatic stay.

Fifth, the basic economic result of the equity receivership was typically a recapitalization of the debtor in a way that looks very much like the result of the paradigmatic chapter 11 corporate reorganization. Under then-existing law, courts lacked the authority to modify the terms of outstanding bonds. But the court, in effect, used the foreclosure process to achieve a workaround The reorganization committee (typically dominated by the major bondholders and, often, the existing management) would negotiate a plan of reorganization that restructured the capital stack — reducing debt, converting some bonds to equity, issuing new securities to various classes. The court would then conduct a foreclosure sale of the railroad's assets. The reorganization committee would submit a credit bid, using the outstanding bonds as currency, and acquire the property at the sale. A new corporation would be formed to receive the assets and issue the new securities contemplated by the reorganization plan.

Creditors who refused to participate — those who wouldn't deposit their bonds with the reorganization committee and accept the new securities — would have their interests extinguished by the foreclosure. They would therefore receive no recovery unless the foreclosure sale produced a surplus (which, in view of the economics of the railroad, rarely if ever occurred). To be sure, this was a very harsh treatment of a "holdout" creditor. But the consequence was that it gave the reorganization committee substantial leverage to impose a collective solution on dissenters.

The process was, of course, deeply susceptible to abuse. The reorganization committee was typically controlled by the existing bondholders and management, and they had obvious incentives to craft plans that benefited themselves at the expense of junior creditors, trade creditors, and public shareholders. Courts exercised some supervision, but it was uneven and often deferential. The *sixth* feature of modern bankruptcy law that traces its roots to the equity receivership, the absolute priority rule, grew out of this problematic dynamic. Principles that we now describe as absolute priority developed gradually over time, running from the 1880s through a series of Supreme Court decisions that culminated in *Northern Pacific Railway Co. v. Boyd*, 228 U.S. 482 (1913), and ultimately *Case v. Los Angeles Lumber Products Co.*, 308 U.S. 106 (1939).

The core problem the rule addressed was the fact that reorganization plans negotiated by committees dominated by senior interests routinely gave something to equity holders — existing shareholders — while leaving junior creditors less than full payment. This seemed wrong as a matter of priority logic (equity is residual; it gets nothing until creditors are paid in full), but reorganization committees justified it on various grounds: the shareholders' cooperation was needed, or their going-concern contribution merited recognition, or the plan simply couldn't be consummated otherwise.

Boyd rejected this reasoning. The Northern Pacific reorganization had extinguished the claims of an unsecured creditor (Boyd, who held a personal injury judgment against the railroad) while preserving value for equity. The Supreme Court held that this was impermissible. If the debtor was insolvent, equity could receive nothing on account of its old interests unless all creditor claims were satisfied first. The property passing to the new corporation was, in equity, subject to the creditors' claims, and any reorganization plan that gave equity value while leaving creditors less than full payment was, in effect, a fraudulent conveyance.

Case v. Los Angeles Lumber refined this principle, holding that equity's participation in a reorganization plan could only be justified if equity contributed "new value" commensurate with the interest it retained.

* * *

These features of the federal equity receivership, all developed in response to the insolvency of the railroad industry, now serve as foundational principles of modern bankruptcy law. These developments serve as one of the clearest examples in American law of courts genuinely creating a major legal institution — not just interpreting a statute but building a comprehensive procedural and substantive regime from scratch — in response to an economic crisis for which existing law had no adequate answer.

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OIL, ASBESTOS & CONSTITUTIONAL CRISIS

The Statutory Landscape Before 1978

The Bankruptcy Act of 1898, as revised by the Chandler Act in 1938, established a trustee-centered, court-supervised regime that would govern corporate reorganization for four decades. Chapter X covered publicly held corporations, Chapter XI served closely held businesses, and Chapter XII addressed real estate. In each, appointment of a trustee was mandatory in most cases. The trustee displaced management entirely, operated the business, formulated the reorganization plan, and held the estate's causes of action. The court was deeply hands-on — it conducted meetings of creditors, the direct predecessor of today's § 341 meeting — and exercised either "summary" jurisdiction over property in the bankrupt's possession or "plenary" jurisdiction, through full adversary proceedings, over property held by third parties. This summary/plenary distinction would cast a long shadow.

The 1978 Bankruptcy Code

By 1970, Congress created the Commission on Bankruptcy Laws to propose reforms. The National Conference of Bankruptcy Judges — notably excluded from the Commission — submitted its own competing proposal. Congress drew from both in crafting the Bankruptcy Reform Act of 1978, which transformed virtually every aspect of the system. The mandatory trustee gave way to the debtor-in-possession. The automatic stay halted all collection efforts upon filing. Section 363 authorized sales free and clear of liens; § 364 created the DIP financing framework. Plan acceptance was measured class by class, and a confirmed plan bound all creditors regardless of vote.

On jurisdiction, the Code was ambitious to a fault. It created bankruptcy courts with nationwide *in personam* and *in rem* jurisdiction over all persons and property in a case, empowering bankruptcy judges — Article I adjuncts without life tenure or salary protection — to hear and decide all proceedings "arising in, under, or related to" a bankruptcy case. The House Judiciary Committee had flagged in its own legislative report that such a pervasive grant of jurisdiction to a non-Article III judge would be unconstitutional. Congress passed the Act anyway. The time bomb was set.

The Constitutional Crisis: Northern Pipeline Construction Co. v. Marathon Pipe Line Co.

It detonated in 1982. Northern Pipeline Construction Co. filed Chapter 11 and, as debtor-in-possession, brought state law contract claims against Marathon Pipe Line Co. in the bankruptcy court. Marathon had no claim in the estate and no other reason to submit to a non-Article III judge. The Supreme Court agreed it should not have to. In *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), a plurality held that resolution of common law claims between private parties requires Article III judicial power. The Court declined to sever the offending jurisdictional provision, struck down the entire framework, and stayed its own mandate to give Congress time to respond.

Congress did not act before the stay expired. The Administrative Office of the Courts circulated an Emergency Rule allowing district judges to "refer" cases to bankruptcy judges on a provisional basis. Two years later, Congress enacted the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333, vesting jurisdiction nominally in the district courts with referral authority to bankruptcy courts. Bankruptcy judges could enter final orders in "core" proceedings; in "non-core" proceedings, they could only submit proposed findings for de novo district court review. The arrangement revived, under new vocabulary, the old summary/plenary distinction — with the same Article I judges whose predecessors had been called "referees" once again exercising referred jurisdiction.

A New Frontier: Mass Tort Liability and the Johns-Manville Chapter 11

While the constitutional architecture was being rebuilt, the new system was pressed into service for a purpose its drafters had not contemplated: managing not present insolvency, but massive, incalculable future liability. During the 1950s and 1960s, Johns-Manville Corporation was the world's largest miner and a major manufacturer of asbestos products. By the early 1980s it faced approximately 12,500 personal injury lawsuits from over 16,000 claimants, with new suits arriving at 425 per month. Company-commissioned studies projected 50,000 to 100,000 additional future claimants. Manville was not presently insolvent — it could pay its current debts — but the trajectory of future liability threatened to exhaust its resources and insurance coverage before all claimants could be compensated. *In re Johns-Manville Corp.*, 36 B.R. 743, 745 (Bankr. S.D.N.Y. 1984). On August 26, 1982, Manville filed Chapter 11 in the Southern District of New York.

The Manville case produced three innovations that reshaped mass tort reorganization practice. First, the court appointed a Future Claims Representative to protect the interests of individuals already exposed to asbestos who had not yet become ill — a device with no express statutory basis, grounded in § 105 and the analogy to class action practice, that has since become standard in mass tort cases. Second, the confirmed plan established an Asbestos Health Trust as the exclusive source of payment for all asbestos claims, present and future, and paired it with a channeling injunction permanently enjoining claims against reorganized Manville and its affiliates. The plan was approved in 1986 and affirmed by the Second Circuit. Kane v. Johns-Manville Corp., 843 F.2d 636 (2d Cir. 1988). Congress codified both features in § 524(g) of the Code in 1994. Third, when Manville's stockholders — dissatisfied with the concessions being offered to other constituencies — sued in Delaware Chancery Court to compel a shareholder meeting and elect a new board, the bankruptcy court enjoined the litigation, finding that the shareholders' intent was to risk the reorganization's failure altogether to extract a larger share for equity. Manville Corp. v. Equity Sec. Holders Comm. (In re Johns-Manville Corp.), 66 B.R. 517 (Bankr. S.D.N.Y. 1986).

The Manville plan's durability proved remarkable. More than thirty years after confirmation, courts continued to enforce the channeling injunction against future claimants — including, ultimately, a plaintiff whose asbestos-related disease did not manifest until 2015, decades after the petition date. *In re Johns-Manville Corp.*, 552 B.R. 221 (Bankr. S.D.N.Y. 2016), *aff'd* 623 B.R. 242 (S.D.N.Y. 2020), *aff'd sub nom. Berry v. Graphic Packaging Int'l*, No. 20-3858, 2022 WL 4487889 (2d Cir. 2022).

Litigation Bankruptcy: The Texaco Chapter 11

If Manville established that Chapter 11 could manage unmatured future liability, Texaco's 1987 filing demonstrated that it could manage a judgment that had already landed. When Texaco acquired Getty Oil in 1984, Pennzoil sued for tortious interference with its own prior agreement in principle to acquire Getty. A Texas jury awarded Pennzoil over $10 billion. The Texas Court of Appeals affirmed. *Texaco, Inc. v. Pennzoil, Co.*, 729 S.W.2d 768 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.). The Supreme Court declined to enjoin enforcement. *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1 (1987). Texaco filed Chapter 11 on April 12, 1987 — then the largest Chapter 11 in history — not because its business had failed, but because the automatic stay halted enforcement and the reorganization process provided a forum for negotiating a settlement. Bankruptcy as a litigation strategy had arrived.

Texaco's bankruptcy also transformed M&A practice. The jury's finding that an undocumented agreement in principle was legally binding established that a deal could be enforceable based on intent and conduct — not signatures. Tortious interference became a boardroom-level concern in contested acquisition situations. And the case precipitated the widespread adoption of breakup fees, no-shop clauses, fiduciary-out provisions, and careful documentation of precisely when a transaction becomes binding — the machinery of modern M&A practice designed, in significant part, to prevent another Texaco.

* * *

In less than a decade, the 1978 Code had been constitutionally challenged and rebuilt, deployed to manage a new species of mass tort liability, and used to manage a civil judgment of unprecedented scale. The Marathon jurisdictional crisis, the Manville mass tort template, and the Texaco litigation bankruptcy together mark the period in which the 1978 Code ceased to be a new statute and became the living foundation of a practice whose full dimensions its drafters had only dimly foreseen.

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THE FINANCIAL CRISIS – LEHMAN, GM & CHRYSLER

The Crisis and the Question

In September 2008, Lehman Brothers Holdings Inc. filed the largest bankruptcy in American history. Within days, the Treasury and Federal Reserve had committed hundreds of billions of dollars to stabilize the financial system, the commercial paper market had seized, and money market funds had broken the buck. The immediate question for bankruptcy practitioners was whether the tools of Chapter 11 — the automatic stay, the § 363 sale, DIP financing, the plan process — could handle a crisis of this scale. The answer that emerged over the following years was that they could, but that doing so required a degree of government involvement in the reorganization process that the 1978 Code had neither contemplated nor expressly authorized.

Nonbank Financial Institutions: Lehman, Bear Stearns, and AIG

The federal response to the collapse of three nonbank financial institutions in 2008 took three different forms. Bear Stearns did not file for bankruptcy: the Federal Reserve facilitated a sale to JPMorgan Chase by extending a $29 billion loan to absorb Bear's illiquid assets. AIG did not file: the Federal Reserve extended an $85 billion direct loan, ultimately acquiring a nearly 80% equity stake. Lehman Brothers received no government assistance and filed Chapter 11 on September 15, 2008. The contrast between the three outcomes underscored what scholars had long observed — that resolution by ad hoc intervention, unlike resolution by statute, provides no consistent framework for the distribution of losses among creditors and counterparties. *See* Kenneth Ayotte & David A. Skeel, Jr., *Bankruptcy or Bailouts?*, 35 J. Corp. L. 469, 492 (2010).

The Lehman case demonstrated that the Code's tools were well suited to resolving a nonbank financial firm at speed. Within days of filing, the bankruptcy court approved the § 363 sale of Lehman's U.S. investment banking business to Barclays Capital. *In re Lehman Bros. Holdings Inc.*, Case No. 08-13555 (JMP) (Bankr. S.D.N.Y. Sept. 20, 2008). Barclays also provided DIP financing, enabling an orderly wind-down of remaining assets. The international operations were sold separately to Nomura on a slower timeline, and the estate ultimately returned substantial value to creditors — a result that a disorderly liquidation would not have produced.

Chrysler and General Motors: The § 363 Sale as Restructuring Vehicle

The Chrysler and General Motors cases applied the § 363 process under circumstances that tested its limits. In both cases, the United States and Canadian governments acted as DIP lenders, provided the funding for the acquisitions, and structured the terms of the sales. The speed of both processes — each moved from filing to sale approval in weeks — compressed the time available for creditor objection and judicial review in ways that drew sustained scholarly attention.

In Chrysler, substantially all operating assets were transferred to a new entity in which Fiat received a 25% equity stake in exchange for manufacturing expertise, and the UAW retiree health care trust received a 55% equity stake as part of the assumption of modified collective bargaining obligations. The prepetition first lien lenders — owed approximately $6.9 billion — received approximately $2 billion in cash. A group of objecting creditors argued that the transaction constituted a sub rosa plan of reorganization because it distributed value among constituencies outside the plan confirmation process. The bankruptcy court approved the sale, reasoning that the equity allocated to the UAW trust came from the government's own investment rather than from the debtor's estate and therefore did not implicate the Code's distribution rules. *In re Chrysler LLC*, 405 B.R. 84, 99 n.18 (Bankr. S.D.N.Y. 2009), *aff'd*, 576 F.3d 108 (2d Cir. 2009), *vacated as moot sub nom. Indiana State Police Pension Trust v. Chrysler LLC*, 558 U.S. 1087 (2009). The Supreme Court's vacatur left the sub rosa question without a definitive appellate ruling.

The GM sale involved a credit bid of the government's secured debt, transferring substantially all of GM's assets to a new entity whose capital structure allocated significantly more equity to the UAW retiree trust than to the bondholders. The bankruptcy court held that a purchaser's allocation of value within its own newly formed entity does not constitute a sub rosa plan. *In re Gen. Motors Corp.*, 407 B.R. 463, 497 (Bankr. S.D.N.Y. 2009). That principle — that value created or contributed by the purchaser in its new entity falls outside the Code's distribution framework — has since generated ongoing debate about the treatment of exit financing arrangements that direct value to favored constituencies. *See* Vincent S.J. Buccola, Adi Marcovich Gross & Matthew R. McBrady, *The Backstop Party*, 100 Am. Bankr. L.J. 116 (2026).

American Airlines: Labor, Merger, and Exit

AMR Corporation filed Chapter 11 in November 2011, using the reorganization process to renegotiate its labor agreements under § 1113 of the Bankruptcy Code. *In re AMR Corp.*, 477 B.R. 384 (Bankr. S.D.N.Y. 2012). The § 1113 process produced significant labor cost reductions and cleared the path for a merger with US Airways as the exit strategy. The Department of Justice moved to block the merger on antitrust grounds, but the challenge was settled by a consent decree requiring slot divestitures at Reagan National and LaGuardia airports. *United States v. US Airways Grp., Inc.*, No. 1:13-cv-01236 (D.D.C. 2013). The merged company emerged as one of the world's largest airlines, and the case stands as a model of the reorganization process used to achieve a strategic combination that would have been unattainable outside of bankruptcy.

The AMR case also highlighted the importance of a viable exit. The contrast with later cases — including Spirit Airlines, where no comparable merger partner was available — illustrates that the Code's tools can produce strong outcomes when a reorganization path exists, and face structural limits when it does not. The analogy to Penn Central's 1970 filing is a useful historical marker: when Penn Central collapsed without a government resolution mechanism in place, the disruption to the commercial paper market created systemic risk that extended well beyond the railroad. *See* Adam J. Levitin, *In Defense of Bailouts*, 99 Geo. L.J. 435, 454 (2011).

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The 2008 financial crisis and its aftermath tested every major mechanism of the Code under conditions of urgency and scale that its drafters had not imagined. The Lehman case demonstrated the Code's capacity. The Chrysler and GM cases demonstrated its limits — and produced questions about the boundaries of § 363, the meaning of sub rosa, and the role of government-funded purchasers in distributing reorganization value that remain actively litigated today.

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RETAIL APOCALYPSE

The role of the "retail apocalypse" in the development of U.S. bankruptcy law.

The 2010s saw the decline of the brick and mortar retail establishments. In 2017 alone, 7,000 stores closed and there were more than 15 major retail bankruptcies. This "retail apocalypse" resulted in changes in restructuring strategies in lease rejection, credit bidding, the sale of intellectual property, and lease assignment. Retail bankruptcy cases trended from Chapter 11 reorganization cases to liquidating Chapter 11 cases, blurring the lines with Chapter 7 cases. "Going out of business" procedures were established, and Section 363 sales became the dominant restructuring mechanism in retail. Several aspects of the cases and case law now serve as foundational principles of retail restructuring practice.

First, the retail crisis demonstrated how Chapter 11 could be used as a sale mechanism. Prior to the 2010s, Chapter 11 had always been a reorganization statute, premised on the idea that a debtor could rehabilitate its business and emerge as a going concern under a confirmed plan. Chains filed Chapter 11 not to reorganize but to sell — to find a buyer for the brand, the leases, and the inventory while the going-concern premium still existed, before liquidation became the only option. *In re Sports Authority Holdings, Inc.*, Case No. 16-10527 (Bankr. D. Del. 2016), was an early and prominent illustration: Sports Authority filed with dual tracks running in parallel, eventually conducting a going-out-of-business sale under court-approved procedures that have since become standard form documents in retail cases. *Sports Authority* highlighted landlord conflicts regarding lease rejection timing and damages.

Second, the retail cases produced important clarification of the credit bidding right. In *In re Aéropostale, Inc.*, No. 16-11275 (Bankr. S.D.N.Y. 2016), the secured term lenders sought to credit bid their claims in the § 363 sale of the assets securing their loan. Other parties objected, arguing that permitting the credit bid would chill third-party bidding and depress the sale price. The court rejected that argument and allowed the credit bid to proceed. *Aéropostale* established as a practical matter what the statutory text of § 363(k) implies: a secured creditor's right to credit bid its claim for collateral is not subject to limitation on generalized grounds that the bid may chill competing offers. Absent specific evidence of misconduct or unusual circumstances justifying "cause" to deny the credit bid, the right holds. *See* Joel S. Moss, *Aéropostale: Private-Equity Triumph*, 36-Feb Am. Bankr. Inst. J. 12 (Feb. 2017).

Third, the retail cases produced the first significant body of case law addressing the treatment of customer data as estate property. When RadioShack filed for bankruptcy in 2015 and Aéropostale in 2016, both sought to sell their customer loyalty program data as part of their going-concern sales. Each ran into the same problem: the customer agreements governing the loyalty programs did not expressly contemplate the sale of customer data to a third party. In both cases, the courts appointed consumer privacy ombudsmen to evaluate the proposed sale and protect customer interests, and conditioned the sales on limitations protecting data that had been collected under promises of confidentiality. *In re RadioShack Corp.*, No. 15-10197 (Bankr. D. Del. 2015); *In re Aéropostale, Inc.*, No. 16-11275 (Bankr. S.D.N.Y. 2016).

When Brooks Brothers filed for bankruptcy in 2020, its customer loyalty program agreements expressly authorized indirect data transfers to third parties. No privacy ombudsman was appointed. *In re BBGI US, Inc.*, No. 20-11785 (Bankr. D. Del. 2020). The progression from RadioShack to Aéropostale to Brooks Brothers — a learning curve compressed into five years — illustrates how bankruptcy litigation shapes transactional drafting. Counsel now routinely draft customer-facing agreements with bankruptcy data sales specifically in view. *See* Diane Lourdes Dick, *The Bankruptcy Playbook for Dealing with Valuable Data Assets*, 42 No. 1 Bankruptcy Law Letter NL 1 (Jan. 2022).

Fourth, the treatment of intellectual property in bankruptcy reached the Supreme Court in the wake of the retail crisis. In *Mission Product Holdings, Inc. v. Tempnology, LLC*, 587 U.S. 370 (2019), the Court addressed the consequence of a debtor's rejection of a trademark licensing agreement under § 365. Tempnology, which manufactured chemical-free cooling fabrics for athletic apparel, had licensed its trademark to Mission Product Holdings. When Tempnology filed bankruptcy and rejected the license, the question was whether rejection merely gave rise to a damages claim for Mission, or whether it also stripped Mission of its right to continue using the trademark.

The Supreme Court held that rejection of an executory contract under § 365 constitutes a breach — not a rescission or avoidance — and that a breach does not extinguish the counterparty's rights under the contract. The licensee retains the right to use the trademark for the remaining contract term, subject to its obligation to continue making royalty payments, which it may offset against its damages claim. The Court also held that no negative inference against trademark licensees should be drawn from § 365(n), which expressly preserves the rights of licensees of other specified categories of intellectual property; the omission of trademarks from § 365(n) reflected Congress's intent to leave that question to be resolved by case law, not an intent to strip trademark licensees of protection. The practical consequence is that a trademark licensor's ability to use bankruptcy to shed a burdensome license is significantly constrained: rejection ends the debtor's obligation to perform, but the licensee's rights under the contract survive. *See* Eric Goodman & Ferve Khan, *Tempnology: Trademark License Rejection in Chapter 11*, 38-Aug Am. Bankr. Inst. J. 12 (Aug. 2019).

Fifth, the retail cases produced a decade of litigation over the assignment of shopping center leases in bankruptcy. The Sears bankruptcy, filed in 2018, generated the most consequential of these disputes. Sears sought to assign its lease at the Mall of America to a third party over the landlord's objection. The bankruptcy court approved the assignment. The landlord sought a stay pending appeal, which the court denied. The assignee, in the appellate proceedings, then invoked § 363(m) — which provides that reversal of a sale or lease assignment order on appeal does not affect the validity of the transaction as to a good-faith purchaser unless the order was stayed — even though it had expressly represented to the bankruptcy court that it would not do so.

The Supreme Court's decision in *MOAC Mall Holdings LLC v. Transform Holdco LLC*, 598 U.S. 288 (2023), resolved the threshold question that the facts presented: whether § 363(m) is jurisdictional. The Court held that it is not. Jurisdictional rules require a clear statement in the statutory text; § 363(m) contains none. The provision limits available relief, not the court's authority to hear the case. Because it is not jurisdictional, it can be waived or forfeited — and the landlord could assert that the assignee had done precisely that by representing it would not invoke the provision.

But the Supreme Court expressly declined to decide whether § 363(m) applies to lease assignments at all, or only to sales of property. On remand, the Second Circuit resolved the Sears dispute on different grounds entirely: it held that the Sears lease at the Mall of America was not a "true lease" to which § 365(d)(4)'s assignment restrictions apply because Sears had retained attributes of ownership — including the right, after fifteen years, to cease operations and assign the lease without the landlord's consent. *In re Sears Holdings Corp.*, No. 24-1354-BK, 2024 WL 5113165 (2d Cir. Dec. 16, 2024), *cert. denied sub nom. MOAC Mall Holdings LLC v. Transform Holdco LLC*, 145 S. Ct. 1931 (2025). The landlord lost after years of litigation. The lesson for shopping center counsel is pointed in two directions: a provision in a lease granting the tenant unlimited assignment rights may render the statutory protections of § 365 inapplicable; and the failure to obtain a stay pending appeal of a lease assignment order — as the Sears landlord discovered — can be dispositive. *See* David R. Kuney, *MOAC Mall Holdings, LLC: Did the Sears Bankruptcy Case Create Uncertainty for Commercial Landlords and Owners of Shopping Centers?*, 33 Am. Bankr. Inst. L. Rev. 195 (2025).

* * *

These features of the retail bankruptcy wave — the use of § 363 sales, the clarification of credit bidding rights, the emergence of customer data as a transactional asset, the Supreme Court's treatment of trademark license rejection, and the unresolved complexity of shopping center lease assignment — trace their origins to the economic disruption of a single decade. The retail apocalypse did not merely produce a run of large bankruptcy filings. It produced a body of authority governing the treatment of assets and relationships for which the prior versions of the Code had provided only a partial framework. As with the railroads a century before, and with the oil industry and mass tort cases, a concentrated wave of industry-specific distress proved to be the catalyst for some of the most durable developments in bankruptcy practice.

THE PRESENT & FUTURE

The Supreme Court Returns to Bankruptcy

In the years following the financial crisis, the Supreme Court returned to bankruptcy law with sustained attention to the Code's foundational provisions — the automatic stay, the discharge, the § 363 sale process, and the scope of third-party releases. Four decisions between 2021 and 2024 refined doctrines that practitioners had applied, in some cases, for decades on the basis of circuit law alone. Each turned on the relationship between a statute's text and the equitable powers that courts had layered on top of it. Each drew a line.

The Automatic Stay and Passive Retention: City of Chicago v. Fulton

The automatic stay is among the most fundamental protections the Code provides. It halts, upon the filing of a petition, virtually all collection action against the debtor and the debtor's property.

But what the stay requires of creditors who already hold estate property when the petition is filed had divided the circuits for years. Some courts held that retaining property after the petition constituted an ongoing "act to exercise control" over estate property in violation of § 362(a)(3), giving the debtor an immediate right to demand its return without invoking § 542's turnover mechanism. Others held that passive retention was not a stay violation at all.

The Supreme Court resolved the split in *City of Chicago v. Fulton*, 592 U.S. 154 (2021). The City of Chicago had impounded vehicles belonging to debtors who subsequently filed bankruptcy, and declined to return them pending adequate protection arrangements. The debtors argued that continued retention of the vehicles after the petition violated the stay. The Court, in an opinion by Justice Alito, held that it did not. Section 362(a)(3) prohibits "any act to obtain possession of property of the estate or to exercise control over property of the estate." The word "act," the Court reasoned, implies an affirmative step — a creditor who does nothing after the petition is filed has not taken any act. Reading the provision to require turnover of property would render § 542's separate and carefully structured turnover mechanism superfluous. If the automatic stay compelled immediate return of all estate property, there would be no work left for § 542 to do.

The practical consequence of Fulton is significant: a creditor holding estate property at the time of filing is not required to return it immediately. It may retain the property — subject to the debtor's right to seek turnover under § 542, which carries its own requirements and defenses — without thereby violating the stay and exposing itself to sanctions. The decision clarified a compliance question that had generated substantial litigation and resolved it in favor of a textual reading that preserves the Code's structural distinction between the stay's prohibitory function and § 542's affirmative turnover remedy.

Nondischargeability and Imputed Fraud: Bartenwerfer v. Buckley

The discharge is the central benefit of bankruptcy for an individual debtor — the relief from prepetition obligations that makes the fresh start possible. Congress has carved out from the discharge a defined set of debts that the debtor's conduct has rendered nondischargeable, including debts "for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by false pretenses, a false representation, or actual fraud." 11 U.S.C. § 523(a)(2)(A). The question presented in *Bartenwerfer v. Buckley*, 598 U.S. 69 (2023), was whether that exception extends to a debtor who did not personally commit the fraud — specifically, whether a debt obtained by fraud in a business venture can be held nondischargeable against a partner who was innocent of the fraudulent conduct.

Kate Bartenwerfer and her husband David had jointly sold a home in San Francisco without disclosing known defects. David was aware of the defects and concealed them; Kate was not. When the purchaser obtained a fraud judgment against both and the Bartenwerfers filed bankruptcy, Kate sought to discharge her portion of the debt on the ground that she had not personally committed fraud. The Supreme Court, in an opinion by Justice Barrett, held that the debt was nondischargeable as to Kate regardless of her personal innocence. The text of § 523(a)(2)(A) focuses on the debt — it excepts from discharge a debt "obtained by fraud" — not on the debtor's own conduct. When a debt is the product of fraud, the exception attaches to the debt itself, and the question of whether the debtor personally committed the fraud is beside the point. The Court grounded this reading in common law agency and partnership principles under which one partner's fraud in the conduct of partnership business binds the other partners to liability.

Bartenwerfer has implications beyond the partnership context. It confirms that the nondischargeability exceptions are keyed to the character of the debt, not exclusively to the debtor's own culpability — a reading that expands the reach of § 523(a)(2)(A) and narrows the fresh start for debtors who find themselves legally responsible for another's fraudulent conduct.

Section 363(m) and the Limits of Appellate Review: MOAC Mall Holdings LLC v. Transform Holdco LLC

Section 363(m) of the Bankruptcy Code provides that the reversal or modification on appeal of an order authorizing a sale of estate property does not affect the validity of the sale to a good-faith purchaser, unless the court stays the sale order pending appeal. The provision has long been understood to protect consummated sales from being unwound on appeal — its practical effect is to make unappealed or unstayed sale orders nearly final. But courts had disagreed about the nature of that protection: was § 363(m) a jurisdictional rule that stripped appellate courts of authority to hear challenges to completed sales, or a statutory defense that a purchaser could waive or forfeit?

The Supreme Court resolved the question in *MOAC Mall Holdings LLC v. Transform Holdco LLC*, 598 U.S. 288 (2023), a case arising from the Sears bankruptcy in which a shopping mall landlord sought to challenge the assignment of its lease. The Court held that § 363(m) is not jurisdictional. Jurisdictional rules must be clearly stated in Congress's text; § 363(m) contains no such clear statement. It limits the relief available on appeal of a consummated sale — it does not limit the appellate court's authority to hear the appeal. Because § 363(m) is not jurisdictional, a purchaser who fails to invoke it at the appropriate time may waive or forfeit the protection.

The practical significance of MOAC is twofold. First, it confirms that appellate challenges to completed sales are not categorically barred for want of jurisdiction — the court has the power to hear the appeal even if the sale has closed. Second, it means that the protection of § 363(m) belongs to the purchaser and can be lost if the purchaser does not affirmatively assert it. The decision reinforces the importance of obtaining a stay pending appeal for any party seeking to challenge a § 363 sale on the merits, since the jurisdictional argument that previously served as a backstop is no longer available.

Third-Party Releases: Harrington v. Purdue Pharma L.P.

Perhaps no issue in modern bankruptcy law generated more sustained controversy in the decade before 2024 than the use of confirmed plans to release claims against nondebtor third parties — typically the controlling shareholders, officers, or affiliates of the debtor — without the consent of the releasing creditors. The practice had grown from the asbestos reorganization context, where Congress in 1994 had expressly authorized channeling injunctions protecting nondebtor parties in asbestos cases under § 524(g). Courts in the Second and Fourth Circuits, relying on §§ 1123(b)(6) and 105(a), had extended the concept to non-asbestos cases, reasoning that broad nondebtor releases could be approved as a matter of equitable power when they were integral to a feasible reorganization.

The Purdue Pharma reorganization brought the question to a head. Purdue's plan proposed to release civil claims against the Sackler family — Purdue's controlling shareholders — in exchange for the Sacklers' contribution of several billion dollars to a settlement trust. The releases would be binding on all creditors, including opioid victims who had not consented and had not been given a meaningful opt-out. The Supreme Court, in a five-to-four decision in *Harrington v. Purdue Pharma L.P.*, 603 U.S. 204 (2024), held that the Bankruptcy Code does not authorize such non-consensual third-party releases. The majority reasoned that there is no express statutory authority for releasing the claims of nonconsenting creditors against nondebtors. Sections 1123(b)(6) and 105(a) permit courts to include "appropriate" plan provisions and to issue process necessary to carry out the Code — they do not create substantive rights not found elsewhere in the Code. Congress's express provision for nondebtor releases in asbestos cases under § 524(g), the Court concluded, implies their exclusion in non-asbestos cases under the familiar canon of expressio unius.

The decision substantially altered the landscape of mass tort reorganization. Plans that had been structured around broad nondebtor releases — in opioid, talc, sexual abuse, and other mass tort cases — required reconsideration. The ruling confirmed that the equitable powers of the bankruptcy court, however broad, cannot be used as a substitute for statutory authority to discharge the debts of parties who have not themselves filed for bankruptcy.

Cryptocurrency and the New Frontier: The Digital Asset Bankruptcies

Beginning in 2022, a wave of cryptocurrency exchange and lending platform failures presented bankruptcy courts with a set of questions for which neither the Code nor prior case law provided ready answers. The fundamental issues — who owned the digital assets on the platforms, how those assets should be valued for claim purposes, and what evidentiary standards applied to expert testimony in rapidly evolving technical domains — required courts to apply established legal frameworks to instruments and relationships that existing doctrine had not contemplated.

Voyager Digital Ltd., FTX Trading Ltd., Celsius Network LLC, and BlockFi Inc. each filed Chapter 11 between 2022 and 2023, collectively representing billions of dollars in customer claims and introducing crypto-specific complexity into reorganization practice at scale. The FTX case produced two significant rulings. In *In re FTX Trading Ltd.*, 91 F.4th 148 (3d Cir. 2024), the Third Circuit addressed examiner appointment under § 1104(c), holding that the provision's text made appointment mandatory in large cases meeting the statutory threshold — a reading that rejected the bankruptcy court's discretionary approach and confirmed that the examiner requirement is not merely precatory. On the question of valuing cryptocurrency claims, the bankruptcy court held that claims would be valued at petition-date value using a specified methodology. *In re FTX Trading Ltd.*, No. 22-11068 (JTD), 2024 WL 3191668 (Bankr. D. Del. June 26, 2024), *aff'd sub nom. In re FTX Trading, Ltd.*, No. 22-11068, 2025 WL 3470890 (D. Del. Dec. 3, 2025). The petition-date valuation rule, a standard feature of bankruptcy practice, produced results in the crypto context that departed sharply from customers' expectations, since many digital assets had appreciated substantially between the petition date and the time of distribution.

The Celsius Network case raised two issues that encapsulate the novelty of the digital asset era. The first was ownership: Celsius had operated a lending platform under which customers deposited cryptocurrency in exchange for yield, and its terms and conditions purported to transfer title of the deposited assets to Celsius upon receipt. The bankruptcy court held that ownership of the cryptocurrency was governed by those terms and conditions — that customers who had deposited assets into Celsius's "Earn" program had transferred title and held only unsecured claims, not a property interest in specific assets. *In re Celsius Network LLC*, 655 B.R. 301 (Bankr. S.D.N.Y. 2023). The second issue was evidentiary: a party had submitted an expert report generated by artificial intelligence. The court found the AI-generated report unreliable and inadmissible — an early and notable application of traditional expert witness standards to a new category of purported expertise, with implications that extend well beyond the cryptocurrency context.

* * *

The decisions surveyed here share a common thread: in each, the Supreme Court or a lower court was asked to extend the Code's reach — its stay, its discharge, its sale protections, its equitable powers, its claim valuation tools — into territory where the statutory text provided no express authority. In each, the court looked first to text and found limits. The digital asset cases added a further dimension, presenting courts with assets, ownership structures, and evidentiary challenges that the Code's drafters in 1978 could not have foreseen. The questions those cases have raised about the definition of property, the reliability of algorithmic analysis, and the application of petition-date rules to volatile assets will be among the defining issues of bankruptcy practice in the years ahead.

Authority

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