

# Bankruptcy + Restructuring



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## 2011 Mid-Year Review: Our Bankruptcy **10** **TOP**

**2011** has ushered in a whirlwind of insolvency-related developments, prompting a host of new concerns by bankruptcy courts, practitioners, and a number of other parties affected by the bankruptcy process. These parties are wide-ranging, including secured lenders, debt traders, acquirors of distressed assets and businesses, and even potential targets of litigation by trustees or debtors.

On the regulatory side, 2011 has also marked the robust infancy of the Dodd-Frank Act, a mammoth piece of legislation affecting an array of systemically important financial institutions (SIFIs), both domestic and foreign. SIFIs will soon be providing bank regulators with comprehensive contingency plans detailing their survival strategy in the event of material distress. Interestingly, the working model for these plans, or “living wills,” is none other than the U.S. Bankruptcy Code.

With change comes opportunity. In addition to our notable roles on the forefront of these developments, MoFo continues to figure prominently in some of the nation’s largest Chapter 11 cases. These cases involve a myriad of issues that require us to call upon our firm’s vast expertise in other areas, such as real estate, tax, energy, and media rights.

In the first half of 2011, three chapter 11 cases in which MoFo serves as counsel to the official committee of unsecured creditors—Mesa Air Group, Inc., Innkeepers USA Trust, and Caribbean Petroleum—confirmed and produced significant value for unsecured creditors. Our team also continues to address a number of high-profile and complex bankruptcy issues through our representation of the creditors’ committees in Ambac Financial Group Inc. and the recently filed Los Angeles Dodgers bankruptcy case.

Our combined practical experience and knowledge of bankruptcy and insolvency-related developments benefits all of our clients, including those in the banking, secured lending, and insurance sectors. We describe these unique opportunities in further detail here, along with our group’s impressive array of pro bono legal contributions during the first half of 2011.

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# Morrison & Foerster's Bankruptcy + Restructuring Our Bankruptcy



- 1. *Stern v. Marshall: A Jurisdictional Game Changer?***  
Does the Supreme Court's recent 5-4 decision mark the death knell for counterclaim litigation in bankruptcy courts? Or is the Court's holding limited to its facts? What could it portend for the future power of bankruptcy courts and bankruptcy litigants? [Click here for more on these questions, including some useful practice tips.](#)
- 2. *River Road: A Win for Secured Lenders.*** In a decision that is expected to have wide-ranging implications on secured lenders and reorganization plan sales nationwide, the Seventh Circuit's June 28, 2011 opinion in *River Road* marks a jurisdictional split on the contours of credit bidding in bankruptcy. What does this mean for the secured lending community going forward? [Learn about some strategic tips, and Morrison & Foerster's leading role in the outcome of these cases.](#)
- 3. *GTE REinsurance Company Limited: Unlocking Value in Run-off.*** In the wake of the Providence County Superior Court's April 25, 2011 decision in the *GTE REinsurance Company Limited* case, solvent corporate captives, stand-alone run-off businesses, and insurance and reinsurance companies with a U.S. run-off portfolio are undoubtedly considering the unique opportunities afforded by Rhode Island's Restructuring Act. [Learn more, including Morrison & Foerster's key role in the litigation.](#)
- 4. *Fewer Bank Failures? The AmericanWest Chapter 11 Sale Offers a New Way.*** In the current economic environment, many banks have lost significant capital and are under immense pressure, regulatory and otherwise, to recapitalize. Failure to recapitalize within time frames set by bank regulators can result in a bank's seizure by its chartering authority and an FDIC receivership. [Learn how Morrison & Foerster pioneered the use of section 363 of the Bankruptcy Code to effectuate the recapitalization of a bank and its sale to a private equity-backed buyer.](#)
- 5. *South Edge LLC v. JPMorgan Chase Bank, N.A.: How to Successfully Preserve an Involuntary Filing.*** When creditors succeed in obtaining an order for relief in an involuntary Chapter 11 case and the appointment of a Chapter 11 trustee, who controls the appeals for those orders? Following a recent Tenth Circuit Court of Appeals decision, a Nevada district court recently ruled that the Chapter 11 trustee can unilaterally resolve that litigation by dismissing the appeals. [Learn about Morrison & Foerster's leading role in obtaining this outcome.](#)
- 6. *Dodd-Frank and Living Wills: The New Paradigm.*** The FDIC and Treasury, through the Dodd-Frank Act, have created a significant number of SIFI requirements. In particular, section 165(d) requires SIFIs to file a resolution plan or "living will," which is a detailed contingency plan designed to mitigate the risk that a SIFI's failure would have on U.S. financial stability. [Learn more about the proposed rule here.](#) For a living wills checklist, click on our [Blueprint](#).

7. **Bankruptcy Rule 2019: The Long-awaited Amendment.** While the primary goal of amended Rule 2019 is to provide greater transparency to all parties in interest, this rule may have unintended effects—it could be used as a weapon for debtors to restrict the participation of certain parties. [Learn why parties considering participating in future bankruptcy cases need to be aware of the potential impact of this new rule.](#)
8. **TOUSA: Commercial Lending and Debt Trading Markets Breathe a Sigh of Relief.** A degree of certainty—for the time being—has been restored for participants in the commercial lending and debt trading markets who have been tracking the appeal of a controversial 2009 fraudulent transfer decision in the TOUSA, Inc. bankruptcy case. [Learn more about the effects of this decision on commercial lending and debt trading markets here.](#)
9. **DBSD North America, Inc.: A Warning Call for “Loan-to-Own” Strategies; Future Empowerment to Unsecured Creditors under the Gifting Doctrine.** In this key decision with particular significance to unsecured creditors and claims traders, the Second Circuit Court of Appeals disregarded the vote of a creditor that had purchased claims to acquire control of a debtor using a “loan-to-own” strategy, and also held that the common practice in which senior creditors “gift” some of their recovery to junior parties under a Chapter 11 plan is violative of the absolute priority rule. [Learn why here.](#)
10. **Contemplating Chapter 11 as a “Fresh Start”?** **Consider Recent Developments in Environmental Claims Liability.** When a company saddled with potential environmental liabilities seeks bankruptcy protection, the goals of Chapter 11—giving the reorganized debtor a “fresh start” and fairly treating similarly situated creditors—can conflict with the goals of environmental laws, such as ensuring that the “polluter pays.” Courts have long struggled to reconcile this tension. A slew of recent bankruptcy cases from the Southern District of New York evidence this ongoing balancing act. [Learn more about these bankruptcy and environmental law developments here.](#)

#### On the horizon:

**Chapter 11 Bankruptcy Venue Reform Act of 2011.** On July 14, 2011, House Judiciary Committee Chairman Lamar Smith and Ranking Member John Conyers, Jr. introduced legislation to address forum shopping in Chapter 11 reorganization cases. H.R. 2533 is designed to promote fairness by helping to ensure maximum stakeholder participation in Chapter 11 cases. But will this proposed legislation have unintended consequences? [Learn more about this legislative development here.](#)



The Bankruptcy and Restructuring Group was recognized by *The Legal 500* in its 2011 directory. Clients described the growing team as providing “creative, astute, constructive and proactive advice” to a broad array of stakeholders including corporations, banks, and hedge funds; and as “[b]oth knowledgeable on the law as well as being able to apply that in a business setting.”



Partner Brett Miller was ranked in the *Chambers USA* 2011 edition for his work in Bankruptcy/Restructuring.



New York Times Dealbook

Morrison & Foerster was recognized by the New York Times DealBook as a “leading bankruptcy firm.”



MoFo won the 2011 Turnaround Atlas Award of the Year (\$1+ billion deal category) for its work representing the Official Committee of Unsecured Creditors in the Mesa Air Group case.



Nominated for Restructuring Team of the Year

Morrison & Foerster’s restructuring team counselled AmericanWest Bancorporation in its Chapter 11 sale/recapitalization, which ultimately saved an undercapitalized community bank from seizure.



Pro Bono Firm Of 2011: MoFo

“Handling volunteer efforts with the same dedication as its paid representations, Morrison & Foerster LLP over the past year secured victories for veterans, advocates for the disabled and a wrongfully convicted prisoner, earning it a spot among Law360’s Pro Bono Firms of 2011.”





### MoFo Named to *AmLaw* A-List for Eighth Year Running

Considered to be *AmLaw*'s most prestigious list, the A-List is *AmLaw*'s effort to "look beyond pure dollars to quantify the qualities that define the 20 most successful law firms in America" by scoring firms on four factors: revenue per lawyer, pro bono commitment, diversity among lawyers, and associate satisfaction. MoFo scored particularly well in diversity, continuing the firm's historic strength in this key area.

Members of the Bankruptcy and Restructuring Group have contributed an impressive variety of pro bono legal services over the last six months. Here is how a number of nonprofit organizations under financial stress are benefiting from the group's specialized expertise:



- Larren Nashelsky, Erica Richards, and Jordan Wishnew are helping to free a piece of property from liens against its owners, so that a nature conservancy organization can add the parcel to a land trust along the Hudson River.

- Lorenzo Marinuzzi, Brett Miller, Renee Freimuth, Adam Lewis, Samantha Martin, Vincent Novak, and Jordan Wishnew have all been involved in counseling charitable organizations as they consider, or undertake, bankruptcy proceedings and dissolution.
- Larren Nashelsky has been helping an arts group get out of a long-term lease it cannot afford and reorganize its operations for the future.
- Gary Lee, Adam Lewis, Dina Kushner, and Kristin Hiensch have been providing strategic advice to benefit a group of immigrant forestry workers from Guatemala, whose former employer is using bankruptcy in an attempt to thwart collection of a judgment they won for unpaid wages.



Members of the group are also using their legal skills to help low-income individuals with many other pressing legal problems:

- Gary Lee and Lorenzo Marinuzzi are at the helm of a new project launched in conjunction with NEDAP, a community economic development organization in New York.

Participating attorneys—including Renee

Freimuth, Stacy Molison, Erica Richards, and lawyers from other practice groups—are helping individuals obtain administrative discharges from student loan debt they incurred by attending programs at for-profit trade schools that provided them with no actual educational benefit.



Extending a helping hand to immigrants and refugees is another significant part of our pro bono practice:

- Gary Lee, Kristin Hiensch, and Dina Kushner have represented refugees seeking asylum in the U.S.
- Dina Kushner and Alexandra Steinberg Barrage have also been involved in helping immigrant victims of violence apply for a U-visa to obtain lawful permanent residency here.
- Melissa Hager and Erica Richards have represented jobless New Yorkers whose benefits were being contested at hearings before the Unemployment Insurance Division of the NYS Department of Labor.



In these and other projects too numerous to list here, members of the Bankruptcy and Restructuring Group are contributing to their communities, and bringing legal assistance to individuals and organizations who otherwise might go without representation.



## Bankruptcy + Restructuring Team



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