Paul | Weiss

OCTOBER 2024

# Restructuring Department Bulletin

**Paul, Weiss Welcomes Experienced Financial Restructuring and Special Situations Partner Liz Osborne in London**

Liz Osborne joined the firm in London as a partner in the Restructuring Department and head of European Restructuring. Liz advises companies and creditors on stressed and distressed investments, including special situations financings and complex restructurings. Liz, recognized as a top restructuring lawyer by *Chambers UK* and *The Legal 500 UK*, regularly works on some of the largest cross-border restructurings in the market.

**Delaware Bankruptcy Court Holds That Mallinckrodt's Repurchase of 36 Million Shares on the Open Market Was Safe Harbored under Section 546(e) of the Bankruptcy Code**

In *In re Mallinckrodt*, No. 20-12522 (Bankr. D. Del. Sept. 5, 2024), Judge Dorsey rejected claims by a creditor trust that Mallinckrodt's prepetition repurchase of its own shares could be avoided as constructive fraudulent transfers. The court held that the transfers were protected by section 546(e) of the Bankruptcy Code, which provides a "safe harbor" against certain fraudulent transfer claims arising from securities transactions. The safe harbor applies where "two requirements are met": there is a "qualifying transaction" (a settlement or transfer payment made in connection with a securities contract) and a "qualifying participant" (the transfer was made by or to or for the benefit of a financial institution). At issue, among other things, was whether a company's repurchase of its own shares was a qualifying transaction if made in alleged violation of governing corporate law. The creditor trust argued that a company's distribution to its shareholders made while insolvent could never be a qualifying transaction because it is not one "commonly used" in the securities trade as the Bankruptcy Code requires. The court rejected the creditor trust's argument that uncommon transfers could not be qualifying settlement payments and noted that the Third Circuit has made clear that the Bankruptcy Code's definition of settlement payment is extremely broad. The court thus found no reason to exclude the share repurchase payments from the qualifying transaction prong of the safe harbor provision. Judge Dorsey distinguished the creditor trust's legal authority which had held that a safe harbored transfer had to be commonly used in the securities trade to qualify, and thus did not protect one that involved "a single transfer made to a single defendant pursuant to a single contract" in violation of Oregon law. In contrast, Mallinckrodt's share payments were "a widespread series of transactions" that spanned over three years and involved the repurchase of more than 36 million shares on the open market from over 75 defendants. The court found these differences crucial given the safe harbor's underlying purpose—which is to protect the securities markets from systemic risk arising from attempted avoidance of consummated transfers between market participants. The court also rejected the creditor trust's arguments that the moving defendants did not establish themselves as qualifying financial participants because they relied on their audited financial statements and SEC filings, among other things. The court found that once the defendants produced evidence by submitting their financial statements along with sworn declarations from their officers, the burden shifted to the creditor trust to present evidence raising a genuine issue of material fact, which it found the creditor trust failed to do. The trust appealed the decision on September 19, 2024.

## DID YOU KNOW...

**TMA's 2024 Turnaround & Transaction Awards Recognizes Paul, Weiss in Two Categories**

The Turnaround Management Association recognized four Paul, Weiss lawyers in its 2024 Turnaround and Transaction of the Year awards. Restructuring partners Paul Basta and Alice Eaton were recognized in the "Mega Company Turnaround/Transaction" category for their work advising Revlon in connection with its emergence from bankruptcy. Restructuring partners Paul Basta and Bob Britton and associate Michael Colarossi were recognized in the "Large Company Turnaround/Transaction" category for their work advising Proterra Inc. in connection with its emergence from chapter 11. The Turnaround and Transaction of the Year Awards recognize the most successful turnarounds and impactful transactions industrywide. Winners will be honored at a ceremony at the TMA Annual Conference on October 17 in Philadelphia.

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



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Paul M. Basta


Lauren Bilzin


Brian Bolin


Robert A. Britton


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