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KEY ISSUES IN STANDING TO CHALLENGE LIABILITY MANAGEMENT-RELATED TRANSACTIONS

In this article, the author discusses key issues in creditor standing to challenge (or otherwise bring litigation related to) liability management-related transactions. The author begins by providing an overview of “no-action” clauses in credit agreements and bond indentures and describes how such clauses may be used by defendant lenders and/or borrowers to seek dismissal of certain litigation claims brought by plaintiff individual or minority lenders and bondholders. The author also discusses some recent decisions that address the application of no-action clauses generally, the difference between direct and derivative claims and how creditor standing is affected by the bankruptcy process.

By Michael R. Handler *

“Liability management” transactions¹ that directly or indirectly disadvantage certain creditor constituencies and/or that precede chapter 11 cases that impair undersecured or general unsecured creditors are frequently the subject of lawsuits brought by or on behalf of such creditors. Given the pick-up in restructuring activity generally and the prevalence of liability management transactions structured around prioritizing some creditor constituents over others, lawsuits in and outside of chapter 11 challenging such transactions will likely become more frequent and potentially play a large role in affecting restructuring

outcomes and economic recoveries in connection therewith. But a slam dunk lawsuit brought by a party without standing will not go anywhere. In simple terms, standing is the litigant’s ability as a matter of applicable law to prosecute a particular cause of action before a court.² Standing is analyzed on a claim-by-claim basis; indeed, as will be discussed below, a litigant may bring a lawsuit in response to a liability management transaction that alleges multiple causes of action, but may be found to have standing to assert some of the causes of action, but not others. As also discussed below, a lender or bondholder (or group of lenders or bondholders) may

¹ “Liability management” is an industry term used to refer to transactions that allow a company to borrow to refinance or restructure outstanding debt or otherwise mitigate downside risk related to its balance sheet and operations.

² *Allen v. Wright*, 468 U.S. 737, 750 (1984) (“In essence, the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues.”).

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