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Cold Comfort: Reconciling Commentary with Case Law On the Enforceability of Capital Commitments When a Fund Goes Bankrupt

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A sound understanding of the risk incurred in any investment is essential for a hedge fund manager to insulate itself against the adverse impacts of that risk. In the context of capital call credit facilities, one material risk is that the primary assets pledged to secure such facilities (the callable capital commitments of a fund's investors) will be unenforceable in the event of the fund's bankruptcy should investors assert a defense based on section 365(c) of the U.S. Bankruptcy Code. The so-called Section 365 Defense operates to prohibit an estate trustee from assigning or assuming an executory contract if applicable law would excuse the counterparty from accepting performance from someone else. In the context of hedge funds and capital call commitments, this means that investors may credibly sustain a defense against contributing additional capital to satisfy a fund's obligations to creditors in the bankruptcy.

Legal commentators have generally concluded that case law favors the creditors' position against the potential risk of fund investors asserting a Section 365 Defense. In summarizing the relevant case law, they have reported that courts have generally held that section 365(c)(2) is unavailable as a defense for an investor,[1] and that lenders can take significant comfort that capital commitments will be enforceable even in a fund bankruptcy.[2] But the relevant case law is not so clear, and such summary assessments leave latent its limits for lenders and the latitude it may afford investors.

In a two-part guest article, Hunton & Williams partner E. Perry Hicks and counsel Bryon J. Mulligan present a more thorough assessment of the relevant case law and legal principles related to the availability of a Section 365 Defense, with the aim to better equip market participants to identify relevant risks, so that their transactions documents accurately anticipate issues and provide for outcomes consistent with the expectation of the parties, making the market more stable for all participants. This article, the first in the series, reviews the judicial rulings underlying the *Iridium* case, the leading case cited by commentators to provide comfort to the market, and examines the elements of a section 365(c) defense. The second article highlights certain limits of *Iridium* and proposes a viable strategy to manage the uncertainties that arise from these limitations.

Background on the *Iridium* Case

The principal limit of the Iridium Case is that two judges came to conflicting conclusions on the merits of the investors' Section 365 Defense. The initial judge found, contrary to the commonly cited decision, that section 365(c)(2) of the Code *applied to preclude the lenders* from calling the capital contributions of investors.[3] Other limits of the

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the case include that the commonly cited ruling (i) is not legally binding on any court in the United States; (ii) relies on legal authority that applies in the Third Circuit (which includes Delaware), but which may not apply in other federal circuits, including the Second Circuit (which includes New York); (iii) has been characterized as "unpersuasive" by some commentators; and (iv) cannot be cited in a brief to some federal courts in the United States because the ruling was "unpublished" and entered before January 1, 2007. To date, published commentary has not focused on such limits of the Iridium Case.

Iridium Case

The leading case on the application of a Section 365 Defense in the context of a capital call credit facility is based on a bankruptcy petition filed more than 15 years ago. The case was brought by Chase Manhattan Bank to compel certain investors in Iridium, LLC to make capital contributions to cover loans advanced by Chase and other creditors to Iridium Operating LLC , a wholly owned subsidiary of Iridium .[4] The loans had been advanced to Iridium Operating prior to the relevant bankruptcy petitions. In response to Chase's capital call to cover the obligations on the defaulted loans, Iridium's investors asserted, among other defenses, a Section 365 Defense.

On August 13, 1999, Chapter 11 bankruptcy petitions were filed against Iridium and Iridium Operating.[5] Eight months prior to the bankruptcy petitions, on December 23, 1998, Iridium Operating had entered into an $800 million senior secured credit agreement with Chase and a syndicate of more than twenty other banks.[6] The loan was secured, in part, by the assignment of Iridium's right to call certain capital commitments from Iridium's members, the investors .[7] These call rights, arising under Iridium's limited liability company agreement , were valued at $243 million and were identified as reserve capital call rights because they were in addition to the initial accepted capital call obligations of the investors.[8] The RCC Rights obligated the Iridium Investors to purchase certain "Class 1" interests in Iridium on demand, whether the demand was made by Iridium's board of directors or by Chase.[9] The day before the Iridium bankruptcy petitions were filed, Chase sent a demand letter to the Iridium Investors invoking the call rights. No payment was made by the Iridium Investors in response to Chase's demand.

In June 2000, Chase obtained a waiver from the United States Bankruptcy Court for the Southern District of New York to the automatic stay applicable in the Iridium bankruptcy to pursue its claims for capital contributions against the Iridium Investors. Chase filed a complaint against the Iridium Investors in Delaware on June 9, 2000.[10] The relevant rulings were made in the adversarial proceedings that followed.

The Iridium Rulings

In the Iridium Case, there were two separate rulings on the merits of the Iridium Investors' Section 365 Defense, and the rulings came to conflicting legal conclusions. The initial ruling, entered by Magistrate Judge Mary Pat Thynge on April 23, 2002, and which was published in an official federal court reporter,[11] concluded that section 365(c)(2) of the Code applied to preclude Chase from calling the capital contributions.[12] The Thynge Ruling stopped short of granting the Iridium Investors' motion for summary judgment on the Section 365 Defense because an issue of material fact remained to be resolved.

The subsequent ruling on the merits of the Iridium Investors' Section 365 Defense, entered by District Judge Joseph James Farnan on February 13, 2004, concluded, in *an unpublished decision*, that the Iridium Investors' capital contribution obligations qualified as "an 'already advanced' guarantee"[13] and that the Iridium Investors were "not within the class of creditors Congress intended to protect under section 365(c)(2) of the Bankruptcy Code."[14] Although the Farnan Ruling came later in time and rejected some of Magistrate Judge Thynge's legal conclusions, a subsequent court would not be required to give the Farnan Ruling more weight as a matter of binding legal

precedent than the Thynge Ruling (discussed in more detail in Part Two of this series).

Framework of a Section 365 Defense

For a fund's investors to successfully invoke a defense based on section 365(c) of the Code, investors must prove two key elements. The first element is that the agreement giving rise to the capital contribution obligations of the investors (generally the limited partnership agreement or limited liability company agreement) qualifies as an "executory" contract under the Code. The second element is that the funding of such obligations qualifies for the financial accommodation protections of section 365(c)(2) of the Code. If both elements are satisfied, section 365(c) of the Code could be applied to prohibit the bankrupt entity or fund from assuming the relevant contract and, consequently, investors in the fund could be relieved of their capital contribution obligations. Such an outcome could leave lenders in a capital call facility without their bargained-for collateral and potentially without recourse to the investors.

The Executory Contract Hurdle

The Code does not define the terms "executory" or "executory contract." The legislative history of section 365(c) of the Code states: "[t]hough there is no precise definition of what contracts are *executory*, it generally includes contracts on which *performance remains due to some extent on both sides*."[15] The absence of a precise definition in the Code and the broad language in the congressional legislative history have caused courts to develop different approaches.

Some courts have followed the legislative history more strictly and adopted a concept of "executory" contract that requires only that "*some performance be due*" from each party. Such courts include the Second Circuit (which includes federal districts in the states of New York, Connecticut and Vermont). Other courts have found the "*some performance due*" approach too broad and have instead adopted a more restrictive approach that requires that the performance obligations of each party be "so far unperformed that the failure of either to complete performance would constitute a *material breach* excusing performance of the other party."[16] This "*material breach*" approach has been adopted broadly by courts, including the Third Circuit (which includes federal districts in the states of Delaware, New Jersey and Pennsylvania, and the Virgin Islands). Finally, some courts have found the "*material breach*" approach too "constraining and static" and have developed an alternative approach known as the "functional test" which focuses on the benefits that assumption or rejection would produce for the estate.[17]

These different approaches require different factual hurdles that an investor must demonstrate in order to successfully invoke a Section 365 Defense. The "*some performance due*" approach presents the lowest hurdle because it requires only that an investor demonstrate that some performance be left undone by the underlying fund to which the investor owes its capital contribution. Where a fund is subject to an obligation to issue certificates to its investors in exchange for capital contributions (or update capital account records or take other, less substantial, action to reflect the additional contributions), the factual requirement of the "*some performance due*" approach would likely be satisfied. In contrast, the "*material breach*" approach raises the bar for a Section 365 Defense because it requires that the unperformed element be "material" enough that its nonperformance would excuse the performance of the other party.[18] The Iridium Rulings applied the "*material breach*" approach, which creates a higher hurdle for investors to successfully assert their Section 365 Defense.

The Financial Accommodation Hurdle

Section 365(c)(2) of the Code provides that an executory contract cannot be assumed or assigned in bankruptcy by a debtor-in-possession or its trustee if:

> "[S]uch contract is a contract to make a loan, extend other debt financing or

> financial accommodations, to or for the benefit of the debtor, or to *issue a security of the debtor* [emphasis added]."[19]

In determining whether section 365(c)(2) applies to a given set of facts, some courts have relied on the express language of this provision, while other courts have looked to the intent of Congress evidenced in the relevant legislative history.

Courts that have looked primarily to the express language of the Code may be inclined to construe the language more broadly. The term "security" is defined in the Code to include *debt securities* (such as notes, bonds, debentures, collateral trust certificates and certificates of deposit) as well as *equity securities* (such as stock, treasury stock, and interests in a limited partnership).[20] Courts construing the language of section 365(c)(2) have generally not distinguished between creditors acquiring debt securities and investors acquiring equity securities.[21] A court that construes the phrase "to issue a security of the debtor"[22] in the context of a capital call credit facility, could find the language of section 365(c)(2) applicable by its terms, but that conclusion could be impacted by how the issuance is structured. (The relevance of the structure of securities and timing of their issuance is discussed in more detail below.)

Other courts have looked to the legislative history to fashion a more narrow interpretation of section 365(c)(2). In *In re Securities Group 1980*, the District Court for the Middle District of Florida distinguished investor capital contributions from extensions of new credit by lenders.[23] This narrower interpretation is arguably supported by the legislative history of the Bankruptcy Reform Act of 1978, which consistently evidences a focus on the risk that lenders (not equity investors) would be required to extend additional credit to a bankrupt borrower if the draft language of section 365 was not clarified.[24]

The language that ultimately became section 365(c)(2) of the Code was taken substantially from the testimony of witnesses who urged Congress to incorporate express language into Senate Bill 2266 to clarify the intent of Congress.[25] In advocating for an express provision in Senate Bill 2266, Edward J. Kulik, who testified on behalf of The National Association of Real Estate Investment Trusts ("NAREIT"), noted:

> The House Report makes it clear that section 365(e) is intended to prevent a trustee from assuming contracts such as *loan commitments* but NAREIT believes that this issue is too important to be left to coverage in legislative history . . . [emphasis added].[26]

A similar concern was voiced by Robert J. Grimmig,[27] who testified that:

> The present wording of § 365(e) . . . does not make clear that the right to reaffirm executory contracts does not extend to *lending commitments* . . . . We believe this problem must be met by a clear amendment to § 365 to preclude the preposterous situation of a *lending institution* being required to *make loans* to a bankrupt [emphasis added].[28]

Stuart D. Root[29] testified that:

> The long term mortgage and unsecured senior debt investment community is greatly concerned about the status of *commitments to lend money* to, or purchase *debt securities* from, a debtor [emphasis added].[30]

John Creedon, representing the American Council of Life Insurance, testified:

> The council continues to urge strongly that section 365 be clarified so as to leave no doubt that *loan commitments* may be terminated in the event of a prospective borrower's bankruptcy. It would be extremely unjust and inequitable to force an *institutional lender* to *lend money* to a bankruptcy trustee . . . [emphasis added].[31]

These witnesses (and every other witness that proposed language related to section 365 during the hearings before the Subcommittee on Improvements in Judicial Machinery of The Judiciary held November 28-29 and December 1, 1977) focused on a lender's commitment to make loans to a debtor in bankruptcy, as opposed to capital investments of equity investors.

In the revised version of Senate Bill 2266 following the 1977 Hearings, the U.S. Senate adopted NAREIT's proposed amendment to the bill verbatim, adding new section 365(b)(4) to the bill. Courts have noted that "where Congress adopts language urged by a witness, it may be assumed that Congress also adopted the intent voiced by the witness."[32] Accordingly, a court looking at the legislative history of section 365(c)(2) might construe its scope to be limited to lenders and find that equity investors are outside the class of intended protected parties. This narrower view of the scope of section 365(c)(2) could make it harder for investors to prevail on a Section 365 Defense. Courts, however, under the standard canons of statutory construction, generally do not look to the legislative history to determine the intent of Congress unless the court finds an ambiguity in the express language of a statute.[33] A court might find that, because the term "security" is clearly defined in the Code and because Congress did not limit the concept of "security" to "*debt* security" in section 365(c)(2), such provision is clear on its face and does not preclude equity investors from its scope. This broader view of section 365(c)(2) could facilitate the assertion of a Section 365 Defense by an investor in a bankrupt fund.

Evaluating the Iridium Rulings

The Thynge Ruling concluded that the Iridium Agreement (i) was within the purview of section 365(c)(2) of the Code as a form of financial accommodation[34] and (ii) created "executory commitments."[35] Under the Thynge Ruling, the Financial Accommodation Hurdle was deemed satisfied, but no ruling could be made on the Executory Contract Hurdle because a question of material fact existed.[36] In contrast, the Farnan Ruling concluded that (i) the Iridium Agreement was already performed[37] (even though the reserve capital commitments remained unfunded), and (ii) the Iridium Investors were not within the class of creditors Congress intended to protect under section 365(c)(2).[38] Under the Farnan Ruling, arguably neither the Executory Contract Hurdle nor the Financial Accommodation Hurdle were deemed satisfied. To evaluate the relative reliability of the two Iridium Rulings, we review their conclusions in the context of existing case law.

Iridium Rulings – Executory Contract Analysis

A number of bankruptcy cases have evaluated whether limited partnership and limited liability company agreements qualify as "executory" contracts. Several of these cases have concluded that where investors have continuing capital contribution agreements, the underlying agreements qualify as "executory" contracts.[39] In contrast, the bankruptcy cases that have concluded such agreements do not qualify as "executory" contracts are generally limited to circumstances in which investors did not have any continuing obligations (including continuing capital contribution obligations).[40]

The Thynge Ruling did not reach a definitive conclusion on whether the Iridium Agreement was "executory" because of an open question of material fact. The Thynge Ruling did, however, conclude that the Iridium Agreement gave rise to "executory commitments." In contrast, the Farnan Ruling concluded that the Iridium Agreement did not qualify as an "executory" contract because the capital contribution obligations of the Iridium Investors qualified as an "already advanced guarantee that the trustee or debtor is permitted to continue to use"[41]—notwithstanding that Iridium Investors had not funded the reserve capital calls, and Iridium had not taken any action to issue the relevant Class 1 Interests to be acquired from the reserve capital contributions.

The Thynge Ruling seems more consistent with the findings of bankruptcy courts that have addressed whether limited partnership agreements with continuing capital contribution

commitments qualify as "executory" contracts. Accordingly, the conclusion reflected in the Thynge Ruling may be more predictive of how a future court might analyze this issue.

Iridium Rulings – Financial Accommodation Analysis

The Thynge Ruling found that the Iridium Agreement satisfied the Financial Accommodation Hurdle. This conclusion appears to be based on the express language of section 365(c)(2) and specifically the phrase "*to issue a security of the debtor*" therein.[42] The Thynge Ruling found that *limited partnership interests* are expressly included in the term *security* under the Code.[43] The Thynge Ruling also found that limited liability company interests are sufficiently similar to limited partnership interests to qualify as a "security" under the Code.[44] Given such findings, Magistrate Judge Thynge concluded that the Iridium Agreement was a contract to issue a security within the purview of section 365(c)(2) of the Code.

In contrast, the Farnan Ruling did not address whether the phrase "to issue a security of the debtor" brought the Iridium Agreement within the purview of section 365(c)(2) of the Code.[45] Instead, citing *In re Securities Group 1980,* Judge Farnan concluded that the Iridium Investors were "not within the class of creditors Congress intended to protect under Section 365(c)(2) of the Bankruptcy Code."[46] In drawing that conclusion, the Farnan Ruling appears to focus on the "already advanced" nature of the Iridium Investors capital commitments.[47] The Farnan Ruling notes that the purpose of section 365(c)(2) is:

> to protect parties from financial exposure for *new* obligations whose repayment relies on the *fiscal strength* of the already bankrupt debtor [emphasis added][48]

and concludes that the capital contributions of the Iridium Investors were "not new obligations."[49] This narrower holding seems to be based on an interpretation of the legislative history and not a direct application of the language of section 365(c)(2).

A variety of cases and secondary sources support a narrow construction of the language "to make a loan, or extend other debt financing or financial accommodations, to or for the benefit of the debtor" as it appears in section 365(c)(2) of the Code.[50] The interpretation of the phrase "to issue a security of the debtor" as it appears at the end of such provision has received less attention. The limited guidance in the relevant case law, the legislative history and other resources on the phrase "to issue a security" as used in section 365(c)(2) present an element of uncertainty in the relevant analysis. One aspect of that uncertainty may be the timing of the issuance of the security at issue.

The Relevance of Timing With Respect to the Issuance of a Security

The Thynge Ruling did not specifically address whether the timing of the issuance of the Class 1 Interests of Iridium was relevant to the conclusion that section 365(c)(2) applied to the Iridium Agreement. As noted above, the RCC Rights at issue in the Iridium Case were structured to be an exchange of funds for the relevant Class 1 Interests. Because the exchange was to occur on demand when the RCC Rights were called, the structure of the RCC Rights appears to fit more readily under section 365(c)(2) as it has been interpreted by courts such as the *In re Teligent* court:

> [A] contract "to issue a security of the debtor," as used in § 365(c)(2), refers to a pre-petition agreement obligating the non-debtor to advance new cash or credit in exchange for the debtor's note (a debt security) or its stock (an equity security).[51]

Where call rights are structured so that investors receive new interests in exchange and concurrent with funding of a capital call, as in the Iridium Case, there may be a greater concern that section 365(c)(2) could be applied.

In a broad sense, most limited partnership and limited liability agreements are contracts to issue a security. As such, there is an argument that they fit within the express language of section 365(c)(2) of the Code. A countervailing argument, however, is that where the relevant equity interests are issued to investors at the time they subscribe to the fund, a subsequent capital call on such interest does not qualify as an obligation to advance new cash or credit in exchange for the debtor's stock, because the stock was already issued and accordingly, section 365(c)(2) would not apply. In the context of the Iridium Case, had the Class 1 Interests tied to the RCC Rights been issued at the time the investors initially accepted the reserve capital call obligations, the Thynge Ruling may have viewed the application of section 365(c)(2) differently. Because the timing of the issuance of such interests was not addressed in either Iridium Ruling, it is not clear whether an alternative structure would have impacted the legal determinations.

To diminish the possibility that a court might determine that a fund's capital call structure set forth in its organizational agreement qualifies as "a contract to issue a security," funds and investors may want to structure capital calls in a way that provides for the issuance of the relevant securities at the time of subscription and not concurrently with the funding of the capital call. Similarly, lenders may want to confirm, as part of their diligence on a fund, that the relevant capital call structure does not contemplate an exchange of cash or credit for an equity interest at the time the capital call is made. While we believe most funds have adopted this structure, funds with reserve capital calls similar to Iridium may present a question.

Limitations of the Iridium Rulings

Apart from the uncertainty created by the divergent rulings in the Iridium Case (addressed in Part One of this article), other limitations applicable to the Iridium Rulings introduce further uncertainty as to the likely legal conclusions of a future court addressing circumstances analogous to the Iridium Case.

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The Iridium Rulings Are Not Legally Binding on Any Courts

Neither the Farnan Ruling nor the Thynge Ruling is legally binding on any state or federal court in the United States. Each U.S. district court is bound by the decisions of the U.S. circuit court that it sits under, but it is not bound by the decisions of other U.S. district courts, including U.S. district courts in the same federal district.[52] Accordingly, the Iridium Rulings are not binding on any U.S. district court. They are similarly not binding on a state court. Although not legally binding, a future court could consider the Iridium Rulings. In so doing, however, it is not clear whether future courts would find the Thynge Ruling or the Farnan Ruling more persuasive.

Which Law is Applied to a Section 365 Defense May Impact the Outcome of Any Future Decision

Both the Farnan Ruling and the Thynge Ruling applied the law of the Third Circuit in determining whether the Iridium Agreement was an "executory" contract. The Third Circuit follows the "*material breach*" approach, which presents a higher factual hurdle for investors asserting a Section 365 Defense. This higher factual threshold kept Magistrate Judge Thynge from ruling on the Iridium Investors' Section 365 Defense, and it may have been key to the Farnan Ruling as well.[53] The "material breach" approach also generally favors lenders over investors in a section 365(c)(2) dispute, and may not apply in a future case.

In the Iridium Case, the Iridium Investors asserted that the Second Circuit's "*some performance due*" approach applied to their claim.[54] Neither the Iridium Investors nor Chase briefed the issue; accordingly, Magistrate Judge Thynge assumed that Third Circuit law applied.[55] If a future claim is brought in a U.S. district court in the Second Circuit, or if investors persuasively argue that Second Circuit

law applies, the higher "material breach" threshold might not be applied in that dispute. Such an outcome could favor investors asserting a Section 365 Defense.

The Farnan Ruling Has Been Characterized as "Unpersuasive"

The Farnan Ruling has been characterized as "unpersuasive" by certain commentators,[56] in part because it deemed the capital call commitments of the Iridium Investors to be an "already advanced guarantee."[57] Although the court acknowledged that to effectuate the reserve capital calls, the Iridium Investors were to acquire a certain number of Class 1 Interests (at a price of $13.33 per interest),[58] Judge Farnan characterized those obligations as "existing debt obligations" and as "more analogous to an old equity investment that the [Iridium Investors] already made."[59] This analysis appears to equate the reserve capital call obligations of the Iridium Investors with guarantees. It is not clear that a future court would adopt this rationale.

Additionally, the Farnan Ruling is unclear about whether the value of the Class 1 Interests was material to its ruling on the Executory Contract Hurdle. In other words, whether the Iridium Agreement failed to qualify as an "executory" contract because it had been fully performed by the Iridium Investors upon its execution or because the non-issuance of worthless Class 1 Interests failed to satisfy the requirements of the "*material breach*" approach, is not clarified in the opinion. In characterizing the Farnan Ruling as "unpersuasive," one commentator has suggested that the value of the Class 1 Interests was an important element of the ruling.[60] That commentator, in comments submitted to the Southeast Bankruptcy Law Institute, noted that the ruling effectively holds:

> [C]ontracts to buy a debtor's securities are enforceable only when the securities are worthless – but are not enforceable under section 365(c)(2) when the securities are worth something.[61]

From a normative perspective, requiring a buyer to buy something only if the thing is worth nothing may not be a persuasive outcome for a future court, and such a rationale also creates issues delineating what qualifies as "worthless" in that context. Do the securities in question have to have absolutely no value, or would the valuation of a few cents still be little enough to qualify as "worthless?" The uncertainties of the Farnan Ruling create some question as to whether a future court would adopt its reasoning and, even if it did, whether it would arrive at the same legal conclusions.

The Farnan Ruling is "Unpublished" and Cannot Be Cited in Some Jurisdictions

Unpublished opinions are opinions that do not appear in an official reporter. Before technology facilitated the aggregating and reporting of legal decisions, the majority of opinions were unpublished. Cases that were identified for publication in an official reporter were, historically, more carefully prepared by courts because, in part, they would be broadly available to the public and would, therefore, be more likely to be cited to courts. Opinions that were not designated for publication were generally regarded as unpolished.[62] Judges decide whether a particular case is published or unpublished.[63] If a judge designates a case as unpublished, it does not appear in an official reporter.[64]

With advances in technology, court decisions became more readily available to the public and, therefore, more likely to be cited. Given the historical distinction between the carefulness with which "published" cases were prepared relative to "unpublished" opinions, some courts are unwilling to rely on certain "unpublished" opinions. The Farnan Ruling, as an *unpublished decision* may be regarded by future courts as unpolished and less reliable. The Thynge Ruling, as a *published decision*, could be regarded as more polished and reliable, notwithstanding that it is a ruling of a magistrate judge that was reversed in part by Judge Farnan.

The Federal Rules of Appellate Procedure, Rule 32.1, created a distinction between *unpublished* opinions entered before January 1, 2007 and opinions entered on or after that date. The rule, which applies to U.S. circuit courts (including briefs submitted to such courts), confirms that *unpublished* opinions entered on or after January 1, 2007 may be cited to such courts, but left the citing of earlier *unpublished* opinions to the local rules of the applicable U.S. district courts. The Second Circuit (which includes districts in the state of New York, including the Southern District of New York where many bankruptcy cases are filed) prohibits citation to unpublished opinions issued before 2007.[65] That prohibition would block the citing of the Farnan Ruling in a brief to the Second Circuit, but would not block the citing of the Thynge Ruling because it was a "published" decision, although any citation of the Thynge Ruling would have to acknowledge the subsequent reversal in the Farnan Ruling.

In contrast, the Third Circuit (which covers the state of Delaware) permits citation to pre-2007 *unpublished* opinions. At least one commentator, however, has noted that "judges on the Third Circuit almost always avoid citing unpublished opinions" and that "litigants should think twice before relying exclusively on such precedent to that court."[66] Accordingly, while the Farnan Ruling could be cited in briefs filed with the Third Circuit, it would not historically provide a sufficient foundation for a ruling by the court.

A Direct Recourse Strategy Can Manage Risks Arising from a Section 365 Defense

Participants in the subscription credit facilities market generally take a number of steps to confirm that the capital contribution obligations of investors will be enforceable when called to repay the outstanding loan obligations. Such steps can appear in the relevant constituent documents of the funds and in the financing documents and include, among other protections: (i) that the fund is expressly authorized to enter into subscription credit facilities and related documentation; (ii) that each fund and its general partner (or managing member, as applicable) provide a pledge of its capital call rights to the lenders; (iii) that investors agree to fund their capital contributions irrevocably and unconditionally[67] and without setoff or counterclaim; (iv) an acknowledgement by the investors that lenders may rely on the capital call obligations; and (v) waivers, including waivers of sovereign immunity and section 365(c)(2) of the Code. These steps have evolved over time and have made subscription facilities available to a broader market. They have also improved the efficiency of the market by identifying and addressing potential uncertainties, which facilitates the negotiation process.

While these steps have proven effective to address existing uncertainties, where a Section 365 Defense is asserted, the existing precautionary provisions may be viewed as insufficient. For example, a pre-petition waiver of a Section 365 Defense by an investor may be unenforceable.[68] Additionally, relying on the enforceability of capital call obligations under state statutes[69] may be insufficient for enforcing such obligations where an investor asserts a Section 365 Defense if the state statute conflicts with the Code. Under the Supremacy Clause (Article VI, Clause 2) of the United States Constitution (U.S. Const. art. 1, § 3), federal law (such as the Code) has the power to supersede inconsistent provisions of state law.[70]

The potential disruptive impact on the subscription facility market arising from the uncertainties involved in a Section 365 Defense could be avoided where the lenders in subscription facilities have some direct recourse to the investors, which they anticipated and relied on in making the loan available to the fund. Some strategies that provide direct recourse to the investors, however, present significant hurdles. For example, a properly documented guaranty from investors in favor of the lenders could address the risk of a Section 365 Defense, but guaranties present substantial feasibility issues because, among other reasons, some investors are not authorized to provide guaranties. Accordingly, other potential

strategies that could provide direct recourse to investors should be explored.

The Debt Acquisition Direct Resource Strategy

One strategy that could provide the necessary recourse to address potentially disruptive concerns is to require the investors, upon the occurrence of certain limited circumstances, to invest in the relevant fund in which they are equity investors by acquiring the fund's outstanding subscription credit facility loans from the lenders. This Debt Acquisition Strategy would create an obligation on the investors to acquire the outstanding loans from the lenders at par value (whether by assignment or otherwise) on a *pro rata* basis. This requirement also would be subject to the limits of such investor's capital commitment. By acquiring the outstanding loans, the investors would be changing only the form of their investment—from an investment via an equity security to an investment via a debt security.

One way to implement the Debt Acquisition Strategy could be to modify the fund's constituent documents, which is consistent with the way several other issues have been addressed in the evolution of the market. Where the constituent documents provide appropriate implementing language, there would be no need for the lenders to negotiate directly with a fund's investors. The strategy could be drafted to be triggered only when a lender was unable to successfully call the capital commitments from the investors after the fund has become subject to bankruptcy proceedings. This protection would only apply to credit facilities authorized by the fund's constituent documents and could include other limitations.

The Debt Acquisition Strategy would preserve the expectations of the various parties. With respect to the lenders, this strategy would preserve the lenders' expectations that they can look to the investors for repayment of the subscription facility loans. In entering into a secured subscription credit facility, lenders bargain for a return on (and return of) their principal and the credit risk represented by the investors in the fund. The ability to shift the outstanding subscription credit facility loans to the investors at par value would preserve this set of expectations.

With respect to the investors, the Debt Acquisition Strategy is consistent with the investors' expectations that they are the ultimate source of capital to finance the investments of the fund, and that they bear the credit risk of the borrower. In general, a subscription facility is intended to facilitate the investment process and enable the fund to react more quickly to market opportunities. Subjecting investors to an obligation to acquire the outstanding subscription facility loans would leave the investors in their bargained-for position—funding capital calls to reimburse lenders that have advanced credit to facilitate the fund's acquisition of investments.

With respect to the fund, it bargained for the subscription credit facility loans to facilitate its investment process and relieve potential burdens on investors from repeated capital calls. The transition of the holder of those loans from the lender to the fund's investors is not inconsistent with the fund's expectations.

Finally, the Debt Acquisition Strategy would permit a more efficient resolution of claims in the case of an insolvency of the fund, which should make capital call facilities to funds that are prepared to accept this strategy more attractive to lenders. In addition to addressing section 365(c)(2) issues, the Debt Acquisition Strategy could avoid delays arising from the implementation of an automatic stay. In the Iridium Case, Iridium filed for bankruptcy on August 13, 1999 and Chase obtained a waiver of the automatic stay from the bankruptcy court ten months later in June 2000. Chase filed its complaint against the Iridium Investors just days later on June 9, 2000.

An additional benefit of the Debt Acquisition Strategy is that lenders would be enforcing a contractual right as the lenders, as opposed to enforcing a contractual or other right of the

debtor against the investors. As a result, the need to obtain a waiver of the automatic stay could be avoided. Similarly, because the enforcement of the rights under the Debt Acquisition Strategy does not involve rights of the debtor, section 365(c)(2) would not apply, which avoids the uncertainties that can arise under such claims, as identified in this article.

Conclusion

Public commentary suggests the Farnan Ruling in the Iridium Case can be relied on for the proposition that section 365(c)(2) of the Code is unavailable to investors as a defense to funding capital contributions to a bankrupt fund.[71] Such public commentary may overstate the reliability of the Farnan Ruling. As a potential consequence, participants in the market may underestimate the risk of a Section 365 Defense and fail to secure appropriate language in their transaction documents to shield their interests.

This article concludes that the limits of the Farnan Ruling create a potential question about whether a subsequent court would reach the same legal conclusions Judge Farnan reached in a similar case. Given that the two judges in the Iridium Case came to conflicting legal conclusions, it is apparent that the legal conclusions of future judges, addressing similar but separate facts, could differ from the conclusions identified in the Farnan Ruling.

Market participants could address this uncertainty by requiring borrowers to incorporate language into the applicable fund documents that preserves the expectations of the parties. The approach outlined in this article would permit a lender to put the outstanding loans to the investors, without having to obtain leave from an automatic stay or other entanglements of a bankruptcy proceeding. In order to implement such a strategy, however, the market must first acknowledge the risk.

[1] Pamela J. Martinson, *Security Interests: Capital Calls and Capital Commitments*, Practical Law (July 11, 2016), http://us.practicallaw.com/1-535-9385.

[2] The authors have opted not to identify a series of specific articles to evidence the consensus view in the market because such approach is not required to present the substance of this article. Articles that may not be widely available have been identified so that they can be more readily identified and obtained.

[3] *See Chase Manhattan Bank v. Iridium Afr. Corp.*, No. 00-564 JJF, 2004 U.S. Dist. LEXIS 2332, at *11 (D. Del. Feb. 13, 2004). For reasons discussed in this article, the initial ruling did not resolve the Section 365 Defense, but the later ruling did find that the first ruling found section 365(c)(2) applicable.

[4] *Chase Manhattan Bank v. Iridium Afr. Corp.*, 197 F. Supp. 2d 120, 124-126 (D. Del. 2002).

[5] On August 13, 1999, creditors filed involuntary Chapter 11 bankruptcy petitions in the United States Bankruptcy Court for the Southern District of New York against Iridium and Iridium Operating and each of Iridium and Iridium Operating filed voluntary Chapter 11 bankruptcy petitions in the United States Bankruptcy Court for the District of Delaware within hours of such involuntary filings. Ultimately, the Delaware petitions were transferred to the Southern District of New York. *See Motorola, Inc. v. Official Comm. of Unsecured Creditors (In re Iridium Operating LLC)*, 478 F.3d 452, 457 (2d Cir. 2007).

[6] Chase had also entered into a $750 million loan to Iridium, but that loan was guaranteed by Motorola, Inc. Iridium was spun off from Motorola, Inc. in 1993 as Iridium, Inc., which converted to Iridium, LLC in July 1996. Some case opinions and published commentary indicate the $800 million loan was made by Chase to Iridium, but such representations are inconsistent with the Senior Secured Credit Agreement dated December 23, 1998.

[7] Iridium pledged its call rights to secure the debt of its wholly-owned subsidiary, Iridium Operating, as part of the negotiation of new credit facilities in December 1998, the proceeds of which facilities were to be used to build out Iridium's network, which permitted voice and data communication anywhere on the globe from handheld wireless devices.

[8] *Chase Manhattan Bank v. Iridium Afr. Corp.*, 197 F. Supp. 2d 120, 125 (D. Del. 2002).

[9] *See id*.

[10] *Chase Manhattan Bank v. Iridium Afr. Corp.*, 474 F. Supp. 2d 613 (D. Del. 2007).

[11] *Chase Manhattan Bank*, 197 F. Supp. 2d 120. Generally decisions that appear in an official court reporter are referred to as "published decisions." The ruling was referenced as a Memorandum and Order because the legal findings would have been given effect if the parties did not raise objections to the legal conclusions. The Memorandum and Order is also described as a "Report and Recommendation" because it is subject to review by the district court judge. To the extent that a party in interest objects to the legal findings in a Memorandum and Order, the magistrate's decision is subject to review

by the applicable U.S. district court judge. Where a dispositive matter in a case is at issue, such as a motion for summary judgment, as was the case in the Iridium matter, the district court conducts a *de* novo determination on those portions of the magistrate judge's memorandum as to which objects were filed. The district court may accept, reject or modify the magistrate judge's findings and recommendations. For purposes of this article, we refer to the findings of Magistrate Judge Mary P. Thynge and District Judge Joseph J. Farnan as "rulings." The reader should be aware that notwithstanding the publication of Magistrate Judge Thynge's Memorandum and Order in an official federal court reporter, the legal findings were subject to review by U.S. District Court Judge Farnan.

[12] *Id.* at 133. *See also Chase Manhattan Bank v. Iridium Afr. Corp.*, No. 00-564 JJF, 2004 U.S. Dist. LEXIS 2332, at *11 (D. Del. Feb. 13, 2004).

[13] *Chase Manhattan Bank*, 2004 U.S. Dist. LEXIS 2332, at *16.

[14] *Id.* at *17.

[15] *See Route 21 Assocs. of Bellville v. MHC, Inc.*, 2012 U.S. Dist. LEXIS 180285, at *82 (Bankr. S.D.N.Y. Dec. 19, 2012) (emphasis added) (citing H.R. REP. NO. 95-595, at 347 (1977)).

[16] *See id*. at *82 (emphasis added). *See also* Vern Countryman, *Executory Contracts in Bankruptcy: Part 1*, 57 MINN. L. REV. 439, 460 (1973) (Vern Countryman formulated this approach in his article).

[17] *See In re Riodizio, Inc.*, 204 B.R. 417, 421 (Bankr. S.D.N.Y. 1997). This article focuses on the "some performance due" and "material breach" approaches because of their relevance in the Iridium Rulings and because of the likelihood that they will apply in future disputes where disputes are litigated in either federal courts in New York City or the state of Delaware.

[18] Whether the failure of a fund to issue new certificates or otherwise update the capital accounts of its investors should qualify as a "material" breach because the exchange of capital for fund interests is the essence of the bargain or because the failure to produce the certificate or increase the capital account would amount to a failure of a condition precedent or concurrent condition that should excuse performance, is unresolved. *See* RICHARD A. LORD, WILLISTON ON CONTRACTS §§ 38:7 – 38:8 (4th ed. 2013).

[19] 11 U.S.C. § 365(c)(2) (2016).

[20] 11 U.S.C. § 101(49) (2016).

[21] *See*, *e.g*, *In re Teligent, Inc.*, 268 B.R. at 737 (finding that the scope of section 365(c)(2) includes "a pre-petition agreement obligating the non-debtor to advance new cash or credit in exchange for the debtor's note (a debt security) or its stock (an equity security).").

[22] 11 U.S.C. § 365(c)(2) (2016).

[23] *See In re Sec. Grp. 1980*, 124 B.R. 875, 901 (M.D. Fla. 1991) ("In this instance, the Post-Confirmation Administrator's call for Additional Capital Contributions is not the equivalent of requiring the limited partner defendants to extend new credit to the debtors in the form of loans, lease financings or the purchase of [*sic*] discount [*sic*] notes. In contrast, the money which was pledged by these defendants to the Limited Partnerships was made as an equity investment without any expectation that the Partnerships would repay the limited partners at a future date."). The language "*or the purchase of discount notes*" should be "*or the purchase **or** discount **of** notes*." *See* S. Rep. No. 95-989, 95th Cong. 2nd Sess. (1978) 59.

[24] *See Bankruptcy Reform Act of 1978: Hearings on S. 2266 Before the Subcommittee on Improvements in Judicial Machinery of The Judiciary*, 95th Cong. (1977). The hearings were held November 28-29 and December 1, 1977.

[25] Prior to the 1977 Hearings, there was no express language analogous to section 365(c)(2) in the version of the law proposed by the U.S. House of Representatives (H.R. 8200) or the U.S. Senate (S. 2266). The Statement of NAREIT recommended the adoption of new language as a separate provision (new clause (4) to section 365(b)), that provided, "Notwithstanding anything to the contrary contained in this section, the trustee may not assume an executory contract *to make a loan or deliver equipment to or to issue a security of the debtor*." Section 365(c)(2) as ultimately adopted in the Code, generally broadened the concept of "deliver equipment" by replacing that language with the concept of "other debt financing or financial accommodation" but the recommendation to adopt an express provision and its language was otherwise adopted by Congress.

[26] *See 1977 Hearings* at 718 (Statement by NAREIT). The legislative history referenced by Mr. Kulik in his testimony was a reference to page 348 of the House Report, No. 95-595, 95th Cong. 1st Sess. (Sept. 8, 1977), which noted, "The purpose of this subsection, at least in part, is to prevent the trustee from requiring new advances of money or other property. . . . Thus, under this provision, contracts such as loan commitments and letters of credit are nonassignable, and may not be assumed by the trustee." The reference to section 365(e) included section 365(c) because of the cross-reference to 365(c) in section 365(e) of H.R. 8200.

[27] Robert J. Grimmig testified as a senior vice president of Chemical Bank and as a member of the American Bankers Association's Bankruptcy Task Force. *See 1977 Hearings* at 573 (Statement of Robert J. Grimmig).

[28] *See id.* at 576.

[29] Stuart D. Root testified as a practicing New York attorney who has counseled institutional investors on aspects of the bankruptcy laws. *See 1977 Hearings* at 521 (Statement of Stuart D. Root).

[30] *See id*.

[31] *See 1977 Hearings* at 858 (Statement of John Creedon).

[32] *In re Teligent, Inc.*, 268 B.R. at 723.

[33] *See In re Teligent, Inc.*, 268 B.R. at 733 (citing *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989)).

[34] *Chase Manhattan Bank v. Iridium Afr. Corp.*, 197 F. Supp. 2d 120, 133 (D. Del. 2002); *see also Chase Manhattan Bank*, 2004 U.S. Dist. LEXIS 2332, at *11 (D. Del. Feb. 13, 2004).

[35] *See Chase Manhattan Bank*, 197 F. Supp. 2d 120, 133 (D. Del. 2002); *see also Chase Manhattan Bank*, 2004 U.S. Dist. LEXIS 2332, at *11 (D. Del. Feb. 13, 2004).

[36] *See id*. at 132. The Thynge Ruling applied the "material breach" test in evaluating whether the Iridium Agreement qualified as an "executory" contract. In a footnote in the case, Magistrate Judge Thynge noted that whether the Second Circuit's "some performance due" test or the Third Circuit's "material breach" test applied was unclear and had not been briefed by the parties. In the absence of briefs on the issue, Magistrate Judge Thynge assumed the Third Circuit's precedent applied.

[37] *Chase Manhattan Bank*, No. 00-564 JJF, 2004 U.S. Dist. LEXIS 2332, at *16.

[38] *Id*. at *17.

[39] *See Samson v. Prokopf* (In re Smith), 185 B.R. 285, 292-93 (Bankr. S.D. Ill. 1995) (stating that a majority of courts that have found limited partnership agreements to be executory contracts have either accepted the executory contract characterization summarily or have dealt with limited partnership agreements under which the limited partner has continuing financial obligations to the partnership); *In re Sunset Developers*, 69 B.R. 710, 712 (Bankr. D. Idaho 1987) (in which an obligation to contribute capital to the partnership by the debtor partner creates an executory contract); *In re Daugherty Constr.*, 188 B.R. 607, 612 (Bankr. D. Neb. 1995) (operating agreements are executory contracts because there are material unperformed and continuing obligations among the members, including participation in management and contribution of capital).

[40] *See Movitz v. Fiesta Invs., LLC* (In re Ehmann), 319 B.R. 200 (Bankr. D. Ariz. 2005); *In re Smith*, 185 B.R. at 291-95 (limited partnership agreement was not an executory contract as to a limited partner/debtor who had no material obligations to perform); *In re Garrison-Ashburn, L.C.*, 253 B.R. 700, 708-09 (Bankr. E.D.Va. 2000) (there is no executory contract and 11 U.S.C. §365 does not apply to an operating agreement that imposes no duties or responsibilities on its members, but merely provides for the structure of the management of the entity).

[41] *Chase Manhattan Bank*, 2004 U.S. Dist. LEXIS 2332, at *17 (citing H.R. Rep. 95-595, 95th Cong., 1st Sess. 348 (1977)) ("This section permits the trustee to continue *to use and pay for property already advanced*, but is not designed to permit the trustee to demand new loans or additional transfers of property under lease commitments (emphasis added).").

[42] 11 U.S.C. § 365(c)(2) (2016).

[43] *Chase Manhattan Bank v. Iridium Afr. Corp.*, 197 F. Supp. 2d 120, 133 (D. Del. 2002).

[44] *See id*.

[45] *See Chase Manhattan Bank*, 2004 U.S. Dist. LEXIS 2332, at *17 (D. Del. Feb. 13, 2004).

[46] *Id*.

[47] *Id*.

[48] *Chase Manhattan Bank*, 2004 U.S. Dist. LEXIS 2332, at *15. The statement that section 365(c)(2) was intended to protect parties from financial risk where the parties were relying on the "fiscal strength" of the debtor is consistent with the legislative history. The Senate Report (S. Rep. No. 95-989, 95th Cong. 2nd Sess. (1978)), which accompanied Senate Bill 2266 as revised following the *1977 Hearings*, was the first draft to incorporate section 365(b)(4) (which was ultimately modified to become section 365(c)(2)). In addressing the purpose for including new section 365(b)(4), the Senate Report states, "[t]he purpose of this subsection [365(b)(4)] is to make clear that a party to a transaction which is *based upon the financial strength of a debtor* should not be required to extend *new credit* to the debtor whether in the form of loans, lease financings, or the purchase or discount of notes (emphasis added)." *See* S. Rep. No. 95-989, 95th Cong. 2nd Sess. (1978) 58-59. The Farnan Ruling is clearly drawing on the purpose statement in the Senate Report when it addresses the purpose of section 365(c)(2), although the Farnan Ruling does not cite it directly. The Farnan Ruling, however, stressed the "new credit" element of the Senate Report statement, and not the final strength element. Lending commitments are made by lenders based on the financial strength of the borrower, while equity commitments are made by investors based on potential returns. Private equity investors are not investing in the fund based on the fund's financial strength. A private equity fund draws investors based on its management team and track record of preceding funds (if applicable). Accordingly, investors in private equity funds might be viewed as outside the intended scope of the section 365(c)(2).

[49] *Id*.

[50] *See*, *e.g.*, 3-365 *Collier on Bankruptcy* P365.07[2] ("The scope of paragraph (2) is limited, however, and applies only to extensions of credit that are 'loans,' 'debt financings' or 'financial accommodations,' and not to all contracts to extend credit. These terms are strictly construed and do not extend to an ordinary contract to provide goods and services that has incidental financial accommodations or extensions of credit.") (citing *In re United Airlines, Inc.*, 368 F. 3d 720 (7th Cir. 2004), *In re Ernie Haire Ford*, 403 B.R. 750, 753 (Bankr. M.D. Fla. 2009), *American Flint Glass Workers Union v. Anchor Resolution Corp. (In re Anchor Resolution Corp.)*, 197 F.3d 76 (3rd Cir. 1999), *Citizens & Southern Nat'l Bank v. Thomas B. Hamilton Co. (In re Thomas B. Hamilton Co.)*, 969 F.2d 1013 (11th Cir. 1992).

[51] *In re Teligent, Inc.*, 268 B.R. at 737.

[52] *See Nat'l Union Fire Ins. Co. v. Allfirst Bank*, 282 F. Supp. 2d 339, 351 (D. Md. 2003) ("Of course, no decision of a district court judge is technically binding on another district court judge, even within the same district.").

[53] The Farnan Ruling does not (i) discuss the distinction in law between the Second Circuit and the Third Circuit or (ii) articulate what qualifies as "material" for purposes of the "material breach" test, but commentators have construed the ruling as relying, at least in part, on the fact that the Class 1 Interest was worthless to determine the "material breach" test was not satisfied.

[54] *See Chase Manhattan Bank v. Iridium Afr. Corp.*, 197 F. Supp. 2d 120, 132 (D. Del. 2002).

[55] *See id*. at 133.

[56] *See* Thomas Moers Mayer, *Executory Contracts – Developments* (Apr. 25, 2009) (submitted to the Southeast Bankruptcy Law Institute), sbli-inc.com/archive/2009/documents/EE.pdf.

[57] *See Chase Manhattan Bank*, 2004 U.S. Dist. LEXIS 2332, at *17. This legal conclusion is interesting because both Judge Farnan and Magistrate Judge Thynge had previously dismissed arguments made by Chase that there was an implied-in-fact contract between the Iridium Investors and Chase that gave Chase a distinct claim against each Iridium Investor for which Chase was entitled to recover such Iridium Investor's obligation under the RCC rights and to which the Iridium Investors waived their defenses. *See Chase Manhattan Bank v. Iridium Afr. Corp.*, 239 F. Supp. 2d 402, 408 (D. Del. 2002); *see also Chase Manhattan Bank v. Iridium Afr. Corp.*, 294 F. Supp. 2d 634 (D. Del. 2003).

[58] *See Chase Manhattan Bank*, 197 F. Supp. 2d at 125.

[59] *See Chase Manhattan Bank*, 2004 U.S. Dist. LEXIS 2332, at *16.

[60] *See* Thomas Moers Mayer, *Executory Contracts – Developments* (Apr. 25, 2009) (submitted to the Southeast Bankruptcy Law Institute), sbli-inc.com/archive/2009/documents/EE.pdf ("The district court held that the [Iridium Agreement] was not an executory contract (and thus not subject to section 365(c)(2)) because material performance was not due from Iridium. The only performance that was due was the issuance of LLC interests, and since the interests were admittedly worthless, the court held that failure to issue such interests was not material.").

[61] *See id.*

[62] *See* Erica S. Weisgerber, Note, *Unpublished Opinions: A Convenient Means to an Unconstitutional End,* 97 Geo. L.J. 621, 623-27 (2009).

[63] *See id.* at 627.

[64] *See id.* at 624.

[65] *See* Robert Timothy Reagan*, Citing Unpublished Federal Appellate Opinions Issued Before 2007*, FEDERAL JUDICIAL CENTER (Mar. 9, 2007), http://www.uscourts.gov/file/17899/download (providing a full list of applicable rules by circuit).

[66] *See* Colter Paulson, *Case Management in the Sixth Circuit: Unpublished Opinions*, Sixth Circuit Appellate Blog, SQUIRE PATTON BOGGS (Oct. 17, 2011), http://www.sixthcircuitappellateblog.com/news-and-analysis/case-management-in-the-sixth-circuit-unpublished-opinions.

[67] Such express language was expressly identified in the Farnan Ruling. *See Chase Manhattan Bank*, 2004 U.S. Dist. LEXIS 2332, at *16 (D. Del. 2004).

[68] *See In re Trans World Airlines, Inc.*, 261 B.R. 103, 115 (Bankr. D. Del. 2001).

[69] *See*, *e.g.*, *In re LJM2 Co-Inv., L.P.*, 866 A.2d 762, 782-83 (Del. Ch. 2004).

[70] *See Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 203-04 (1983).

[71] *See* Pamela J. Martinson, *Security Interests: Capital Calls and Capital Commitments*, Practical Law (July 11, 2016), http://us.practicallaw.com/1-535-9385.