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Trump takes the White House, lawyers take stock

Richard Woolley 14 November 2016

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In the aftermath of the US presidential election, *GRR* asked bankruptcy lawyers what the next four years might hold under a president with direct experience of Chapter 11 filings.

Donald Trump's surprise victory at the ballot box on 8 November was immediately followed by another surprise in the form of a spike in the stock markets – at least for the majority of financial markets commentators who saw him as embodying the type of uncertainty that typically drives markets down.

Fluctuations throughout the campaign season, including the most recent uptick when the Dow Jones jumped 371 points as the FBI announced it was not recommending criminal charges against Democratic candidate Hillary Clinton, proved a poor indicator of the post-election atmosphere. On 10 November, the day after Trump's victory, the Dow Jones closed at an all-time high.

While concrete policies were hard to come by in Trump's campaign rhetoric, the overall tone was unmistakably pro-business and anti-regulation; the Dodd-Frank Wall Street Reform and Consumer Protection Act, which brought about significant reforms to financial regulation in the aftermath of the 2008 crisis, is in the crosshairs. The campaign rhetoric also showed a fervent bias towards the US as a standalone – rather than a globally integrated – economic power.

It appears that the markets have clung to these few indications, and yet some are not surprised by the mood of stability currently evident on Wall Street.

"The markets slipped [before the election] because of uncertainty, not because of fear of Trump," says **Louis Kornreich**, the former Chief Judge of the US Bankruptcy Court for the District of Maine and now of counsel at Bernstein Shur Sawyer & Nelson in Portland. "It is true that Wall Street had invested in Mrs Clinton and would have preferred her patronage to the ambivalence of Mr Trump. But the markets are not personal and they will rebound."

Kornreich predicts there won't be any seismic changes in the nature of bankruptcy work that will land on lawyers' desks in the near future. "The sectors which may see an uptick in work will be those that were in the pipeline the day before the election, namely, retail, retail real estate (shopping malls, and the entities that finance them) and oil," he says.

"Petroleum stabilisation will occur; but the industry's vertical shakeout and repair will continue. All of this will keep the bankruptcy bar and its supporting cast busy and prosperous," he adds.

Scott Greenberg, of Jones Day in New York, suggests that oil and particularly coal in the US, which have both seen a large number of big bankruptcies in recent years, could bounce back if Trump follows through on promises to rejuvenate these sectors. This could lead to more work from green energy companies whose market share is eroded by a return to traditional fossil fuels.

Another pillar of Trump's campaign was a projected employment policy that would revitalise the domestic workforce in the US and place checks on migrant labour. According to **Brian Spector** at Spector & Ehrenworth in New Jersey, such measures could affect smaller companies, which "may be negatively impacted by a possible raise in the minimum hourly rate payable to workers and the reduced availability of immigrant workers."

Lawyers have also noted that sectors dependent on imports and exports could suffer, following the president-elect's consistent and pointed criticism of the US's international trade deals, such as the North American Free Trade Agreement (NAFTA), and the Trans-Pacific Partnership (TPP) – a proposed trade bloc of the US and 11 countries on the Pacific Rim.

Debevoise & Plimpton partner **David Rivkin**, the current head of the international Bar Association, has raised concerns that the Trump presidency would cause the US to have a conservative Supreme Court for a generation, and lead to its withdrawal from international trade deals. "It will be difficult to renegotiate NAFTA," he told *GRR*'s sister publication *Global Arbitration Review* last week, adding that he feared the TPP is dead. On 11 November, the White House conceded that TPP would not pass congress.

Another source predicts that a shift away from international trade will have a knock-on effect for bankruptcies. "US manufacturing is most likely to be hit," they said, adding that blocking trade and other protectionist policies, if implemented, would undoubtedly call for more work in restructuring.

One other area that lawyers suggest might be significantly affected under Trump is tax. A memo circulated by Baker Botts immediately after the election noted that the president-elect has proposed to eliminate capital gains tax for carried interest, and focus instead on higher income tax rates. Such measures "could lead to changes in investment strategies and potentially fewer investments in start-up and distressed US companies," according to Dallas partner **Samantha Crispin**.

Her partner in New York, bankruptcy specialist **Manny Grillo**, suggests the progress of the new Financial Institution Bankruptcy Act (https://www.congress.gov/bill/114th-congress/house-bill/2947) (FIBA) of 2016 could be complicated by a change of administration. FIBA proposes to amend the Bankruptcy Code to expedite the restructuring of financial services firms by allowing operating assets to be transferred more quickly; "over the course of a weekend," according to Judicial Committee Chairman Bob Goodlatte, writing when the bill passed the House of Representatives in February.

“This quick transfer allows the financial firm to continue to operate in the normal course, which preserves the value of the enterprise for the creditors of the bankruptcy without a significant impact on the firm’s employees, suppliers and customers,” Goodlatte added.

The new regulation, which Grillo says was in part intended to address shortfalls in Dodd-Frank, was expected to be “whisked through by the Senate” before the end of the year. This now “seems unlikely” he said.

During the presidential debates, Clinton focused on Trump’s status as a repeat user of the US bankruptcy statutes. Trump conceded that his businesses had relied on Chapter 11 four times (the *Washington Post* later corrected this number to six though the president-elect said he counted the first three as a single case) all tied to Trump’s hotel and casino endeavours.

Kornreich predicts that Trump will “maintain a pro-debtor orientation” insofar as his administration spends any time focusing on bankruptcy legislation, though he concedes that the president-elect does not appear to be associated with the kinds of lobbying groups that focus on bankruptcy reform in any direction. The new administration will probably be far more engaged with tax reform, he suggests.

“This is a guy who knows bankruptcy, he understands how the code works,” says Scott Greenberg. “As a bankruptcy lawyer I did find that the criticism of him for making use of Chapter 11, which is a federal law, rang hollow somewhat.”

With experience in several casino bankruptcies, Greenberg has himself worked on a Trump Chapter 11 file, but notes that it was a straightforward affair: a troubled economy creating ripples in the gambling and hospitality sector.

Spector similarly worked on the bankruptcy of the Trump Taj Mahal casino in Atlantic City in 1991. “This was the first casino bankruptcy, which obviously drew much interest because people could not fathom how a business that deals in so much money would ever have to seek protection from creditors, but which did because it was burdened with so much debt and had such high operating costs,” Spector says.

“It was also the first of the Trump bankruptcies so it was the beginning of the loss of some sheen on his run of purported business successes and eventually led to his loss of control of his casino empire.”

While Trump himself has never personally filed for bankruptcy, he came close during the US real estate downturn at around the same time, having personally guaranteed around US$1 billion in debt. "I think he borrowed more than most other prudent real estate people," Pillsbury real estate partner **Alan Pomerantz** told CNN in October. "Because he personally guaranteed so much debt, the leverage shifted dramatically over to the banks. It was no longer an issue of a bank and a piece of real estate. It was a bank and Trump's actual survival."

"We made the decision that he would be worth more alive to us than dead. Dead meaning in bankruptcy. We don't want him to be in bankruptcy. We want him out in the world selling these assets for us,” Pomerantz said. “We kept him alive to help us.”

While sweeping reforms to the Bankruptcy Code are unlikely, the president-elect’s status as a user of bankruptcy law might mean he’s interested in one pending case on the Supreme Court docket. The case of *Czyzewski v Jevic Holding Corp*, which has been sent up from Delaware via the Third Circuit, will decide whether or not bankruptcy courts can dismiss Chapter 11 cases when property is distributed as part of a settlement that violates the priorities of claims and expenses laid out in section 507 of the Bankruptcy Code.

“The current Solicitor General has entered an appearance on the side of those who believe the bankruptcy court went beyond the law in allowing a settlement,” says Kornreich. “Trump could let that stand or he could pull the Solicitor General off the case.”

An opinion in *Jevic* is due to be issued in the first quarter of 2017, by which time President Trump will be a reality and the lay of the land should be clearer for lawyers and businesses of all specialisms.

Many will hope that predicting the behaviour of the markets will be easier than predicting the outcome of the election in 2016.

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