Marcia R. Meoli

From: John T. Gregg, Editor <marcia@federalbarassociationwmbankrupcey.ccsend.com> on behalf of John T. Gregg, Editor <jgregg@btlaw.com>
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To: Marcia Meoli
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Federal Bar Association

Bankruptcy Section Newsletter
October 2009

This newsletter is published by the Federal Bar Association, Bankruptcy Section, for the Western District of Michigan. Prepared by lawyers with busy practices, every effort is made to publish on a quarterly basis. For your records, here are the dates of newsletters for the recent past: June 2009, March 2009, October 2008, July 2008, April, 2008, January 2008, October 2007, August 2007, April 2007, January 2007, October 2006, July 2006, February 2006, October 2005, June 2005, February 2005, October 2004, May 2004, January 2004, October 2003, July 2003, April 2003 and January 2003.

To view this email in its best format (green and tan background, with the tree logo at the top), we suggest that you set your internet software to "HTML" view. On versions of INTERNET EXPLORER, click "tools" then "options" then "environment". Under the "views" tab, click "default read view" and set to "HTML", instead of "plain text".

In this issue

Upcoming dates:

FBA Steering Committee will meet the 3rd Friday of each month for lunch at the University Club in downtown Grand Rapids. Please confirm with Chair A. Todd Almassian at talmassian@kvalawyers.com.

Bankruptcy Section Steering Committee:

A. Todd Almassian, Chair
David C. Andersen
Dan E. Bylenga, Jr.
W. Francesca Ferguson

Editor's Note

In June 2009, Marcia Meoli published her final edition of the FBA Bankruptcy Section Newsletter, for which she acted as editor for approximately four years. During her tenure, the Section and the Western District of Michigan as a whole underwent significant changes, including the institution of electronic filing, the enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act, the retirement of the Honorable Jo Ann C. Stevenson, and the appointment of the Honorable Scott W. Dales. Throughout this period, Marcia provided the membership with updates from the Court as well as other newsworthy events. It goes without saying that her efforts and commitment were greatly appreciated.

Dan Bylenga also deserves recognition for the timely and informative case summaries he provided during this period. Dan has agreed to continue to provide case summaries for future newsletters, so please thank him for his past and future contributions the next time you see him.

In the forthcoming editions of the newsletter, it is my hope that the membership will view the newsletter as not only a source for news, but also thoughtful insight with respect to recent legal developments, whether in the Western and Eastern Districts of Michigan, the Sixth Circuit or even nationally. As always, the membership is invited to submit short articles addressing notable recent developments. In this issue, Patrick Mears and Steve Weber have contributed articles on international insolvency and the role of chief restructuring officers, respectively. In addition, Robert Salomon, a professor at the Stern School of Business, New York University, shares his thoughts on the "new" automotive industry.

Submissions need not be filled with citations or considered "law review" caliber. Rather, mere observations or short analyses of relevant issues and/or creative arguments, whether set forth in pleadings or published/unpublished decisions, are welcome.

In addition, members should contact the editor if they wish to post announcements or other news (e.g., promotions, awards, appointments, and firm mergers) in the Announcements section of the upcoming newsletter. In the event that you have any suggestions or criticism, please feel free to contact the editor at jgregg@btlaw.com or Barnes & Thornburg LLP, Attn: John T. Gregg, 171 Monroe Avenue, NW, Suite 1000, Grand Rapids, Michigan 49503.

Quick Links...

United States Bankruptcy Court, Western District of Michigan

Local filing statistics

United States Trustee Program, including means test tables and other BACPA data

United States Bankruptcy Courts

Chapter 13 Trustee Brett N. Rodgers

Chapter 13 Trustee Mary K. Viegelahn Hamlin

Federal post judgment rate of interest

State Bar of Michigan

American Bankruptcy Institute

National Association of Bankruptcy Trustees

Letter from the Chair

One All Purpose Bankruptcy Kit

A. Todd Almassian
Chair of the Bankruptcy Section
Federal Bar Association
talmassian@kvalawyers.com

In 1979 The Regel Press, Inc., from Flint Michigan printed and sold bankruptcy pleadings. The documents were printed with carbon paper allowing for an original and four copies. The documents were packaged in a manila envelope titled "One All Purpose Bankruptcy Kit." Our law firm used the packaged carbon pleadings when filing personal bankruptcy petitions on behalf of clients.

Today, when you hear the phrase "all purpose kit" you're probably watching an infomercial on late night television. To apply that phrase to modern bankruptcy pleadings is entertaining. Can anything that is "all purpose" and described as a "kit" shepherd a debtor through a bankruptcy? Times have changed and the bankruptcy process has demanded more education, time and money from clients, practitioners, Trustees and Judges. Seeking bankruptcy protection and obtaining a discharge now requires significantly more than just filling out the Petition, Schedules, and Statement of Financial Affairs.

The most significant change has been the arrival of BAPCPA. Although BAPCPA has presented a number of challenges, the change in the law has been instrumental in bringing our local bankruptcy community together.

As a result of BAPCPA, the natural process of learning about the changes in the law, considering various interpretations of the statutes, and reconciling conflicting case law has significantly increased dialogue and brought us together as practitioners. Over its twenty-one years, the FBA Bankruptcy Steering Committee has been an integral part of that process and has continued to evolve with the bankruptcy code.

The Steering Committee and the members who have previously served have assisted with the annual seminar, retirement parties, investure ceremonies, the Lion Award, the FBA Newsletter, the occasional social event, and most recently the Nims-Howard Civility Award. In recent years, the Steering Committee has reached out to practitioners in Lansing, Kalamazoo, Traverse City and Marquette. In fact, as a result of Judge Gregg's tenacious commitment to education,

he has requested the Steering Committee contribute to an upcoming December 17, 2009, reception/seminar in Marquette.

The expansion of the Steering Committee's impact has been a goal of its current members who include: Brett Rodgers, Robb Wardrop, Hal Nelson, Dan Kubiak, Fran Ferguson, Dave Anderson, Mary Viegelahn, John Piggins, Marcia Meoli, Peter Teholiz, Norm Witte, Dan Bylenga, Steve Rayman, Will Green and John Gregg.

Currently, the Steering Committee is investigating options with respect to increasing local educational opportunities, sponsoring more social events, and reaching out to our colleagues outside of the Grand Rapids area.

We have also recently welcomed Matt Cronin, the new Assistant United States Trustee for the Western District of Michigan. The US Trustee's Office has embraced a culture of approachability that has helped bring our bankruptcy community together. This past year new members Will Green and John Gregg joined the Steering Committee. Marcia Meoli retired as FBA Newsletter Editor and turned over duties and responsibilities to John Gregg.

Robb Wardrop suggested, and Rebecca Johnson led the way, for the Court to consider wireless internet access in Grand Rapids. This matter has been submitted to our local Bankruptcy Court for review.

Last year, Norm Witte sponsored a resolution for the FBA to contribute to a Lansing mixer and social event for Judge Dales. Mike Maggio sponsored a similar resolution for a social event for the Marquette Bar and Judge Hughes. Jim Boyd assisted with a reception for Judge Gregg in Traverse City.

John Piggins assumed the role as Treasurer after Mary Viegelahn's years of dedicated time and service to the Steering Committee.

Fran Ferguson and Judge Gregg organized what has been called by many the best FBA Seminar on record. A record 297 attendees were present. A Porsche' golf bag was presented to Professor James J. White in recognition of his service to the Michigan legal community. John Porter received the first Nims- Howard Civility Award for the Western District of Michigan. Professor Naveen Khanna was the keynote speaker at the seminar, keeping everyone's attention regarding the projected direction of the economy. Professor Anne Lawton from the Michigan State University College of Law and numerous bankruptcy judges deserve

special recognition and appreciation from the Section. Special thanks also goes to Robb Wardrop and Tim Hillegonds who, year after year, have remained instrumental in securing sponsorship dollars to help keep the seminar costs limited.

Recently, Martin Rogalski wrote to the Court and requested the Court consider, on behalf of the Debtor's Bar, a higher "No-Look Fee" and an increase in rates for hourly attorney fees. The FBA Bankruptcy Steering Committee wrote a letter to the Court supporting the request.

In summation, the Bankruptcy Code, our clients, the US Trustees Office, the Chapter 13 Trustees, their Attorney's and Staff, Chapter 7 Panel Trustee's and Judges require more from us than filling out boilerplate forms. Citizens who find themselves as creditors or debtors are better served by everyone's commitment to be better practitioners. Although sometimes challenging, BAPCPA was in large part the catalyst for this renewed commitment to our bankruptcy practice. Years ago a "One All Purpose Bankruptcy Kit" may have been all you needed to be a successful bankruptcy practitioner. It takes much more now and I believe the bankruptcy community throughout the Western District of Michigan has met this challenge.

Next year's seminar is scheduled for July 22 - 24, 2010 in Traverse City. I look forward to seeing you all.

News from the Bankruptcy Court

Judge Gregg has organized a seminar for the Upper Peninsula Bankruptcy Bar, which is currently scheduled for December 17, 2009.

The Auto Industry's Big Little Problem

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Kudos to The Economist for recognizing that overcapacity continues to plague the automobile industry and just won't go away. Although cash-for- clunkers and other government subsidy programs meant to prop up the ailing automakers have helped the industry avert imminent disaster, the reality is that by enacting such programs governments have simply kicked today's problems down the road until tomorrow. Not

one of the major automakers has been allowed to fail in any meaningful sense, whereby massive productive capacity has eliminated from the industry.

According to The Economist:

"LAST December the boss of Fiat, Sergio Marchionne, predicted that the economic crisis would finally force the world's car industry to confront profit-destroying overcapacity and change its broken business model. . .But his predictions look increasingly like wishful thinking.

Across the world governments have lavished their ailing car firms with subsidies. Although General Motors (supported with over $50 billion of taxpayers' money) has shed some brands and factories in America, so far not a single carmaker of any size has disappeared. One of the weakest was Chrysler, but thanks to a $7 billion federal bail-out and a deal with none other than Fiat, it motors on. So too does GM's perennially lossmaking former European arm, Opel/Vauxhall, propelled with a 4.5 billion euros ($6.5 billion) dowry from the German government last week into the arms of Magna, a Canadian auto-parts company, and Russia's Sberbank.

. . .the remarkable thing is that not a single car factory in Europe has closed in the past 12 months. According to industry estimates, overcapacity in Europe next year will be around 7m units, or 30%. In America, a market of similar size, overcapacity will fall from about 6m vehicles this year to 3.5m next year, but a great deal of the overcapacity elsewhere will be aimed at America when sales begin to recover. . .

All this means that the industry's return to health is by no means assured. . .predictions that the car business will have to close factories to reduce overcapacity on the one hand, and consolidate into a smaller number of big firms to cut costs on the other, may not come true next year. But one way or another, they will come true eventually."

I agree with the sentiment expressed by The Economist. Even with rapid growth in developing markets, the auto industry is (and will continue to be) dogged by overcapacity. Capacity has got to be purged.

I have expressed concerns about overcapacity on several occasions. For example, in August I wrote:

"The automobile industry has been plagued by mass overcapacity and has been in decline for decades."

In June I wrote:

". . .we discussed some of the ills confronting the global auto industry - i.e., the severe overcapacity problem (in the order of 20-30 million units per year). We also talked about the prospects of Chrysler ending up right back in bankruptcy within 5 years. That is a distinct possibility."

In April:

"The global auto industry continues to be plagued by massive overcapacity. Keeping a weak competitor like Chrysler around will certainly not resolve systemic overcapacity in any meaningful way."

Overcapacity is a real problem, and expecting sales to bounce back quickly enough to eliminate that overcapacity is wishful thinking. A full recovery of the auto industry's fortunes will not happen until the overcapacity problem gets resolved, and that likely translates into fewer plants and fewer firms.

Robert Salomon is a professor at the Stern School of Business, New York University. Professor Salomon authors a blog on business-related issues, which can be viewed at blog.robertsalomon.com.

Globalization's Further Advance: Business Insolvency Proceedings in Other Countries

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Everyday, most of us in the United States encounter evidence of relentless economic globalization. Gone are the days when American-brand automobiles dominated our roads. As a result of NAFTA, fresh Mexican produce fills the shelves of our local supermarkets. You are perhaps just as likely to fly overseas on Japan Air Lines, Aer Lingus or Lufthansa as on Northwest-Delta, American or United. As a result of the world financial crisis that reared its Medusa-like head last fall upon the collapse of Lehman Brothers, American businesses are now experiencing an additional and different dose of globalization through their involvement in foreign bankruptcy proceedings. It is common now for American businesses to be significant creditors of overseas companies in insolvency administration in Asia or Europe. In addition, American corporations with financially troubled foreign subsidiaries sometimes decide to seek relief for these subsidiaries by commencing proceedings under the insolvency laws of countries such as Germany, France or Canada.

One's initial exposure to a foreign business bankruptcy proceeding is likely to surprise in many ways. In the United States, we have been conditioned to expect certain events and developments in Chapter 11 cases. We know that, in large insolvency cases, the reorganizing business will more often than not obtain post-bankruptcy financing, commonly referred to as "debtor in possession financing," to provide the debtor with funds to operate its business. If your company has a long-term supply contract with a Chapter 11 debtor, such as a multi-year requirements contract common in the automotive industry, the nonbankrupt supplier knows that it cannot terminate the contract upon the bankruptcy filing but must, in absence of a bankruptcy court order to the contrary, continue to ship goods to the debtor under the contract. Finally, American creditors of a domestic debtor in Chapter 11 will expect the debtor to propose a plan for the reorganization or liquidation of its business (or some combination of both). Recently, as was evident in the recently concluded Chapter 11 cases of automakers Chrysler and General Motors, the debtor often adopts a reorganization strategy that will split assets between "Oldco," as the repository of the "bad" assets, and "Newco," as the transferee of the "good" assets, coupled with a debt-for-equity swap.

Many, if not most, insolvency laws of other nations, however, focus less on the financially troubled company's rehabilitation, than on enforcing the rights of creditors. This focus is often to the detriment of the debtor's reorganization. In many of these countries, a debtor in insolvency proceedings suffers from a heavy social and economic stigma in contrast to American Chapter 11 debtors who are afforded an "umbrella of protection" in order to put their financial affairs in order and thereby make a "fresh start." Foreign bankruptcy laws, particularly those of Continental Europe that have a basis in Roman law or the Napoleonic Code, have been recently changing, albeit slowly, to emphasize the debtor's rehabilitation.

To illustrate some of the differences between American bankruptcy law and the insolvency laws of other nations, as well as the recent statutory reforms stimulated, in part, by the American rehabilitation- oriented example, we will now engage in a brief review of the insolvency laws of Germany, France and Canada.

A. Insolvency Proceedings in Germany

Germany's economy has been long regarded as the driving force of the Eurozone area, i.e., those European Union countries that have adopted the single-currency Euro. The critical element of Germany's national economy is exports, particularly those of heavy industrial machinery and

automotive products. Just recently, economists announced that Germany, along with France, officially exited the worldwide recession by experiencing positive GDP growth (.3% in both cases) during the second quarter of 2009. At the same time, however, Germany has experienced a significant number of large corporate bankruptcies (e.g., the department store conglomerate Arcandor) and near-bankruptcies (General Motors' German subsidiary, Adam Opel GmbH). Although popular sentiment in Deutschland believes that "happy days are here again," the German economy is not yet out of the woods. Unemployment is at 8.3% and is expected by many to increase in the immediate future.

German insolvency law, first enacted in 1877 in the days of Chancellor Otto von Bismarck, was completely overhauled by Germany's legislature, the Bundestag, in 1999 when it adopted the new Insolvency Code ("Insolvenzordnung"). One of the primary stimuli for this statutory revision was the inadequacy of prior law to deal satisfactorily with the increasing number of business insolvencies. Prior to this change, an analysis of court statistics demonstrated that (i) 75% of all insolvency petitions filed in Germany were dismissed because of the insufficiency of the debtor's assets; and (ii) successful business reorganizations occurred in less than 1% of the filed cases.

The new Insolvency Code now contains provisions permitting debtors to formulate reorganization plans. Petitions for insolvency are within the exclusive jurisdiction of the Insolvency Court of the various District Courts ("Landgericht"). Insolvency proceedings are handled by judges and "referees," which may be excluded by the judge from taking any role in a particular proceeding.

During the first phase of an insolvency case, which lasts approximately three months from the filing of a petition, the German court gathers information concerning the case to determine if the debtor qualifies for relief. If the court determines that the debtor so qualifies, the court will enter an order commencing the case and appointing an insolvency administrator. Unlike our Chapter 11, the German Insolvency Code permits the debtor's creditors to decide whether to opt for the debtor's liquidation or reorganization. This decision is usually made after the administrator reports on the present state of the debtor's business and the reasons why the debtor is applying for insolvency relief. If the creditors opt for reorganization, then a plan will normally be proposed to either transfer the debtor's business assets to a third party free and clear of claims (with the debtor thereafter being liquidated) or by reorganizing the debtor's business.

The debtor's reorganization may only be accomplished via a

reorganization plan which can only be submitted by the administrator and the debtor. An appointed creditors committee and the appropriate worker's council will normally participate in plan drafting and negotiations. After the plan is prepared and submitted to the Insolvency Court, the judge will review the plan to determine whether it complies with the applicable statutory requirements. If the plan does not withstand this scrutiny, it will be rejected. A plan may also be rejected because there is little or no creditor support for its provisions or when the plan cannot satisfy certain creditors' claims.

Creditors holding claims not previously objected to have the right to vote on the plan at a hearing scheduled by the Insolvency Court. In order to become legally binding on the debtor, its creditors and its equity holders, the Insolvency Court must confirm the plan. The Court may deny confirmation in the following circumstances:

(a) the procedural requirements for the formulation, submission and acceptance of the plan have been violated and are incapable of being cured;

(b) creditor acceptance of the plan has been obtained through fraud, e.g. by purchasing votes;

(c) a creditor disadvantaged by the plan and timely objecting to its confirmation would, upon confirmation, be placed in a less favorable position than that creditor would occupy vis a vis the debtor in the absence of a plan;

(d) the plan has no chance of being accepted by the creditors or confirmed by the court; or

(e) the plan cannot satisfy the claims treated by the plan (*i.e.*, the plan is not feasible).

After the German court confirms a plan, all parties affected by the plan will be legally bound by its provisions. Plan confirmation discharges the debtor from all debts except for those to be paid pursuant to the plan. After confirmation, the Insolvency Court will then terminate the insolvency proceedings. If the plan so provides, the administrator will monitor the debtor's compliance with the obligations imposed upon it by the plan and must report annually to the court and the creditors committee as to the debtor's performance under the plan.

B. Insolvency Proceedings in France

On January 1, 2006, the ability of French, financially troubled business enterprises to reorganize was significantly enhanced

by new insolvency legislation adopted in France. This legislation, which facilitates rehabilitation, was stimulated by statistics assembled by the French Ministry of Justice demonstrating that, of the 44,699 French insolvency proceedings pending in 2003, 89% ended in liquidation. Central to French insolvency law is the concept of *cessation des paiements*, which is similar to the so- called "equity" test of insolvency of American bankruptcy law. According to this concept, the debtor is unable to repay its debts from its available assets. The French Commercial Court, administered by a bankruptcy judge, a *Juge-Commissaire*, has jurisdiction in insolvency cases commenced in this country.

First of all, there are two court-supervised procedures that are often used to reorganized businesses in France. The first is titled a *mandataire ad hoc*, which can be commenced by a business debtor that is not insolvent under the *cessation* test described above. The bankruptcy judge will appoint a receiver with directions that are tailor-made to the debtor and its present difficulties. The negotiations for a voluntary restructuring involving the company, its creditors and the receiver will normally take place out of court although the receiver is required to report to the court on the progress of these proceedings. The second procedure is *conciliation*, which was formerly referred to as a "voluntary arrangement." This process involves the filing of a petition with the Commercial Court, after which the court will appoint a *conciliator* who is responsible for supervising and facilitating an agreement for the company's restructuring. This relief is not available for debtors who have been insolvent for longer than 45 days. Like a receiver appointed in a *mandataire ad hoc* proceeding, the *conciliator* is required to report to the Commercial Court and any restructuring agreement must be officially recognized ("homologated") by that court. In both *mandataire ad hoc* and *conciliation* proceedings, the company's management will continue to operate the business.

A third restructuring procedure is one established by the 2006 legislation and is entitled *procedure de sauvegarde* or "safeguard" proceedings. In order to qualify for this relief, the company commencing this process must not be insolvent. This procedure is commonly used by enterprises experiencing financial problems that are likely to result in an insolvency. In safeguard and in the other two rehabilitation proceedings described above, there is a stay imposed by French law that prohibits the payment of most claims arising prior to the entry of the "opening judgment" that must be published in a legal newspaper and described in the debtor's company register. The exceptions to this stay are certain employee claims for wages and salaries and some setoff claims. If the debtor pays a claim subject to this stay, the payment will be nullified and revoked and the debtor itself may be subject to

criminal sanctions. This stay in safeguard proceedings extends further to protect individuals who have guaranteed any of the debtor's indebtedness. Safeguard proceedings are normally completed by a judgment of the Commercial Court approving a plan providing for the restructuring of the debtor or the sale of its assets.

Finally, French law provides for two additional procedures. Recovery proceedings (*redressement judiciare*) are available only to companies that are insolvent but have some chance of rehabilitation. In these proceedings, the bankruptcy trustee (*administrateur*) is empowered to supervise current management or will be directed by the court to operate the entire business. A successful recovery proceeding will be evidenced by a reorganization plan approved by a judgment of the Commercial Court. The final mode of insolvency proceedings under French law is liquidation (*liquidation judiciare*). This proceeding is available to insolvent companies for which any recovery by creditors is deemed to be impossible. In these cases, only the trustee manages the debtor's business even though the debtor's board of directors will remain in place. In liquidation proceedings, the debtor's business activity will eventually terminate and the debtor's assets will be sold by the trustee to satisfy creditor claims.

One major and striking difference between American and French insolvency proceedings is the treatment of employee claims for wages and salaries that arise prior to the bankruptcy filing. In the United States, these claims are limited by specific formulas written into the Bankruptcy Code and are assigned a priority lower than the priorities enjoyed by secured claims and administration expenses. In France, employee wages and certain other benefits enjoy a "superpriority" over administrative expenses and secured claims in safeguard, recovery and liquidation proceedings. French law provides a third priority for loans made to the debtor during conciliation proceedings that precede a safeguard or recovery case. This priority does not extend to post-filing capital contributions by shareholders.

C. Insolvency Proceedings in Canada

The insolvency regime in Canada is based on two laws, the Bankruptcy and Insolvency Act ("BIA") and the Companies' Creditors Arrangement Act ("CCAA"), both of which are federal statutes. Insolvency cases under both statutes are administered by the provincial courts of general jurisdiction that are staffed by federally- appointed judges. These are not specialized bankruptcy judges as exist in the United States but are judges who handle all matters of general jurisdiction. Some provincial courts, however, are organized such that a few judges are singled out to handle insolvency cases.

Canadian courts, however, do not play as great a role in these cases as do bankruptcy courts in America, primarily because Canadian insolvency proceedings are less litigious than those in the United States. Assisting the judges in administering insolvency cases are federally-licensed bankruptcy trustees, the majority of whom are chartered accountants. The large accounting firms in Canada have insolvency departments headed by bankruptcy trustees.

Liquidation cases similar to Chapter 7 cases in the United States are commenced under the BIA which was last amended by the Canadian Parliament in 2007. These cases may be initiated by voluntary petitions filed by debtors or involuntary petitions filed by their unsecured creditors. A petitioning creditor filing a voluntary petition in bankruptcy may also seek the appointment of an interim receiver to take immediate possession of the debtor's property pending the court's ruling on the involuntary petition. In a voluntary liquidation, the debtor will designate the person to be the trustee. Shortly after a liquidation case is commenced, a meeting of creditors will be held where the creditors in attendance may appoint a group of up to five individuals, labeled "Inspectors", who will work alongside the trustee in administering the case. In essence, Inspectors act as a creditors committee in liquidation cases. Thereafter, the trustee will liquidate the debtor's assets, reduce them to cash, and then administer claims filed in the case either by accepting them or rejecting them. If a claim is rejected, the affected creditor can request the court to rule on the propriety of the trustee's rejection.

Debtors may also reorganize under the BIA but this procedure is mainly used by small to mid-sized business debtors. Larger enterprises routinely seek reorganization under the CCAA, which is discussed below. A reorganization case under the BIA is commenced when a debtor files either a "Proposal" or a "Notice of Intention to File a Proposal" ("NOI"). A Proposal forms the basis for a plan of reorganization. Upon the filing of a Proposal or a NOI, all proceedings against the debtor are automatically enjoined for an initial period of 30 days. This stay may be extended for periods not longer than 45 days each but no injunction may be in effect for a period in excess of six months from the date a Proposal or NOI is filed. During the stay period after the filing of a NOI, the debtor must file a Proposal. If the debtor fails to do this, its insolvency case will convert into one of liquidation.

A Proposal, which involves a compromise of debt and does not involve rejection of executory contracts other than commercial real estate leases, must be accepted (i) by 2/3 of the creditors of every class measured by the dollar value of

their claims, and (ii) by a majority in number of those creditors. The debtor will normally attempt to negotiate settlements with secured creditors beyond the realm of the Proposal. The NOI/Proposal must identify a bankruptcy trustee to act as a monitor, who will report to the court and sometimes negotiate settlements between creditors and the debtor. Creditors will be required to file claims shortly after the debtor files its Proposal, which claims will then be reviewed by the debtor and be either accepted or rejected by it subject, however, to ultimate court review.

In the event that creditors fail to accept the Proposal or if the Court, after acceptance of the Proposal by creditors, denies approval of the Proposal, the CCAA case will revert to one of liquidation. The debtor's assets will then be disposed of and the case administered as described above.

As previously noted, most large Canadian business enterprises will seek to reorganize under the CCAA. Although this statute was enacted during the Great Depression, it was not widely invoked until the 1980s when it became popular. The original statutes comprising the CCAA were few and sparsely written, permitting the courts to add a judicial gloss on the procedure over the years. The CCAA was amended by the Canadian Parliament twice in the 1990s and was recently amended again in 2005 and 2007. The final statutory changes will now take effect on September 18, 2009.

Relief under the CCAA is available to corporations or groups of related corporations having debts totaling at least $5 million Canadian. Upon the filing of a petition, the court will normally enter an initial order containing provisions for a stay of proceedings against the debtor; these orders are commonly referred to as "Stay Orders." Debtor in possession financing is now specifically permitted by the CCAA as a result of the 2007 amendments. These amendments also permit the court to sell the debtor's assets during the case and the debtor to reject or assign executory contracts. Newly added to the CCAA (and the BIA) is a provision permitting the recovery of "transfers at undervalue," that is analogous to the right of a trustee or debtor in possession to recover fraudulent transfers under the United States Bankruptcy Code.

In CCAA proceedings, a Monitor is appointed at the beginning of the case and is charged generally with observing and following the debtor's business and financial affairs and filing reports with the court concerning those affairs. A Monitor may also be required by the court in a particular case to perform other functions. In complex or highly acrimonious cases, a court may grant additional powers to a Monitor to enable him or her to compile detailed reports on

the debtor's assets and their values as well as to negotiate settlements among stakeholders. The centerpiece of a CCAA proceeding is a plan that classifies creditor claims and provides for their treatment. Each class of creditors whose claims are compromised in the plan must accept it by 2/3 in amount of their claims and a majority of their number, as determined with reference to those creditors attending the meeting of creditors held in the case. Unlike Chapter 11 cases in the United States, there is no requirement for a disclosure statement explaining the operation of the plan as a precondition to court approval of the plan. In order to confirm a CCAA plan, the court must find at a hearing that the debtor has strictly complied with the CCAA requirements and prior orders of the court, that nothing has been done in the case that violates a provision of the CCAA and that the plan is fair and reasonable. Once approved, the plan will become effective after a period of one or two months while the claims review process is concluded.

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Managing in Crisis - The Worth of a Chief Restructuring Officer

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Due to the harsh economic downturn, many businesses are in dire economic straits. Falling demand means less cash flow and deteriorating balance sheets. Vendors are tightening terms and perhaps even demanding up-front payment before delivery. Loan covenants that were waived in prior periods are now being strictly enforced. Due to the overall decline in the quality of business credits, banks may not have the ability to extend additional credit to all borrowers who make the request. Business owners or managers ("Management") must fight so many new fires that their businesses suffer due to lack of attention. In a time of crisis, this can be the last straw and can tip the business into a downward financial spiral.

If one of your clients is slipping into this type of situation, now might be the time for you as their attorney to suggest they consider hiring a consultant to step into the temporary role of Chief Restructuring Officer ("CRO") for their business. There are several reasons for suggesting this step, not the least of which is to keep them operating as a viable business.

- First, the hiring of the right CRO can bring instant enhanced credibility to lenders who may no longer trust management to provide leadership in a crisis situation. Often the most important role of a CRO is to defuse the tension among all the stakeholders and work towards a reasonable solution for all parties.
- Second, the CRO will remove much of the burden existing management has had in dealing with creditors so they can focus on customer service and operational excellence.
- Third, the CRO has specialized knowledge and experience in leading companies back to positive cash flow and profitability while operating companies under financial distress.

When a CRO is initially hired in a restructuring engagement, he or she will focus on a number of areas. The first, cash, is the lifeblood of the business. This must be maintained and protected until the business has been stabilized. Other areas of work the CRO will address include:

What are the overall financial strengths and weaknesses of the company?

In order to quickly get the business back on sound financial footing, it is essential that cash flow is improved. In the short term, receivables must be controlled and non-performing customers collected from and weeded out. Payables must be evaluated frequently and control of purchases centralized in order to stop unnecessary spending. Expenses and capital expenditures must be rationalized in order to stop the bleeding. Unprofitable business lines are often closed immediately.

In the intermediate term, the overall financial structure of the business should be re-evaluated to ensure that the sources and terms of financing match the goals and uses of the business. Does the business have the right working capital mix or should its liquidity be re-evaluated? Does the capital structure mix (e.g., revolving lines of credit, term loans, mezzanine debt, and equity) make sense and give the business enough flexibility to operate? Are there assets or business lines that can be sold to raise cash to fund a restructuring plan?

Is there a strong core operation or product that can sustain the business over the short term?

In many businesses, a single customer, product, or product line is the chief revenue and cash producer for a business. When times are good, this revenue stream can help cover up a lot of problems. However, as sales levels fall, it makes sense to evaluate a business's customers and product lines for

profitability to ensure that resources are only allocated to those products that help the bottom line.

This analysis can be accomplished in a number of ways including industry benchmarking, break-even analysis, cash flow analysis, and profitability analysis by customer, sales channel, product line, etc. Care and judgment is essential in allocating costs to properly evaluate profitability. In many cases, the results of these analyses differ from the conventional wisdom in a company.

What are the strengths and weaknesses of the company in relation to the industry?

The strength of the business in their given industry as well as the overall industry life-cycle should be evaluated to position the business for success in the future. This will differ depending upon the individual business and industry. Planning for a large player in a declining industry will differ significantly from that of a small player in a high-growth industry.

The job of the CRO is to evaluate the company and assist management with matching the corporate goals, strengths, and weaknesses to the right financial model to operate. Poor choices in the past may have contributed significantly to the situation facing the business now.

Implementation of the turnaround plan

After the business plan has been formulated, the CRO is now tasked with its implementation. The best plan will not save a business without quick and decisive implementation. A CRO has the experience to guide a troubled business through this process. This includes holding management team members accountable for their parts of the plan, monitoring the implementation of each phase of the plan, and ensuring that sacred cows are not kept from the process if they hinder the overall success of the plan. The stresses of today's business environment are extreme for many businesses in our area. For a troubled business, the window of time to make decisions and implement a turnaround survival plan is short. By hiring a CRO with a proven track record, the chances of saving a business as a going concern are greatly enhanced.

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Summaries of Recent Cases

Bankruptcy Cases: June 1, 2009 to September 30, 2009

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A. Supreme Court

Travelers Indem. Co. v. Bailey, 129 S.Ct. 2195, 174 L.Ed.2d 99 (U.S. June 18, 2009) - Does a bankruptcy court's injunction bar state-law actions against the insurer for Chapter 11 debtor based on allegations of either the insurer's own wrongdoing while insuring debtor or of misuse of information that it obtained from debtor as the insurer? As part of debtor asbestos company's reorganization plan, the bankruptcy court approved a settlement. The settlement provided that debtor's insurers, including The Travelers Indemnity Company, would contribute to a settlement trust and would be released from any policy claims - claims and allegations against insurers based upon, arising out of or relating to insuring the debtor. The bankruptcy court approved the settlement agreement and reorganization plan in 1986 (the 1986 Orders), and the District Court and Second Circuit affirmed. More than 10 years later, plaintiffs filed claims directly against Travelers in state courts, alleging violations of consumer-protection statutes or of common law. Travelers invoked the 1986 Orders and asked the bankruptcy court to enjoin the direct actions. The parties settled and Travelers agreed to make payments to plaintiffs, contingent upon the bankruptcy court specifying which direct actions the 1986 Orders barred. In 2004, the bankruptcy court approved the settlement and entered an order that the 1986 Orders barred the direct actions and other claims. Objectors to the settlement appealed, and the district court affirmed. The Second Circuit reversed, holding that the bankruptcy court lacked jurisdiction to enjoin the direct actions because the claims did not pertain to debtor.

The Supreme Court, Justice Souter writing the majority opinion, reversed, holding that (1) the injunction barred the actions and (2) the finality of a bankruptcy court's order after direct review generally precludes challenging the enforcement in later proceedings. The Supreme Court specified that its holding was narrow and did not resolve whether a bankruptcy court could enjoin claims against nondebtor insurers that are not derivative of a debtor's wrongdoing. First, the direct actions are "policy claims" relating to the insurer's coverage of debtor, which the 1986 Orders expressly enjoined. Second, because the 1986 Orders were final on direct review more than 20 years ago, the issue of the bankruptcy court's jurisdiction and authority to enter the injunction in 1986 was not properly before the appellate

courts. The bankruptcy court explicitly retained jurisdiction to enforce its 1986 Orders. The Second Circuit erred in holding that the 1986 Orders were unenforceable because they exceeded the bankruptcy court's jurisdiction. On direct appeal of the 1986 Orders, an objector was free to argue about jurisdiction. And the District Court and Court of Appeals could have raised jurisdiction on their own. Once the 1986 Orders became final on direct review, however, they became res judicata. Finally, the Supreme Court's holding was narrow. It did not did not resolve whether bankruptcy courts can enjoin claims against nondebtor insurers that are not derivative of a debtor's wrongdoing, nor did it decide whom the 1986 Orders bound. Reversed.

In dissent, Justice Stevens, with Justice Ginsburg joining, argued that the injunction only barred claims against insurers, which claims sought to recover from the estate for debtor's misconduct. This comports with (1) a bankruptcy court's power, (2) the Second Circuit's understanding when it upheld the 1986 Order on direct review, and (3) codification of 11 U.S.C. § 524.

Indiana State Police Pension Trust v. Chrysler, LLC, 129 S.Ct. 2275, 173 L.Ed.2d 1285 (June 9, 2009) - Should the Supreme Court exercise its discretion to stay a motion for authority to sell assets? Debtor and affiliated companies, having filed jointly administered Chapter 11 cases, moved for authority to sell assets outside ordinary course of business and outside plan confirmation. The bankruptcy court granted the motion despite objections to the sale as an improper sub rosa plan. The Court of Appeals granted a stay, and the Supreme Court, Justice Ginsburg, granted a temporary stay. The Supreme Court then vacated the temporary stay. In determining whether to grant a stay, the Supreme Court considers whether an applicant shows "(1) reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari or to note probable jurisdiction; (2) a fair prospect that a majority of the Court will conclude that the decision below was erroneous; and (3) a likelihood that irreparable harm will result from the denial of a stay." *Conkright v. Frommert*, 556 U.S. ----, ----, 129 S.Ct. 1861, 1862, 173 L.Ed.2d 865 (2009). The party requesting the stay failed to carry the burden of showing that circumstances justified a stay. Stay vacated.

B. Sixth Circuit

In re QSI Holdings, Inc., 571 F.3d 545 (6th Cir. (Mich.) July 6, 2009) - Is § 546(e) limited to publicly traded securities or does it also apply to privately traded securities? Chapter 11 debtors filed adversary proceedings to avoid and recover, as constructive fraudulent transfers, payments to shareholders

as part of a leveraged stock buy out. The bankruptcy court granted summary disposition for shareholders, and debtors appealed. The district court affirmed; debtors appealed. The Sixth Circuit, addressing an issue of first impression, held that (1) shareholder payments constitute a "settlement payment" for purposes of § 546(e), which bars the trustee's avoidance of prepetition settlement payments made by or to a financial institution; and (2) the bank's role in a leveraged buyout satisfied § 546(e)'s requirement that the transfer go to a financial institution. Under § 741(8), a settlement payment must be one "commonly used in the securities trade." Looking at Eighth Circuit precedence, the Sixth Circuit agreed that that the phrase is a "catchall phrase" that underscores the scope of § 546(e)'s exemption. The transaction at issue had the characteristics of a common LBO involving the merger of nearly equal companies. Also, the transaction included a "transfer" to a financial institution. Nothing in the plain language of § 546(e) requires a "financial institution" to have a "beneficial interest" in the transferred funds. The bank's role in the LBO satisfied the requirement. Affirmed.

In re Mitan, 573 F.3d 237 (6th Cir. (Mich.) July 17, 2009) - Does the bankruptcy court have the power to issue a retroactive conversion order? The bankruptcy court entered an order converting Chapter 11 case to Chapter 7 retroactive to the date of an earlier conversion order, which debtor's father ("Frank"), a secured creditor, previously appealed for lack of notice. Frank appealed the new conversion order, and the district court affirmed. Frank appealed, arguing that the order violated the remand order and that the bankruptcy court had no power to enter the order and abused its discretion. The Sixth Circuit affirmed, holding that (1) its remand order, which reversed the first conversion order, did not prohibit converting the case on remand or from doing so nunc pro tunc; (2) the nunc pro tunc order did not violate any Bankruptcy Rules; (3) the court had the power to enter a nunc pro tunc order and properly did so; and (4) converting the case instead of dismissing it was not an abuse of discretion. First, the nunc pro tunc order did not violate the remand order by retroactively converting the case to Chapter 7. The remand order reversed the first conversion order only because Frank did not have the required notice. It did not prohibit the bankruptcy court from converting the proceedings on remand. In fact, it even authorized appropriate sanctions following a properly noticed hearing if there was inappropriate conduct. Second, the nunc pro tunc order did not violate any Bankruptcy Rules. The Court complied with Rule 2002(a)(4) by giving Frank timely notice before the conversion hearing; the Rule did not require notice 20 days before the effective date of an order. Third, under the broad grant of equitable powers to bankruptcy

courts in 11 U.S.C. § 105(a), the court had the power to grant retroactive relief where there was "ample justification" to find that the debtor and his father had acted in bad faith. Finally, there was no indication that the bankruptcy court abused its discretion in converting the case. Conversion is not futile, and the bankruptcy court opined that more investigation is necessary to find potential hidden assets. Affirmed. (The dissent believed that the bankruptcy court's actions on remand failed to comply with the remand order).

In re Bunn, 578 F.3d 487 (6th Cir. (Ohio) August 25, 2009) - Is a recorded mortgage with a street address, but no legal description, sufficient to prevent setting aside the otherwise-valid mortgage? Chapter 7 trustee brought adversary proceeding to avoid mortgage on debtor's property under strong-arm powers, and the bankruptcy court ruled for trustee. Mortgagee appealed. The district court reversed, and trustee appealed. The Sixth Circuit held that under Ohio law a mortgage with a street address for residential property but no legal description provided constructive notice of the mortgage to third parties. Any purchaser would have constructive notice of all properly recorded instruments that the owner executed, of the deed by which the debtor took title, and of the recorded mortgage. The mortgage, though lacking a formal legal description, included a street address and the parcel's tax identification number. Furthermore, Ohio law does not appear to require an exact legal description in order to provide notice to third parties. Consequently, the trustee could not use his strong-arm powers to set aside the mortgage. Affirmed.

C. Sixth Circuit B.A.P.

In re Brown, --- B.R. ----, 2009 WL 2959665 (6th Cir. BAP (Ky.) September 27, 2009) - Did the bankruptcy court abuse its discretion in setting aside a default judgment pursuant to Fed. R. Civ. P. 60(b)(6) absent extraordinary circumstances? Chapter 7 trustee brought adversary complaint to avoid mortgage and obtained default judgment against assignee. The bankruptcy court granted assignee's motion to set aside the default judgment and entered summary judgment for assignee. Trustee appealed. The Panel reversed the order to set aside the default and vacated the order in favor of the assignee. The bankruptcy court abused its discretion in setting aside the default under Fed. R. Civ. P. 60(b)(6). A meritorious defense and avoidance of a mortgage do not constitute "exceptional circumstances" for relief under (b)(6), and assignee failed to allege facts which would trigger relief under the provision. Instead, the bankruptcy court improperly applied the factors when a defendant invokes 60(b)(1). Reversed and vacated.

In re Ritchie, --- B.R. ----, 2009 WL 3029664 (6th Cir. BAP (Ky.) September 24, 2009) - Does the doctrine of *lis pendens* apply to personal property for which Kentucky law requires a certificate of title? Did a prior state court judgment preclude the bankruptcy court from avoiding creditor's interest in a manufactured home? Creditor had mortgage on real property and manufactured home on it. After a file destroyed the home, creditor released funds to debtor to buy a new home but failed to record its lien on the certificate of title for the replacement home. Creditor obtained a default judgment in foreclosure proceedings, and debtor filed bankruptcy one month later. The trustee filed an adversary complaint asserting that (1) creditor's interest in the home was avoidable for lack of perfecting its lien before the bankruptcy, and (2) any interest the state court judgment gave creditor was a preferential transfer. The bankruptcy court granted the trustee's motion for summary judgment and avoided creditor's lien, and creditor appealed. The Panel affirmed. The home remained personal property because creditor did not comply with requirements to attach the home to the real estate. Also, the creditor failed to perfect its lien because it did not appear on the certificate of title. This notwithstanding, creditor argued that its *lis pendens* put trustee on notice of its interest in the home and that trustee could not obtain a superior interest, despite the unperfected lien, because the lis pendens predated the bankruptcy. The Panel disagreed. First, *lis pendens* does not apply to personal property where state law requires a certificate of title. The trustee was seeking creditor's interest in personal property pursuant to § 544(a)(1) and became a judgment lien creditor when Debtor filed bankruptcy. Under Kentucky law, creditor's unperfected security interest is subordinate to a subsequent lien creditor, despite any knowledge of the creditor's claim. Second, the bankruptcy court did not contradict any of the state court's findings. It found that creditor's lien was unperfected and therefore avoidable, while the state court simply found that creditor had an equitable lien. An unperfected equitable lien remains subordinate to the trustee's interest as a hypothetical judgment lien creditor under § 544(a)(1). Affirmed.

In re Morton, 410 B.R. 556 (6th Cir. BAP (Ohio) September 9, 2009) - Did bankruptcy court err in *sua sponte*, without notice or hearing, disapproving an attorney-certified reaffirmation agreement as not in debtor's best interest? Chapter 7 debtor entered into attorney-certified reaffirmation agreement to retain a truck. The bankruptcy court disapproved the agreement; creditor appealed. The Panel first held that a creditor has standing to appeal the disapproval of a reaffirmation agreement because its rights are adversely affected. Second, a court cannot disapprove a reaffirmation agreement just because it does not believe it is in the debtor's

best interest. The debtor met the requirements of § 524(c) and had counsel. Therefore, according to § 524(k), the agreement was effective upon filing absent undue hardship. Third, § 524(m) provides that a bankruptcy court can only disapprove an attorney-certified reaffirmation agreement for undue hardship after notice and hearing. Consequently, the court erred in disapproved the agreement without notice and hearing. Finally, the Panel would apply equitable tolling to the deadline for debtor to rescind the agreement if he so desired. This would put the parties in the same position when the court erroneously disapproved the agreement. Order reversed, agreement reinstated, deadline to rescind tolled.

In re Dutkiewicz, 408 B.R. 103 (6th Cir. BAP (Mich.) July 6, 2009) - Did the bankruptcy court err in finding that trustee's objection to debtor's claim of exemptions was untimely? When did the § 341 meeting conclude? Chapter 7 trustee conducted a § 341 meeting and requested a copy of a divorce judgment but did not call a subsequent meeting. Two months later, trustee filed the § 341 Report, and two weeks after that trustee objected to debtor's claim of exemptions, arguing that funds from a divorce judgment were a property settlement and not exempt as spousal support. Debtor argued that the objection was untimely because it was more than 30 days after the conclusion of the § 341 meeting, while trustee argued that the meeting concluded when he filed his report. The bankruptcy court, using a case-by-case approach while looking for a bright line that provides notice, agreed with debtor and struck the objection as untimely. Trustee appealed. The Panel affirmed and held that the objection was untimely. Under the bright- line approach, a § 341 meeting is concluded on the date it last convened unless a trustee announces a specific date to which it is being adjourned. Under the "debtor's burden" approach, the meeting concludes when the trustee says so or when the court orders it done. Under the case-by-case approach, the conclusion date depends on the circumstances. The Panel rejected the "debtor's burden" approach as inconsistent with Rule 2003(e) and concluded that the objection was untimely under either the bright-line approach or the case-by-case approach. The trustee did not announce an adjournment within 30 days of the § 341 meeting and did not state clearly that he was keeping the meeting open. Affirmed.

In re Nashville Senior Living, LLC, 407 B.R. 222 (6th Cir. BAP (Tenn.) June 11, 2009) - Did the bankruptcy court err in granting debtors' motion to sell to a third party property that debtors and co-owners held as tenants in common? Is the appeal moot under 11 U.S.C. § 363(m)? Chapter 11 debtors requested authority to sell property that they held as tenants in common with non-debtors. The bankruptcy court granted motion and approved of the sale, including the sale of the

interests of non-debtors co- owners under § 363(h), and creditors appealed. The Panel held that the appeal was moot because the sale had been consummated. § 363(h) allowed debtors as tenants in common to seek partition by sale, while § 363(m) provides that appeals are treated as moot absent a stay. Under Sixth Circuit precedent, § 363(m) applies whenever a party fails to obtain a stay from an order permitting the sale of a debtor's assets; it serves to protect the finality of sales and should have limited exceptions. The bankruptcy court authorized sale of the properties under §§ 363 (b) and (h), and the creditors did not stay the sale order before the sale was consummated. Consequently, § 363(m) mooted the appeal. Dismissed as moot.

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Announcements

The 29th Annual Hillman Advocacy Program is scheduled for January 20-22, 2010 at the United States District Court in Grand Rapids, Michigan. For more information please visit www.hillmanadvocacy.com.

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