Business Bankruptcy Newsletter

COMING UP AT THE FALL MEETING
SEPTEMBER 24-27, 2008 | SCOTTSDALE, ARIZONA

Programs Sponsored by the Business Bankruptcy Committee
In conjunction with the 2008 National Conference of Bankruptcy Judges in Scottsdale, Arizona

Pro Bono Subcommittee
September 24, 2008, 3:00 p.m. - 5:00 p.m.
Shelly Crocker, Chair
Jessica Gabel, Program Moderator

PROGRAM: Avoiding the Pitfalls of a Bankruptcy Pro Bono Practice

Navigating a bankruptcy pro bono case since the enactment of BAPCPA is only one challenge for the volunteer lawyer. A volunteer must also be sensitive to certain other aspects of each case, especially where volunteers include in-house lawyers or law students, who frequently lack relevant consumer bankruptcy experience. In addition, there are the challenges of connecting with clients and gaining their trust, especially in the context of diversity and language barriers. This program will provide advice on how to overcome these challenges to provide the best possible assistance or representation to a low-income debtor.

Joint Program of the Claims, Priorities and Exemptions Subcommittee and the Membership Subcommittee
September 24, 2008, 3:00 pm - 5:00 pm
Susan Brandt and Margaret Anderson, Program Co-Chairs

PROGRAM: Almost Everything You Ever Wanted to Know About Tricky Proof of Claim Issues and Objection Landmines for the Unwary

Although the concept of filing a proof of claim stating the amount due and owing to your client by the debtor appears to a simple task (and is often delegated to junior associates), the claims process is fraught with peril. The panelists, whose experiences include serving as claims agent in large retail bankruptcy cases, debtors’ counsel, and as counsel for lessors and insurance companies, will explore many of the "trickiest " issues in preserving and maximizing your client's claim and defending it from objections. The panelists will address issues such as estimation of claims, contribution and reimbursement claims, offensive use of §§502(d) and (e), omnibus objections and transferring claims. Additionally, the panelists will address recent bankruptcy rule changes and current developments.

Joint Meeting of the Business Committees Subcommittee and Rules Subcommittee
September 25, 2008, 7:30 am - 8:30 am
Michael H. Reed, Chair and Susan J. Brandt, Chair
Kaaran Thomas, Program Chair
PROGRAM: Model Rule for Committee Solicitation Working Group

The Subcommittee on Committees will discuss the status of their two-year project on ethical parameters for solicitation for committee work. The program will culminate in a presentation at the NCBJ in 2009. The subcommittee has obtained input from law school professor and leading professional ethics expert Nancy Rapoport, from attorneys around the country, from bankruptcy judges and from the Executive Office of the United States Trustees. We look forward to a stimulating discussion - please attend and provide us with your input.

UNCITRAL Task Force
September 25, 2008, 7:30 a.m. - 8:45 a.m.
Christopher J. Redmond, Chair

PROGRAM: UNCITRAL'S Work on Corporate Groups, International Post Commencement Finance and Protocols

The presentation as to ongoing projects at the United States Commission on International Trade Law (UNCITRAL) will focus on development of a guide on Protocols, a Legislative Guide on Corporate Groups and a Legislative Guide on Cross-Border Finance. The Model Law on Cross-Border Insolvency (Chapter 15) provides a basis for countries to reorganize businesses as opposed to liquidating them. Follow up projects were developed to address insolvency issues regarding businesses in multiple jurisdictions. The presentation will include an update and a copy of the most recent draft of the proposed treatment by UNCITRAL in regard to these three areas.

Chapter 11 Subcommittee Luncheon
September 25, 2008, 12:30 p.m. - 2:15 p.m.
Susan M. Freeman, Chair and Program Moderator

PROGRAM: How Safe is the Harbor? Navigating Restructurings Involving Insurance Company and Other Specialized Counterparties, CDSs, Mortgage Repos, Biofuels Contracts and Obscure Derivatives

You've heard about credit default swaps and widespread concern about the extent to which CDSs and various types of derivatives will necessitate restructuring billions of dollars of debt. The restructurings are happening, in and out of court. This panel of experts will explain "safe harbors" and special rights and limitations of non-debtor counterparties, including commodities and securities contracts, forward contracts, repos, swap agreements and master netting agreements. The panelists will discuss specialized categories of these agreements being used in current restructurings, including those of insurance companies that offered default protection for massive amounts of asset backed securities that have plunged in value, and energy commodities suppliers. The dollars at issue are as staggering as the transaction complexity. This program will help you make sense of it all, and guide your clients when they are affected by such transactions.

Trustees and Examiners Subcommittee
September 25, 2008, 2:30 p.m.-3:45 p.m.
David Allard, Chair
Phoebe Morse, Program Chair

**PROGRAM: Trustees and Examiners After BAPCPA: Master Yoda or Darth Vader?**

When does the large chapter 11 case need an outside investigator? In public company cases, the SEC, Department of Justice and other regulatory bodies have become more aggressive in investigating alleged wrongdoing. Whether an investigation is by a governmental body, a creditors’ committee or a debtor in possession, the same issues arise. If the unmistakable odor of fraud is in the air, do you seek an examiner, a trustee, a corporate restructuring officer? What issues must be considered by any investigator in order to effectively address the power of the SEC or Department of Justice to preempt or sidetrack the investigation? Will a "responsible person" help or hurt? Hear perspectives from the Enron examiner, the U.S Trustee Program and the courts.

Claims Trading Subcommittee
September 25, 2008, 2:30 p.m. - 3:30 p.m.
James Patton, Chair
Tobias Keller, Program Chair

**PROGRAM: Repos and Swaps and Derivatives -- Will the Real Creditor Please Stand Up?**

The past several years have witnessed an explosion of derivative credit instruments, including total return swaps, credit default swaps, distressed loan participations, and similar synthetic products. These instruments frequently bifurcate ownership from economic exposure: Holders of debt instruments may bear little or no economic risk, and often have incentives to accelerate the commencement of a debtor's bankruptcy case; counterparties who have no direct rights against a debtor, on the other hand, may themselves be rendered insolvent by a debtor's failure. This program explores issues surrounding the existing disclosure regimes in current practice and some of the attempts that have been made to revise them, and questions whether assumptions regarding the incentives of creditors and other traditional parties in interest must be revisited in light of the impact of derivatives in the marketplace.

Task Force on Current Developments
September 25, 2008, 2:30 p.m.- 4:00 p.m.
Martin J. Bienenstock, Chair and Moderator

**PROGRAM: Current Developments in Bankruptcy Law**

This panel, led by Martin Bienenstock, will discuss significant current developments in chapter 11 bankruptcy cases, as well as highlight some of the most recent case law in the areas of claims, exemptions and priorities. There is a reason this is one of the most well attended bankruptcy programs year after year: it covers both bread and butter topics that every practitioner needs to know while at the same time covering the most complex chapter 11 rulings imaginable.
Joint Program of the Bankruptcy Appeals Subcommittee and the Litigation Subcommittee
September 26, 2008, 7:30 a.m. - 8:45 a.m.
Richard M. Meth, Co-Chair and Program Co-Moderator; Judith Greenstone Miller, Co-Chair and Program Co-Moderator, and Sam R. Maizel, Chair

PROGRAM: Is the Pen Mightier Than the Sword? – The Art of Persuasion Through Effective Writing and Litigation Skills

How to increase your chances of winning is a question that intrigues all lawyers. The key to success in bankruptcy litigation and bankruptcy appeals is effective advocacy, both written and oral. And the basic rules of effective communication apply equally at the trial and the appellate levels, and to bankruptcy and non-bankruptcy cases alike. Recognizing the importance of "keeping it simple," paying attention to details, knowing your audience, and being the consummate professional are just some of the important fundamentals known, and heeded, by the most successful advocates. Knowing that preparation, the use of effective writing techniques, and proficiency as a public speaker work hand-in-hand to improve one's overall presentation of a client's case is also a key to success. And, protecting one's credibility, knowing the permissible limits of zealous and creative representation, and the making of "wise choices," are the benchmarks of a good advocate.

Don't miss this opportunity to listen to, and to learn from, our extraordinary panel of judges and lawyers, each having unique experience and perspective to share concerning the art of persuasion on both the trial and appellate level.

Health Care and Nonprofits in Bankruptcy Subcommittee
September 26, 2008, 7:45 a.m. - 8:45 a.m.
Harold L. Kaplan, Chair and Andrew Troop, Program Moderator

PROGRAM: Reorganizing Despite Medical Malpractice

A central component of any chapter 11 case is determining the identity of the debtor's creditors and the amount and priority of its liabilities. While this task is seldom an easy one, it is particularly difficult where the debtor is a healthcare institution with a variety of unique industry, regulatory, and Bankruptcy Code obligations, including particularly potentially significant (and often largely unknown) medical malpractice personal injury liabilities.

This program will examine the multi-creditor dynamic in healthcare cases particularly those factors that must be considered in connection with, and methods for, addressing a healthcare debtor's prepetition medical malpractice claims in light of the unique characteristics of those claims, state and federal regulations and confidentiality provisions in respect of patient information, and statutory restrictions on the Bankruptcy Court's (and Bankruptcy Code's) ability to assist the debtor in finally adjudicating and satisfying those claims. Panelists will discuss what has worked in the past, what hasn't, and what are the keys to keeping a chapter 11 process on track notwithstanding a debtor's significant medical malpractice liabilities.
September 26, 2008, 11:30 a.m. - 12:30 p.m.
Hon. Audrey R. Evans and Clifton R. Jessup, Program Chairs

PROGRAM: Sibling Rivalry: Intra- and Inter-Creditor Disputes

Battle lines are increasingly being drawn in bankruptcy cases between creditors. Competition has become fierce, not only between creditors of different priorities (inter-creditor), but between creditors who share the same priority (intra-creditor). What factors affect the leverage of creditors in intra-and inter-creditor disputes? What rights are typically waived by junior creditors; are these waivers enforceable; and do these waivers matter in bankruptcy? How do you deal with the conflicts resulting from increasingly complex capital structures where lenders participating in difference levels of a debtor's capital structure? Intra- and inter-creditor disputes now are often addressed at the beginning of a bankruptcy case and usually arise in the context of DIP financing and section 363 sales. This program will discuss these and other cutting-edge issues.

Secured Creditors Subcommittee Luncheon
September 26, 2008 12:30 p.m. - 2:15 p.m.
Corinne Ball, Chair and Moderator

PROGRAM: Credit Markets in Flux and Exit Financing: Planning for Confirmation in Uncertain Times

Instability in the credit markets has lead to a variety of terms and conditions in exit financing. The panel will address several of these terms in recent chapter 11 cases. Examples include:

- In re Calpine Corporation: The debtors obtained fully committed exit financing linked to their DIP financing. This commitment "roll-over" from the DIP settled feasibility issues early in the case, allowing for a swift confirmation and exit.
- In re Dana Corporation: Fully committed exit financing was obtained by the debtors, but the financing was not linked to the DIP. Like Calpine, the firm commitment of the lenders lead to a smooth confirmation and exit process.
- In re Solutia Inc.: Committed exit financing was obtained by the debtors, with the caveat of a Market MAC Clause. This clause presented a loophole through with the lenders attempted to withdraw from their commitment.
- In re Delphi Corp.: The debtors obtained exit financing subject to the best efforts of the lenders. The plan was confirmed and found feasible; however, subscription to the exit financing ultimately failed.
- In re Dura Auto. Sys., Inc.: Like Delphi, Dura obtained exit financing subject to the best efforts of the lender. In contrast, the plan was found unfeasible without firmly committed exit financing.

Each case and relevant terms will be analyzed, highlighting the positives and negatives of the various forms of exit financing. The panel will also discuss feasibility of the different forms pursuant to §1129(a)(11) as well as strategies for confirmation.

Joint Program of the Business Bankruptcy Committee and the Corporate Governance Subcommittee
September 26, 2008, 2:30 p.m. - 4:00 p.m.
Michael St. Patrick Baxter, Chair; Hon. Jean Fitzsimon, Co-Chair and Sandra Mayerson, Co-Chair and Program Moderator

PROGRAM: You are Entering the Zone. . . the Delaware Zone

Subcommittee on International Bankruptcy
September 26, 2008, 4:00 p.m. - 5:00 p.m.
Susan Block-Lieb, Chair

PROGRAM: North America Interwined - Cross Border Insolvency Practice within Canada, US and Mexico

This panel will examine issues arising in cross-border insolvency cases involving the US and Mexico or Canada. The panel will focus on specific important cross-border cases including, among others, Satmex (US-Mexico) and Calpine (US-Canada). The panel will also explore how cross-border insolvency cases are coordinated through the use of existing legislation in these countries, judicial protocols and other means. The panel will consist of leading judges and practitioners who have been actively involved in these cross-border insolvencies.

Submit Articles for the Business Bankruptcy Newsletter

The Business Bankruptcy Committee invites you to submit articles for possible publication in future issues. The articles do not need to be long or in-depth, and it is a great way to get involved in the Business Bankruptcy Committee. Articles can survey the law nationally or locally, discuss particular business bankruptcy issues, or examine a specific case. If you are interested in submitting an article, please contact Newsletter Editor-in-Chief Kay Kress at KRESSK@pepperlaw.com or Editor Chris Alston at ALSTC@foster.com.

The Section of Business Law of the American Bar Association
321 N. Clark Street - Chicago, IL 60654 - 312.988.5588
Section Staff - businesslaw@abanet.org - www.abanet.org/buslaw
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