District Court Denies Secured Creditors' Right to Credit Bid
Nina M. Varughese, Pepper Hamilton LLP, Philadelphia, Pennsylvania

A United States District Court recently held that secured creditors do not have a right to credit bid their debt in an asset sale conducted pursuant to a "cramdown" plan of reorganization, so long as the plan provides the secured creditors with the "indubitable equivalent" of their claims. This article analyzes the decision and its impact on the Chapter 11 plan process.

More...

Legislative Update
Lisa P. Sumner, Poyner Spruill LLP, Raleigh, North Carolina, and Judith Greenstone Miller, Jaffe Raitt Heuer & Weiss PC, Southfield, Michigan

The ABA is pursuing several important legal challenges to the application of certain rules and regulations to attorneys. This update reviews and summarizes recently enacted and pending rules and bills that affect bankruptcy practitioners.

More...

Materials From the Business Bankruptcy Committee Fall Meeting

At the Fall Meeting of the ABA Section of Business Law Business Bankruptcy Committee in Las Vegas, members of the Committee presented a number of informative and interesting programs. Below is a link to all of the materials provided at these programs. (Access to some of the articles requires your ABA password.)

Materials...

Coming up at the Spring Meeting April 22-24, 2010 | Denver, CO

Program: The Current Status of Officers and Directors Insurance Claims in Bankruptcy

The program will survey the types of claims that have recently been asserted in the bankruptcy context and discuss related issues, including what constitutes property of the estate, the allocation of limited pools of funds, who is authorized to assert claims and where disputes are to be resolved. Panelists include...
Stephen A. Weisbrod of Gilbert LLP and Mary-Pat Cormier of Edward Angell Palmer & Dodge LLP.

**Joint Program of the Business Bankruptcy Committee and the Business Law Education Committee**
April 22, 2010, 10:30 a.m. - 12:30 p.m.
Carol D. Newman, Program Chair

**PROGRAM: Gotcha! A Survey of Hidden Traps for the Unwary in Several Practice Areas**

No one can be an expert on everything. A panel of specialists will share their top three "traps for the unwary" in their respective practice areas: business bankruptcy, limited liability corporations, intellectual property, business litigation and contract law. This program will help non-specialists avoid hidden traps.

**Secured Creditors Subcommittee Luncheon**
Co-sponsored by the UCC Committee and ComFin Subcommittee on Loan Documentation and Creditors Rights
April 22, 2010, 12:30 p.m. - 2:30 p.m.
Corinne Ball and Samuel Maizel, Program Co-Chairs and Moderators

**PROGRAM: Collective Action: Winners and Losers in Defaulted Loan Syndicates**

The panel will discuss the most recent cases on the ability of an agent of a syndicated loan, acting upon the instruction of the requisite lenders, to exercise various remedies, including forbearance, consenting to a sale of collateral with the release of liens and credit bidding.

**Chapter 11 Subcommittee Luncheon**
Co-sponsored by the Securitization & Structured Finance Committee and the Corporate Governance Committee
April 22, 2010, 12:30 p.m. - 2:30 p.m.
Susan M. Freeman and Michael H. Reed, Program Chairs
Corali Lopez-Castro, Moderator

**PROGRAM: General Growth Properties - Governance Principles in Chapter 11; Does Bankruptcy Remoteness Work?**

A panel of experts will discuss the General Growth Properties cases. Panelists include counsel for the special servicers and General Growth Properties ("GGP") as debtor in the bankruptcy case. In GGP, New York bankruptcy court ruled that "bankruptcy remote" does not mean "bankruptcy proof," and refused to dismiss companion cases of GGP's special purpose entity subsidiaries that were current in payment to their own separate creditors. The court's ruling was based in part on the language in the entities' organizational documents and loan documents that enabled GGP as the parent company to assert that its shareholder interest should take priority over the objections of the SPEs' lenders, and that it could replace the lender-appointed independent board members of the SPE subsidiaries without notice with new directors who were willing to authorize bankruptcy petitions without lender consent. Then, in January 2010, the bankruptcy court confirmed a reorganization plan that not only restructured the SPE subsidiaries' debt, but re-documented the loans and changed the subsidiaries' structure to LLCs to meet lenders' goals of preventing the parent from being able to repeat the bankruptcy filings. The panel will explore the nuances of the GGP bankruptcy cases and their lessons for transactional lawyers documenting loans and advising clients on entity governance, as
well as lessons for bankruptcy lawyers.

**Executory Contracts Subcommittee**  
April 22, 2010, 2:30 p.m. - 4:30 p.m.  
*Christopher Combest, Program Chair and Moderator*

**PROGRAM: Unsecure at Any Speed: Understanding the Rights and Obligations of Suppliers and Other Parties to Contracts with Troubled Companies - Lessons from the Auto Industry Cases**

What are the rights and obligations of a debtor and non-debtor to contractual relationships? This program will address what non-debtors do right, what they do wrong, and what they don't even think of doing - but maybe should. While looking at the automobile industry cases, the panelists will offer perspectives on topics applicable to all industries: (a) protecting accounts receivable, both before and after bankruptcy, including the surprising amount of leverage creditors may have in the first weeks of a bankruptcy case, (b) contractual performance obligations of the non-debtor and the debtor, and the legal and practical leverage they have, (c) what debtors can do with contracts that they could not do outside of a bankruptcy, and what non-debtors should look out for, and (d) how innovative, internet-based procedures for dealing with thousands of contacts worked in the auto cases for debtors and non-debtors.

**Joint Program of the e-Commerce and Technology-Oriented Bankruptcies Subcommittee and Small Business Subcommittee**  
April 23, 2010, 8:00 a.m. - 9:30 a.m.  
*Marc Barreca and Mark E. Leipold, Program Chairs*  
*Mark E. Leipold, Moderator*

**PROGRAM: Real World Business Bankruptcy Sales: From Beginning to Close**

What are the opportunities, challenges and issues in purchasing assets in bankruptcy? Section 363 sales are unique in financing, bidding and closing on a transaction. This authoritative panel, including Hon. Elizabeth E. Brown, James T. Markus, James Miller, and Maria Seip, will review the Section 363 bankruptcy sale process, examine the associated risks and opportunities, and provide insight in negotiating and closing on a transaction once the buyers' bid is accepted. The panel will provide real world experience and advice for both buyers and secured creditors involved in Section 363 sales.

**Joint Program of the International Bankruptcy Subcommittee and the Asian Pacific Working Group**  
April 23, 2010 at 8:00 a.m. - 9:30 a.m.  
*Professor Susan Block-Lieb and Professor Charles Booth, Program Chairs*

**PROGRAM: China's New Enterprise Bankruptcy Law After 3 Years of Experience - Key Lessons and Principal Challenges**

China adopted a major new insolvency law which introduced significant changes to the legal framework for insolvency. After three years of experience, has the new law been effective in promoting reorganizations in China? Has the insolvency process as it plays out in the Chinese courts changed substantially from prior practice? These and other issues will be examined as the panel of experts examine China's experience under the new law.
Business Transactions Subcommittee
April 23, 2010, 8:30 a.m. - 9:30 a.m.
Mark S. Chehi, Program Chair and Moderator

PROGRAM: Restructuring a Bank Holding Company

This program will discuss the financial and legal issues facing a bank holding company in need of restructuring and the lessons learned from the successful pre-packaged bankruptcy case of CIT Group. Panelists include Gregg Galardi of Skadden, Arps, Anne Miller of Houlihan Lokey, Andrew Rosenberg of Paul Weiss, and Dan Ross of Evercore Partners, all of whom were advisers on the CIT case. The topics to be discussed will include the costs and benefits of out-of-court and in-court restructurings, financing a bank holding company restructuring, and navigating the government agencies.

Joint Program of the Corporate Governance Subcommittee and Partnerships and Limited Liability Entities in Bankruptcy
April 23, 2010, 9:30 a.m. - 10:30 a.m.
Sandra A. Riemer and My Chi To, Program Chairs

PROGRAM: How Remote is Bankruptcy Remote?

When the Bankruptcy Court denied motions to dismiss the cases of General Growth Properties bankruptcy remote, special purpose affiliates, it called into questions lenders' reliance on such vehicles as a protection against bankruptcy and its consequences. The panelists, Fredric L. Altshuler, D.J. (Jan) Banker and Richard F. Hahn, bring their considerable knowledge and experience to an in-depth discussion of the General Growth Properties cases, examining the facts behind and the reasons for the Court's decision, discussing "bankruptcy-remote" special purpose entities and exploring the decision's broader implications for future structuring, financing and governance of such entities.

UNCITRAL Task Force
April 23, 2010, 9:30 a.m. - 10:30 a.m.
Christopher J. Redmond, Program Chair

PROGRAM: Update on the Status of UNCITRAL

The United Nations on International Trade Law (UNCITRAL) has been very active in the continued development of international insolvency law reform. Three projects will be addressed: (1) the Practice Guide on Cross-Border Agreements which addresses the background and key elements that should be considered when entering into a cross border protocol, (2) the development of a legislative guide on Corporate Enterprise Groups, both on a domestic and on an international basis, and (3) a proposal by the United States for future work by Working Group V. Program materials will include the materials for all three projects.

Use and Disposition Subcommittee
April 23, 2010, 9:30 a.m. - 10:30 a.m.
Steven Cousins, Program Chair and Moderator

PROGRAM: Creative Uses of 363 Sales: Are You Buying a Company or a Lawsuit?

The panel of Howard Weg, Carl Ecklund and Steven Cousins will discuss the opportunities and obstacles of pursuing the acquisition of a company's assets through the deployment of cutting-edge 363 sale tactics.
Joint Program of the Claims and Priorities Subcommittee, Mass Tort and Environmental Claims Subcommittee and the Environmental, Energy and Natural Resources Law Committee
April 23, 2010, 10:30 a.m. - 12:00 a.m.
Brett D. Fallon and Craig Goldblatt, Program Chairs
Hon. Howard A. Tallman, Chief Judge, U.S. Bankruptcy Court, for the District of Colorado

PROGRAM: Restructuring Environmental Claims in Bankruptcy After Chrysler and General Motors
Chief Judge Howard Tallman will moderate a panel discussion of recent developments with respect to environmental claims in bankruptcy. The panelists will discuss (1) challenges in estimating environmental claims at multiple sites, (2) structuring liability transfers, including custodial trusts, of contaminated properties in bankruptcy, (3) dischargeability of injunctive orders after the Apex case, (4) joint and several liability, (5) bankruptcy settlements of environmental claims, (6) dealing with PRP claims, and (7) the ASARCO case (described by the USDOJ as the most complex environmental bankruptcy case in history) and the development in that case of an innovative claims estimation and resolution process to dispose of hundreds of millions in environmental claims.

Task Force on Current Developments
April 23, 2010, 2:30 p.m. - 4:00 p.m.
Martin J. Bienenstock, Chair and Moderator

PROGRAM: Current Developments in Bankruptcy Law

Martin Bienenstock will lead a discussion of the significant current developments in chapter 11 bankruptcy cases, as well as highlight some of the most recent case law in the area of claims, exemptions and priorities. This program will cover both bread-and-butter topics that every practitioner needs to know, and also the most complex chapter 11 rulings recently issued.

Joint Program of the Business Bankruptcy Committee and the Securitization and Structured Finance Committee
April 23, 2010, 2:30 p.m. - 4:30 p.m.
Michael St. Patrick Baxter and Kenneth E. Kohler, Program Chairs
Vicki O. Tucker, Program Chair

PROGRAM: Back to the Future (of Securitization) III: Is 2010 the Wild West, the End of an Era or the Return to Normalcy?

The absence of a properly functioning securitization market, and the funding and liquidity this market has historically provided, adversely impacts consumers, businesses, financial markets and the broader economy. Many policy makers recognize that the recovery and restoration of confidence in the securitization markets is needed to resume and sustain economic growth, while others still seek to impose severe restrictions on the securitization markets. Our panel of experts, Michael H. Krimminger, James R. Mountain, Stephen S. Kudenholtz, and Anna T. Pinedo, will have a timely and informative discussion of the FDIC's proposed rulemaking with respect to its securitization safe harbor, covered bond developments and the FDIC securitization program, recent changes to sale accounting rules for securitizations, U.S. and international regulatory developments, and other recent developments in the securitization market.
Joint Program of the Business Bankruptcy Committee and the Uniform Commercial Code Committee
April 24, 2010, 8:00 a.m. - 10:00 a.m.
Professor Kristen D. Adams, Program Chairs

PROGRAM: The Drawback of Clawbacks: Bankruptcy Clawback Risk in Commercial Transactions

This program explores preference and fraudulent conveyance claims, and defenses to such claims in commercial transactions, including upstream guarantees, fund investments, and secured lending to funds and funds of funds. The Madoff ponzi scheme and other recent cases highlight a creditor or investor's potential exposure to the clawback of profits, payments or collateral in a bankruptcy.

Joint Program by the Healthcare and Nonprofits in Bankruptcy Subcommittee, Legislation Subcommittee and the Trust Indentures and Indenture Trustee Subcommittee
April 24, 2010, 8:00 a.m. - 10:00 a.m.
Jean Robertson, Andrew Troop, Judith Greenstone Miller and Harold Kaplan, Program Chairs

PROGRAM: Legislative Attempts to Heal an Ailing Healthcare System - Take Two Aspirin and Call Us in 2010

With reform up-in-the air, the ability to craft feasible credit relationship with or restructuring for healthcare organizations may be as much art as science. Join us as we explore the legislative waterfront with Congressman Ed Perlmutter (a former bankruptcy lawyer) and discuss its implications on the economy, financings and restructurings with a panel representing a diverse array of interests in the healthcare field: William A. Brant, Jr., Development Services, Inc. and Chair of the Illinois Finance Authority, Kris Frank, Head of State Government Relations for Aetna Inc., Mark Finucane, Managing Director, Alvarez & Marshal Healthcare Group, and Dr. Roy Wilson, Chancellor of the University of Colorado, Denver.

Joint Program of the Administrative, U.S. Trustee, Jurisdiction & Venue and Courts Subcommittee and Professional Ethics Subcommittee
April 24, 2010, 8:30 a.m. - 10:00 a.m.
Kyung S. Lee and Margaret Anderson, Program Chairs

PROGRAM: Doing Hard Time in Delaware and New York - Ethical and Practical Issues for Bankruptcy Lawyers Appearing in Cases Outside of Your "Home" State

As a result of the apparent monopoly of two jurisdictions on bankruptcy cases, bankruptcy lawyers are practicing more in bankruptcy courts outside of the state in which they are licensed to practice. This program will address the ethical and practical issues of practicing in "foreign" courts: the role of local counsel, whether local counsel can prevent legal malpractice claims by limiting the scope of their retention, how the rules in various jurisdictions deal with pro hac admissions and the need for local counsel, limitations placed by courts on hourly rates of attorneys from other jurisdictions, and the practices relating to the formation and solicitation of unsecured creditors committees.
PROGRAM: Putting the Bank in the Box: Reinstating Below-Market Debt

This panel will focus on various aspects and implications of recent judicial decisions regarding the reinstatement of debt. When the case law first emerged, there was wide-spread speculation that numerous other reinstatement cases would follow. This has not yet occurred because of the continuing chill in the credit markets. Experts, however, see signs of the a recovery and investors looking for high yield returns, and the strategy of using the reinstatement of debt, even for matured loans, will be a significant tool in middle market bankruptcy cases. The panelists, Jan Baker, John Weiss and the Hon. Elizabeth Stong, will discuss the issues raised by the reinstatement cases, and the credit-bidding trend.

BUSINESS BANKRUPTCY COMMITTEE BRUNCH
April 24, 2010, 10:00 a.m. - 12:00 p.m.
Michael St. Patrick Baxter, Committee Chair
Andrea S. Hartley, Program Chair
Hon. Philip H. Brandt, U.S. Bankruptcy Court for the Western District of Washington, Moderator

PROGRAM: To File Or Not To File, That Is The Question: Bankruptcy And Its Alternatives

In an increasingly complex financial world, is bankruptcy the most effective choice? The answer requires lawyers to ask hard questions of their clients to understand whether other vehicles may better serve the clients’ needs. The discussion moderated by the Hon. Philip Brandt, with the participation of Diane E. Coffino, James H. Fierberg, Jessica D. Gabel and Mark Podgainy, will focus on how to use bankruptcy more effectively and alternatives to bankruptcy, including, out-of-court workouts, assignments for the benefit of creditors, composition agreements and asserting rights under Article 9 of the Uniform Commercial Code.

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.

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DISTRICT COURT DENIES SECURED CREDITORS’ RIGHT TO CREDIT BID

By Nina M. Varughese

The United States District Court for the Eastern District of Pennsylvania recently held that secured creditors do not have an absolute right to credit bid their debt in an asset sale conducted pursuant to a “cramdown” plan of reorganization, so long as the plan provides the secured creditors with the “indubitable equivalent” of their claims.

Philadelphia Newspapers, LLC and several affiliated companies (the “Debtors”) filed voluntary petitions under Chapter 11 of the Bankruptcy Code on February 22, 2009. At the time of the filing, a group of lenders (the “Senior Lenders”) held claims in the amount of approximately $295 million secured by first priority liens and security interests in substantially all of the Debtors’ property. The Debtors filed a plan of reorganization (the “Plan”) providing for the sale, by public auction, of substantially all of their assets, excluding certain real property (valued by the Debtors at approximately $30 million) that will be transferred directly to the Senior Lenders. The Plan also proposed that insiders of the Debtors would submit a stalking horse bid of $30 million in cash, plus the assumption of approximately $11 million in liabilities, for a total purchase price of approximately $41 million. Pursuant to the Plan, substantially all of the proceeds (including every dollar above the stalking horse’s bid) received through the auction process would be paid directly to the Senior Lenders.

The Debtors filed motions seeking court approval of bid procedures for the sale. The key issue was whether, in connection with the auction, the Senior Lenders would have the right to bid the full amount of their claims, a mechanism known as “credit bidding.” The right of a creditor to engage in credit bidding is provided for explicitly by Bankruptcy Code § 363(k): “[a]t a sale… of property that is subject to a lien that secures an allowed credit claim, unless the court orders otherwise, the holder of such claim may bid at such sale, and if the holder of such claim purchases such property, such holder may offset such claim against the purchase price of such property.”

The Debtors argued that structuring the auction without credit bidding would promote competitive bidding, thereby maximizing the value of the collateral. The Senior Lenders objected to the Debtors’ bid procedures that denied them a right to credit bid and asserted that a sale pursuant to such procedures would not result in a plan that could be confirmed over the Senior Lenders’ rejection under the “fair and equitable” standard under § 1129 of the Bankruptcy Code.

Section 1129 of the Bankruptcy Code states that a “cramdown” plan is “fair and equitable” if the plan provides: (i) that the secured lender retains a lien in the collateral and receives deferred cash payments equal to the allowed amount of its claim; or (ii) the secured lender with the right to credit bid the allowed amount of its secured claim if the plan proposes a

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sale of the assets subject to the secured creditor’s lien (the “Sale Prong”); or (iii) treatment that will allow the secured creditor to realize the “indubitable equivalent” of the allowed amount of its secured claim (the “Indubitable Equivalent Prong”). 11 U.S.C. § 1129(b)(2)(A). The Debtors argued that because § 1129 was written in the disjunctive, credit bidding would not be required as long as the Plan provided the Senior Lenders with the “indubitable equivalent” of their secured claim.

Ruling in favor of the Senior Lenders, the Bankruptcy Court for the Eastern District of Pennsylvania reviewed the legislative history of § 1129 and determined that the integrated provisions of the Bankruptcy Code (§§ 363, 111, 1123, and 1129) dictate that where a debtor proposes to sell an undersecured creditor’s collateral, the creditor must be afforded the choice of either: i) the right to make an election under § 1111(b) to have its total claim treated as a secured claim under a plan; or ii) to credit bid the amount of its secured claim. Furthermore, the Bankruptcy Court noted that the bidding procedure proposed by the Debtors seemed to have been designed to promote the success of the stalking horse bidder – an insider – and thereby continue with the current ownership and management.

On appeal, the District Court disagreed with the Bankruptcy Court’s holding and rejected its analysis of the statute. The District Court found the disjunctive language of § 1129 to be unambiguous. Where a sale of collateral is proposed pursuant to the Sale Prong, a secured creditor expressly retains the right to credit bid. However, the right to credit bid does not extend to the Indubitable Equivalent Prong.

The District Court noted that the inability to use credit bidding does not leave a secured creditor unprotected. A secured creditor, who is not entitled to credit bid or make an election under § 1111(b), still possesses a deficiency claim that entitled it to vote in both the secured and unsecured classes of a plan of reorganization. Furthermore, the reorganization plan itself could still be rejected by the Court on other grounds. The Senior Lenders have appealed the District Court’s decision to the Third Circuit, which heard oral arguments on December 15, 2009.

Regardless of the outcome, the Bankruptcy Court may still conclude at the confirmation hearing that the Senior Lenders were not provided with the “indubitable equivalent” for their secured claim, or that the plan did not otherwise meet the “fair and equitable” standard under a plan of reorganization. In that respect, the District Court’s decision is limited in scope: the analysis is limited to a pre-confirmation public auction, and not a sale under § 363 (where credit bidding is authorized).

The decision of the District Court is consistent with a decision of the United States Court of Appeals for the Fifth Circuit in In re Pacific Lumber Co.4, which confirmed a plan of reorganization that denied a group of secured noteholders their asserted right to credit bid at a private judicial sale of the secured noteholders’ collateral. If the Third Circuit reverses the

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District Court, the result will be a split between circuits and potentially an appeal to the United States Supreme Court.
“Red Flag” Rules:

On August 27, 2009, the ABA filed a lawsuit in the U.S. District Court for the District of Columbia challenging the FTC’s “Red Flag” rules that require a broadly defined category of “creditors” to implement identity theft prevention programs by November 1st. The lawsuit, American Bar Association v. Federal Trade Commission, Case No. 09-1636 (RBW), seeks to prohibit the FTC from applying the rules to practicing attorneys. The complaint states that the application of the rule to practicing attorneys is “arbitrary, capricious, and contrary to law” and imposes a serious burden on law firms. In addition, the ABA contends in the complaint that the FTC has failed to articulate “a rational connection between the practice of law and identity theft; an explanation of how the manner in which lawyers bill their clients can be considered an extension of credit under the Fair and Accurate Credit Transactions Act; any legally supportable basis for application of the red flags rules to lawyers engaged in the practice of law.” The FTC contends that lawyers should be covered because many of their billing practices, such as charging clients on a monthly basis rather than in advance, make lawyers “creditors” that fall within the ambit of the rules.

On October 29, 2009, Judge Reggie Walton for the United States District Court for the District of Washington, D.C. held in a bench ruling that the FTC cannot force practicing lawyers to comply with the Red Flag Rules. In ruling upon the issues, Judge Walton indicated that he had trouble with the FTC’s definition of “creditor.” According to the judge, under the FTC’s interpretation, “a plumber who charges a customer after working on a toilet for two days would also be considered a “creditor.”” The judge also indicated that he did not think that Congress had intended to regulate lawyers when these statutes were enacted. It is anticipated that the FTC will appeal the ruling. On February 25, 2010, the FTC filed a notice of appeal to the D.C. Circuit appealing the decision of Judge Walton. John Daly, deputy general counsel for litigation at the FTC, is representing the agency in the appeal.

After the ruling, on October 30, 2009, the FTC, citing to a request from the House, announced that it was delaying enforcement of the Red Flag Rules for a 4th time until June 1, 2010.

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1 This date for implementation has already been postponed three times.
According to the FTC, the extension will provide Congress with more time to address industry group concerns related to the FTC broad interpretation of the rules.

On October 8, 2009, Representative John Adler (D-NJ) introduced HR 3763 that would exempt certain businesses from the FTC’s “Red Flag” rules. Under the Bill, health care, accounting and legal practices with 20 or fewer employees would not be included as creditors. In addition, the Bill would require the FTC to issue rules allowing any business to apply for an exemption form the rule. The House Financial Services Committee plans to mark up the legislation. The House approved the Bill on October 20, 2009 by a vote of 400 to 0.

*Milavetz, Gallop & Milavetz v. United States:*

The ABA has filed an amicus brief in this case pending in the United States Supreme Court that was appealed from a decision in the Eighth Circuit Court of Appeals. The issue before the Court is whether lawyers are “debt relief agents” under the Bankruptcy Abuse Prevention and Consumer Protection Act (“BAPCPA”). The Eighth Circuit Court of Appeals held that attorneys who “provide ‘bankruptcy assistance’ to ‘assisted persons’ are ‘debt relief agencies’ as that terms is defined by the Code.” *Milavetz, Gallop & Milavetz, P.A. v. United States*, 541 F.3d 785, 792 (8th Cir. 2008). The ABA has argued that if this provision of BAPCPA that require debt relief agencies to make various disclosures applied to attorneys it would have a substantial negative impact on the regulation of the legal profession by the state judicial systems. In addition, its application to attorneys would significantly and unnecessarily undermine and create new exceptions to the attorney-client privilege and would be contrary to the goals of encouraging full and frank communication and protection of the client’s interests.

The hearing before the United States Supreme Court on this case took place on December 1, 2009. A copy of the amicus brief submitted by the ABA can be found at this link: http://www.abanet.org/media/docs/Milavetz_v._US.pdf. A copy of the transcript from the Supreme Court argument can be found at this link: http://www.supremecourtus.gov/oral_arguments/argument_transcripts/08-1119.pdf

*The Medical Bankruptcy Fairness Act of 2009 (S.1624):*

Senator Whitehouse (D-RI) introduced a Bill to amend title 11 to provide protection for medical debt homeowners, to restore bankruptcy protections to individuals experiencing economic distress are caregivers to the ill, injured or disabled family members and to exempt means testing debtors whose financial problems were caused by serious medical problems. The Bill was referred to the Judiciary Committee.

Hearings were held on the Bill by the Senate Judiciary Committee’s Subcommittee on Administrative Oversight and the Courts on October 20, 2009. The witnesses that testified at the hearing included John A.E. Pot Tow, a professor of law at the University of Michigan, Parana Mathura, a research fellow at the American Enterprise Institute for Public Policy Research in Washington, and Diana Furchtgott-Roth, senior fellow at the Judson Institute in Washington.
According to Senator Whitehouse, medical bills are responsible for at least 60% of the bankruptcy filings. The proposed legislation would modify the means test to provide that a “medical debt” is “any debt incurred directly or indirectly as a result of the diagnosis, cure, mitigation, treatment, or prevention of injury, deformity, or disease, or for the purpose of affecting any structure or function of the body.” The Bill also defines “medically distressed debtor” as “a debtor who, in any consecutive 12-month period during the three years before the petition filing date incurred or paid medical debts for the debtor, a dependent, or a non-dependent member of the immediate family of the debtor, not paid by any third-party payor and in excess of the lesser of $10,000, or 10% of the debtor’s adjusted gross income.”

Highlights of the Bill are:

- Would outline circumstances under which a medically distressed debtor can claim an exemption of up to $250,000 of the debtor's aggregate interest in specified real or personal property that the debtor (or dependent) uses as a residence, in a cooperative, or in a burial plot for the debtor (or dependent).

- Would prohibit the court or specified parties from filing a motion to dismiss or convert to Chapter 11 or 13 if the debtor is a medically distressed debtor.

- Would waive the credit counseling requirement for a medically distressed debtor.

- Would deny a discharge of debt incurred for attorneys' fees to file a Chapter 7 debtor’s petition.

- Would require written, sworn certification by a debtor claiming medically distressed status that the medical debts were not incurred specifically to bring the debtor within the coverage of these special provisions.

“Too Big to Fail – The Role for Bankruptcy and Antitrust Law in Financial Regulation Reform:” - Wall Street Reform and Consumer Protection Act of 2009 (H.R. 4173), Too Big to Fail, Too Big to Exist Act (S. 2746 and H.R. 4142) and Financial Services Industry Stability Act of 2010 (H.R. 4516):

The “Too Big to Fail” Bills consist of four separate Bills, three introduced in the House and one introduced in the Senate, each of which is described below.

**H.R. 4173:**

On October 22, 2009, the House Judiciary Subcommittee on Commercial and Administrative Law held a hearing on the role of bankruptcy and antitrust law in the area of the financial regulatory system in response to the Obama Administration’s proposal that the largest financial institutions be restructured by the federal agencies rather than through the bankruptcy system. Testifying at the hearing was Treasury Assistant Secretary Michael S. Barr who indicated that the proposal “is narrowly limited to situations in which there are exceptional threats to financial stability. It is not intended to replace bankruptcy.” This original Bill was passed by the House on 12/11/2009 and thereafter was received in the Senate, read twice and referred to the Committee on Banking, Housing, and Urban Affairs.
The Bill is opposed by the American Bankers Association, the National Association of Federal Credit Unions, the U.S. Chamber of Commerce and the Mortgage Bankers Association.

This Bill is extensive and the subject of over 20 proposed amendments in the House. Highlights of this original Bill include:

- Would establish a Financial Services Oversight Council, consisting of the heads of specified federal financial regulatory bodies and chaired by the Secretary of the Treasury, to: (1) resolve a dispute among two or more federal financial regulatory agencies in specified circumstances; (2) subject a financial company to stricter prudential standards; and (3) require a financial holding company to undertake one or more mitigatory actions to address any grave threat its activities pose to the financial stability or economy of the United States.

- Would give the Federal Reserve Board and the Council power to impose stricter standards on financial holding companies and certain financial activities or practices to promote financial stability.

- Would amend the Securities Act of 1933 to direct the appropriate federal financial regulatory agencies to prescribe regulations to require any creditor to retain an economic interest in a material portion of the credit risk of any loan the creditor transfers, sells, or conveys to a third party, including for the purpose of including such loan in a pool of loans backing an issuance of asset-backed securities.

- Would allow appointment of the FDIC as receiver for one year to resolve, liquidate, or take other specified emergency stabilization actions with respect to a financial company whose imminent or actual default would have serious adverse effects on financial stability or economic conditions in the United States.

- Would authorize the Federal Reserve Board to terminate the activities of the U.S. branch, agency, or subsidiary of a foreign bank that presents a systemic risk to the United States.

- Would amend the Securities Exchange Act of 1934 to require a separate, non-binding shareholder vote to approve the compensation, including golden parachute compensation, of corporate and financial institution executives.

- Would repeal the exemption from CFTC regulation of derivatives transaction execution facilities and boards of trade, and create extensive regulation of and restrictions on swap markets.

- Would create a Consumer Financial Protection Agency (CFPA) as an independent agency to regulate the provision of consumer financial products or services.

- Would impose new examination requirements for small insured depository institutions (with total assets of $10 billion or less) and credit unions (with total assets of $1.5 billion or less).
• Would require the CFPA Director to lead a Negotiated Rulemaking Committee to promulgate appraisal independence requirements for residential loan purposes.

• Would require the CFPA Director to conduct an annual financial autopsy regarding bankruptcies and foreclosures, including any specific financial products or services that have caused substantial numbers of them.

• Would allow the FDIC to commence an involuntary bankruptcy case against a depository institution holding company or other company participating in a guarantee program established by the FDIC on the ground that the company has defaulted on a debt or obligation guaranteed by the FDIC.

• Would give any FDIC receivership for a covered financial company supremacy over any proceeding against the financial company under State insolvency law and over any bankruptcy case under title 11. Would allow the FDIC to convert a receivership to a chapter 7 bankruptcy case and allow the FDIC to serve as the trustee for the company.

S. 2746 and H.R. 4142:

S.2746 was introduced on 11/05/2009 and referred to the Banking, Housing and Urban Affairs Committee.

H.R. 4142 was introduced on 11/19/2009 and referred to the Financial Services Committee.

Both Bills would require the Treasury Secretary to send Congress a list of all commercial and investment banks, hedge funds and insurance companies that the Secretary believes are “too big to fail,” and then require the Secretary to break up such entities to protect the United States economy.

Financial Services Industry Stability Act of 2010 (H.R. 4516):

This Bill was introduced on 1/26/2010 and referred to the Financial Services Committee.

Key provisions of the Bill are:

• Would direct the Federal Reserve Board Chairperson, in consultation with other federal departments and agencies, to develop regulations to ensure no financial company can pose a systemic risk to the health of the United States economy by becoming “too large to fail.”

• The new regulations would provide for restructuring of financial companies that are deemed too large to reduce the size and scope of their operations, and may impose increased capital reserve requirements.

• Annual levies on financial companies would be used to create a fund for the purpose of financing restructurings of companies that are too large to fail.
**Employees' Pension Security Act of 2009 (H.R. 4281):**


The Bill provides:

- Would amend Section 507 of the Bankruptcy Code to allow priority for unsecured benefit claims of participants and beneficiaries under a single-employer plan in connection with termination of the plan, to the extent such claims are in excess of the benefits payable to the participants and beneficiaries by the Pension Benefit Guaranty Corporation under section 4022 of the Employee Retirement Income Security Act of 1974.

**Personal Data Privacy and Security Act of 2009 (S. 1490):**

The Bill was introduced on 7/22/2009 and Sen. Leahy from the Committee on Judiciary filed a written report on the Bill on 12/17/2009.

The Bill provides:

- Would amend the Bankruptcy Code to prohibit dismissal or conversion of a bankruptcy case based upon a debtor's failure to meet means testing eligibility requirements if such debtor is a victim of identity theft.

**Bankruptcy Judgeships Act of 2010 (H.R. 4506):**

The Bill was introduced on 1/26/2010 and referred to the House Committee on the Judiciary. On 1/27/2010, it was ordered to be reported by voice vote.

The Bill provides:

- Would increase by 13 the number of permanent offices of bankruptcy judges, convert 22 temporary bankruptcy judgeships to permanent offices and extend the duration of 2 temporary offices.

- Includes “PAYGO” (pay-as-you-go) offset provisions increasing bankruptcy filing and related fees in order to fund the additional positions and remain “budget neutral.” Specifically, filing fees for Chapter 7 and Chapter 13 cases by $1, and by $42 for Chapter 11 cases.