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In This Issue:

Business Bankruptcy Committee Newsletter

"Business Bankruptcy Committee: The World's Largest Organization of Bankruptcy Restructuring Lawyers"

The Business Bankruptcy Committee looks forward to seeing you at the ABA Business Law Section Spring Meeting in Vancouver, British Columbia, Canada from March 28-30, 2019. We have a dynamite lineup of interesting and informative programs for bankruptcy and business law practitioners. In the Spring newsletter, we will highlight all of the program and events sponsored by the Business Bankruptcy Committee. We hope to see you in Vancouver!

A Note from our Chair, Susan Freeman:

As you’ll see from the following articles about Adam Maerov and Michael St. Patrick Baxter, the Business Bankruptcy Committee is an excellent opportunity to build a reputation and become a leader in the business bankruptcy community, and also to give back to our profession. We’re so glad new members listed below have joined us, and encourage you to attend meetings, offer to present webinars and podcasts, write Business Law Today content and help in presenting programs and materials. You’ll see interesting and useful articles below on recent developments in the law by Michael Sabella, John Hall, and Sam Henninger (who is not yet out of law school, but already active). We welcome articles for this Newsletter by all members. Please join us!
Adam C. Maerov, a partner with the McMillan LLP in Calgary, Canada, is the winner of the prestigious 2018 Kathryn R. Heidt Memorial Award presented by the Business Law Section of the American Bar Association. The Heidt Award is given annually to a recipient under the age of 45 who has made a significant contribution to the ABA Business Bankruptcy Committee in terms of a written publication, has demonstrated leadership potential within the ABA or the larger legal community and has displayed generosity of spirit.

Adam was one of co-chairs of the Model Asset Purchase Agreement Task Force, which culminated in the publication of the Model Asset Purchase Agreement for Bankruptcy Sales. While serving as co-chair, Adam drafted significant portions of the publication, coordinated the efforts of the dozens of bankruptcy practitioners around the country (and abroad), and edited the final product. His efforts are long-lasting, substantial, and evident throughout the Model Asset Purchase Agreement, and made a valuable contribution to the ABA and the legal profession.

In addition to his work on the Model Asset Purchase Agreement project, Adam has served as Vice Chair of the International Bankruptcy Subcommittee, Co-Chair of the Corporate Governance Subcommittee of the Business Bankruptcy Committee, Co-Chair of the Use & Disposition of Property Subcommittee, and Liaison to the International Coordinating Committee. He has spoken at many ABA programs over the last several years. Adam is and will be continue to be a leader in the ABA and is an extraordinary example of an attorney who has given back to his community through his generosity of spirit.
We are pleased to announce that this quarter’s Member Spotlight is Michael St. Patrick Baxter!

Michael St. Patrick Baxter is a partner at Covington & Burling LLP in Washington, D.C. He is a past chair of the Business Bankruptcy Committee, a former member of the Business Law Section Council, and served as co-chair of Business Law Today. A graduate of Western University in London, Canada, and Harvard Law School, Baxter served as law clerk to the Chief Justice of Ontario. He has represented creditors, official committees, and debtors in bankruptcy cases, and counseled companies in workouts and corporate restructurings. He has received several fiduciary appointments in bankruptcy cases, including as Examiner in Trump Casinos, Chapter 11 Trustee in Money Centers of America, and Consumer Privacy Ombudsman in Borders.

Baxter is a Fellow of the American College of Bankruptcy, a Conferee of the National Bankruptcy Conference, a Founding Member of the International Insolvency Institute, and a member of The American Law Institute. He is an editor of Norton Bankruptcy Law and Practice and an adjunct professor at The George Washington University Law School, where he earned the Distinguished Adjunct Faculty Teaching Award. He served, by appointment of the Chief Justice of the United States, on the United States Judicial Conference Advisory Committee on Bankruptcy Rules from 2008-2014.

**Spotlight Questions and Answers:**

1. **How did you come to be a bankruptcy practitioner?**
   It was more by happenstance, than by design. As a junior associate at Covington, I was in the mergers and acquisitions practice, when two associates in the firm’s bankruptcy practice left the firm. The partner in charge of associate assignments told me the firm wanted to assign me to the bankruptcy group, and he asked me if I had any interest in bankruptcy practice. I had not taken the bankruptcy course in law school. I didn’t even know there was a Bankruptcy Code. But I thought quickly about what he said, and realized that, if I had any interest in a future at the firm, I had better be interested in bankruptcy. So I said, “Absolutely, I’ve been looking to get into that practice!” Fast-forward 3 decades, and here I am.
2. **How did you get involved with the ABA BBC?**

As a freshman partner, I was attending a BBC program in New Orleans, when I met a member of the BBC leadership. I did not know him previously, but he used to be an associate at Covington. When he saw from my nametag that I was at Covington, he struck up a conversation. A few months later, he invited me to speak in a program. Later, he recommended me for appointment as his vice chair of the Executory Contracts subcommittee. I have been part of the BBC family ever since.

3. **What is your most memorable ABA BBC moment?**

That has to be the phone call I received from then BBC Chair Kathryn Heidt. Kate asked me to serve as Vice Chair of the BBC (to then incoming Chair Eric Brunstad) and to succeed Eric as the Chair. I did not have the slightest idea I was even under consideration, and was shocked when she asked me. I have regarded my service as Chair to be among the highest honors I have received, and enormously satisfying, both professionally and personally.

4. **Who was the best mentor you have had, and why?**

When I was a first-year associate at Covington, I was assigned to Wesley S. Williams, Jr. Wes’s reputation as a brilliant and indefatigable lawyer was well deserved. He liked to meet in the evenings to discuss my assignments. As we sat at a small table in his office, he would read whatever memorandum, agreement, or other work I had given him. He would mark it up and explain why. He always used a green, felt-tipped pen. He corrected and revised everything: style, structure, word-choice, punctuation. When he was done, my work was a sea of green. I would return to my office and try to learn from what he had done. Every assignment I submitted received the same scrutiny and much green ink. After a while, I felt I was not improving and that Wes was dissatisfied with my work. Discouraged, and convinced I was failing, I requested an assignment to a different partner, while there was still time to salvage my career.

I met with Wes to tell him I was thinking about accepting an assignment with a different partner. Expecting him to be relieved by my decision, I was surprised when he said, “Why would you want to do that?” What he said then floored me. He said, I was the best associate he had ever had, and that he intended to do everything he could to ensure I achieved my potential to become an outstanding lawyer.

It was years after I became a partner that I realized how important my development was to Wes. As a partner, there are many demands on your time. Associate development, while important, seldom rises to the top of a partner’s to-do list. The lawyer I am today is in large part the result of the care and attention I received from Wes.
5. **What tips do you have for other mentors?**
Make the development of your associates a priority. The primary factor in the development of associates -- indeed, in their success or failure -- is the care and attention they receive from the partner, and the quality of their experiences.

6. **What advice would you give to younger members of ABA?**
Take advantage of opportunities to write and to speak. There are only two ways you really master a subject: writing about it and teaching it. Only when you do that, do you realize what you don’t know, and then you learn it. The ABA offer many opportunities to write materials for programs and to participate as speakers in program. Take advantage of these opportunities.
New Members to the Business Bankruptcy Committee—Please Welcome the Newest Members to the Committee!

- Riley C. Walter, *Walter Wilhelm Law Group*
- Diana K. Carey, *Karr Tuttle Campbell*
- Don D. Grubman, *Hahn & Hessen LLP*
- Richard W. Engle, Jr., *Armstrong Teasdale LLP*
- Natasha Songonuga, *Gibbons PC*
- Michael T. Conway, *Shipman & Goodwin LLP*
- Brianna J. Blazek
- Amanda Wood Barnett, *Red River Bank*
- Ehud Barak, *Proskauer Rose LLP*
- Benny D. Council, *The Council Law Firm*
- Mark W. Dell’Orfano, *Mark W. Dell’Orfano, PLLC*
- Debra Kay Epp, *Principal Financial Group*
- Solon McGee
- Brian D. Mazurowski
- Franklin Rosario
- Harry Dixon
- Bryan Kidzus, *Vinson & Elkins LLP*
- Michael Krombach, *OG Capital*
- Ali Al Sari
- Kelvin Amorighoye
- Yuyang Lin
- Raven Robertson
- Alejandro Velez
- Kelsey Brandes
- Khy Chestnut
- Gisselle Fernandez
- Lee Snodgrass
- Sandhya Taneja
- Tamara Van Heel, *Agentis PLLC*
- Emily D. Leblanc
- Anthony J. Gore, Jr.
- Ross J. Greenspan
- Firley Permata
- Shao Yun hsu
- Ryan Nichols
- Chase Riddle
- Paul L. Manigrasso, *Paul Manigrasso CPA*
- Lucas Lima
- Emily Manbeck
- Jill Bienstock, *Cole Schotz P.C.*
- Crysta Herman
In a recent case from the Bankruptcy Court for the Southern District of New York, Judge Mary Kay Vyskocil dismissed an involuntary bankruptcy petition and held that that holders of nonrecourse notes fail to qualify as creditors eligible to commence an involuntary case against the issuer. *Taberna Preferred Funding IV, Ltd. v. Opportunities II Ltd. (In re Taberna Preferred Funding IV, Ltd.)*, No. 17-11628, 2018 WL 5880918 (Bankr. S.D.N.Y Nov. 8, 2018). In so holding, the Court reaffirmed that holders of nonrecourse notes have no claims against putative debtor because their claims were limited to the collateral. *Id.*

Section 303 of the Bankruptcy Code allows three or more qualified creditors to commence an involuntary case against a person. To qualify, among other requirements, each of those creditors must hold a claim against that person. 11 U.S.C. § 303(b)(1) (2012). This requirement was the only one in dispute after three creditors (the Petitioning Creditors) filed an involuntary chapter 11 petition against Taberna Preferred Funding IV, Ltd. (“Taberna”). *Taberna*, 2018 WL 5880918, at *1.

In 2005, Taberna issued notes worth over $630 million. *Id.* at *2. An indenture governed the notes. *Id.* The indenture explicitly stated that the notes were nonrecourse and that Taberna had no personal liability under the notes. *Id.* at *8. Because the notes were nonrecourse, the obligation under the notes could “be satisfied only out of the collateral securing the obligation and not out of the debtor’s other assets.” *Id.* at *7 (quoting Nonrecourse, Black’s Law Dictionary (10th ed. 2014)). In sum, the Petitioning Creditors held claims against the collateral but not Taberna—failing to meet the requirement that they each hold a claim against a person under section 303(b) of the Bankruptcy Code. *Id.* at *15.

But the Petitioning Creditors argued that the nature of the notes—recourse or nonrecourse—should not matter for the purpose of commencing an involuntary chapter 11 case because of sections 102(2) and 1111(b) of the Bankruptcy Code. *Id.* at *9. First, at this stage of litigation (motion for judgment on partial findings under Rule 52(c) of the Federal Rules of Civil Procedure), the court found that the nonrecourse claims of the Petitioning Creditors were not “entitled to allowance as recourse claims under section 1111(b).” *Id.* at *5, *11. Treatment under section 1111(b) may be available only for allowance and distribution purposes; not for determining whether a creditor is eligible to commence an involuntary chapter 11 case. *Id.* at *10.
Second, the Petitioning Creditors asserted that the distinction between recourse and nonrecourse is insignificant because section 102(2) of the Bankruptcy Code states that a “claim against property of the debtor” is a claim against the debtor. Id. at *13 (quoting 11 U.S.C. § 102(2) (2012)). Again, section 303(b)(1) requires a filer of an involuntary case against a person to hold “a claim against such person.” 11 U.S.C. § 303(b)(1) (2012). The court, however, concluded that a claim against a person does not include a claim against property of the person in the same way that a claim against a debtor includes a claim against property of the debtor. Taberna, 2018 WL 5880918, at *13. By examining the precise language of the Bankruptcy Code, the court arrived at this result. Id.

Finally, the court concluded that dismissal was in the best interest of the creditors and the estate under section 1112 of the Bankruptcy Code. Id. at *17. The court found that the case was “a last-ditch effort by a senior sophisticated noteholder to further its personal, tactical and pecuniary aims and to coerce a redemption of its notes to the detriment of junior creditors.” Id. at *22. Further, because Taberna was not an operating business, the goal of chapter 11 bankruptcy to reorganize operating businesses could not be met by allowing an involuntary case against Taberna to proceed. Id. at *21. Therefore, even if the Petitioning Creditors could meet the requirements under section 303, which they failed to do, the court concluded that cause would exist to dismiss their proposed involuntary case. Id. at *24.

In short, three holders of nonrecourse notes failed to meet the requirements to commence an involuntary case against the structured finance entity that issued the notes. Id. at *1. And even if the three holders could meet the requirements, cause would exist to dismiss the case because it would fail to serve a legitimate bankruptcy purpose. Id. at *2.
The UCC-1 financing statement is an innocent-looking form, with just a few boxes to complete and check as part of a secured financing transaction, but it is a critical document that must be correctly completed and filed. In another recent reminder of the significance of the financing statement, a bankruptcy court has ruled that a lender’s financing statement designed to perfect a $7.6 million lien against all assets of a business was insufficient, rendering the underlying lien avoidable by the chapter 7 trustee and making the assets available to unsecured creditors. *First Midwest Bank v. Jeana K. Reinbold, Chapter 7 Trustee (In re 180 Equipment, LLC)*, No. 17-81749, Adv. No. 18-8003 (Bankr. C.D. Ill., Aug. 20, 2018).

In the case, the borrower executed a security agreement granting a security interest in 26 categories of collateral, including accounts, chattel paper, equipment, general intangibles, goods, instruments, and inventory. The bank filed its financing statement promptly, describing the collateral as “All Collateral described in First Amended and Restated Security Agreement dated March 9, 2015 between Debtor and Secured Party.” The bank did not file the underlying security agreement with the financing statement. After the debtor filed its chapter 7 bankruptcy case, the bank sought a declaratory judgment that its lien was valid; the trustee counterclaimed to assert that the lien was avoidable because the financing statement was insufficient.

The bank argued that its financing statement was adequate under section 9-108(b) of the UCC, which allows a description of collateral in the financing statement by certain methods (e.g., specific listing, category, quantity), including “any other method, if the identity of the collateral is objectively determinable.” The bank contended that the reference to the security agreement, even though it was not filed, met the requirements and put other lenders on sufficient notice of the bank’s lien. The court disagreed, finding the statement did not describe the collateral; rather, “it attempts to incorporate by reference the description of collateral set forth in a separate document, not attached to the financing statement.” Therefore, the trustee prevailed and the bank’s lien was avoided.

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The obvious lesson is that lenders should not play games or take any shortcuts with financing statements. Do not seek to incorporate other documents under the financing statement without filing the other documents with the financing statement. Such omissions are low-hanging fruit for bankruptcy trustees and unsecured creditor committees.

The recent news for lenders in this area is not all bad, however. Another bankruptcy court upheld a financing statement describing collateral as “all accounts receivable, inventory, equipment, and all business assets located at 1803 W. Main Street...” The tangible assets actually were located at a different address. The court nevertheless found the address limitation could be read to apply only to “all business assets,” and in any event, the description was ambiguous such that a reasonably prudent searcher would be put on inquiry notice. In re 8760 Service Group, No. 17-20454-drd-11, 2018 WL 2138282 (Bankr. W.D. Mo. 2018). And yet another court has found a financing statement listing “equipment,” among other things, was not seriously misleading even though it incorrectly included in the collateral description that “this filing filed as ag lien.” Because the debtor’s name was stated correctly, the incorrect additional “ag lien” language created an ambiguity with the “equipment” description but would not mislead a searcher as to the actual collateral covered. Winfield Solutions, LLC v. Success Grain, Inc., No. 3:17CV00329 JLH, 2018 WL 1595871 (E.D. Ark. Apr. 2, 2018).

The adequacy of financing statements to perfect liens continues to generate substantial litigation. Much of this could be avoided by careful diligence by lenders in the preparation and filing of their perfection documents. The additional time taken at the initial stage to get the financing statement correct can save immense loss at the end stage.
On August 14, 2018, the Eleventh Circuit rendered a decision in Kaye v. Blue Bell Creameries, Inc. (In re BFW Liquidation, LLC), 899 F.3d 1178 (11th Cir. 2018), holding that new value does not need to remain unpaid in order to support a creditor’s subsequent new value defense in a preference action. In confronting and putting aside Eleventh Circuit precedent, the Circuit created new opportunities for creditors to prevail in preference actions where they had received payments from the debtor within the preference period.

Background:
On February 5, 2009, Bruno’s Supermarkets, LLC (the “Debtor”) filed a voluntary chapter 11 bankruptcy case. The Debtor was a grocery-store chain with stores in Alabama and along the Florida panhandle, and one of its vendors was Blue Bell Creameries, Inc. (“Blue Bell”), a seller of ice cream and related products. Blue Bell sold goods to the Debtor on credit and the Debtor would pay Blue Bell twice a week. However, in 2008 the Debtor began suffering financial difficulties, and on the advice of an advisory firm, it ceased making regular payments to its creditors, including Blue Bell. Ultimately, the Debtor filed Chapter 11.

The key facts at issue in the decision were that: (i) within ninety days prior to the filing, November 7, 2008, the Debtor had paid Blue Bell $563,869.37 for goods in thirteen separate payments; and (ii) during this same time period, Blue Bell delivered $435,705.65 worth of ice cream and other merchandise to the Debtor’s grocery stores.

On September 25, 2009, the bankruptcy court confirmed the Fourth Amended Plan of Liquidation, and William Kaye was appointed as the liquidating trustee for the Debtor’s bankruptcy estate (the “Trustee”). The Trustee eventually commenced an adversary proceeding against Blue Bell seeking to avoid, as a preference, the $563,869.37 that the Debtor paid to Blue Bell during the preference period. The Trustee and Blue Bell stipulated that all of the elements of a preference claim under 11 U.S.C. § 547(b) were satisfied. Blue Bell raised two defenses to the Trustee’s claims: (i) § 547(c)(2)’s ordinary-course-of-business defense; and (ii) § 547(c)(4)’s subsequent new-value defense. Using the subsequent new-value defense, Blue Bell argued that it should be permitted to offset against its preference liability the goods it delivered to the Debtor during the preference period. The question in the case was whether it could do that to the extent that it had been paid by the Debtor.

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The Bankruptcy Court Decision:
The Bankruptcy Court rejected Blue Bell’s ordinary-course-of-business defense because of the Debtor’s pre-petition staggering and delaying of vendor payments. As for the subsequent-new-value defense, despite Blue Bell having provided new value to the Debtor – “lots of ice cream products that the latter was able to sell to its customers in its efforts to remain financially afloat” – the Court stated that it was bound by the 11th Circuit precedent of Jet Florida System, and rejected, in large part, Blue Bell’s new-value defense.

In Jet Florida System the Eleventh Circuit stated that § 547(c)(4) had “generally been read to require . . . that the new value must remain unpaid.” The Bankruptcy Court commented that while subsequent decisions followed Jet Florida System, there were contrary decisions that concluded that new value did not have to remain unpaid. However, persuasive as those decisions may have been, the Court stated that it was bound by precedent. As such, it held that the Trustee could avoid, or claw back, $438,496.47 of the $563,869.37 that the Debtor paid to Blue Bell during the preference period. Blue Bell made a direct appeal of the § 547(c)(4) aspect of the decision to the Circuit, with the consent of the Trustee.

The Eleventh Circuit Court Decision:
The Eleventh Circuit undertook a four-part analysis of the issue, beginning with a review of the Jet Florida System decision. After analyzing the facts and basis of that decision, the Circuit concluded that the “new value must remain unpaid” language in the decision was dictum because it is not necessary for the ultimate holding. The Circuit was free to conduct a fresh analysis of section 547(c)(4). The Eleventh Circuit analyzed section 547, focusing on the statutory language of section 547, its legislative history, and policy considerations.

The Eleventh Circuit found that the plain, unambiguous language of section 547(c)(4) does not require new value to remain unpaid because it only requires “that (1) any new value given by the creditor must not be secured by an otherwise unavoidable security interest and (2) the debtor must not have made an otherwise unavoidable transfer to or for the benefit of the creditor on account of the new value given.” Despite concluding that the statute was unambiguous, and it did not need to proceed further in its analysis, the Circuit did so anyway, turning to the legislative history of section 547(c)(4).

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Prior to the enactment of section 547(c)(4), section 60(c) of the Bankruptcy Act did require new value to remain unpaid. The Commission on the Bankruptcy Laws of the United States specifically recommended eliminating this requirement in its report. Upon this recommendation, Congress replaced it with section 547(c)(4) and removed the “remaining unpaid” language. After discussing this legislative history, the Circuit turned to the policy considerations surrounding its analysis of section 542(c)(4).

It noted that one of the primary policies behind section 547 is “to encourage creditors to continue extending credit to financially troubled entities while discouraging a panic-stricken race to the courthouse.” To hold that new value must “remain unpaid” would be counter to this policy and cause creditors to cease providing goods to the potential debtor, thereby accelerating its financial predicament. By finding that section 547(c)(4) does not require new value to remain unpaid, the Circuit said that its decision may help a troubled entity push forward through financially difficult times and avoid bankruptcy altogether, something both short-term and longer-term creditors would prefer. The Circuit remanded the case for a new calculation of Blue Bell’s preference liability.

**Observations:**

With this decision, the Eleventh Circuit helped push for greater uniformity in applying section 547(c)(4), as it joins the Fourth, Fifth, Eighth and Ninth Circuits in not requiring new value to remain unpaid. However, it does add to the present split in the Circuits, with the Seventh, and possibly the Third Circuit, requiring new value remain unpaid. It remains an open question in the First, Second, Tenth, and D.C. Circuits. This decision is good news for vendors, especially with the rise of retail and farm-based bankruptcies, and a possible looming recession on the horizon.