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BANKRUPTCY & RESTRUCTURING UPDATE

Squire, Sanders & Dempsey L.L.P.

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Dear Clients and Friends,

We are pleased to share with you the Fall 2009 edition of Squire Sanders' *Bankruptcy & Restructuring Update.* Our dedicated lawyers continue to play leading roles in a number of significant restructurings, two of which are highlighted in this Update. You will also find informative articles on Bankruptcy Code Section 502(d) and recent changes to the time periods applicable in bankruptcy cases, as well as timely summaries of high-profile matters.

As fall heads into winter, we would like to take the opportunity to wish each and every one of you a joy-filled and peaceful holiday season. Thank you for your ongoing friendship and support.

– Squire Sanders Bankruptcy & Restructuring Group

RECENT NOTEWORTHY REPRESENTATIONS

Squire Sanders Represents Phoenix Coyotes Owner in Historic Chapter 11 Proceedings

– *Thomas J. Salerno, Phoenix*

Squire Sanders lawyers in Phoenix, Cleveland and Washington DC represented the owner of the NHL Phoenix Coyotes in a historic bankruptcy proceeding, ultimately resulting in the purchase of the Coyotes by the NHL. This represents the first time in the 90-year history of the NHL that it purchased one of its own teams (the last time this happened in any professional sport was the purchase by MLB of the Expos in 2002). Squire Sanders represented Coyotes Hockey, LLC, the owner of the Coyotes, in the initial negotiation for the sale of the team to Canadian billionaire Jim Balsillie (founder of RIM, maker of BlackBerry). Balsillie wished to move the team to Ontario, Canada for the 2009-10 season. The NHL opposed the transfer of the team to Balsillie and any move of the team out of Arizona. In May, the Coyotes were put into chapter 11 in Phoenix to effectuate the Balsillie transaction (at about $240 million), becoming at the time the fourth professional sports team to have filed chapter 11 since the Bankruptcy Code was

This represents the first time in the 90-year history of the NHL that it purchased one of its own teams.

enacted in 1978 (the NBA Kings and NHL Penguins and Ottawa Senators being the other teams, in addition to the MLB Chicago Cubs filing in Delaware to effectuate a sale of the team through a bankruptcy). The case has been called "a novel and creative interpretation of the Bankruptcy Code." *The Deal,* November 15, 2009.

The Coyotes moved to Arizona from Winnipeg in 1996. Since then, the team (through a series of owners, with Coyotes Hockey, LLC being the third such owner) had lost over $300 million cumulatively. The current owner acquired the team in 2006 as a result of a deal converting about $200 million in debt to equity – as such, the owner was "accidental" in the sense that he didn't intend to own a hockey team when he started to finance the prior owner. As part of the acquisition in 2006, hockey legend Wayne Gretzky was given a nominal ownership interest, and he took over coaching duties at that time. The NHL vehemently opposed any move of the team, and also objected to Balsillie as an owner based on prior dealings the NHL had with him in his attempts to acquire the Penguins and the Nashville Predators. The NHL Constitution and Bylaws require NHL approval (through a majority vote of its member teams) to transfer a team, and a unanimous vote to relocate a team within 50 miles of another NHL team. The proposed Ontario site was 47 miles from Toronto, where the Maple Leafs play.

Squire Sanders lawyers filed an antitrust action against the NHL, asserting that the unanimous vote requirement for a relocation violated antitrust laws, amounting to a veto by any team (here, the Maple Leafs). Based on this lawsuit, the Coyotes sought bankruptcy court approval for a transfer of the team to Balsillie, and approval of the relocation to Canada, through the bankruptcy court process. The issues raised in the case were matters of first impression under US law. The opponents of the transaction were both the NHL and the city of Glendale, AZ, whose arena would be left without a key tenant should the team move, resulting in the breaking of a 30-year lease between the city and the Coyotes. The stage was set for a historic battle.

The case proceeded at a feverish pace commencing in May and culminating in an early September hearing in the bankruptcy court in which NHL Commissioner Gary Bettman testified. The NHL adamantly denied that any team had a "veto" for a relocation (notwithstanding the clear provisions of the NHL Constitution). The NHL promised the court that there would be numerous buyers for the team

(at much lower purchase prices) that would keep the team in Arizona. Given the economic losses the team had suffered since moving to Arizona, not surprisingly, no buyers surfaced who would keep the team in Arizona without material concessions by the city of Glendale on its lease, which the city was unwilling (or perhaps, as a matter of law, unable) to give. As a scheduled auction date neared, with the only bidder being Balsillie, the NHL made an unprecedented move and put in its own offer to buy the team – at a purchase price of $100 million less than the Balsillie offer. The court was faced with thousands of pages of legal briefs on matters of first impression, expert and non-expert declarations, and ultimately a two-day trial on certain key issues, with MLB, the NFL and the NBA all filing *amicus* briefs in the matter. The case garnered a substantial amount of local, national and international press – the court in Arizona set up an "overflow" courtroom for journalists who reported, via computer, "real time" dispatches during hearings. On September 30, 2009, the court issued its ruling, denying both the Balsillie bid (finding the court could not, under bankruptcy law, order the team moved over the objection of the NHL), and also the NHL bid as being violative of the Bankruptcy Code.

Given the economic losses the team had suffered since moving to Arizona, not surprisingly, no buyers surfaced who would keep the team in Arizona without material concessions by the city of Glendale on its lease.

Under the circumstances, with the NHL funding operational losses of close to $1 million per week, the debtors agreed to a modified NHL bid allowing the NHL to acquire the team, and the sale closed November 2, 2009. The NHL is feverishly seeking a buyer to keep the team in Arizona, with the distinct possibility that the team may ultimately be moved if a local buyer cannot be found.

Squire Sanders Assists World's Largest Grower of Hydroponic Tomatoes in Restructuring More Than $280 Million of Debt Through a Confirmed Chapter 11 Plan

– *Kristin E. Richner, Columbus*

In late 2008, Squire Sanders was approached by Eurofresh, Inc., the world's largest grower of hydroponic tomatoes, to assist in its restructuring efforts. With seven state-of-the-art greenhouse

facilities with more than 318 acres under glass, Eurofresh markets its high-quality products to major US food retailers and food wholesalers. In 2005, Eurofresh had engaged in a comprehensive recapitalization, which resulted in the replacement of Eurofresh's first lien secured debt of almost $119 million, as well as the issuance of $170 million in unsecured senior notes and $44.1 million in unsecured discount notes. The recapitalization left Eurofresh with a significant amount of debt and little margin for error in executing its business plan. Unfortunately, a string of events occurred between 2006 and 2008 that significantly affected Eurofresh's operations. First, greenhouse-grown tomatoes are particularly susceptible to certain types of disease and infestation that, while in no way harmful to humans, either destroy the fruit or make it unsaleable, and Eurofresh began to face serious infestations, which significantly lowered volume and affected operating profits. Eurofresh also suffered from labor shortages, given its remote locations in Arizona. Thus, by 2008, the level of debt incurred by Eurofresh could no longer be sustained by operations, and Eurofresh brought on financial advisors and Squire Sanders to help it evaluate the options for restructuring.

Eurofresh had engaged in a comprehensive recapitalization, which resulted in the replacement of its first lien secured debt, as well as the issuance of unsecured senior notes and unsecured discount notes. The recapitalization left Eurofresh with a significant amount of debt and little margin for error in executing its business plan.

In January 2009, Eurofresh missed an interest payment to the senior noteholders, but entered into a forbearance agreement designed to provide Eurofresh with time to develop a restructuring plan. After intensive negotiations with Eurofresh's secured lenders and representatives of Eurofresh's unsecured noteholders, Eurofresh filed for chapter 11 bankruptcy protection with the goal of significantly de-leveraging its balance sheet. Before the bankruptcy was filed, Squire Sanders assisted Eurofresh in negotiating an investment and plan support agreement (IPSA) with the majority of unsecured noteholders, which ultimately formed the basis for the plan of reorganization.

After intensive negotiations with Eurofresh's secured lenders and representatives of Eurofresh's unsecured noteholders, Eurofresh filed for chapter 11 bankruptcy protection with the goal of significantly de-leveraging its balance sheet.

On April 21, 2009, Eurofresh filed for chapter 11 bankruptcy protection. Given the state of the economy, Eurofresh was unable to find affordable debtor-in-possession financing, but fortunately, was able to reach an agreement with the secured lenders for the use of cash collateral. In June 2009, Eurofresh filed the original plan of reorganization, based around the IPSA. After lengthy negotiations, in August 2009,

Eurofresh ultimately presented an amended plan of reorganization that provided for the founder of Eurofresh to re-invest in reorganized Eurofresh for a 40% ownership interest, with the senior noteholders having the opportunity to participate in a new money investment for a *pro rata* share of 40% ownership in reorganized Eurofresh. The remaining ownership interest in reorganized Eurofresh was to be split among all senior noteholders *pro rata* in satisfaction of their claims.

The secured lenders voted against the proposed plan, presenting Eurofresh with a "cram-up" situation – the corollary of cramming down a plan on junior classes under the Bankruptcy Code. Interestingly, and showing the perceived strength of a reorganized Eurofresh freed from significant debt, 29 of 33 voting senior noteholders voted to participate in the new money investment. Ultimately, the secured lenders, the senior noteholders and Eurofresh negotiated a consensual plan, involving a paydown to the secured lender of $20 million. On October 28, the court confirmed Eurofresh's plan of reorganization, just six months after the case began. Through the combined efforts of Eurofresh, Squire Sanders and the company's other professionals, Eurofresh is emerging from bankruptcy as a strong, healthy and financially viable company.

ARTICLES

Does Your Dog Bite?[1]: Asking the Right Questions in Actions Under Bankruptcy Code Section 502(d)

– *Peter A. Zisser, New York*

The current economy is bad for everybody, particularly small business owners who may not have an adequate equity base to draw on. The last thing they need is their customers filing for bankruptcy relief. Unfortunately, it is happening in almost every region of the country. As a result, in order to protect themselves, small business owners need to have as much practical knowledge of how the Bankruptcy Code[2] actually works, what to look for and what to ask. This article is not intended to be a complete guide, but only to bring the reader's attention to section 502(d) of the Bankruptcy Code.

[1] In "The Pink Panther Strikes Again" (1976), Inspector Clouseau enters a hotel and sees a small dog. Clouseau: "Does your dog bite?" Hotel Clerk: "No." Clouseau bends down and pets the dog, which bites his hand. Clouseau: "I thought you said your dog does not bite?" Hotel Clerk: "That is not my dog."
[2] 11 U.S.C. §§ 101 *et seq.*

Under this section, if a small business owner (or any creditor) received payments from one of its customers and shortly thereafter, the customer files for relief under the Bankruptcy Code, the small business owner's remaining claim for unpaid amounts may be disallowed unless the small business owner returns the payments to the estate. Nevertheless, unlike Inspector Clouseau, small business owners can avoid an unexpected bite by asking the right questions.

If a small business owner received payments from one of its customers and shortly thereafter, the customer files for relief under the Bankruptcy Code, the small business owner's remaining claim for unpaid amounts may be disallowed unless the small business owner returns the payments to the estate.

I. What Does Section 502(d) Say?

On its face, section 502(d) is relatively short. It provides, in pertinent part, that:

> [T]he court shall disallow any claim of any entity from which property is recoverable under section [550] of this title or that is a transferee of a transfer avoidable under section [547] of this title, unless such entity or transferee has paid the amount, or turned over any such property . . .[3]

Put simply, if a small business owner received a prepetition payment that is found to be avoidable under Bankruptcy Code section 547, then any claim the small business owner may assert against the debtor's estate may be disallowed unless the small business owner returns the payment to the estate.

II. What Is a Preferential Transfer?

Under the Bankruptcy Code, a chapter 11 trustee (if one is appointed) or a debtor (called a "debtor-in-possession") may be able to avoid and recover for the benefit of the estate certain transfers made by the debtor prepetition, particularly "preferential" transfers. A "preferential" transfer is a transfer of the debtor's property: (i) to or for the benefit of a creditor; (ii) for or on account of an antecedent debt; (iii) made while the debtor was insolvent; (iv) made during the ninety (90) days prior to the filing of the bankruptcy petition; and (v) that enables the creditor to receive more than it would have received under a chapter 7 liquidation if the transfer had not been made.[4]

[3] 11 U.S.C. § 502(d). This section references other Bankruptcy Code provisions under which certain transfers or other actions may be avoided. For purposes of this analysis only, only sections 547 and 550 are relevant. *See* n.10.
[4] *See* 11 U.S.C. § 547(b). There is a rebuttable presumption that Debtor is insolvent during the ninety (90) days prior to the Petition Date. *See* 11 U.S.C. § 547(f).

III. What Is a Claim ?

In order to share in any distribution (if any) from the bankruptcy estate, a creditor must either (i) be listed in the debtor's schedule of unsecured claims[5], which is filed with or shortly after the petition[6] or (ii) file a written proof of claim.[7] Once a proof of claim is filed, the debtor or any party in interest may object to allowance of the claim. There generally is **no time limit** for filing an objection to a claim.

IV. How the Process Works

Let's apply the above to real-world scenarios. Let's assume that a small business owner (SBO) has been selling goods (or services) to its customer (Customer). As of January 1, 2009, Customer owes $100 to SBO. On January 2, 2009, after many letters, calls and emails demanding payment, Customer pays SBO $10 (the Payment) of the $100 owed, leaving a $90 balance. On January 3, 2009 (the Petition Date), Customer seeks relief under the Bankruptcy Code. Customer is now a debtor (Debtor). SBO timely files a written proof of claim against Debtor's estate for the $90 (the Claim). The Payment, made just days before the Petition Date, when Debtor was presumed insolvent, arguably fits within the criteria for a preferential transfer and thus may be subject to avoidance.[8]

[5] An overwhelming majority of courts that have addressed the issue have ruled that section 502(d) operates only with respect to unsecured claims and cannot be used to block claims entitled to treatment as administrative expenses of the estate under Bankruptcy Code section 503. *See, e.g., ASM Capital, LP v. Ames Dep't Stores, Inc. (In re Ames Dep't Stores, Inc.),* 2009 U.S. LEXIS 20764 (2nd Cir. September 18, 2009); *In re Plastech Eng. Prods., Inc.,* 394 B.R. 147 (Bankr. E.D. Mich. 2008); *In re USA Labs, Inc.,* 2006 Bankr. LEXIS 2394 (Bankr. S.D. Fla. Apr. 13, 2006); *Phoenix Rest. Group, Inc. v. Proficient Food Co. (In re Phoenix Rest. Group, Inc.),* 2004 Bankr. LEXIS 2186 (Bankr. M.D. Tenn. Dec. 16, 2004); *In re Roberds, Inc.,* 315 B.R. 443 (Bankr. S.D. Ohio 2004); *In re Durango Georgia Paper Co.,* 297 B.R. 326 (Bankr. S.D. Ga. 2003); *In re Lids Corp.,* 260 B.R. 680 (Bankr. D. Del. 2001); *In re CM Holdings, Inc.,* 264 B.R. 141 (Bankr. D. Del. 2000); *In re Rand Energy Co.,* 256 B.R. 712 (Bankr. N.D. Tex. 2000); *but see contra In re Microage, Inc.,* 291 B.R. 503 (B.A.P. 9th Cir. 2002); *In re Georgia Steel, Inc.,* 38 B.R. 829 (Bankr. M.D. Ga. 1984).

[6] In a chapter 11, the debtor is required to file with the court a schedule of all of its unsecured creditors and the amounts owed to each. If a creditor is listed in those schedules and its claim is not designated as disputed, contingent or unliquidated, it can accept the amount shown and does not have to file a written claim. *See* Federal Rule of Bankruptcy Procedure 3003 ("The schedule of liabilities . . . shall constitute prima facie evidence of the validity and amount of the claims of creditors, unless they are scheduled as disputed, contingent or unliquidated. [If not], it shall not be necessary for a creditor or equity security holder to file a proof of claim or interest . . . .").

[7] *See* Federal Rule of Bankruptcy Procedure 3002 ("An unsecured creditor or an equity security holder must file a proof of claim or interest for the claim or interest to be allowed.") A filed proof of claim supersedes the scheduled claim. *See In re Cohen,* 198 B.R. 382, 388 (Bankr. S.D. Fla. 1996).

[8] There are a number of defenses available to the recipient of a possible preferential transfer. *See* 11 U.S.C. § 547(c). For purposes of this analysis only, the author assumes that no statutory defenses can be raised.

V. Application of Section 502(d)

If Debtor intends to seek avoidance and recovery[9] of the Payment as a preferential transfer, it must commence an action (called an adversary proceeding) against SBO no later than two (2) years after the Petition Date,[10] or January 3, 2011. This deadline is crucial: No avoidance action commenced after January 3, 2011 can be maintained. As a result, there are two basic scenarios under section 502(d).

In the first scenario, Debtor timely commences a preferential transfer avoidance action and obtains a judgment against SBO. Section 502(d) would act to prohibit SBO from claiming against Debtor's estate unless SBO pays the judgment (i.e., returns the Payment). No one would argue against this result.

If Debtor intends to seek avoidance and recovery of the Payment as a preferential transfer, it must commence an action against SBO no later than two (2) years after the Petition Date.

In the second scenario, Debtor does not commence an avoidance action by January 3, 2011. Instead, on January 3, 2014, three (3) years after the deadline for commencing an adversary proceeding, SBO gets served with a notice stating that a liquidating trustee[11] (Trustee) is moving to disallow the Claim under section 502(d) because (i) the Payment is a preferential transfer, and thus "avoidable" under section 547 and (ii) SBO has failed to return the Payment (or its value) to the estate. Understandably annoyed, SBO says "Hey, what about the January 3, 2011 cut-off date for preference actions? Trustee is too late!" Trustee says "I may not be able to recover anything from you, but I can still use section 502(d) defensively to block the Claim."

Who is right depends on where the bankruptcy case is pending. In a number of jurisdictions, courts have taken a strict view of section 502(d), holding that it cannot be raised defensively unless Trustee already has obtained a judgment against SBO (the first scenario).[12] In other jurisdictions, however,

[9] As a point of clarity, a preferential transfer is "avoided" under section 547, but the rules for actually recovering an avoided transfer are found in section 550.
[10] *See* 11 U.S.C. § 546(a)(1)(A). That period may be extended by up to one (1) year if a trustee is appointed before the expiration of the two (2) year period. *Id.* at (a)(1)(B).
[11] Many chapter 11 plans provide for the creation of a liquidating trust and the appointment of a liquidating trustee to prosecute claims objections. *See* 11 U.S.C. § 1123(b)(3).
[12] *See, e.g., Holloway v. Internal Revenue Svc. (In re Odom Antennas, Inc.),* 340 F.3d 705, 708 (8th Cir. 2003); *In re Midwest Agri Dev. Corp.,* 387 B.R. 580, 586 (B.A.P. 8th Cir. 2008); *In re Asia Global Crossing, Ltd.,* 344 B.R. 247, 255-56 (Bankr. S.D.N.Y. 2006); *In re Southern Air Transport, Inc.,* 294 B.R. 293, 297 (Bankr. S.D. Ohio 2003); *In re Coral Petroleum, Inc.,* 60 B.R. 377 (Bankr. S.D. Tex. 1986); *State Bank and Trust v. Spaeth (In re Motorwerks, Inc.),* 371 B.R.

even if no judgment against SBO was ever obtained, Trustee is permitted to raise section 502(d) only as a defense to the Claim, but is barred from obtaining any affirmative recovery from SBO.[13] Nevertheless, as in a timely avoidance action, Trustee bears burden of proving that the Payment was an avoidable preferential transfer.

There is one element that should serve as the lynchpin in any decision SBO makes, but it does not depend on which jurisdiction the case is filed: What is the projected *pro rata* distribution to unsecured creditors? For example, if our case was pending in a jurisdiction where section 502(d) could be used defensively, SBO would be crazy to return the Payment to the Trustee in exchange for allowance of a general, unsecured claim in the amount of $100, unless the *pro rata* recovery on unsecured claims was going to be **greater** than 10%.[14]

Under 10%, and SBO would be getting back less than it returned to the estate.[15] Let us assume a 9% distribution. If SBO returns the $10 Payment, SBO will have an unsecured claim for $100, on which it will receive a distribution of $9. Return Score: Estate, up $1; SBO, down $1. If, on the other hand, SBO refuses to return the Payment, the score shifts to SBO. Don't Return Score: Estate, down $1; SBO, up $1.

SBO's decision tree should remain the same even if the dollar amounts increase. There is no dollar limitation under section 502(d) with respect either to the amount of the claim or the amount of the avoidable transfer. Thus, if we change our assumptions so that SBO received an avoidable transfer of $10 million and was left with a claim of $90 million, Trustee could seek to disallow the **entire** $90 million claim unless SBO returned the $10 million. Again, the starting point of the analysis must be the projected *pro rata* distribution to unsecured creditors. If the distribution is going to be any less than 10%, SBO should tell Trustee to take a hike.

281, 296 (Bankr. S.D. Ohio 2007); *Logan v. Credit General Ins. Co. (In re PRS Ins. Group, Inc.),* 331 B.R. 580, 587 (Bankr. D. Del. 2005) (citing *Holloway v. IRS*); *Cohen v. TIC Fin'l Sys. (In re Ampace Corp.),* 279 B.R 145, 163 (Bankr. D. Del. 2002); *see also Seta Corp. of Boca, Inc. v. Atlantic Computer Sys. (In re Atlantic Computer Sys.),* 173 B.R. 858, 862 (Bankr. S.D.N.Y. 1994) (turnover action under section 542).

[13] *See, e.g., Benninger v. First Colony Life Ins. Co. et al.,* 357 B.R. 337, 359 (Bankr. W.D. Penn. 2006); *In re America West Airlines, Inc.,* 217 F.3d 1161 (9th Cir. Ariz. 2000); *In re McLean Indus., Inc.,* 196 B.R. 670, 673 (S.D.N.Y. 1996); *In re Enron Corp.,* 340 B.R. 180, 183 (Bankr. S.D.N.Y. 2006); *In re Loewen Group Int'l, Inc.,* 292 B.R. 522, 526 (Bankr. D. Del. 2003).

[14] Under Bankruptcy Code section 502(h), if SBO returns the Payment to Trustee, SBO is permitted to add the $10 to the amount of the Claim, making it $100.

[15] It has been the author's experience that if a liquidating trustee has been appointed, unsecured creditors can expect to receive little or no recovery on their claims.

Conclusion

Unlike Clouseau, small business owners and all other creditors should at least know the right questions to ask. Where was the bankruptcy case filed? Can the debtor/trustee use section 502(d) in that jurisdiction? Did I receive any payments from my customer in the ninety (90) days prior to the petition date? Do I know or can I find out what the projected *pro rata* distribution will be? Having the answers to these questions may help to avoid the unforeseen bite.

Unlike Clouseau, small business owners and all other creditors should at least know the right questions to ask.

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Only a Matter of Time: A Look at the December 1, 2009 Changes to the Time Periods Governing Bankruptcy Cases

– *Elliot M. Smith, Cincinnati*

On December 1, 2009, numerous changes to the time periods applicable in bankruptcy cases took effect. These changes, which will impact creditors and debtors alike, are relatively straightforward but must be carefully reviewed and thoroughly understood. Time plays a critical role in the administration of bankruptcy cases, affecting the degree of notice a party is required to give before certain actions can be taken or approved by the bankruptcy court as well as deadlines for filing various documents, asserting various rights and satisfying certain statutory obligations. The importance of understanding applicable time periods cannot be overstated, as parties may forfeit valuable rights or suffer other ill consequences by failing to comply with these requirements.

The importance of understanding applicable time periods cannot be overstated, as parties may forfeit valuable rights or suffer other ill consequences by failing to comply with these requirements.

This article categorizes the changes to the time periods imposed by the US Bankruptcy Code and the Federal Rules of Bankruptcy Procedure, with a special emphasis on changes to Bankruptcy Rule 9006 and other notable changes and how they impact various parties in interest.

A. Changes to the Bankruptcy Code

On May 7, 2009, Congress enacted Public Law No. 111-16, known as "The Statutory Time-Periods Technical Amendments Act of 2009." The statute provides for changes to time periods in nine different sections of the Bankruptcy Code and various other provisions of the US Code that are unrelated to bankruptcy cases. Generally speaking, however, each of the changes to the Bankruptcy Code simply increases the existing time period from five to seven days. Seven is the new five.

Generally, the changes to the Bankruptcy Code are limited to chapter 7 liquidation and chapter 13 reorganization cases filed by individuals, as well as stockbroker and commodity broker liquidation cases, and do not materially impact chapter 11 cases. The exceptions to this are certain changes relating to the prerequisites for a person to serve as a trustee under chapter 11 (among other chapters) and the appointment of a "consumer privacy ombudsman" in connection with the sale or use of property of the bankruptcy estate outside of the ordinary course of business under section 363 of the Bankruptcy Code.

Specifically, the following statutes were affected by having a five-day time period increased to seven days:

- Section 109(h)(3)(A)(ii) – Relates to the time period for an individual to obtain credit counseling.
- Section 322(a) – Relates to the time period for a trustee to post a bond with the court to ensure the faithful performance of official duties.
- Section 332(a) – Relates to the time period for appointing a consumer privacy ombudsman.
- Section 342(e)(2) – Relates to the time period for the effectiveness of a creditor's request to receive notices at a specific address in an individual's chapter 7 or 13 case.
- Section 521(e)(3)(B) – Relates to the time period for a court to provide a copy of a chapter 13 debtor's plan of reorganization to a requesting creditor.

- Section 521(i)(2) – Relates to the time period for a court to dismiss an individual's chapter 7 or 13 case at the request of a party in interest.

- Section 704(b)(1)(B) – Relates to the time period for the United States Trustee to send a statement to all creditors that an individual's chapter 7 case is an "abuse" under section 707(b) of the Bankruptcy Code.

- Section 749(b) – Relates to the prohibition against the avoidance of certain transfers in a chapter 7 stockbroker liquidation case in which the transfers occurred during a particular time period.

- Section 764(b) – Relates to the prohibition against the avoidance of certain transfers in a chapter 7 commodity broker liquidation case in which the transfers occurred during a particular time period.

B. Changes to the Federal Rules of Bankruptcy Procedure

On March 26, 2009, the United States Supreme Court approved a number of amendments to the Bankruptcy Rules. The amended Bankruptcy Rules govern all proceedings in bankruptcy cases commenced on or after December 1, 2009 and, "insofar as just and practicable" (to use the words of the Supreme Court), all existing proceedings pending as of that date. These changes fall into three categories: (1) changes relating to time computation, (2) substantive changes to existing Bankruptcy Rules and (3) the enactment of new Bankruptcy Rules.

Time Computation Changes

The changes relating to time computation were intended to simplify and clarify the method in which time periods under the Bankruptcy Rules are computed. These changes are principally reflected in Bankruptcy Rule 9006 and mirror similar changes being made to parallel provisions in other federal procedural rules (i.e., the Federal Rules of Civil, Criminal and Appellate Procedure).

The changes relating to time computation were intended to simplify and clarify the method in which time periods under the Bankruptcy Rules are computed.

The principal change was the adoption of a so-called "days-are-days" approach to computing time. Instead of omitting intermediate weekends and holidays when computing certain shorter time periods (as was the case under existing Bankruptcy Rule 9006), these days will now be included in time computation. Other changes clarify how to account for deadlines that fall on a weekend or holiday, provide for computing hourly time periods (when deadlines are expressed in hours) and address special timing considerations that accompany electronic filing.

Including weekends and holidays in time computation, however, will have the practical effect of shortening numerous shorter time periods provided for in the Bankruptcy Rules. To remedy this, and to further simplify matters by changing most periods of less than 30 days to multiples of seven days (so that deadlines will usually fall on weekdays), time periods in 38 other Bankruptcy Rules were either increased or, in a few instances, decreased.

Specifically, the following time adjustments have been made:

- **5 days → 7 days:** Bankruptcy Rules 2006, 2007, 2008, 2015.3, 6004, 9006 and 9027.
- **10 days → 14 days:** Bankruptcy Rules 1007, 2003, 2015.1, 2015.2, 2016, 3020, 4001, 6004, 6006, 7004, 7012, 8001, 8002, 8003, 8006, 8009, 9015, 8017, 9027 and 9033.
- **15 days → 14 days:** Bankruptcy Rules 1007, 1019, 1020, 2015, 2015.1, 2016, 3015, 4001, 4002, 6004, 6007 and 8009.
- **20 days → 21 days:** Bankruptcy Rules 1011, 2002, 2003, 2007.2, 2015, 2015.3, 3001, 3015, 3019, 6003, 7012, 8002, 9027 and 9033.
- **25 days → 28 days:** Bankruptcy Rules 2002, 3017 and 4004.

Notably, the provisions in the Bankruptcy Rules regarding the enlargement and reduction of time periods (i.e., Rules 9006(b) and (c)) remain unchanged. Under these Bankruptcy Rules, bankruptcy courts continue to have the authority, subject to certain exceptions, to either enlarge or reduce time periods provided for elsewhere in the Bankruptcy Rules or through a court order.

Substantive Changes to Existing Rules

In addition to the foregoing time computation changes, substantive changes were made to certain existing Bankruptcy Rules. These changes are minor (and, in most cases, technical) in nature and do not materially impact chapter 11 cases or the rights of creditors. Specifically, the following changes were made to existing Bankruptcy Rules:

- Rule 2016(c) – This rule relates to disclosures a bankruptcy petition preparer needs to make regarding its compensation. It was amended to reflect an updated Bankruptcy Code section number that is cross-referenced in the rule.

- Rule 4008(a) – This rule relates to the filing of reaffirmation agreements. It was amended to require reaffirmation agreements to be accompanied by a cover sheet.

- Rules 7052 and 9021 – These rules relate to findings and entries of judgment made by a bankruptcy court in adversary proceedings and/or contested matters. The amendments to these rules are related to each other as well as to new Bankruptcy Rule 7058 (as explained below). These rules were amended to conform the Bankruptcy Rules to the so-called "separate judgment rule" of Rule 58 of the Federal Rules of Civil Procedure. Specifically, under Civil Rule 58, all judgments must be set out in separate documents, subject to certain exceptions. Under the amended and new Bankruptcy Rules, only judgments in adversary proceedings will be subject to this requirement, but not judgments or orders in other actions (including contested matters).

- Rule 9006 – As discussed above, this rule relates to various aspects of time in bankruptcy cases (e.g., computation, enlargement and reduction). In addition to the time computation changes described above, the rule was also amended to update a reference in the rule to a renumbered Civil Rule.

- Rules 9015 and 9023 – These rules relate to jury trial matters and new trial matters. Together, they were amended to impose a 14-day deadline (instead of the 28-day deadline under the Civil Rules) to file certain post-judgment motions.

New Bankruptcy Rules

The only new Bankruptcy Rule to be enacted was Bankruptcy Rule 7058. As described above, this new rule – titled "Entering Judgment in Adversary Proceeding" – was enacted together with amendments to existing Bankruptcy Rules 7052 and 9021 in order to limit the requirement that judgments must be set out in separate documents to adversary proceedings, and not to any other bankruptcy matter (including contested matters).

C. Chapter 11 Creditors and Debtors Take Note

As is evident from the foregoing description of the amendments to the Bankruptcy Code and Bankruptcy Rules, a large number of the changes have no material impact on the rights and obligations of creditors and debtors in chapter 11 cases. The only changes that merit particular attention are the time computation changes that increase or decrease time periods that are extremely relevant to chapter 11 cases by multiples of seven.

A large number of the changes have no material impact on the rights and obligations of creditors and debtors in chapter 11 cases.

The following are some of the more noteworthy changes in this regard:

Disclosure Statements and Plans of Reorganization

- No less than 28-days' notice must now be given of the time fixed (a) for filing objections to and for the hearing to consider approval of a disclosure statement, (b) to make a final determination whether a proposed plan provides adequate information so that a separate disclosure statement is not necessary and (c) for filing objections to and for the hearing to consider confirmation of, among others, a chapter 11 plan of reorganization (three-day increase).

- No less than 21-days' notice must now be given of the time fixed to accept or reject a proposed modification of a plan (one-day increase).

- Orders confirming plans of reorganization are now automatically stayed for 14 days, unless the court orders otherwise (four-day increase).

Statements of Financial Affairs and Schedules of Assets and Liabilities

- Debtors are now required to file their Statements of Financial Affairs and Schedules of Assets and Liabilities within 14 days of the petition (one-day decrease). In large chapter 11 cases, however, it is typical for courts to grant extensions of this time period. As such, the impact of this amendment in this sort of case will be limited.

Deadlines to File Proofs of Claim

- Creditors must now receive at least 21-days' notice of a deadline to file proofs of claim (one-day increase).

Creditors Committees

- If an ad-hoc committee of unsecured creditors formed prior to a bankruptcy becomes the official creditors committee during the bankruptcy, the bankruptcy court has the ability, under Bankruptcy Rule 2007(b), to determine whether the members of such committee were fairly chosen. In making such a determination, the court must determine, among other things, that the meeting at which the prepetition committee was formed was held on no less than seven-days' notice to certain creditors (two-day increase).

Interim "First Day" Relief

- In large chapter 11 cases, it is typical for debtors to request that the court authorize and approve various forms of relief the debtor deems to be critical. A court cannot, however, authorize relief during the first 21 days of the case regarding the following, unless the relief is necessary to avoid immediate and irreparable harm: (a) requests to retain and employ professionals, (b) requests to use, sell, lease or otherwise incur an obligation regarding property of the estate (including motions to pay prepetition claims, but excluding cash collateral and DIP financing motions), and (c) requests to assume or assign executory contracts or unexpired leases (one-day increase).

DIP Financing and Cash Collateral Matters

- Final hearings regarding DIP financing and the use of cash collateral can now only be held no sooner than 14 days from the date the motion was filed (one-day decrease). Preliminary hearings are permitted, however, prior to the expiration of the 14-day period if requested in the motion.

Use of Property Outside of the Ordinary Course of Business

- No less than 21-days' notice must given of a proposed use of property of the estate outside of the ordinary course of business (one-day increase).

- Objections to a debtor's use of property of the estate, other than cash collateral, outside of the ordinary course of business must now be filed and served no less than seven days before the date set for the proposed action, or within the time fixed by the court (two-day increase). In large chapter 11 cases, however, courts will typically fix an objection period. As such, the impact of this amendment may be limited.

- Orders authorizing the use of such property outside of the ordinary course of business are now automatically stayed for a 14-day period, unless the court orders otherwise (four-day increase).

Relief From the Automatic Stay

- Orders granting relief from the automatic stay are now automatically stayed for a period of 14 days, unless the court orders otherwise (four-day increase).

Assignment of Executory Contracts and Unexpired Leases

- Orders authorizing the assignment of executory contracts and unexpired leases are now automatically stayed for a period of 14 days, unless the court orders otherwise (four-day increase).

Time Periods for Filing Motions

- Unless a specific time period is fixed by the Bankruptcy Rules or order of the court, all motions and related notices of hearing must now be filed at least seven days before the hearing date (two-day increase).

While the effects of the foregoing amendments to the Bankruptcy Rules may seem relatively minor in many respects and, in many large chapter 11 cases, either will be superseded by court order or will not materially harm or benefit the interests of creditors and debtors, they are nonetheless important to know and understand. Indeed, it is perhaps the more minor modifications (i.e., the one- or two-day increases or decreases in time) that pose the most danger to those who are not familiar with them. As with many things, timing is everything, and time waits for no one. In bankruptcy cases, the passing of a single day is often sufficient to result in the loss of valuable rights forever.

CASE SUMMARIES

Second Circuit Joins Chorus on Inapplicability of Bankruptcy Code Section 502(d) to Administrative Claims

– *Nicholas Brannick, Columbus*

The Second Circuit Court of Appeals recently issued its decision on a question of first impression before the court: whether section 502(d) of the Bankruptcy Code applies to administrative claims arising under section 503(b) of the Bankruptcy Code. *See, generally, ASM Capital, L.P. v. Ames Dept. Stores, Inc. (In re Ames Dept. Stores, Inc.),* 582 F.3d 422 (2d Cir. 2009). While on the surface this decision appears to be a technical decision involving Bankruptcy Code minutiae, the outcome could provide a significant advantage to suppliers of debtors in the future, as well as lead to additional litigation over the application of the decision.

Section 502(d) of the Bankruptcy Code provides, generally, that a bankruptcy court **shall** disallow the claim of any entity from which property is recoverable under certain sections of chapter 5 of the Bankruptcy Code or that is a transferee of a transfer avoidable under certain other sections of chapter

5 of the Bankruptcy Code unless that entity turns over the property in question. In general, this provision is used to disallow the claims of creditors against whom the trustee or debtor-in-possession may assert avoidance actions under the Bankruptcy Code, such as claims to avoid fraudulent conveyances under sections 544 and 548 of the Bankruptcy Code, preferential transfers under section 547 of the Bankruptcy Code or unauthorized post-filing transfers under section 549 of the Bankruptcy Code.

The purpose of section 502(d) of the Bankruptcy Code is to coerce creditors into complying with orders of the bankruptcy court. *See Campbell v. United States (In re Davis),* 889 F.2d 658, 662 (5th Cir. 1989) *cert. denied* 495 U.S. 933 (1990). Section 502(d) effectively mitigates the ability of a pre-petition creditor to assert setoff against chapter 5 causes of action arising from pre-petition transactions between the debtor and the creditor. *See, e.g., Comm. of Unsecured Creditors of Interstate Cigar Co. v. Interstate Distrib. (In re Interstate Cigar Co.),* 278 B.R. 8, 25 (Bankr. E.D.N.Y. 2002) (section 502(d) provides statutory support for prohibition against offset). This provision also advances the overarching goal of the various chapter 5 avoidance causes of action, which is to ensure the *pro rata* sharing among all creditors of a debtors' estate. Of course, from the perspective of the creditor already facing an avoidance action merely for receiving payment from a debtor who still owes that creditor money, section 502(d) can also serve to enhance the perceived arbitrary or punitive nature of the trustee's avoidance powers.

The purpose of section 502(d) of the Bankruptcy Code is to coerce creditors into complying with orders of the bankruptcy court.

The issue confronting the Second Circuit in *Ames* was whether section 502(d) of the Bankruptcy Code applies to administrative claims arising under section 503(b) of the Bankruptcy Code. Administrative claims are generally granted to those who provide goods or services to the debtor following the filing of the bankruptcy petition. As a preliminary matter, the facts in *Ames* present a cautionary tale to those who purchase the claims of others in bankruptcy cases. The creditor in *Ames* acquired the administrative claims of another party, which itself ultimately filed bankruptcy and liquidated. 582 F.3d at 424-26. However, the creditor either failed to obtain the authority to defend against a preference action filed against the seller, or failed to provide that defense, resulting in default judgment against the seller in favor of Ames – a judgment that was uncollectable due to the seller's liquidation. *Id.* at 425. The liquidating trustee of Ames then used the judgment against the seller to assert that the

creditor's administrative claim should not be allowed under section 502(d) of the Bankruptcy Code, illustrating the importance of claims purchasers retaining the ability to address or intervene in the preference actions of those whose claims they purchase.

With regard to the application of section 502(d) disallowance to administrative claims, the Second Circuit joined a long list of other courts in holding that Congress did not intend section 502(d) to apply to administrative claims arising under section 503(b) of the Bankruptcy Code. *Ames,* 582 F.3d at 432. *See also In re USA Labs, Inc.,* Case No. 04-41587-BKC-RAM, 2006 Bankr. LEXIS 2394 at * 4 (Bankr. S.D. Fla. Apr. 13, 2006); *Phoenix Rest. Group, Inc. v. Proficient Food Co. (In re Phoenix Rest. Group, Inc.),* 2004 Bankr. LEXIS 2186 at * 62 (Bankr. M.D. Tenn. Dec. 16, 2004); *Roberds, Inc. v. Broyhill Furniture (In re Roberds, Inc.),* 315 B.R. 443, 476 (Bankr. S.D. Ohio 2004); *In re Durango Georgia Paper Co.,* 297 B.R. 326, 330-31 (Bankr. S.D. Ga. 2003); *In re Lids Corp.,* 260 B.R. 680, 683-4 (Bankr. D. Del. 2001); *Camelot Music, Inc. v. MHW Advertising and Pub. Relations, Inc. (In re CM Holdings, Inc.),* 264 B.R. 141, 158 (Bankr. D. Del. 2000); *Rand Energy Co. v. Del Mar Drilling Co., Inc. (In re Rand Energy Co.),* 256 B.R. 712, 718-19 (Bankr. N.D. Tex. 2000). *But see MicroAge, Inc. v. Viewsonic Corp. (In re MicroAge, Inc.),* 291 B.R. 503, 512-13 (B.A.P. 9th Cir. 2002) (holding that because section 502(d) applies to any claim, it applies to post-petition administrative claims).

The *Ames* court, like previous bankruptcy courts, concluded that section 502 of the Bankruptcy Code itself applies only to claims that are required to be filed under section 501 of the Bankruptcy Code. 582 F.3d at 429. Because section 501 refers only to "creditors" of the debtor, and the term "creditor" is defined under section 101(10)(A) of the Bankruptcy Code as an entity holding a pre-petition claim, section 502(d) may be applied only to those entities that hold pre-petition claims against a debtor's estate. *Id.* Moreover, the filing of requests for the payment of administrative expenses is separately governed by section 503(a) of the Bankruptcy Code, which is not referenced in section 502 of the Bankruptcy Code. *Id.* at 429-30. Finally, the *Ames* court noted that the purpose of affording higher priority to administrative claims than to certain other claims under section 503 of the Bankruptcy Code is to encourage parties to deal with the debtor post-petition and that purpose would be frustrated through the use of section 502(d) to evade administrative claims. *Id.* at 431.

The Ames decision is important because it resolves a critical question for creditors in the influential Second Circuit, which includes the Southern District of New York.

The *Ames* decision is important because it resolves a critical question for creditors in the influential Second Circuit, which includes the Southern District of New York. Creditors providing post-petition goods and services to bankruptcy debtors within the Second Circuit, which accounts for a substantial number of such debtors, can now be assured that they will not subsequently face a challenge to the debtor's payment for those goods and services as an administrative claim as a result of potential avoidance actions.

However, the *Ames* decision leaves unanswered two additional questions that creditors should consider when dealing with potential debtors or responding to allegations of having received avoidable transfers. First, the *Ames* court failed to address the application of section 502(d) to reclamation claims arising under section 546(c) of the Bankruptcy Code, despite the fact that the creditor in that case asserted such claims. 582 F.2d at 424. While parties regularly argue that reclamation claims arising under section 546(c) are entitled to priority under the Bankruptcy Code, that priority does not arise under the express language of section 503(b) of the Bankruptcy Code (or any other explicit provision of the Bankruptcy Code). Thus, reclamation claims remain subject to litigation regarding the applicability of section 502(d) to such claims.

Moreover, the *Ames* court states that "section 502(d) does not apply to administrative expenses under section 503(b)." 582 F.2d at 432. Arguably, this language could be read to encompass administrative claims arising under section 503(b)(9), which provides vendors of debtors with an administrative claim for goods delivered to the debtor during the 20 days **preceding** the petition date. However, the *Ames* decision itself largely focuses on the **post-**petition nature of administrative claims by relying on the definition of the term "creditor" and the policy reason behind granting administrative claims to post-petition creditors of debtors. It is likely that in the future debtors will continue to argue, even in the Second Circuit, that section 502(d) applies to claims arising under section 503(b)(9) of the Bankruptcy Code. It remains to be seen whether the Second Circuit will join the growing chorus of bankruptcy courts to have decided that, notwithstanding the pre-petition nature of section 503(b)(9) claims, section 502(d) is inapplicable to those claims as well. *See, e.g., In re Plastech Eng. Prods., Inc.,* 394 B.R. 147, 164 (Bankr. E.D. Mich. 2008); *Southern Polymer, Inc. v. TI Acquisition, LLC (In re TI Acquisition, LLC),* 410 B.R. 742, 751 (Bankr. N.D. Ga. 2009). *But see In re Renew Energy, LLC,* Case No. 09-10491,

2009 Bankr. LEXIS 3352 at * 13-15 (Bankr. W.D. Wis., Sep. 30, 2009) (disallowing a 503(b)(9) claim and declining to rule on the applicability of section 502(d) until the adversary proceeding regarding avoidable preference was resolved).

SemCrude Court Provides Clarification on Treatment of Section 503(b)(9) Claims for Goods Received by Debtors in the 20 Days Prior to Bankruptcy

– *Sherri L. Dahl, Cleveland*

In a recent order entered in *In re SemCrude, L.P.,* Case No. 08-11525, the Delaware bankruptcy court (1) clarified the application of Bankruptcy Code section 503(b)(9) to creditors' priority claims arising from the delivery of goods in the 20 days before a bankruptcy filing and (2) amended a previously entered procedures order to allow for the resolution of disputed "Twenty Day Claims" on their merits. The court's order, entered on October 7, 2009 (the Order), applied to 234 claims against SemCrude with a face amount of $151 million, each of which was included in the pool of "Other Twenty Day Claims" in the debtors' Fourth Amended Joint Plan. This order provides clarification of a "creditor friendly" provision added to the Bankruptcy Code in 2005 – section 503(b)(9) – which now provides administrative expense priority for pre-bankruptcy claims that were, previously, deemed general unsecured claims.

Section 503(b)(9) in General

Section 503(b)(9) of the Bankruptcy Code provides creditors with an allowed administrative expense priority claim for "the value of any goods received by the debtor within 20 days before the date of commencement of a [bankruptcy] case . . . in which goods have been sold to the debtor in the ordinary course of such debtor's business." Administrative expense claims must be paid in full prior to other lower priority claims, including general unsecured claims. In most chapter 11 cases, administrative expense claims are paid 100 cents on the dollar.

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The 503(b)(9) Procedures

Although not required by the Bankruptcy Code, in *SemCrude,* the debtors sought and, on September 15, 2008, the bankruptcy court entered an order (the Procedures Order) providing detailed procedures (the Procedures) for the administration of 503(b)(9) (Twenty Day Claims). Such procedures provided for, among other things, (a) the *SemCrude* debtors to include in Schedule E of their Schedules of Assets and Liabilities a listing of estimated amounts, based on their books and records, owed to vendors who delivered goods within the 20 days prior to the date of the bankruptcy filing (the Petition Date); (b) the debtors to seek and the court to set a deadline for the filing of proofs of claim asserting section 503(b)(9) rights (the Bar Date); (c) any party in interest to have 30 days to file an objection to the debtors' Schedule E as it related to Twenty Day Claims; (d) a deadline of 45 days after the Bar Date for the debtors to file a notice with the court disputing the amounts of asserted Twenty Day Claims (the Notice); and (e) interested parties to have 20 calendar days to object to the Notice. Certain settlement procedures were also included in the Procedures Order.

"Value" Presumptively Means Purchase Price

In the Order, the court provided guidance on the determination of value within the context of section 503(b)(9). The court adopted the holdings of several other courts related to value analysis in other contexts and concluded that "invoice or contract price" is presumptively the best determination of value when considering Twenty Day Claims under section 503(b)(9). The court further found that purchase price could be rebutted by evidence indicating that, under the facts and circumstances of a particular transaction, the purchase price or invoice price is not the most relevant indicator of value.

UCC Definitions Adopted

The court also adopted the definitions for "received," "sold" and "ordinary course of business" set forth in Article 2 of the Uniform Commercial Code. The court noted that "there is nothing in the [Bankruptcy] Code or in the legislative history accompanying the recent enactment of § 503(b)(9) suggesting that Congress intended that bankruptcy courts should look beyond the Uniform Commercial Code ("UCC") to construe or define these terms as they apply to sales of goods." Moreover, the court reasoned that,

based upon the adoption of the UCC in all but one of the 50 states, applying UCC definitions would "thus be consistent with commercial expectations in the marketplace."

Observations

The *SemCrude* order provides helpful insight for debtors and creditors in their analysis of the treatment of section 503(b)(9) claims and the payment for goods received by debtors in the 20 days prior to a bankruptcy filing. The Procedures Order offers guidance in the important Delaware venue for interpretation of key terms in section 503(b)(9) and also approves procedures for the efficient resolution of 503(b)(9) claims that will likely continue to serve as a model in Delaware and other jurisdictions.

The SemCrude *order provides helpful insight for debtors and creditors in their analysis of the treatment of section 503(b)(9) claims and the payment for goods received by debtors in the 20 days prior to a bankruptcy filing.*

Florida Bankruptcy Court Issues Sweeping Ruling Against Lenders in High Stakes Fraudulent Transfer and Preference Litigation

– *Andrew V. Banas, Phoenix*

In a recently published opinion, Judge John K. Olson of the United States Bankruptcy Court for the Southern District of Florida permitted the bankruptcy estates of TOUSA, Inc. and its debtor subsidiaries to avoid and recover more than $1 billion of liens and cash that the debtors had transferred to secured lenders in a transaction entered into six months prior to the debtors' chapter 11 bankruptcy filing. *Official Committee of Unsecured Creditors of TOUSA, Inc. v. Citicorp North America, Inc.,* 2009 Bankr. LEXIS 3311 (Bankr. S.D. Fla. Oct. 13, 2009). In a controversial decision, Judge Olson ruled that the transfers were voidable as fraudulent under federal bankruptcy law and New York and Florida state law.

In a controversial decision, Judge Olson ruled that the transfers were voidable as fraudulent under federal bankruptcy law and New York and Florida state law.

TOUSA and its network of subsidiaries build, market and finance the sale of detached single-family residences, town homes and condominiums. On January 29, 2008, TOUSA and several of its

subsidiaries filed for chapter 11 bankruptcy protection in Florida. Prior to the bankruptcy filing, the debtors used joint ventures to rapidly expand their operations through a series of acquisitions. In 2005, for example, one of TOUSA's subsidiaries participated in a joint venture to acquire the homebuilding assets of Transeastern Properties Inc. in Florida. The acquisition was financed by, among other things, $675 million of unsecured third-party debt, which TOUSA guarantied (the Transeastern Debt). In the wake of the economic downturn in the housing market, however, the joint venture failed. This resulted in litigation and, ultimately, a settlement payment of more than $420 million to the financiers of the joint venture. To finance the settlement, TOUSA and certain of its subsidiaries (referred to in the opinion as the Conveying Subsidiaries) borrowed $500 million from Citicorp Inc. and other lenders. As part of the settlement, TOUSA caused the Conveying Subsidiaries to guaranty the new loans (the Subsidiary Guaranties) and to grant liens on substantially all their assets to secure the Subsidiary Guaranties, despite that none of the Conveying Subsidiaries were obligors or guarantors of the old Transeastern Debt.

The Unsecured Creditors' Committee, which primarily represented creditors holding $1 billion of unsecured bond debt, filed an adversary proceeding to avoid and recover, as fraudulent transfers, the $500 million of liens on the Conveying Subsidiaries' assets and the $420 million of settlement proceeds. The Committee also sought to avoid and recover, as a preferential transfer, security interests in a $207 million tax refund, which TOUSA had granted to the new lenders in connection with settlement of the Transeastern Debt. Ruling in favor of the Committee, the bankruptcy court ordered a shocking array of remedies in favor of the bankruptcy estates, including avoidance of the $500 million of liens on the Conveying Subsidiaries' assets as fraudulent transfers under Bankruptcy Code sections 544 and 548 and New York and Florida state law; disallowance of the new lenders' claims against the Conveying Subsidiaries; disgorgement of all principal, interest, costs, expenses and other fees received by the new lenders; disgorgement of $403 million of the settlement proceeds plus 9% prejudgment interest per year from the date of the transaction (July 31, 2007); payment of the costs incurred by the debtors and the Committee in prosecuting the adversary proceeding, including the fees and expenses of their attorneys, advisers and experts; and avoidance of all liens on the $207 million tax claim as a preferential transfer under section 547.

The bankruptcy court's opinion has been criticized on several grounds, most notably with respect to the court's sweeping rejection and invalidation of so-called "savings clauses" in upstream guaranties.

The bankruptcy court's opinion has been criticized on several grounds, most notably with respect to the court's sweeping rejection and invalidation of so-called "savings clauses" in upstream guaranties. Savings clauses purport to protect a guaranty from being avoided as a fraudulent transfer by limiting the guarantor's liability to an amount that would not render the guarantor insolvent if the guaranty were enforced. In the TOUSA case, however, the bankruptcy court ruled that the savings clauses in the Subsidiary Guaranties were unenforceable because, among other things, they effectively prevented creditors from exercising their rights under federal bankruptcy law and state law to avoid fraudulent transfers. In other words, the court ruled that the savings clauses in the Subsidiary Guaranties constituted an impermissible "end run" around fraudulent transfer law.

Several of the defendants in the adversary proceeding have appealed the bankruptcy court's decision to the United States District Court for the Southern District of Florida. The appellate proceedings will be watched closely as likely having a significant impact on the law of fraudulent transfers and the practice of including savings clauses in guaranties.

IN THE NEWS

Distinctions

Craig D. Hansen (Phoenix), **Jordan A. Kroop** (Phoenix), **Stephen D. Lerner** (Cincinnati, New York), **Jeffrey A. Marks** (Cincinnati), **G. Christopher Meyer** (Cleveland) and **Thomas J. Salerno** (Phoenix) were listed in ***The Best Lawyers in America® 2010.***

The Best Lawyers in America has named a single lawyer in each discipline in each community to be honored as the "Lawyer of the Year" for 2010. Our bankruptcy practice is home to two of these distinguished lawyers:

- **Stephen Lerner** – Cincinnati Bankruptcy and Creditor Debtor Rights Lawyer of the Year
- **Thomas Salerno** – Phoenix Bankruptcy and Creditor Debtor Rights Lawyer of the Year

Stephen Lerner and **Christopher Meyer** were named by Legal Media Group, the legal publishing arm of Euromoney Institutional Investor, to its 2009 ***Guide to the World's Leading Insolvency and Restructuring Lawyers,*** the international legal market's leading guide to the top practitioners advising on insolvency and restructuring law.

Recent and Upcoming Speaking Engagements

Jeffrey Marks and **Sherri L. Dahl** (Cleveland) spoke on *Restructuring Strategies* at a corporate law seminar on October 16 sponsored by Capital University Law School in Columbus.

Christopher Meyer was featured on the panel *Myths and Realities of Chapter 11* on October 19 at the 83rd Annual National Conference of Bankruptcy Judges in Las Vegas. In addition, **Sandra E. Mayerson** (New York) presented the Kathryn R. Heidt Memorial Award during the ABA Business Bankruptcy Committee luncheon.

On October 23, **Craig Hansen, Jordan Kroop** and **Thomas Salerno** participated in the 21st Annual Arizona Bankruptcy Practice Seminar in Scottsdale. Jordan Kroop also edited the *Arizona Bankruptcy Practice* manual, written by members of the seminar faculty specifically for this program.

On October 28, **Sherri Dahl** spoke on a panel discussion entitled *Another One Bites the Dust – A Case Study of a Retail Bankruptcy* at the Real Estate Law Institute sponsored by the Cleveland Metropolitan Bar Association.

Squire Sanders sponsored the Structured Finance Conference in Karlsruhe, Germany on November 3-4, with **Dr. Andreas Fillmann** and **Jan Sudmeyer** (both of Frankfurt) participating in the conference.

On November 4, **Jordan Kroop** appeared at the Fall 2009 Meeting of the Commercial Finance and Uniform Commercial Code Committees of the ABA Business Law Section in Las Vegas to discuss *Workouts That Worked Out.*

Christopher A. Rose (Moscow) moderated the program *EU Regulation of the Private Equity Industry* on November 5 at C5's 14th Annual CEE Private Equity Forum in London. The program featured panellists **Kevin T. Connor** (Budapest, Bratislava, Warsaw), **Andreas Fillmann** and **Guido Panzera** (Bratislava) and included discussions on bankruptcies and restructurings that resulted from the recent financial crisis and the consequences for the private equity industry.

Carol M. Welu (London) presented the session *Global Reach of the FCPA: Traps for the Unwary* on November 12 at the 44th BME Symposium: Purchasing and Logistics: New Opportunities in Berlin. On the same day, **Andreas Fillmann** participated in the "Compliance in Purchasing" session as a member of a discussion panel, *Accidentally Corrupt – Do Small Gifts Preserve a Friendship?*

Robert A. Wolf (New York) chaired a New York State Bar Association program on *Receiverships in New York* on November 13.

On November 16, **Christopher Meyer** moderated a panel of nationally recognized bankruptcy and restructuring lawyers, *Reorganization in the Fast Lane: Automotive Chapter 11 Cases,* hosted by the American College of Bankruptcy and Cleveland-Marshall College of Law. **Stephen Lerner** participated as a panellist.

At the 2009 AICPA National Business Valuation Conference on November 16 in San Francisco, **Sandra Mayerson** presented *A Bankruptcy Perspective in Valuation Engagements – In Good Times and In Bad Times.*

Thomas Salerno participated in the panel *Multi-Jurisdictional Workout Issues* on November 18 at the 10th Annual European Real Estate Opportunity & Private Fund Investing Forum in London. Thomas also participated in a panel at the annual conference of TMA Germany on November 19 in Berlin, where he spoke about the Czech Republic's insolvency law.

Sandra Mayerson participated in the breakout session *Corporate Counsel: Bankruptcy Code* on November 20 at The Dayton Bar Association's 17th Annual Bench Bar Conference: Tools to Survive Changing Legal Times.

On December 9, **Sherri Dahl** spoke on 363 sales at a CLE event entitled *Introduction to Chapter 11 of the Bankruptcy Code* sponsored by the Bankruptcy and Commercial Law Section of the Cleveland Metropolitan Bar Association.

Sandra Mayerson will speak at the session *Unexpired Leases and Executory Contracts* on December 15 at the Practising Law Institute conference Nuts and Bolts of Corporate Bankruptcy in New York.

On March 18, **Thomas Salerno** will present *The Intersection of Bankruptcy Law and Franchise Law* at the Southeastern Bankruptcy Law Institute's 36th Annual Seminar on Bankruptcy Law and Rules in Atlanta. The next day, he will present *Defending Preference Actions.*

Media Appearances

The National Law Journal Nov. 30 featured an interview with **Stephen Lerner** regarding the landmark Chrysler bankruptcy. The interview was part of the publication's special section on bankruptcy.

The Deal quotes **Thomas Salerno** throughout a feature on the high-profile Phoenix Coyotes bankruptcy, which has been characterized as one of the most important US sports law matters of 2009. Thomas was also recently quoted regarding the bankruptcy by media such as **Reuters, Bloomberg.com, AmLawDaily** and **Law360. CBSSports.com** previously quoted Thomas Sept. 2 regarding aspects of the legal wrangle over control of the Coyotes. The **Daily Deal** and **Law.com** also published updates on the running dispute, noting that **Jordan Kroop** and **Kelly E. Singer** (Phoenix) join Thomas in representing debtor Dewey Ranch Hockey LLC.

Thomas Salerno was quoted by ***The Distressed Debt Report*** regarding challenges posed by non-US debt restructurings.

Stephen Lerner and **Christopher Meyer** were quoted Dec. 3 by ***The Plain Dealer*** regarding the AmTrust bankruptcy. The firm represents AmTrust.

The Arizona Republic quoted **Jordan Kroop** regarding a partial settlement between firm client Radical Bunny LLC and the US Securities & Exchange Commission. Regulators claim the company defrauded investors of nearly US$200 million.

The Deal quoted **Craig Hansen** Nov. 19 regarding Eurofresh Farms' exit from bankruptcy. Craig and **Kristen Richner** (Columbus) represent Eurofresh, a major produce company based in Arizona.

The **Associated Press** quoted **Jordan Kroop** Sept. 11 regarding competing bids for the Phoenix Coyotes.

Tri-State Online quoted **Jordan Kroop** Sept. 3 regarding firm client Laughlin Ranch, which recently emerged from bankruptcy.

Sergey A. Treshchev and **Patrick J. Brooks** (both in Moscow) published an article, "Russia's Rapidly Evolving Commercial Bankruptcy Law," in Financier Worldwide's ***Bankruptcy & Corporate Restructuring 2009 Ebook.*** Sergey and Patrick also published "The Commercial Bankruptcy Law of Russia: A Year of Change" in two parts in the September and October 2009 editions of the ***Russia/Eurasia Executive Guide.***

Our **bankruptcy practice group** published two timely alerts on topics relevant to our clients and friends:

- "Delaware Bankruptcy Court's *Pillowtex* Decision Favors Preference Defendant Relying on Subsequent New Value Defense"
- "Recent Bankruptcy Court Decisions Affecting Counterparties to Open or Terminated Derivative Contracts With Lehman Brothers Entities"

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