SQUIRE SANDERS | LEGAL COUNSEL WORLDWIDE

# BANKRUPTCY & RESTRUCTURING UPDATE

Squire, Sanders & Dempsey L.L.P.

**Spring 2010**

## RECENT NOTEWORTHY REPRESENTATIONS*



## ARTICLES



## CASE SUMMARIES



## IN THE NEWS



* PRIOR RESULTS DO NOT GUARANTEE OR PREDICT A SIMILAR OUTCOME IN ANY FUTURE CASE. RESULTS DEPEND UPON A VARIETY OF FACTORS UNIQUE TO EACH CASE.

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Dear Clients and Friends,

We are pleased to share with you the Spring 2010 edition of Squire Sanders' *Bankruptcy & Restructuring Update.* Our global practice has been integrally involved in a number of recent high-profile restructurings, including representing AmTrust Financial Corporation and the special litigation committee of the board of directors of Station Casinos, Inc., both cases highlighted in this Update.

You will also find timely articles on the US Bankruptcy Court for the Southern District of New York's adoption of the *Madoff* trustee's method of determining "net equity"; the strategic use of bankruptcy examiner requests; and the Second Circuit's conclusion that general unsecured creditors may include postpetition attorneys' fees as part of their claim in certain circumstances, as previously held by the Ninth Circuit.

The Update concludes with informative summaries of recent significant restructuring cases.

We thank you for your continued support.

– Squire Sanders Bankruptcy & Restructuring Group

## RECENT NOTEWORTHY REPRESENTATIONS

### Representing AmTrust Financial Corporation in Chapter 11 Proceedings Calls for Innovative and Shrewd Moves by Squire Sanders

– Sherri L. Dahl, *Cleveland*

In a move called "shrewd" by a bank regulator,[1] Squire Sanders filed chapter 11 bankruptcy cases for AmTrust Financial Corporation (nka AmFin Financial Corporation) and five subsidiaries in Cleveland, Ohio on November 30, 2009. AmTrust Financial was the holding company for AmTrust Bank, which is headquartered in Cleveland, with 66 branches nationwide and approximately 1,700 employees; AmTrust Bank was specifically excluded from the bankruptcy proceedings. Beginning bankruptcy

[1] *See* Teresa Dixon Murray, *AmTrust Parent Files for Bankruptcy*, THE PLAIN DEALER, Dec. 2, 2009, available at Cleveland.com www.cleveland.com/business/index.ssf/2009/12/amtrust_parent_files_for_bankr.html.

cases for a savings and loan association holding company, when its subsidiary thrift is not in receivership, is unusual. Here, Squire Sanders recognized that certain liens and payments provided to previously unsecured bondholders were subject to possible avoidance as preferences if bankruptcy proceedings were initiated within 90 days of such transfers. Failing to file for bankruptcy by the expiration of the preference period could have resulted in a windfall to the bondholders (by allowing their secured status to become immune to avoidance) and a detriment to other unsecured creditors. AmTrust Financial, with Squire Sanders' advice, sought and obtained acquiescence from the Office of Thrift Supervision (OTS) to commence bankruptcy proceedings in advance of an expected receivership and filed the petitions under the Bankruptcy Code prior to the conclusion of the preference period.

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Four days after the bankruptcy filing, the OTS took control of AmTrust Bank, and named the Federal Deposit Insurance Corporation (FDIC) AmTrust Bank's receiver. AmTrust Bank was the fourth-largest bank or savings and loan association put into receivership by the OTS during 2009. On the same day, pursuant to a purchase and assumption agreement, New York Community Bank (NYCB) acquired certain assets and assumed certain liabilities of AmTrust Bank from the FDIC. NYCB immediately assumed control over AmTrust's headquarters, employees and business records.

In the first 30 days of the bankruptcy, Squire Sanders (i) initiated a lawsuit seeking avoidance of actions taken by bondholders during the preference period, (ii) obtained court-authorized use of the debtors' cash during the bankruptcy, (iii) negotiated an information access agreement with the FDIC and (iv) began the process of untangling several benefits plans covering AmTrust Bank employees with AmTrust Financial named as plan sponsor.

Within the first 60 days of the bankruptcy, AmTrust Financial took the unusual step of seeking to compel access to AmTrust Financial's own records from NYCB in the bankruptcy court using Bankruptcy Rule 2004, a rule most often used by creditors to obtain information from debtors in bankruptcy. Ultimately, AmTrust Financial negotiated a transition services agreement with NYCB resulting in a mutually acceptable protocol for the flow of information from NYCB to AmTrust Financial.

Within the first 90 days of the bankruptcy, AmTrust Financial successfully conducted an auction process and obtained bankruptcy court authority to sell AmTrust Insurance Agency, Inc. to Novak Insurance Agency.

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AmTrust Financial is now faced with defending a controversial alleged priority capital maintenance claim asserted by the FDIC for more than $500 million. Early in the bankruptcy cases, in papers filed related to cash collateral usage, the FDIC asserted a $2 billion priority capital maintenance claim. During a hearing in December 2009, Squire Sanders' Stephen Lerner explained the "game changing" nature of the potential allowance of an alleged $2 billion priority capital maintenance claim. Subsequently, Squire Sanders filed a motion seeking estimation of the alleged capital maintenance at $0 and disallowance of such claim in its entirety.[2] The FDIC has filed responsive pleadings and has sought withdrawal of the reference to have the district court determine these matters. Many of the issues raised in the litigation are unprecedented and novel. The outcome of the litigation will have a dramatic impact on these cases.

In addition to the FDIC litigation, Squire Sanders continues to work with AmTrust Financial to (i) facilitate a Financial Industry Regulatory Agency (FINRA) audit and the related sale of AmTrust Financial's brokerage subsidiary, (ii) analyze the complex tax issues surrounding a potential tax refund of more than $180 million, (iii) review, analyze and maintain the debtors' assets and investment portfolio, (iv) review and analyze claims filed by creditors and (v) manage litigation in and outside of the bankruptcy court.

Through the combined efforts of our bankruptcy, employment, tax, corporate, financial services, regulatory and litigation professionals, Squire Sanders will continue to provide innovative solutions in these on-going proceedings.

[2] *See* Docket No. 320.

## Squire Sanders Represents Special Litigation Committee of the Board of Directors of Station Casinos, Inc.

– *Scott A. Kane, Cincinnati*

A team of Squire Sanders bankruptcy, litigation, and corporate lawyers recently represented a special litigation committee of the board of directors of Station Casinos, Inc. (SCI). SCI, through its affiliates, owns and operates numerous casino properties in the Las Vegas area and manages a casino in California for a Native American tribe. Prior to November 2007, SCI was publicly traded on the NYSE. In November 2007, the company completed an approximately $9 billion leveraged buyout (the LBO) that took the company private. The new owners were entities affiliated with senior management of SCI and a new private equity investor.

Following the closing of the LBO, SCI experienced significant declines in revenue and earnings. SCI (together with numerous affiliates) filed chapter 11 petitions in the United States Bankruptcy Court for the District of Nevada in July 2009. Anticipating that the LBO would draw significant scrutiny in the bankruptcy proceedings, SCI formed a special litigation committee (the Special Committee) prior to filing to conduct an independent investigation and analysis of the LBO. Over the course of approximately eight months, both pre- and post-filing, Squire Sanders represented the Special Committee in its investigation of the LBO. The Special Committee and Squire Sanders were also assisted by an independent financial advisor. The Special Committee's investigation included the legal and factual analysis of potential claims for actual and constructive fraudulent transfer, equitable subordination, breach of fiduciary duty and other theories. The Special Committee also analyzed the potential for "recharacterization," as disguised debt, of a master lease of four of the largest casino properties following an approximately $2.5 billion sale and leaseback transaction.

The Special Committee's investigation included the collection and review of relevant documents and electronically stored information, the analysis of financial projections and assumptions supporting the LBO, and numerous witness interviews of representatives of the company, financial advisors, lenders, auditors, appraisers, attorneys and others.

Following its investigation, the Special Committee prepared and filed with the bankruptcy court written reports detailing its investigation. The reports spanned several hundred pages and set forth the Special Committee's recommendations regarding potential claims based on its independent investigation. In a nutshell, the Special Committee recommended that the debtors-in-possession not pursue claims related to the LBO. The Special Committee concluded that while the LBO did leave SCI with approximately $1.6 billion in additional interest-bearing debt, the LBO was not the cause of SCI's financial demise. The Special Committee concluded, among other things, that the financial projections underlying the LBO were reasonable at the time they were made, that the assumptions and methodology were appropriate, and that SCI's chapter 11 filing was most directly explained by the severe, rapid and unanticipated deterioration of the local, national and global economies in 2008 and 2009.

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Based on the Special Committee's independent investigation and recommendations, the debtors-in-possession refused demands to bring claims challenging the LBO. The Official Committee of Unsecured Creditors (UCC) of SCI filed a motion requesting that the bankruptcy court grant it derivative standing to pursue claims related to the LBO and to seek recharacterization of the master lease as a disguised financing. Consistent with its independent investigation and conclusions regarding potential claims, the Special Committee filed an opposition to the motion, as did the debtors-in-possession and others. Ultimately, the bankruptcy court declined to allow the UCC to bring claims. In doing so, the bankruptcy court pointed in significant part to the Special Committee's prior investigation and analysis of the claims. The Special Committee and Squire Sanders believe that this was the appropriate result. Apart from the merits of the potential claims, SCI believes that the proactive approach of forming the Special Committee and authorizing a thorough and independent investigation of potential claims before filing saved significant time, effort and expense in its bankruptcy case and avoided significant disruption to its reorganization efforts.

## ARTICLES

### Bankruptcy Court Adopts *Madoff* Trustee's Method of Determining "Net Equity"

– *Peter R. Morrison, Cleveland*

The United States Bankruptcy Court for the Southern District of New York issued an important ruling on March 1, 2010 in the Securities Investor Protection Act (SIPA) liquidation of Bernard L. Madoff Investment Securities LLC (Madoff Securities), adopting the trustee's method of determining "net equity" for purposes of distributing "customer property" and Securities Investor Protection Corporation (SIPC) funds under SIPA.[3]

**Securities Investor Protection Act**

Congress enacted SIPA in 1970 in an effort to reinforce investor confidence in the US securities markets by establishing a mechanism for protecting investors from losses resulting from insolvent or unstable broker-dealers. As US Bankruptcy Judge Burton R. Lifland noted, "[a] SIPA liquidation is essentially a bankruptcy liquidation tailored to achieve SIPA's objectives." "Customers," as defined by SIPA, are given preferential treatment and entitlement to a *pro rata* share in the special fund of "customer property" that is set aside from the estate. Each customer's *pro rata* share is limited by the customer's "net equity." Customer property is often insufficient to cover a customer's net equity claims. To account for these situations, SIPA created SIPC, a nonprofit entity through which each customer is paid the "amount by which his net equity exceeds his ratable share of customer property," up to $500,000 for securities claims.

**The Madoff Ponzi Scheme**

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The *Madoff* proceeding involves more than 15,000 claims based on final customer statements that fictitiously portrayed $73.1 billion in net investments and related gains. Bernard Madoff ran the investment

[3] *In re Bernard Madoff Investment Securities, LLC, Debtor, Securities Investor Protection Corporation v. Bernard L. Madoff Investment Securities LLC,* 2010 Bankr. LEXIS 495 (Bankr. S.D.N.Y. 2010).

advisory arm of his firm as a traditional Ponzi scheme. As customers deposited investment money, rather than actually purchase the securities that were represented on customer statements, Madoff deposited the money into what was essentially a “slush fund” from which he fulfilled requests for distributions, supported operations and satisfied his own financial needs.

Madoff Securities issued entirely fictitious account statements to customers that stated gains from securities investments that never actually occurred. As the court pointed out, customer funds were never actually “exposed to the uncertainty of price fluctuation, and account statements bore no relation to the United States securities market at any time.” The fact that Madoff Securities never invested the money made it difficult to determine each customer’s net equity. When Madoff’s Ponzi scheme collapsed and SIPA liquidation began, Madoff Securities customers were left with final account statements indicating significant investment growth that never actually existed. This most recent proceeding attempted to unravel the resulting financial dispute between customers and the SIPA trustee over how to calculate a customer’s net equity.

**Net Investment Method v. Last Statement Method**

The trustee maintained that he should follow the “net investment method” whereby he would calculate net equity as the amount of cash deposited by the customer into its securities account less any amount withdrawn. Some of the objecting investors contended that the trustee should use the “last statement method” and simply look at the value of their portfolio on their last statement to calculate their net equity because that last statement shows significant earnings on their initial cash investments. Other objecting claimants maintained that the trustee should use the net investment method when distributing customer property but rely on the last statement method when distributing SIPC funds.

**The Court’s Analysis**

The court agreed with the trustee’s position and held that it must apply the net investment method. The court arrived at its conclusion that the net investment method is the proper way to calculate a customer’s net equity by examining the statutory language and legislative history, the bankruptcy avoidance powers, recent Second Circuit precedent, and principles of equity and practicality.

To determine the definition of net equity, the court begins by examining the plain language of the SIPA statute, which reads:

> The term "net equity" means the dollar amount of the account or accounts of a customer, to be determined by –
>
> > (A) calculating the sum which would have been owed by the debtor to such customer if the debtor had liquidated, by sale or purchase on the filing date, all securities positions of such customer . . . ; minus
> >
> > (B) any indebtedness of such customer to the debtor on the filing date . . . [4]

The court's primary focus was how to define a customer's "securities positions." The objecting parties contended that the court should rely on the legislative history, which speaks to making the customers whole and fulfilling their expectation, to support implementing the last statement method. Rejecting this position, the court dismissed any arguments based on customer expectations by pointing to the absurdity of the trustee relying on fictitious statements. Rather, the correct method to determine a customer's securities position is to look to the books and records of Madoff Securities, and not fictitious statements. The court further reasoned that the net investment method is most consistent with the plain language of the statute because the securities positions of the Madoff customers were in fact nonexistent and the trustee must therefore rely on verifiable information – deposits and withdrawals.

The court also concluded that the net investment method is consistent with the principle of the trustee's avoidance powers. While SIPA is codified in Title 15 of the US Code, a SIPA liquidation is conducted in accordance with Title 11, the Bankruptcy Code (the Code). The Code gives the SIPA trustee the power to avoid fraudulent transfers in order to benefit the customers. The court reasoned that the trustee's power to avoid fraudulent transfers, like those made in furtherance of a Ponzi scheme, is consistent with the net investment method – both work to discredit transfers of

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[4] 15 U.S.C. § 78lll(11)

fictitious amounts. Therefore, applying the net investment method is consistent with the statutory power to avoid fraudulent transfers.

The court then turned to Second Circuit precedent and found that the Second Circuit Court of Appeals' holding in *In re New Times Securities Services, Inc.,* 371 F.3d 68, 86 (2d Cir. 2004) supported the trustee's net investment method. In *New Times,* there were two types of claimants – those whose money was claimed to be invested in nonexistent money market funds (fake securities claimants), and those who were induced to invest in mutual funds that actually existed (real securities claimants). Real securities claimants were compensated via the last statement method, while the trustee employed the net investment method for the fake securities claimants. The court in *New Times* ruled in favor of the trustee and approved using the net investment method for the fake securities claimants, holding their claims should be based on the net cash that customers invested in the Ponzi scheme, not the fictitious interest or dividend reinvestments reflected on account statements.

The court in *Madoff* agreed with the trustee that *New Times* stands for the proposition that the net investment method is proper whenever a trustee would be required to rely on account statements bearing arbitrary amounts with no basis in reality.

Finally, the court supported its ruling with reference to principles of equity and practicality. Because the customer property available for distribution under a SIPA liquidation is a finite source of funds, the court reasoned that any dollar paid to reimburse a fictitious profit is one that is no longer available to pay the claim of a dollar invested. If the trustee used the last statement method, "net winners would receive more favorable treatment, profiting from the principal investments of net losers." "Net winners" are those who were able to recover some money from Madoff over time by withdrawing money that actually represented the investments of more recent customers – who become "net losers." These net winners have already collected their initial deposits from Madoff Securities, but the last statement method would permit these net winners to recover funds from the finite pool of customer property at the expense of the net losers, who would have recovered little or no money from Madoff before his Ponzi scheme collapsed. The court determined that the last statement method would create an unacceptable result by favoring the net winners rather than treating Madoff's victims equally, as does the net investment method.

Judge Lifland ultimately concluded that the net investment method provided the proper methodology to calculate net equity because it is consistent with the statutory scheme, Second Circuit precedent, and provides a fair "workable blueprint for distribution to the victims of Madoff's incogitable scheme."

**Stay Tuned . . .**

On March 8, 2010, at the request of the trustee and objecting investors, Judge Lifland certified his ruling for a direct appeal to the Second Circuit Court of Appeals. Accordingly, the issue of how to calculate net equity, so important to many thousands of investors harmed by the Madoff scandal, will likely be decided by the Second Circuit much sooner than if it had taken the normal route of an intermediate appeal to the US District Court for the Southern District of New York.

## Strategic Use of Bankruptcy Examiner Requests

*– Andrew M. Simon, Cincinnati*

Seeking to have an independent examiner investigate a debtor or its management can be a powerful tool available to creditors and other interested parties in a bankruptcy case. Typically, a party might request that an examiner be appointed if the debtor or its management is suspected of fraud or other misconduct. The low cost associated with making the request, together with recent positive outcomes for requesting creditors, may help to increasingly popularize the use of examiner requests by parties seeking leverage in bankruptcy plan negotiations.

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From the perspective of a debtor in possession, an examiner's investigation can be intrusive or disruptive to the management of its bankruptcy case. Additionally, examiners are often expensive and drain valuable estate assets. But when an interested party requests that an examiner be appointed, the court has little or no discretion to refuse – the appointment is likely mandatory under the Bankruptcy Code. As a result, when an examiner request is filed or threatened, the only practical way a debtor can avoid the appointment is by convincing the party to withhold or withdraw its request. This can force debtors to deal with parties who might otherwise lack significant negotiating leverage.

**Statutory Basis for Examiner Appointments**

The Bankruptcy Code mandates that an examiner be appointed upon the request of an interested party and if certain basic criteria are met. Bankruptcy Code section 1104(c) provides that, as long as a court has not already appointed a trustee or confirmed a plan of reorganization, any interested party may request that an examiner be appointed.[5] After the request is made, "the court shall order the appointment of an examiner . . . if . . . the debtor's fixed, liquidated, unsecured debts, other than debts for goods, services, or taxes, or owing to an insider, exceed $5,000,000," a fairly low threshold in most corporate bankruptcy cases.[6] Additionally, examiner appointments are mandatory under section 1104(c)(1) if the appointment "is in the interests of creditors, any equity security holders, and other interests of the estate."

Once the court directs the appointment to be made, the United States trustee is actually charged with making the appointment of the examiner pursuant to section 1104(d). The trustee's appointee must be a disinterested person and cannot be the trustee himself.

**Interpretations of Section 1104(c) in Case Law**

Although some published opinions hold that courts retain discretion to refuse appointment requests, by interpreting "shall" to mean "may" in section 1104(c)[7], many courts disagree, and have found that "shall" means "must."[8] The only circuit-level opinion to address this issue refutes this conclusion.[9] In *Revco,* the Sixth Circuit reversed a bankruptcy court's refusal to appoint an examiner to investigate the debtor's prepetition leveraged buyout, holding that "the statute requires the court to appoint an examiner" when more than $5 million of unsecured debts are involved. The majority of examiner

[5] 11 U.S.C. § 1104(c).
[6] 11 U.S.C. § 1104(c)(2).
[7] *See, e.g., In re Rutenberg,* 158 B.R. 230 (Bankr. M.D. Fla. 1993); *In re Shelter Resources Corp.,* 35 B.R. 304, 305 (Bankr. N.D. Ohio 1983).
[8] *See, e.g., In re Mechem Financial of Ohio, Inc.,* 92 B.R. 760, 761 (Bankr. N.D. Ohio 1988); *In re The Bible Speaks,* 74 BR 511, 514 (Bankr. Mass 1987).
[9] *Morgenstern v. Revco D.S., Inc. (In re Revco D.S., Inc.),* 898 F.2d 498 (6th Cir. 1990).

requests today are granted based on the same plain language reasoning as the *Revco* court employed.[10]

Federal bankruptcy statutes have long provided for bankruptcy examiners. The current language in section 1104(c) is rooted in Chapter X of the pre-1978 Bankruptcy Act, and was largely designed to protect stakeholders of large publicly traded debtors. Despite the long history behind the current provision's language, employment of bankruptcy examiners has become significantly more prominent over the past 10 years or so.

Creditors and other parties favor the use of examiners partly because they are relatively inexpensive to the requesting party. The mandatory language of 1104(c)(2) often results in estate-paid examiners being appointed at the request of parties who must come out of pocket for little more than drafting and filing the request. Courts have appointed examiners in a number of recent notable cases. Some examples include *In re Lyondell Chemical Co., et al.,* Case No. 09-10023 (Bankr. S.D.N.Y.), *In re Fontainebleau Las Vegas LLC, et al.,* Case No. 09-21482 (Bankr. S.D. Fla.), *In re TCI 2 Holdings LLC, et al.,* Case No. 09-13654 (Bankr. N.J.), *In re DBSI Inc., et al.,* Case No. 08-12687 (Bankr. Del.), and *In re UAL Corp., et al.,* Case No. 02-48191 (Bankr. N.D. Ill.).

**Examiner Appointments Generate Results**

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Another reason examiner requests have gained popularity is because examiners are often effective in furthering the agendas of interested parties. Famously, the examiner appointed in *Enron* produced four separate reports that cost the estate nearly $90 million in examiner fees. Some argue that the examiner fees were money well spent, as the reported finding provided part of the basis for criminal charges against ex-management and opened the door for the recovery of billions of dollars to the estate in so-called "mega-claims" litigation.

[10] *See, e.g., In re Loral Space & Communications Ltd.* (S.D.N.Y. 2004) (district court found that bankruptcy court had no discretion to deny equity holders' request to appoint an examiner because the debt threshold was met).

In *Loral Space and Communications (In re Loral Space & Communications Ltd.* (S.D.N.Y. 2004)), shareholders petitioned the court unsuccessfully several times to appoint an official committee of equity holders, arguing that the debtors' valuation was too low. Each time, the court rejected their request, reasoning that the equity was worthless and holders had no interests to protect. When equity holders shifted their strategy and requested instead that an examiner be appointed, the bankruptcy court still refused. The holders appealed to the district court, which ordered the appointment.

The resultant examiner's report suggested a much higher valuation than the debtors' financial advisors had proposed. In response to this higher possible valuation, an official shareholder committee was appointed. Ultimately, shareholders did not recover anything under the plan, but the examiner request had provided them an opportunity to protect any interests they might have had.

In early 2010, the examiner appointed in *Lehman Brothers (In re Lehman Brothers Holdings, Inc., et al.,* Case No. 08-13555 (Bankr. S.D.N.Y.)) filed a report that numbers well over 2,200 pages in nine volumes. The examiner's findings included evidence that potentially misleading accounting methods were partially to blame for Lehman's swift collapse. The report could result in civil or even criminal charges being brought against Lehman or members of its pre-bankruptcy management. After the examiner's report is more fully analyzed by the bankruptcy court, creditors and other parties-in-interest, and regulatory authorities, its full impact will begin to emerge.

**Using Examiner Requests Strategically**

*Examiner requests can be effective even when they are not granted, but instead are threatened or filed and withdrawn.*

Examiner requests can be effective even when they are not granted, but instead are threatened or filed and withdrawn. In *FairPoint Communications (In re FairPoint Communications, Inc., et al.,* Case No. 09-16335 (Bankr. S.D.N.Y.)), senior noteholders used the threat of an examiner appointment to improve their treatment under the plan of reorganization. The noteholders had been negotiating an out of court debt-for-equity exchange prior to the debtors' bankruptcy filing. This plan would have left the debtors' secured credit facility in place and shifted ownership of the company to noteholders.

The debtors significantly revised their projections and instead negotiated a prepackaged bankruptcy with senior lenders, which proposed granting 2% ownership of the reorganized company to unsecured creditors and 10% to management. The noteholders filed a motion seeking appointment of an examiner to investigate a leveraged buyout, stock dividend and other prepetition transactions involving the debtors. After the examiner request was withdrawn, the debtors filed a revised plan that would allocate 8% of the reorganized company and warrants to purchase additional stock to unsecured creditors and the remainder to senior lenders. It appears that the noteholders used the threat of an examiner request in part to improve their negotiating position with the debtors.

Although examiner appointments are usually considered mandatory, the Bankruptcy Code does provide the court discretion to check the breadth of the examiner's investigation. The Sixth Circuit explicitly recognized this in *Revco,* noting that under section 1104(c) "the bankruptcy court retains broad discretion to direct the examiner's investigation, including its nature, extent, and duration." Once an examiner is appointed, sections 1106(a) and (b) describe certain duties, but for every one, the qualifier "unless the court orders otherwise" is included.

In *Lyondell,* the court approved an examiner request, limiting the scope of the examiner's investigation to focus only on a proposed rights offering. After the report was filed, the court determined that the rights offering posed no cause for concern and denied a request filed by unsecured creditors who sought to expand the examiner's role. In theory at least, a court could order the appointment of an examiner and then fully limit the scope of its duties.

**Conclusion**

Given the recent uptick in such motions and the results they appear to have generated, expect to see more of these as this current bankruptcy cycle plays out. It is reasonable to expect that as the frequency of examiner requests increases, so too will resistance from courts in the form of scope limitations.

## Second Circuit Joins Ninth in Permitting General Unsecured Creditors to Include Attorneys' Fees as Part of Their Claim

– *Bradley A. Cosman, Phoenix*

In *Ogle v. Fidelity & Deposit Co. of Maryland,* 586 F.3d 143 (2d Cir. 2009), the Second Circuit has now become the second circuit court of appeals to recently conclude that general unsecured creditors may include postpetition attorneys' fees as part of their claim when attorneys' fees are permitted by contract or applicable state law.[11]

In *Ogle,* Fidelity had issued surety bonds to various third parties. Agway, the debtor, made an agreement to indemnify Fidelity for the payments made under the bonds as well as any legal fees incurred to enforce the agreements. After filing chapter 11, Agway defaulted on its indemnity payments to Fidelity. Fidelity subsequently incurred attorneys' fees attempting to enforce its rights under the indemnity agreement and, in turn, sought to recover those attorneys' fees as part of its unsecured claim.

At issue in *Ogle* was whether Bankruptcy Code sections 502(b) or 506(b) or policy concerns bar an unsecured creditor's ability to recover postpetition attorneys' fees.

**Postpetition Attorneys' Fees Are Simply Contingent, Unliquidated Amounts as of the Petition Date and Not Barred by Bankruptcy Code Section 502(b)**

Bankruptcy Code section 502(b) provides that the "court, after notice and a hearing, shall determine the *amount of [a] claim . . . as of the date of filing the petition.*" (emphasis added). The trustee argued that the "as of the date of filing" language of section 502(b) barred postpetition fees because postpetition fees were contingent and unliquidated as of the petition date. The Second Circuit expressly rejected this argument, however, concluding that a contingent right to fees arose when the agreement was executed, not when the fees were incurred. That is, even though the attorneys' fees arose out of postpetition events, the contingent right to recover such fees arose prepetition. Moreover, the fact that the postpetition attorneys' fees were unliquidated as of the petition date was not a bar to recovery because the Bankruptcy Code's definition of "claim" expressly extends to unliquidated amounts.[12]

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[11] *See also In re SNTL Corp.,* 571 F.3d 826 (9th Cir. 2009).
[12] *See* Bankruptcy Code section 101(5).

**Bankruptcy Code Section 506(b) – Which Expressly Applies to Oversecured Creditors – Does Not Create a Negative Inference Barring Unsecured Creditors From Recovering Postpetition Attorneys' Fees**

The trustee alternatively argued that since Bankruptcy Code section 506(b) only expressly permits oversecured creditors to recover fees, the requisite negative inference is that unsecured creditors may not collect fees. The Second Circuit, however, refused to assume that Congress intended to exclude unsecured creditors from collecting reasonable fees through negative inference, noting that neither section 506(b) nor the Bankruptcy Code's legislative history mentions the status of unsecured creditors collecting fees.

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**Allowing Unsecured Claims for Postpetition Attorneys' Fees Does Not Unfairly Disadvantage Other Creditors**

Finally, the Second Circuit rejected the trustee's policy argument that allowing unsecured claims for contractual postpetition attorneys' fees would unfairly disadvantage other creditors, such as tort claimants and trade creditors, whose distributions would be correspondingly reduced. The Second Circuit concluded that creditors who had contractual rights to recover attorneys' fees most likely received such rights in exchange for giving value, in the form of a contract term favorable to the debtor or otherwise, and such creditors should not be denied the benefit of their bargain.

**Potential Effects of the *Ogle* and *SNTL* Ruling**

Debtors should expect *Ogle* and *SNTL* to embolden individual unsecured creditors to become more litigious in cases where a significant distribution to unsecured creditors is expected. And while fee requests under *Ogle* and *SNTL* will, of course, remain subject to the bankruptcy court's review for reasonableness, debtors will incur additional associated costs. On the other side of the coin, *Ogle* and *SNTL* suggest vendors and suppliers should insist on including a contractual right to attorneys' fees and costs in their customer contracts. Moreover, all unsecured creditors are incentivized to research whether a contractual or statutory basis exists for including postpetition attorneys' fees as part of their claim.

## CASE SUMMARIES

### Third Circuit Restricts Lenders' Right to Credit Bid on Collateral Sold Through a Plan of Reorganization

– Christine Murphy Pierpont, *Cleveland*

The Third Circuit Court of Appeals dealt a blow to secured creditors in its recent decision holding that a debtor may prohibit a lender from credit bidding on its collateral in connection with a sale of assets under a plan of reorganization. In the case of *In re Philadelphia Newspapers, LLC,* No. 09-4266 (3d Cir. Mar. 22, 2010), the court, in a 2-1 decision, determined that a plan that provides secured lenders with the "indubitable equivalent" of their secured interest in an asset is not required to permit credit bidding when that asset is sold. The *Philadelphia Newspapers* decision follows a similar ruling last September by the Fifth Circuit in *In re Pacific Lumber Co.,* 584 F.3d 229 (5th Cir. 2009).

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**Factual Background**

On February 22, 2009, Philadelphia Newspapers, LLC and eight affiliates (the debtors) filed for relief under chapter 11 of the Bankruptcy Code before the United States Bankruptcy Court for the Eastern District of Pennsylvania (the bankruptcy court). The debtors own and operate the two major newspapers in Philadelphia, as well as a related website and certain ancillary businesses that they had purchased in 2006 for approximately $515 million. To finance the purchase, the debtors borrowed approximately $295 million from a group of lenders (the lenders) under a credit agreement that provided the lenders with a first priority lien on substantially all of the debtors' real and personal property.

In August 2009, the debtors proposed a plan of reorganization (the plan) and entered into an asset purchase agreement with Philly Papers, LLC (the buyer) pursuant to which the buyer agreed to serve as a stalking horse bidder for the acquisition of the debtors' assets that were to be sold (the asset sale) under the plan. The buyer was formed and owned by holders of approximately 50% of the shares in Philadelphia Media Holdings, LLC, one of the debtors. The plan proposed to satisfy the lenders' claims through a combination of cash generated from the asset sale and the transfer of ownership of certain real estate, the value of which together was estimated to be $66 million. The debtors asserted that this plan treatment provided the lenders with the "indubitable equivalent" of the value of their secured interest under section 1129(b)(2)(A)(iii) and therefore met the "fair and equitable" requirement of section 1129(b).

In conjunction with the asset sale, the debtors proposed bidding procedures that specifically precluded the lenders from submitting a credit bid and required that all bids be in cash. The lenders objected to the bidding procedures and argued that section 1129(b)(2)(A) specifically protected their right to credit bid.

**Procedural Background**

In October 2009, the bankruptcy court agreed with the lenders and denied the debtors' bidding procedures, finding that the Bankruptcy Code entitles a secured lender to credit bid its debt in an asset sale under a plan. On appeal, the district court reversed, finding that section 1129(b)(2)(A) provides three separate and distinct alternatives for satisfaction of plan confirmation over the objections of a secured creditor: retention of liens and deferred cash payments under subsection (i); a free and clear sale of assets subject to credit bidding under subsection (ii); or provision of the "indubitable equivalent" of the secured interest under subsection (iii), and holding that the third of these, the "indubitable equivalent" alternative chosen by the debtors, did not entitle the lenders to credit bid their debt. Thereafter, the lenders filed an appeal with the Third Circuit Court of Appeals, which affirmed the district court's decision.

**The Third Circuit's Decision**

The Third Circuit opinion focused on what it called the "central question" of the appeal: the meaning of Bankruptcy Code section 1129(b) and what rights it confers on secured lenders as a matter of law. The court began its analysis by noting that a plan sale of assets is authorized under section 1123(a)(5)(D) of the Bankruptcy Code but that section 1123(a)(5)(D) does not contain explicit procedures for the sale of assets that are secured. Lacking such direct authority, the court then looked to the plan confirmation provision in section 1129(b) of the Code to determine what requirements must be satisfied in order to confirm a plan that includes an asset sale. Section 1129(b) provides circumstances under which a reorganization plan can be confirmed over the objection of secured creditors – a process referred to as a "cramdown" because the secured claims are reduced to the present value of the collateral, while the remainder of the debt becomes unsecured, forcing the secured creditor to accept less than the full value of its claim. Section 1129(b)(1) requires the court to assess whether the proposed treatment of the secured claims is "fair and equitable."

Closely following the reasoning in the district court's earlier decision, according to the Third Circuit, the three subsections of section 1129(b)(2)(A) each propose "fair and equitable" means of satisfying a lender's lien against assets of the bankruptcy estate: subsection (i) provides for the transfer of assets with the liens intact and deferred cash payments equal to the present value of the lender's secured interest in the collateral; subsection (ii) provides for the sale of the collateral free and clear of liens so long as the lender has the opportunity to "credit bid" at the sale; or subsection (iii) provides for the realization of the claim by any means that provides the lender with the "indubitable equivalent" of its claim. Because section 1129(b) is phrased in the disjunctive – that is, each subsection is separated by the word "or" – the provision operates to provide alternatives. The debtor may proceed under subsection (i), (ii) *or* (iii), and need not satisfy more than one subsection. Thus, the Third Circuit concluded that 1129(b)(2)(A) unambiguously permits a court to confirm a reorganization plan so long as secured lenders are provided the "indubitable equivalent" of their secured interest.

The court recognized that there may be cases where credit bidding is required, stating "our holding here only precludes a lender from asserting that it has an absolute right to credit bid when its collateral is being sold pursuant to a plan of reorganization." The holding is further limited to the preconfirmation process, and a secured creditor can still object to plan confirmation on a variety of bases, including that the absence of a credit bid did not provide it with the "indubitable equivalent" of its collateral. Objections by secured creditors to confirmation of a plan based on credit bid preclusion may include: the restriction of credit bidding failed to generate fair market value at the auction; a foreclosure auction would have generated greater value than the plan sale; or the process did not provide for adequate marketing.

*The court recognized that there may be cases where credit bidding is required, stating "our holding here only precludes a lender from asserting that it has an absolute right to credit bid when its collateral is being sold pursuant to a plan of reorganization."*

Circuit Judge Ambro wrote a lengthy dissenting opinion. Judge Ambro argued that subsection 1129(b)(2)(A)(ii) (which includes a secured creditor's right to credit bid) is the exclusive subsection of 1129(b)(2)(A) applicable to sales under plans of reorganization. Further, he emphasized the importance of a secured creditor's right to credit bid at any sale, including a sale under a plan of reorganization, as a means to permit secured creditors to protect against the undervaluation of secured assets at a sale, pointing out that such undervaluation in this case likely benefited only the buyer, who had substantial insider and equity ties. He was troubled by other practical concerns as well, such as the potential increase in the cost of credit as secured creditors were denied the benefit of their bargain.

**Conclusion**

The *Philadelphia Newspapers* decision, coupled with the earlier *Pacific Lumber* case, gives debtors new leverage in negotiating with lenders and in structuring sales in chapter 11 cases. On the other hand, secured creditors are likely to consider conditioning debtor-in-possession financing or the use of cash collateral on the debtor's agreement to include the right to credit bid at any sales (including sales under plans of reorganization) of their collateral.

## Third Circuit Reaffirms 1999 *O'Brien* Decision Regarding Application of Bankruptcy Code Section 503(b) to Break-Up Fees of Stalking Horse Bidders

– *Nicholas Brannick, Columbus*

In 1999 the Third Circuit Court of Appeals rendered its decision in *Calpine Corp. v. O'Brien Environmental Energy, Inc. (In re O'Brien Environmental Energy, Inc.),* 181 F.2d 527, denying Calpine Corporation's request for the payment of a break-up fee after Calpine lost its effort to acquire the assets of O'Brien Environmental Energy out of bankruptcy. In *O'Brien,* the Third Circuit held that a prospective bidder seeking the payment of a break-up fee must satisfy the requirements of section 503(b) of the Bankruptcy Code, which allows for the payment of claims as priority administrative claims where those claims reflect "the actual, necessary costs and expenses of preserving the [bankruptcy] estate."[13]

[13] *See* 11 U.S.C. § 503(b); *O'Brien,* 181 F.2d at 536.

A decade later the Third Circuit has reaffirmed its decision in *O'Brien,* notwithstanding the proliferation of break-up fees in bankruptcy cases involving the sale of all or substantial portions of the debtor's assets under section 363 of the Bankruptcy Code.[14]

The debtors in *Reliant* sought to sell their largest asset, a power plant. With the assistance of their consultants, the debtors ran a marketing process through which they solicited 115 potentially interested purchasers, from whom they obtained 38 signed confidentiality agreements, of whom 24 prospective purchasers conducted due diligence.[15] Ultimately 12 parties submitted bids to purchase the power plant, including Kelson Channelview LLC (Kelson) and Fortistar.[16] Kelson's bid, in the amount of $468 million, was the only bid that did not have financing contingencies and was, therefore, selected as the winning bid.[17] Thereafter, the debtors entered into an asset purchase agreement (the APA) with Kelson.

The APA provided that the debtors would "file a bidding procedures motion with the Bankruptcy Court . . . *seeking* the entry of an order approving the bid protections."[18] Specifically, the bid protections Kelson sought included the requirement that any topping bid exceed Kelson's bid by $5 million, a break-up fee of $15 million and expense reimbursement of up to $2 million.[19] After the bankruptcy court declined to approve the sale of the power plant to Kelson without the debtors first holding a bidding process, the debtors sought approval of the bid protections.[20] Fortistar objected to the approval of the bid protections, arguing that they would chill bidding for the power plant by other prospective purchasers, including itself.[21]

**The Bankruptcy Court's Ruling**

The bankruptcy court approved the topping bid requirement and the expense reimbursement requirement, but denied approval of the break-up fee.[22] Of particular importance to the bankruptcy court was the existence of another party that had expressed its interest and intention to bid.[23] According to the bankruptcy court: "It's hard generally to consider how bid protections or break-up fees protect the estate.

14 *See In re Reliant Energy Channelview LP,* 594 F.3d 200 (3d Cir. 2010).
15 *Id.* at 202.
16 *Id.*
17 *Id.*
18 *Id.* at 207 (emphasis supplied by court).
19 *Id.* at 203.
20 *Id.*
21 *Id.*
22 *Id* at 204.
23 *Id.*

I've heard the arguments and have approved them in the case where the . . . parties have convinced me that it is the only way to get other bidders, any bidder to the table. But I'm not convinced in this case that that is the case. There are other bidders, at least one other bidder. And I have in the past denied break up fees in circumstances where another party had appeared and expressed an intention to bid at the auction."[24] The Third Circuit rejected Kelson's argument that the bankruptcy court established a *per se* rule that break-up fees are not allowed where there is another bidder, finding that the bankruptcy court merely recognized that, as a factual matter, they "are often not needed when there are bidders for an asset other than the initial bidder."[25]

*The Third Circuit rejected Kelson's argument that the bankruptcy court established a* per se *rule that break-up fees are not allowed where there is another bidder.*

Kelson dropped out of the auction process, and the power plant was ultimately sold to Fortistar for a bid that was $32 million greater than that of Kelson.[26] The debtors paid Kelson's expenses but did not pay the break-up fee. The bankruptcy court denied Kelson's request for payment of the break-up fee, and Kelson appealed to the district court, which also denied the request.[27]

**The Third Circuit Upholds the Lower Courts' Rulings**

The Third Circuit, applying *O'Brien,* acknowledged that a break-up fee may be necessary to preserve the value of the estate in two scenarios: (1) where the opportunity to obtain the break-up fee could have induced the bidder to make its bid before the bankruptcy court ordered the auction or (2) where the break-up fee is necessary to induce the bidder to adhere to its bid after the court enters an order to conduct the auction.[28] The Third Circuit rejected Kelson's argument that collateral benefits that might emanate from the offer to purchase itself, such as the satisfaction of all creditor claims, satisfy the *O'Brien* requirement or section 503(b) of the Bankruptcy Code.[29]

As to the first scenario, the Third Circuit stated that while it understood "that the first bidder may be motivated in part to submit its bid by the possibility that it will receive a break-up fee, it does not follow from the motivation that the bidder will withdraw its bid, pass up on the opportunity to acquire the asset

[24] *Id.*
[25] *Id.* at n. 5.
[26] *Id.*
[27] *See Kelson Channelview LLC v. Reliant Energy Channelview, LP (In re Reliant Energy Channelview LP),* Civ. Act. No. 08-409-JF, 2009 U.S. Dist. LEXIS 26994 (D. Del., Mar. 31, 2009).
[28] *In re Reliant Energy Channelview LP,* 594 F.3d at 205-06.
[29] *Id.* at n. 9.

to be sold, and nullify its working in preparing its bid if a court, when ordering that there be an auction of assets, declines to authorize a break-up fee to be paid to the initial bidder."[30] With regard to Kelson, the Third Circuit was convinced "beyond doubt" that Kelson did not condition its bid on the presence of the break-up fee because the APA itself merely required the debtors to seek a break-up fee and did not condition Kelson's bid on actually *obtaining* that break-up fee. Thus, Kelson was not induced to bid by the break-up fee itself.

As to the second scenario, the Third Circuit acknowledged that a "break-up fee certainly provides a benefit to an estate if a bidder remains committed to a purchase," although the court saw "no reason to believe that bidders who already have made a full and complete bid necessarily will abandon their efforts to obtain an asset without a break-up fee."[31] As to Kelson, the Third Circuit declined to find reversible error in the bankruptcy court's conclusion that the $15 million Kelson break-up fee was a deterrent to additional bidding that far outweighed any possible benefit achieved from keeping Kelson committed to the deal.[32] Moreover, the bankruptcy court was satisfied, as was the Third Circuit, that the break-up fee was unnecessary due to the fact that Fortistar was waiting in the wings to bid, the language of the APA was binding on Kelson and there was a logical belief that Kelson would not abandon its bid if no other bidder materialized.[33]

The Third Circuit rejected several other arguments advanced by Kelson. These included the argument that no creditors objected to payment of the break-up fee, to which the Third Circuit responded that "[c]learly section 503(b) does not give the Bankruptcy Court authority to award fees solely because there is not objection to them from a party-in-interest."[34] The Third Circuit also rejected the argument that the break-up fee reflected an exercise of the debtors' business judgment, referring to the *O'Brien* decision's conclusion that the business judgment rule should not be considered in determining whether a requested fee should be approved under section 503(b) of the Bankruptcy Code as a necessary expense of preserving the estate.[35] Finally, the Third Circuit rejected the argument that the debtors were estopped from opposing the break-up fee because they had initially supported it, noting that debtors-in-possession have a duty to maximize the value of the estate and that the debtors had

[30] *Id* at 207.
[31] *Id* at 207-08.
[32] *Id* at 208.
[33] *Id.*
[34] *Id.*
[35] *Id.* at 209 (quoting *O'Brien,* 181 F.3d at 535).

convincingly argued that changed circumstances led them to believe that the break-up fee would harm the estate and violate that fiduciary duty.

**Takeaways from the *Reliant* Ruling**

The *Reliant* decision is important to bankruptcy practitioners and their clients, particularly those who file in Delaware, for several reasons. First, it reminds all parties that break-up fees are not a given in every case in which a party agrees to be a stalking horse bidder and that the fee should not only be reasonable, but provide some direct benefit to the estate. Second, the Third Circuit's cursory dismissal of Kelson's ancillary arguments regarding the absence of any objection by other creditors and the debtors' business judgment in agreeing to the break-up fee instruct all parties that bankruptcy courts cannot, as the Third Circuit states, "create new ways to authorize the payment of fees from a bankruptcy estate . . . [or] methods of recovering fees from an estate" that are not supported by the Bankruptcy Code.

*The Reliant decision may create a conundrum for debtors seeking to sell their assets and bidders seeking bid protections to serve as a stalking horse.*

Finally, the *Reliant* decision may create a conundrum for debtors seeking to sell their assets and bidders seeking bid protections to serve as a stalking horse. The sale of substantially all of a debtor's assets pursuant to section 363(b) of the Bankruptcy Code in Delaware requires a showing that, among other things, there is a sound business purpose for the sale and that the proposed sale price is fair.[36] As a result, selling assets in bankruptcy generally requires an auction process in order to establish that the proposed sale price is the highest and best price for the assets. However, a successful auction process that generates numerous interested parties is likely to result in denial of any break-up fee. Consequently, it may become more challenging for debtors to find stalking horse bidders and for those bidders to obtain break-up fees as a result of *Reliant.* Of course, *Reliant* does not really add anything new to *O'Brien,* which has been the law in the Third Circuit for more than a decade, and yet the section 363 sale process has grown exponentially, along with the presence of break-up fees, during that decade. Accordingly, reports of the death of the break-up fee may be greatly exaggerated.

[36] *See, e.g., In re Delaware & Hudson Ry. Co.,* 124 B.R. 169, 176 (D. Del. 1991).

# IN THE NEWS

## Distinctions

**Stephen D. Lerner** (Cincinnati, New York), **Jeffrey A. Marks** (Cincinnati) and **G. Christopher Meyer** (Cleveland) have been listed as **Ohio Super Lawyers** in a survey distributed by *Law & Politics* magazine.

**Sherri L. Dahl** (Cleveland) was selected by her peers as an **Ohio Super Lawyer–Rising Star,** being among the top up-and-coming lawyers, defined as 40 years of age and younger or in the practice of law for less than 10 years.

## Recent and Upcoming Speaking Engagements

**Sandra E. Mayerson** (New York) spoke at the session *Unexpired Leases and Executory Contracts* on December 15, 2009 at the Practising Law Institute conference "Nuts and Bolts of Corporate Bankruptcy" in New York.

On March 18, 2010, **Thomas J. Salerno** (Phoenix) presented *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 presented *Defending Preference Actions.*

In April 2010, **Stephen Lerner** was a guest lecturer teaching on the acquisition of distressed companies in multiple sections of the *Private Equity Finance Course* at Harvard Business School.

**Robert A. Wolf** (New York) will serve as the overall planning co-chair of the New York State Bar Association's program "Practical Skills – Mortgage Foreclosures and Workouts," which will take place in Albany, Buffalo, Long Island, New York City, Rochester and Syracuse on various dates in April. Robert will also serve as local chair of the New York City program on April 22.

On April 28, **Christopher Meyer** will speak at a panel discussion, *FDIC Bank Takeovers,* sponsored by the Turnaround Management Association Ohio Chapter.

Squire Sanders is proud to renew its longstanding sponsorship of the *Business Money* "All-Asset Finance Conference," which will take place on April 29 in London. **Andrew J. Knight** (London), **Guy F. Guinn** (Cleveland) and **Grant M. Jones** (London) will be speakers at the conference.

**Thomas Salerno** and **Jordan A. Kroop** (Phoenix) will serve as faculty at the 9th Annual American Bankruptcy Institute/Tulane University Law School "Litigation Skills Symposium" to be held at Tulane Law School in New Orleans on May 11-14.

**Sherri Dahl** will participate on a panel at the 2010 "William J. O'Neill Great Lakes Regional Bankruptcy Institute," sponsored by the Cleveland Metropolitan Bar Association, on May 13. The panel will discuss credit bidding, gifting, 503(b)(9) claims, reclamation claims, preference defenses and DIP priming liens.

On May 24, 2010, **Sandra Mayerson** will participate on a panel at the seminar "The Intersection of Federal Bankruptcy and State Corporate Law" to be held by the University of Delaware Widener Law School.

## Media Appearances

**Peter A. Zisser** (New York) March 29 posted an article on **Law360** regarding granting third party releases under chapter 15.

The ***Phoenix Business Journal*** quoted **Thomas Salerno** March 22 about a potential sale of the Phoenix Coyotes professional hockey team. We represent the team in chapter 11 proceedings.

***The Deal*** noted **Squire Sanders'** active bankruptcy practice in a March 10 article analyzing results of the 2009 Bankruptcy League Tables maintained on pipeline.thedeal.com. Our practice is ranked 30th based on law firm 2009 bankruptcy representations.

***Crain's Cleveland Business*** quoted **Christopher Meyer** Feb. 11 on a US bankruptcy court decision that allows our client AmTrust Financial to sell an insurance agency unit. *Crain's Cleveland Business* also quoted Christopher Jan. 7 in connection with AmTrust's bankruptcy proceedings.

***The Deal*** Jan. 21 noted **Sandra Mayerson** and **Peter A. Zisser** (New York) are debtor counsel for real estate holding company Rubicon US REIT Inc.

**Thomas Salerno** was quoted Jan. 1 on **Law360** regarding ways the US bankruptcy system could be improved.

***American Bankruptcy Institute Journal*** published an analysis of the high-profile Phoenix Coyotes bankruptcy in its December 2009-January 2010 issue, noting “world-class lawyering” throughout the case. The article also notes that **Thomas Salerno** participated in an ABI podcast interview regarding the bankruptcy.

The December issue of ***Corporate Counsel*** included **Stephen Lerner**’s *National Law Journal* question-and-answer interview regarding bankruptcy trends.

**AmLaw Daily** Dec. 17 noted **Squire Sanders’** representation of Stations Casino in an overview feature of 10 AmLaw firms participating in the “year’s craziest bankruptcies.”

**AmLaw Daily** Dec. 11 noted that **Stephen Lerner, Christopher Meyer, Christine M. Pierpont** (Cleveland), **Sherri Dahl** and **Elliot M. Smith** (Cincinnati) are the Squire Sanders team representing AmTrust Financial in bankruptcy proceedings.

**Stephen Lerner** was interviewed in the November 30, 2009 edition of *The National Law Journal* for its article “This Year’s Model: Chrysler, GM and ‘Reorganization in Disguise.’”

**Elliot Smith** published an article, “The Approval of the Chrysler Asset Sale: Implications for the Future,” in the November/December 2009 issue of *Pratt’s Journal of Bankruptcy Law.*

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