SUMMER 2009

Full Disclosure

NEWS AND INFORMATION FROM BENESCH'S BUSINESS REORGANIZATION PRACTICE GROUP

Big Government: Is U.S. Department of Treasury (the "Treasury") Overreaching as DIP Lender?

The Treasury's Role

With the Treasury's efforts to serve as a debtor in possession lender in the Chrysler Bankruptcy and the General Motor's filing, many are wondering aloud as to whether the government's involvement in these bankruptcies is changing bankruptcy law as we know it. The simple answer is: NO.

Like any debtor in possession lender who agrees to provide post-petition financing under section 364 of the Bankruptcy Code, the Treasury determined that providing post-petition financing to Chrysler and GM enabled these companies to avoid a liquidation and maximize the value of the companies' assets. With regard to the Chrysler Bankruptcy, the Treasury agreed to make available $7.7 billion in post-petition financing to enable Chrysler to sell its assets as part of a sale to Fiat S.p.A. under section 363 of the Bankruptcy Code. Similarly, the Treasury intends to inject $50 billion in post-petition financing to GM so that it can reduce its debt to approximately $10 to $12 billion of third-party debt with the government owning 70% of the equity of new GM, once it emerges from bankruptcy.

Thanks to the post-petition financing that the Treasury is making available, we anticipate that GM's largest secured lenders like J.P. Morgan Chase & Co., Citigroup and Credit Suisse should retain interests in a reorganized GM that enables their realization of a full recovery over time. Moreover, the equity in the restructured GM also will grow in value over time as GM regains profitability.

continued on page 2

IN THIS ISSUE:

News About Us

- The Business Reorganization Group was ranked in Chambers 2009, and Will Kohn was recognized by Chambers as a "brilliant negotiator who is always able to steer clients away from trouble."
- Ray Lemisch is presenting, "After the Ball: Post-Confirmation Issues" at the 5th Annual Mid-Atlantic Bankruptcy Workshop in Hershey, PA, August 6–8.
- Stuart Laven is presenting "Landlord Tenant Issues in Bankruptcy," September 9, (location TBA)
- Will Kohn is presenting, "The New Reality: Government as Debtor-in-Possession Lender" at the 5th Global Distressed Debt Investors Forum in New York, September 22–23.
- Stuart Laven presented "Negotiating Commercial Leases: The Impact of Bankruptcy" in Cleveland on June 16.
- Will Kohn and Kari Coniglio presented "Advising Your Client When There is Trouble in the Supply Chain: Bankruptcy Issues for Healthy Companies" at the May meeting of the Lake County Bar Association.

continued on page 6

BENESCH
Attorneys at Law

Big Government: Is U.S. Department of Treasury (the "Treasury") Overreaching as DIP Lender?

continued from page 1

The DIP financing also will provide critical vendors of GM with payment for prepetition and post-petition services rendered.

Unhappy GM Bondholders

All of these measures that the Treasury has taken have angered the bondholders who claim that GM should not reorganize. While the bondholders accepted the deal that provided them with 10% of GM stock and warrants to purchase another 15%, the bondholders still believe that liquidating GM's assets would be in the best interests of creditors.

But if the bondholders had their way, we believe that GM would not be able to maximize value, and the taxpayers would be forced to fund several of GM's ongoing obligations. Specifically, if GM was required to liquidate, it would attempt to sell over a dozen special use facilities in a weak real estate market. Thus, GM would need to market its specialized facilities to potential purchasers with similar manufacturing needs. Most likely, a lack of demand for these facilities would drive down the price and prevent a maximization of value. The lack of market for such facilities has already been demonstrated with GM's tentative deal to sell its Hummer brand to a Chinese manufacturer and the anticipated sales of Saturn and Pontiac. Furthermore, if GM liquidated its operations, we believe that the taxpayers would be left with significant bills. The taxpayers would be required to fund the pension liability for GM's soon-to-be former employees. Moreover, the respective states where GM's employees reside would be responsible for satisfying GM's workers' compensation claims and employees' requests for unemployment compensation.

The Treasury has determined that infusing capital into GM and allowing it to reorganize is in the best interests of creditors, employees, customers, and for that matter, the country. No question, this is a calculated risk, but a scaled down version of GM that sells excess facilities will maximize the opportunity to return value.

Government Has No Special Authority

The Treasury has determined that infusing capital into GM and allowing it to reorganize is in the best interests of creditors, employees, customers, and for that matter, the country. No question, this is a calculated risk, but a scaled down version of GM that sells excess facilities will maximize the opportunity to return value. Car production will be maintained resulting in preserving jobs and maintaining demand for product from suppliers.

Based on the Treasury's DIP Financing commitment, GM has been provided a new opportunity to rebuild its name. The Treasury's role in the Chrysler and GM Bankruptcies is like any other DIP Lender who believes that value remains in a reorganized debtor. Thus, we believe the Treasury is not making new law with its commitment. Instead, it is operating within the framework of the Bankruptcy Code to assist with the reorganization of one of America's largest industries.

For more information on this topic, please contact Will Kohn at (216) 363-4182 or wkohn@beneschlaw.com, or Scott Lepene at (216) 363-4428 or slepene@beneschlaw.com.

Administrative Expense Priority For Erisa Withdrawal Liabilities – Never Available According To Sixth Circuit Bankruptcy Appellate Panel

In a Nov. 4, 2008 opinion favorable to debtors, the Sixth Circuit Bankruptcy Appellate Panel (BAP) held that as a matter of law, liability imposed under the Employee Retirement Income Security Act (ERISA) for withdrawal from a multiemployer plan could not be treated as an administrative expense (priority in terms of payment over general unsecured claims) even if the withdrawal occurred after the bankruptcy filing. This decision, currently briefed and awaiting a decision from the Sixth Circuit Court of Appeals, would be great news for employers participating in multiemployer pension plans if the decision is upheld.

A multiemployer plan is a pension plan to which more than one employer contributes and is maintained under a collective bargaining agreement between an employee organization and more than one employer. In order to ensure that these multiemployer pension plans maintain sufficient assets to meet future pension liabilities and to deter employers from withdrawing from financially shaky plans, ERISA imposes withdrawal liability on employers who withdraw from an underfunded multiemployer plan. This withdrawal liability is intended to represent an employer's proportionate share of the plan's unfunded vested benefits. Calculation of the withdrawal liability takes several factors into consideration, such as the amount of hours worked by the particular employer's employees.

The Bankruptcy Code provides for administrative expense priority for the "actual, necessary costs and expenses of preserving the estate, including wages, salaries, or commissions for services rendered after the commencement of the case." Claimants entitled to administrative expense priority are paid in full before any other subordinate creditors receive any distributions in a bankruptcy case. In determining if a claim is both actual and necessary it must arise from a transaction with the bankruptcy estate and directly and substantially benefit the estate.

Because withdrawal liability may be allocated from any number of methods, the determination of the liability is not an exact science.

With regard to the withdrawal liability issue that was before the Sixth Circuit BAP, the Court needed to determine whether the withdrawal liability, which occurred after the bankruptcy filing, constituted an administrative expense claim.

The BAP determined that calculating the amount of a withdrawing employer's liability is anything but simple. Because withdrawal liability may be allocated from any number of methods, the determination of the liability is not an exact science. Further complicating matters, both the bankruptcy court and the BAP recognized that many factors affect the amount of unfunded benefits at any given time, including changes in contractual promises, such as increases in benefit levels, and changes in actuarial assumptions, such as employee longevity. Many other factors affect the value of the plan's assets including the amount of contributions, the types of investments chosen by the plan's trustee and the performance of financial markets. The BAP concluded that the amount of a pension plan's unfunded invested benefits can be greatly affected by factors unrelated to the withdrawing employer or its employees. With this understanding of the calculations used to impose withdrawal liability, the BAP then determined whether the liability benefited the estate.

Although the BAP concluded that (1) work performed by employees of the debtors postpetition benefit the estate, and (2) compensation for the employees included wages and the accrual of pension benefits. However, withdrawal liability did not *directly* relate to this benefit.

Because the amount of withdrawal liability assessed against a withdrawing employer is dependent on factors that are not directly related to the postpetition work of a debtor's employees, the BAP concluded that the liability cannot as a matter of law be deemed to have directly and substantially benefited a bankruptcy estate. In reaching this decision, the BAP noted that many of the factors affecting withdrawal liability are based on sophisticated guessing and estimating. The many factors that are

continued on page 4

Administrative Expense Priority For Erisa Withdrawal Liabilities – Never Available According To Sixth Circuit Bankruptcy Appellate Panel

continued from page 3

unrelated to work performed by employees postpetition destroy the casual connection that is necessary for administrative expense priority. Therefore, because withdrawal liability under ERISA can never be deemed to have a direct and substantial benefit to the estate, this liability is not entitled to payment as an administrative expense under the BAP's holding.

The Sixth Circuit BAP's decision is contrary to the views of several other courts that have either expressly held or suggested that withdrawal liability may be prorated between general unsecured and administrative expense claims. However, each of these contrary cases focused on the simple timing of when the services were performed and did not consider the many other factors involved in the calculation of the liability.

The Sixth Circuit BAP's decision will be great news for Companies participating in multiemployer pension plans because this decision, if upheld on appeal, will enable companies to limit their administrative expense priorities thereby leaving them more likely to successfully reorganize. More practically, companies that are caught up in a multiemployer plan issue as part of an acquisition or sale may have a new alternative for avoiding a deal-killing liability by considering whether a 363 sale or a chapter 11 plan may permit the transaction to close.

For more information on this topic, please contact Kari Coniglio, at kconiglio@beneschlaw.com or (216) 363-4690.

Show Me the Money (or some other remedy): Best ways to protect your company after a customer/supplier files a Chapter 11

In today's economic turmoil, inevitably, one of your customers/suppliers or another entity which owes you a substantial sum (co-venturer, borrower) will have financial difficulty. The further likelihood is that this entity will end up seeking protection under chapter 11 of the bankruptcy code. Perhaps this has already occurred. The good news is you can protect your company's interests both before and after the initiation of a bankruptcy proceeding by an entity which is indebted to you. This article will discuss ways to protect your company after the filing of a chapter 11.

The first thing to understand is that the initiation of a chapter 11 by an entity acts as a stay against all actions to collect sums from that entity or to reach any assets of such entity (the "Debtor"). Simply put, a bankruptcy stops (the "automatic stay") all litigation against the debtor or its assets as well as any other collection type activities (sending demand letters (except for reclamation demand letters, as set forth below), asserting defaults) with certain exceptions not relevant for purposes of this discussion that relate to governmental entities. But what do you do if all traditional procedures are stalled?

First, immediately assess whether you have sold goods to the debtor within 45 days. If so, consider whether the goods have been delivered or are in transit. If in transit, consider stopping delivery. If not, consider making a reclamation claim. A reclamation claim is a right under the Uniform Commercial Code that allows the seller of goods to reclaim such goods from a purchaser if the seller reasonably believes that such purchaser is unable to pay for such goods. To access this remedy, you must act quickly and must send a Reclamation Demand Letter to the Debtor (an exception to the automatic stay) within 45 days of the date of delivery of the goods or within 20 days after the commencement of the debtor's bankruptcy (if the 45 day period ends after the date of the initiation of the debtor's bankruptcy). The letter must be sufficiently detailed to provide a clear understanding as to which goods are sought to be reclaimed. Following this, an appropriate motion must be filed in the bankruptcy court to obtain an Order allowing reclamation. The vitality of this remedy depends upon where the bankruptcy is pending, but in certain courts (the 6th circuit-Ohio), this remedy has real value.

At the same time you assess whether you have sold any goods within 45 days, you should also determine whether any goods were sold within 20 days. Since the October 2005 amendments, any goods received by the debtor within 20 days of the filing of its bankruptcy petition also qualify for treatment as an administrative claim. An administrative claim has priority in terms of payment over general unsecured claims so this can add real value to your overall claim. If you do have such a claim, you will need to file a motion in the bankruptcy court to get such claim allowed, and, if the motion is granted, to have such claim paid promptly.

If you are a landlord, a lessor of personal property to the Debtor, or a counter party to the Debtor to any other type of executory contract (a contract that has obligations to be preformed by both your company and the Debtor after the filing date, such as a supply agreement), you should promptly determine if the Debtor is fulfilling its obligations post-petition (after the filing date). If not, you may be able to file a motion seeking relief from the automatic stay to cancel such contract/lease. If successful, you will then be able to re-lease, re-let or sell your property to a paying entity. Further, the obligations owed to your company by the Debtor post-petition are administrative claims which you can pursue in the bankruptcy court for payment now. If the Debtor is paying, you should monitor the Debtor closely to make sure that it continues to comply with its post-petition obligations.

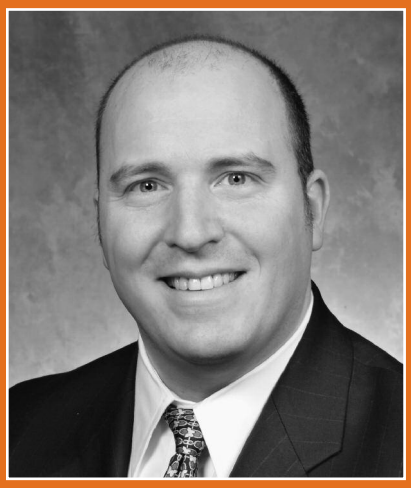
Next, you should determine the amount owed to your company and file a proof of claim. At some point during the proceedings a proof of claim bar date will be set, but there is no harm in filing a claim early on as it can always be amended. By filing early in a case, you will not miss the bar date.

An additional way you can safeguard your claim is to become a member of an official committee of unsecured creditors. Such a group is a court-recognized party within the bankruptcy process and has standing to be heard on all matters. This very important aspect of protecting your claim will be discussed in an upcoming issue of Full Disclosure.

In all of these situations, prompt action and diligence are the keys and the best ways to maximize your claim and minimize your loss.

For more information on this topic, please contact Ray Lemisch at (302) 442-7005 or rlemisch@beneschlaw.com

Get to Know **Bradford J. Sandler**



What Brad wants you to know about the current Business Reorganization industry: For the first time since post-World War II, and perhaps since the Great Depression, we are in the midst of a recession that is affecting everyone -- regardless of socio-economic status, geographic location or industry. Based on what I am now seeing, in the not too distant future we will likely see the commercial real estate market crumble, continued weakness in the automotive sector, and additional retail bankruptcies (indeed, beware of any industry that is dependant on consumer spending!). I also see a growing trend to amend the changes made by the 2005 amendments to the United States Bankruptcy Code to roll-back those changes that have made it substantially more challenging to reorganize a business. These economic times are not only challenging, but will likely produce "temporary" recoveries that will produce several ebbs and flows of varying degree and frequency—in short, we are in the middle of the desert and only will see oases, but we are no where close to being in the green fertile valley of a true, lasting recovery, so now is the time for businesses to team their management, financial advisors and counsel to create strategies that will enable them to find, make, and take advantage of, opportunities.

When Brad is not practicing law: He is actively participating in community activities in various leadership roles as a Board member of the Settlement Music School, the largest community arts school in the Country, and the Philadelphia Art Alliance, one of the oldest multidisciplinary arts centers in the United States. He also writes for his bankruptcy blog called www.absoluteprioritybloc.com, and spends time with his wife, Lisa, and their two children, Devon and Aiden.

Representative Transactions

Some of our recent client engagements include:

- Assist second tier defense contractor with preparation and implementation of key employee retention program and composition agreement to resolve claims of unsecured creditors and protect.
- Representing the Official Committee of Unsecured Creditors for Anchor Blue Retail Group, Inc. et al (250+ stores across the U.S.), in the United States Bankruptcy Court for the District of Delaware.
- Assist Spanish manufacturer of agriculture and viticulture products with the regeneration of its distribution agreement with Senco Products, Inc. who filed a Chapter 11 bankruptcy in the U.S. Bankruptcy Court for the Southern District of Ohio.
- Restructured the debt obligations of a high energy thirst quencher to permit the company to be a low price alternative without a formal proceeding.
- Negotiated and helped implement an outsourcing business model for a protein bar company, returning the operation to profitability.
- Maximized the recovery for a national bank with regard to obligations owed by a commercial contracting company.
- Represent as co-counsel the Official Committee of Unsecured Creditors in Eddie Bauer Holdings, Inc.
- Represent as co-counsel the Official Committee of Unsecured Creditors in Buildings Material Holding Corporation.

News About Us

continued from page 1

- Will Kohn has been named Chair of the 2010 William J. O'Neill Regional Bankruptcy Institute by the Cleveland Metropolitan Bar Association. The Institute is the largest bankruptcy seminar offered in the Midwest.
- Brad Sandler serves as Chair of the Philadelphia Bar Association's Bankruptcy Sub-Committee. Brad also is an adjunct professor of law at Temple University teaching Bankruptcy Law. Brad has recently been appointed as a mediator by the New York State Bar Association.

Pass this copy of *Full Disclosure* on to a colleague, or email jgurney@beneschlaw.com to add someone to the mailing list.

Printed on recycled paper.

For more information about our Business Reorganization Practice Group, please contact any of the following:

William I. Kohn, *Chair* | (216) 363-4182
wkohn@beneschlaw.com
Kari Coniglio | (216) 363-4690
kconiglio@beneschlaw.com
Jennifer R. Hoover | (302) 442-7006
jhoover@beneschlaw.com
Stuart A. Laven, Jr. | (216) 363-4493
slaven@beneschlaw.com
Raymond H. Lemisch | (302) 442-7005
rlemisch@beneschlaw.com
Scott B. Lepene | (216) 363-4428
slepene@beneschlaw.com
David M. Neumann | (216) 363-4584
dneumann@beneschlaw.com
Mark A. Phillips | (216) 363-4153
markphillips@beneschlaw.com
Matthew Samsa | (216) 363-4409
msamsa@beneschlaw.com
Bradford J. Sandler | (302) 442-7007
bsandler@beneschlaw.com
William E. Schonberg | (216) 363-4634
wschonberg@beneschlaw.com
Jennifer E. Smith | (302) 442-7011
jsmith@beneschlaw.com
E. Mark Young | (216) 363-4518
myoung@beneschlaw.com

Cleveland
200 Public Square, Suite 2300
Cleveland, OH 44114-2378
Phone: (216) 363-4500
Fax: (216) 363-4588

Columbus
41 South High Street, Suite 2600
Columbus, OH 43215-6150
Phone: (614) 223-9300
Fax: (614) 223-9330

Philadelphia
One Liberty Place
1650 Market Street, 36th Floor
Philadelphia, PA 19103-7301
Phone: (267) 207-2947
Fax: (267) 207-2949

Shanghai
Kerry Centre, Suite 1802
1515 W. Nanjing Road
Shanghai, P.R. China 200040
Phone: (86) 21-3222-0388
Fax: (86) 21-5298-5955

Wilmington
222 Delaware Avenue, Suite 801
Wilmington, DE 19801-1611
Phone: (302) 442-7010
Fax: (302) 442-7012

www.beneschlaw.com

BENESCH
Attorneys at Law