

**FIRST REPORT OF THE
COMMERCIAL FINANCE ASSOCIATION
TO THE ABI COMMISSION TO STUDY THE REFORM OF
CHAPTER 11**

**FIELD HEARING AT COMMERCIAL FINANCE ASSOCIATION ANNUAL MEETING
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INTRODUCTION

The Commercial Finance Association ("CFA") welcomes the opportunity to testify before the ABI Commission to Study the Reform of Chapter 11 (the "Commission") with respect to possible amendments to the Federal Bankruptcy Code (the "Code"), and wishes to thank the Commission for scheduling a hearing at the venue of CFA's 2012 Annual Convention in Phoenix, Arizona.

By way of background, CFA is the principal U.S. trade association for financial institutions that provide asset-based financing and factoring services to commercial borrowers. The nearly 270 members of CFA include substantially all of the major money-center banks, regional banks, and other large and small commercial lenders engaged in asset-based lending. Asset-based lending, estimated to consist of \$620 billion in outstanding loans in 2012,¹ comprises a substantial portion of the United States credit market. Asset-based financing extended by CFA members allows borrowers the opportunity to obtain the working capital they need to operate and grow, as well as financing for capital expenditures and acquisitions of other companies. Additional information about CFA may be found at www.cfa.com.

As a preliminary matter, CFA offers the following general observations to the Commission:

First, a principal criterion for evaluating any proposed amendments to the Code is the extent to which they maximize the value of companies as going concerns (thereby preserving jobs and maximizing value for creditors), either through a reorganization in those situations where reorganization is a realistic option, or through a sale or liquidation where reorganization is not a realistic option. Our suggestions below were developed with this standard in mind.

Second, although large U.S. corporations play an important role in the U.S. economy, CFA believes that an even greater role is played by small and medium-sized enterprises ("SMEs").² Commercial finance (in both its asset-based lending and cash-flow lending forms) has traditionally been, and continues to be, the backbone of financing for SMEs in the United States. Although many of the current suggestions for amending the Code (including some from members of the Commission) are designed to address perceived problems arising in the chapter 11 cases of large corporations, these concerns are not necessarily applicable to chapter 11s of SMEs (which currently comprise the greatest number of chapter 11 cases).³ For example, although the practice of claims

¹ See Report of R. S. Carmichael & Co., Inc., dated November 9, 2012, attached to this paper as Exhibit A.

² Although definitions of an SME vary, the U.S. Department of Commerce defines an SME as an enterprise having fewer than 500 employees. See, e.g., "Small and Medium-Sized Enterprises: Overview of Participation in U.S. Exports," United States International Trade Commission, Investigation No. 332-508, USITC Publication 4125, January 2010.

³ See separate testimony of Hon. Melanie L. Cyganowski (Ret.) accompanying this paper.

trading may have an impact upon the composition of the creditor base of a large corporate debtor, the phenomenon typically has little impact or no impact in a chapter 11 of an SME. CFA respectfully submits that any proposed amendments to the Code must be evaluated not only in terms of their potential impact upon large U.S. corporations, but also in terms of their potential impact upon SMEs.

Finally, CFA believes that any proposed amendment to the Code should also be evaluated in terms of its likely impact upon the availability and cost of financing for U.S. companies. Particularly during the current, nascent U.S. economic recovery, proposed amendments to the Code that are likely to reduce the availability, or increase the cost, of such credit should be considered only if the need for them is highly compelling.

In that spirit, discussed below are various topics that CFA believes merit study by the Commission. In each case, we have included a brief statement of the reason that CFA feels the topic is worthy of consideration. The following paragraphs are not intended to be an exhaustive treatment of the topics addressed, but rather an introduction that we hope will stimulate further discussion. For convenience of reference, in most instances the topics are listed in the order of the applicable Code sections to which they refer.

If, during the course of our oral presentation, issues are raised that, in our opinion or the opinion of the Commission deserve further discussion, we would appreciate the opportunity to submit one or more papers addressing such issues.

SUGGESTED TOPICS FOR FURTHER STUDY

1. *Topic (§§361 and 362): Whether the Code should be amended to reverse Timbers and provide that adequate protection for a secured creditor includes compensation for the time value of money.*

Reason for Study: Prior to the U.S. Supreme Court's ruling in *United Savings Association of Texas v. Timbers of Inwood Forest Associates, Ltd.*,⁴ many judges, academics and practitioners believed that a secured creditor had the right to be protected against the decline in value of its collateral in terms of real dollars.⁵ Because *Timbers* decided that all secured creditors must bear the cost of the time value of money unless they have sufficient additional collateral to cover their

⁴ 484 U.S. 365 (1988).

⁵ See, e.g., Grant Gilmore & David Gray Carlson, GILMORE AND CARLSON ON SECURED LENDING CLAIMS IN BANKRUPTCY § 17.01 (2000)(describing *Timbers* as "perhaps the most important American bankruptcy case of all time" and a "radical new law" that "rests on shaky ground"); Douglas G. Baird & Thomas H. Jackson, *Corporate Reorganizations and the Treatment of Diverse Ownership Interests: A Comment on Adequate Protection of Secured Creditors in Bankruptcy*, 51 U. Chi. L. Rev. 97 (1984)(arguing that the concept of adequate protection should include a component for opportunity cost); James J. White, *Death & Resurrection of Secured Credit*, 12 Am. Bankr. Inst. L. Rev. 139, 146-147(2004).

post-petition interest, creditors have been motivated to take actions designed to minimize the costs and uncertainty of delay. Conversely, opposing interests have been incentivized to use time and uncertainty to try to achieve opportunistic advantages over secured creditors (including using the threat of delay to reallocate value to other parties in interest).⁶ As aptly put by Judge Edith Jones, a secured creditor's "interest" includes the right to force a sale and reinvest the proceeds.⁷

The debtor's fiduciaries should not be incentivized to redistribute value based upon delay. If decisions to spend more time in reorganization had an attendant cost to debtors, fiduciaries would measure the value realized from delay against that cost, which would, in turn, lead to a more efficient allocation of resources, as well as greater cooperation among constituents. Accordingly, CFA suggests that the Commission consider the reversal of the rule of *Timbers*.

2. *Topic (§362): Whether the value of the interest of a secured creditor entitled to adequate protection includes going-concern value.*

Reason for Study: Pre-petition secured loans are based upon the expected value that can be realized by the secured creditor upon the exercise of its remedies. When the secured creditor has a lien upon substantially all assets of the debtor, those remedies may include going-concern value arising from the disposition of the debtor's shares, or the voluntary or involuntary sale of all assets of the debtor as a going concern. Certain assets that only exist as a function of federal bankruptcy law, such as avoidance actions, would not typically be regarded as part of the expectation interest, though it is not unreasonable to study whether pre-bankruptcy financing secured by post-petition avoidance actions also should be available.

There is no requirement under state law that a lien on sale proceeds, whether voluntary or involuntary, be limited to "liquidation value" or other standard different from the full allocation of the proceeds less sale expenses. While some commentators have advocated limiting a secured creditor's interest to "liquidation value" while preserving incremental "going-concern surplus" for the

⁶ See James J. White, *Death and Resurrection of Secured Credit*, 12 Am. Bankr. Inst. L. Rev. 139 (2004) (hereinafter, *Death & Resurrection*).

⁷ *In re Timbers of Inwood Forest Associates, Ltd.* 808 F.2d 363, 376-77 (5th Cir.)(en banc)(Jones, J., dissenting).

benefit of others,⁸ CFA submits that prepetition lending expectations should be preserved. For example, with an increasingly large segment of the secured lending market dedicated to "cash-flow lending" predicated upon the present value of anticipated future income streams or cash-flows based upon a multiple of EBITDA, when those proceeds are realized upon a sale (whether voluntary or involuntary), the net proceeds of sale should be allocable to the secured party. On the other hand, consistent with pre-bankruptcy expectations, the secured creditor should also be required to bear the reasonable costs and expenses incurred in connection with the preservation and disposition of the collateral (a concept presently addressed by §506(c) of the Code). Accordingly, CFA believes that the Commission should consider codifying the principal that the secured creditor's interest includes the realizable value of the collateral including going-concern value.

3. *Topic (§363): Whether new procedural and substantive provisions should be developed to promote maximizing enterprise value through an expedited sale of the debtor as a going concern.*

Reason for Study: Significant academic, judicial and practitioner attention has focused on whether, and under what circumstances, §363 of the Code should be used to expedite sales of debtors as a going concern. Suggestions have been made that certain sales are "fire sales"⁹ that lead to the destruction of value and that some "secured parties in possession"¹⁰ have a bias toward value-destroying liquidation,¹¹ while others view the same sales as more of a "market in possession," where market forces respond to exigent circumstances in order to preserve jobs and trade credit relationships and maximize collateral value under the circumstances.¹²

Certainly the well-known expedited sales in the GM and Chrysler cases demonstrate the value-enhancing power of expedited §363 sales in appropriate

⁸ Omer Tene, *Revisiting the Creditors' Bargain: The Entitlement to the Going-Concern Surplus in Corporate Bankruptcy Reorganizations*, 19 Bankr. Dev. J. 287 (2003); see also Evan D. Flaschen, *Adequate Protection for Oversecured Creditors*, 61 Am. Bankr. L. J. 341 at 346 (1987).

⁹ Lynn M. LoPucki & Joseph W. Doherty, *Bankruptcy Fire Sales*, 106 Mich. L. Rev. (2007).

¹⁰ Elizabeth Warren & Jay Lawrence Westbrook, *Secured Parties in Possession*, Am. Bankr. Inst. J., Sept. 2003 at 12.

¹¹ Kenneth M. Ayotte & Edward R. Morrison, *Creditor Control and Conflict in Chapter 11*, J. Leg. Studies, 1: 511-551 (2009); Barry E. Adler, Vedran Capkun & Lawrence A. Weiss, *Value Destruction in the New Era of Chapter 11*, J. Law, Econ. and Org. 1 (2012).

¹² Douglas G. Baird & Robert K. Rasmussen, *The End of Bankruptcy*, Stanford L. Rev. 55: 751-89 (2002); compare Douglas G. Baird & Robert K. Rasmussen, *Anti-Bankruptcy*, Yale L. Rev. 119: 648-99 (2010).

circumstances. Similar circumstances frequently occur in the much smaller cases that form the bulk of chapter 11 dockets. Issues for study could include the standards to be used by courts to approve such expedited sales, the allocation of the costs of such sales, and the allocation of sale proceeds (particularly with respect to incremental value in excess of liquidation value). CFA submits that promoting an efficient sale of collateral to a purchaser who is able to continue to use those assets in a productive form is good for the economy in general and for the selling debtor's stakeholders in particular.¹³

4. *Topic (§§362 and 506): Whether the scope of a prepetition lien should exclude some percentage of every dollar of realizable value (i.e., a "carve-out") for unsecured creditors.*

Reason for Study: Various commentators have advanced the idea that a lender's prepetition security interest should be subject to a carve-out for unsecured creditors.¹⁴ The practical experiences with such carve-outs in other countries in recent years have made a compelling case that, in practice, carve-outs can have the unintended consequence of reducing the availability of credit for borrowers.

One case in point is the United Kingdom, where the response of asset-based lenders to the creation of a "ring-fenced pot" for unsecured creditors of up to £600,000 created by the Enterprise Act (2002) has routinely been to reserve that amount from availability. A second case in point is Sweden where, by a law enacted in 2003, unsecured creditors were granted a 45% carve-out from the Swedish enterprise mortgage (the Swedish form of the blanket security interest). In 2010, the law was restored to its pre-2003 status in order to address the unintended consequence that the carve-out was making it prohibitively expensive or impossible for SMEs in Sweden to obtain financing from established banks.

It should be noted in this regard that the UNCITRAL Legislative Guide on Secured Transactions (2007), which is widely heralded as the most comprehensive blueprint for countries wishing to modernize their secured transactions laws, expresses the view that such carve-outs "may have an adverse impact on the availability of credit by effectively reducing the assets available to serve as security for credit."¹⁵

¹³ *Death & Resurrection* at 164.

¹⁴ See, e.g., Woodward, *The Realist and Secured Credit: Grant Gilmore, Common-Law Courts, and the Article 9 Reform Process*, 82 Cornell L. Rev. 1511 (1996-1997); Lynn M. LoPucki, *Should the Secured Credit Carve Out Apply Only in Bankruptcy? A Systems/Strategic Analysis*, 82 Cornell L. Rev. 1483 (1996-1997); Kenneth N. Klee, *Barbarians at the Trough: Riposte in Defense of the Warren Carve-Out Proposal*, 82 Cornell L. Rev. 1466 (1996-1997).

¹⁵ UNCITRAL Legislative Guide on Secured Transactions (2007), Chapter II, para. 66.

The experiences of other countries also illustrate how changing the insolvency laws in ways that are not reflective of the realities of the economic marketplace can drive debtors, and their lenders, away from a given venue's insolvency process. A dramatic case in point is Germany, where recent changes to the insolvency law (effective March 2012) were needed to reverse the unintended consequences of the previous overhaul of the German insolvency law, which were perceived by the marketplace as vesting far too much control in German insolvency administrators and were driving companies to establish their "centre of main interests" in a country other than Germany, so that they could avail themselves of the insolvency laws in that other country.

5. *Topic (§364): Whether §364(d) of the Code should be replaced with a statutory provision recognizing "sandwich" liens that are junior to the value of secured creditor's secured claim and senior to the secured creditor's unsecured claim.*

Reason for Study: CFA believes that one of the more inefficient provision of the Code is the threat of a "priming" lien that could in theory trump the secured creditor and result in a secured creditor receiving less than its state law entitlements. CFA is aware that prominent practitioners have advocated the loosening of 364 "priming" standards as the single most important subject for reform from the debtor's perspective.¹⁶ CFA is opposed to any such change and submits that it would have an immediate adverse impact on the availability and cost of credit.

On the other hand, alternative approaches could have the opposite effect. For example, if secured creditors had the assurance of maintaining the priority of their liens up to the value of their interest in the collateral (measured, as discussed elsewhere in this paper, based upon the realizable value of the collateral under the circumstances taking into account any limitation on the consensual use of cash collateral or incremental financing to be provided by the secured creditor), new sources of DIP financing could become available without the risks and expenses created by the present system for obtaining priming loans. For example, if the creditor's claim of \$50 is secured by collateral then worth \$35 without new investment, but worth \$60 to \$75 with an incremental \$25 of investment, it probably would be difficult to convince the existing secured creditor (particularly a regulated bank) to increase its investment to \$75 only to recover \$75. However,

¹⁶ The statement has been attributed to Harvey Miller that the single change that would most improve the Bankruptcy Code would be to relax the standards for approving priming liens. Kenneth Ayotte & David A. Skeel, *Bankruptcy Law as a Liquidity Provider* at n. 94 (2012), available at www.law.chicago.edu/files/files/Ayotte.pdf.

if the secured creditor is assured a first lien of \$35 (plus interest), the creditor may be more likely to consent to an additional \$25 junior to its \$35 and senior to its remaining \$15.

In addition, and consistent with the discussion elsewhere in this paper regarding prepetition expectations, further study should be devoted to the issue of the reach of the prepetition lender's lien on the incremental value created in part by using the prepetition collateral and in part from the new DIP financing.

CFA believes that this modified DIP financing approach would be preferable to existing law because it gives the secured creditor the assurance that it would retain its secured claim in much the same manner (*i.e.*, via judicial valuation) as its secured claim is preserved under a plan, and thereby encourages secured creditors to invest additional funds in debtor companies.

6. *Topic (§365): Whether the requirement that a Debtor assume or reject leases within 7 months should be repealed or modified.*

Reason for Study: Section 365(d)(4), which provides that non-residential real property leases are automatically rejected within 210 days (about 7 months) of the filing of a case if they are not earlier assumed, both discourages reorganization and impairs secured creditor recoveries. Debtors and their secured and unsecured creditors must make decisions about whether to retain leases in a period of time that is often unrealistically short. As a result, businesses that might have been reorganized or sold as going concerns to new owners are liquidated instead. Because they know that debtors with significant leases will have difficulty reorganizing, lenders are less willing to support reorganizations with DIP financing. They do not want to begin lending money to a chapter 11 debtor only to have to choose, 7 months later, between agreeing to an unfavorable deal with a landlord that has such significant leverage and liquidating the debtor, possibly at a loss to the lender. So they simply refuse to provide DIP financing in the first place, forcing debtors to liquidate before they have had an opportunity to make operational changes, regardless of the potential for reorganization. In addition, going concern asset sales (a frequent form of "reorganization" without a plan)¹⁷ become more difficult and less advantageous to creditors and owners because buyers have insufficient time to assess the value of an enterprise with important leases. Uncertainty about value always results in lower prices and

¹⁷ Randall Klein & Danielle Juhle, *Majority Rules: Non-Cash Bids and the Reorganization Sale*, 84 Amer. Bankr. L. J. (2010).

therefore lower payments to creditors. Worse, such uncertainty can render going concern sales so difficult that they are not even pursued, again resulting in otherwise avoidable liquidations.

7. *Topic (§502): Whether the Code should be amended to expressly preclude the application of "equitable" doctrines of "recharacterization" or "equitable disallowance" to otherwise allowable claims.*

Reason for Study: In general, the Code dictates that non-bankruptcy law entitlements be honored in bankruptcy cases, and nowhere is that principle more clearly stated than in §502(b). Yet some courts have felt empowered to go beyond that limitation on their power by effectively disallowing claims that would be enforceable under non-bankruptcy law. Those courts have applied what they call "equitable" principles to effectively disallow otherwise valid claims by "recharacterizing" or disallowing them as contributions to equity.¹⁸ The doctrine of equitable subordination is sufficiently flexible to address circumstances when allowable claims should be subordinated to other claims while preserving the relationship of claims to equity interests. Equitable disallowance could also have the effect (as intended by its advocates) of giving priority to holders of structurally subordinated claims against a parent company over the otherwise allowable claims against subsidiaries.¹⁹ While such doctrines are usually (but not always) applied to insiders, their application discourages vital rescue financing that might preserve values for other stakeholders, including secured creditors. At a minimum, it often makes lending to distressed debtors more expensive by encouraging the use of complex agreements or participations to protect financing from insiders or others who fear later attack on equitable grounds.

8. *Topic (§503(b)(9)): Whether the administrative priority granted to certain trade creditors should be abolished.*

Reason for Study: Section 503(b)(9) grants an administrative priority to claims arising from the sale of goods received by the debtor within 20 days before the bankruptcy case. Such sellers of goods would otherwise be general unsecured creditors (although they might also have reclamation rights under non-bankruptcy law, which is not relevant to this discussion). Because of §503(b)(9), however, they have a right to be paid before all other unsecured creditors (such as

¹⁸ Hilary A. Goehausen, *You Said You Were Going to Do What to My Loan? The Inequitable Doctrine of Recharacterization*, 4 DePaul Bus. & Comm. L. J. 117 (2005-2006).

¹⁹ Scott Alberino, Hon. Judith Fitzgerald, Scott Greenberg & Gary Marsh, *Corporate Bankruptcy Panel: Hot Chapter 11 Plan Issues*, 28 Emory Bankr. Dev. J. 283 at 289 (2011-2012).

providers of services, rather than goods) whose claims arose before the case was commenced, contrary of the policy of equality of treatment of similar creditors. Worse, that priority is given the status of an administrative claim. Because holders of administrative claims are not placed in classes and do not vote on a plan, and each administrative creditor must be paid in full in cash at the time of confirmation, unless that creditor agrees otherwise, §503(b)(9) creates holdout power in all members of a particular group of creditors, contrary to the policy of bankruptcy law to reduce such power. Because of that power, and the requirement to pay all administrative expenses even in sale cases, secured creditors will reserve for such claims, reducing the resources available to distressed debtors for reorganization.²⁰

9. *Topic (§506): Whether definitions of secured claims should be clarified to explicitly include all contract rights, such as the contractual right to receive default interest, prepayment premiums, and make-whole or similar yield maintenance fees).*

Reason for Study: Certain issues have generated unnecessary and inefficient litigation regarding certain portions of asserted secured claims of the type described in the heading to this topic. In larger chapter 11 cases, claims trading may create a "win win" environment for these issues to be settled between the creditor-assignee and the estate constituents. For SME secured creditors, the cost of litigation is used to force a settlement to deprive creditors of their bargain. CFA believes that these issues should be studied further, with the possible goal of developing specific statutory guidance for allowable state law entitlements.²¹

10. *Topic (§510): Whether the Code should be amended to expressly provide for the enforceability of intercreditor agreements (including the clarification or removal of the reference to 510 in Section 1129(b)).*

Reason for Study: Secured credit has expanded for the benefit of debtors by reason, among other things, of the creation and growth of second-lien financing,

²⁰ See generally, Judith Greenstone Miller & Jay L. Welford, *503(b)(9) Claimants – The New Constituent, a/k/a "the 500 Pound Gorilla," at the Table*, 5 DePaul Bus. & Comm. L. J. 487 (2006-2007); Note, *Should Congress Repeal Bankruptcy Code Section 503(b)(9)*, 19 Am. Bankr. Inst. L. Rev. 217 (2011).

²¹ See generally Scott K. Charles & Emil A. Kleinhaus, *Prepayment Clauses in Bankruptcy*, 15 ABI L. Rev. 537 (2007), cited in *In re Chemtura Corporation*, 439 B.R. 561 (Bankr. S.D. N.Y. 2010); Michael L. Cook & David M. Hillman, *Update on Reorganization Financing: Prepayment Premiums, Commitments Fees and Post-Bankruptcy Interest* (June 19, 2012) (available at http://www.srz.com/Update_on_Reorganization_Financing/).

which relies heavily on the use of intercreditor agreements. Newer financing products with similar results, such as "unitranche" lending, are producing similar agreements among lenders. Case law has been mixed regarding the enforceability of intercreditor agreements. The Commission should study the positive impact of making clear that contractual rights among sophisticated creditors will be respected in bankruptcy.²²

In addition, some recent cases have cast further uncertainty by reason of the curious reference to §510 in §1129(b). While some have asserted that this clause can be read to override §510 subordination agreements, CFA is of the view that the reference in §1129(b) was intended only to override contractual restrictions if approved by a particular senior class.²³

Similarly, CFA believes that Bankruptcy Courts should have statutory authority to adjudicate disagreements among creditors (whether between minority and majority creditors under a single-tranche credit facility, among creditors holding claims in a "unitranche" facility, or between classes of senior and junior secured creditors). The rights among creditors and the redistribution of estate assets is at the core of the purpose of bankruptcy, and shunting competing creditors to state courts is both inefficient and counterintuitive.

11. Topic (546/548): *Whether the Code should validate fraudulent conveyance "savings clauses."*

Reason for Study: Apart from a brief mention in *In re Exide Technologies*,²⁴ the Bankruptcy Court's opinion in *In re Touse*²⁵ is the first reported decision to address the enforceability of fraudulent transfer "savings clauses," under which a lender voluntarily reduces its claim to an amount that would not cause the claim to constitute a fraudulent transfer under the Code or state fraudulent transfer laws. However, the opinion failed to consider the merits of such clauses, such as (i) their similarity to savings clauses in other legal contexts whose enforceability or value is generally unquestioned (such as usury savings clauses, and the

²² Seth Jacobson, Ron Meisler, Matt Kriegel & Katherine Field, *Enforcement of Intercreditor Agreements in Bankruptcy*, 20 Norton J. Bankr. L. & P. 343 (2011).

²³ Compare *In re TCI 2 Holdings LLC*, 428 B.R. 117 (Bankr. D. N.J. 2010) and Kenneth N. Klee, *All You Ever Wanted to Know About Cram Down Under the New Bankruptcy Code*, 53 Am. Bankr. L. J. 133 at 142 n. 70 (1979).

²⁴ 299 B.R. 732 (Bankr. D. Del. 2003).

²⁵ 422 B.R. 783 (Bankr. S.D. Fla. 2009).

practice, in some states, of blue-penciling restrictive covenants in employment agreements) or (ii) the obvious value to a chapter 11 estate of achieving a voluntary reduction in a lender's secured debt without the necessity of expensive and protracted litigation against the lender. CFA submits that the Commission should consider an amendment to the Code that expressly validates such clauses.²⁶

12. *Topic (§547): Whether the plaintiff should have the burden of pleading and proving that allegedly preferential transfers were outside the ordinary course of business and not subject to setoff for new value.*

Reason for Study: Since 1978, it has become common in cases of any size that post-confirmation liquidation trustees or post-conversion chapter 7 trustees assert claims against all creditors who received payments from the debtor within 90 days before the commencement of the case that those payments may be avoidable preferences. In some, but not all, such cases, the trustees at least perform new value analyses and claim only the net balance; in virtually no cases do the trustees assess the likelihood of an ordinary course defense. There are usually exchanges of letters and spreadsheets resulting in settlements for a fraction of the amount of the original claims. Often, the creditors settle for nuisance value just to avoid the costs of litigation. This practice imposes costs on creditors vastly disproportionate to the gain to estates, and is particularly difficult for factors who do not have direct access to the original vendors' records. Since factors are a major source of financing for small and medium sized firms, this burden should be of concern to everyone. Requiring the trustees to plead that challenged transfers were not in the ordinary course or subject to new value setoff would reduce the number and burden of weak claims without imposing undue burdens on the trustees. The same records that allow the trustees to identify the payments they question would also allow them to assess sufficiently for Rule 9011 purposes the ordinary course and new value issues at little additional cost to them. On the other hand, the savings to factors and other creditors that would result from weeding out weak claims before they are even asserted would be substantial.

13. *Topic: Whether §552 should be clarified to extend prepetition liens to post-petition income streams generated by pre-petition collateral.*

²⁶ Jessica D. Gabel, *Terrible Tousse: Opinions Test The Patience of Corporate Lending Practices*, 27 Emory Bankr. Dev. J. 415, 460-464 (2010-2011).

Reason for Study: When the 1978 Code was being drafted, conceptual disagreements developed among the drafters of the revised Uniform Commercial Code and the members of the National Bankruptcy Conference.²⁷ Those disagreements centered on the application of the after-acquired collateral clauses favored by the UCC lawyers and secured lenders. The concept at the time was revolutionary: a single lien could attach to property not then in existence, such as future inventory to be delivered by vendors not under contract. Notice of the lien could be filed, thereby putting voluntary creditors on notice of the future extensions of credit. However, bankruptcy advocates sought to cut off the growth of the secured creditors' rights at the expense of the prepetition vendor so that, among other things, the happenstance of bankruptcy did not redistribute certain value in favor of the secured creditor who did not extend additional credit in exchange for that value.

In 1978, "cash flow lending" was in its infancy. As secured credit grew and courts endorsed the secured creditor's rights to "enterprise value," a new market grew that enabled lenders to make loans predicated upon the realizable value of future income streams.²⁸ Put another way, secured loans are now often advanced based upon a multiple of EBITDA rather than asset liquidation value. When the future income streams are generated by the debtor prepetition, the lien clearly attaches to the proceeds. When those income streams are generated post-petition, it is less clear that the language of §552 would protect the prepetition lender's interest in post-petition income streams. Similar concerns regarding municipal finance led to the enactment of clarifying legislation in §928 of the Code.²⁹ Now, courts are beginning to struggle with §552 as it relates to post-petition income streams, with mixed results.³⁰ Similar issues exist with respect to federally regulated businesses, such as the holders of FCC licenses.³¹ CFA thinks

²⁷ Anthony T. Kronman, *The Treatment of Security Interests in After-Acquired Property Under The Proposed Bankruptcy Act*, 124 U. Pa. L. Rev. 110 (1975-1976); Thomas H. Jackson & Anthony T. Kronman, *Voidable preferences and Protection of the Expectation Interest*, 60 Minn. L. Rev. 971 (1975-1976).

²⁸ Allison Taylor and Alicia Sansone, *THE HANDBOOK OF LOAN SYNDICATION & TRADING* at 9 (2007) ("Had bankruptcy judges used their considerable discretion to rule against [enterprise value as a] form of collateral, the value of seniority and security in many loan agreements would have been greatly diminished, and the advantages of this asset class would have been diluted.")

²⁹ Robert S. Amdursky, *The 1988 Municipal Bankruptcy Amendments: History, Purposes, and Effects*, 22 *The Urban Lawyer* 1 (1990), quoting S. Rep. No. 506, 100th Cong., 2d Sess. 4, 6-7 (1988).

³⁰ Randall Klein & Erin Casey, *The Pre-Petition Right to Post-Petition Income Streams and the Misinterpretation of section 552*, *Amer. Bankr. Inst. J.* (December 2010).

³¹ *In re Tracy Broadcasting Corporation*, 2012 U.S. App. LEXIS 21505 (10th Cir. Oct. 16, 2012).

that the 10th Circuit in *Tracy Broadcasting*³² gets it right: the prepetition right to a future sale of an FCC license can be the subject of a prepetition security interest that attaches to the post-petition proceeds of the sale notwithstanding §552. Therefore, CFA believes that the Commission should study appropriate clarifications for §552, with the goal of promoting the availability of lending secured by future income streams.³³

14. *Topic (§1122): Whether express provisions should be added to the Code to clarify that holders of claims, and in particular secured claims, must be separately classified under a plan of reorganization based upon the debtor's contractual agreement with the claimant rather than merely upon the claimant's status in the capital structure.*

Reason for Study: While the Bankruptcy Code mandates that similarly situated creditors be classified for plan purposes in substantially similar classes, the Code offers no guidance as to how to determine which claims are in fact "substantially similar." As a result, creditors in general, and secured creditors in particular, do not often get the benefit of their contractual bargain with the debtor. Indeed, it is the debtor who, in the first instance, makes the economic determination of the creditors' rights when it comes to classification of claims based upon the specific prepetition contractual agreements with the debtor, rather than merely whether the claim is secured or unsecured. All too often, factors come into play in determining classification of claims that should be irrelevant, such as motivation of the parties, purchase price and third-party rights. While creditors certainly maintain their right to object to classification, the various judicial decisions highlight that there is no uniformity to the case law, and the Commission should give consideration to modifying Section 1122(a) to further define the term so that secured creditors would be better able to quantify their risks. This, in turn, would have the effect of encouraging lending.

15. *Topic (§1129): Whether the Code should be amended to expressly permit senior classes to share their distributions under a plan with other classes regardless of whether intervening classes have consented (i.e., permitting so-called "gift" plans).*

³² *Ibid.*

³³ See generally, Steven L. Schwarcz, *Protecting rights, Preventing Windfalls: A Model for Harmonizing State and Federal Laws on Floating Liens*, 75 N.C. L. Rev. 403 (1997).

Reason for Study: There currently is a split of authority regarding the ability of a senior creditor to share reorganization distributions with junior debt holders.³⁴ However, the origin and efficacy of the rule that prohibits senior creditors from sharing reorganization distributions with equity holders has been criticized in the academic literature.³⁵ CFA believes that senior creditors should be permitted to reallocate their recovery to junior classes because doing so would foster the reorganization process, even if it means skipping out-of-the-money junior classes. The law should favor efficient ventures between managers and senior lenders and encourage reorganizations that share in the growth in the value of the debtor. Accordingly, CFA encourages the Commission to reexamine the prohibition against "gift" plans.

16. *Topic (§105): Whether chapter 11 should be subdivided between "mega" cases and all other cases with respect to the rights and treatment of allowed secured claims and whether the Code should give bankruptcy judges more authority to act on behalf of unrepresented interests in cases where no creditors' committees are formed.*

Reason for Study: The "mega" cases and the "pre-arranged" or "pre-pack" cases come to the Bankruptcy Court with many issues having already been pre-negotiated among the various constituencies in the debtor's capital structure. There is often consensus among the debtor and the various creditor groups and their representatives as to financing and management and, indeed, many times even agreement on an exit strategy. These creditor groups are in almost all cases represented by counsel. These cases differ markedly from the typical SME filing where the debtor has had little, if any, contact with any creditors other than its secured lender. Given these differences, and many more not touched upon herein, it seems that in "mega" cases, the consent of the parties should override the normal findings and statutory pre-requisites for such issues as DIP financing and other "first day" decisions, such as the payment of pre-petition obligations (including the payment of "critical vendors"). However, in the non-mega or non-pre-arranged cases, it is necessary to maintain the statutory construction set forth

³⁴ Compare *In re DBSD North America, Inc.*, 634 F.3d 79 (2d. Cir. 2010) with *In re SPM Mfg. Corp.*, 984 F. 2d 1305 (1st Cir. 1993). See generally, Harvey R. Miller & Ronit J. Berkovich, *The Implications of the Third Circuit's Armstrong Decision on Creative Corporate Restructuring: Will Strict Construction of the Absolute Priority Rule Make Chapter 11 Consensus Less Likely?*, 55 Am. Univ. L. Rev. 1345 (2006); Douglas G. Baird, *Lessons from the Automobile Reorganizations*, 4 J. Leg. Analysis 271 (2012).

³⁵ Douglas G. Baird, *Secured Lending and Its Uncertain Future*, 25 Cardozo L. Rev. 1789 (2003-2004).

in the Code, tempered by the Court's judicial discretion and the exercise of business judgment.

17. *Topic: Whether the provisions of the Code relating to Chapter 11 liquidating plans and Chapter 11 Trustees should be revised in order to better protect creditors in general and secured lenders in particular.*

Reason for Study: As Professors Warren and Westbrook point out in their article "Remembering Chapter 7,"³⁶ Chapter 11 plans of liquidation continue to grow in popularity as a "reorganization" option but offer less protection to creditors, including secured creditors, than a liquidation under Chapter 7. In almost all cases, once the Chapter 11 plan of liquidation has been confirmed, it is the debtor or liquidating trustee who conducts the liquidation without further input from creditors and often with limited (if any) judicial oversight. As a result, creditors have little or no input into the liquidation decisions made by the liquidating trustee/debtor beyond the information contained in the disclosure statement, and there is no real ability on the part of creditors to oversee the liquidation that is being accomplished – allegedly for their benefit. While deference should be given to the business judgment rule and the additional expenses of administration that are incurred in a conversion of the case to a Chapter 7 liquidation, the need for creditor oversight cannot be ignored. As the Professors posit: what is the standard by which a case is liquidated in a Chapter 11 or must be converted to a Chapter 7 liquidation? With the Code providing for two separate chapters for liquidation, when does a Chapter 11 liquidation defer to liquidation under Chapter 7? To say that one is the liquidation of a going concern and the other is not begs the question, as the Chapter 7 Trustee may operate some or all of the Debtor's operations pending a sale as in a liquidating Chapter 11.

It is becoming commonplace that courts will not condone a §363 sale which dispose of substantially all of the estate's assets without the court and the creditors being advised as to the terms of "wind-down" or a plan of liquidation. Similarly, many courts allow for what are referred to as "structured dismissals" in lieu of either a Chapter 11 plan of liquidation or a conversion to Chapter 7, without any specific statutory underpinning. Without giving any real guidance as to when a Chapter 11 liquidation is appropriate and the level of interaction available to creditors if the Debtor has not complied with the plan or refuses to

³⁶ Elizabeth Warren and Jay Westbrook, *Remembering Chapter 7*, 23-4, AM. BANKR. INST. J. 22 (2004).

cooperate, the secured lender is left only with the option of reclaiming its collateral.

18. *Topic: Whether alternatives to the preservation of prepetition corporate governance should replace the current concept of "debtor-in-possession."*

Reason for Study: For many mid-sized debtors, the board or manager may be a single individual, or third parties appointed by a single shareholder. On rare occasions, the board will include third parties recommended by minority shareholders who also hold debt. On even rarer occasions, the board will be designated by secured parties exercising proxy rights to vote in new representatives. In some cases, there is the possible overlap between the board and day-to-day managers, while in other cases there is no overlap. Prior to a default, most secured creditors have no control over, or input regarding, the selection of fiduciaries. Similarly, in those instances, incentives are aligned such that the residual owners of the debtor select the controlling fiduciaries.

While some current academic and practitioner literature has focused on the incentives of secured creditors who exercise indirect control through the appointment of restructuring officers, much less attention has focused on the interplay between out-of-the money equity holders and board members as of the commencement of the case.³⁷ Many practitioners argue that out-of-the-money shareholders should lose their state law right to demand an annual meeting and to replace the board. This suspension of corporate governance machinery is neither consistent with state law nor mandated by the Code. Nonetheless, the presumption is that the existing board should be maintained absent cause of the appointment of a trustee.³⁸ Oddly then, neither the shareholders nor the other creditors have the contractual right to replace the board. Secured creditors who lack the confidence in existing fiduciaries may seek to implement alternatives, such as appointment of CROs or exercising proxy rights, to shift control to independent third parties. The United States Trustee's office may view these

³⁷ Christopher W. Frost, *Running the Asylum: Governance Problems in Bankruptcy Reorganizations*, 34 Ariz. L. Rev. 89 (1992); compare Yaad Rotem, *Better Positioned Agents: Introducing A New Redeployment Model for Corporate Bankruptcy Law*, 10 U. Pa. J. Bus. & Emp. L. 509 (2008).

³⁸ John Wm. Butler, Jr., Chris L. Dickerson & Stephen S. Neuman, *Preserving State Corporate Governance Law in Chapter 11: Maximizing Value Through Traditional Fiduciaries*, 18 Am. Bankr. L. Rev. 337 (2010); compare Michelle M. Harner, *Corporate Control and the Need for Meaningful Board Accountability*, 94 Minn. L. Rev. 541 (2010); Thomas G. Kelch, *Shareholder Control Rights in Bankruptcy: Disassembling the Withering Mirage of Corporate Democracy*, 52 Md. L. Rev. 264 (1993); David A. Skeel, Jr., *The Nature and Effect of Corporate Voting in Chapter 11 Reorganization Cases*, 78 Va. L. Rev. 461 (1992).

efforts as attempts to end-run the process for appointment of a trustee. Yet, creditors who are the residual claimants (and residual beneficiaries of the fiduciary duties) will invariably prefer trusted third parties. Accordingly, CFA believes that due consideration should be given to the hybrid proposal of creditors electing a replacement board with weighted voting based upon the proportion of their claims to enterprise value.

CONCLUSION

Given the important relationship between secured credit, the proper functioning of primary and secondary credit markets and the rights of debtors and other parties in interest during a bankruptcy case, CFA believes that continued involvement of the finance community in this reform project is necessary. Commissioner Klee's guidance to the 1994 Bankruptcy Review Commission holds true today:

Identification of goals should facilitate objective and subjective analyses of the success of the current system and help determine whether fundamental changes are necessary. [These analyses require] obtaining a firm understanding of the reasons for change, the anticipated effects change will bring to the current system, and the likelihood that recommended changes will produce a superior result.³⁹

Accordingly, to the extent that specific proposals for reform are to be suggested by the Commission, CFA would welcome an opportunity to review, consider and provide further testimony in respect of such proposals.

³⁹ Kenneth N. Klee, *A Brief Rejoinder to Professor LoPucki*, 69 Am. Bankr. L. J. 583, 588 (1995).

EXHIBITA

November 9, 2012

U.S. ASSET-BASED LENDING MARKET SIZE AND GROWTH

Background

“Asset-based” loans are defined as secured or collateralized transactions that fall within the purview of Article 9 of the Uniform Commercial Code. These loans are secured by current assets (i.e., accounts receivable, inventory), as well as by fixed assets (e.g., equipment) and other collateral. Asset-based loans are also characterized by some form of collateral tracking that is more frequent and more intensive than is found in traditional bank-type lending.

The Commercial Finance Association is the trade association for asset-based lenders across the entire collateral/credit risk spectrum. The CFA represents all organizations engaged in business-to-business asset-based lending, including bank-affiliated and independent finance companies, commercial banks, thrifts, credit unions, captive finance companies, hedge funds, floorplanners, etc. For example:

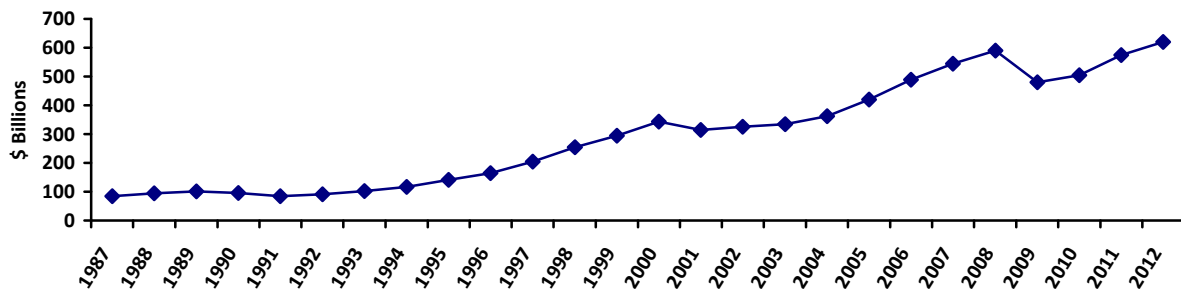
- Thousands of U.S. commercial banks are engaged in commercial and industrial lending, and the aggregate value of their C&I loans is well in excess of \$1 trillion. Many of these loans are asset-based transactions.
- At least 50 hedge funds and private equity funds with assets under management exceeding \$1 billion are active in direct lending, often of an asset-based nature. Also, an estimated 20% of all private equity funds are involved with some form of asset-based lending.
- Over 1500 credit unions now provide commercial loans, including asset-based loans.
- Captive finance companies such as IBM Global Financing often provide asset-based loans in the form of accounts receivable financing and floorplanning to their distributors and dealers.
- A number of equipment leasing companies also have broadened their involvement in asset-based lending because of intensified competition and shrinking margins in their traditional business.

Market Size

The size of the overall U.S. asset-based lending market in 2012 is estimated to be \$620 billion in terms of loans outstanding. This estimate is based on extrapolations of data obtained from CFA

members and other sources such as government agencies (e.g., FDIC) and trade publications (e.g., American Banker). The exhibit below shows market growth and how market size has been impacted by economic recessions:

R.S. Carmichael & Co., Inc.



R.S. Carmichael & Co., Inc.

BIOGRAPHIES

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Mr. Helfat specializes in the representation of foreign and domestic banks, commercial finance companies, hedge funds and other specialty lenders and in the restructuring of secured loan transactions, including in connection with workouts, forbearance and restructuring agreements, Chapter 11 Debtor-in-Possession and "Exit" financing facilities and the use of cash collateral. Mr. Helfat has also represented numerous financial institutions in connection with enforcing and defending the rights of various financial institutions.

Mr. Helfat graduated from American University, received his law degree from the University of Louisville School of Law and a Master of Laws (Corporation Law) from New York University.

Mr. Helfat is Co-General Counsel to the Commercial Finance Association and co-authors a column in The Secured Lender magazine relating to current legislative and judicial developments in asset-based lending. He has also represented the Commercial Finance Association in the filing of various *amicus* briefs before the United States Supreme Court relating to issues affecting secured lenders.

Mr. Helfat is also a Fellow and Regent of the American College of Commercial Finance Lawyers and previously was a member of the Bankruptcy Judge Merit Selection Panel for the United States District Court, Eastern District of New York.

Mr. Helfat has been selected since 2006 as a New York Super Lawyer by Super Lawyers Magazine and by Best Lawyer in America since 2011."

Mr. Helfat has lectured widely before numerous financial trade and professional associations.

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Richard Kohn is one of the founders of Goldberg Kohn and is a senior principal of the firm. He is a member of the firm's Commercial Finance Group, recognized as having one of the strongest and most diversified commercial finance practices in the country, which he founded in 1978. Selected by *Chambers Global* 2012 as one of the leading lawyers in Banking & Finance in the United States, Richard also heads up the firm's practice in cross-border asset-based lending, a field in which he is widely recognized as a pioneer.

Since January 2002, Richard has served as Co-General Counsel of the Commercial Finance Association, which is the principal U.S. trade association for the commercial finance industry. On the international front, for the past twelve years he has represented CFA in proceedings before the United Nations Commission on International Trade Law (UNCITRAL) relating to the development of the Convention on the Assignment of Receivables in International Trade (2001), the UNCITRAL Legislative Guide on Secured Transactions (2007), the Supplement on Security Interests in Intellectual Property (2010) and the current UNCITRAL project on registry systems (also serving on the Expert Group for the latter three projects and as a consultant to the U.N. in connection with the Guide). He is also active in law reform activities in other countries, having spearheaded an initiative in Mexico in 2011 (co-sponsored by CFA, USAID and others) to promote secured transactions in Mexico, and serving on a member of a 7-person delegation invited to Shanghai, China in 2011 by the Chinese Central Bank and the International Finance Corporation (of the World Bank Group) to teach asset-based lending to over 150 Chinese commercial bankers.

Richard is a Lecturer in Law on cross-border lending at The University of Chicago Law School, and a frequent speaker and writer on international finance topics (with recent speaking engagements including the American Bar Association, ALI-ABA, the New York City Bar Association and the World Bank). He is also co-organizer of the CFA International Lending Conference, now heading into its seventh year. Richard is a Fellow of the American College of Commercial Finance Lawyers and a member of the Founders Leadership Council of the CFA Education Foundation, the Association of Commercial Finance Attorneys and the American Bankruptcy Institute. Recent articles include: S. V. Bazinas, Richard M. Kohn & Louis F. Del Duca, *Facilitating a Cost-Free Path to Economic Recovery: Implementing a Global Uniform International Receivables Financing Law*, 44 UCC L. J. 277 (2012) (with S.V. Bazinas and Louis F. Del Duca); *The Case for Including Directly Held Securities Within the Scope of the UNCITRAL Legislative Guide on Secured Transactions*, 15 Uniform L. Rev. 413 (2010); and *Convention to Bolster Exports and Jobs*, Wash. Times, March 6, 2012.

Richard is admitted to practice in Illinois. He received his law degree, *cum laude*, in 1969 and his B.A., with distinction, in English in 1966, both from the University of Michigan.

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Since joining Goldberg Kohn in September 2002 as a principal in the Bankruptcy & Creditors' Rights Group, Ronald Barliant has represented debtors and creditors in complex bankruptcy cases. As head of the firm's "burgeoning practice in debtor work," his debtor representations include a machine tool manufacturing company in a Delaware chapter 11 case involving significant environmental and mass tort liabilities (plan confirmed with future claimants trust 11 months after filing), a wireless telecommunications carrier in a chapter 11 case requiring the restructuring of debts owed the FCC for PCS licenses (plan confirmed 5 months after filing), and a home products manufacturing company in a pre-negotiated chapter 11 case involving a debt-for-equity swap and the issuance of new debt securities (plan confirmed 75 days after filing).

His creditor representations include the indenture trustee for most of the aircraft operated by United Airlines; the prepetition secured lenders and debtor in possession lenders in the chapter 11 cases of a large manufacturing company; a foundry and a food distributor, the secured creditor resisting substantive consolidation in the Delaware case of a sub-prime lender; and claimants in asbestos-related chapter 11 cases.

Mr. Barliant has also argued several appeals and counseled major financial firms in connection with distressed investments, and both debtors and creditors in connection with workouts. In addition, he has mediated disputes in over a dozen cases, including Delphi Corporation, U.S. Energy Biogas, HALO, Altheimer & Gray and Fleming Foods. He has also been engaged as a consultant by other law firms representing clients in bankruptcy cases, and as an expert witness. In addition, he is an estate representative in the Global Crossing case and was a director of a Delaware debtor in the automotive industry.

Before joining Goldberg Kohn, Mr. Barliant served as a United States bankruptcy judge for the Northern District of Illinois from 1988 to 2002. During his tenure on the bench, one of the largest cases over which he presided was Comdisco Inc. (in the technology services industry), involving more than \$4 billion in debt. Other prominent cases he heard include Florsheim Group Inc. (men's shoes); Birmingham Steel Corp. (specialty steel); Archibald Candy Corp. (confectionaries under Fanny May and Fanny Farmer brands); e-spire Communications Inc. (telecommunications); Ben Franklin Retail Stores (retail); Keck, Mahin & Cate (law firm); Forty-Eight Insulations Inc. (asbestos products); Outboard Marine Corp. (boat engines); and the developers in several significant single-asset real estate cases. Before ascending to the bench, he represented the trustee in the chapter 7 case of the owner and operator of an oil refinery, Energy Cooperative Inc., which at the time was the largest chapter 7 case in the history of the Northern District of Illinois.

Mr. Barliant has taught debtor-creditor relations at John Marshall Law School and has frequently lectured and participated in panel discussions on bankruptcy-related topics at the invitation of many organizations, including the Federal Judicial Center, the National Conference of Bankruptcy Judges (NCBJ), the American Bankruptcy Institute (ABI), the American Bar Association (ABA), the Commercial Finance Association, the Turnaround Management Association, the Chicago Bar Association (CBA) and LexisNexis Mealey's. Mr. Barliant was a panelist for "Section 363 Sales, Selected Issues," Eastern District of Wisconsin Bar Association Eighth Annual Meeting, 2010; "Claims Trading: Implications for the Chapter 11 Process, Pitfalls for the Claims Trader," The National Conference of Bankruptcy Judges, 2008; "Do You Remember Lender Liability?," The Distressed Debt Conference, 2008; and "Valuation in the Context of Bankruptcy," 57th Annual Meeting of the Seventh Circuit Bar Association and Judicial Conference of the Seventh Circuit, 2008. Mr. Barliant served as the mock trial Federal Bankruptcy Judge at the YPO-WPO Business & Personal Development Seminar, "Turning Distressed Markets to Your Advantage," 2009. Mr.

Barliant testified in the Judge Porteous impeachment trial, appearing on C-SPAN before the Senate Impeachment Trial Committee in September, 2010.

His published writings include articles on chapter 11 plans, executory contracts, preferences, and the anti-trust litigation in the United Airlines case (in which he represented an indenture trustee/defendant). He also co-authored an article featured in the American Bankruptcy Institute Law Review, *From Free-Fall to Free-For-All: The Rise of Pre-Packaged Asbestos Bankruptcies* (Winter 2004). He was a member of the board of governors of the NCBJ from 1998 to 2000 and of the NCBJ's Endowment for Education from 1997 to 1998. In addition, he served on national judicial committees and on working groups considering technology issues and the treatment of mass torts in bankruptcy cases. Mr. Barliant has been recognized annually by the Leading Lawyers Network, *Super Lawyers*, and *Chambers USA*. He is currently a member of the ABI (Business Reorganization Committee), ABA (Business Law Section), and NCBJ (Former Judges Section) and is Chair of the Bankruptcy and Reorganizations Committee of the CBA. He is a Fellow in the American College of Bankruptcy and is the current ACB Regent for the Seventh Circuit.

Mr. Barliant is admitted to practice in Illinois. He received his law degree in 1969 from Stanford University School of Law, where he was a member of the editorial board of the *Stanford Law Review*. He received his B.A. in 1966 from Roosevelt University.

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Judge Melanie L. Cyganowski (*ret.*) became a Member of Otterbourg, Steindler, Houston & Rosen, P.C. in 2008, after serving a full 14-year term as a Bankruptcy Judge in the Eastern District of New York. From November 29, 2005 through the end of her term, she was the Chief Judge of the Court. Following her graduation *magna cum laude* from the School of Law at the State University of New York at Buffalo, she served as a law clerk to the late Hon. Charles L. Brieant, former Chief Judge in the Southern District of New York. Following the clerkship, she was a litigation associate at Sullivan & Cromwell (1982-89) and a senior attorney in litigation at Milbank, Tweed, Hadley & McCloy (1989-93).

Judge Cyganowski is Chair of the Insolvency Litigation & Fiduciary Appointments Group. She practices in insolvency and bankruptcy litigation, and is also an active mediator, having mediated cases in bankruptcy and federal cases throughout the country. Among other representations, she currently represents the FDIC, as Receiver, in connection with various bankruptcy cases; serves as the Auditor in connection with a consent judgment in a national matter involving Capital One; and serves as arbitrator and/or mediator in numerous disputes, including *Madoff*, *Quebecor* and *Metaldyne*. She has also been appointed referee in the largest commercial foreclosure involving Stuyvesant Town and Peter Cooper Village in New York City, and has served as a receiver in an SDNY federal court action where she marshaled over \$13.5 million for the benefit of the plaintiffs in less than one month.

An author of numerous articles, she is active in the New York State Bar Association. She was appointed as co-chair of the NYSBA Special Task Force on Courts (2008-2009), and is a Fellow of the American and New York State Bar Foundations. She is also an adjunct professor of law at St. John's University, School of Law, in the LL.M. Program in Bankruptcy, where she teaches bankruptcy courses.

Education

- State University of New York at Buffalo, J.D. *magna cum laude*, 1981
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Bar and Court Admissions

New York; Supreme Court of the United States; Court of Appeals for the Second Circuit; U.S. District Courts for the Southern, Eastern and Western Districts of New York; U.S. District Court for the District of Columbia; U.S. Court of Federal Claims.

Professional Associations

New York State Bar Association (Commercial & Federal Litigation Section: Executive Committee and Chair of the Section's Nominating Committee since 1993); American Bankruptcy Institute; American Bar Association; Bar Association of the City of New York; and Federal Bar Council.

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Randy Klein is a principal at Goldberg Kohn and Chairs the firm's Bankruptcy & Creditors' Rights Group. He concentrates his practice in the area of the protection and enforcement of creditors' rights. Mr. Klein is recognized as a leader in his field by his peer selection as a Fellow in the American College of Bankruptcy.

Mr. Klein has written extensively on creditors' rights, including: "The Pre-Petition Right to Post-Petition Income Streams and the Misinterpretation of section 552," Co-author, *American Bankruptcy Institute Journal*, (December 2010); "Majority Rules: Non-Cash Bids and the Reorganization Sale," Co-author, *American Bankruptcy Law Journal* (September 2010). The latter article resulted from Mr. Klein's novel structuring and implementation of the acquisition of Ames Taping & Tooling by a subset of junior secured lenders for non-cash consideration, including debt and equity securities issued by the acquisition entity.

Mr. Klein is also a nationally recognized expert on the drafting and enforcement of intercreditor agreements. He is a frequent lecturer on the topic and has spoken on many occasions including: "The New ABA Model Intercreditor Agreement," *American Bar Association's Section of Business Law Commercial Finance Committee Teleconference* (2010); "Dealing with Intercreditor Issues in Today's Loan Markets - The Role of the ABA Model Intercreditor Agreement," *Commercial Finance Association's 65th Annual Convention* (2009); "An Introduction to the Model Intercreditor Agreement," . He is one of the co-authors of the American Bar Association's model form: "Report of the Model First Lien/Second Lien Intercreditor Agreement Task Force," Contributor, *Committee on Commercial Finance, ABA Section of Business Law* (July 2010).