absolute PRIORITY
Current Developments in Bankruptcies and Workouts to Keep You Ahead of the Curve

Cooley GODWARD KRONISH LLP

BANKRUPTCY AND RESTRUCTURING GROUP

Dear Colleagues and Friends,

Welcome to the inaugural issue of ***Absolute Priority—Current Developments in Bankruptcies and Workouts to Keep You Ahead of the Curve***, the quarterly newsletter from Cooley Godward Kronish's Bankruptcy & Restructuring Group. What an exciting time for us to launch our new publication aimed at keeping you informed about recent cases and developments in the dynamic world of bankruptcy cases and out-of-court restructurings. Exciting? Yes, because this Fall marked two important events.

Same Great Service with an Extended National Platform

First, as you hopefully know by now, effective October 1, 2006, Kronish Lieb Weiner & Hellman LLP and Cooley Godward LLP, a national leader in representing technology and life sciences companies and litigating high-stakes commercial and intellectual property disputes, merged to create a dynamic new firm, **Cooley Godward Kronish LLP**. The newly merged firm consists of 550 lawyers with a coast-to-coast, high-caliber litigation practice, and extensive corporate, transactional, and bankruptcy and restructuring capabilities with a significant presence nationwide. Kronish's leading bankruptcy group combined with Cooley's market-leading strengths enables the merged firm to offer our clients even deeper expertise in this critical area.

Combining Cooley Godward's bankruptcy and litigation practices with Kronish's—both of which represent the highest caliber insolvency and workout professionals—provides our national bankruptcy and restructuring group a more extended platform to generate business and service our existing and new clients.

Besides our New York office, the new firm offers full-service offices in the major commercial and government centers of San Francisco and Washington, DC, as well as in the country's most significant technology markets: Palo Alto and San Diego, California; Reston, Virginia; and Broomfield, Colorado.

One Year Later

Second, October 17, 2006 represented the one year anniversary of the effective date of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"). Over this past year, we have seen changes in the law where we expected (*e.g.*, obligations of committees under section 1102(b)), changes in the practical issues affecting debtors (*e.g.*, the disposition of real estate leases), and, frankly, little or no change in areas that change was expected (*e.g.*, treatment of bonuses formerly called "KERPs"). So, what better way to start off our new newsletter than by looking back at the last year and seeing how the bankruptcy practice has responded to BAPCPA.

We hope that you look forward to each issue of ***Absolute Priority*** so that you can stay *ahead of the curve* with us.

Lawrence C. Gottlieb
Chair, Bankruptcy & Restructuring

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Stay informed. To sign up for future issues of ***Absolute Priority***, Cooley's quarterly newsletter on bankruptcy issues and developments, visit www.cooley.com/alert.

To keep informed on regular updates in the bankruptcy sector, you can check In The (Red): The Business Bankruptcy Blog, authored by Cooley Godward Kronish partner Robert Eisenbach. To sign up for In The Red, visit: bankruptcy.cooley.com.

from the editor

ADAM C. ROGOFF

As you read above, our inaugural issue is dedicated to certain key areas of BAPCPA and their developments over the last year. Each issue, we will focus on decisions that could impact the bankruptcy and restructuring practice. We will also focus on keeping you updated about practical developments.

For example, over the last few years, more and more chapter 11 cases are seeing the formation of official committees *beyond* the unsecured creditors' committees. Sometimes, these are committees required by the Code, such as a committee of retirees to negotiate any changes to retiree medical benefits under section 1114. However, other times, they are employee committees, tort claimant committees, bondholder committees and even equity security holder committees. Why is this relevant? Because shareholders or unsecured creditors, who believe that their interests are not being adequately represented by the unsecured creditors' committee, may have greater recourse through a court-sanctioned (and estate compensated) committee with professionals.

In addition, it has been well-appreciated that chapter 11 cases have always been an opportunity to divest non-core assets or business lines, either piecemeal or as a going concern. One person's sale is another person's buy, which is why, for non-debtors, chapter 11 cases represent potential acquisition opportunities. Distressed "M&A" is still "M&A" (just usually at a better price). Under the new law, with tighter time frames and other restrictions impacting debtors, we anticipate that the opportunity to benefit from distressed acquisitions will only continue to increase. This is why, each issue,

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KERPS—Executive Compensation Plans

Executive Compensation Plans Before BAPCPA

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") introduced amendments to the Bankruptcy Code that have imposed significant restrictions on a debtor's ability to pay executive retention bonuses, severance pay and other similar compensation. Prior to the enactment of the BAPCPA, debtors typically sought approval of proposed employee retention programs (generally referred to as "KERPS") pursuant to § 363(b)(1) of the Bankruptcy Code, which permits debtors to use property of the bankruptcy estate outside the ordinary course of business provided that there is a "good business reason" for such use. Accordingly, debtors routinely utilized this relatively lax standard to obtain approval of retention-based compensation schemes that either matched or exceeded annual salaries for their senior executives. A debtor's liability for payments under an approved KERP gives rise to "administrative expense" claims which enjoy priority in payment over general unsecured claims.

In response to perceived KERP abuse in some of the more high profile bankruptcy cases commenced prior to 2005, Congress passed legislation as part of the BAPCPA aimed to restrict the use of KERPS in chapter 11 cases. Specifically, § 503 of the Bankruptcy Code was amended to include new subsections (c)(1), (2) and (3).

Executive Compensation Plans After BAPCPA

Section 503(c)(1) prohibits administrative expense treatment for retention bonuses and similar liabilities to "insiders" unless the debtor can show that: (a) the payment is "essential" to the employee's retention because the employee has received a *bona fide* job offer from another business at the same or greater rate of compensation; (b) the services provided by the employee are "essential" to the survival of the debtor's business; and (c) the amount of the payment does not exceed either (i) 10 times the mean amount of similar transfers paid to non-management employees for any purpose during the same calendar year, or (ii) if there are no such transfers, 25 percent of the amount of any similar transfer to the particular employee for any purpose during the preceding calendar year.

Section 503(c)(2) prohibits administrative expense treatment for severance payments to insiders unless the court finds both that: (a) such payment is part of a program generally applicable to all full-time employees; and (b) the amount of such payment is not greater than 10 times the mean severance

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Meeting the Requirements of Creditor Committee Disclosure

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") established expansive new duties for creditors committees. Specifically, BAPCPA (i) authorizes bankruptcy courts to alter the composition of a creditors committee in order to ensure adequate representation of creditors with varying interests; (ii) provides creditors who are not committee members with greater access to information provided to the committee; and (iii) requires committees to solicit and obtain feedback from non-committee members.

Despite general pronouncements that BAPCPA would provide smaller creditors with substantial access to the information available to statutory committees, BAPCPA does not provide any guidance as to the nature or scope of the information that a committee must provide to non-committee creditors, and the legislative history accompanying BAPCPA is unclear. Accordingly, the interpretation of the scope and effect of BAPCPA has been left largely in the hands of the bankruptcy court judges presiding over the cases that have been filed in the immediate aftermath of BAPCPA's enactment.

Committee Composition

BAPCPA clarifies the role of the bankruptcy court in overseeing the composition of a creditors committee through the newly inserted section 1102(a)(4). Pursuant to this new provision, on request of a party in interest and after notice and a hearing, the court may order the U.S. Trustee to change the membership of a committee appointed under section 1102, if the court determines that the change is necessary to ensure adequate representation of creditors and equity security-holders. *See* 11 U.S.C. § 1102(a)(4). Further, the court may order the U.S. Trustee to increase the number of members of a committee to include a creditor that is a small-business concern (as described in § 3(a)(1) of the Small Business Act), if the court determines that the creditor holds claims (of the kind represented by the committee) the aggregate amount of which, in comparison to annual gross revenue of that creditor, is disproportionately large. *See* 11 U.S.C. § 1102(a)(4).

A review of the post-BAPCPA case law does not reveal any reported decisions interpreting this amended provision. However, the composition of an official committee of unsecured creditors was recently challenged in *In re Delphi Corp.*, Case No. 05-44481 (Bankr. S.D.N.Y.) (Drain., J.). In the *Delphi* proceeding, the U.S. Trustee appointed a committee consisting of a labor union, several trade creditors, institutional investors, and the indenture trustee for senior noteholders. In the immediate aftermath of the committee's appointment, the United Auto Workers ("UAW") and the Pension Benefit Guaranty Corp. ("PBGC") sought court orders directing the U.S. Trustee to appoint them to the committee. By agreement with the debtors and the U.S. Trustee, the UAW and PBGC were appointed as non-voting members of the committee.

More recently, General Motors ("GM") sought a court order directing its appointment to the committee, contending that (i) its claims were unique; and (ii) it is the only major creditor of the debtors not appointed to the committee. Accordingly, GM asserted that the committee does not adequately represent its interests and characterized the U.S. Trustee's decision to exclude it from the committee as arbitrary and capricious. *See Motion for Order Directing Appointment of General Motors Corp. To Statutory Creditors' Committee*, *In re Delphi Corp.*, Case No. 05-44481 (Bankr. S.D.N.Y.) (Docket # 2443).

The committee, among others, objected to GM's request, asserting that because GM is (i) a former parent of the debtors; (ii) the single largest customer of the debtors; (iii)

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Changes to the Rights of Reclamation Creditors Under BAPCPA

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") has expanded the rights of creditors entitled to reclaim goods that were delivered to a debtor in the period immediately preceding a bankruptcy filing.

Under pre-BAPCPA law, a creditor could assert a reclamation claim to goods received by a debtor while it was insolvent if the creditor demanded the reclamation of such goods in writing before 10 days after the receipt of such goods by the debtor, or if such 10-day period expired, after the commencement of the case, but before 20 days after the receipt of such goods by the debtor. The creditor could be denied reclamation as long as the court provided the creditor with an allowed reclamation claim, an administrative expense or priority claim, or provided the creditor with a lien.

BAPCPA extends the period during which a creditor may reclaim goods to 45 days. If a creditor sells goods to a debtor in the ordinary course of the creditor's business, it may reclaim such goods, subject to the prior rights of a holder of a security interest in such goods or the proceeds thereof, if the debtor receives such goods while insolvent and within 45 days before the date of the commencement of the bankruptcy case. The creditor cannot reclaim the goods unless it demands the reclamation of the goods in writing not later than (i) 45 days after the date of receipt of such goods by the debtor or (ii) 20 days after the commencement of the case, if the 45 day period expires after the commencement of the case.

In addition, suppliers now have the right to an administrative expense claim under Section 503(b)(9) of the Bankruptcy Code for goods sold within the ordinary course of business and shipped to the debtor within

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In the News

Current Cooley Representations

***In re Copeland Enterprises, Inc.*, Case No. 06-10853 (Bankr. D. Del. 2006).** Copeland Enterprises, Inc. is a leading specialty sporting goods retailer on the West Coast and inter-mountain regions of the United States, with 31 specialty sporting goods stores in California, Oregon, Nevada, and Utah. Cooley's Bankruptcy & Restructuring Group was initially retained prior to the bankruptcy filing by an unofficial committee formed by 19 of the largest unsecured trade vendors of Copeland, in order to represent the interests of all of Copeland's unsecured trade creditors while Copeland attempted to restructure its debts and achieve a forbearance from its secured creditors. Cooley's Bankruptcy & Restructuring Group was subsequently retained by the official committee of unsecured creditors and continues to represent the Committee as the company attempts to reorganize its business in chapter 11.

***In re Bachrach Clothing Corp.*, Case No. 06-06525 (Bankr. N.D. Ill. 2006).** Bachrach Clothing, a Chicago-based retailer of men's clothing, operated 47 retail stores at the time of its bankruptcy filing. Representing the official committee of unsecured creditors in the case, Cooley helped to facilitate a competitive auction for substantially all of the assets of the company as a going concern, resulting in a sale of the business for approximately $11 million. Cooley continues to represent the Committee in its efforts to investigate the facts and circumstances surrounding the leveraged buyout of Bachrach in 2005 and the purportedly secured status of certain parties' claims.

Extending Deadlines to Assume or Reject Leases

Prior to the recent amendment of the Bankruptcy Code, a debtor had 60 days following the date of its bankruptcy filing by which to determine whether it wanted to assume or reject its nonresidential real property leases and executory contracts. However, a debtor could request an innumerable amount of extensions of this deadline from the bankruptcy court, and judges were permitted to approve such requests for "cause," a term undefined in the Bankruptcy Code. Such extensions were routine, often extending through the date of confirmation of a chapter 11 plan.

Under section 365(d)(4) of the amended Bankruptcy Code, a debtor now has 120 days following its bankruptcy filing to make this determination, but the guidelines for granting extensions of this deadline are now more structured and less discretionary. Section 365(d)(4)(B) permits bankruptcy courts to grant an extension of this deadline for 90 days upon the motion of a debtor or lessor. However, the Court may only grant subsequent extensions of this deadline "upon prior written consent of the lessor in each instance."

Thus, after the 210th day post-filing (the initial 120-day period plus the 90-day extension period), a debtor must obtain approval from the landlord(s) in question in order to extend the lease assumption or rejection deadline any further. This new provision has imbued landlords with greater control over when debtors must determine if they want to assume or reject their leases, a decision which can have a significant impact on a debtor's reorganization prospects or the value of a liquidated estate.

In the one reported decision on this issue, *In re Tubular Technologies, LLC*, Case No. 06-00228, 2006 WL 2529588 (Bankr. D.S.C. Jul. 18, 2006), the District Court denied the debtor's motion to stay the turnover of its lease premises to the landlord, which motion was filed following the Bankruptcy Court's ruling denying the debtor's motion to extend its time to assume or reject its lease. The District Court held that a debtor may not obtain an extension to assume or reject its lease if the extension is not granted within the debtor's automatic 120-day period to make this determination. Although the debtor filed its motion to extend its deadline on the 112th day of the case, the hearing to consider this motion was not scheduled to occur until the 144th day of the case, and the debtor had not attempted to schedule an expedited hearing to occur prior to the expiration of the 120-day period. Accordingly, since the debtor was unlikely to be successful on its appeal of the Bankruptcy Court's order, the District Court did not stay the immediate turnover to the landlord of the premises occupied by the debtor.

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we will highlight recently reported "M&A" activity in chapter 11 cases.

And, needless to say, because the bankruptcy and restructuring professionals at Cooley Godward Kronish are well-versed in the issues and opportunities discussed above, and many more diverse facets of chapter 11 cases (*e.g.*, representing debtors, creditors, various types of committees, private equity and hedge funds), we will update you each issue as to what we have been up to.

We look forward to your feedback as ***Absolute Priority*** launches and develops over time. If you would like to see certain things in our newsletter, please feel free to contact me or anyone else in our dynamic group. •

In contrast to this quite strict interpretation of the Bankruptcy Code's provisions governing extending the time to assume or reject real property leases, a review of several large chapter 11 filings post-BAPCPA in the Southern District of New York shows that various landlords appear willing to permit discrete extensions beyond the 210-day deadline and request little consideration from the debtors in exchange.

In *In re Dana Corporation*, Case No. 06-10354, the Court approved the debtor's initial 90-day extension request and subsequent extensions that were agreed to by the lessors in question. The debtors submitted two separate proposed orders to the Court, one seeking approval of a stipulation that requested an additional 60 days to determine whether to assume or reject a lease and the other requesting approval of 14 stipulations, each seeking an additional 90 days to make that determination. Each stipulation constituted the lessor's written consent to the requested extension. Additionally, in exchange for obtaining the requested extensions, the debtor was not required to perform any extra tasks—only to pay any postpetition obligations under the leases, which payment is already required under the Bankruptcy Code.

In *In re Calpine Corporation*, Case No. 05-60200, after approving the initial 90-day extension to assume or reject all of the debtors' unexpired real property leases, the Court entered approximately 25 orders approving stipulations entered into by the debtors and various lessors agreeing to extend the debtors' deadline to assume or reject their leases. Each of the stipulations stated that they (a) constituted the lessor's written consent to the requested extension, and (b) neither waived any of the lessor's potential claims against the debtors, nor altered the terms of the lease in question in any way. The stipulations ranged from granting the debtors an additional two weeks to an additional year to decide whether to assume or reject the lease in question. Additionally, at least four of the landlords entered into more than one stipulation over the course of the case to permit the debtors an even greater amount of time to assume or reject their leases.

Although most of the *Calpine* stipulations were drafted in a sparse, straightforward manner and merely granted the extension with the lessor's consent, some of the stipulations placed more qualifications on the arrangement. For instance, in two separate stipulations, one of which was entered into by the lessor who extended the debtors' time to assume or reject by one year, the orders permitted the lessors to withdraw from the agreed-to extensions on 45 days notice to the debtors and provided that the leases would be deemed rejected if the debtors did not move to assume them before the new deadlines. In one instance where a lessor permitted the debtors a 60-day extension, the order required that the debtors pay their postpetition balance to the lessor in order to take advantage of the extension. In another scenario, the lessor agreed to an extension of approximately 100 days, but the order required the debtors to inform the lessor if they intended to make repairs to the property costing $150,000 or more and provided that the debtors would have to pay the necessary cure amount to assume the lease, even if the lessor had failed to file a proof of claim for the cure amount.

The *Refco* Court (Case No. 05-60006), after approving a blanket order to extend the lease assumption and rejection deadlines for all of the debtors' unexpired real property leases by 90 days, entered three stipulated orders approving further extensions of approximately 240 days each with regard to three of the debtors' leases. However, each of those orders stated that the debtors would be deemed to have rejected the lease in question effective as of the newly extended lease deadlines. Although the orders did not say this, the

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***In re Saint Vincent's Catholic Medical Centers of New York, et al.*, Case No 05-14945 (Bankr. S.D.N.Y. 2005)**. Cooley's Bankruptcy & Restructuring Group has been retained as counsel to the official tort claimants' committee, representing over 750 medical malpractice claimants asserting hundreds of millions of dollars of claims against the various debtors operating 10 hospitals and related medical facilities in the five boroughs of New York City.

Representing the tort claimants' committee, Cooley has helped facilitate relief from the automatic stay in order to afford medical malpractice claimants in the Manhattan, Staten Island and Westchester regions the ability to liquidate their claims.

***In re The Consumers Trust*, Case No. 05-60155 (Bankr. S.D.N.Y. 2005).** Cooley's Bankruptcy & Restructuring Group is representing two English solicitor trustees in a Bankruptcy Rule 2004 investigation being conducted by the debtor, together with the creditors' committee in this cross-border insolvency case. The matter presents challenging jurisdictional and conflicting legal principles between U.S. bankruptcy and non-bankruptcy laws against U.K. receivership, common law and statutory laws.

***In re Three A's Holdings, LLC*, Case No. 06-10886 (Bankr. D. Del. 2006).** Cooley's Bankruptcy & Restructuring Group is representing the stalking horse bidder for substantially all of the assets of the Tower Records music store chain, which includes 89 store locations.

***In re Tyringham Holdings, Inc.*, Case No. 06-32385 (Bankr. E.D. Va. 2006).** Cooley's Bankruptcy & Restructuring Group is representing the liquidating partner in a joint

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venture serving as the stalking horse bidder for the fine jewelry chains of Shreve Crump & Low, in Boston, Massachusetts, and Schwarzschild Jewelers, in Richmond, Virginia.

Privately Held Bio-Science Company

Cooley assisted a privately held California based bio-science research company wind up its affairs. In March of 2006, the company's board voted to cease all operations following certain unfavorable developments as to its lead pharmaceutical candidate, and the company ceased to actively conduct its business. Immediately thereafter, Cooley began the corporate dissolution of the company, which included the sale of its assets to multiple parties and resolution of liens held by secured parties and disputed claims of unsecured creditors. Over the course of a six month period, Cooley drafted over a dozen patent and compound sale agreements, patent assignment agreements, lease termination agreements and assisted in negotiating the sale of virtually all of the company's assets. These assets were sold with a minimum amount of representations and warranties in order to eliminate potential future liability related to the sales. It is anticipated that the company's creditors will receive distributions substantially in excess of 50% of their claims.

Recent Decisions

***In re Adelphia Fee Committee*, Case No. 02-41729 (Bankr. S.D.N.Y. Aug. 18, 2006).** On August 18, 2006, Judge Robert E. Gerber issued the first decision in the country relative to the confidential and privileged nature of a court-appointed Fee Committee and its work papers. In granting the Fee Committee's motion for a protective order from discovery, the

Committee Round-up

In the following cases, courts have appointed statutory committees other than an unsecured creditors committee to protect the rights of other discrete classes of creditors.

Case Name	Case Number	Type of Committee
Calpine Corporation	SDNY, 05-60200	Official Committee of Equity Security Holders and Committee of Non-Union Retired Employees
Delphi Corporation	SDNY, 05-44481	Official Committee of Equity Security Holders
Northwest Airlines Corporation	SDNY, 05-17930	Committee of Retired Employees
Saint Vincent's Catholic Medical Centers of NY	SDNY, 05-14945	Official Committee of Tort Claimants
Dana Corporation	SDNY, 06-10354	Official Committee of Equity Security Holders and Committee of Non-Union Retired Employees.

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tone and wording of the extension period and terms suggests that the debtors would only be permitted to reject the leases and were simply being granted additional time to occupy the leased premises before being required to reject the leases and exit the property. In two of the orders, the lessors even agreed not to assert lease rejection damages against the debtors' estates. The third order set a schedule for turnover, whereby the lessor required the debtors to surrender the premises in question in stages as set forth in the order, *e.g.*, to vacate the second floor by a certain date, then the remaining floors a couple of months following that date, etc.

However, notwithstanding the rather relaxed practice that appears to typify the extensions of debtors' deadlines to assume or reject leases in the Southern District of New York, there are always exceptions. In *G&G Retail*, Inc. (Case No. 06-10152), the Court approved the debtor's extension motion, extending the debtor's lease assumption/rejection deadline to 210 days following the filing date, over the landlord's objection thereto. In that case Max Rave LLC purchased substantially all of the debtor's assets, including the right to select and designate the debtor's leases for assignment to it or to a third party. Although the Court permitted the requested extension of time to determine whether to assume and assign or reject the lease, the Court order required Max Rave LLC to meet with the objecting lessor three months prior to the termination of the extension period to discuss possible assignment of the lessor's lease to the purchaser. Thus, the landlord exerted sufficient authority over Max Rave LLC while it was determining whether to assign the lease to itself or another party that it was required to meet with the landlord to discuss the future disposition of that lease directly following the expiration of the automatic 120-day period all debtors receive, despite the fact that the debtor was granted a 90-day extension of its deadline to assume or reject the lease.

In the District of Delaware, although courts have consistently approved debtors' motions to extend the initial period to assume or reject their leases by the 90 days contemplated in the Bankruptcy

Code (as is evident in the *FLYi, Inc.*, *Pliant Corporation, J.L. French Automotive Castings, Inc., Global Home Products LLC*, and *Nellson Nutraceutical, Inc.* cases), few if any debtors have sought Court approval of subsequent extensions, so it is not possible at the present time to predict how that Court might respond to such requests.

These cases show that despite the limitations imposed upon debtors, certain landlords have been willing to negotiate extensions of the debtors' deadlines. Clearly, while the balance of negotiating power has shifted to landlords, business realities of rejected leases and vacant properties have brought about reasonable accommodations. Nonetheless, the days of a debtor's expectation to unfettered extensions are gone.

Assuming and Assigning Leases

Pursuant to section 365(f)(2) of the Bankruptcy Code, a debtor may assume and assign unexpired nonresidential real property leases so long as the debtor properly assumes the contract, which requires that a debtor cure any past due amounts under the lease or at least provide adequate assurance that it will do so promptly, and the assignee provides the lessor with "adequate assurance of future performance." However, section 365(b)(3) of the Bankruptcy Code requires that, where the lease in question is located in a shopping center, "adequate assurance of future performance" includes assurance that assumption and assignment of the lease is subject to all the provisions contained in the lease and will not upset the tenant mix or balance in the shopping center in question. The amended Bankruptcy Code section 365(f) makes clear that the debtor's right to assume and assign its leases may only be exercised pursuant to the restrictions on assignment set forth in section 365(b)(3).

Prior to the amendments, there was clearly the opportunity for conflict between these two provisions in the Bankruptcy Code. Although section 365(f) of the Bankruptcy Code provided for a debtor's right to assume and assign a lease so long as the lessor is assured of future payments, shopping center leases have the added requirements concerning the mix of tenants, operation of the store in accordance with various location and signage restrictions, etc. Often, in order to allow assignments, courts held that the assignment provisions of section 365(f) trumped the additional "shopping center" provisions. However, the amendments eliminated this possibility by providing that section 365(f) cannot supersede section 365(b)(3). As with the requirement that landlords approve subsequent extensions of the deadline to assume or reject leases, landlords regained a significant amount of control over whether and to whom a debtor may assign its "shopping center" lease(s).

There have not yet been any reported decisions discussing this issue. However, looking to retail cases in the District of Delaware, in *Global Home Products LLC* (Case No. 06-10340), the debtors obtained Court authority to assume and assign unexpired leases and executory contracts to C.R. Gibson, Inc., SEB S.A. and Groupe SEB USA, entities that purchased certain of the debtors' assets. The Court found the proposed assumptions and assignments to constitute exercises of "sound business judgment" and to be in the best interests of the debtors, their creditors and their estates. As required by the Bankruptcy Code, the lessors were entitled to receipt of the cure amounts, of which the debtors paid a portion and the purchasers paid the remainder. The orders also noted that the purchasers had provided the lessors with adequate assurance of future performance. Neither the motions nor the orders approving the motions discussed the "shopping center" lease provisions set forth in the Bankruptcy Code. Thus, although this is a retail case, it appears that either none of the leases in question were located in shopping centers or the landlords in question had

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Court stated that "care must be taken to protect [the Fee Committee's] legitimate rights to the protection of work product, attorney mental impressions, and the attorney-client privilege."

Cooley's Bankruptcy & Restructuring Group continues its representation of the court-appointed fee committee as the fees and expenses reviewed in this mega-bankruptcy case eclipse the $500 million mark.

***In re Enron Corp.*, Case No. 01-16034 (Bankr. S.D.N.Y. Sept. 15, 2006).** On September 15, 2006, Judge Arthur J. Gonzalez issued a published decision in favor of the creditors of Enron, in an action brought by Cooley in its capacity as counsel to the Enron Employee Committee, against the estate of Cliff Baxter for the $1.3 million Baxter wrongfully took in the month before Enron's bankruptcy filing.

Baxter was a "Top Hat" executive of Enron who accelerated his deferred compensation benefits, taking the money in the month before Enron's collapse ahead of other creditors. Some time after the Enron bankruptcy filing, Baxter ultimately took his own life. The Baxter estate argued, among other things, that the bankruptcy court did not have federal jurisdiction to hear the case under the so-called probate exception to federal jurisdiction. Essentially, the Baxter estate sought to avoid liability in the same way that the family of the deceased unsuccessfully sought to defeat Anna Nicole Smith in the *Marshall v. Marshall* case recently decided by the U.S. Supreme Court. The Enron court found the *Marshall* decision to be wholly dispositive on the "probate exception" issue.

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Activity of Interest

***In re Enron Corp.*, Case No. 01-16034 (Bankr. S.D.N.Y. 2001).** Cooley's Bankruptcy & Restructuring Group, which has been representing the Employee Committee of Enron, continues to pursue the recovery of accelerated deferred compensation made to select "Top Hat" employees of Enron in the month before the company's bankruptcy filing.

On May 18, 2006, Judge Arthur J. Gonzalez of the United States Bankruptcy Court for the Southern District of New York, approved a settlement resulting from a suit on behalf of the Enron estate involving 27 defendants. The settlement nets the estate an additional $21.1 million, comprised of $15.7 million in cash repayment and an additional $5.4 million through a waiver of claims. The latest settlement benefits the debtors' estate and its creditors, including Enron employees as creditors of the estate. To date, the Employee Committee has secured settlements with 104 top hat defendants for a net benefit to the Enron estate exceeding $36 million.

***In re Levitz Home Furnishings, Inc.*, Case No. 05-45189 (Bankr. S.D.N.Y. 2005)**. Cooley's Bankruptcy & Restructuring Group filed a complaint on behalf of the official committee of unsecured creditors seeking a declaration that a "unitary lease" encompassing 42 store locations was severable and, therefore, capable of individual assumption or rejection.

Cooley's efforts facilitated a consensual resolution between the parties which provided for the partial unbundling of certain store locations from the "unitary lease," which ultimately provided the purchaser of Levitz the added flexibility to designate additional individual store locations for

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no objections to the proposed lease assignments. The fact that the two purchasers intended to continue conducting similar business operations following the sales makes it likely that the purchasers would not violate any of the use restrictions in the assigned leases.

In *The LoveSac Corporation* case (Case No. 06-10080), the orders authorizing the debtors to assume and assign leases directed the debtors to cure all defaults under the lease. The orders also limited the assignees' business conduct in the leased premises such that the premises could only be used for the retail sale of brand name or designer perfumes and cosmetics, beauty supplies, hair care and skin care items. The orders recited that the assignees had provided adequate assurance of future performance, and that the leases would remain in full force and effect, notwithstanding any provisions in the leases that prohibit assignments or transfers.

Turning to Southern District of New York retail cases, the Court in *G+G Retail, Inc.* (Case No. 06-10152) entered at least four orders permitting the debtor to assume and assign certain lease agreements to Max Rave LLC, the purchaser of substantially all of the debtor's assets, including the right to select and designate the debtor's leases for assignment to it or to a third party. The orders stated that the proposed assumptions and assignments were approved because the lessors had received adequate assurance of future payments and cure payments where necessary. Neither the motions nor the orders approving the motions discussed whether these leases were a part of shopping centers, although the debtor is a retail business. However, since Max Rave LLC purchased the debtors' assets as a going business concern, it would not likely violate any of the leases' use provisions (since it would continue using the premises as the debtor had used them).

In *Musicland* (Case No. 06-10064), the Court issued two orders approving the assumption and assignment of certain leases to The New 5-7-9 and Beyond, Inc. and to Record Town Utah, LLC. In each order, the Court required the debtors to pay the necessary cure amounts. The agreements governing the assumption and assignment, which were attached to the orders, specified that the assignees were required to provide adequate assurance of future performance, including a written statement of the expected use of the premises, a list of the assignees' existing stores and landlords, and a current financial statement and financial statements for the three previous years. Additionally, the Court just recently entered the debtors' motion to assume and assign certain leases to Record Town Inc. or Record Town USA, LLC, which was pending before the Court for 2.5 months while the debtors, the proposed assignees and the several objecting landlords conducted negotiations. In that motion, the debtors requested the Court's authority to ignore any anti-assignment provisions in the leases in question and also that the Court deem satisfied the requirements discussed above regarding shopping center leases. While the Court did approve the proposed assumption and assignment, the order requires the assignees to comply with all of the terms and provisions of the leases in question, as said leases were modified through agreements with the landlord. Thus, although none of these revised lease agreements are publicly available, it is clear that the debtors were not able to obtain blanket allowances to ignore lease provisions prohibiting or limiting assignment, but rather were forced to work with the landlords to gain consensual leniency regarding those provisions.

In addition to these examples of successful assumptions and assignments, however, the *Musicland* debtors also declined to assign a lease to a potentially non-conforming assignee in lieu of accepting a lower purchase price from the landlord for the

surrender of the lease. Notably, the debtors accepted the landlord's offer of only $1 million versus an offer of $1.5 million from a third party. This example shows that debtors' estates are being required to forego assignments which they otherwise would have pursued pre-BAPCPA, thereby underscoring the increased leverage of landlords in the assignment arena.

These cases show that most retail debtors are now required to heed use provisions in their "shopping center" leases when considering the potential for assuming those leases and assigning them to third parties. Debtors appear to be less likely to encounter difficulties with their landlords where the proposed assignees intend to conduct business operations similar to those conducted by the debtors. However, as evidenced in the *Musicland* auction discussed above, debtors may be left with no option but to surrender their leases to the landlords, notwithstanding the presence of offers on the table that would yield a greater benefit to the estate, where the would-be assignee is not a member of the debtor's industry and/or the landlord simply refuses to relax the use provisions contained in the lease. •

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20 days prior to the commencement of the bankruptcy case.

In light of these amended provisions, post-BAPCPA debtors have sought to establish Court-approved streamlined procedures for dealing with reclamation claims. These procedures do not differ significantly from those utilized by debtors before the implementation of BAPCPA. In *In re Flyi, Inc.*, (05-20011 D. Del. 2005), for example, the debtor proposed the following procedures for reconciling reclamation procedures:

(a) any vendor asserting a reclamation claim must satisfy all requirements of section 546(c)(1) and applicable state law, and must send the reclamation demand to the debtor at an address listed in the motion;

(b) after receipt of all reclamation demands and an opportunity to review them, the debtor will file a Notice listing those claims that it deems valid within 150 days after the petition date;

(c) should the debtors fail to file a Notice with respect to a reclamation claim, any holder of a claim may bring its own motion, but may not do so earlier than 90 days after the Court's ruling on the motion;

(d) all parties in interest shall have the right to object to the inclusion or omission of any reclamation claim in the Notice;

(e) any claim included in the Notice that is not objected to within 20 days after service shall be deemed a valid reclamation claim allowed by the Court;

(f) if the debtors become aware of any additional reclamation demands within 20 days after the filing of the report, they shall file a supplemental report within 30 days of their discovery. All parties will have 20 days to object to the conclusions of this report;

(g) if an objection is filed to any report with respect to a particular reclamation demand, the debtors shall attempt to reach a consensual resolution of the objection. If no resolution is reached within 60 days, the debtors shall file a motion with the Court to resolve such objection;

(h) in the event that the debtors resolve a reclamation demand, they shall file a notice of settlement and serve it upon the Trustee, the Committee, et al., who will have ten days to object;

(i) no vendor shall, without the written consent of the debtors, be entitled to

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assumption and assignment or rejection. This ability increased the potential for a distribution to unsecured creditors in this chapter 11 case as unsecured creditors maintain a direct interest in the proceeds of lease designations, as a result of an arrangement with the purchaser of Levitz, an affiliate of Prentice Capital Management.

At the time of the bankruptcy filing, Levitz Home Furnishings, Inc. was a leading retailer of furniture in the United States, with 121 locations in major metropolitan areas.

***In re Airway Industries, Inc.*, Case No. 06-20224 (Bankr. W.D. Pa. 2006).** Cooley's Bankruptcy and Restructuring Group represented TravelPro International Inc, a subsidiary of Holiday Holdings Inc, in its purchase of substantially all of the assets of Airway Industries, Inc. and Austin House, Inc. d/b/a Atlantic Luggage Company, in their chapter 11 cases filed in Pittsburgh, Pennsylvania. Cooley guided TravelPro through negotiations of the Asset Purchase Agreement, the auction process and the closing. This transaction has enabled TravelPro to significantly increase its market share in the manufacturing and distributing of luggage products. The purchase of the Austin House makes TravelPro a major distributor of luggage and related accessories.

***In re Delphi Corp.*, Case No. 05-44481 (Bankr. S.D.N.Y.).** Cooley's Bankruptcy & Restructuring Group assisted Wireless Matrix USA, Inc. in its purchase of Mobile Aria, an operating subsidiary of Delphi Corporation. Cooley assisted Wireless Matrix in negotiating the terms of the asset purchase agreement under which the client was selected as the stalking horse buyer. At an auction held at debtor's counsel's office, the purchase

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price increased by over $5 million and our client was "outbid" for the assets. Two weeks later, however, and less than 48 hours prior to the sale hearing, we were contacted by debtor's counsel and informed that the auction "winner" had withdrawn its bid and our client was once again the would-be purchaser. In a late night session, Cooley renegotiated many terms of the purchase agreement and sale order. The Bankruptcy Court for the Southern District of New York approved the $11.1 million sale to our client the next day.

***In re USG Corporation,* Case No. 01-2094 (Bankr. D. Del. 2001).** Cooley's Bankruptcy & Restructuring Group represented USG and its affiliated debtors in bankruptcy proceedings related principally to asbestos liability, assisting with strategic planning and all asbestos-related issues. Cooley engaged in large-scale litigation in preparation for a trial to estimate hundreds of thousands of asbestos personal injury claims for bankruptcy-related purposes and defended bankruptcy litigation alleging asbestos liability under substantive consolidation, successor liability, corporate veil piercing and other theories. Ultimately, Cooley helped achieve a global settlement, providing for a personal injury trust to pay asbestos personal injury claims, paying all non-asbestos claimants in full and providing shareholders with equity in the reorganized debtors. The settlement, incorporated into a reorganization plan that was confirmed in the summer of 2006, was, in USG's words, "fair, fast, final and affordable."

K's Merchandise Mart, Inc. and Eldridge Jewelers. The Cooley Bankruptcy and Restructuring Group recently concluded it representation of an unofficial creditors

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pay paid to non-management employees during the same calendar year.

Section 503(c)(3) prohibits administrative expense treatment for payments that are outside the ordinary course of the debtor's business and are not justified by the circumstances of the case, including amounts paid to officers, managers or consultants hired after the commencement of the bankruptcy case.

The specific evidentiary requirements of §§ 503(c)(1) and (2) have created legitimate concern over the ability of a debtor (especially those expected to liquidate all or part of its business) to retain those executives needed to maximize value for the benefit of the estate and its creditors. In following, the inaugural year of the BAPCPA has been marked by a creative, and largely successful, attempt by debtors to circumvent the stringent requirements of new §§ 503(c)(1) and (2) and obtain court approval of proposed executive compensation plans.

Circumventing BAPCPA: Executive "Incentive" Plans

The most frequently used tool in maneuvering around the new Code sections has been the recharacterization of "retention" plans as "incentive" plans. The BAPCPA amendments are silent with respect to incentivizing, "produce value for pay" plans, and debtors have successfully used this delineation to have their proposed compensation plans scrutinized under the less restrictive "business judgment" lens of § 363(b)(1). In so doing, debtors have argued that their proposed compensation plans do not fall within the retention-based schemes contemplated by §§ 503(c)(1) and (2), but rather under the "catch-all" classification of § 503(c)(3). Unlike §§ 503(c)(1) and (2), § 503(c)(3) does not enumerate specific evidentiary requirements that must be satisfied before a debtor's compensation plan can be approved. Consequently, debtors have successfully argued that compensation packages falling outside the retention and severance classifications of §§ 503(c)(1) and (2), respectively, should be routinely approved as the product of the debtor's sound business judgment pursuant to § 363(b)(1).

Among some of the larger cases subject to the BAPCPA, this line of reasoning has been accepted by bankruptcy courts in the *In re Nobex Corp.*, *In re Pliant Corp.*, and *In re Werner Holding Co. (DE), Inc.* cases currently pending in the District of Delaware, as well as in the *In re Calpine* and *In re Refco* cases currently pending in the Southern District of New York. In this case, the debtor pursued a sale of substantially all of its assets pursuant to § 363 and proposed a compensation plan that paid executives based on the percentage by which the sale proceeds exceeded an initial threshold. The bankruptcy court reasoned that the compensation plan could not be classified as a retention or severance plan and therefore classified the plan under § 503(c)(3), ultimately finding that the plan satisfied the business judgment test of § 363(b)(1). Similarly, in the *Pliant* case, the bankruptcy court approved a compensation plan that used the achievement of certain financial goals as the determinative factor in the amount of compensation paid to management. The bankruptcy court classified the debtor's compensation plan under § 503(c)(3) and approved it under § 363(b)(1). In *Calpine*, the bankruptcy court approved a compensation plan under § 363(b)(1) that based the amount of compensation paid to executives on, among other factors, the "adjusted enterprise value" of the debtor and the successful confirmation of a plan of reorganization.

Taking A Stand: *In re Dana Corp.*

Not all attempts by debtors to have their compensation plans classified under §503(c)(3) have been met with success. Recently, the Bankruptcy Court for the Southern District of New York issued a

bench ruling denying the compensation plan proposed by the debtors in the *In re Dana Corp.* case. Relying on Judge Lifland's decision approving the compensation plan proposed in the *Calpine* case, the *Dana Corp.* debtors similarly sought to have Judge Lifland classify their proposed compensation package under §503(c)(3).

Notwithstanding his prior approval of the compensation plan presented in the *Calpine* case, Judge Lifland differentiated between the *Calpine* and *Dana Corp.* compensation plans based on the presence of objecting parties, including the Creditors' Committee, the Equity Committee and the U.S. Trustee, in the *Dana Corp.* case and the absence of any such objections in the *Calpine* case. Refusing to analyze the compensation plan under § 503(c)(3), Judge Lifland rejected the debtors' proposal to pay its executives substantial "completion" bonuses that were payable, in large part, regardless of the outcome of the chapter 11 cases. Consequently, Judge Lifland reasoned that this compensation scheme "walks, talks and is a retention bonus," and found the "completion" bonus to be in violation of § 503(c)(1). Additionally, Judge Lifland rejected the debtors' proposal to pay its executives a "non-compete" payment to be paid upon involuntary dismissal or resignation for "good reason." Judge Lifland determined that such a payment was actually a disguised severance payment proposed in violation of § 503(c)(2).

Lessons From *In re Dana Corp.*

The lessons learned from Judge Lifland's decision in *Dana Corp.* will have a significant impact on the future landscape of compensation plans in chapter 11 cases. Committees and individual creditors should recognize their considerable influence with respect to the level of scrutiny assigned by the court to a particular compensation plan proposal. On the other hand, debtors should be mindful of the theory that excess breeds excess and balance breeds balance. Overly generous compensation plans are now ripe for objections from committees and individual creditors, and will likely receive closer scrutiny from courts. Debtors should narrowly tailor their proposed compensation plans to ensure that, on balance, the components of the plan will be construed as "incentivating" as opposed to "retentive." The *Dana Corp.* decision is not all bad news for debtors, as Judge Lifland cautiously refused to recognize that "incentivating plans which may have *some* components that arguably have a retentive effect, necessarily violate section 503(c)'s requirements."

Indeed, the *Dana Corp.* debtors considered Judge Lifland's ruling and sought Court approval of a revised executive compensation package for Dana Corp.'s President and Chief Executive Officer, as well as other senior executives. Under the proposed plan, Dana Corp.'s President and other senior executives would be eligible for completion bonuses *only if* the company's earnings before taxes and restructuring costs rises to $250 million in 2007.

Noting that the plan before him was "substantially watered down," Judge Lifland approved the revised compensation plan as "within the zone of acceptability." In particular, Judge Lifland noted that the revised compensation plan "has no guaranteed payments to the CEO or senior executives other than base salary," and stated that the benchmarks that the company needed to reach in order for the executive bonuses to vest were "difficult targets to reach." Characterizing the plan as a "substantial retreat from the original proposals," Judge Lifland granted the revised compensation motion pursuant to sections 503(c) (3), 363(b) and 365 of the Bankruptcy Code. •

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committee of K's Merchandise Mart, Inc. and its Eldridge Jewelry division. The out of court workout, which took less than four months from the inception of the committee until the final cash distribution, resulted in unsecured creditors receiving a 50.14% distribution where the liquidation analysis had shown that unsecured creditors would have received between 0 and 26% in a bankruptcy scenario. The successful out of court reorganization of this enterprise, consisting of big-box discount retail stores with headquarters based in Decatur, IL and mall-based fine jewelry stores in the southeast and Midwest, required Cooley to solicit approval of over 4,000 creditors for approval of the transaction within an approximate 30 day period.

Burger King Franchises. The Cooley Bankruptcy & Restructuring Group assisted HG Foods, LLC as the stalking horse buyer in the purchase of 15 operating Burger King® franchises located in Washington, Idaho and Oregon from a Spokane, Washington chapter 7 trustee. We assisted in lease diligence for all of the locations, drafted the asset purchase agreement, drafted virtually all of the underlying pleadings and represented the client at a very lively in-court auction. The ultimate sale price for the restaurants was $4.4 million.

SeeCommerce. SeeCommerce, a California corporation, was an insolvent company with significant secured and unsecured debt. After spending months trying to sell the company, SeeCommerce finally found a potential buyer of its assets in a public Fortune 500 company. The buyer, however, was unwilling to purchase the assets either through a bankruptcy or without significant representations and warranties, which would have been

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difficult for an insolvent company to provide. Cooley negotiated a sale to the buyer pursuant to a complicated transaction involving an assignment for the benefit of creditors (ABC), with representations and warranties provided by the company's secured creditors and with no recourse against the company, and with a holdback fund to provide security for the representations and warranties. Ultimately, we completed the transaction in the ABC, the assignee conveyed the assets to the buyer, and the assignee completed the liquidation of the company's assets and distribution of proceeds to creditors.

Vivato, Inc. Cooley handled the corporate dissolution of Vivato, Inc., a Delaware Corporation. Vivato, based in Spokane, Washington, invented the first indoor and outdoor Wi-Fi base stations. For several years, an outside management team was successful in raising additional operating capital from investors to reinvigorate the company. However, a further call for investments in late 2005 was not successful. In mid-December 2005, the company's board voted to dissolve the company. Cooley drafted the dissolution plan and worked closely with the company's remaining employees to market the company's primary assets —finished inventory and a significant Wi-Fi patent portfolio—as well as overseeing the drafting of necessary IP licenses related to the company's products and detailed asset purchase agreements. With Cooley's assistance, offers for the patent portfolio increased substantially. These assets were sold with a minimum amount of representations and warranties in order to eliminate potential future liability related to the sales. With Cooley's assistance, trade creditors were paid in full.

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one of the key players in the labor negotiations in these cases; and (iv) the self-described largest creditor of the debtors, the insertion of GM on the committee would cripple, if not destroy, the committee's capacity to function as a fiduciary seeking to maximize the return to all unsecured creditors. *See Id.* at Docket #2699.

Faced with this opposition from the committee, GM withdrew its motion seeking appointment to the committee. *See Id.* at Docket #2746. Nonetheless, GM's motion raised several interesting issues concerning the newly amended section 1102(a)(4) that courts must address in subsequent cases: 1) Does BAPCPA require that a creditor with unique interests be appointed to a committee? 2) Is a creditor with a disproportionately large claim capable of acting as a fiduciary of smaller creditors? 3) Can a committee adequately represent the interests of all unsecured creditors in cases such as *Delphi*, where a wide variety of creditors possess unsecured claims?

Committee's Duty To Disclose Information

BAPCPA also adds section 1102(b)(3) to the Bankruptcy Code. This new section requires creditors committees to provide access to information to non-committee members that hold claims of the kind represented by the committee. *See* 11 U.S.C. §1102(b)(3)(A). Notably, section 1102(b)(3)(A) does not provide any guidance as to the nature or scope of the information that a committee must provide to non-committee creditors. Accordingly, it has been left to the courts to determine what limits, if any, should be placed on the disclosure requirements enacted by BAPCPA. Unlike the issue of committee membership, which has been resolved without resort to judicial ruling, this issue has been addressed by courts.

For example, in *In re Refco, Inc.*, et al., Case No. 05-60006 (Bankr. S.D.N.Y. 2005) (Drain, J.), in response to the unsecured creditors committee's motion for the approval of a protocol for complying with section 1102(b)(3)(A), the court established limiting conditions on the committee's mandate to disclose information to its constituents. The court ordered that the committee's disclosure of information pursuant to section 1102 was not required to include the following: (i) information that could reasonably be determined to be confidential, non-public, or proprietary; (ii) information that, upon disclosure, could reasonably be determined to result in a waiver of the attorney-client privilege; or (iii) information that, upon disclosure, could reasonably be determined to violate an agreement, order or law, including securities laws. See 336 B.R. 187, 200-202 (Bankr. S.D.N.Y. 2006).

The court's order did, however, provide important guidelines for the dissemination of non-confidential information to non-committee creditors. The court ruled that the committee must establish a website that provides the following information to creditors represented by the committee: (i) general information concerning the case; (ii) monthly reports summarizing recent case developments; (iii) highlights of significant events in the cases; (iv) a case calendar; (v) access to the claims docket; (vi) any press releases; (vii) a form to submit questions and complaints to the committee; (viii) responses to creditor inquiries; and (ix) answers to frequently asked questions. *See Id.* at 200. Further, the court's order states that the committee should take into account the willingness of a party requesting information to be bound by a confidentiality agreement in determining whether to disclose otherwise confidential information to that party. *Id.* at 201-202.

The issue of committee disclosure of confidential information also came to the fore in *In re Flyi, Inc.*, Case No. 05-20011 (Bankr. D. Del. 2005) (Walrath, J.), where the debtor sought an order limiting the committee's ability to disseminate information to non-committee members. The debtor argued that because it was in a very competitive industry, the disclosure of confidential

information could cause its competitors to obtain its business strategies, and could destroy its business. The debtor further argued that this potential consequence would deter it from disclosing important information to the committee. *See In re Flyi, Inc.*, Case No. 05-20011, Docket #23.

Accordingly, the court entered an order that, like the order entered in *Refco*, states that the committee is not authorized or required to provide creditors with access to confidential information. *See Id.* at Docket #145. However, the order also provides that the committee is permitted to provide access to any information that is subject to a privilege to any non-committee creditor, provided that the privileged information is not confidential information, and the relevant privilege is held by the committee. *Id.*

Similar orders have been entered in other recently filed cases. *See In re Nellson Neutraceutical, Inc.*, Case No. 06-10072 (D. Del. 2006) Docket #134 (ordering that no creditors committee shall be authorized or required to provide access to any confidential information of the debtors to any creditor it represents); *In re G+G Retail, Inc.*, Case No. 06-10152 (Bankr. S.D.N.Y. 2006) (ordering that while the committee must respond to written and telephonic creditor inquiries from the creditors that it represents, the committee is not authorized or required to provide access to confidential information); *In re Calpine Corp. et al.*, Case No. 05-60200 (Bankr. S.D.N.Y. 2005) Docket #810 (ordering that the committee shall not be required to disseminate any non-public information concerning the debtors to any non-committee creditors).

In addition, one court has approved a special protocol guiding a creditors committee's sharing of confidential information with claims traders. In *In re Airway Indus.,* Inc., Case No. 06-20224 (Bankr. W.D. Pa. 2006), the Court entered an order that any creditor requesting information "must file a document with the Court, and serve upon counsel to the Committee, the debtor and the United States Trustee confirming that it has established an information barrier…that will be enforced, such that no Confidential Information will be revealed to claims traders, trading desk or any person or entities involved in trading…"). *See Id.* at Docket #188.

The orders highlighted above demonstrate that courts have indeed increased the access of non-committee creditors to relevant information generated during a bankruptcy case. These orders address global concerns of all creditors, and indicate that non-committee creditors are now entitled to far greater access to information than before the enactment of BAPCPA. Whether through the use of a creditors committee website (*e.g.* Musicland) or some other medium, committees are now required to disseminate information to all of their constituents. Moreover, the *Refco* decision indicates that creditors willing to sign a confidentiality agreement should be entitled to access confidential and privileged information of the debtor.

Of equal importance, committees are now required to solicit feedback and respond to questions from non-committee members regarding important aspects of the case. For example, the Court in *Refco* ordered that the committee maintain a website, through which it must (i) provide creditors with a non-public forum through which to submit questions and requests for information; (ii) provide both public and non-public responses to creditor inquiries, depending on the nature of the creditor question, the committee's restraints based on the existence of confidentiality agreements, and the committee's discretion; and (iii) provide answers to frequently asked questions. Accordingly, BAPCPA will make committees more accountable to the interests of non-committee members, and will level the playing field between larger creditors, some of whom will likely possess committee membership, and smaller unrepresented creditors, who are less likely to be members of the committee. •

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Recent Notable Distribution Results

***In re Footstar, Inc.*, Case No. (Bankr. S.D.N.Y. 2004).** Cooley's Bankruptcy and Restructuring Group played a leading role in securing a full pay, 100% distribution, plus 4.25% interest per annum, for unsecured creditors in the chapter 11 bankruptcy case of specialty footwear retailer Footstar, Inc. and its now reorganized discount and family footwear business (also known as Meldisco).

Representing the official committee of unsecured creditors in the case, Cooley helped to facilitate a competitive auction for the company's Footaction retail business as a going concern to Foot Locker, Inc. for approximately $225 million with 353 stores.

***In re BSI Holdings, Inc.*, Case No. (Bankr. D. Del. 2003).** Cooley's Bankruptcy and Restructuring Group has played a key role in securing a 98.5% total distribution for unsecured creditors in the chapter 11 bankruptcy of Bob's Stores, the casual clothing and footwear chain. Early in the bankruptcy proceeding, the return for unsecured creditors was projected to be approximately 30%.

Representing the creditors committee in the case, Cooley ensured that a competitive auction, over three days, more than doubled the projected recovery. Further work by the firm's attorneys in representing the liquidating trustee on both claims reconciliation and litigation helped to increase the recovery by another 30%.

Meriden, Connecticut-based Bob's Stores filed for chapter 11 bankruptcy protection in the U.S. Bankruptcy Court, District of Delaware on October 22, 2003. At that time, the retail chain operated 34 stores in six states throughout the Northeast. •

M&A Transactions

Date Announced	Date Effective (if known)	Debtor's Name	Debtor's Industry Sector	Acquirer's Name	Acquirer's Industry Sector
October 04, 2005	October 04, 2005	Sellers & Josephson Inc	Textile and Apparel Products	EXX Inc	Miscellaneous Manufacturing
October 05, 2005		Cosmyl Inc	Soaps, Cosmetics, and Personal-Care Products	Columbus Economic Development Corp	Soaps, Cosmetics, and Personal-Care Products
October 12, 2005		Arlington Hospitality Inc	Hotels and Casinos	Seeking Buyer	Investment & Commodity Firms
October 13, 2005		Amherst Technologies LLC	Business Services	ePlus Technology Inc	Prepackaged Software
October 14, 2005	April 11, 2006	O'Sullivan Industries Holdings Inc	Wood Products, Furniture, and Fixtures	Creditors	Investment & Commodity Firms
October 18, 2005		Toms Foods Inc	Food and Kindred Products	Lance Inc	Food and Kindred Products
October 19, 2005		Able Laboratories Inc	Drugs	Aurobindo Pharma US Inc	Drugs
November 1, 2005	December 27, 2005	Able Laboratories Inc	Drugs	Sun Pharmaceuticals Industries Ltd	Drugs
November 01, 2005	January 03, 2006	FiberMark Inc	Paper and Allied Products	Creditors	Investment & Commodity Firms
November 02, 2005		Badger Paper Mills Inc-Flexible Packaging Operation	Paper and Allied Products	Meriturn Partners LLC	Investment & Commodity Firms
November 10, 2005		FLYi Inc	Air Transportation and Shipping	Seeking Buyer	Investment & Commodity Firms
November 10, 2005	November 25, 2005	Refco Inc-Futures Brokerage Business	Investment & Commodity Firms, Dealers, Exchanges	Man Financial Ltd	Investment & Commodity Firms
November 11, 2005		Forex Capital Markets LLC	Investment & Commodity Firms, Dealers, Exchanges	Forex Capital Markets LLC	Investment & Commodity Firms
November 11, 2005		Refco FX Associates LLC-Retail Client Accounts	Investment & Commodity Firms, Dealers, Exchanges	Forex Capital Markets LLC	Investment & Commodity Firms
November 17, 2005		ATA Holdings Corp-Ambassadair Travel Club Assets	Air Transportation and Shipping	Grueninger Cruises & Tours Inc	Transportation and Shipping (except air)
November 17, 2005	November 17, 2005	Richter Furniture	Wood Products, Furniture, and Fixtures	Buxbaum Group Inc	Business Services
December 01, 2005		Casting Technology Co	Metal and Metal Products	Monomoy Capital Partners LLC	Investment & Commodity Firms
December 05, 2005	June 07, 2006	Curative Health Services Inc	Health Services	Bondholders	Investment & Commodity Firms
December 08, 2005		Durango Georgia Paper Co- Certain Assets	Paper and Allied Products	Seeking Buyer	Investment & Commodity Firms, Dealers, Exchanges
December 12, 2005		Orius Corp-Certain Assets	Construction Firms	Dycom Industries Inc	Construction Firms
December 19, 2005	December 19, 2005	Levitz Home Furnishings Inc	Retail Trade-Home Furnishings	Prentice Capital Management LP	Investment & Commodity Firms
December 20, 2005	December 20, 2005	Morwear Manufacturing Inc- Morwear Brand	Chemicals and Allied Products	Diversified Coatings Inc	Chemicals and Allied Products
December 28, 2005	January 10, 2006	Winn-Dixie Stores Inc-Miami Dairy Facility	Wholesale Trade-Nondurable Goods	McArthur Dairy	Food and Kindred Products
December 29, 2005		Fitzgerald's Reno Inc	Hotels and Casinos	Seeking Buyer	Investment & Commodity Firms, Dealers, Exchanges
December 30, 2005	May 03, 2006	Anchor Glass Container Corp	Stone, Clay, Glass, and Concrete Products	Creditors	Investment & Commodity Firms
January 6, 2006		American Remanufactures Inc- Certain Assets	Transportation Equipment	Black Diamond Capital Management LLC	Investment & Commodity Firms
January 17, 2006		Daticon Inc	Prepackaged Software	Xiotech Corp	Computer and Office Equipment
January 27, 2006	January 30, 2006	Steve's Shoes, Inc.	Retail Trade-General Merchandise and Apparel	Walking Co	Wholesale Trade-Nondurable Goods
January 31, 2006	January 31, 2006	Global Industrial Products LLC	Metal and Metal Products	Felman Production Inc	Metal and Metal Products
February 03, 2006	March 31, 2006	Glazed Investments LLC-Certain Assets	Retail Trade-Food Stores	Westward Dough LLC	Retail Trade-Food Stores
February 07, 2006	April 27, 2006	Riverstone Networks Inc- Certain Assets	Prepackaged Software	Lucent Technologies Inc	Communications Equipment
February 14, 2006	May 12, 2006	Integrated Electrical Services Inc	Construction Firms	Creditors	Investment & Commodity Firms
February 15, 2006		G+G Retail Inc	Retail Trade-General Merchandise and Apparel	Max Rave LLC	Textile and Apparel Products

Date Announced	Date Effective (if known)	Debtor's Name	Debtor's Industry Sector	Acquirer's Name	Acquirer's Industry Sector
February 17, 2006	February 17, 2006	FiberCore Inc	Metal and Metal Products	Silica Tech LLC	Metal and Metal Products
February 21, 2006	March 29, 2006	Musicland Group Inc	Retail Trade-Home Furnishings	Trans World Entertainment Corp	Retail Trade-Home Furnishings
February 24, 2006		President Riverboat Casino- Missouri Inc	Amusement and Recreation Services	Pinnacle Entertainment Inc	Amusement and Recreation Services
March 06, 2006	April 20, 2006	PlusFunds Group Inc-PlusFunds Business	Investment & Commodity Firms, Dealers, Exchanges	FTVenture	Investment & Commodity Firms
March 06, 2006	April 29, 2006	ProCare Automotive Service Solutions LLC	Repair Services	Monro Muffler Brake Inc	Repair Services
March 08, 2006		Davis Petroleum Corp	Oil and Gas; Petroleum Refining	Investor Group	Investment & Commodity Firms
March 13, 2006		Urban Hotels Inc	Hotels and Casinos	Seeking Buyer	Investment & Commodity Firms
March 14, 2006		Republic Storage Systems Co Inc	Wood Products, Furniture, and Fixtures	Monomoy Capital Partners LLC	Investment & Commodity Firms
March 22, 2006		AusAm Biotechnologies Inc- Immuno-Assay Line	Drugs	Keryx Biopharmaceuticals Inc	Drugs
March 23, 2006	March 23, 2006	Lockport Mattress Co	Wholesale Trade-Durable Goods	Vymac Entities	Wood Products, Furniture, and Fixtures
March 29, 2006		Nobex Corp	Drugs	Biocon Ltd	Drugs
April 12, 2006		UHP Healthcare	Insurance	Care1st Health Plan	Insurance
April 14, 2006		Foss Manufacturing Co Inc	Textile and Apparel Products	Alinian Capital Group LLC	Investment & Commodity Firms
April 15, 2006		Wheeling-Pittsburgh Corp	Metal and Metal Products	Cia Siderurgica Nacional{CSN}	Metal and Metal Products
April 17, 2006		Jill Kelly Productions Inc	Motion Picture Production and Distribution	Penthouse Media Group Inc	Printing, Publishing, and Allied Services
April 19, 2006	June 16, 2006	Easy Gardener Products Ltd	Textile and Apparel Products	Green Thumb Acquisition Corp	Investment & Commodity Firms
April 19, 2006		Sylvest Farms Inc	Food and Kindred Products	Seeking Buyer	Investment & Commodity Firms
May 04, 2006	May 04, 2006	Galvex Holdings Ltd	Metal and Metal Products	SPCP Group LLC	Credit Institutions
May 09, 2006		Western Medical Inc-Certain Assets	Wholesale Trade-Durable Goods	Providential Holdings Inc	Business Services
May 10, 2006		Owens Corning	Textile and Apparel Products	Creditors	Investment & Commodity Firms
May 23, 2006	May 23, 2006	Watkins Pattern Co Inc	Wholesale Trade-Durable Goods	Consolidated Precision Products Corp	Metal and Metal Products
May 25, 2006		Crescent Jewelers Inc	Wholesale Trade-Durable Goods	Friedman's Inc	Miscellaneous Retail Trade
May 29, 2006		Collins & Aikman Corp	Textile and Apparel Products	Seeking Buyer	Investment & Commodity Firms
June, 6, 2006	June 06, 2006	Advanced Beauty Solutions LLC- Certain Assets	Miscellaneous Manufacturing	CirTran Corp	Electronic and Electrical Equipment
June 12, 2006		Stephany's Chocolates	Food and Kindred Products	Russell Stover Candies Inc	Food and Kindred Products
June 20, 2006		Jet Holdings Ltd	Construction Firms	Joseph T Ryerson & Son Inc	Wholesale Trade-Durable Goods
June 30, 2006		Michaels Stores Inc	Miscellaneous Retail Trade	Investor Group	Investment & Commodity Firms
July 07, 2006		Mirro WearEver	Electronic and Electrical Equipment	Lifetime Brands Inc	Metal and Metal Products
July 07, 2006	July 31, 2006	MobileAria Inc	Prepackaged Software	At Road Inc	Prepackaged Software
July 08, 2006		Calpine Corp-Electricity Power Plant	Electric, Gas, and Water Distribution	BG North America LLC	Oil and Gas; Petroleum Refining
July 14, 2006		Intervisual Books Inc.	Printing, Publishing, and Allied Services	Educational Development Corp	Wholesale Trade-Nondurable Goods
July 28, 2006		Aphton Corp	Drugs	Receptor BioLogix Inc	Drugs
August 03, 2006		Larrys Markets Inc-Stores	Retail Trade-Food Stores	L-M Acquisition Partners	Investment & Commodity Firms
August 08, 2006		Pegasus Broadcast Television Inc	Business Services	Investor Group	Investment & Commodity Firms, Dealers, Exchanges
August 09, 2006		Mirro WearEver-Certain Assets	Electronic and Electrical Equipment	Groupe SEB	Electronic and Electrical Equipment
August 18, 2006		Weld Wheel Industries Inc	Transportation Equipment	American Racing Custom Wheels	Transportation Equipment
August 21, 2006		Radnor Holdings Corp	Rubber and Miscellaneous Plastic Products	TR Acquisition Co Inc	Investment & Commodity Firms, Dealers, Exchanges
August 25, 2006		Blue Bird Corp	Transportation Equipment	Cerberus Capital Management LP	Investment & Commodity Firms
September 11, 2006		Dana Corp-Trailer Axle Manufacturing Business	Transportation Equipment	Hendrickson USA LLC	Transportation Equipment

RECLAMATION continued from page 9

> reclaim goods without first seeking a motion for relief from the court for relief from the automatic stay. The reclaiming vendor shall be prohibited from seeking such relief until the Debtors' report is filed.

A vendor filed a limited objection to this motion, noting that the revised 546(c)(1) no longer requires that sellers demonstrate a reclamation right under "any statutory or common law." Because the revised section 546(c)(1) removed any reference to state law, which often provide suppliers with more restrictive reclamation procedures than the Bankruptcy Code, the vendor requested that the procedures be revised to reflect the new law.

The Court's order granting the motion resolved this dispute by stating that any reclamation claimant must satisfy both state law and 546(c). Nevertheless, the Court held that notwithstanding any applicable state law or other law, a seller, pursuant to section 546(c)(1) of the Bankruptcy Code, may seek to reclaim goods received by the debtors within 45 days before the Commencement Date.

Orders establishing procedures similar to those outlined above have been entered in several other recently filed cases. *See, e.g., In re Dana Corp.*, (06-10354 S.D.N.Y.) (stating that the procedures are the sole method for resolving reclamation claims, and holding that all adversary proceeding previously filed by suppliers were stayed); *In re The Lovesac Corp.*, (06-10080).

Debtors, including *Flyi Inc.* and the debtor in *In re Pliant Corp.*, (06-10001) have also sought and received Court authority to pay the pre-petition claims of suppliers of goods entitled to reclamation or administrative priority. As a condition to any such payments, these debtors reserved the right in the motions to require any vendor receiving payment pursuant to the motion to agree to provide the debtors with goods or services on credit, pricing, or payment terms and order limits that are equal to, or better than, those provided to the debtor's pre-petition. These debtors asserted that it may be more beneficial to their estates to pay for goods subject to reclamation rather than being forced to return the relevant goods to the vendor, especially since some vendors are critical vendors.

As these cases demonstrate, debtors have sought to adapt to the increased reclamation rights of suppliers in two important ways: (i) by establishing streamlined procedures in order to resolve reclamation claims in an orderly and efficient manner; and (ii) by seeking to minimize the impact of these expanded reclamation rights by seeking to pay the pre-petition claims of suppliers of goods entitled to reclamation or administrative priority in full during the early stages of the bankruptcy. Prior to the enactment of BAPCPA, debtors had sought to make payments to these suppliers pursuant to the "doctrine of necessity." Under the new law, debtors possess an added procedure for paying their pre-petition suppliers in exchange for credit term commitments. Regardless of the method selected, it is clear that BAPCPA has expanded the rights of a debtor's pre-petition suppliers and has made it easier for vendors to receive full payment for goods delivered to a debtor in the period immediately preceding a bankruptcy filing. •

Bankruptcy & Restructuring Event Calendar
2006/2007 Cooley Godward Kronish Speaking Appearances

Event	Date/Location	Cooley Godward Kronish Participant/Topic
National Association of Credit Managers	Oct. 5, 2006 (Ledyard, CT)	Jay R. Indyke (Speaker: "Out of Court Workouts and Related Anti-Trust Issues")
Turnaround Management Association	Oct. 14 (Orlando, FL)	Ronald R. Sussman (Panelist: Retail Industry)
International Council of Shopping Centers	Oct. 25-28 (Orlando, FL)	Cathy Hershcopf (Speaker: U.S. Shopping Center Law)
Vendor Compliance Forum	Nov. 6 (Phoenix, AZ)	Lawrence C. Gottlieb (Speaker: Developments Concerning the UCC)
ABI Winter Leadership Conference	Dec. 1 (Scottsdale, AZ)	Jay R. Indyke (Panelist: BAPCPA in Practice in Retail Bankruptcy Cases)
TMA's Distressed Investing Conference	Jan. 17-19, 2007 (Las Vegas, NV)	Lawrence C. Gottlieb, (Panelist: "Alternative Equity Plays in Distressed")
Employee Benefits Post-Bankruptcy Reform	Jan. 23 (Teleconference)	Ronald R. Sussman (Panelist: "Maximizing Savings While Complying with the New Rules.")
Riemer Credit Association of Footwear Executives	Jan. 30 (Las Vegas, NV)	Jay R. Indyke (Speaker: "Antitrust Matters for Credit Executives")
Riemer Athletic Group	Jan. 31 (Las Vegas, NV)	Jay R. Indyke (Speaker: "Out of Court Workouts")
State Bar of Texas Advanced Business Bankruptcy Bar	Feb. 22 (Austin, TX)	Lawrence C. Gottlieb (Panelist: Retail bankruptcies)

For more information on these appearances, please contact the Marketing Department at 212-479-6482 or 212-479-6127.