FOREWORD

*Frank J. Vecchione**

The *Seton Hall Law Review* has chosen an opportune time to publish a symposium issue dedicated to Bankruptcy Law. As Mark S. Kirschner, Dan A. Kusnetz, Laurence Y. Solarsh and Craig S. Gatarz attorneys with Jones Day Reavis and Pogue's New York City office poignantly point out in their article, *Prepackaged Bankruptcy Plans: The Deleveraging Tool of the '90s in the Wake of OID and Tax Concerns*, "The excesses of the '80s — marked by the overleveraging of many domestic companies — came crashing down at the beginning of the '90s with an explosion of debt defaults, out of court debt restructurings and bankruptcies." The outstanding collaboration of work contained in this book thoroughly and expansively assesses many of the recent developments and trends in a volatile and evergrowing area of legal practice.

This book's commitment to the analysis of issues at the forefront of bankruptcy law is exemplified by *Prepackaged Plans*. The authors provide a comprehensive look at the controversial court decision in *In re Chateaugay Corp.*, 109 Bankr. 51 (Bankr. S.D.N.Y. 1990) and its interplay with recently enacted tax legislation as they relate to original issue discount. The article contends that because of the aforementioned factors there will be a dramatic increase in bankruptcy filings with a concomitant decrease in consensual "workouts." The article illustrates that the "prepackaged plan," under section 1126 of the Bankruptcy Code (the Code), is a viable alternative to a full-blown bankruptcy. The authors point out that prepackaged plans may be particularly viable in light of the *Chateaugay* decision's detrimental impact on non-bankruptcy restructurings in a subsequent bankruptcy case.

Often cited as the main reason for the proliferation of troubled debtors is the overleveraging of many healthy businesses during the 1980's. The embattled methodology that was utilized to accomplish this result was the leveraged buyout or LBO. Contained in this book is the publication of the transcript of a Semi-

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nar held by the Association of the Bar of the City of New York entitled *Leveraged Buyouts and Lenders Risks*. The seminar participants include: Judge Keith Lundin, a United States Bankruptcy Court Judge, District of Tennessee; Mr. James J. Burns, Partner, Kenneth Leventhal & Company, certified public accountants, New York, New York; Ms. Barbara J. Houser, Partner, Sheinfeld, Maley & Kay, Dallas, Texas; Robin E. Phelan, Partner, Haynes & Boone, Dallas, Texas; Mr. Wilbur L. Ross, Senior Managing Director, Rothschild, Inc., New York, New York; and Mr. Richard Lieb, Partner, Kronish, Lieb, Weiner and Hellman, New York, New York.

Primarily, the seminar offers an expansive introduction and overview of LBOs as a principle cause of the increased bankruptcy filings. The seminar also provides a lively discussion concerning fraudulent conveyance claims and the attorney's ethical obligations in the LBO context.

To provide additional insight into this fertile area of commercial litigation, Mr. Lieb and his partner at Kronish, Lieb, Mr. Robert J. Feinstein, have authored *Litigation, Financial Projections and the Chapter 11 Plan Process*. The article details the current state of the law as it relates to the confirmation of chapter 11 plans pursuant to unsuccessful LBOs. Painting with a broad brush, the authors have detailed many of the complex problems that arise during the confirmation process due to financial uncertainties, extensive documentation requirements and fraudulent conveyance claims. In order to obviate the unsettled ramifications that an LBO involved bankruptcy will engender the author calls on debtors to formulate a plan that will gain the support of every major creditor and shareholder constituency. Their analysis encompasses the theme implicit throughout the Code which prevents a debtor from favoring one creditor over other similarly situated creditors.

One tool utilized to ensure the equal treatment of creditors is the trustee's strong arm power under section 544 of the Code. In his article, *Bankruptcy Code Section 544(a) and Constructive Trusts: The Trustee's Strong Arm Powers Should Prevail*, Professor Carlos J. Cuevas of the New York Law School exhaustively analyzes the controversy concerning the imposition of a constructive trust to defeat the application of section 544(a). As indicated in the title of his article, Professor Cuevas demonstrates the reasons why, in his view, the imposition of a constructive trust should not preclude the application of section 544(a).

Additionally, section 547 of the Code permits the trustee in bankruptcy to "void" any transfer that is deemed a "preferential transfer." In *Deprizio's Honor: Lender's Insider Guarantors and the Prisoners Dilemma*, Walter Effross, an Associate at the Newark, New Jersey firm of McCarter & English, discusses the Seventh Circuit's decision in *Levit v. Melrose Park National Bank (In re V.N. Deprizio Construction Co.)*, 874 F.2d 1186 (7th Cir. 1989). Departing from the prior norm, the *Deprizio* court held that the preference recovery period for outside creditors is one year when a payment to such creditor produces a benefit for an inside creditor such as a guarantor.

"The effect of *Deprizio*," explains the article, "is to pit banks against insider guarantors during the period from 90 days through one year before the debtor's filing for bankruptcy." The article continues, "During this extended preference period the debtor's preferential payments can be recovered not merely from the guarantor but also are recoverable from the bank." Interestingly, Mr. Effross analogizes the plight of the creditors to the game theory problem — "the Prisoner's Dilemma." Calling for trust and communication between the insider guarantors and the non-insider creditors, the article models mathematically the relative expectations of the parties and suggests a method for negating the effects of *Deprizio*.

Another principle aim of federal bankruptcy law is to maintain the economic viability of a debtor, in part by granting the debtor a financial reprieve and a fresh start. Thus, the normative bankruptcy goals of rehabilitation and egalitarian distribution of assets can conflict with self-interested entitlements of the paradigmatic secured creditor. This clash of interests is particularly evident when the secured creditor negotiates with the debtor over the use of cash collateral in which the creditor has perfected a security interest.

In a perceptive, detailed, and pragmatic article, the Honorable Stephen A. Stripp, a United States Bankruptcy Court Judge for the District of New Jersey, reviews the policy imperatives attendant to reorganization in bankruptcy, and explains how these imperatives can be undermined by the entry of a consensual cash collateral order. Judge Stripp in his article *Balancing of Interests in Orders Authorizing the Use of Cash Collateral in Chapter 11*, explains how secured creditors may abuse the negotiation process by inserting a host of questionable provisions into the cash collateral use agreement. If the bankruptcy court adopts the agreement,

the secured creditor may enjoy entitlements beyond the constitutional mandate of adequate protection for the creditor's security interest in the collateral. Given the emergent circumstances in which the bankruptcy court may authorize the use of cash collateral, creditors may not have a meaningful opportunity to present objections to an order which may nonetheless be binding on every party in a case. To alleviate these due process concerns and to vindicate the equitable goals of bankruptcy, Judge Stripp suggests that the bankruptcy court should exercise its discretion by crafting a fundamentally fair cash collateral order. Judge Stripp concludes his article with a proposed standard form order to equitably balance the interests of creditors with the egalitarian tenets and rehabilitation principles of the Code.

In conclusion, the Honorable William H. Gindin, Chief Judge of the United States Bankruptcy Court for the District of New Jersey offers an insightful "Perspective" on the law of appointments and compensation of trustees in bankruptcy. In the first part of *Professionals in Bankruptcy Proceedings: Appointment, Right to Compensation and Conflicts of Interest*, Judge Gindin utilizes his perspective from the bench to illuminate the role of the court in the appointment of professionals. The emphasis of the article, however, is on recent developments within the District of New Jersey in the area of conflicts of interest within the bankruptcy setting.

The reader may also wish to note that Volume 21, Book 2 of the *Seton Hall Law Review* contains an article discussing "the still-unresolved controversy as to whether a bankruptcy judge has the power to conduct a jury trial in. . . the United States Bankruptcy Court." The article, *Jury Trials, Bankruptcy Judges, and Article III: The Constitutional Crisis of the Bankruptcy Court*, written by Mr. Anthony M. Sabino, an Associate with LeBoeuf, Lamb, Leiby & MacRae, in New York City, and dedicated to the memory of Judge Vincent J. Commissa, is a thorough and expansive survey of the law regarding the Article III powers of the Article I bankruptcy judge. Mr. Sabino cogently, and persuasively explains why bankruptcy judges should not be empowered with the right to conduct jury trials and implores the Supreme Court to resolve the issue.

All of these scholarly articles reflect the high level of sophistication of current bankruptcy law. It is, therefore, fitting that this issue of the *Seton Hall Law Review* should be dedicated to Vin-

cent J. Commisa, who did so much to help elevate the bankruptcy practice to what it is today.

The evolution of the bankruptcy practice and the body of law that has been established over the last twenty-five years is indeed significant. Bankruptcy departments today are a staple at every medium to large law firm, including all of the "white shoe firms." However, it wasn't always that way.

Not too many years ago, learned articles on bankruptcy law were not being written, and the "prominent" law firms did not get involved in the practice. That was certainly the state of affairs when Vincent J. Commisa was appointed to the Bankruptcy Court bench in 1967. He was determined to attract new attorneys into the practice and to break what was perceived to be a "bankruptcy ring" controlled by a small handful of practitioners.

One way of doing that was to appoint bright, young attorneys (many of them former Assistant United States Attorneys) as receivers and trustees. Another way was to demand that all of the professionals who participated in the bankruptcy process and who appeared in his court performed their work at the highest levels of skill and honesty.

As Sid Zion tells us, Judge Commisa took pride in everything he undertook and made certain that all those who worked with him shared that pride. He made all of us proud to be bankruptcy lawyers. He would be truly pleased to see this wonderful book dedicated to his memory.