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INTRODUCTION

The Spring 2008 issue of the *American Bankruptcy Institute Law Review* is an outstanding edition featuring articles on a wide variety of topics. The issue includes seven open-issue pieces and one LL.M. thesis, all of which address cutting edge bankruptcy matters.

The issue begins with a study by Professor William H. Widen, *Report to the American Bankruptcy Institute: Prevalence of Substantive Consolidation in Large Public Company Bankruptcies From 2000 to 2005*. The study examines the frequency of the use of the doctrine of substantive consolidation in large public company bankruptcies from 2000 to 2005 as well as the extent to which reorganization negotiations occur "in the shadow of the doctrine of substantive consolidation." The report illustrates the significance of substantive consolidation in the reorganization and liquidation of large public company bankruptcies. Moreover, the report concludes that the popularity of substantive consolidation in these bankruptcies brings to light the unreliability of using the simple asset partition formed by a legal entity to match assets with liabilities and that asset partitioning can only partly explain the structure of consolidation groups.

Professor Jackie Gardina provides the issue's second article, *The Bankruptcy of Due Process: Nationwide Service Process, Personal Jurisdiction and the Bankruptcy Code*. The author asserts that federal courts should alter the existing Fifth Amendment analysis in bankruptcy matters because the nature of bankruptcy claims change the balance under the Fifth Amendment due process analysis and limit Congress' typically broad power to permit bankruptcy courts to exert personal jurisdiction based on nationwide service of process. The article discusses due process concerns in bankruptcy and reveals the relationship between personal jurisdiction and choice of law. The article concludes by recognizing the federal interests in bankruptcy and proposing a solution for balancing those interests with the individual interests that drive the due process clause.

The third article is an excellent piece by Professor Michelle M. Harner. In *Trends in Distressed Debt Investing: An Empirical Study of Investors' Objectives*, empirical data on investment patterns and techniques of distressed debt investors are explored and the role of these investors in chapter 11 cases is discussed. The author concludes that activist distressed debt investors are well-financed and can be reasonably successful in their efforts to effectuate change in or acquire troubled companies. Moreover, the author finds that, when left unimpeded, creditor control

by distressed debt investors can bring about creditor self-dealing and negatively impact the debtor as well as other interested parties. Finally, after describing the current chapter 11 system, the author advocates for the need to develop a more estate-focused reorganization process.

The issue's fourth article, *The Missing Piece of the Puzzle: Perspectives on the Wage Priority in Bankruptcy*, is written by Professor C. Scott Pryor. The article begins by reviewing the legal history of the wage priority in bankruptcy as well as the recent Supreme Court decision in *Howard Delivery Service, Inc. v. Zurich Am. Ins. Co.* Next, three viewpoints on the rationale of the wage priority are explored: the market failure, the rationale autonomy, and the normative points of view. The author then argues that the influence of religion and politics on public morality had a considerable impact on the development of the wage priority. Finally, the author concludes that the resilience of the wage priority provides an implied example of religious ideas being, to some extent, converted into generally accepted social policies.

The Honorable Stan Bernstein, Susan H. Seabury, and Professor Jack F. Williams provide the issue's fifth article, *Squaring Bankruptcy Valuation Practice With Daubert Demands*. This piece studies the issue of how bankruptcy courts manage expert testimony on valuation. The article addresses the Supreme Court decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, which sets forth new guidelines for federal courts when dealing with expert valuation testimony. The authors then examine valuation tools utilized by experts in bankruptcy cases and design a system to address the relevance and reliability concerns discussed in *Daubert*. Finally, the authors look to recent valuation decisions to illustrate how expert valuation testimony can be squared with *Daubert* standards.

Delaware's Irrelevance, the issue's sixth article, is written by Professor Stephen J. Lubben. In this piece, the author discusses the bankruptcy community's recent debate over whether Delaware, out of desperation for large cases, has reduced its level of supervision, causing a striking rise in companies reentering chapter 11. The author, based on a previously developed sample of chapter 11 cases, uses several non-Delaware specific variables to develop a new regression model that predicts whether large companies in chapter 11 will refile bankruptcy within five years. The author's model demonstrates that many non-Delaware factors influence the likelihood that a company will reenter bankruptcy. While the article does not conclude that Delaware is entirely irrelevant to the issue of refiling, the author does question the belief that Delaware is a significant factor in this problem and suggests additional areas that need further studying.

The last of the open-issue pieces, *A Study of Consumers' Post-Discharge Finances: Struggles, Stasis, or Fresh-Start?*, was written by Dr. Jay L. Zagorsky and Professor Lois R. Lupica. In this article, the authors use a large national random sample survey to empirically study whether a bankruptcy discharge actually serves to effectuate bankruptcy's fresh start objective. The authors begin with an overview of available information and research on consumer bankruptcy and then

transition into a discussion about the data set and statistical analysis used in this study. The authors' results show that consumers filing for bankruptcy to alleviate financial distress do eventually experience a fresh start; however, it takes a significant amount of time before the effect of their distress is no longer evident in their finances.

The final piece in Spring 2008, *Recognizing the Breadth of Non-Assignable Contracts in Bankruptcy: Enforcement of Nonbankruptcy Law as Bankruptcy Policy*, is an LL.M. thesis authored by Michael J. Kelly. This thesis addresses the court split in interpreting the relationship between Bankruptcy Code subsections 365(c)(1) and (f)(1). Based on the plain language and legislative history behind section 365, the author provides an in-depth analysis of the scope of these subsections. The author theorizes that Congress intended section 365(c)(1) to include only those laws that require the non-debtor party's consent prior to assignment of the involved contracts or leases. In contrast, subsection (f)(1) remains feasible and renders unenforceable laws generally prohibiting, restricting, or placing conditions on assignment other than the consent of the non-debtor. The thesis concludes by advocating for application of this theory because it effectively eliminates inconsistent treatment of subsections (c)(1) and (f)(1) and allows them to successfully coexist.

The Editorial Board would like to give many thanks to all of the authors for helping create another extraordinary issue of the *American Bankruptcy Institute Law Review*. Further thanks to the editors, the staff, and particularly our faculty advisor, Professor G. Ray Warner. The *ABI Law Review* continues to be an exceptionally rewarding experience for the students at St. John's University School of Law.

Stacy L. Molison and the Editorial Board