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Issue 4, 2022

Welcome!

Welcome to our fourth *Promissory Notes* issue of 2022.

We are very pleased to announce that our Banking & Finance Practice Group is growing as we have recently welcomed a new attorney with experience in this area of law to the firm.

Brian H. Richardson is an Associate in our Roanoke office. His primary areas of practice are commercial disputes, workouts, and related litigation, with an emphasis in corporate restructuring, bankruptcy, and creditors' rights. His experience includes representing creditors, creditors' committees, and debtors in all aspects of bankruptcy, restructuring, and troubled loan workouts. In addition, Brian is well versed in representing trustees, creditors, and debtors in federal and state court litigation matters, including commercial litigation involving breach of contract, fiduciary duty disputes, business torts, preference and fraudulent transfer prosecution and defense, relief from stay, lease rejection, cash collateral, claim objections, section 363 bankruptcy sales, dischargeability disputes, denial of discharge, chapter 11 plan confirmation, involuntary petitions, complex family law and estate disputes, and other related litigation. He received his B.S. from Brigham Young University and his J.D. (with a Certificate in Law, Science, & Technology, with dual emphasis in Health Law and Psychology Law) from Arizona State University Sandra Day O’Connor College of Law. He is admitted to the Virginia Bar, the United States District Courts for the Eastern and Western Districts of Virginia, the United States Bankruptcy Courts for the Eastern and Western Districts of Virginia, and the United States Court of Appeals for the Fourth Circuit. Brian is also fluent in Spanish.

At Spilman, we are dedicated to providing the services needed to address all of your legal issues. The addition of Brian helps us attain an elevated level of service. Please join us in welcoming him to the firm!

As always, thank you for reading.

F. B. Webster Day, Chair, Banking & Finance Practice Group, and Editor, *Promissory Notes*

"If there is anyone to whom I owe money, I'm prepared to forget it if they are." --- Errol Flynn

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CFPB Focuses on Rural Banking Access

"Rural Americans visit bank branches at nearly double the rate of urban and suburban customers, the CFPB found in its report, titled Challenges in Rural Banking Access."

Why this is important: In April, the Consumer Financial Protection Bureau released a report entitled "Data Spotlight: Challenges in Rural Banking Access." The report is the starting point for a CFPB initiative that will focus on the unique consumer finance challenges faced by individuals residing in rural communities. According to the report, the initiative will include devoted engagement with rural communities across the country, research into challenges faced by rural communities, and actions to protect rural consumers from predatory bad actors and repeat offenders in consumer financial markets. The report recognizes that additional research is necessary to better understand the unique challenges faced by rural Americans, but it preliminarily identifies the following as some of the issues these individuals face: (1) rural communities have lower incomes and higher poverty rates than the rest of the country and significant issues making ends meet; (2) rural Americans depend on physical bank branches and smaller banks more than the rest of the country, have less access to the internet and online banking options, and are more likely to live in banking deserts; (3) rural people are less likely to have credit scores and more likely to use non-bank credit, resulting in rural consumers paying more for credit; and (4) consumers in rural areas submit fewer complaints per capita to the CFPB. The CFPB is prioritizing outreach to rural communities, and will host roundtables with rural stakeholders across the country. It will also work with the Department of Agriculture, Department of Housing and Urban Development, and Department of Treasury to ensure rural communities have adequate resources. --- Brienne T. Marco

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Court Ponders Constitutionality of Disparate Fees in Business Bankruptcy Cases

"The argument in Siegel v. Fitzgerald was a meandering exercise that shed little direct light on how the justices will dispose of this matter."

Why this is important: This article reports on the oral arguments in a matter involving the bankruptcy of Circuit City. The arguments explore alternative remedies to an inconsistent administrative fee system. The question before the court is whether two apparently inconsistent systems authorized by Congress violate Article I of the Constitution empowering Congress to make "***uniform laws*** on the subject of Bankruptcies throughout the United States." (Emphasis added.) This is not part of the federal Bankruptcy Code, it permits that Code! That clause is the meat and bones of the protracted oral arguments described. As background, in 2017, fee schedules for the U.S. Trustee Program were dramatically increased. The bankruptcy courts in North Carolina and Alabama do not operate within the U.S. Trustee Program. They have a separate oversight system. The administrative fee schedule under this alternate system is set by the Judicial Conference, an appointed group that helps administer the federal bankruptcy system. As a result, courts recently levied significantly higher fees against corporate debtors in districts that participate in the U.S. Trustee Program, which meant that there are lower fees in North Carolina and Alabama. Bankruptcy questions rarely reach the Supreme Court. Who knows how the Court will decide this case. --- Brian H. Richardson

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OCC's Hsu Pushes for Stricter Safeguards for Big Regional Banks

"The acting comptroller proposed banks make lines of business more easily separable and that their parent companies hold more long-term debt in an effort to expand their options during stress."

Why this is important: The key sentence in this article is: "Hsu recommends that large regional banks have a single-point-of-entry (SPOE) resolution strategy, that their parent companies hold enough long-term debt to absorb a total loss, and that lines of business or large portfolios within the banks be easily separable." The explanations are interesting. Banks should not be "too big to fail." Once banks, especially large banks, embark on a venture, there should be a plan in place for how that venture might be separated from the bank when it is necessary for the health of the bank. These structures and plans should be part of the review of any bank merger application. Read this article and you will be forewarned. --- Hugh B. Wellons

LIBOR Act Provides Transition of Key Interest Rate in Over $200 Trillion Worth of Contracts Without Replacement Mechanisms

"H.R. 4616 would establish a process for certain financial contracts that currently reference the London Interbank Offered Rate to instead reference a replacement benchmark interest rate upon the occurrence of certain events affecting LIBOR."

Why this is important: The Omnibus Spending Bill recently signed into law contains, among other initiatives, the Adjustable Interest Rate ("LIBOR Act"). The LIBOR Act resolves the legal uncertainty regarding how "Tough Legacy" contracts (contracts that reference the London Interbank Offered Rate ("LIBOR") as a benchmark rate and that do not contain either a specified replacement rate or a replacement mechanism, estimated to be worth over $200 trillion) should be treated after USD LIBOR ceases publication on June 30, 2023.

The LIBOR Act seeks to preserve continuity of Tough Legacy contracts and to preclude the selection of a benchmark replacement rate being grounds to impair, discharge, terminate, void, or breach any contract that previously incorporated LIBOR and now uses a benchmark replacement rate. The LIBOR Act also includes a safe harbor provision to help protect lenders, trustees and other persons involved in determining or calculating the benchmark replacement (e.g., SOFR) from related litigation.

Market participants and organizations have welcomed the LIBOR Act as a key step in providing clarity in the face of the impending cessation of LIBOR. Over the coming months, the Federal Reserve Board of Governors will release the necessary regulations associated with selecting a replacement rate, which will finalize issues surrounding LIBOR replacement in Tough Legacy contracts. --- Bryce J. Hunter

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FDIC Issues Letter to Financial Institutions Engaging in Crypto-Related Activities and FDIC Seeks Comments on Mergers Between Banks

"The FDIC's intention is to review all the information and provide relevant supervisory feedback which, while supporting innovation, will be designed to ensure that FDIC-supervised institutions are in compliance with laws and regulation and acting in a manner that is fair to consumers."

"The FDIC wants to know about the effectiveness of the existing framework, as there have been 'significant changes' over the last few decades in the banking industry."

Why this is important: Banks are now required to notify the FDIC if they are involved in any crypto-related activities. The first article explains how this will work. The second article introduces proposed laws and rules governing bank mergers. There are other acts proposed that will make bank mergers even more difficult and time-consuming. Bank regulation has been increasing slowly, but the regulation of new activities and mergers will escalate. Does this surprise anyone? Bank regulatory agencies were designed and formed to protect consumers and safeguard banking, which is necessary to any successful economy. These agencies were not designed or formed to oversee multi-dimensional, multi-national, technology and financial behemoths working in businesses that even the business insiders do not understand completely. Our working definition of "financial" expanded in ways no one saw coming. Additional regulation seldom does more good than bad, but who can refute the regulatory concerns? --- Hugh B. Wellons

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Are "Bankruptcy Directors" Bad for Creditors?

"A new paper studies the rise of so-called 'bankruptcy directors,' typically former bankruptcy lawyers, investment bankers, or distressed debt traders who join corporate boards as ostensibly independent members."

Why this is important: This article previews a Southern California Law Review article that explores recent trends in "bankruptcy directors," sometimes called Chief Restructuring Officers, or CROs, in distressed companies. You expect to see a CEO, COO, CFO, etc. in a typical large corporation. The role of a CRO is unusual, but not new. The focus here is when the person in the role of a CRO also is appointed to the corporate board of directors, which is not always the case. Recent large bankruptcy filings often include some form of bankruptcy director. The article employs a type of meta-analysis of large chapter 11 filings between 2004 and 2019. In summary, the article argues that bankruptcy directors generally do not help unsecured creditors. This is becoming a cottage industry for a many individuals, who move from company to company with a median of 13 directorships per individual in the sample analyzed. article's proposal for measures to ensure independence and accountability to creditors is gaining support as similar measures are being championed in proposed legislation from Senator Elizabeth Warren. --- Brian H. Richardson

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SBA Says American Rescue Plan has Given $450 Billion to Small Business

"The different programs, some of which are aimed at specific industries, include the Restaurant Revitalization Fund, the Paycheck Protection Program, COVID Economic Injury Disaster Loans, and Shuttered Venue Operators Grants."

Why this is important: This is a summary and reminder of how The American Rescue Plan saved small businesses across the U.S. Propaganda? Yes, but also an interesting reminder of how we encouraged business during a pandemic. --- Hugh B. Wellons

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