FALLOUT: EMERGING ISSUES OF THE CREDIT CRISIS

Each year in its Annual Survey, the *Columbia Business Law Review* selects a major business law topic and presents a group of articles exploring the relevant legal and economic developments in the area. Not surprisingly, this year's Survey topic focuses on the legal and commercial implications of the 2008-2009 global financial crisis. Firms such as Lehman Brothers, Bear Stearns, and American International Group ("AIG") have become household names for the roles they played in changing the makeup of Wall Street. Home foreclosures and unemployment have reached historic levels while credit and the private capital markets remain frozen to individuals and businesses. Following Wall Street's lead, it seems inevitable that the world of corporate law will experience dramatic change. The articles included in the Survey explore a variety of issues directly impacted by the financial crisis. From the severe reduction in debtors' ability to obtain financing in bankruptcy to recent efforts by state attorneys general to curb executive compensation, the authors of the 2009 Survey analyze the diverse implications of a changing business law landscape.

In the first article, *Chapter 18? Imagining Future Uses of 11 U.S.C. § 363 to Accomplish Chapter 7 Liquidation Goals in Chapter 11 Reorganizations*, Bryant P. Lee examines the implications of the constricting credit markets for the practice of avoiding the formal requirements of Chapter 11 through debtor-managed sales of all or substantially all of the assets of a business in bankruptcy. The article argues that the increasing scarcity of financing will disproportionately impact firms in bankruptcy by necessarily increasing the speed at which these transactions occur, which may further depress sale prices and the resulting recovery for creditors. In order to alleviate some of this downward pressure, it is suggested that debtors and

creditors discover a renewed commitment to workouts and other out-of-court solutions.

In the second article, *Interpretation of Material Adverse Change Clauses in an Adverse Economy*, David Cheng discusses the common features of Material Adverse Change ("MAC") clauses and the standard for materiality in two recent cases. After comparing the purpose of MAC clauses today to their role in the 2001 recession, the article concludes that courts should continue to maintain a steep hurdle for buyers seeking to prove a MAC.

In the third article, *Credit Rating Agencies and the Credit Crisis of 2007-2008: How the Issuer Pays Conflict Contributed and What Regulators Might Do About It*, Deryn Darcy discusses how the issuer pays conflict inherent in the business model of the major credit rating agencies ("CRAs") may have been exacerbated when CRAs rated structured finance products. The article examines why the current disclosure-based regulatory regime may not adequately deter agencies from issuing ratings tainted by the conflict and evaluates two current proposals that would impose sanctions on CRAs for low-quality ratings, ultimately advocating that one proposal may provide a promising template for regulatory reform.

In the fourth article, *Overcompensating Much? The Federalism Preemption Implications of State Regulation of Executive Compensation Caps*, Sarah H. Burghart explores the mercurial regulatory efforts taken to curb executive compensation in the wake of the Credit Crisis. The article notes that that the involvement of state regulatory authorities, most visibly New York State Attorney General Andrew Cuomo, raises preemption implications that have thus far gone unaddressed. She concludes that reactionary regulation, such as that taken in response to the recent economic downturn, must take into account the two relevant disparate lines of preemption jurisprudence currently espoused by the Supreme Court: a broadly preemptive approach seen in the banking context and the statutory

presumption against preemption seen in more traditional preemption analysis.

In the final article, *Finding the Right Balance For Sovereign Wealth Fund Regulation: Open Investment vs. National Security*, Jennifer Cooke explores the changed legal environment surrounding sovereign wealth funds ("SWFs") as a result of the marked rise in SWF investment in Western companies during the emergence of the Credit Crisis. The United States amended its foreign investment statute and issued new regulations under it while countries around the globe entered into voluntary legal agreements governing the behavior of both SWFs and countries receiving their funds. The author considers the competing concerns of maintaining an economic environment open to foreign investment and protecting the United States against national security threats. The article ultimately finds that the current legal environment balances well these competing concerns but also makes several suggestions for improving the balance.

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