NATIONAL BANKRUPTCY CONFERENCE

A Voluntary Organization Composed of Persons Interested in the Improvement of the Bankruptcy Code and Its Administration

OFFICERS

Chair
DONALD S. BERNSTEIN

Vice Chair
RICHARD LEVIN

Secretary
K. JOHN SHAFFER

Treasurer
R. PATRICK VANCE

CONFEREES
HON. THOMAS L. AMBRO
PROF. DOUGLAS G. BAIRD
R. NEAL BATSON
MICHAEL ST. PATRICK BAXTER
RICHARD F. BROUDE
HON. LEIF M. CLARK
MICHAEL J. CRAMES
PROF. DAVID G. EPSTEIN
CHAIM J. FORTGANG
PROF. S. ELIZABETH GIBSON
DANIEL M. GLOSBAND
MARCIA L. GOLDSTEIN
ROBERT A. GREENFIELD
HON. ALLAN L. GROPPER
NELL HENNESSY
HON. BARBARA J. HOUSER
MARSHALL S. HUEBNER
PROF. MELISSA B. JACOBY
CARL M. JENKS
*JOHN J. JEROME
RICHARDO I. KILPATRICK
PROF. KENNETH N. KLEE
DAVID A. LANDER
JONATHAN M. LANDERS
*HON. JOE LEE
E. BRUCE LEONARD
MARC A. LEVINSON
HON. KEITH LUNDIN
HON. RALPH R. MABEY
*MORRIS W. MACEY
PROF. RONALD J. MANN
HON. BRUCE A. MARKELL
THOMAS MOERS MAYER
*HARVEY R. MILLER
HERBERT P. MINKEL, JR.
PROF. JEFFREY W. MORRIS
PROF. EDWARD R. MORRISON
*GERALD F. MUNITZ
SALLY SCHULTZ NEELY
HAROLD S. NOVIKOFF
ISAAC M. PACHULSKI
PROF. RANDAL C. PICKER
PROF. ALAN N. RESNICK
HON. MARY DAVIES SCOTT
RAYMOND L. SHAPIRO
*MYRON M. SHEINFELD
HON. A. THOMAS SMALL
EDWIN E. SMITH
GERALD K. SMITH
HENRY J. SOMMER
RICHARD S. TODER
*J. RONALD TROST
JANE L. VRIS
PROF. ELIZABETH WARREN
HON. EUGENE R. WEDOFF
PROF. JAY L. WESTBROOK
ROBERT J. WHITE
BRADY C. WILLIAMSON
**Senior Conferee*

EMERITUS
HERBERT H. ANDERSON
PAUL H. ASOFSKY
JOHN A. BARRETT
H. BRUCE BERNSTEIN
STEPHEN H. CASE
HON. DAVID COAR
RONALD DEKOVEN
MURRAY DRABKIN
DEAN M. GANDY
HON. ROBERT E. GINSBERG
GEORGE A. HAHN
HON. HERBERT KATZ
HON. ROBERT D. MARTIN
PATRICK A. MURPHY
LEONARD M. ROSEN
BERNARD SHAPIRO
LAWRENCE K. SNIDER
GEORGE M. TREISTER
JOEL B. ZWEIBEL

ADMINISTRATIVE OFFICE
SHARI A. BEDKER
ARMSTRONG & ASSOCIATES

June 29, 2010

Chairman John Conyers, Jr.
House Committee on the Judiciary
2138 Rayburn H.O.B.
Washington, D.C. 20515

Re: H.R. 5503

Dear Chairman Conyers:

I am writing this letter on behalf of the National Bankruptcy Conference (the "Conference") to convey the Conference's serious concerns about Section 7 of H.R. 5503, as reported, which would amend the Bankruptcy Code to address liabilities arising out of an oil spill, such as the Deepwater Horizon/BP spill in the Gulf of Mexico on April 20, 2010. The Conference is a voluntary, non-profit, non-partisan, self-supporting organization of approximately sixty lawyers, law professors and bankruptcy judges who are leading scholars and practitioners in the field of bankruptcy law. Our primary purpose is to advise Congress on the operation of bankruptcy and related laws and any proposed changes to those laws. Attached to this letter is a Fact Sheet about the Conference, including a list of its Conferees.

Section 7 of H.R. 5503 includes proposed amendments to the Bankruptcy Code that would prohibit the estate of a debtor that is liable for claims arising from an "incident" (as defined in the Oil Pollution Act of 1990 ("OPA")) (such claims being referred to herein as "OPA Incident Claims"), such as an oil spill, from selling all or substantially all assets of its estate, unless (i) the purchaser assumes liability for all of the OPA Incident Claims, regardless of their amount, or (ii) the OPA Incident Claims holders consent to the sale. The effect of the amendments is to grant OPA Incident Claims a priority in right to payment over all other claims, including claims of creditors holding liens to secure their claims, claims of other innocent victims such as tort claimants and others damaged by a spill whose claims would not qualify as claims arising out of an "incident" under OPA, and holders of claims for goods, services and financing used to remediate an oil spill or address the resulting claims. The OPA Incident Claims would, however, receive the priority only if the debtor sells all or substantially all of its assets, not if the debtor reorganizes without a sale.

The proposed amendment appears be intended to protect certain victims of an oil spill from a bankruptcy sale of assets that might leave them without a source of full repayment of their claims for damages. As laudable as this purpose might seem, however, the Conference believes that the proposed amendments are not likely to achieve their purpose and instead are likely to have pernicious, unintended and counterproductive consequences. Moreover, the proposed amendment may represent bad public policy and, by granting a preference to holders of OPA Incident Claims at the expense of other innocent and equally deserving creditors, represent bad bankruptcy policy.

PMB 124, 10332 MAIN STREET • FAIRFAX, VA 22030-2410 • TEL: 703-273-4918 • FAX: 703-802-0207
E-mail: info@nbconf.org • Website: www.nationalbankruptcyconference.org

We start from the twin premises that when a company is unable to pay all its debts in bankruptcy, (i) bankruptcy law should facilitate the estate's ability to maximize the value of its assets to increase the amount of claims that can be paid, and (ii) the company's shareholders will typically receive nothing and be wiped out. Maximizing value minimizes creditors' losses; and shareholders cannot retain any interest if creditors, including OPA Incident Claims holders, are not paid in full. We also note the fundamental and long-established bankruptcy policy of equity of distribution among unsecured creditors, as well as Fifth Amendment concerns about using assets in which a secured creditor has a property interest to pay unsecured claims, without just compensation. See U.S. v. Sec. Indus. Bank, 459 U.S. 70 (1982).

To summarize some of the Conference's concerns, we believe that the proposed amendments will:

Deter Sales and Entrench Management

- Chill bidding for assets in a bankruptcy that involves OPA Incident Claims – which will reduce recoveries of all creditors – by effectively requiring the purchaser in such an asset sale to write a "blank check" for OPA Incident Claims that have not been resolved or liquidated at the time of the sale;

- Create an inherent systemic bias against asset sales in cases involving OPA Incident Claims, and instead encourage an internal reorganization that could have the effect of entrenching the very management that presided over the spill and led the company into bankruptcy;

- Impede or even prevent the transfer of oil producing assets from less responsible operators who create oil spills to more responsible operators, and thereby reward corporate management that is responsible for a major oil spill;

Discourage New Financing to Clean Up a Spill, Pay Resulting Claims and Prevent Bankruptcy

- Reduce the ability of a company that is subject to OPA Incident Claims to obtain goods and services on credit to clean up an oil spill and remedy its consequences and to obtain new debt financing (even on a secured basis) to help address the costs of an oil spill and the resulting claims. The ability to obtain trade credit and debt financing will be impaired by the increased risk of non-payment of such claims in the event of a later bankruptcy, resulting from the effective subordination of the claims of suppliers and lenders to OPA Incident Claims in an unknown amount arising out of the spill.

- Discourage suppliers from providing goods and services to the company on credit and prospective lenders from providing financing, thereby reducing the company's ability to pay creditors, including OPA Incident Claims, and maintain operations as a going concern and thereby forcing the company into a premature bankruptcy.

What follows is further analysis of these concerns:

Deter Sales and Entrench Management. There are three basic reasons why the proposed amendment could effectively eliminate a sale of all or substantially all assets as a viable option for rehabilitating the business of a financially troubled debtor that is subject to OPA Incident Claims. First, the proposed amendment would expose the asset purchaser to unlimited liability for all allowed unsecured OPA Incident Claims, whether those claims are allowed and liquidated before or after the sale, because the purchaser could not liquidate or quantify the potential exposure for the assumed OPA Incident Claims before assuming them. The proposed amendments would require the purchaser to assume the obligation

to pay "the amount of allowed unsecured claims arising from such incident that is not paid by the debtor. . ." without any limitation based on whether the claims are allowed before or after the sale. Thus, the purchaser would face the risk of writing a "blank check" for an unknown and unknowable amount of OPA Incident Claims. No responsible purchaser is likely to take the risk of writing such a blank check.

Second, even if some mechanism could be devised to protect asset purchasers from the "blank check" problem, it is likely that such sales would still be blocked by other creditors and creditors' committees, who can be expected to object vigorously to sales the proceeds of which would first be consumed by the payment (or assumption) of OPA Incident Claims. As a practical matter, it is likely that other creditors would seek to block sales, in which the holders of OPA Incident Claims would effectively have first claim on the sale proceeds, in favor of "internal" reorganizations in which the holders of OPA Incident Claims would *not* receive such a preference and would instead simply share ratably in the distribution under a plan with all other holders of allowed general unsecured claims of equal rank and priority. The proposed amendment will create a powerful incentive for nearly all creditors other than the holders of OPA Incident Claims to oppose asset sales to which the amendment applies in favor of internal reorganization. Thus, the amendment is likely to produce a bias in favor of the retention of oil producing assets by a debtor that was responsible for an oil spill, and the continued management of those assets by the management that was in place when the oil spill occurred.

Third, the amendments would effectively give a particular group of unsecured creditors – holders of OPA Incident Claims – a veto over a sale of all or substantially all assets, unless the buyer agreed to assume liability for all of their allowed claims.

Impeding or preventing a sale of all or substantially all assets in every case in which there are OPA Incident Claims may not be a desirable result. For example, public policy might favor the transfer of oil-producing assets from a debtor that is responsible for a major oil spill to a more responsible operator of oil producing assets; yet the proposed legislation would have just the opposite result. Moreover, by creating a bias in the favor of "internal" reorganization (where assets are retained by the debtor instead of being sold), the proposed legislation might help to entrench the very management that created the problem in the first place and keep assets in the hands of bad operators. It seems counterproductive to create a construct that makes it (i) easier for the management of a company that is responsible for a major oil spill to retain control of the company's oil producing assets and (ii) harder to sell those assets to a more responsible operator.

Discourage New Financing to Clean Up a Spill, Pay Resulting Claims and Prevent Bankruptcy. The potential adverse impact of the proposed amendments on the ability to obtain debt financing to help address the costs of an oil spill should be of particular concern. Published reports indicate that BP plc will be seeking approximately $30 billion in new financing – including from banks – as part of a fundraising plan to deal with costs resulting from the oil spill in the Gulf of Mexico. If the proposed amendment is enacted, lenders being asked to provide this new financing will face the new and meaningful risk that, even if their loans were secured, a sale of their collateral could not occur in bankruptcy unless all holders of OPA Incident Claims (the amount of which is unknown) were paid in full by the buyer's assumption of liability for those claims. By creating this new, substantial and unquantifiable risk, the amendment may impede efforts to obtain the financing necessary to address the consequences of an oil spill.

In addition to the counterproductive effects of the proposed amendments, at their core, they violate the fundamental bankruptcy policy of equality of distribution among creditors by effectively granting the holders of OPA Incident Claims a *de facto* first priority in the proceeds of any sale of all or

substantially all of the assets of a bankruptcy estate that is subject to such claims. This point – and the importance of the bankruptcy policy of equality of distribution – are more than just theoretical abstractions. A basic function of our system of bankruptcy law is to allocate value among unpaid creditors fairly where the value of the debtor's assets is insufficient to pay creditors in full. For most of the history of Anglo-American bankruptcy law, a guiding principle has been that the value that remains in a bankrupt estate, after satisfying secured claims (those with a property interest in the debtor's assets) and the limited classes of claims, such as taxes and wages, that are accorded priority by statute for strong public policy reasons, should be allocated among general unsecured creditors on an equal and ratable basis. This basic principle is captured in the homily "equality is equity." Where a particular group of creditors (here, holders of OPA Incident Claims under the proposed amendments) is granted a priority, that priority is paid for not by the debtor, but by other creditors, for whom fewer assets will remain after satisfying the preferred claims.

Thus, the proposed amendments cannot be viewed simply from the standpoint of conferring a benefit on holders of OPA Incident Claims; the amendments must also be viewed as taking value away from all other holders of claims. The Conference can discern no reason in principle or policy why value in a case where there are insufficient assets to pay all creditors in full should be taken from all other creditors and given to the holders of OPA Incident Claims. The other creditors from whom value would be taken include equally worthy unsecured creditors, such as holders of other tort claims (for example, parties who may have been injured in an accident that did not constitute an "incident" under the OPA), trade creditors (including creditors that provide goods and services used to clean up the environmental and other damage that follows an oil spill), public bondholders, and lenders who provide financing to help pay for remediation costs and the cost of resolving OPA Incident Claims.

In addition to the possible effects of the proposed amendments, we note one drafting issue that may cause confusion or may impair the bill's effectiveness. The last clause in the proposed amendment to section 1129(b)(2)(B) – ", or creditors holding at least two-thirds in amount, and more than one-half in number, of such claims consent to different treatment" – is wholly unnecessary. Section 1129(b)(2)(B) applies only when the class to which it applies does not "consent to different treatment". 11 U.S.C. § 1129(b)(1). So providing that option in proposed section 1129(b)(2)(B)(iii) is unnecessary and appears to make section 1129(b) internally inconsistent. Under the statutory construction maxim that the Legislature is presumed not to include any unnecessary language, courts might import more meaning into the clause than intended and disrupt the delicate balance of the operation of chapter 11's absolute priority rule, under which shareholders may not receive or retain any value unless creditors are paid in full or consent to shareholder recovery. What's more, the provision could prevent a class of OPA Incident Claims from being protected. If the OPA Incident Claims were classified as part of a general unsecured class that accepted the plan, the proposed amendment would never apply, and the OPA Incident Claims holders would be deprived of any protection at plan confirmation.

Finally, we note that aside from these substantive flaws, the proposed amendments may be premature. Published reports indicate that BP has agreed to establish a $20 billion fund to address claims of the type described in the proposed amendments. Until the details of that fund are clarified, however, those details cannot be taken into account in drafting the proposed amendments, and the interplay between that fund and the provisions of the proposed amendments remain unclear. Once those details are clarified, the purposed amendment could take them into account in integrating the provisions of Section 363 with the impact of that fund.

* * *

The Conference appreciates your consideration of our views.

Very truly yours,

Sally S. Neely
Chair, Committee on Legislation
National Bankruptcy Conference
(213) 896-6024
sneely@sidley.com

cc (w/atts.): Ranking Member Lamar E. Smith (w/atts.)
Chairman Steve Cohen, Commercial and Administrative Law Subcommittee
Ranking Member Trent Franks, Commercial and Administrative Law Subcommittee

NATIONAL BANKRUPTCY CONFERENCE

A non-profit, non-partisan, self-supporting organization of approximately sixty lawyers, law professors and judges who are leading scholars and practitioners in the field of bankruptcy law. Its primary purpose is to advise Congress on the operation of bankruptcy and related laws and any proposed changes to those laws.

History. The National Bankruptcy Conference (NBC) was formed from a nucleus of the nation's leading bankruptcy scholars and practitioners, who gathered informally in the 1930's at the request of Congress to assist in the drafting of major Depression-era bankruptcy law amendments, ultimately resulting in the Chandler Act of 1938. The NBC was formalized in the 1940's and has been a resource to Congress on every significant piece of bankruptcy legislation since that time. Members of the NBC formed the core of the Commission on the Bankruptcy Laws of the United States, which in 1973 proposed the overhaul of our bankruptcy laws that led to enactment of the Bankruptcy Code in 1978, and were heavily involved in the work of the National Bankruptcy Review Commission (NBRC), whose 1997 report initiated the process that led to significant amendments to the Bankruptcy Code in 2005.

Current Members. Membership in the NBC is by invitation only. Among the NBC's 60 active members are leading bankruptcy scholars at major law schools, as well as current and former judges from eleven different judicial districts and practitioners from leading law firms throughout the country who have been involved in most of the major corporate reorganization cases of the last three decades. The NBC includes leading consumer bankruptcy experts and experts on commercial, employment, pension, mass tort and tax related bankruptcy issues. It also includes former members of the congressional staff who participated in drafting the Bankruptcy Code as originally passed in 1978 and former members and staff of the NBRC. The current members of the NBC and their affiliations are set forth on the second page of this fact sheet.

Policy Positions. The Conference regularly takes substantive positions on issues implicating bankruptcy law and policy. It does not, however, take positions on behalf of any organization or interest group. Instead, the NBC seeks to reach a consensus of its members - who represent a broad spectrum of political and economic perspectives - based on their knowledge and experience as practitioners, judges and scholars. The Conference's positions are considered in light of the stated goals of our bankruptcy system: debtor rehabilitation, equal treatment of similarly situated creditors, preservation of jobs, prevention of fraud and abuse, and economical insolvency administration. Conferees are always mindful of their mutual pledge to "leave their clients at the door" when they participate in the deliberations of the Conference.

Technical and Advisory Services to Congress. To facilitate the work of Congress, the NBC offers members of Congress, Congressional Committees and their staffs the services of its Conferees as non-partisan technical advisors. These services are offered without regard to any substantive positions the NBC may take on matters of bankruptcy law and policy.

National Bankruptcy Conference
PMB 124, 10332 Main Street • Fairfax, VA 22030-2410
703-273-4918 Fax: 703-802-0207 • Email: info@nbconf.org • Web: www.nationalbankruptcyconference.org

NATIONAL BANKRUPTCY CONFERENCE

Chair
Donald S. Bernstein, Esq.
Davis Polk & Wardwell
New York, NY

Vice Chair
Richard B. Levin, Esq.
Cravath, Swaine & Moore LLP
New York, NY

Treasurer
R. Patrick Vance, Esq.
Jones, Walker, Waechter, Poitevent,
Carrere & Denegre L.L.P.
New Orleans, LA

Secretary
K. John Shaffer, Esq.
Stutman, Treister & Glatt, Prof. Corp.
Los Angeles, CA

Chair, Legislation Committee
Sally S. Neely, Esq.
Sidley Austin LLP
Los Angeles, CA

Chair, Drafting Committee
Prof. Alan N. Resnick
Hofstra University School of Law
Hempstead, NY

Hon. Thomas L. Ambro
U.S. Court of Appeals for the Third Circuit
Wilmington, DE

Prof. Douglas G. Baird
University of Chicago Law School
Chicago, IL

R. Neal Batson, Esq.
Alston & Bird LLP
Atlanta, GA

Michael St. Patrick Baxter, Esq.
Covington & Burling LLP
Washington, D.C.

Richard F. Broude, Esq.
New York, NY

Hon. Leif M. Clark
U.S. Bankruptcy Court
San Antonio, TX

Michael J. Crames, Esq.
Davis Polk & Wardwell
New York, NY

***Murray Drabkin, Esq.**
Washington, D.C.

Prof. David G. Epstein
Dedman School of Law
Southern Methodist University
Dallas, TX

Chaim J. Fortgang
Silver Point Capital Advisors, LLC
Greenwich, CT

Prof. S. Elizabeth Gibson
Univ. of North Carolina Law School
Chapel Hill, NC

Daniel M. Glosband, Esq.
Goodwin Procter LLP
Boston, MA

Marcia L. Goldstein, Esq.
Weil, Gotshal & Manges LLP
New York, NY

Robert A. Greenfield, Esq.
Stutman, Treister & Glatt, Prof. Corp.
Los Angeles, CA

Hon. Allan L. Gropper
U.S. Bankruptcy Court
New York, NY

Nell Hennessy, Esq.
Fiduciary Counselors Inc.
Washington, D.C.

Hon. Barbara J. Houser
U.S. Bankruptcy Court
Dallas, TX

Marshall S. Huebner, Esq.
Davis Polk & Wardwell
New York, NY

Prof. Melissa B. Jacoby
Univ. of North Carolina Law School
Chapel Hill, NC

Carl M. Jenks, Esq.
Jones Day
Cleveland, OH

***John J. Jerome, Esq.**
Saul Ewing LLP
New York, NY

Richardo I. Kilpatrick, Esq.
Kilpatrick and Associates, P.C.
Auburn Hills, MI

Prof. Kenneth N. Klee
UCLA School of Law
Los Angeles, CA

David A. Lander, Esq.
Thompson Coburn LLP
St. Louis, MO

Jonathan M. Landers, Esq.
Milberg LLC
New York, NY

***Hon. Joe Lee**
U.S. Bankruptcy Court
Lexington, KY

E. Bruce Leonard, Esq.
Cassels Brock & Blackwell LLP
Toronto, Ontario, Canada

Marc A. Levinson, Esq.
Orrick, Herington & Sutcliffe LLP
Sacramento, CA

Hon. Keith Lundin
U.S. Bankruptcy Court
Nashville, TN

Ralph R. Mabey, Esq.
Stutman, Treister & Glatt, Prof. Corp.
Salt Lake City, UT

***Morris W. Macey, Esq.**
Macey, Wilensky, Kessler,
Howick & Westfall
Atlanta, GA

Prof. Ronald J. Mann
Columbia Law School
New York, NY

Hon. Bruce A. Markell
U.S. Bankruptcy Court
Las Vegas, NV

Thomas Moers Mayer, Esq.
Kramer Levin Naftalis & Frankel LLP
New York, NY

***Harvey R. Miller, Esq.**
Weil, Gotshal & Manges
New York, NY

Herbert P. Minkel, Jr., Esq.
New York, NY

Prof. Jeffrey W. Morris
University of Dayton School of Law
Dayton, OH

Prof. Edward R. Morrison
Columbia Law School
New York, NY

***Gerald F. Munitz, Esq.**
Butler Rubin Saltarelli & Boyd
Chicago, IL

Harold S. Novikoff, Esq.
Wachtell, Lipton, Rosen & Katz
New York, NY

Isaac M. Pachulski, Esq.
Stutman Treister & Glatt, Prof. Corp.
Los Angeles, CA

Prof. Randal C. Picker
University of Chicago Law School
Chicago, IL

Prof. Katherine M. Porter
The University of Iowa, College of Law
Iowa City, IA

John Rao
National Consumer Law Center
Boston, MA

Hon. Mary Davies Scott (retired)
Langley, WA

Raymond L. Shapiro, Esq.
Blank Rome, LLP
Philadelphia, PA

***Myron M. Sheinfeld, Esq.**
King & Spalding LLP
Houston, TX

Hon. A. Thomas Small
U.S. Bankruptcy Court
Raleigh, NC

Edwin E. Smith, Esq.
Bingham McCutchen LLP
Boston, MA

Gerald K. Smith, Esq.
Lewis and Roca LLP
Phoenix, AZ

Henry J. Sommer, Esq.
Philadelphia, PA

Richard S. Toder, Esq.
Morgan, Lewis & Bockius LLP
New York, NY

***J. Ronald Trost, Esq.**
Vinson & Elkins, LLP
New York, NY

Jane L. Vris, Esq.
Vinson & Elkins, LLP
New York, NY

Prof. Elizabeth Warren
Harvard Law School
Cambridge, MA

Hon. Eugene R. Wedoff
U.S. Bankruptcy Court
Chicago, IL

Prof. Jay Lawrence Westbrook
University of Texas School of Law
Austin, TX

Robert J. White, Esq.
Los Angeles, CA

Brady C. Williamson, Esq.
Godfrey & Kahn, S.C.
Madison, WI

---

* Senior Conferees