July 2012

In This Issue

President’s Report, p.1
Anouncing the Turnaround/Transaction of the Year Award, p. 3
Meeting Schedule, p. 4

Will TOUSA Turn On Stern?
By Kelly Burgan and Joseph Esmont, Baker Hostetler LLP
Stern v. Marshall, 131 S.Ct. 2594 (2011) and Official Committee of Unsecured Creditors v. Senior Transeastern Lenders (In re TOUSA, Inc.), 680 F.3d 1298, two of the most talked-about bankruptcy cases in recent memory, will share center stage if the Eleventh Circuit agrees to review its panel decision in TOUSA en banc. At issue will be whether the Eleventh Circuit, in overturning the District Court’s decision in TOUSA, properly deferred to the Bankruptcy Court’s findings of fact in light of Stern v. Marshall.

In TOUSA, the Bankruptcy Court and District Court came to very different conclusions about the facts of the case. The undisputed facts are that a group of lenders, Transeastern, brought a $2-billion lawsuit against TOUSA, and Transeastern was very likely to win a judgment of at least $400 million. TOUSA borrowed more than $400 million to settle the Transeastern litigation, and TOUSA's subsidiaries secured that debt by granting liens on their assets. TOUSA's subsidiaries would not have been liable if Transeastern obtained a judgment against TOUSA, but if TOUSA went into bankruptcy or suffered an adverse judgment of more than $10 million, the subsidiaries would become liable on more than $1 billion in guarantees of TOUSA's bonds.

Continues...(Feature Article, p. 3)

President’s Report
by John K. Lane

Dear Ohio TMA Members and Friends,

Recently passed Independence Day certainly has enormous historical significance for us Americans. It also summons sentimental memories from our more youthful days. Picnics and cookouts. Hot dogs and hamburgers. Days spent at the beach, boating, bicycling, lawn games and races, visiting relatives or watching parades. And, of course, fireworks and the constant, but seldom heeded, warnings not to play with them.

These are all fond memories that most Americans share and perhaps memories that even define who we are as Americans. However, what I want to talk about this month is the concept itself – independence.

Continues...(President's Report, p. 2)

Baker Hostetler, celebrating its 96th year, is one of the nation’s top 100 law firms, with more than 800 attorneys serving clients around the country and throughout the world. Established in 1916 by Newton D. Baker, U.S. Secretary of War during World War I and former Mayor of Cleveland, the firm now has offices in 11 U.S. cities across four time zones. Baker is a multidisciplinary firm with 11 practice groups and more than 55 areas of practice strength. The firm's clients include 10 of the FORTUNE 25, along with American institutions such as Major League Baseball and many other dynamic companies and institutions.
President’s Report (continued)

I am fairly sure that all of us can think back to a job, a relationship, a business deal or other situation where you felt “shackled,” unable to proceed as you desired. At that time, you did have choices, though perhaps not good ones, to stay in the current situation or to figure out how to extract yourself. Unfortunately, many times staying the course required less work than it would take to extract. Perhaps that is why so many owners of troubled businesses just keep slugging away, day after day, hoping that something or someone will come along to save them.

However, as our Founding Fathers (and Mothers!) learned, there should come a time when one must stand up for himself or herself and declare that they will no longer be controlled by others, or by a situation. Is it not one of the greatest rewards of our profession, that we have the opportunity to help free individuals from their troublesome financial bonds?

I recall one owner, who had to bring his company to a close after almost 20 years at its helm, stating that the money he spent to shut his business was the best money he had ever spent. There was little that could surpass the newly found independence from that very difficult situation.

As I believe that I have stated before in these pages, life is too short. Too short not to enjoy each moment that life presents us, too short not to enjoy the freedoms that we have and too short not to seek happiness when we are able. Now, those are some truths that are self evident.

Let us talk now about Ohio TMA chapter events.

Our Summer Social at Shoreby turned out to be even more memorable to some than to others. Certainly, the event itself was fantastic. We had over 230 participants from the TMA and the ACG, all of whom appeared to have a good time. The weather was wonderful (as it seems to have been since last fall!), the service and the setting were great and my ongoing mission to make this a more casual event had modest success. However, the real excitement appears to have occurred after the Summer Social, when selected event participants went out in a boat on Lake Erie and attempted a real life re-enactment of the pilot episode of Gilligan’s Island. Apparently, the boat hit a submerged object and the Coast Guard had to be called as the disabled boat was taking on water. Thankfully, all aboard were safe and sound, but perhaps a song was floating in their heads, “Just sit right back and you’ll hear a tale, a tale of a fateful trip…”

Final preparations are underway for our 16th annual TMA golf outing at the Mayfield campus of the Mayfield Sandridge Country Club on Monday, July 16th. Perhaps we should have prepared shirts that stated “16th on the 16th” or “16/16,” or something like that. But we did not. Instead, Drew Parobek of Vorys Sater and his fellow golf committee members have devoted their efforts to presenting you the very best golf outing. I know it will be a fun time. Don’t miss it!

After taking August off, we will restart our slate of indoor TMA events in September with a networking event that will focus on young professionals (all of you old coots are invited, however). The details of the event are being worked on, but right now, subject to change, it is scheduled for Thursday, September 27. This event will also be part of our “College Outreach” program in which we will be inviting college seniors and post graduates to attend. More details to follow.

You can sign up for all of the TMA events at www.turnaround.org. I hope that we will see you there!

Best regards,
John K. Lane
President of Ohio TMA
jlane@ingw.com
216-533-5860
Six months after the settlement, TOUSA and its subsidiaries filed for bankruptcy, triggering the guarantees despite the settlement. The unsecured creditors sued Transeastern to recover the value of the liens, among other things.

The Bankruptcy Court avoided the settlement as a fraudulent transfer, finding that the subsidiaries did not receive reasonably equivalent value in exchange for the liens they granted. The Bankruptcy Court found that TOUSA's management knew that the settlement caused TOUSA to incur too much debt and that the settlement made TOUSA's bankruptcy "inevitable." From the perspective of the subsidiaries, then, the Bankruptcy Court held that delaying liability on $1 billion in debt by a few months was not reasonably equivalent to granting more than $400 million in liens.

Transeastern appealed to the District Court, which quashed the Bankruptcy Court's judgment. The District Court relaxed the deference it would ordinarily pay to the Bankruptcy Court's findings of fact because it found that the court improperly adopted the Committee's proposed findings of fact almost verbatim. The District Court then found that the subsidiaries received reasonably equivalent value in exchange for the liens they granted because the settlement "strengthen[ed] the viability of the corporate group[,]" which was heavily integrated, and created "immense economic value" in allowing the subsidiaries the opportunity to avoid default and bankruptcy. Thus, the District Court found that the subsidiaries were in a "better position to remain as going concerns" than they would have been without the settlement.

The Eleventh Circuit subsequently reinstated the Bankruptcy Court's judgment. The Eleventh Circuit determined that debtors are not free to "pay any price or bear any burden" in the name of avoiding bankruptcy. If there is no "chance that the investment would generate a positive return[,"] then the debtor did not receive reasonably equivalent value in exchange for the transfer. The Eleventh Circuit deferred to the Bankruptcy Court's findings that the settlement in fact harmed the subsidiaries and made their failure inevitable and more costly.

Continues...(Feature Article, p.4)
Transeastern recently requested that the Eleventh Circuit reconsider its opinion en banc (that is, it is asking the entire court to reconsider the earlier judgment of a smaller number of its judges who heard the case). While TOUSA was on appeal to the Eleventh Circuit, the Supreme Court held, in Stern v. Marshall, that bankruptcy courts are not constitutionally capable of entering final judgments in certain causes of action. While the parties filed letter briefs on the issue, the Eleventh Circuit panel did not discuss the matter in its opinion.

Transeastern argues in its petition for rehearing en banc that the fraudulent conveyance claims asserted by the Committee could only have been finally adjudicated by the District Court, not the Bankruptcy Court, and that it would violate Stern to require Article III courts to defer to findings found by the Bankruptcy Court. The defendants argued that, instead, the Eleventh Circuit should defer to the District Court’s holding.

The Committee will soon file its response to the petition for an en banc rehearing. The TOUSA case exemplifies an issue of particular importance for creditors and their counsel when structuring transactions with struggling companies.

The Supreme Court’s decision in Stern sparked immediate controversy and debate regarding the potential implications on bankruptcy courts’ authority to enter final orders. Similarly, the Eleventh Circuit’s decision in TOUSA and its implications for financing transactions became a focus of interest and discussion among attorneys and other professionals in the turnaround community. Now, the ultimate resolution of TOUSA may turn on further clarification regarding the scope of bankruptcy courts’ authority under Stern in the context of a District Court’s review on appeal. Whatever the ultimate outcome, the final determination of TOUSA and further jurisprudence on the applicability of Stern will provide important guidance.

### 2012 Meeting Schedule*

**July**
- Golf Outing - July 16, 2011 - Mayfield Country Club

**August**
- No event. Enjoy the summer!

**September**
- Networking and College Outreach Event -- September 27 – Further details will be forthcoming.

*Event dates and locations are subject to change*