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MAXIMIZING CREDITOR REMEDIES IN AN ANTITRUST WORLD

ANTITRUST REPORT, ISSUE 1
JULY 2008

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Maximizing Creditor Remedies In An Antitrust World

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INTRODUCTION[1]

Inevitably certain of a company's customers will become financially distressed. When that happens, the company, as creditor, must know how to minimize its financial risk and know the available remedies in case a debtor breaches its obligations. Although there are numerous protective and remedial steps that creditors can undertake individually, both before and after the debtor enters bankruptcy, creditors of the distressed debtor may find it advantageous to work collectively to maximize their individual recoveries. Even the debtor may benefit from dealing with creditors collectively because doing so may permit the debtor to restructure all or substantially all of its debt while minimizing the disruption to its business. Conversely, the failure of creditors to cooperate can lead to the destruction of the debtor's business due to a proliferation of contentious litigation and a race to levy upon the debtor's assets. Yet, despite the potential for mutually beneficial arrangements among the creditors and the debtor, creditors often fail to recognize collective action as a valuable strategy.

Notwithstanding the significant benefits, there are limitations on the collective actions creditors may take. This article focuses on one such limitation: the federal antitrust laws. Although competitors may have sound business reasons for collaborating in their efforts to enforce creditor remedies against a common debtor, they must be mindful of federal antitrust laws. This article is intended to guide creditors with antitrust concerns in maximizing their recoveries as creditors while minimizing their likelihood of violating antitrust laws. This article sets forth the protective and remedial actions creditors may take both individually and collectively in light of federal antitrust law.

This article is organized into five sections. Section I provides an executive summary highlighting permissible and impermissible creditor remedies in light of debtor/creditor and antitrust laws. Section II provides a very brief overview of the bankruptcy process and the relevant underlying bankruptcy principals. Section III outlines steps that creditors may take individually to (i) minimize financial risk before a bankruptcy occurs and (ii) enforce creditor remedies against a debtor, both in and outside the bankruptcy context. Section IV provides a brief overview of the federal antitrust laws affecting the ability of competitors to cooperate with one

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** We gratefully acknowledge the input of Lawrence I. Fox, partner in charge of McDermott Will & Emery's Distribution Counseling and Litigation Group and chairperson of the Antitrust and Competition Practice Group, and Stephen B. Selbst, a partner in McDermott's Corporate Department and head of McDermott's New York Restructuring and Insolvency Group.

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another. Finally, Section V outlines protective measures available to creditors acting collectively and offers various strategies for such creditors to enforce remedies against a debtor, both in and outside the bankruptcy context without violating federal antitrust law.

I. EXECUTIVE SUMMARY

A. *Permissible Collective Actions: Pre-Bankruptcy*

Outside of bankruptcy, creditors can take collective action that may increase their recoveries and which, at the same time, may save the debtor's business. In the event of a breach of the debtor's obligations, creditors may collaborate to exercise collection remedies. Creditors can work collectively to salvage a debtor's business by: (i) helping to find a buyer so that its operations will continue, (ii) proposing a debt for equity swap, (iii) requesting permission to speak with the debtor's secured lenders to reach an out-of-court workout, and (iv) discussing the formation of a distribution joint venture in order to ensure continued distribution of the debtor's product in the event that the debtor goes out of business. In the event of a debtor's breach, collective actions may include (i) retaining common legal counsel, (ii) demanding repayment, (iii) filing legal claims when a demand for repayment is ignored, (iv) making reclamation demands for the return of goods, and (v) commencing an involuntary bankruptcy case.

B. *Permissible Collective Actions: Debtor in Bankruptcy*

As in the non-bankruptcy context, the creditors of a bankrupt debtor can also take collective steps toward saving the debtor's business and exercising collection remedies. Creditors may help to preserve the distribution system of which a bankrupt debtor is a part by negotiating for postpetition financing of the debtor's business or by negotiating an acquisition of the debtor's business. Collective collection strategies available to a group of creditors include (i) retaining joint legal counsel, (ii) joining an official or unofficial creditors' committee, (iii) objecting to motions that impair creditor rights, (iv) seeking appointment of a trustee or examiner, (v) seeking to convert a Chapter 11 restructuring case to a Chapter 7 liquidation case, (vi) seeking to dismiss the bankruptcy case if warranted, (vii) seeking to terminate the debtor's exclusive right to file a Chapter 11 restructuring plan or filing a competing plan, (viii) pursuing reclamation remedies, (ix) seeking immediate payment of the twenty-day administrative claim, and (x) negotiating a Chapter 11 plan.

C. *Impermissible Collective Remedies*

There are limitations on the collective remedies that creditors may pursue. For example, creditors may not enter into agreements with competitors not to do business with the debtor or to deal with it only on specified terms. Creditors are also prohibited from collectively deciding to stop goods already in transit or to refuse to deliver future shipments. Though creditors may make collective decisions, they are restricted from making collective pricing or credit decisions. Finally, any collective action to seek relief from a court must be made in good faith, i.e., there must be a genuine desire to obtain the relief sought rather than merely a desire to harm a competitor or competition.

II. BANKRUPTCY OVERVIEW

Bankruptcy is a common, but not the exclusive, means for effectuating a restructuring or liquidation of a company's business or assets. A debtor's liabilities may be restructured out of court through a "workout." Workouts are typically faster and cheaper than a bankruptcy. However, a company and its creditors often find it difficult to reach an agreement with all creditors outside of bankruptcy. Workouts not only require an agreement among a significant

number of the debtor's creditors to be effective but also pose "unwind risk."[2] In such situations, a sale of the company to a "white knight" may be an attractive option.[3] Finally, there may be state law alternatives to bankruptcy, such as an assignment for the benefit of creditors and state law receivership actions. A discussion of these non-bankruptcy restructuring alternatives is outside the scope of this article.

A. *Chapters 7 and 11 of the Bankruptcy Code*

All bankruptcy cases are commenced with the filing of a bankruptcy "petition." Most bankruptcy cases are filed under Chapter 7 or 11 of the Bankruptcy Code. Chapter 7 of the Bankruptcy Code provides for the orderly and equitable liquidation and distribution of non-exempt assets of the debtor. In exchange, an "individual" debtor will receive a discharge.[4] Corporations do not receive discharges under Chapter 7.[5] Instead, the corporate shell is left with debts, but no assets. A corporation seeking a discharge must file under Chapter 11 and confirm a plan of reorganization.[6]

Unlike Chapter 7, Chapter 11 expressly authorizes a debtor, known as a debtor-in-possession, to continue to operate while it reorganizes its business and capital structure pursuant to a court-approved plan of reorganization.[7] Chapter 11 may also be used to conduct an orderly liquidation of the debtor's business avoiding the need for the appointment of a trustee and a "fire sale" climate.

B. *The Goal of Chapter 11*

The goal of a Chapter 11 case is the consensual confirmation of a plan of reorganization or plan of liquidation. To be approved or "confirmed, Chapter 11 plans must satisfy the requirements of the Bankruptcy Code. After the plan is confirmed, the debtor is required to make plan payments or distributions and is bound by the plan's provisions. The confirmed plan creates new contractual rights and can create, replace, or supersede pre-bankruptcy contractual rights. Both pre-"petition" and post-"petition" creditor claims are satisfied as set forth in the plan. Upon consummation of the plan, except as provided in the plan, the debtor receives a discharge of any debt that arose before the date of confirmation.[8]

C. *The Automatic Stay*

The filing of a bankruptcy petition automatically stays a wide variety of actions against the debtor to collect debts that arose before the bankruptcy filing. Section 362 of the Bankruptcy Code stays such actions and is intended to provide the debtor with a breathing spell during its bankruptcy case.

If a creditor violates the automatic stay, a bankruptcy court may hold the creditor in contempt of court and award the debtor compensatory damages.[9] In addition, where the violation is willful, the bankruptcy court may award punitive damages.[10]

D. *Restrictions on the Sale, Use, or Lease of Property of the Estate*

Although a debtor is authorized to operate its business, it may not sell, use, or lease property of the estate outside of the ordinary course of business without court approval.[11] With court approval, it may sell estate property free and clear of liens, claims, encumbrances, and defenses.[12] Pursuant to section 363 of the Bankruptcy Code, bankruptcy courts will approve a sale outside of the ordinary course of business when it is based on the sound business judgment of the debtor.[13]

E. *Creditors' Committee*

As soon as practicable after a Chapter 11 bankruptcy case is commenced, a creditors' committee may be appointed by the U.S. Trustee.[14] The creditors' committee may consult with the debtor, investigate the debtor and its business, and participate in the formulation of a plan of reorganization. The U.S. Trustee may also appoint other committees, including, but not

limited to committees representing the interests of equity holders, bondholders, retirees and reclamation claimants. Generally, an official committee is entitled to retain separate legal counsel and such other professionals as the court may approve in order to represent the interests of its respective constituents.

III. INDIVIDUAL CREDITOR ACTION

Too often, creditors do not consider their exposure as creditor until after a debtor becomes financially distressed, e.g., after the debtor breaches an agreement or becomes unable to repay its debts as they become due. It is far more challenging and risky for a creditor to take steps to improve its position when the debtor is on the eve of bankruptcy because, during that period, the debtor is generally distracted due to great financial pressure, many similarly situated creditors may be clamoring for payment, and there is a heightened risk that a payment or security interest granted during this period will avoided in the subsequent bankruptcy filing. (See Section III.A.1 immediately below.) There are a range of available protective strategies that a creditor may employ before the onset of the debtor's financial distress. Once financial distress sets in, creditors will be better positioned to maximize their recoveries, both before and after the commencement of bankruptcy proceedings, if they understand the available remedial strategies.

A. *Pre-Financial Distress Protective Measures Available to Creditors*

There are a number of steps that creditors may take individually to protect themselves from a debtor's future financial distress. Examples of individual actions include the following:

1. Obtain Security Interest

A creditor will be much better off if its claim is secured, rather than unsecured. A purchase money security interest (a security interest in future goods sold by the creditor on notice to existing secured creditors) will protect the creditor with respect to sales of future goods. A creditor may be able to obtain a security interest in the debtor's assets with respect to prior sales. However, such a security interest may be subject to avoidance as a preference, pursuant to Section 547 of the Bankruptcy Code, if the security interest is obtained within ninety days prior to a debtor's bankruptcy filing. Under Section 547 of the Bankruptcy Code, a debtor may avoid and recover any payments it made within ninety days before the commencement of the bankruptcy case to a creditor on account of preexisting debt owed by the debtor while the debtor was insolvent if such payment resulted in the creditor receiving more than it would have received if the bankruptcy case were a Chapter 7 case, the payment had not been made, and the creditor received payment of such debt as provided for under the Bankruptcy Code. Such payments are often called preferences because they allow a creditor to receive more than other similarly situated creditors who did not receive payments just prior to the bankruptcy filing.

2. Obtain Financial Statements and Financial Assurances

A creditor who is receiving timely financial information about the debtor's business may be in a better position to take protective steps to minimize risk of nonpayment. For example, if the financial health of a customer is deteriorating, a creditor may be able to demand cash in advance or cash on delivery as a precondition to future sales.

3. Modify Contracts to Provide Maximum Flexibility

A creditor should try to make sure that its contracts with debtors provide maximum flexibility to the creditor. For example, a creditor may want to have the right to terminate a

contract at any time without any notice or with minimal notice to the debtor. A creditor with such a right will have an easier time terminating a contract (whether before a bankruptcy or after a bankruptcy) than a creditor who has no such right. However, contract provisions providing for the right to terminate the contract upon the insolvency of the counterparty are generally not enforceable upon a bankruptcy filing.[15] Also, a contract that builds in pricing flexibility (such as the ability to pass along price increases) will ensure that a creditor will not be required to honor unfair prices throughout the debtor's bankruptcy.

4. *Modify Contracts to Provide Adequate Remedies*

A creditor will want to ensure that it has adequate contract remedies in the event of a debtor's breach. For example, contracting for equitable remedies upon a breach (such as the right to injunctive relief to prevent irreparable harm) may provide additional protections to a creditor, perhaps even after a debtor's bankruptcy. It should be noted, however, that such a provision might not be enforceable following rejection of the contract by the debtor. In addition, providing for the retention of title to goods until resale may provide a creditor with greater rights than a creditor who immediately passes title to goods to a debtor. Some steps may need to be taken, however, to preserve such rights after a bankruptcy or insolvency.

5. *Encourage Debtors to Protect Themselves*

A creditor should encourage its customers to take measures to protect themselves from their own future bankruptcies. For example, a creditor may wish to encourage its customers to obtain security interest in goods sold or other assets, retain title to goods until resale, prohibit returns to other sellers of goods (which would increase the debtor's credit exposure to the creditor), or require advance notice of termination of a contract.

B. ***Individual Creditor Remedies: Pre-Bankruptcy***

A creditor has numerous remedies available to it in the event a debtor breaches its contract or is unable to repay its debts when due. However, the available remedies may depend upon whether the debtor is in bankruptcy or not. Generally, a creditor may take unilateral action to enforce its individual creditor remedies without any fear of violating the antitrust laws under the Sherman Act.[16] Among such remedies are the following:

1. *Demand Repayment*

A creditor may demand repayment of past due amounts. If a creditor is able to obtain a judgment lien outside of the preference period,[17] it will have the benefit of a secured claim in the event the debtor commences a bankruptcy case.

2. *Demand Assurances*

Section 2-609 of the Uniform Commercial Code ("UCC") gives a seller of goods under a contract the right to demand adequate assurance of due performance as a precondition to doing future business where the creditor has reasonable grounds for feeling insecure. In particular, Section 2-609(1) provides, "A contract for sale imposes an obligation on each party that the other's expectation of receiving due performance will not be impaired."[18] When one party has reasonable grounds for insecurity with respect to the other party's performance, that party may demand assurance of due performance and may suspend performance until it receives such assurance.[19] In addition Section 2-609(4) allows a repudiation of the contract in the event that a party receives a demand of assurance and does not provide an adequate assurance of performance within thirty days of the receipt of the demand.[20]

3. *Demand Seller Remedies*

Section 2-702 of the UCC provides the seller with three rights when the seller discovers the buyer to be insolvent, depending upon the location of the goods at the time the seller discovers the buyer's financial condition. The seller may: (i) reclaim goods received by the debtor in the preceding ten days that are still in the actual or constructive possession of the buyer, (ii) stop deliveries of goods already in transit (regardless of who holds title to the goods), and (iii) refuse delivery of pending or future orders (regardless of who holds title to the goods) unless all amounts are paid for in cash, including amounts for goods theretofore delivered under the contract.

4. *Commence Collection Action*

A creditor may commence a lawsuit demanding repayment of past due amounts.

5. *Commence Involuntary Bankruptcy*

If a debtor has less than twelve qualifying creditors, a single creditor may commence an involuntary Chapter 7 or Chapter 11 case pursuant to Section 303 of the Bankruptcy Code.

C. *Individual Creditor Remedies: Debtor in Bankruptcy*

Creditors that are suddenly faced with a customer in bankruptcy naturally wonder what steps they can take to protect and maximize their rights and claims against the debtor. A creditor has many options notwithstanding the automatic stay. This section provides creditors with guidance for protecting and maximizing their rights and claims against the debtor and navigating the often confusing dynamic of a bankruptcy proceeding.

1. *Do Not Violate the Automatic Stay*

As noted above in Section II.C above, under the Bankruptcy Code, debtors are granted certain protections from creditors upon the filing of a bankruptcy case, the most significant being the "automatic stay."[21] Creditors must remain cautious and must make a concerted effort to respect the automatic stay.

2. *Hire an Experienced Bankruptcy Lawyer*

A creditor should not attempt to manage the bankruptcy process on its own. It can be highly beneficial to hire an experienced bankruptcy attorney to provide a creditor with useful advice that is relevant to its particular situation. Although this paper is intended to provide creditors with general guidance, it cannot substitute for the valuable advice that can often be provided by an experienced bankruptcy attorney.

3. *Take Specific Steps to Protect Your Rights*

A creditor may have rights that need to be preserved during the debtor's bankruptcy case. In order to do so, that creditor may need to take specific timely steps to preserve those rights. Among other things, a supplier creditor of the debtor may have lien, reclamation, or claim rights that need to be protected. Included below are a few examples of actions that can be taken by a supplier to preserve those rights.

a. Send a Written Reclamation Demand.

Do not delay. Sellers of goods may reclaim goods received by the debtor within forty-five days before the bankruptcy filing, but the reclamation demand must be made within forty-five days of the debtor's receipt of reclaimed goods or within twenty days of the bankruptcy filing.

It is important to send a reclamation demand to the debtor as soon as possible. Although the reclamation provisions of the most recent version of the Bankruptcy Code, i.e., the Bankruptcy Abuse Prevention and Consumer Protection

Act of 2005 ("BAPCPA"), do not state that a supplier's reclamation rights are subject to state law defenses (such as the rights of a subsequent purchaser of the goods in the ordinary course of the debtor's business), a supplier should assume that a bankruptcy court will continue to recognize such defenses.[22] A supplier should not wait to send its reclamation demand until it obtains a full sales history if one is not readily available. Instead, a supplier should send out a less detailed reclamation demand and then follow up with an amended demand along with a detailed itemization of the goods being reclaimed as soon as possible. By sending the demand by fax or e-mail to the debtor and its counsel, the supplier and its counsel can ensure that the debtor receives the demand as quickly as possible. Although it is unnecessary to file a copy of the demand with the bankruptcy court, many suppliers, through counsel, file a notice of the reclamation demand with the bankruptcy court—often times through the electronic filing procedure, which is in place in most jurisdictions.[23] This filing ensures that the debtor and other parties in interest are notified of the reclamation demand.[24]

Absent a debtor's agreement to return goods subject to reclamation, a supplier may be required to commence an adversary proceeding against the debtor in the bankruptcy court to enforce its reclamation rights.[25] Courts have ruled that it is not a violation of the automatic stay to commence an adversary proceeding against the debtor in the debtor's bankruptcy case.[26]

b. Object to Motions That Seek to Impair Supplier's Lien, Reclamation, or Claim Rights.

Many motions, such as postpetition financing or cash collateral motions, filed in the beginning of, or during, a bankruptcy case can have a significant impact upon the rights of a supplier. Debtors typically give both their postpetition lenders and their prepetition lenders priming or adequate protection liens and superpriority administrative claims that can affect the validity or priority of a supplier's lien, reclamation, or claim rights.[27] Although such motions are typically granted, if suppliers are vigilant, certain protections can be incorporated into orders approving such motions that may reduce the negative impact of such motions on the suppliers' rights.

c. File a Proof of Claim.

Many creditors must file a "proof of claim" in order to receive a distribution in bankruptcy. Claims in bankruptcy cases are divided between prepetition claims (claims that arose before the bankruptcy filing) and postpetition claims, also known as "administrative claims" (claims that accrued after the case is filed). The term "claim" is given very broad meaning under the Bankruptcy Code. A "claim" includes the right to payment or the right to an equitable remedy for breach of performance if such a breach "gives rise to a right to payment."[28] The determination of the nature of a claim is usually a matter of state law.[29]

A claim or interest is deemed "allowed" once proof of that claim or interest is timely filed with the bankruptcy court, unless a party in interest objects.[30] Allowed claims are paid in accordance with the priority scheme set forth in Section 507 of the Bankruptcy Code. Section 507 provides that secured claims are to be satisfied in full first, followed by administrative claims, then priority claims, such as certain wage claims, then non-priority unsecured claims, and finally equity interests.[31]

The court will set a deadline by which claims must be filed. At a minimum, a supplier should file a proof of claim before the proof of claim deadline (also known as the "bar date") established by the bankruptcy court. By filing such a claim, the supplier will substantially increase the likelihood that it will be entitled to vote on the debtor's Chapter 11 plan[32] and receive a distribution in connection with the case.

d. File a Request for Payment of Twenty-Day Administrative Claim.

A supplier that has shipped goods that the debtor received within twenty days before the bankruptcy filing should also file a request for payment of its administrative claim pursuant to Section 503(b)(9) of the Bankruptcy Code for the value of any such goods. Although Section 503(b)(9) does not impose a time restriction on the filing of such a claim, the Court may enter an order imposing such a deadline.[33] In addition, the local rules of some bankruptcy courts may impose a deadline for filing such a claim.[34] Although the bankruptcy court may not have a rule imposing a deadline to file the Section 503(b)(9) claim, it may nevertheless have a local rule imposing a deadline to file administrative claims in general.[35] Accordingly, a supplier should file its claim before any deadline imposed by the bankruptcy court.

e. Seek to Terminate Debtor's Exclusive Right to File Plan and/or File Competing Plan.

Section 1121(b) grants a debtor exclusive periods for the filing, and solicitation, of a reorganization plan. These periods are subject to extension, or contraction, for cause. Section 1121(d) provides: "On request of a party in interest made within the respective periods specified in subsections (b) and (c) of this section and after notice and a hearing, the court may for cause reduce or increase the 120-day period or the 180-day period referred to in this section." Although "cause" is not defined by the Bankruptcy Code, the legislative history and case law make clear that "cause" is a flexible standard designed to balance the competing interests of debtors and their constituencies.[36] Among the factors a court will consider are (i) the size and complexity of the case; (ii) the necessity of sufficient time to permit the debtor to negotiate a plan of reorganization and prepare adequate information; (iii) the existence of good faith progress toward reorganization (iv) the fact that the debtor is paying its bills as they become due; (v) whether the debtor has demonstrated reasonable prospects for filing a viable plan; (vi) whether the debtor has made progress in negotiations with its creditors; (vii) the amount of time which has elapsed in the case; (viii) whether the debtor is seeking an extension of exclusivity in order to pressure creditors to submit to the debtor's reorganization demands; and (ix) whether an unresolved contingency exists.[37]

4. *Consider Applying for Membership on Creditors' Committee*

If a supplier is one of the largest unsecured creditors of a debtor, it may be invited to apply for membership on the creditors' committee. There are advantages and disadvantages to serving on a creditors' committee.

a. Advantages of Committee Membership.

There are a few potential benefits available to creditors serving on a creditors' committee. Because members of a creditors' committee have obligations to investigate the debtor's business and affairs, and negotiate with the debtor concerning formulation of a plan of reorganization, members of a creditors' committee typically enjoy a higher degree of access to the debtor's executives than other creditors and are privy to more detailed information about the causes of the debtor's bankruptcy filing and the results of the debtor's operations in Chapter 11.[38] Such increased access may foster improved business relations between a committee member and the debtor both during and after the Chapter 11 case.[39] However, the committee members may be required to keep certain information learned during the case confidential.[40] Finally, creditors who serve on the committee may be able to forego some of the expenses related to the retention of separate outside counsel or financial

advisors because the committee will typically retain its own legal counsel and financial advisors whose fees are paid out of the debtor's estate.[41]

b. Disadvantages of Committee Membership.

Service on a creditors' committee may present a few disadvantages. First, depending on the size and complexity of the case, committee membership may be quite time-intensive.[42] During active parts of a Chapter 11 case (such as in the beginning of the case and during negotiation of a plan), creditors' committees will often meet at least once a week.[43] However, members are usually permitted to participate in creditor's committee meetings by telephone except during direct negotiations with the debtor or other major creditor constituents.[44] In addition, such negotiations are occasionally delegated to a negotiating subcommittee, which reports back to the full committee.[45] Second, committee members are not remunerated for their time. However, the expenses related to service on a creditors' committee are typically reimbursable by a debtor's estate.[46] Third, a member of a creditors' committee owes a fiduciary duty to all unsecured creditors and must act in the best interest of all unsecured creditors, not just itself.[47] A creditors' committee member must take actions that will maximize the return to all unsecured creditors generally and must not promote their own individual interests over the interests of other unsecured creditors when acting on behalf of the committee.[48] A committee member can avoid conflicts in this regard by refraining from discussion and/or voting on any matter that would be of particular benefit or detriment to that member. Finally, while members of a creditors' committee enjoy a qualified immunity from liability for their service on a creditors' committee, that immunity is not absolute.[49] A committee member can be held liable for breaches of his or her fiduciary obligations.[50]

5. *Negotiate an Agreement with the Debtor*

When it comes to negotiating with a debtor, only creditors who yell loudly and often will likely be heard because there are always many other creditors seeking the debtor's attention.[51] This is especially true in the early stages of a debtor's bankruptcy case when the debtor is performing financial triage. Sometimes counsel may have greater success getting the attention of the debtor's representatives. Other times, the client may have better luck speaking to the debtor directly. Generally, it is best to communicate with someone who has the authority to grant the relief the creditor is seeking. Lower level employees of the debtor or junior associates with the debtor's law firm cannot usually assist a creditor in obtaining any type of meaningful relief. Therefore, a creditor should not be deterred if inquiries to lower level employees or junior lawyers are not productive.

In negotiations one should critically consider what a debtor says because a debtor may exaggerate the truth to obtain bargaining leverage. For example, a debtor may suggest that a certain creditor is the only creditor requesting certain type of relief, or that the creditors' committee or the debtor's post-petition lender will not agree to such relief. Alternatively, a debtor may also suggest that a creditor does not qualify for such relief. A persistent and deserving creditor can sometimes obtain relief despite such alleged obstacles.

A consensual resolution between the creditor and debtor is ideal. The approach a creditor should take will often depend upon the creditor's bargaining leverage. For example, a creditor who is a sole-source supplier of a critical good may be able to obtain more favorable treatment than a creditor who is a supplier of non-critical goods with many alternate suppliers. Some of the types of relief that may be available to a creditor include a critical vendor payment (see Section III.C.5.a immediately below), assumption of existing contracts (see Section III.C.5.b below),

settlement or release of claim (see Section III.C.5.c), or immediate payment of its twenty-day administrative expense claim (see Section III.C.5.d below). If negotiations break down, a supplier may be able to increase its bargaining leverage through exercise of its stoppage of delivery rights (see Section III.C.6.c below) or through litigation (see Section III.C.6 below). Generally, these latter remedies should be treated as options of last resort.

a. Seek to Obtain Critical Vendor Payments (If No Contract).

Debtors sometimes agree to pay all or a portion of a critical supplier's prepetition debt in exchange for concessions from the supplier. Such relief is generally not available if a supplier has a contract with the debtor, which requires the supplier to supply goods to the debtor. If a supplier has a contract with the debtor, a supplier may wish to negotiate an assumption of the contract instead (see Section III.C.5.b below). Depending upon the degree of a supplier's leverage, a supplier may need to provide a debtor with incentives in order to obtain critical vendor status. Some possible incentives include: (i) an agreement to continue to supply goods to the debtor during the course of the bankruptcy case, (ii) an agreement to maintain prices at a certain level during the course of the bankruptcy case, (iii) an agreement to provide certain credit terms during the course of the bankruptcy case, (iv) an agreement to reduce the amount of the supplier's claim in the case, and (v) an agreement to defer payment of the critical vendor payment for some specified period of time. Which, if any, of these incentives may be required will depend upon the facts of the case and the relative bargaining leverage of the parties. It is essential that a seller remember not to make payment demands or condition future business with the debtor on payment of prepetition arrears, which could be a violation of the automatic stay. The seller can stop doing business with the debtor and wait for the debtor to offer a critical vendor payment or, if there is a motion to pay critical vendors, it can ask if it is on the critical vendor list without conditioning the request on payment of the arrears.

b. Request that the Debtor Assume Prepetition Contracts.

Debtors are given broad discretion under Section 365 of the Bankruptcy Code to assume or reject "executory contracts"[52] and unexpired leases. The purpose of Section 365 is to enable the debtor in possession "to maximize the value of the debtor's estate by assuming executory contracts and unexpired leases that benefit the estate and rejecting those that do not."[53] Section 365(a) of the Bankruptcy Code provides, in relevant part, that the debtor, "subject to the court's approval, may [generally] assume or reject any executory contract or unexpired lease of the debtor" at any time prior to confirmation of the plan of reorganization.[54]

Based on sound business judgment,[55] a debtor may assume or assume and assign an executory contract or unexpired lease only if it cures any existing defaults, other than non-monetary defaults, and provides adequate assurance of future performance under such executory contract or unexpired lease. Similarly, based on sound business judgment, a debtor may also reject an executory contract or unexpired lease. The rejection of such executory contract or unexpired lease constitutes a breach of such contract or lease immediately before the filing of the bankruptcy petition.[56]

Suppliers often seek to convince a debtor to assume or reject their contracts at the beginning of a case. The supplier may seek a decision, even it if it means rejection, because, for example, the supplier is about to incur substantial costs in connection with the contract with the debtor and it will be harmed if the debtor ultimately rejects it. The supplier would want to have an early determination on rejection to avoid those costs. The two primary reasons why suppliers seek assumption are: (i) a precondition to

assumption of a contract is a cure of all defaults under the contract, including payment of all prepetition amounts,[57] and (ii) assumption eliminates any preference liability that may be associated with such contract.[58] Chapter 11 debtors are not generally required to make decisions on whether to assume or reject their executory contracts with suppliers until confirmation of the debtor's Chapter 11 plan.[59]

A debtor may agree to assume a contract sooner than it would otherwise choose if it is given sufficient incentives to do so. Some possible incentives include: (i) an agreement by the supplier to extend the term of the contract or to continue performing under the contract during the course of the debtor's bankruptcy case notwithstanding the supplier's possible right to terminate the contract or to withhold delivery of goods, (ii) an agreement by the supplier to reduce prices below those called for under the contract, (iii) an agreement to more favorable credit terms than called for under the contract, (iv) an agreement to reduce the cure payment called for under the contract, and (v) an agreement to defer payment of the cure payment for some specified period of time. Many debtors are not likely to agree to an early assumption of a contract absent such incentives because, besides obligating the debtor to cure all prepetition defaults and releasing the supplier from any preference liability relating to the contract, assumption also may expose the debtor to a potentially large administrative expense claim if the debtor were to subsequently breach the contract. To avoid such ramifications, some debtors have conditioned early assumption of contracts upon certain concessions from the suppliers. For example, in *In re Delphi Corp.*, the debtors established a program, which was approved by the bankruptcy court, that authorized them to assume certain contracts without further approval of the creditors' committee, the debtors' lenders, or the bankruptcy court if certain concessions were agreed to by the supplier.[60] Among other things, the supplier had to agree that Delphi could terminate the contract at its convenience and that such termination would not give rise to an administrative expense claim. Other conditions included payment of a reduced cure amount paid in quarterly installments with the uncured balance of the prepetition claim to be treated as a general unsecured claim. Suppliers who sold their contract claims were not eligible to participate in the debtor's program. This requirement is not surprising because the primary purpose of offering early assumption of a supplier's agreement is to incentivize the supplier to cooperate in the debtor's reorganization. A claim trader who purchases creditors' claims is not generally interested in the debtor's reorganization, but instead is interested in maximizing its recovery on the purchased claim. For this reason, it may not be advisable for a supplier that has a contract with a debtor to sell its contract claim until it is confident that it will not be able to reach an agreement with the debtor regarding assumption of its contract.

c. Request Settlement or Release of Preference and Other Claims.

Although elimination of preference liability is a significant benefit of a contract assumption, a supplier without a contract may have preference exposure unless it can negotiate a waiver of such claims. A debtor may be willing to agree to such a condition (as well as a release of other claims between the parties), subject to court approval, because such a waiver would not typically impact the debtor's short term liquidity needs. A creditors' committee or a bankruptcy judge may resist a waiver of such claims at the beginning of a bankruptcy case on the basis that such a request is premature and that the committee has not had an adequate opportunity to investigate the claims. Ultimately, whether a supplier is successful in obtaining such relief will depend upon the total package being offered to the debtor and how much bargaining leverage the supplier has with the debtor.

d. Request Immediate Payment of Administrative Claim.

As set forth in Section III.C.3.d above, BAPCPA provides suppliers of goods with an administrative expense claim for the value of goods received by the debtor in the twenty days prior to the bankruptcy filing. BAPCPA does not state, however, when the administrative expense claim must be paid. Therefore, debtors may agree to pay suppliers in the ordinary course of business or it may seek to avoid paying them until the effective date of the plan, which can be years after the bankruptcy filing. Suppliers should seek to obtain an agreement with the debtor that the administrative claim will be paid at the earliest possible time. In *In re Dana Corp.*, for example, the debtors obtained court authority to pay such administrative claims in the ordinary course of their business and some trade creditors have been successful in having such claims paid early in the case.[61]

6. Litigation As an Alternative to Failing Negotiations

If a supplier is unable to get the debtor's attention or negotiations with the debtor are not going well, a supplier may have no choice but demonstrate to the debtor that it is willing to litigate to get what it wants. Listed below are a few common examples.

a. Moving For Relief From the Automatic Stay to Terminate a Contract.

Generally, provisions in a contract that permit a party to terminate the contract upon the bankruptcy filing or poor financial condition of the other party are not enforceable.[62] However, a supplier may have the right under its contract with a debtor to terminate the contract for other reasons or for no reason at all. In such a situation, a supplier can gain bargaining leverage with a debtor by threatening to terminate the agreement. The automatic stay imposed by Section 362 of the Bankruptcy Code, however, prohibits a supplier from carrying out such a threat unless it first obtains relief from such stay. By filing a motion for relief from the automatic stay to terminate the contract, a supplier can sometimes get the debtor's attention, which can lead to a negotiated resolution. A supplier should not file such a motion unless it is prepared to walk away from the contract because it is possible that the debtor's response will be to agree to the termination.

b. Moving to Compel the Debtor to Assume or Reject the Contract.

In addition to, or in lieu of, moving for relief from the automatic stay to terminate the contract, a supplier can move to compel the debtor to assume or reject the contract. Under Section 365(d)(2) of the Bankruptcy Code, a debtor may assume or reject an executory contract at any time before confirmation of a plan but the bankruptcy court, on the request of any party to such contract, may order the debtor to determine within a specified period of time whether to assume or reject the contract. Generally, bankruptcy judges are loathe to grant such motions at the beginning of a case and will rarely force the debtor to do so prior to plan confirmation.[63] However, a judge may force a debtor to make such a decision earlier in the unusual case where the equities warrant it. One example might be where the supplier is about to incur substantial costs that could not be recovered if the contract were soon rejected. Again, such a motion might serve to get the debtor's attention, allowing the parties to reach a consensual resolution.

c. Asserting Right to Withhold Delivery of Orders Under a Contract.

A supplier's assertion of the right to withhold delivery of orders under a contract may cause the debtor to file an order to show cause seeking to compel the supplier to perform

under the contract. Debtors are likely to take the position that a supplier is prohibited by the automatic stay from exercising such rights. The case law is sparse on this issue, but the little there is appears to support a supplier's position that the assertion of such rights does not violate the automatic stay.[64] In *In re Dana Corp.*, Sypris Technologies found itself having to defend against an order to show cause obtained by the debtor. Sypris had asserted that it had the right under the UCC to demand payment for goods in advance rather than on forty-five day terms as called for under the contract. The bankruptcy judge issued a temporary restraining order requiring Sypris to honor the payment terms in the contract pending a preliminary hearing. The parties were eventually able to settle their dispute on terms acceptable to both parties. The entry of a temporary restraining order against Sypris shows that asserting a supplier's right to withhold delivery is not without risk. The more conservative course would be to file a motion for a determination that the supplier's assertion of such rights would not violate the automatic stay, or, alternatively, that relief from the automatic stay should be granted to permit the supplier to exercise its right to withhold delivery. The one thing that is clear, however, is that assertion of the supplier's rights to withhold delivery of orders may get the debtor's attention, allowing the parties to reach a consensual resolution.

d. Move for Immediate Payment of Administrative Expense Claim.

Such motions are not likely to be granted, but such a motion might serve to get the debtor's attention, allowing the parties to reach a consensual resolution.

e. Seek Appointment of Trustee or Examiner.

Such motions are not typically granted but may encourage a debtor who is not acting in the best interest of creditors to act more appropriately.

f. Seek to Convert Chapter 11 Case to Chapter 7 or to Dismiss Bankruptcy.

Again such motions are not typically granted but may encourage a debtor who is not acting in the best interest of creditors to act more appropriately.

IV. ANTITRUST PRINCIPALS AND THEIR IMPACT ON CREDITOR RIGHTS

Antitrust laws limit the extent to which creditors may collaborate. As discussed in greater detail below, antitrust law precludes creditors from entering into agreements with competitors not to do business with a debtor or to deal with it only on specified terms. Creditors are also prohibited from collectively deciding to stop goods already in transit or to refuse to deliver future shipments. Although creditors may make collective decisions, they are restricted from making collective pricing or credit decisions. Finally, any collective action to seek relief from a court must be made in good faith, i.e., there must be a genuine desire to obtain the relief sought rather than merely to harm a competitor or competition and

A. *The Sherman Act*

The Sherman Act is the primary source of authority that a creditor must consider in determining if a particular creditor strategy may violate antitrust principals. Section 1 of the Sherman Act prohibits any "contract, combination . . ., or conspiracy" that unreasonably restrains trade or commerce.[65] Section 1 does not require any formal written or unwritten agreement. All that is required is a conscious commitment to a common scheme.[66] Accordingly, creditors may not enter into agreements, written or unwritten, that unreasonably restrain trade or commerce.

Proof of an agreement or a common scheme can be direct, as where the parties have entered into a formal agreement, or circumstantial, where parallel conduct by competitors is

coupled with evidence of certain "plus factors."[67] Such "plus factors" might include (i) conduct that would be contrary to a company's self-interest absent collusion and (ii) communications among competitors without any legitimate business justification.[68] If only circumstantial evidence of an agreement or scheme exists, the evidence must "tend[] to exclude the possibility that the alleged conspirators acted independently" rather than pursuant to an agreement or scheme.[69]

B. *Per Se Illegal Restraints v. Rule of Reason*

As in other antitrust analyses, courts would usually apply a "rule of reason" to determine whether an agreement or scheme among creditors violate Section 1 of the Sherman Act. The rule of reason is a flexible analytical approach under which the court will examine the reasonableness of the agreement in light of the industry involved, the proffered justification for the agreement, and the likely effect upon competition.[70]

Some agreements, such as agreements to fix prices,[71] are deemed to be so pernicious that they will be found to be illegal regardless of the effect on competition or the business excuse for their use.[72] Such agreements are deemed illegal per se.[73] Use of a per se analysis generally is limited to "conduct that is manifestly anticompetitive" or conduct "that would always or almost always tend to restrict competition and decrease output."[74] The per se rule avoids the "incredibly complicated and prolonged economic investigation into the entire history involved" attendant to the rule of reason and provides clear direction as to certain types of agreements that are clearly proscribed by Section 1 of the Sherman Act.[75]

C. *Group Boycotts*

Group boycotts would likely be an impermissible creditor strategy whether the debtor is in bankruptcy or is pre-bankruptcy. A number of courts have found group boycotts to be per se illegal. For example, in *Klor's, Inc. v. Broadway-Hale Stores*, the United States Supreme Court held that a boycott among an appliance manufacturer and certain distributors not to sell to a certain distributor, or to sell only on unfavorable terms, should be condemned regardless of the economic effect:

> Group boycotts, or concerted refusals by traders to deal with other traders, have long been held to be in the forbidden category. They have not been saved by allegations that they were reasonable in specific circumstances, nor by a failure to show that they "fixed or regulated prices, parceled out or limited production, or brought about a deterioration in quality." Even when they operated to lower prices or temporarily stimulate competition they were banned.[76]

Similarly, in *United States v. General Motors Corp.*, the Supreme Court held per se illegal an agreement where various automobile dealers, through their trade association, persuaded General Motors to prevent certain dealers from selling to discount outlets.[77] The Supreme Court called the agreement "a classic conspiracy in restraint of trade" because it involved "joint collaborative action" by dealers and General Motors to "eliminate a class of competitor."[78] The Supreme Court further stated that "where businessmen concert their actions in order to deprive others of access to merchandise which the latter wish to sell to the public, we need not inquire into the economic motivation underlying their conduct."[79]

However, not all group boycotts are per se illegal.[80] Agreements between competitors, commonly known as *horizontal agreements*,[81] are more likely to be deemed per se illegal.[82] In contrast, *vertical agreements*, agreements between entities at different levels of distribution, are less likely to be deemed per se illegal.[83] In *NYNEX Corp. v. Discon, Inc.*, the Supreme Court made clear that the per se rule against group boycotts and concerted refusals to deal does not apply to vertical agreements "in the

absence of a horizontal agreement" on at least one level of the distribution chain.[84]

In *Northwest Wholesale Stationers, Inc. v. Pacific Stationary & Printing Co.*, the Supreme Court identified the class of group boycotts to which the per se rule should be limited:

> Cases to which this Court has applied the *per se* approach have generally involved joint efforts by a firm or firms to disadvantage competitors by "either directly denying or persuading or coercing suppliers or customers to deny relationships the competitors need in the competitive struggle." In these cases, the boycott often cut[s] off access to a supply, facility, or market necessary to enable the boycotted firms to compete, and frequently the boycotting firms possessed a dominant position in the relevant market. In addition, the practices were generally not justified by plausible arguments that they were intended to enhance overall efficiency and make markets more competitive. Under such circumstances the likelihood of anticompetitive effects is clear and the possibility of countervailing procompetitive effects is remote.
>
> Although a concerted refusal to deal need not necessarily possess all of these traits to merit *per se* treatment, not every cooperative activity involving a restraint or exclusion will share with the *per se* forbidden boycotts the likelihood of predominantly anticompetitive consequences.[85]

Accordingly, the per se test will generally only apply where (i) a group boycott involves a joint effort by competitors to harm another competitor, (ii) the boycotting firms possess market power or exclusive access to products or services that the targeted firm needs to compete, and (iii) the boycott was not justified by plausible efficiency arguments that it was intended to enhance overall efficiency and make markets more competitive.[86] However, a group boycott will be per se illegal even in the absence of market power where the purpose of the boycott is to fix prices.[87] Generally speaking, even if a group boycott is not found to be violative of antitrust principals, it would likely be found violative of the automatic stay if it is intended to pressure a debtor in bankruptcy to pay a prepetition debt or to gain control over property of the debtor's estate.

D. U.S. Department of Justice and Federal Trade Commission Guidelines

In 2000, the U.S. Department of Justice and the Federal Trade Commission ("FTC") (collectively, the "Agencies") developed guidelines pertaining to competitor collaboration (the "Guidelines"). The Guidelines state the antitrust enforcement policy of the Agencies with respect to competitor collaborations.[88] The Guidelines are intended to enable businesses to evaluate proposed transactions with greater understanding of antitrust concerns, thus encouraging procompetitive collaborations and deterring collaborations likely to harm competition and consumers.[89] The Guidelines are not binding on the courts.

For the purposes of the Guidelines, a competitor collaboration consists of a set of one or more agreements between or among competitors to engage in certain economic activity along with the resulting economic activity.[90] "In general, the Agencies assess the competitive effects of the overall collaboration and any individual agreement or set of agreements within the collaboration that may harm competition. . . . Two or more agreements are assessed together if their procompetitive benefits or anticompetitive harms are so intertwined that they cannot meaningfully be isolated and attributed to any individual agreement."[91]

1. *Per Se Test*

The Guidelines state that the per se test will generally be reserved for agreements not to compete on price or output.[92] The per se test will not be applied where (i) the purpose of collaboration is an efficiency-enhancing integration

and (ii) integration is reasonably necessary to its procompetitive benefits.[93] The per se test would likely be applied to creditors' collective pricing or credit decisions.

2. *Rule of Reason*

If a creditor agreement is not challenged as per se illegal, it may be analyzed under the rule of reason to determine their overall competitive effect.[94] The rule of reason is a flexible inquiry focusing on whether an agreement harms competition.[95] "The central question is whether the relevant agreement likely harms competition by increasing the ability or incentive profitably to raise price above or reduce output, quality, service, or innovation below what likely would prevail in the absence of the relevant agreement."[96]

3. *Examples of Potentially Anticompetitive Collaborations*

Collaborations, including collaborations among creditors, regarding production, marketing, buying, or research and development may potentially result in anticompetitive harms. Nevertheless, under certain circumstances, these four types of collaborations may be considered procompetitive.[97]

4. *Safety Zones*

The Guidelines established safety zones to encourage competitor collaborations.[98] The safety zones are designed "to provide participants in a competitor collaboration with a degree of certainty in those situations in which anticompetitive effects are so unlikely that the [a]gencies presume the arrangement to be lawful without inquiring into the particular circumstances."[99] The safety zones "are not intended to discourage collaborations that fall outside the safety zones."[100]

There are two safety zones outlined in the Guidelines. The first safety zone addresses competitor collaborations in general.[101] The second safety zone addresses research and development collaborations whose competitive effects are analyzed within an innovation market.[102] The safety zones do not apply to agreements that are per se illegal.[103]

E. Noerr-Pennington Doctrine

The Noerr-Penington Doctrine may be a source of protection for creditors acting collectively. The Noerr-Pennington Doctrine is an exception to the reach of antitrust laws that provides protection to entities that petition the government regardless of the potential anticompetitive effect.[104] In *City of Columbia v. Omni Outdoor Advertising Inc.*, the Supreme Court stated,

> The federal antitrust laws . . . do not regulate the conduct of private individuals in seeking anticompetitive action from the government. This doctrine . . . rests ultimately upon a recognition that the antitrust laws, "tailored as they are for the business world, are not at all appropriate for application in the political arena."[105]

The Noerr-Pennington Doctrine applies to petitions to each of the three branches of government, including the courts.[106] Courts have extended the Noerr-Pennington Doctrine to encompass concerted efforts incident to litigation, such as prelitigation "threat letters" and settlement offers.[107]

However, if the litigation is a "sham", an entity will not be entitled to the protections of the Noerr-Pennington Doctrine. Entities will not be entitled to the benefits of the Noerr-Pennington Doctrine where they improperly use the means of petitioning the government to reduce competition or injure a competitor.[108] To establish that administrative or judicial proceedings are a sham, a party must show that the litigation in question is: (i) "objectively baseless," and (ii) "an attempt to interfere directly with the business relationships of a competitor through use of the governmental process — as opposed to the outcome of that process — as an anticompe-

titive weapon."[109] "A sham situation involves a defendant whose activities are not genuinely aimed at procuring favorable governmental action at all, not one who genuinely seeks to achieve his governmental result, but does so through improper means."[110] The Noerr-Pennington Doctrine may protect a creditor who petitions a court seeking relief from a debtor, unless the litigation seeking such relief is determined to be a sham.

V. COLLECTIVE CREDITOR ACTION

As noted above, a creditor seeking payment on a debt has many alternative remedies available to it. The remedies available to a creditor may depend upon whether the debtor is in bankruptcy or not. The antitrust principals discussion in Section IV above make clear that such remedies may be limited by antitrust law. Although a creditor is generally free to take unilateral action to enforce its individual creditor remedies without fear of violating Section 1 of the Sherman Act, a creditor's ability to act collectively to enforce its remedies, whether in or out of bankruptcy, are more limited.

In the bankruptcy context, a creditor acting alone has numerous options to maximize its leverage without fear of violating antitrust laws. Creditors acting collectively, though restricted by such laws, may be able to achieve significant results in a bankruptcy case which exceed the results that any single creditor could achieve.

A. *Protective Measures Available to Creditors Acting Collectively*

Collective actions that creditors may take to protect themselves from a debtor's financial distress include: (i) changing their distribution system; (ii) helping to find a buyer for an under-performing business that will continue a customer's operations; (iii) proposing a debt for equity swap; (iv) requesting permission to speak with customer's lenders to reach an out of court workout; and (v) discussing formation of a distribution joint venture, which could ensure distribution of product in the event a customer goes out of business.

B. *Collective Creditor Remedies: Pre-Bankruptcy*

As previously stated, cooperation among creditors in negotiating with a debtor is commonly in the interest of all parties.[111] Further, such cooperation is not necessarily inconsistent with the antitrust laws. As the Second Circuit has stated,

> If creditors were forced to act individually, each would be compelled to resort to the most extreme action available in order to protect its individual interest. Such an action, however, might well drive the debtor out of business thereby eliminating any opportunity for it to work out of present difficulties and ultimately satisfy the debts. Mutual forbearance by creditors, therefore, may be in the interests of both debtors and creditors in that it maximizes repayment and gives the debtor a chance of survival. That it entails concerted activity by creditors does not mean, however, that consumers are injured. To the contrary, by reducing both losses to creditors and transaction costs resulting from bankruptcy, such activity reduces the costs of borrowing and the costs of doing business, all of which is to the consumer's advantage.[112]

1. *Permissible Collective Actions*

One of the remedies that competitors may collectively take to enforce their creditor remedies is to negotiate a composition or workout agreement, i.e., an agreement among creditors to scale down their claims and accept a lesser sum or forbear repayment for a period of time. A composition agreement, by definition, requires participation of at least two creditors to be valid. Accordingly, absent unusual circumstances, it is not likely such an agreement would violate Section 1 of the Sherman Act and would be consistent with the Guidelines.

The Noerr-Pennington Doctrine, as discussed above in Section IV.E, protects creditor collaboration in the petition of the government regardless of the potential anticompetitive effect. The following remedies available to competitors collectively would likely be actions protected under the doctrine: (i) jointly retaining legal counsel to represent the interests of the creditors in their effort to seek legal redress against a common debtor, (ii) demanding repayment of past due amounts, (iii) making reclamation demand for the return of goods, (iv) commencing a collection action, (v) seeking court appointment of a receiver, and (vi) commencing an involuntary Chapter 7 or 11 case.[113]

2. *Impermissible Collective Actions*

Among the collection strategies that competitors may not collectively employ are the following:

a. Collectively boycott or refuse to engage in trade with debtor.

Group boycotts may be per se illegal under Section 1 of the Sherman Act. (See Section IV.C above.) Even if the purpose of such a boycott or refusal to deal were not with the intent to fix prices or to harm a competitor, there is substantial risk that such action would be found to violate the Sherman Act even under a rule of reason analysis.

b. Make collective pricing or credit decisions.

As set forth in Section IV.D.1 above, collective pricing or credit decisions are likely illegal per se and, therefore, violative of the Guidelines.[114]

c. Collectively refuse delivery of future shipments.

Such an action would likely be a violation of Section 1 of the Sherman Act as being a collective credit decision or a concerted refusal to deal.

C. Collective Creditor Remedies: Debtor in Bankruptcy

The federal antitrust laws are not preempted by federal bankruptcy law. Generally, federal laws preempt inconsistent state laws,[115] but not other federal laws.[116] Accordingly, the two laws must be read in harmony where possible.[117]

Creditors or other parties-in-interest may violate Section 1 of the Sherman Act if they collude in a way that harms competition or injures a competitor. For example, the FTC has taken action where a company used its position on a creditors' committee to hurt a competitor who was in bankruptcy.[118] In *In re AMERCO*, the FTC prosecuted U-Haul, a member of a creditors' committee for Jartran, Inc. a competing company in bankruptcy. The grounds for prosecution were, in part, based on U-Haul's engagement in "acts and practices that . . . were inconsistent with U-Haul's legitimate interests as a creditor" and U-Haul's efforts to prevent Jartran's reorganization as a competitor.[119] In the end, U-Haul agreed to a consent decree that restricted its ability to participate in future bankruptcy proceedings involving its competitors. Although the Noerr-Pennington Doctrine provides some protection to creditors who seek favorable action from the bankruptcy court, the sham exception will apply where the creditor's actions are not genuinely aimed at procuring favorable government action.[120]

1. *Permissible Collective Actions*

Among the remedies that competitors may collectively take to enforce their creditor rights in a bankruptcy case are (i) jointly retaining legal counsel[121] and (ii) joining the official or unofficial creditor committee.

The *AMERCO* case illustrates that the FTC will go after creditors who seek to abuse the bankruptcy process toward an unlawful end. Absent application of the sham exception, there is no reasonable basis to believe that the following collective actions would not be protected under the Noerr-Pennington Doctrine: (i) participating

as a member of or seeking assistance from the creditors committee,[122] (ii) pursuing reclamation remedies,[123] (iii) negotiating a Chapter 7 or Chapter 11 plan,[124] (iv) seeking appointment of a trustee or examiner, (v) objecting to motions that impair creditor rights, (vi) seeking to convert a Chapter 11 case to Chapter 7 or to dismiss the bankruptcy case, and (vii) seeking to terminate a debtor's exclusive right to file a plan and/or file a competing plan.

2. *Impermissible Collective Actions*

a. Collectively boycott or refuse to engage in trade with debtor.

As set forth in Section IV.C above, group boycotts may be per se illegal under Section 1 of the Sherman Act. Even if the purpose of such a boycott or refusal to deal were not with the intent to fix prices or to harm a competitor, the risk is substantial that such action would be found to violate the Sherman Act even under a rule of reason analysis.

b. Make collective pricing or credit decisions.

As set forth in Section IV.D.1 above, collective pricing or credit decisions are likely illegal per se and, therefore, violative of the Guidelines.[125]

c. Collectively refuse delivery of future shipments.

Such an action would likely be violative of Section 1 of the Sherman Act as being a collective credit decision or a concerted refusal to deal. It is also likely that such a refusal (at least where a contract existed) would violate the automatic stay, absent authorization of the bankruptcy court.

VI. CONCLUSION

Creditors have a host of available strategies for protecting themselves from risks associated with a financially distressed debtor and for remedying a breach. In order for creditors to best protect themselves from the future bankruptcy of a debtor, and to maximize their return upon a debtor's breach of contract, creditors must take advantage of both individual and collective protective and remedial actions to the fullest extent possible. While many creditors are relatively well-versed in individual actions, collective actions are often overlooked or misunderstood. The individual and collective strategies discussed in this article may greatly decrease a creditor's risk exposure, but as discussed herein, actions taken collectively must always be carefully assessed in light of federal antitrust laws.

NOTES

[1] This article ocassionally draws on a prior article published by the authors hereof, James M. Sullivan & Gary O. Ravert, *A Vendor's Guide to Bankruptcy* ("Vendor's Guide"), 1 BLOOMBERG CORP L.J. 494, 499 (2006). Not all references to the Vendor's Guide are specifically cited herein. A link to the Vendor's Guide can be found at http://www.mwe.com/info/pubs/-bloomberg_sullivan_ravert.pdf.

[2] Generally, agreements to participate in a workout are based on all or most creditors sharing the burden or loss. Occasionally, some creditors will hold out for higher recoveries on their claims. "Unwind risk" is the risk that the debtor will be unable to get a necessary number of creditors to agree to a workout resulting in the unwinding of all the agreements it was able to obtain or possibly that agreements reached out of court could be avoided as fraudulent or preferential in a later bankruptcy filing.

[3] A "white knight" is one of many colorful terms found in a bankruptcy practitioner's lexicon but not found in title 11 of the United States Code (the "Bankruptcy Code"). It refers to a purchaser of substantially all of the distressed assets at a price favorable to creditors.

[4] 11 U.S.C. § 727(a).

[5] *Id*.

[6] 11 U.S.C. § 1141.

[7] Pursuant to Section 1104 of the Bankruptcy Code, on the request of a party in interest, the bankruptcy court is empowered to appoint a Chapter 11 trustee for cause, including fraud, dishonesty, incompetence, or gross mismanagement, either before or after the bankruptcy filing or where appointment of a trustee is in the best interest of the parties in interest. 11 U.S.C. § 1104(a)(1)–(3). Generally, courts will not appoint a Chapter 11 trustee absent a showing of fraud or gross mismanagement. 7 COLLIER ON BANKRUPTCY § 1104.02 (Alan N. Resnick *et al*. eds., 15th ed. rev. 2006); *see In re Microwave Prods. of Am., Inc.*, 102 B.R. 666, 670 (Bankr. W.D. Tenn. 1989).

[8] 11 U.S.C. § 1141(d)(1).

[9] 11 U.S.C. § 362(k).

[10] *Id.*

[11] 11 U.S.C. § 363.

[12] *See*, *e.g.*, *Folger Adam Security, Inc. v. DeMatteis/MacGregor JV*, 209 F.3d 252 (3d Cir. 2000).

[13] *See In re Chateaugay Corp.*, 973 F.2d 141, 143 (2d Cir. 1992) (noting that approval of Section 363(b) sale is appropriate if good business reasons exist for such sale); *Committee of Equity Sec. Holders v. Lionel Corp. (In re Lionel Corp.)*, 722 F.2d 1063, 1070 (2d Cir. 1983) (same); *see also*, *Comm. of Asbestos-Related Litigants v. Johns-Manville Corp. (In re Johns-Mansville Corp.)*, 60 B.R. 612, 616 (Bankr. S.D.N.Y. 1986).

[14] 11 U.S.C. § 1102(a)(1). The U.S. Trustee is a representative of the United States Department of Justice that is responsible for overseeing bankruptcy cases. 28 U.S.C. § 586.

[15] 11 U.S.C. § 365(e) (invalidating contract clauses, so called "ipso facto" clauses, that purport to allow termination or modification of an agreement solely based on the insolvency of the debtor or the commencement of a bankruptcy case).

[16] 15 U.S.C. § 1 *et seq.*

[17] The preference period is 90 days prior to a bankruptcy filing for non-insiders of the debtor. 11 U.S.C. § 547.

[18] U.C.C. § 2-609(1).

[19] *Id.*

[20] *Id.* at § 2-609(4).

[21] *See* Section II.C *supra; see also* Vendor's Guide at 496.

[22] *In re Dana Corp.*, 2007 Bankr. LEXIS 1466, 17–26 (Bankr. S.D.N.Y. 2007) (holding that BAPCPA § 546(c) continues to incorporate the state law right of reclamation and does not create a brand new federal bankruptcy law right); *see also In re Incredible Auto Sales LLC*, 2007 Bankr. LEXIS 1024, 17–18 (Bankr. D. Mont. 2007) ("[I]t may be a mistake to assume that the amended § 546(c) was intended to provide an entirely new and self-contained body of reclamation law . . . because it fails to recognize the rights of buyers in the ordinary course, other good faith purchasers and lien creditors, who were always protected under the U.C.C. Perhaps the intent was to incorporate and expand on the U.C.C. reclamation rights, rather than to supplant them entirely, in which case some U.C.C. analysis may continue to be relevant in

interpreting and applying the new § 546(c).").

[23] Vendor's Guide at 497.

[24] *Id.*

[25] *See* Fed. R. Bankr. P. 7001(1); *In re Realty S.W. Assocs.*, 140 B.R. 360 (Bankr. S.D.N.Y. 1992).

[26] *See, e.g., In re Washington Mfg. Co.*, 118 B.R. 555, 561 (Bankr. M.D. Tenn. 1990).

[27] Vendor's Guide at 498.

[28] 11 U.S.C. § 101(5).

[29] *Butner v. United States*, 440 U.S. 48, 54–55 (1979) (". . . Congress has left the determination of property rights in the assets of a bankrupt's estate to state law. . . . Property interests are created and defined by state law. Unless some federal interest requires a different result, there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding."); *see also Raleigh v. Ill. Dep't of Rev.*, 530 U.S. 15, 16 (2000) ("Creditors' entitlements in bankruptcy arise in the first instance from the underlying substantive law creating the debtor's obligation . . . .").

[30] 11 U.S.C. § 1104.

[31] 11 U.S.C. § 507.

[32] Creditors and equity holders are generally entitled to vote to accept or reject the plan of reorganization. Once a debtor has obtained the necessary votes of the creditors and equity holders, it may attempt to confirm the plan in the bankruptcy court. If the debtor is unable to obtain the necessary votes, it may seek confirmation pursuant to Section 1129(b). Section 1129(b) is known as the "cramdown" provision because the unaccepted provisions of the plan are crammed down on the dissenting creditors.

[33] *See In re Dana Corp.*, 2007 Bankr. LEXIS 1934 (Bankr. S.D.N.Y. 2007) (denying ability of claimant to file a 503(b)(9) claim after the court-ordered deadline).

[34] *See, e.g.*, Local Rule 3002-1 of the United States Bankruptcy Court for the District of Massachusetts (requiring that such a claim be filed within sixty days of the first date set for the meeting of creditors pursuant to Section 341 of the Bankruptcy Code).

[35] *See, e.g.*, Local Bankruptcy Rule 1019-1(F)(1) of the United States Bankruptcy Court for the Southern District of Florida (establishing a ninety-day deadline for filing an administrative claim after a case converts to Chapter 7).

[36] *See* H.R. Rep. No. 95-595, 1978 U.S.C.C.A.N. at 6191; *In re Sletteland*, 260 B.R. 657, 670 (Bankr. S.D.N.Y. 2001); *In re Texaco, Inc.*, 76 B.R. 322, 325 (Bankr. S.D.N.Y. 1987).

[37] *In re Express One Int'l, Inc.*, 194 B.R. 98, 100 (E.D. Tex. 1996).

[38] *See* Vendor's Guide at 499.

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] *Id.*

[43] *Id.*

[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] *In re* ABC *Automotive Products Corp.*, 210 B.R. 437 (Bankr. E.D. Pa. 1997); *In re Caldor, Inc.*, 193 B.R.165 (Bankr. S.D.N.Y. 1996).

[48] *In re Drexel Burnham Lambert Group, Inc.*, 138 B.R. 717 (Bankr. S.D.N.Y. 1997).

[49] *In re Envirodyne Indus., Inc.*, 174 B.R. 955 (Bankr. N.D. Ill. 1994).

[50] *See Central Transp., Inc. v. Roberto* (*In re Tucker Freight Lines, Inc.*), 62 B.R. 213 (Bankr. W.D. Mich. 1986).

[51] Vendor's Guide at 500.

[52] Generally speaking, an executory contract is any "contract under which the obligation of both the [debtor] and the other party to the contract are so far

unperformed that the failure of either to complete performance would constitute a material breach excusing performance of the other party." Vern Countryman, *Executory Contracts in Bankruptcy: Part I*, 57 MINN L. REV. 439, 460 (1973); *see, e.g., Matter of Superior Toy & Mfg. Co., Inc.*, 78 F.3d 1169, 1172 n. 3 (7th Cir. 1996); *In re Bradlees Stores, Inc.*, 2001 WL 1112308, *6 (S.D.N.Y. 2001) (collecting cases).

[53] *In re Rickel Home Centers, Inc.*, 209 F.3d 291, 298 (3d Cir. 2000). Recent amendments to the Bankruptcy Code have placed some time limitations on a debtor's ability to assume or reject an unexpired lease of non-residential real property. 11 U.S.C. § 365(d)(4).

[54] 11 U.S.C. § 365(a); *see In re Trans World Airlines, Inc.*, 145 F.3d 124 (3d Cir. 1998); *In re Sharon Steel Corp.*, 872 F.2d 36, 43 (3d Cir. 1989).

[55] *Group of Institutional Investors v. Chicago, Milwaukee, St. Paul and Pacific R.R. Co.*, 318 U.S. 523, 549–50 (1943); *In re Pinnacle Brands, Inc.*, 259 B.R. 46, 53–54 (Bankr. D. Del. 2001); *see also In re Market Square Inn, Inc.*, 978 F.2d 116, 121 (3d Cir. 1992) ("The resolution of the issue of assumption or rejection will be a matter of business judgment . . ."); *In re Trans World Airlines, Inc.*, 261 B.R. 103, 120–21 (Bankr. D. Del. 2001); *In re Trans World Airlines*, 261 B.R. 103, 121 (citing *In re Wheeling-Pittsburgh Steel Corp.*, 72 B.R. 845, 849–50 (Bankr. W.D. Pa. 1987)).

[56] 11 U.S.C. § 365(g); Some equitable remedies, however, may be preserved notwithstanding rejection because a rejection does not terminate the executory contract or unexpired lease. *See In re Mirant Corp.*, 378 F.3d 511, 519 (5th Cir. 2004) (noting that rejection does not terminate or extinguish the obligations under the contract.); *In re The Ground Round, Inc.*, 335 B.R. 253, 261 (1st Cir. BAP 2005) (noting that a debtor's rejection of executory contract does not constitute a termination thereof and does not cause the contract to "magically vanish"); *Sir Speedy, Inc. v. Morse*, 256 B.R. 657, 659 (D. Mass. 2000); *In re Annabel*, 263 B.R. 19, 25 (Bankr. N.D.N.Y. 2001). Arguably, because the contract is breached but not terminated, the debtor remains bound by those terms of the contract that cannot be remedied by money damages. *See In re Bacon*, 212 B.R. 66, 69 (Bankr. E.D. Pa. 1997).

[57] 11 U.S.C. § 365(b)(1).

[58] *See, e.g., Kimmelman v. Port Authority of New York and New Jersey* (*In re Kiwi International Air Lines, Inc.*), 344 F.3d 311 (3d Cir. 2003).

[59] *See, e.g., Sharon Steel Corp. v. Nat'l Fuel Gas Distr. Corp.*, 872 F.2d 36 (3d Cir. 1989).

[60] *In re Delphi Corp.*, Case No. 05-44481-rdd (pending in the United States Bankruptcy Court for the Southern District of New York).

[61] *In re Dana Corp.*, Case No. 06-10354-brl, (pending in the United States Bankruptcy Court for the Southern District of New York).

[62] 11 U.S.C. § 365(e).

[63] *See Nostas Assocs. v. Costich* (*In re Klein Sleep Prods.*), 78 F.3d 18, 35 (2d Cir. 1996).

[64] There are few bankruptcy cases discussing a seller's right to refuse delivery of goods under a contract pursuant to section 2-702 of the UCC after a bankruptcy filing. However, all of the reported cases that we have been able to locate appear to uphold a seller's right to refuse delivery under section 2-702. *See In re National Sugar Refining Co.*, 27 B.R. 565 (S.D.N.Y. 1983) (holding that the debtor's refusal to deliver goods absent payment of the goods in cash did not violate the automatic stay imposed by section 362 of the Bankruptcy Code); *see also In re Fabric Buys*, 34 B.R. 471 (Bankr. S.D.N.Y. 1983); *In re Morrison Indus., L.P.*, 175 B.R. 5 (Bankr. S.D.N.Y. 1994).

[65] 15 U.S.C. § 1; *Standard Oil Co. v. United States*, 221 U.S. 1, 58 (1911); *Continental*

T.V., Inc. v GTE Sylvania Inc., 433 U.S. 36, 49 (1977).

[66] *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984).

[67] *See, e.g.*, *Theatre Enter. v. Paramount Film Distrib. Corp.*, 346 U.S. 537, 541 (1954); *Am. Tobacco Co. v. United States*, 328 U.S. 781, 810 (1946).

[68] *See Market Force, Inc. v. Wauwatosa Realty Co.*, 906 F.2d 1167, 1172 (7th Cir. 1990); *Cayman Exploration Corp. v. United Gas Pipe Line, Co.*, 873 F.2d 1357, 1361 (10th Cir. 1989); *Apex Oil Co. v. Di Mauro*, 822 F.2d 246, 254 (2d Cir. 1987).

[69] *Matsushita Elec. Indus. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986).

[70] *See, e.g.*, *Standard Oil v. United States*, 221 U.S. at 58.

[71] *U.S. v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 212–213 (1940)

[72] *N. Pacific Ry. v. United States*, 356 U.S. 1, 5 (1958).

[73] *Id.*

[74] *Business Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 723 (1988).

[75] *See N. Pacific Ry. v. United States*, 356 U.S. at 5. The following are examples of agreements that have been found to be per se illegal: agreements to fix prices or set maximum prices, *Ariz. v. Maricopa Cty. Med. Soc'y*, 457 U.S. 332 (1982); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940); agreements to limit production or restrict output, *Hartford-Empire Co. v. United States*, 323 U.S. 386 (1945); *United States v. Am. Linseed Oil Co.*, 262 U.S. 371 (1923); agreements to divide markets, *Palmer v. BRG of Ga. Inc.*, 498 U.S. 46 (1990); *United States v Topco Assoc.*, 405 U.S. 596 (1972); *United States v. Sealy, Inc.*, 388 U.S. 350 (1967); agreements to standardize credit terms, *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643 (1980) (holding that agreement among competing wholesalers to refuse to sell unless retailer makes payment in cash either in advance or on delivery is illegal per se because it is merely one form of price-fixing); group boycotts intended to fix prices or harm competitors, *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990); *Silver v. N.Y. Stock Exchange*, 373 U.S. 341 (1963); *Klor's Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959); *Fashion Originators' Guild of Am., Inc. v. FTC*, 312 U.S. 457 (1941).

[76] *Klor's Inc.*, 359 U.S. at 210, 212 (citations omitted) (quoting *Fashion Originators Guild v. FTC*, 312 U.S. 457, 466 (1941)).

[77] *United States v. General Motors Corp.*, 384 U.S. 127 (1966).

[78] *Id.* at 140.

[79] *Id.* at 146.

[80] *N.W. Wholesale Stationers, Inc. v. P. Stationary & Printing Co.*, 472 U.S. 284 (1985).

[81] *Business Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 730 n.4 (1988) ("[A] facially vertical restraint imposed by a manufacturer only because it had been coerced by a 'horizontal cartel' agreement among his distributors is in reality a horizontal restraint. . . . [A] restraint is not horizontal because it has horizontal effects, but because it is the product of a horizontal agreement.").

[82] *See, e.g.*, *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128 (1998).

[83] *Id.*

[84] *NYNEX Corp. v. Discon*, 525 U.S. 128, 138 (1998).

[85] *N.W. Wholesale Stationers, Inc.*, 472 U.S. at 293–95 (holding that expulsion of member of buying cooperative should be judged under rule of reason where cooperative was formed to increase economic efficiency and render markets more, rather than less, competitive and where there was no showing that cooperative possessed market power or exclusive access to an element essential to effective competition) (citations omitted).

[86] *Id.* at 293–95.

[87] *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990).

[88] FTC & U.S. Dept. of Justice, Antitrust Guidelines for Collaborations Among Competitors (Apr. 2000), http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf, § 1.1.

[89] *Id.* at Preamble.

[90] *Id.* at § 2.3.

[91] *Id.*

[92] *Id.* at § 3.2.

[93] *Id.* Permissible integration typically involves combinations of significant capital, technology, or other complimentary assets to achieve procompetitive benefits that could not have been achieved separately. Guidelines at § 3.2. "The mere coordination of decisions on price, output, customers, territories, and the like is not integration, and cost savings without integration are not a basis for avoiding per se condemnation." *Id*. The integration must be of a type that plausibly would generate procompetitive benefits, which may enhance the participants' ability or incentives to compete and thus may offset an agreement's anticompetitive tendencies. *Id.* Integration may be permissible without being essential, but an integration will not be permitted when there are comparable means of efficiency-enhancing integration that are significantly less restrictive. *Id.*

[94] *Id.* at § 3.3.

[95] *Id.*

[96] *Id.* Factors the Agencies will consider in the rule of reason analysis include (i) the nature of the agreement, (ii) the business purpose of the agreement, (iii) whether the agreement has caused anticompetitive harm, (iv) whether the parties to the agreement possess market power, (v) the extent to which the parties to the agreement have the ability and the incentive to compete independently, (vi) the duration of the agreement, (vii) whether entry into the market would be timely, likely, and sufficient to deter or counteract any anticompetitive harms, and (viii) any other market circumstances that may foster or impede anticompetitive harms. Guidelines at § 3.3. If the examination of these factors indicates no potential for anticompetitive harm, the Agencies end the investigation without considering procompetitive benefits. *Id*. If investigation indicates anticompetitive harm, the Agencies examine whether the relevant agreement is reasonably necessary to achieve procompetitive benefits that likely would offset anticompetitive harms. *Id*.

[97] First, production collaborations may be procompetitive where participants "combine complementary technologies, know-how, or other assets to enable the collaboration to produce a good more efficiently or to produce a good that no one participant alone could produce." *Id.* at § 3.31(a). Second, marketing collaborations may be procompetitive "where a combination of complementary assets enables products more quickly and efficiently to reach the marketplace." *Id*. Third, buying collaborations may be procompetitive where they allow "participants to centralize ordering, to combine warehousing or distribution functions more efficiently, or to achieve other efficiencies." *Id*. Lastly, research and development collaborations are usually procompetitive where the combination of complementary assets, technology, or know-how enables participants "more quickly or more efficiently to research and develop new or improved goods, services, or production processes." *Id*.

[98] *Id.* at § 4.1.

[99] *Id.*

[100] *Id.*

[101] Absent extraordinary circumstances, the Agencies will not challenge competitor collaboration where the market shares of

the participants account for no more than twenty percent of the relevant markets. *Id.* at § 4.2.

[102] *Id.* at § 4.3. "Absent extraordinary circumstances, the Agencies [will] not challenge competitor collaboration on the basis of effects on competition in an innovation market, *id.* at § 3.32(c) ("An innovation market consists of the research and development directed to particular new or improved goods or processes and the close substitutes for that research and development. The Agencies define an innovation market only when the capabilities to engage in the relevant research and development can be associated with specialized assets or characteristics of specific firms."), where three or more independently controlled research efforts in addition to those of the collaboration possess the required specialized assets or characteristics and the incentive to engage in R&D that is a close substitute for the R&D activity of the collaboration." *Id.*

[103] *Id.* at §§ 4.2, 4.3; *see also* Section IV.D.1 herein.

[104] *See generally Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965); *see City of Columbia v. Omni Outdoor Advertising Inc.*, 499 U.S. 365, 380 (1991).

[105] *City of Columbia*, 499 U.S. at 380.

[106] *See California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510–11 (1972); *Primetime 24 Joint Venture v. National Broadcasting Company*, 219 F.3d 92, 99–100 (2nd Cir. 2000).

[107] *See, e.g.*, *Primetime 24 Joint Venture*, 219 F.3d at 100 (citing cases).

[108] *See, e.g.*, *California Motor Transp. Co.*, 404 U.S. at 513; *Noerr Motor Freight*, 365 U.S. at 144.

[109] *Professional Real Estate Investors, Inc. v. Columbia Pictures Indus.*, 508 U.S. 49, 60 (1993) (citations, internal quotation marks, and alterations omitted); *Primetime 24 Venture*, 219 F.3d at 100.

[110] *City of Columbia*, 499 U.S. at 380.

[111] *See, e.g.*, *Sharon Steel Corp. v. Chase Manhattan Bank, N.A.*, 691 F.2d 1039, 1052 (2nd Cir. 1982).

[112] *Id.*

[113] *See, e.g.*, *Primetime 24 Joint Venture*, 219 F.3d at 100 (citing cases).

[114] *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643 (1980) (holding that agreement among competing wholesalers to refuse to sell unless retailer makes payment in cash either in advance or on delivery is illegal per se because it is merely one form of price-fixing); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940) (holding that agreements to fix prices are per se illegal).

[115] *See Nat'l City Bank v. Turnbaugh*, 463 F.3d 325, 330 (4th Cir. 2006); *see also* Jonathan I. Gleklen, Per Se Legality for Unilateral Refusals to License IP Is Correct As a Matter of Law and Policy at 6 (citing *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 582 (1979)).

[116] *See State of R.I. v. Narragansett Indian Tribe*, 19 F.3d 685, 703 (1st Cir. 1994) ("The doctrine of preemption . . . applies only to conflicts between federal provisions, on one hand, and state or local provisions, on the other hand.").

[117] *See id.* at 704 ("[C]ourts should endeavor to read antagonistic statutes together in the manner that will minimize the aggregate disruption of congressional intent."); *Anderson v. FDIC*, 918 F.2d 1139, 1143 (4th Cir. 1990) ("We believe the more appropriate rule of statutory construction is the principle that a court should, if possible, construe statutes harmoniously.").

[118] *In re AMERCO*, 109 F.T.C. 135 (1987).

[119] *Id.*; *see also* 23-7 American Bankruptcy Institute Journal 34, *59 (September 2004).

[120] *See*, *e.g.*, *City of Columbia v. Omni Outdoor Advertising Inc.*, 499 U.S. 365, 380 (1991).

[121] As in the non-bankruptcy context, there is no reason why competitors should not be permitted to jointly retain legal counsel to represent the interests of the creditors in their effort to seek legal redress against a common debtor. In fact, such an action would likely be protected under the Noerr-Pennington Doctrine. *See*, *e.g.*, *Primetime 24 Joint Venture v. National Broadcasting Company*, 219 F.3d 92, 100 (2nd Cir. 2000) (citing cases).

[122] As discussed in Section III.C.4.a - b, the Bankruptcy Code regulates service as a committee member. However, there is no reason to believe that the overwhelming majority of actions a creditor would take on or in connection with a creditors' committee would not be protected under the Noerr-Pennington Doctrine.

[123] For a detailed discussion, please see Section III.C.3.a above..

[124] Please see sections III.C.3.e and III.C.6.f.

[125] *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643 (1980) (holding that agreement among competing wholesalers to refuse to sell unless retailer makes payment in cash either in advance or on delivery is illegal per se because it is merely one form of price-fixing); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940) (holding that agreements to fix prices are per se illegal).