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Circuit City Unplugged: Did Chapter 11 Fail to Save  
34,000 Jobs?

TESTIMONY OF  
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Professor Zywicki clerked for Judge Jerry E. Smith of the U.S. Court of Appeals for the Fifth Circuit and worked as an associate at Alston & Bird in Atlanta, Georgia, where he practiced bankruptcy and commercial law. He received his J.D. from the University of Virginia, where he was executive editor of the Virginia Tax Review and John M. Olin Scholar in Law and Economics. Professor Zywicki also received an M.A. in Economics from Clemson University and an A.B. cum Laude with high honors in his major from Dartmouth College.

Professor Zywicki is the author of more than 70 articles in leading law reviews and peer-reviewed economics journals. He is one of the Top 50 Most Downloaded Law Authors at the Social Science Research Network, both All Time and during the Past 12 Months. He served as the Editor of the *Supreme Court Economic Review* from 2001-02. He is a frequent commentator on legal issues in the print and broadcast media, including the *Wall Street Journal*, *New York Times*, *Nightline*, *The Newshour with Jim Lehrer*, CNN, CNBC, Bloomberg News, BBC, *The Diane Rehm Show*, and *The Laura Ingraham Show*. He is a contributor to the popular legal weblog The Volokh Conspiracy. He is currently the Chair of the Academic Advisory Council for the following organizations: The Bill of Rights Institute, the film “We the People in IMAX,” and the McCormick-Tribune Foundation’s “Freedom Museum” in Chicago, Illinois. He was elected an Alumni Trustee of the Dartmouth College Board of Trustees.

It is my pleasure to testify today on the subject of “Circuit City Unplugged: Why Did Chapter 11 Fail To Save 34,000 Jobs?” The American economy faces a major recession and there are clear signs of major struggles ahead for the retail industry. Several major retailers have filed bankruptcy in recent months and continued sluggish spending and access to credit by consumers augurs further struggles ahead for the retail sector of the economy. Some commentators have expressed concern that a disproportionate number of retail bankruptcies have ended up in liquidation rather than successful reorganization and have argued that several Bankruptcy Code amendments enacted as part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA”) as creating pressures for economically inefficient liquidations.

It is possible that BAPCPA has at the margin helped to contribute to some of these liquidations. But it is far from clear that this is the case, as there are numerous other factors in the current that likely have contributed substantially to the liquidation of these firms. Moreover, to the extent that BAPCPA’s amendments have arguably contributed to the problem, repealing the relevant provisions will create new problems of their own, such that the costs of their repeal might likely exceed the benefits. In fact, by bringing about a swift and decisive resolution of a failing company’s prospects, thereby clearing the field for more vibrant competitors to grow, BAPCPA’s impact in many cases is unquestionably productive. The amendments in BAPCPA were enacted to address particular problems under the pre-BAPCPA scheme and repealing those amendments would simply resuscitate those problems. Thus before taking this step, Congress should consider whether the benefits of their repeal exceed the costs.

## **Macroeconomic Conditions and Chapter 11**

The overarching purpose of Chapter 11 reorganization is to distinguish between firms that are economically failed and those that are in financial distress. An economically-failed firm is one that is essentially better-off dead than alive—shut down operations and reallocate the financial, human, and physical capital of the enterprise elsewhere in the economy. A firm in financial distress is one that simply needs to reallocate its capital structure in order to be a prosperous enterprise. Chapter 11 exists to reorganize firms in financial distress but not those that are economically-failed. There is reason to believe that some of the retailers that have liquidated in recent months are economically-failed firms, rather than merely financially-distressed. Hence, efforts to reorganize and save those companies would likely be economically inefficient.

The economy in general and the retail sector specifically are currently going through some very difficult times. Unemployment is rising and consumer spending and borrowing is falling. The result has been widespread difficulties for the retail sector.

But these difficulties are not uniform. There are areas of the retail economy that are doing fine or even prospering—most notably discount stores such as Wal-Mart, BJ's Wholesale, Ross's, TJ Maxx, and Big Lots, which have reported rising sales and profits, sometimes reversing struggles during the recent economic boom years. High-end stores such as Saks and Nordstrom, by contrast, have suffered badly in the economic downturn. Going forward we can also expect the Circuit City's of the world to be faced with increasingly strong competition from on-line sellers such as Amazon or eBay, which can sell the same products more cheaply and conveniently than traditional bricks-and-mortar

sellers, and especially as financially-strapped consumers shop more aggressively for lower prices.<sup>1</sup>

As part of the economic slowdown, therefore, we can expect to see the process of “creative destruction” at work in the economy—certain sectors of the retail industry will suffer while others prosper. Sellers of expensive discretionary items—such as big-screen televisions, high-end electronics, consumer durables, and automobiles—will likely feel the pinch especially strongly in a slowing economy. Thus, it is to be expected that there will be some business casualties as consumers tighten their belts—and those casualties probably will be stores such as Circuit City, Sharper Image, and other purveyors of higher-end discretionary consumer and electronic goods. Other retailers, such as Linens ‘n Things’ were consistently losing money for many years before entering bankruptcy, a decline frequently exacerbated by subpar ownership or management.

Circuit City was not immune to these trends. Reports indicate that its year-to-year foot traffic plummeted by double-digit amounts and its downward spiral was exacerbated by poor management, as exemplified by the short-sighted decision to fire several thousand of its most experienced and highly-paid hourly workers and replace them with inexperienced substitutes. Vendors also lost confidence in Circuit City’s reliability and became reluctant to provide inventory. Consumers have scaled back spending and found credit card credit drying up, a particularly damaging hit to Circuit City which makes most of its sales on credit cards. None of these problems

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<sup>1</sup> As a personal illustration, during the past two years or so I have purchased a laptop, headphones, and record album converter from on-line sellers, a high-definition television from Costco, and portable dvd player from Target. In none of those situations did I go to a traditional seller of electronics goods such as Circuit City or Best Buy.

Bankruptcy cannot and should not be used to save economically failed enterprises plagued by a bad business plan, poor ownership, or a fundamental inability to compete in a changing marketplace. Chapter 11 can help financially-troubled but fundamentally-valuable firms live to fight another day. Chapter 11 cannot reverse the creative destruction of the competitive marketplace or force consumers to buy goods and services that they don't want. In such situations, the purpose of the bankruptcy system is to clear-out failed enterprises to allow new firms to expand to fill the void. Not every firm is worth saving and saving weak firms ties up physical, financial, and human capital that could be better deployed elsewhere in the economy. The manufacture of typewriters and typewriter accessories was once a huge industry in the United States but their disappearance isn't the fault of Chapter 11.

Moreover, some experts have suggested that the bankruptcies and liquidations we are seeing now may be consistent with a long-overdue shake-out in the retail industry. Like many other areas of the economy, many retailers may have been kept alive artificially by access to cheap credit that delayed their inevitable day of reckoning. These companies may not have been economically viable for some time but only collapsed when their access to cheap credit dried up. Consumer spending was also artificially inflated by easy access to credit.

In short, some of the liquidations that we see today may be a necessary macroeconomic adjustment to a leaner economic time where certain retailers will shrink or even disappear while others expand to take their place. It is not obvious, for instance, that Circuit City would have successfully reorganized in a market with fierce competition

and sagging consumer demand. Thus, liquidation of some retailers may be a necessary medicine as the economy returns to a less-overheated state.

### **Non-BAPCPA Bankruptcy-Related Factors Explaining Liquidations**

There are also other factors in the economy today that may explain a trend toward liquidation independent of BAPCPA's changes in the law.

First, many scholars have documented that over the past several years, the practice of Chapter 11 has changed dramatically away from the traditional focus on court-supervised reorganization in Chapter 11 to a secured-creditor driven system that results much more often in liquidation.

As Professor Barry Adler noted in his testimony before this Committee in September 2008, during the past decade there has been a sea change in the nature of Chapter 11 practice “as debtor control of bankruptcy has given way to creditor dominance.”<sup>2</sup> When a firm enters bankruptcy today more or all of its assets are already pledged to one or a number of secured creditors. As a result, when bankruptcy is filed the debtor quickly loses control over the case. Shareholders are routinely wiped out and incumbent managers usually lose their jobs. These two constituencies (along with workers) typically are the strongest advocates for reorganization *even if reorganization would be inefficient*—the fact that they are typically sidelined in the bankruptcy process today both weakens internal political forces advocating reorganization as well as

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<sup>2</sup> Testimony of Professor Barry E. Adler, *Hearing on Lehman Brothers, Sharper Image, Bennigan's, and Beyond: Is Chapter 11 Bankruptcy Working?*, House of Representatives Committee on the Judiciary, Subcommittee on Commercial and Administrative Law (Sept. 25, 2008).

reflecting the reality of modern Chapter 11 practice.<sup>3</sup> Secured creditors, by contrast, will often prefer a swift liquidation of the debtor (or sale as a going-concern) to the uncertainty and delay of an extended Chapter 11 process. In fact, the gradual move toward greater control of the Chapter 11 process by secured creditors has better-aligned the incentives of secured creditors with the needs of the bankruptcy case as secured creditors now have proper incentives to push for efficient resolution of financial distress instead of inefficient liquidation or reorganization.<sup>4</sup> In the modern era of swift and competitive global capital flows investors will not tolerate bankruptcy laws and practice that impose undue delay, risk, and uncertainty.<sup>5</sup>

As a result of these new realities of the bankruptcy landscape there has been a growing trend toward liquidation in large Chapter 11 cases wholly independent of (and predating) BAPCPA's enactment. Professor Adler quotes the findings of Professor Lynn LoPucki, who finds that "41 firms that filed bankruptcy as public companies each with assets exceeding approximately \$218 million liquidated in 2002, although no more than 8 such firms did so in any year prior to 1999."<sup>6</sup> Thus, it is likely that many of the retailers that have liquidated in recent months would have liquidated regardless of BAPCPA, especially those firms encumbered by high levels of secured debt.

Second, more specifically to the current environment, the continued problems in credit markets has reportedly made debtor-in-possession financing much less available

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<sup>3</sup> Circuit City's Chief Executive Officer Philip Schoonover was paid \$8.52 million in fiscal 2006, more than double that earned by Best Buy's CEO, even as Circuit City was sliding toward bankruptcy. See Mark Clothier, *Circuit City to Fire 3,400, Hire Less Costly Workers*, <http://www.bloomberg.com/apps/news?pid=20601087&sid=aw.zhHEzMpZU&refer=home> (March 28, 2007).

<sup>4</sup> Barry E. Adler, *Bankruptcy Primitives*, 12 ABIL. REV. 219, 226-33 (2004).

<sup>5</sup> Todd J. Zywicki, *The Past, Present, and Future of Bankruptcy Law in America*, 101 MICH. L. REV. 2016 (2003).

<sup>6</sup> Lynn LoPucki, *The Nature of the Bankrupt Firms: A Response to Baird and Rasmussen's The End of Bankruptcy*, 56 STANFORD L. REV. 645 (2003).

than in the past. Major DIP lenders have scaled back their operations and lending volume. DIP lending is less-available and has a greater number of strings and restrictions attached to it. For instance, it appears that one major reason—if not the major reason—for Circuit City’s liquidation was its difficulty in acquiring DIP financing. Although it is possible that some of the problems in DIP financing markets are caused in parts by BAPCPA’s amendments, this is by no means obvious. Major providers of DIP financing have either disappeared completely or scaled back operations. It seems much more plausible that the paucity of DIP financing reflects the same stresses exhibited in all other credit markets today rather than some unintended consequence of BAPCPA.

### **The Possible Impact of BAPCPA**

Macroeconomic conditions and non-BAPCPA related bankruptcy forces thus may provide much of the explanation for the recent tendency toward liquidation in retail bankruptcy filings. Concern nevertheless has been expressed that various provisions of BAPCPA have resulted in a growing tendency toward liquidation rather than reorganization. Although this argument is possible in theory, it seems doubtful that this factor is especially important when compared to the two factors previously discussed. Moreover, several of those amendments were enacted to address particular chronic problems in the bankruptcy system; thus, even if their repeal or substantial amendment might marginally improve the prospects for reorganization, the costs associated with this course of action might exceed the benefits from marginally increasing the prospects for reorganization.

There are several provisions in BAPCPA that might potentially create a stronger dynamic toward liquidation in cases involving retailers, most notably provisions related to the decision whether to assume or reject a lease of real property and increased protection for vendors that ship goods to the debtor in the period immediately preceding bankruptcy and employees of the debtor. Both of these provisions may arguably increase the likelihood of liquidation in any given case, but may be justified by other offsetting policy concerns.

### ***Expedited Period for Assumption or Rejection of Leases***

BAPCPA amended section 365(d) of the Code to limit the time during which a debtor-lessee must decide whether to assume or reject an unexpired lease of non-residential real property. Prior to BAPCPA, the deadline for this decision was nominally fixed, but a Bankruptcy Judge could and routinely did grant an open-ended extension of time to the debtor up to the time of plan confirmation, a process that could take months or even years to resolve. This extended deliberation period certainly provided the debtor with substantial leisure and leeway to decide whether to liquidate or reorganize.

But this luxurious time for the debtor to make up its mind came at a substantial cost to commercial landlords and other shopping-mall tenants who were forced to bear much of the cost and uncertainty during that period with minimal offsetting benefit. To ameliorate the potential harm to these parties BAPCPA provided for much tighter time-limits for a debtor to decide whether to assume or reject these leases: an initial period of 120 days from the order for relief (the date of the bankruptcy petition in a voluntary case)

that the court can extend for cause for an additional 90 days. Any extension beyond this 210 day period requires the consent of the lessor.

The problem with the pre-BAPCPA regime can be illustrated by an example that draws on my own experience. I live in Falls Church, Virginia, near an area known as Seven Corners that is populated by several large strip malls. The anchor tenant in one such mall was a Montgomery Ward store.<sup>7</sup> In 1997 Montgomery Ward filed for bankruptcy after having been routed by competition from department stores such as Target and Wal-Mart, big box specialty stores such as Home Depot, and a host of other rivals from on-line sellers to specialized boutiques. In fact, Montgomery Ward was just one of several old-line mid-sized department stores that expired during this time, including venerable chains such as Ames (2002), Bradlees (2001), Caldor (1999), Jamesway (1995), Woolco (1994), and numerous other national, regional, and local department stores that could no longer compete. Many other failing department stores were gobbled up by stronger rivals through mergers. Although many at the time predicted Montgomery Ward's eventual demise, they nonetheless launched an extended Chapter 11 reorganization, finally emerging in 1999 having closed many but not all of its outlets. The extended bankruptcy period did nothing to fundamentally rectify Ward's weak competitive position or draw consumers back into the store, and eventually Ward liquidated.

This extended, drawn-out reorganization process certainly gave Ward ample time to decide whether to reorganize—a decision that almost immediately was revealed to be incorrect in the end. More importantly for current purposes, however, the delay and

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<sup>7</sup> Anchor tenants are often even given below-market rental rates in acknowledgement of the external benefits that they provide for other stores.

uncertainty of the process itself proved very harmful to consumers, the landlord, other tenants of the strip mall, and perhaps even the local government. During this period the store grew shabby and Ward's reorganization efforts failed to reverse its decline in popularity among consumers. Ward failed to draw the foot-traffic to the mall that is expected of an anchor tenant by the landlord and other smaller businesses and restaurants in the mall, not to mention the sales and property taxes for the local government. In fact, the Petsmart next door to the Ward store eventually suspended operations for a several-month period because of a lack of customers. Eventually Ward finally succumbed to economic reality and was replaced by a Target outlet. The Target has thrived and has buoyed its co-tenants in the mall. I can vouch from personal experience that consumers have been overjoyed by the conversion.

Under the BAPCPA regime, it is plausible that rather than being given two years to try to reorganize, Montgomery Ward may have been liquidated earlier and the store near my house shuttered. It is worth noting that in hindsight it would have been better for everyone if Ward had been shuttered earlier, allowing Target to move in. But more importantly, the extended delay and uncertainty itself about Ward's future delayed the entrance of a highly-successful Target store, causing harm to consumers, the landlord, vendors, and the small businesses and restaurants in the mall suffered mightily from the uncertainty and delay over Ward's future. The demise of Ward and renaissance of Target brought with it many better jobs in a growing enterprise, not to mention the jobs created for the vendors supplying the prosperous Target rather than the weakling Montgomery Wards and the job-creation brought to the other stores in the strip mall.

As this anecdote illustrates, there may be costs to a bankruptcy regime that brings about a swifter resolution of bankruptcy cases, including the possibility that this may lead to the liquidation of some firms that might otherwise have reorganized successfully. But this delay and uncertainty often has a cost to consumers, landlords, other tenants, vendors, and even local governments. There is harm from being too accommodating of delay as well as being insufficiently patient. One cannot say with certainty that 210 days is the exact right time period for these decisions, but it is evident that a much longer period of time will have substantial costs as well. Professor Adler stated the point well, this provision (and others in BAPCPA that expedited the resolution of bankruptcy cases), “reflect the belief that if a debtor cannot be reorganized quickly, there may be no viable business to save.”

Finally, it should be noted that the BAPCPA amendments permit an extension of the 210 day period with the consent of the landlord. Thus, where a landlord and co-tenants would be benefitted from an effort at reorganization, there are procedures in place to make this possible, so there should be minimal concern about inefficient liquidation where external costs to the landlord and co-tenants are absent. If the retailer is obviously viable and will make more-valuable use of the premises than other possible tenants, the landlord would be expected accommodate a reasonable extension of time if necessary. A landlord confronted with the choice between a weak Montgomery Ward store or a prosperous Target store will find the decision an easy one—a decision that will benefit workers, vendors, and the economy as well. A landlord in the current environment, by contrast, will be unlikely to evict a bankrupt tenant if there is no substitute tenant available.

Moreover, many cases of financial distress are gradual, not immediate. As a result, debtors can and do plan their bankruptcy filings in advance of filing, and many cases are even “pre-packaged.” Thus, 210 days is only the period of time for the debtor to make a decision *after* filing but is not the limit of planning when financial distress is gradual. Many big cases will have extensive pre-bankruptcy planning and there is no reason why the debtor could not open negotiations with a landlord for a consensual extension of time before the debtor even files for bankruptcy.

### ***Increased Administrative Priority for Certain Pre-Petition Claimants***

Critics of BAPCPA have pointed to a second factor that has been argued to undermine efforts to reorganize in Chapter 11, provisions that increased protection for certain categories of pre-petition claimants by providing them with administrative priority or enlarging existing administrative priority provisions. By increasing the amount of claims against the debtor that are subject to an administrative priority claim, these priority claims leave fewer assets available to pay other creditors and post-petition operating expenses. Moreover, the fact that a greater percentage of post-petition resources are being diverted to pay unproductive prepetition claims may make potential DIP lenders more reluctant to lend to finance the Chapter 11 effort.

Two basic amendments in BAPCPA have been singled out as unwisely increasing administrative priority for pre-petition against the debtor, thereby diverting assets to payment of pre-petition claims that otherwise could be used to fund reorganization

efforts.<sup>8</sup> It should be noted at the outset that the theoretical logic of this argument is open to question—it is not clear why the relative priority of claims against a financially-troubled debtor should matter to its ability to reorganize. Nonetheless, there is a perception that increasing the size of administrative claims ties the hands of debtors, limiting their flexibility to reorganize.

The first is the addition of section 503(b)(9) to the Code, which creates a new administrative claim for goods actually received by the debtor within the 20 days prior to the Chapter 11 filing. For a retailer with rapid inventory turnover, this may create a substantial administrative priority claim, arguably making reorganization more difficult. Moreover, this administrative priority claim status may have the unintended consequence of encouraging liquidation in another way: vendors are a constituency in bankruptcy that tends to favor reorganization because this maintains a market for their products. By reducing the value of their unsecured claims in bankruptcy, however, this may reduce their voice and clout in the reorganization process. Thus, while this increased priority helps them in the short run it ironically might create offsetting harm in the long-run by increasing the probability of liquidation.

But the impact of this change in the law may be overstated. Under pre-BAPCPA law these claims were nominally treated as general unsecured claims. But, in practice, in many retailer cases bankruptcy courts would grant administrative priority for pre-petition goods to many vendors as so-called “critical vendors” that were thought especially necessary for the debtor’s successful reorganization. It was commonly argued, and accepted by most bankruptcy judges, that the likelihood of administrative priority for

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<sup>8</sup> See Testimony of Lawrence C. Gottlieb, *The Disappearance of Retail Reorganization in the Post-BAPCPA Era*, House of Representatives Committee on the Judiciary, Subcommittee on Commercial and Administrative Law (Sept. 25, 2008).

goods shipped in the pre-bankruptcy period was necessary to provide assurance to induce vendors who might otherwise be unwilling to ship to a struggling debtor because of fear of non-payment. Or the vendors might be willing to do so only if the debtor paid C.O.D., which would likely exacerbate the problems of a cash-starved firm already on the verge of bankruptcy. If the vendors would not ship goods, the debtor would be unable to stock its shelves, thereby disappointing customers and bringing on a death-spiral into bankruptcy. Thus, it was thought necessary to assure vendors that it was safe to ship goods on credit to the struggling debtor in the period preceding bankruptcy.

In the Kmart bankruptcy case, for instance, 2330 of 4000 vendors were classified as “critical vendors” who were to be paid in full under the plan, thereby consuming \$300 million of Kmart’s \$2 billion DIP financing. Although Kmart’s particular proposal was eventually struck down by the Seventh Circuit, it illustrates the scope and ubiquity of these critical vendor payment proposals. Entitlement to this preferred status, however, was wholly discretionary by the court, allowing some well-connected and influential vendors to achieve critical vendor status while others were left out in the cold. Moreover, there were no set guidelines on how far back these unpaid bills could reach or the amount that could be treated as critical vendors.

One evident purpose of section 503(b)(9) was to rationalize this previously ad hoc “critical vendor” analysis by replacing it with a statutory scheme that would serve the same function but without the apparent arbitrariness and unfairness of the discretionary “critical vendor” regime and to limit the scope of these claims. Thus, section 503(b)(9) may not have created a major increase in overall administrative claims against the estate when compared to the actual pre-BAPCPA practice. It also makes the rules more reliable

and predictable for vendors. Section 503(b)(9) recognizes the need for the functions previously played by critical vendor orders; eliminating it would either lead to the resuscitation of the ad hoc critical vendor analysis or bring about the very results that doctrine was intended to avoid.

The second set of potentially-problematic amendments in BAPCPA is changes to sections 507(a)(4) and (a)(5), which increased the aggregate monetary limits on employee wage and pension benefit priority claims. Formerly, the aggregate amount that an employee could assert as a priority wage or pension benefit claims was limited to \$4,925 in wages and pension benefits earned within 90 days prior to filing. BAPCPA increases the aggregate cap to \$10,950 for wages and pension benefits earned within 180 days prior to filing. Unlike the argued explanation of the increased priority for vendors, however, there is no obvious economic justification for this increased priority for employee wages, unless it is thought that many employees would quit their jobs because of a fear of bankruptcy if refused this heightened priority extended for six months prior to the filing rather than just three months. This seems doubtful and, in fact, this priority is usually justified on grounds of “fairness,” rather than economics. By tying-up more assets to pay pre-petition claims, however, it tends to reduce the prospects for a successful reorganization and thus may not only bring about liquidation but in so doing create job losses for precisely those who it is intended to benefit.

#### ***Summary on BAPCPA’s Impact***

Thus, even if certain provisions of BAPCPA are criticized as potentially encouraging liquidation instead of reorganization, at least some of these criticisms are

mitigated or even outweighed by offsetting concerns. With respect to the stricter deadlines for deciding whether to assume or reject leases of non-residential real property, the purpose of BAPCPA's amendments were to protect landlords and co-tenants from the delay and uncertainty caused when a firm files for bankruptcy, especially a bankruptcy involving an anchor tenant. Although there are economic costs from forcing an unduly-swift decision on the debtor there are costs to many other parties from extended delay of the process. Moreover, BAPCPA does include a safety valve by making it possible to extend the 210-day deadline with the consent of the landlord.

With respect to increased administrative priority for vendors for pre-petition shipments of goods, the primary effect of section 503(b)(9) was to rationalize the ad hoc system of "critical vendor" orders that had grown up in recent years in acknowledgement of the need to provide assurances to vendors to continue to supply goods on credit to struggling retailers.

In contrast to these provisions for which there are offsetting policy goals that may justify them, sections 507(a)(4) and (a)(5) increase the administrative priority for pre-petition wages and pension benefits. There is no obvious bankruptcy policy purpose furthered by these priorities and thus they contribute to the potential for liquidation with no offsetting economic benefit.

## **Conclusion**

As the economy dips deeper into recession it is evident that the near-future will present difficult challenges for the retail industry. In recent times several major retailers have filed bankruptcy and it is foreseeable that more will before the recession is done.

Many of these cases will result in liquidation, perhaps more commonly than a decade or two ago. It is tempting to blame BAPCPA's amendments for this trend.

In reality, however, it is not so easy to point to BAPCPA as a scapegoat. General macroeconomic conditions, higher credit costs, and reduced consumer spending would likely have driven many of these retailers out of business regardless. Moreover, prior to BAPCPA there was a distinct trend toward liquidation in large Chapter 11 cases. These trends have been exacerbated in the recent downturn by a restricted access to DIP financing.

To the extent that BAPCPA has also accelerated this trend, its influence is likely small. Moreover, where BAPCPA potentially has had an impact that impact is mitigated if not offset by other benefits that arise from its reforms. Perhaps the only BAPCPA amendment that has increased the trend toward liquidation with no obvious offsetting benefits is the enhanced administrative expense claim for wages and benefits added by BAPCPA.