September 3, 2002

Connecticut Congressional Delegation
Washington, D.C. 20510

Re: **Significant Problems With Proposed Amendments to Bankruptcy Code In Employee Abuse Prevention Act of 2002: S. 2798 and H.R. 5221**

Dear Senator or Representative:

I am writing you today to alert you to potentially disastrous amendments to the Bankruptcy Code that are now under consideration by Congress. They are contained in the Employee Abuse Prevention Act of 2002 referenced above. Although the intention of this Act's sponsors is to protect employees from corrupt practices of firms that file for bankruptcy, a small number of the Act's provisions will have a devastating effect on the legitimate financing of businesses in good faith, ordinary-course transactions. The provisions (contained in Sections 102, 103, 106 and 203(b) and (c) of the Act) will interfere with the ability of lenders to rely upon collateral for credit that they extend – the "life blood" of the vast majority of business finance in Connecticut and in the United States. These provisions should not be enacted. A brief report and executive summary of the Act's provisions and policy and the serious implications for legitimate and long-standing commercial finance transactions, prepared by a panel of leading attorneys and academics, is enclosed for your use and consideration and for additional information.

By way of introduction, please be advised that I am an attorney in private practice at a small law firm in Meriden, Connecticut and have practiced commercial law and bankruptcy for over 20 years. I am a Fellow of the American College of Commercial Finance Attorneys, a member of the American Law Institute, a member of the Executive Board of the Association of Commercial Finance Attorneys and is a member of the Connecticut Bar Association, being a member of the Executive Committee of the Commercial Law and Bankruptcy Section, and a member of the CBA Commercial Finance Committee. In the recent enactment of Revised Article 9 of the Uniform Commercial Code, dealing with secured transactions, I was a principal spokesperson for the Connecticut Bar Association and of the CBA Commercial Law and Bankruptcy Section before the Connecticut General Assembly, was a member of the Law Revision Commission Advisory Committee on Revised Article 9 that prepared the initial draft of the legislation, and was a party to the discussions leading to the numerous non-uniform amendments in Connecticut regarding this law. I received a Citation from the Connecticut

General Assembly for my work and assistance to the General Assembly in the adoption of this law. I have recently co-authored a book on Revised Article 9 in Connecticut titled, *Connecticut Secured Transactions Under Revised Article 9 of the Uniform Commercial Code Forms and Practice Manual*, DataTrace Publishing Company (2002), have prepared articles and am a frequent lecturer in Connecticut on commercial law topics.

I am extremely concerned about the impact of the proposed Act on the well settled law relied upon by creditors in providing financing for legitimate transactions. Business and consumer borrowers alike will be seriously harmed if these provisions are enacted into law. Collateral gives creditors greater confidence that the credit will be repaid. For this reason, creditors are often willing to extend credit only if the borrower secures credit with collateral. Other creditors insist on higher rates unless the loan is secured. If the Bankruptcy Code is amended, as proposed in the above-referenced sections of this Act, so to invalidate liens when the borrower enters bankruptcy (when the collateral is needed most), future lenders will have no choice but to refuse to extend credit or to extend it at higher rates. Either outcome will have an unacceptable adverse impact on the economy.

No policy reason justifies this wholesale destruction of property rights. Ever since the 19th century, federal bankruptcy law has given effect to legitimate liens and other property rights created by state law. There is no reason to depart now from this proven approach. The sponsors erroneously suggest that these changes respond to the recent amendments to Article 9 of the Uniform Commercial Code. I tell you now that the approaches in Revised Article 9, which has been enacted in all 50 of the United States and the District of Columbia, do not restrict the ability of the federal Bankruptcy Court to set aside fraudulent or otherwise avoidable transactions. Revised Article 9 updated the law to conform to developing business practices and 21st century technology. [Please note that the absence of such comprehensive laws is one of the chief reasons why projects in developing countries, such as in Mexico and in Latin America, cannot be easily developed or financed. This realization led to the creation by the United States Department of State of the long-standing Secretary of State's Advisory Committee on Private International Law.]

Finally, the provisions of the Act make their provisions *retroactive* – to apply to transactions documented in reliance upon existing law. Creditors of all kinds, from the local family-owned retailed to publicly held financial institutions and investors (including individuals and pension funds) have extended billions of dollars in secured credit and capital in the expectation that their liens and securitization transactions would be given effect in bankruptcy. These creditors and investors should not be forced to suffer potentially immense losses by being deprived of their vested property rights in bankruptcy.

I urge you, both for my self and for my colleagues and clients, to oppose the enactment of Sections 102, 103, 1006 and 203(b) and (c) of the Employee Abuse Prevention Act of 2002.

Of course, if you have any questions or comments, or if we can be of further assistance, please do not hesitate to call.

Very truly yours,

BROWN & WELSH, P.C.

Thomas J. Welsh

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