HYPOTHETICAL

Plastics, Inc, ("Plastics") is a family owned business that is a manufacturer of custom injected plastic molded products. Plastics II, Inc. ("Plastics II"), a company that was also a manufacturer of custom injected plastic molded products, was a wholly owned subsidiary of Plastics that was acquired through a bankruptcy sale. On or about August 21, 2002, Plastics entered into a Loan Agreement (the "Loan") with Cheap National Bank ("Cheap Bank"). The total commitment of Cheap Bank, and the total amount loaned to Plastics by Cheap Bank was approximately $9 million. The Loan also contained cross-default and cross-collateralization provisions, as well as cross guarantees of all the borrowing entities.

The acquisition of Plastics II did not prove to be a successful match for Plastics, and, instead, proved to be a financial drain on Plastics. Thus, in late 2004, Plastics began experiencing financial difficulty and found itself in default of certain financial covenants under the Loan and documents evidencing the Loan (the "Loan Documents"). After extensive negotiations with Cheap Bank, on June 3, 2005, Plastics entered into a Forbearance Agreement. The Forbearance Agreement provided Plastics with relief from certain covenant and borrowing restrictions under their lending arrangements and the ability to access additional funding on a revolving loan basis, subject, of course, to availability under and pursuant to lending requirements.

In August 2005, Plastics effectuated the sale of Plastics II for approximately $3 million, the net proceeds of which were paid directly to Cheap Bank and were applied against and in reduction of the indebtedness. Thus, by the end of August 2005, Cheap Bank was owed approximately $6 million. Several weeks before the Forbearance Agreement was set to expire, Cheap informed Plastics that it was unwilling to make further lending advances from the proceeds of the Debtors' accounts receivable that were being paid into a lockbox account held at Cheap Bank. In addition, Cheap Bank transmitted written notices to Plastics' account debtors directing them to remit payments directly to Cheap Bank. Finally, Cheap Bank notified Plastics in writing that it would not continue to forebear from exercising its rights and remedies under applicable law against the debtors. As a result of these actions, Plastics has contacted you to

weigh their options in an effort to preserve the going concern value of its businesses and to pursue a reorganization. Plastics is seeking advice as to whether it would be feasible to file a chapter 11 petition in order to seek to reorganize under the newly amended Bankruptcy Code.

Plastics informs you that it has 100 employees that are paid on a bi-weekly basis. The average payroll for each pay period is $150,000 Plastics has not made payroll for the current pay period. In addition, Plastics' facility is a union shop and Plastics owes approximately $100,000 in benefits accrued over the past six months. Plastics' purchasing on a monthly basis ranged from $600,000.00 to $1.1 million over the past year. Importantly, Plastics' prepetition trade payables averaged $3,500,000.00, which consists almost entirely of the purchase of raw materials used in the plastic manufacturing process and is thus integral to its business. Furthermore, Plastics' monthly utilities average of $53,000.00. At this time, Plastics is current on all of its utility obligations. Plastics revenues for the last fiscal year were $16,000,000 and $4,000,000 for the last quarter. The average monthly collections of receivables is approximately $1,100,000 which, when taken into account with payables and other costs of goods and general administrative expenses results in an average monthly cash flow of $50,000 before debt service, taxes and depreciation. Based on Plastics' troubled financial position, Plastics cannot find alternate financing and in the event of a chapter 11 filing, Plastics would not be able to secure any debtor-in-possession financing. Therefore, Plastics is currently operating strictly on a cash basis and in the event of a chapter 11 filing would only operate by the use of Cheap Bank's cash collateral.

QUESTIONS

1. What is Plastics' potential administrative obligations to its employees and their union upon the commencement of a chapter 11 case? How does this differ from the obligations Plastics would owe its employees upon commencing a chapter 11 proceeding prior to the enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act (the "2005 Act")

2. What will Plastics be required to provide its utilities as adequate protection of future performance? Does it matter that upon the chapter 11 filing, Plastics will be current on all of its obligations to its utilities? What will Plastics' utility providers seek to argue upon the filing of a chapter 11 petition?

3. For this question, assume that Plastics owes two months on its trade payables. What are Plastics' potential administration obligations to its vendors and suppliers upon the filing of a chapter 11 proceeding? Does it matter if not all of its vendors seek to reclaim goods sold to Plastics? How will Plastics vendors and suppliers assert their rights upon the filing of a chapter 11 proceeding.

4. Approximately how much cash will Plastics need immediately upon the filing of a chapter 11 in order to meet all of its obligations at that time?

5. Based on Plastics' cash flow, what is the feasibility of a Plastics chapter 11 filing?

HORNBOOK

I. PRIORITIES

Section 507(a) sets forth ten categories of claims that are entitled to priority in bankruptcy cases. The effect of such claims being entitled to priority varies among the different chapters of the Bankruptcy Code. In considering cases dealing with § 507, it is necessary to keep in mind that most of the subsections of § 507 were renumbered by the 2005 Act. The 2005 Act created a new § 507(a)(1) and renumbered former §§ 507(a)(1), (2), (3), (4), (5), and (6) as §§ 507(a)(2), (3), (4), (5), (6) and (7), respectively. The 2005 Act also created a 10th priority for drunk-driving claims.

Many bankruptcy cases do not generate sufficient proceeds to pay in full all claims entitled to payment in the case. The structure of the Bankruptcy Code reflects a decision by Congress to prefer certain categories of claims over other categories of claims. The preferred categories of claims are designated as having priority over other categories of claims and are entitled to payment in full before those not granted priority.

Wage Claims

Section 507(a)(4) of the Bankruptcy Code gives priority to allowed unsecured claims for wages, salaries and commissions, including vacation, severance and sick leave pay earned by an individual. The purpose of allowing a priority for wages is to alleviate hardship on workers who lose their jobs or part of their salary as a result of a bankruptcy filing and to encourage employees to remain with their employers during periods of financial difficulty. The scope of the priority covers all types of wages, however they may be denominated in the contract between the debtor and the employee. It includes regular salaries, whether the employee is paid by the hour, the week or the month. It covers bonuses so long as the bonus is in the nature of compensation for work performed. It also extends to piecework for employees who are paid by what they produce rather than by the time spent working. The priority also encompasses all types of commissions, however they may be calculated.

In addition to salary and commissions, the priority under § 507(a)(4) also extends to certain benefits that are considered akin to compensation, such as vacation, severance and sick leave pay. The § 507(a)(4) priority does not extend to other fringe benefits or other "perks" of employment or to obligations that may be related to employment, but that are not referred to in the language of § 507(a)(4). Most notably, payments owed with regard to workers' compensation benefits have uniformly been held to be outside the scope of § 507(a)(4). As a result of the 2005 Act, this priority is only for wages, salaries and commissions earned within 180 days before the earlier of the date of the filing of the petition or the date the debtor ceased business. Prior to the 2005 Act, priority extended only to 90 days before the earlier of the date of the filing of the petition or the date the debtor ceased business. The reason that cessation of the business is used as an alternative measuring date is to protect the wage priority of employees if the debtor shuts down its business but delays the filing of a bankruptcy case. *Davidson Transfer & Storage Co. v. Teamsters Pension Trust Fund of Philadelphia and Vicinity*, 817 F.2d 1121 (4th Cir. 1987). The maximum dollar limit on the priority is now $10,000 for each employee owed wages, salaries or commissions. Prior to the 2005 Act, the maximum dollar limit on the priority was $4,925 for each individual employee owed wages, salaries or commissions. Any excess claim for wages, salaries and commissions above the new $10,000 per creditor limit will be treated as a general unsecured claim.

Benefit Claims

Section 507(a)(5) consists of allowed unsecured claims for contribution to an employee benefit plan arising from services rendered within 180 days before the earlier of the petition filing date or the date the debtor's business ceased operations. The maximum dollar amount of priority claims for each employee benefit plan is equal to the number of employees covered by such plan multiplied by $10,000, less the sum of (i) the aggregate amount paid to such employees under § 507(a)(4) and (ii) the aggregate amount paid by the estate on behalf of such employees to any other employee benefit plan. The effect of the last portion of the formula is that if there is more than one plan covering a group of employees, the priority will be apportioned pro rata among the various plans. In calculating the maximum amount of the

priority, the calculation is to be done on the basis of the full number of employees covered by the plan, regardless of the particular amount of benefits allocable to any individual. *In re New England Cartage Corp.*, 220 B.R. 503 (Bankr. D. Mass. 1998). Prior to the 2005 Act, the maximum dollar amount of priority claim for each employee benefit plan was equal to the number of employees covered by such plan multiplied by $4,925, instead of the $10,000 amount under the new Code.

The Bankruptcy Code does not define the term "employee benefit plan." The legislative history refers to pension plans, health insurance plans and life insurance plans as the type of employee benefit plan intended to be included within the scope of the priority. Many courts defer to the definition used in the Employee Retirement Income Security Act of 1974 ("ERISA").

A claim will qualify for priority under § 507(a)(5) only if it is for contributions arising from services rendered during the 180-day period. The Bankruptcy Code does not describe what kind of contributions qualify for priority. In self-insured programs, payments to be made directly to employees will qualify as contributions entitled to priority. In programs established through an insurance company or other third-party provider, the full range of payments owed under the debtor's contract with the third-party ought to be eligible for priority so long as they relate specifically to an eligible employee benefits plan. This would include claims for administrative costs as well as more direct reimbursements.

If a claim is based on services rendered both before and during the 180-day period, it must be apportioned with that part of the claim relating to services within the period being eligible for priority and the balance being a general unsecured claim.

There is considerable disagreement among the courts regarding whether workers' compensation insurance programs are to be considered employee benefit plans within the scope of § 507(a)(5). One line of cases, adopted by the Sixth, Eighth and Tenth Circuits, and by the United States District Court for the Eastern District of Pennsylvania in *In re Allentown Moving & Storage, Inc.*, 214 B.R. 761 (E.D.Pa. 1997), holds that workers' compensation

insurance programs are outside the scope of § 507(a)(5). *See Collier on Bankruptcy* – 15th Edition Revised, § 507.06, footnote 45 (collecting cases). These decisions reason that the intent of § 507(a)(5) was to supplement the wage priority in order to allow contributions to employee benefit plans that constituted fringe benefits, or benefits that may be in lieu of compensation, to achieve priority status. While a workers' compensation program benefits employees, a workers' compensation insurance fund benefits employers by enabling them to meet their statutory obligations. An employee would be covered for workers' compensation even if the employer illegally failed to meet its insurance obligation. A workers' compensation insurance program is fundamentally different from life or health insurance programs that provide benefits to employees that they would not otherwise have and that can be equated with bargained-for fringe benefits.

The other line of cases, adopted by the Court of Appeals for the Ninth and Fourth Circuits, holds that workers' compensation insurance programs are within the scope of § 507(a)(5). These cases suggest that workers' compensation benefits are a form of compensation available to employees in exchange for the work that they perform. *See Collier on Bankruptcy* – 15th Edition Revised, § 507.06, footnote 46 (collecting cases). While the benefit is mandated by statute, it is nevertheless a compensation plan available to and benefiting employees. The distinction between benefits that are "wage substitutes" and those that are not is not meaningful. According to this line of cases, the purpose of the priority is to protect the solvency of benefit plans and that purpose is as applicable to plans that are legally required as to plans that are voluntarily established.

II. UTILITIES

Section 366 of the Bankruptcy Code recognizes the monopoly powers of most utilities that provide essential services such as electricity, water and gas. Unlike other creditors who may usually decline to do business after bankruptcy provided they do not violate other provisions of the Bankruptcy Code, a public utility is required to continue to provide service to the debtor after a bankruptcy case is commenced. § 366 thus ensures that a debtor is able to maintain essential

services necessary to continue operations, at least for a limited time, upon the filing of a petition for relief.

The Bankruptcy Code does not define the term "utility". Clearly the term covers regulated public utilities that provide electric, gas, telephone and water service. Courts have broadly interpreted the term utility to also include any provider of services which maintains a monopoly such that the debtor cannot easily obtain comparable service. *In Re Good Time Charlie's LTD*, 25 B.R. 226 (Bankr. E.D. Pa 1982) held that a shopping mall that supplied electricity to all of its tenants constituted a utility within the meaning of § 366 and hence could not discontinue service to the debtor upon debtor's filing for chapter 11. *Id*. at 227. The court reasoned that the mall constituted a utility because the debtor-tenant could not obtain comparable electricity service without incurring prohibitively expensive rewiring costs to connect directly with the power company. *Id.* The fact that a monopoly does not exist does not preclude a service from being considered a utility. *One Stop Realtour Place, Inc. v. Allegiance Telecom, Inc*., 268 B.R. 430 (Bankr. E.D. Pa. 2001) held that a local exchange carrier that provided telephone service for a chapter 7 debtor's business qualified as a utility and was statutorily barred from discriminating against the debtor based on its bankruptcy filing. *Id*. at 437-38. The court held that though the carrier did not enjoy an absolute monopoly in the area, the debtor's difficulty in changing carriers and keeping the same telephone number mandated that the carrier be treated as a utility subject to § 366. *Id.* at 438.

Provision of Services and Adequate Assurance Prior to the 2005 Act

Section 366(a) expressly prohibits a utility from altering, refusing or discontinuing service if that action is solely based upon the commencement of a chapter 11 case or a debtor's failure to pay prepetition debts. This subsection, in effect, creates an automatic injunction effective upon the commencement of the case and is consistent with the broad automatic stay provisions under § 362 of the Bankruptcy Code.

Section 366 requires a utility not only to continue service, but also to provide service to a debtor who has not had service before or whose service was terminated before the petition was

filed. Furthermore, a utility may not alter service or otherwise discriminate against a debtor who is current on utility payments simply because the debtor has filed a bankruptcy case.

Prior to the 2005 Act enacting § 366(c), § 366(b) governed the provision of adequate assurance in all cases. Section 366(c) now governs the provision of adequate assurance in chapter 11 cases filed after October 17, 2005. For the cases in which it is still applicable, section 366(b) provides that a utility may alter, refuse or discontinue service if neither the trustee nor the debtor furnishes adequate assurance of payment, in the form of a deposit or other security, for service within 20 days after the petition date. The subsection is self-executing and a formal proceeding by the utility is not required. If, however, the parties are unable to agree, the court may modify the amount of the deposit or other security requested upon notice and a hearing by a party-in-interest.

Prior to the 2005 Act, a court could consider factors such as administrative expense priority, debtor payment history, and debtor liquidity in determining whether the utility had received adequate assurance of future payment. In cases where there appears to be little or no risk to the utility company and the debtor is current with payments, an administrative priority may be sufficient assurance. Thus, for example, the Court of Appeals for the Second Circuit, in *Virginia Electric & Power Co. v. Caldor, Inc*., 117 F.3d 646 (2d Cir. 1997) held that no security deposit need be provided by a debtor where utilities had adequate assurance of payment through other means. The court found that the debtor’s good payment history, high degree of liquidity and the availability of administrative expense status for the utility as sufficient assurance of payment. *Id*. at 650-51. The court held that even if the language of § 366(b) were read narrowly to require a deposit or some form of security, the bankruptcy court's power to modify the adequate assurance requirement included the power to eliminate any deposit requirement. In instances where adequate assurance is lacking, such assurance may be provided through payment of a deposit or other security by the debtor. *Id.*

Adequate Assurance Under the 2005 Act

The changes to the utility provisions applicable to chapter 11 cases now preclude a bankruptcy court from considering payment history, cash flow, prepetition security, and administrative priority in determining whether a debtor has furnished adequate assurance of future payment. Under the 2005 Act, § 366(c) limits the types of adequate assurance that can be provided in a chapter 11 case by defining adequate assurance to mean only a cash deposit, letter of credit, certificate of deposit, surety bond, prepayment of utility consumption or some other form of security mutually agreed on between the utility and the debtor or the trustee. Moreover, § 366(c)(1)(B) specifically prohibits the use of an administrative expense priority as adequate assurance, even if the parties agree upon it, although a utility likely can voluntarily enter into an agreement not to terminate services in exchange for an administrative expense priority.

Section 366(c)(2) alters what constitutes adequate assurance by essentially requiring the debtor pay what the utility requires, unless the court orders otherwise. Specifically the new rule allows the utility to alter, refuse or discontinue service if the debtor does not provide adequate assurance that is satisfactory to the utility. The utility must receive such adequate assurance within 30 days after the petition date (extending the 20-day period under current law in the case of chapter 11 cases) and may terminate service if the assurances are not provided.

Section 366(c)(3)(A) provides a procedure for contesting the adequate assurance demand of the utility. On request of a party and after notice and a hearing, the court may modify the amount of adequate assurance demanded by the utility. Because § 366(c)(3)(A) refers only to the amount demanded, it is unclear whether the court can also alter the form of adequate assurance if, for example, the utility insists on a cash deposit. However, § 366(c)(3)(B) specifically prohibits the court from considering certain factors that have been used in past cases to determine adequate assurance of future payment. Specifically, the court may not consider the absence of security before the filing of the petition, the timely payment of utility bills before the petition, or the availability of an administrative expense priority for postpetition service in making its determination.

Finally, § 366(c)(4) permits a utility to setoff a prepetition deposit against a prepetition claim, without notice or order of court, notwithstanding any other provision of law. This provision presumably overrides the automatic stay of setoffs in § 362(a)(7), as well as any state procedures that might otherwise have to be followed before a setoff against a deposit could occur.

CASE SUMMARIES

A. PRIORITIES

***Davidson Transfer & Storage Co. v. Teamsters Pension Trust Fund of Philadelphia and Vicinity*, 817 F.2d 1121, (4th. Cir. 1987)**

Davidson Transfer & Storage Company ("Davidson") filed for protection under chapter 11 of the Bankruptcy Code. Prior to 1981, *Davidson* employed over 800 employees and conducted its business through four wholly-owned subsidiaries and four operating divisions. The operating divisions had no individual legal identity. *Davidson* began to experience financial distress in 1980 which was largely attributable to losses incurred by its General Freight Division. As a result of those losses, *Davidson* elected to close the General Freight Division on January 26, 1981 and discharged approximately 600 of its employees. The remainder of *Davidson's* business continued to operate in good faith.

Certain of *Davidson's* discharged employees, the Highway Truck Drivers and Helpers Union, Local 107, the Teamsters Pension Trust Fund of Philadelphia and the Teamsters Health and Welfare Fund of Philadelphia, appealed an order of the district court reversing a determination of the bankruptcy court and denying appellants priority status pursuant to § 507(a)(3) and (4) with regard to their claims against *Davidson*.

Recognizing that *Davidson* was a bankrupt debtor and that "the debtor's business, although much reduced . . . never ceased," the Fourth Circuit held that "the decision of the district court denying all claimants priority status pursuant to § 507 is affirmed." *Davidson* at 1123-24.

***In re New England Cartage Corp.*, 220 B.R. 503 (Bankr. D. Mass. 1998)**

The New England Teamsters Trucking Industry Pension Fund (the "Pension Fund") filed a proof of claim in the amount of $90,762.33, of which the Pension Fund claimed $9,200.77 was entitled to priority under § 507(a)(4) of the Bankruptcy Code. The Teamsters Local Union 653 Health, Welfare & Insurance Fund (the "HWI Fund," together with the Pension Fund, the

"Funds") filed a proof of claim in the amount of $66,987.84, of which the HWI Fund contended that $33,450.05 was entitled to priority under § 507(a)(4).

The chapter 7 trustee objected to both claims, arguing that the Funds overstated the portions of their respective claims entitled to priority and that properly applied, § 507(a)(4) would accord priority treatment to only $8,282.52 of the Pension Fund claim and only $31,873.38 of the HWI Fund claim. In support of his contention, the trustee argued that § 507(a)(4) imposes a $4,000 cap on the total that can be allowed under priorities (3) and (4) for any given employee. The Funds disagreed, arguing that, by its express language, § 507(a)(4) caps only the amount payable per plan, not per covered employee.

The court agreed with the Funds, holding that "§ 507(a)(4)(B) is an aggregate limitation. It limits the total claims that can be paid under fourth priority, not the amount that can be paid to or on account of an individual employee."

In re Allentown Moving & Storage, Inc., 214 B.R. 761 (E.D.Pa. 1997)

Manufacturers Alliance Insurance Company ("MAIC") provided workers compensation and employer's liability benefits to the employees of *Allentown Moving & Storage, Inc. ("Allentown")* under two policies. The premiums were paid by *Allentown*. At the time *Allentown* filed for bankruptcy it had not fully paid MAIC for prepetition coverage. MAIC filed a priority claim for $12,948.00, which represented that portion of the outstanding premiums under both policies incurred within 180 days of the bankruptcy filing. The trustee objected on the basis that MAIC's claim was not entitled to priority status under § 507(a)(4).

The bankruptcy court agreed with the trustee, holding that MAIC's claim was not entitled to priority treatment under § 507(a)(4) because insurance premiums for workers compensation benefits are not "contributions to an employee benefit plan."

The district court affirmed, holding that "Congress did not intend to grant priority to a claim for unpaid pre-petition workers' compensation insurance premiums."

***In re Howard Delivery Service, Inc.*, 403 F.3d 228 (4th Cir. 2005)**

Howard Delivery Service, Inc. ("Howard") filed a chapter 11 bankruptcy petition in the bankruptcy court for the Northern District of West Virginia. Zurich American Insurance Company ("Zurich"), Howard's workers' compensation insurer, filed an unliquidated and unsecured claim in that proceeding, seeking priority status from the bankruptcy court for $410,215 in unpaid workers' compensation premiums and asserting that its claim was entitled to priority under § 507(a)(4) of the Bankruptcy Code.

Both the bankruptcy court and the district court disagreed with Zurich, relegating its claim to the status of a general unsecured creditor.

The Fourth Circuit reversed, holding that Zurich's claim "is entitled to priority and that the judgment of the district court should be reversed." *Id.* at 241.

B. UTILITIES

***In re Good Time Charlie's, Ltd,* 25 B.R. 226 (Bankr. E.D. Pa. 1982)**

In *In re Good Time Charlie's, Ltd***,** the debtor operated a restaurant in defendant's shopping mall. Through agreements between the power company and defendant and between defendant and its tenants, the defendant provided electrical service to all of its tenants including the debtor. One week prior to debtor filing its chapter 11 bankruptcy petition, the defendant terminated the debtor's electrical service due to delinquency in payment. Upon the filing of the bankruptcy petition, the debtor sought a temporary restraining order requiring the defendant to resume electrical service. In its claim for injunctive relief, the debtor asserted that the defendant was a utility within the meaning of § 366 of the Bankruptcy Code.

In granting debtor's request for relief and compelling the defendant to supply electrical service, the court noted that Congress' use of the word "utility" in § 366 instead of "public utility" indicated a legislative intent that entities other than public utilities be considered a utility. The court further noted that Congress intended § 366 to cover utilities that occupied a special position with respect to the debtor such that the debtor could not easily obtain comparable

service. Applying this reasoning to the facts, the court held that while the defendant was not a true monopoly, it clearly occupied a special position with respect to the debtor as its supplier of electricity and for the debtor to obtain comparable service would be entail costly rewiring expenses. As a result, the court granted the debtor's motion and enjoined the defendant from refusing to supply electrical service to the debtor.

In re One Stop Realtour Place, Inc., 268 B.R. 430 (Bankr. E.D. Pa. 2001)

The defendant, a telephone service company, entered into an agreement with the debtor, a real estate and insurance corporation to provide telephone and voicemail services. After failing to receive payment from the debtor for over six months, the defendant suspended the debtor's service and refused to restore service without a cash deposit. Upon filing a chapter 11 petition, the debtor's attorney requested that the debtor's telephone service be restored. The defendant, however, refused to restore service until adequate assurance of payment was received. The chapter 11 case was then converted to a chapter 7 and the debtor filed a complaint against the defendant for refusing to restore service upon being notified of the debtor's bankruptcy filing. The court held that, notwithstanding the deregulation of the telephone industry and competition in the telephone service business, the carrier qualified as a utility under § 366 and therefore was statutorily barred from discriminating against the debtor based on its bankruptcy filing. The court based its finding on the fact that the debtor could not readily obtain comparable service from another entity nor would it be able to keep its current telephone number if it switched service to a new carrier.

In Re Hanratty, 907 F.2d 1418 (3d Cir. 1990)

In *In Re Hanratty*, the debtors sought to require an electric company to provide utility service without payment of a security deposit. The debtors argued that requesting security deposits from customers who had filed bankruptcy, when it did not impose such a requirement on new customers, was discriminatory. Rejecting this argument the Third Circuit Court of Appeals held that under subsection (b) of § 366 a utility is expressly authorized to request a debtor to furnish adequate assurance of payment in the form of a security deposit and may discontinue service within 20 days after the order for relief if such assurance is not received. The court noted that while the provision of the Bankruptcy Code prohibited discrimination by a

utility against a debtor, it did not preclude the utility from requiring customers who have filed for bankruptcy to pay a deposit as adequate assurance of payment pursuant to § 366(b) even though new customers are not required to make such a deposit.

***Virginia Electric and Power Company v. Caldor, Inc.*, 117 F.3d 646 (2d Cir. 1997)**

The debtor, a large retail enterprise, filed a chapter 11 petition. Pursuant to that petition, a hearing was held to determine whether utilities providing service to the debtor and its affiliated companies had received adequate assurance of payment thereby triggering their obligation to continue to provide such utility service in the future. The court held that utilities had received adequate assurance of payment even absent posting any bond, letter of credit or other similar device by the debtor. The court noted that because of the debtor's prepetition payment history and postpetition financial condition, the bankruptcy court would not require the debtor to post any additional security beyond that otherwise available under the Bankruptcy Code as a prerequisite to requiring the utility to continue to provide service to the debtor postpetition.