turnarounds & workouts

News for People Tracking Distressed Businesses

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Clear Channel Confusion

Despite Aberration, Section 363 Asset Sales Appear Final

by Julie Schaeffer

Several recent bankruptcies have confirmed traditional wisdom regarding the finality of a Section 363 asset sale – despite an aberrational 2008 decision in *Clear Channel*.

Section 363(b) of the Bankruptcy Code permits a Chapter 11 debtor that has court approval to sell assets of the estate "free and clear of any interest in such property of an entity other than the estate" prior to a Chapter 11 plan confirmation.

Moreover, the Bankruptcy Code helps ensure that the purchased assets will not become subject to appeal and prolonged litigation. "In other words, if a bankruptcy court authorizes a debtor to sell its assets to a good faith purchaser pursuant to a Section 363(b) sale order, and the bankruptcy court does not stay consummation of such sale

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A Changed Landscape?

Bankruptcy Reform Five Years Later

by Dave Buzzell

In April of 2005, the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) was enacted into law. It was commonly held at the time that the legislation would greatly change the landscape of bankruptcy filings, for consumers and businesses alike.

Now, with the five-year anniversary of the bill in the rear view mirror, it's worthwhile to consider whether the bankruptcy professional's journey these past few years has been through altered terrain and, if so, how much of that has been due to BAPCPA.

Jonathan Carson, Co-Founder and Managing Director of Kurtzman Carson Consultants, argues that the bankruptcy landscape has changed, but BAPCPA is only a small part

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What Happened to 2010?

Restructuring Pro Comments on Industry Slowdown

by Julie Schaeffer

Restructuring firms usually get very busy during recessions, but 2010 turned out to be very soft for most in the industry, says William H. Henrich, Vice Chairman of Getzler Henrich & Associates LLC. What happened to 2010 – and what can restructuring professionals expect in the coming months? Below, Henrich offers his perspective.

"There has historically been an extensive amount of work during recessions," says Henrich. "Some companies don't get ahead of the cycle and are late in terms of trimming down cost structures to re-align to the new reality."

In the most recent recession, Henrich adds, institutions stopped lending and credit markets froze, exacerbating the problem. "Banks didn't want to take any more losses, so

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pending appeal, then the sale cannot be unwound once consummated, even if the underlying sale order is later challenged on appeal," says Joseph Basile a partner at Weil, Gotshal & Manges.

Although most U.S. appellate courts have recognized this so-called "statutory mootness rule," the bankruptcy appellate panel of the Ninth Circuit U.S. Court of Appeals struck it a blow in 2008.

In *Clear Channel*, a senior creditor purchased a bankruptcy estate's assets under Section 363(b). Although the bankruptcy court's sale order permitted the senior creditor to acquire the assets free and clear of the liens previously held by a junior creditor, the bankruptcy appellate panel overturned this order, thus unwinding the "free and clear" transfer of the 363 sale.

"The bankruptcy appellate panel acknowledged that no stay was granted pending appeal, the sale was consummated during the appeals process, and the senior creditor purchased the assets in good faith," says Basile. "But it concluded that Section 363(m) did not protect all terms of the final sale, only the fundamental transfer of title to the assets."

The bankruptcy appellate panel's holding, which essentially maintained that the asset transfer was valid but made the transfer subject to the pre-existing liens of junior creditors, made the sale economically inviable – and left "the business and legal communities to wallow in uncertainty regarding whether finality can truly be obtained in a consummated sale under Section 363(b)," says Basile.

Since the *Clear Channel* ruling, other appellate courts have emphasized the importance of the statutory mootness rule.

For example, in 2009, in *Nashville Senior Living*, appellants asked the Sixth Circuit bankruptcy appellate panel whether a bankruptcy court erred in granting a motion to sell a Chapter 11 debtor's property under Section 363. The bankruptcy appellate panel ruled that because the purchaser acted in good faith and because the Section 363 sale was unstayed and had been consummated, the appeal was moot. This opinion was upheld on appeal by the Sixth Circuit Court of Appeals, which emphasized the importance of "affording finality to judgments approving sales in bankruptcy."

In 2010, in *Polaroid Corporation*, a Section 363(b) sale stripped pre-existing

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of the reason. "The macroeconomic environment primarily impacted how we perceive the evolution of Chapter 11 cases in the last five years. While bankruptcy reform played a part in its evolution, it hasn't significantly shifted the Chapter 11 landscape."

Aaron Hammer, Chair of the Bankruptcy, Reorganization and Creditor's Rights Practice Group at Freeborn & Peters, LLP, concurs, saying that, "It's hard to evaluate BAPCPA in a vacuum given that the economic circumstances have changed so much since 2005."

Those changing circumstances include, according to Hammer, a scarcity of capital in the aftermath of the credit crisis following the collapse of Lehman Brothers; the growth of online sales, which has impacted big box retailers; a sharp decline in the value of real estate and leasehold interests, which has made retail restructurings more difficult; and a growing aversion to risk on the part of lenders. Consequently, says Hammer, a conflux of economic conditions has led to far fewer attempts to reorganize, with liquidations generally being driven by the lenders. "Cases are shorter, they are more liquidation oriented, and the most successful are prepackaged reorganizations."

Both say that through all the economic turmoil, BAPCPA has actually served relatively well. "While BAPCPA has made restructurings more complex and less likely to facilitate reorganization – although the final verdict is still out on that – it has allowed restructuring professionals to be more creative," says Hammer.

To the extent that the act has changed the lay of the land, several provisions are to blame. "A few main provisions were modified," says Carson, "and the ones the industry thought would have the most impact back in 2005 were, in fact, the ones that have had the most impact."

Section 365(d)(4)

The first of these is the lease modification provisions of Section 365(d)(4). Previously, the Bankruptcy Code required debtors to assume or reject leases within 60 days of filing, but that deadline could be extended for cause, which it routinely was, often for months and sometimes for years.

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they had to determine which companies to support and which to write off," he says.

That, Henrich says, led to significant restructuring activity at the beginning of the recession. "In 2007 and 2008 there was a tremendous amount of activity for companies trying to figure out how to survive by cutting cost structures and by banks and other creditors trying to figure out how to deal with troubled borrowers," he says.

Many larger companies with complex capital structures went through Chapter 11 to clean up their balance sheets, says Henrich, but his firm also saw a significant amount of out-of-court workouts. "People have realized how significant the costs associated with bankruptcies are and want to avoid them, especially when they have cooperative parties involved."

That all changed in 2009, Henrich says. "Most of us in the industry thought 2009 and 2010 would be as active as 2007 and 2008 had been, but in fact, the opposite was the case: Late 2009 and 2010 turned out to be very soft."

That, Henrich continues, is because banks were going through a period of what the industry calls "extend and pretend." Companies may not have been performing well, he says, but as long as they were relatively stable, banks were letting them extend their lines because they didn't want to take any more losses.

"As long as companies weren't asking for more concessions or more money, perhaps in the form of interest deferral or moratoriums, banks were modifying their credit agreements," says Henrich. "After all, what were the banks going to do? Push them to a transaction that at the time couldn't get effected? Push them to a refinancing when the credit markets were tight? Push them to a sale when the values were low? Those weren't options, so restructuring activity stalled in many ways."

The result, says Henrich, is that business for many restructuring firms slowed. Getzler Henrich & Associates saw different levels of activity in 2010: Solid business through April, a lull in May and June, followed by an "opening of the floodgates" in July that extended through the fall. But many firms, particularly the larger ones, which had staffed up in 2007 and 2008, slowed to the point that they had to cut staff in 2009 and 2010. "We witnessed significant layoffs in the

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Research Report

Who's Who in Appleseed's Intermediate Holdings LLC

by Francoise C. Arsenault

Appleseed's Intermediate Holdings LLC, doing business as Orchard Brands, is a direct-to-consumer retailer with a portfolio of more than 15 brands targeting the age 55 and up senior demographic. The company's titles, which offer apparel, accessories, and shoes, as well as home and garden and health products, include Appleseed's, Bedford Fair Lifestyles, Blair Corporation, Coward Shoes, Gold Violin LLC, Haband Company, Intimate Appeal, Linen Source, Inc., Monterey Bay Clothing Company, Norm Thompson Outfitters, Old Pueblo Traders, Sahalie, Solutions, The Tog Shop, Willow Ridge, Draper's & Damons, WinterSilks LLC, and Crosstown Traders, Inc. With its acquisition of Linen Source in 2010 and Crosstown Traders in 2008, Orchard Brands reported a significant increase in its revenues through its catalogs, e-commerce sites, and Appleseed's retail stores in New England and Draper's & Damon's stores in six states. Orchard Brands, which is headquartered in Beverly, Massachusetts, had about 6,500 employees at the end of December 2010. The company reported about $954.3 million in net sales in 2009 and approximately $881.5 million in net sales in 2010.

In September 2005, Appleseed's was acquired by Golden Gate Capital Corporation, a leading private equity firm with about $9 billion in capital under management. Golden Gate Capital Corporation is also the parent company of Eddie Bauer Holdings, Inc., Zale Corporation, Express, a clothing retailer, and Romano's Macaroni Grill.

In October 2010, Golden Gate Capital hired Moelis & Company LLC to explore options for either selling or restructuring Orchard Brands, which owed its creditors more than $700 million. After attempts to sell the company outside of bankruptcy failed, Appleseed's Intermediate Holdings and 27 of its affiliates filed for Chapter 11 in the United States Bankruptcy Court for the District of Delaware on January 19, 2011. In its Chapter 11 filing, Orchards Brands listed debts in excess of $1 billion. Orchard Brands filed the pre-packaged bankruptcy with the support of nearly all of the company's secured lenders. Through its proposed Plan of Reorganization, Orchard Brands was seeking to restructure approximately $725 million in funded indebtedness through a debt for equity exchange and a $40 million investment.

On February 23, 2011, Orchard Brands received final court approval of $140 million in DIP financing provided by its current secured lenders, including UBS AG, Stamford Branch, and Ableco Finance, as administrative agents. The company also secured $120 million in exit financing to help facilitate consummation of a modified Plan of Reorganization. The modified plan incorporates a global settlement among the company, more than 80 percent of the company's first lien lenders, 100 percent of its second lien lenders, and the Official Committee of Unsecured Creditors. The modified Plan of Reorganization, which must be approved by May 21, 2011, will allow Orchard Brands to eliminate approximately $420 million of indebtedness. A hearing on the Disclosure Statement has been scheduled for March 1. Company officials have stated that Orchard Brands should emerge from bankruptcy sometime in April 2011.

In late February, Orchard Brands announced that it will close its call center based in Athens, Georgia and transfer the work to an existing call facility in northwestern Pennsylvania, a move that will result in the termination of 420 jobs.

The Debtor

T. Neale Attenborough is the Chairman of the Board of Directors, Chief Executive Officer, and President of Appleseed Intermediate Holdings LLC. **Daniel W. Ramsey** is the Secretary.

Kirkland & Ellis LLP is serving as the bankruptcy counsel to Orchard Brands. **Richard M. Cieri**, **Joshua A. Sussberg**, and **Joseph Serino, Jr.**, partners with the firm, are directing the work. **Brian E. Schartz**, **Peter Tsao**, **Manoj Ramia**, and **Kristina Alexandra**, associates, also are working on the case.

Klehr Harrison Harvey Branzburg LLP is acting as the Delaware and co-bankruptcy counsel to Orchard Brands. The team includes **Dominic E. Pacitti**, a partner with the firm, **Michael W. Yurkewicz**, of counsel, and **Margaret M. Manning**, an associate.

Alvarez & Marsal North America, LLC is serving as the restructuring advisor to Orchard Brands. **Robert A. Campagna**, a senior vice president and managing director with the firm, is directing the work.

Moelis & Company LLC is the investment banker and financial advisor and capital markets advisor to Orchard Brands. **Gregory Shaia** and **Jared J. Dermont**, managing directors, head up the team.

PricewaterhouseCoopers LLC is providing independent accounting and tax advisory services to Orchard Brands. **Daniel R. Hutchins**, a partner in the firm's Boston office, leads the engagement.

Sard Verbinnen & Co. is serving as the communications and public relations advisor to Orchard Brands. The team includes **Denise DesChenes**, a managing director, and **Robin Weinberg**, a principal.

The Official Committee of Unsecured Creditors

The Committee includes **R.R. Donnelley & Sons Company**; **Gould Paper Corporation**; **News America Marketing**; **Seasons Apparel Inc.**; and **Vallassis**.

Cooley LLP is serving as the lead counsel to the Committee. **Jay R. Indyke** and **Cathy Hershcopf**, partners in the firm's New York office, direct the work. Also working on the case are **Brent Weisenberg**, and **Richelle Kalnit**, associates with the firm.

Drinker Biddle & Reath LLP is acting as the Delaware and co-counsel to the Committee. The team includes **Robert K. Malone**, **Michael P. Pompeo**, and **Howard A. Cohen**, all partners with the firm.

Carl Marks Advisory Group, LLC is the financial advisor to the Committee. **Mark L. Claster** and **Charles C. Reardon**, partners with the firm, are working on the engagement.

The Trustee

The U.S. Trustee is **Roberta A. DeAngelis**.

The Judge

The judge is the **Honorable Kevin Gross**. ¤

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liens, leading to a transfer of unencumbered title to the purchaser. The lienholders asked for their liens to be reinstated, arguing that doing so would not invalidate the sale order, but merely preserve their pre-existing rights. The U.S. Court of Appeals for the Eighth Circuit disagreed, holding that reinstatement of the liens would effectively unwind the benefit of the bargained-for sale.

Also in 2010, *Westpoint Stevens* took the issue a step further. In that case, a group of secured creditors led by Carl C. Icahn (which held a majority of the second-lien debt of $165 million and 40 percent of the

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Section 365(d)(4) now imposes a hard cap of 210 days. "The change was actively supported by the landlord lobby," says Carson. "They wanted some certainty, and Congress gave it to them."

As a result, says Carson, a retailer's hand is forced after seven months and with noticing rules, 30 days' motion, and so forth, that deadline becomes even shorter. "It's hard for companies that want to sell to find a buyer in such a short amount of time. It means that companies are going to have to spend more time in advance preparing for the bankruptcy process, including doing all their lease analyses."

As Carson sees it, when the financial crisis hit, Section 365(d)(4) compounded a difficult situation. "As companies struggled to find debtor-in-possession financing, they were hurt by not having more time to manage their leases. For most large retail Chapter 11s in the last few years – Linens 'n Things, Steve and Barry's, Circuit City – seven months was not adequate for undertaking appropriate lease analysis. It's fair to say that many retailers that ended up with liquidating in Chapter 11 would have had a better chance to reorganize had they had more time to market their leases appropriately to potential buyers."

"I don't see how a major retailer with thousands of stores can effectively reorganize within that 210-day period," adds Hammer. "This singular provision has been widely criticized as unnecessarily causing the liquidation of several big box retailers."

Nonetheless, the verdict remains out as to how much the economy is a factor, Hammer continues. "We're still in a situation where asset values are declining and online sales are growing. Perhaps some are looking to fit a round peg into a square

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industry last year," he says.

Today, according to Henrich, the economic situation has improved and, as a result, banks are starting to compete. "Banks realize that after two or three years of not lending they have to put assets back on books," he says. "Pricing is becoming as competitive as it was during the go-go years of 2003 through 2006, when you saw deals starting in the LIBOR plus 150 range," he says.

That said, he notes that restructuring activity is still soft. "We haven't seen any surge in top-line numbers that would indicate better corporate profitability and cash flow, but banks have in their portfolios a fair number of companies that have been holding their own. As a result, they're currently not inclined to deal with the credits that are borderline."

Henrich sees shifts that indicate that restructuring activity could pick up this year, however. "You see some changes in the players, such as new finance companies being developed, which is a sign that the credit markets have opened up, and institutions that have started asset-based lending units," he says. "And people are starting to actually service the lower to middle markets a little more than they have."

These are positive signs in Henrich's view. "As the market improves, refinancings continue to get more active, private equity groups start investing again (which they are starting to do now), and transactions become a little more routine – then you'll see the banks start dealing with the problems more. When the banks realize there is opportunity to put more assets on the books, they'll want to churn some old ones out, and will be able to afford to take some hits associated with doing so."

While that, says Henrich, is at least six months down the road, it doesn't stop restructuring professional from wondering – and hoping. "It's an industry of wishful thinkers." ¤

Calendar

The National Association of Bankruptcy Trustees
2011 Spring Seminar
March 25-27, 2011
Loews Santa Monica
Santa Monica, CA
Contact: www.nabt.com

American Bankruptcy Institute
29th Annual Spring Meeting
March 31 - April 3, 2011
Gaylord National Resort and Convention Center
National Harbor, MD
Contact: www.abiworld.org

Practising Law Institute
Bankruptcy & Reorganizations: Current Developments 2011 Seminar
April 14-15, 2011
New York, NY
Contact: www.pli.edu

Turnaround Management Association
TMA 2011 Spring Conference
April 27–29, 2011
JW Marriott Chicago
Chicago, IL
Contact: www.turnaround.org

Association of Insolvency & Restructuring Advisors
27th Annual Bankruptcy & Restructuring Conference
June 8-11, 2011
InterContinental Boston
Boston, MA
Contact: www.aira.org

American Risk and Insurance Association
ARIA 2011 Annual Meeting
August 7-10, 2011
San Diego Marriott Hotel & Marina
San Diego, CA
www.aria.org

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Special Report

Restructuring Departments of European Accounting Firms

Firm	Senior Professionals	Representative Clients/Industries
BDO – London 55 Baker Street London W1U 7EU www.bdo.uk.com	Shay Bannon (shay.bannon@bdo.co.uk) Malcolm Cohen (malcolm.cohen@bdo.co.uk) David Gilbert (david.h.gilbert@bdo.co.uk) David Porter (david.porter@bdo.co.uk) Mike Prangley (mike.prangley@bdo.co.uk) Sarah Rayment (sarah.rayment@bdo.co.uk) Mark Shaw (mark.shaw@bdo.co.uk)	Banks and Financial Institutions Bondholders Law firms Debtors
Deloitte Reorganisation Services Athene Place 66 Shoe Lane London EC4A 3BQ www.deloitte.com	Gerry Loftus (geloftus@deloitte.co.uk) Neville Kahn (nkahn@deloitte.co.uk) Guillaume Cornu (gcornu@deloitte.fr) Jochen Wentzler (jwentzler@deloitte.de) Roland Haage (rhaage@deloitte.de) Manuel Roca de Togores (mrocadetogores@deloitte.es) Alex Flatz (alflatz@deloitte.com) David Carson (dcarson@deloitte.ie) Ulf Nolen (unolen@deloitte.se)	Banks and Financial Institutions Corporates Lawyers Government and Public Sector Private Equity and Investors Bondholders Trustees
Ernst & Young 1 More London Place London SE1 2AF www.ey.com/uk	Alan Bloom (abloom@uk.ey.com) Liz Bingham (lbingham@uk.ey.com) Colin Dempster (cdempster@uk.ey.com) Alan Hudson (ahudson@uk.ey.com)	Debtors Banks and Financial Institutions Private Equity Automotive Chemicals Retail
Grant Thornton UK LLP 30 Finsbury Square London EC2P 2YU www.grantthornton.co.uk	Richard Joyce (richard.joyce@uk.gt.com) Oliver Colling (oliver.e.colling@uk.gt.com) Lushani Kodituwakku (lushani.kodituwakku@uk.gt.com)	Banks and Financial Institutions Bondholders Corporates Hedge Funds Private Equity Houses
KPMG ELLP 8 Salisbury Square London EC4Y 8BB www.kpmg.com	Tammo Andersch (tandersch@kpmg.de) Pascal Bonnet (pascalbonnet@kpmg.com) Angel Martin Torres (amartin@kpmg.es) Federico Bonanni (fbonanni@kpmg.it) Klaas Wagenaar (wagenaar.klaas@kpmg.nl) David Burlison (davidburlison@kpmg.com) Stephen Miller (stephenmiller@kpmg.ru)	Lenders Law Firms Private Equity Hedge Funds Corporates
Moore Stephens LLP 150 Aldersgate Street London EC1A 4AB www.moorestephens.co.uk	Phillip Sykes (phillip.sykes@moorestephens.com) Jeremy Willmont (jeremy.willmont@moorestephens.com) David Rolph (david.rolph@moorestephens.com)	Banks and Financial Institutions Bondholders Law Firms Debtors Private Equity
PricewaterhouseCoopers Business Recovery Services Plumtree Court London EC4A 4HT www.pwc.co.uk	Barry Ross (barry.ross@uk.pwc.com) Tony Lomas (tony.lomas@uk.pwc.com) Steve Russell (steve.j.russell@uk.pwc.com) Steven Pearson (steven.pearson@uk.pwc.com) Mark Batten (mark.c.batten@uk.pwc.com)	Debtors Banks and Financial Institutions Private Equity Bondholders Government and Public Sector International Dynamic for Lenders
Zolfo Cooper 10 Fleet Place London EC4M 7RB www.zolfocooper.com	Simon Freakley (sfreakley@zolfocooper.eu) Simon Appell (sappell@zolfocooper.eu) Alastair Beveridge (abeveridge@zolfocooper.eu) Peter Saville (psaville@zolfocooper.eu) Anne-Marie Laing (alaing@zolfocooper.eu) Paul Hemming (phemming@zolfocooper.eu) Gary Squires (gsquires@zolfocooper.eu) Fraser Gray (fgray@zolfocooper.eu) Peter Holder (pholder@zolfocooper.eu) Nick Cropper (ncropper@zolfocooper.eu) Graeme Smith (gsmith@zolfocooper.eu) Simon Longfield (slongfield@zolfocooper.eu)	Lenders Private Equity Hedge Funds Bondholders Law Firms Corporates Pension Funds

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Worth Reading

Titans of Takeover

Author: Robert Slater
Publisher: Beard Books
Softcover: 252 pages
List Price: $34.95

Once upon a time – and for a very long time – corporate behemoths decided for themselves when and if they would merge. No doubt such decisions were reached the civilized way, in a proper men's club with plenty of good brandy and cigars. Like giants, they strode Wall Street, fearing no one save the odd trust-busting politico, mutton-chopped at the turn of the twentieth century, perhaps mustachioed in the 1960s when the word was no longer *trust* but *monopoly*.

Then came the decade of the 1980s. Enter the corporate raiders, men with cash on hand, shrewd business sense, and not a shred of reverence for the Way Things Have Always Been Done. These businesspeople – T. Boone Pickens, Carl Icahn, Saul Steinberg, Ted Turner – saw what others missed: that many of the corporate giants were anomalies, possessed of assets well worth possessing yet with stock market performances so unimpressive that they could be had for bargain prices. When the corporate raiders needed expert help, enter the investment bankers (Joseph Perella and Bruce Wasserstein) and the M&A attorneys (Joseph Flom and Martin Lipton). And when the merger went through, enter the arbitragers who took advantage of stock run-ups, people like Ivan "Greed is Good" Boesky.

The takeover frenzy of the 1980s looked like a game of Monopoly come to life, where billion-dollar companies seemed to change ownership as quickly as Boardwalk or Park Place on a sweet roll of the dice. By mid-decade, every industry had been affected: in 1985, 3,000 transactions took place, worth a record-breaking $200 billion. The players caught the fancy of the media and began showing up in the news until their faces were almost as familiar to the public as the postman's. As a result, Jane and John Q. Citizen's interest in Wall Street began its climb from near zero to where it is today.

What caused the avalanche of activity? Three words: President Ronald Reagan. Perhaps his most firmly held conviction was that Big Business was being shackled by the antitrust laws, deprived a fair fight against foreign competitors that had no equivalent of the Clayton Act in their homelands. Reagan took office on January 20, 1981, and it wasn't long after that that his Attorney General, William French Smith, trotted before the D.C. bar to opine that: "Business does not necessarily mean badness. Efficient firms should not be hobbled under the guise of antitrust enforcement." (This new approach may have been a necessary corrective to the over-zealousness of earlier years, exemplified by the Supreme Court's 1966 decision upholding an enforcement action against the merger of two supermarket chains because the Court felt their combined share of eight percent (yes, that's eight percent) of the Los Angeles market was potentially anticompetitive.)

Raiders, investment bankers, lawyers, and arbitragers, plus the fun couple Bill Agree and Many Cunningham – remember them? – are the personalities profiled in Robert Slater's book, originally published in 1987. Slater is a wonderful writer, and he's given us a book no less readable for being stuffed with facts, many of them based on exclusive behind-the-scenes interviews. ¤

Robert Slater holds degrees from the University of Pennsylvania and the London School of Economics, and has authored several business books, which have been on the best-seller lists. He has been a journalist for Newsweek *and* Time.

This book may be ordered by calling 888-563-4573 or by visiting www.beardbooks.com or through your favorite Internet or local bookseller.

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first-lien debt) submitted the winning bid for control of Westpoint Stevens. A second group of secured creditors led by Wilbur L. Ross, Jr. (which held a majority of the debtor's first-lien debt of $488 million) objected to the Icahn group's plan and, seeking a greater stake in the sale proceeds, appealed to the district court, moving to stay the sale.

However, rather than litigate the stay and attempt to prevent the closing, the Ross group agreed to allow the sale to close on certain terms. Specifically, it wanted the distribution of equity to second-lien lenders delayed pending further litigation regarding the relative rights of the first-lien lenders and second-lien lenders.

In looking at the appeal after the sale closed, the district court ruled that the distribution of equity to the second-lien lenders violated the intercreditor agreement between the first-lien lenders and the second-lien lenders because the agreement provided, as most intercreditor agreements do, that the second-lien lenders were not entitled to any distribution unless the first-lien lenders were paid in full in cash.

The Second Circuit Court of Appeals reversed the district court's decision, ruling that Section 363 barred the district court from modifying the sale order – even though that sale order was contrary to the pre-petition intercreditor arrangements.

According to Basile, these recent cases suggest that unstayed Section 363 sales to good faith purchasers are final in most jurisdictions.

"These recent reaffirmations of finality under Section 363(m), when viewed in light of pre-existing case law in many of these jurisdictions, show a general trend toward establishing *Clear Channel* as more 'aberration' than law of the land," says Basile.

Basile notes, however, that as Westpoint showed, it is important to obtain a stay of the entire sale order to protect a secured creditor against a sale of assets free and clear of existing liens pending resolution of any aspect of the proposed sale.

And Partner Paul Daley and Counsel Joel Millar in WilmerHale's financial restructuring practice group say the Westpoint decision brings up other concerns – namely, that the enforceability of an intercreditor agreement in bankruptcy cannot be assumed, and first-lien lenders may be required to act carefully and strategically to protect their contractual seniority. ¤

Special Report

People to Watch – 2011
Business Professionals Making Their Mark

Name	Firm	Outstanding Achievements
Elizabeth Abrams	Miller Buckfire & Co. New York, NY Elizabeth.abrams@ millerbuckfire.com	Financial advisor to General Growth Properties, among the largest - $27.3 billion in debt - and most complex restructurings ever. Notable for creditors being paid in full; equity holders receiving substantial return; the first Chapter 11 debtor to relist on the NYSE prior to emergence from bankruptcy. Represented American Capital (ACAS), in its restructuring in late June 2010.
John R. Boken	Zolfo Cooper New York / Los Angeles jboken@zolfocooper.com	In 2010 concurrently served as CRO for Flying J in complex Chapter 11 restructuring that delivered full recovery in cash plus interest to over 1.8 billion in creditor claims and retained significant value for pre-petition equity. Since 2008 has served as CEO/CRO for TOUSA in complex wind-down case dominated by a closely followed fraudulent conveyance ruling.
Rick Heller	Carl Marks Advisory Group New York, NY rheller@carlmarks.com	Served as interim CEO for Sleep Innovations, transforming an $18 million EBITDA loss into a $29 million EBITDA profit in 12 months by reducing costs, eliminating unprofitable accounts, consolidating plants, improving the supply chain, etc.
William H. Henrich	Getzler Henrich & Associates New York, NY whenrich@getzlerhenrich.com	CRO, Moonlight Basin – guided Lehman-financed Montana ski resort through Chapter 11. CRO, Precision Valve Corporation – steered nearly $30 million EBITDA improvement, negotiated restructured credit agreement, and advised on recapitalization transactions. Co-CRO, National Envelope Company – successfully led through 363 sale yielding substantial creditor recovery.
David Herman	Gordian Group New York, NY dh@gordiangroup.com	Notable engagements in the past year include Lexington Precision, Ramsey Industries, Spansion, Schutt Sports, and TLC Vision. Prior assignments include Enron, IES, LTV Steel, Mississippi Chemical, Parmalat, RAB Food, Solutia, Summit Global Logistics, and United Rentals.
David C. Johnston	AlixPartners New York, NY djohnston@alixpartners.com	CFO for the $3.5 billion distressed consultancy BearingPoint, an engagement named TMA's Mega Transaction of the Year for maintaining company operations while executing a series of strategic sales leading to 100% recovery for lenders in 7 months. Also served in interim management or advisory roles at Remy International, Calpine, SemGroup, and others.
M. Benjamin Jones	Conway Del Genio Gries & Co. New York, NY bjones@cdgco.com	Interim CFO and 363 sale advisor to Penn Traffic, $1 billion retailer – 4,000 jobs saved with major recoveries to all creditors; CRO of Haven Healthcare, $300 million operator – orderly break-up and return of assets to creditors with no patient care or regulatory issues; restructuring advisor to Caraustar, $700 million packaging company – pre-negotiated Chapter 11 accomplished in less than 90 days.
Sheon Karol	CRG Partners New York, NY Sheon.Karol@CRGPartners.com	CRO of $1 billion private company, including successful renegotiation of its debt. Financial advisor to Grupo Mexico in its successful retention of equity in ASARCO's contested confirmation hearing. Financial advisor to a bio-pharma company in successful renegotiation of its debt. Advisor to CRO in sale of Texas Rangers baseball team.
Edna Lee	Mesirow Financial Consulting New York, NY elee@mesirowfinancial.com	Currently serving as financial advisor to The Brown Publishing Company, certain noteholders in the bankruptcy of Tribune, and litigation trustee in bankruptcy of Quebecor. Other notable engagements include advising UCC of Chrysler, Atlas Air, UAL, and lenders to REIT with $3 billion in CDOs.
Ari Lefkovits	Lazard New York, NY ari.lefkovits@lazard.com	Led Lazard team in role as FA in several high-profile hotel and real estate development company restructurings: $3.9 billion sale of Extended Stay hotels, reorganization of Crescent Resources, and ongoing negotiations in the nearly $2 billion Highland Hospitality restructuring.
Seymour Preston, Jr.	Goldin Associates New York, NY spreston@goldinassociates.com	Successfully advised lenders in Lyondell and bondholders in Abitibi Bowater cases in connection with contested confirmation hearings. Also advised Tribune creditors committee, Lehman SIPC trustee, ResCap directors, and major creditor to Taylor Bean Whittaker.
Dennis Stogsdill	Alvarez & Marsal New York, NY dstogsdill@alvarezandmarsal. com	Co-head of A&M's Creditor Advisory Group. Notable creditor assignments include Mark IV, Lee Enterprises, Oriental Trading, Oneida, and Exide Technologies. Has also served on company side advising EnviroSolutions, McClatchy, and as CRO of international medical device company.
David Tolly	Focus Management Group Tampa, FL d.tolly@focusmg.com	$367 million manufacturer/distributor of fashion wear – FA to lender to Wachovia during bankruptcy and 363 sale. $118 million food vending comp – prepared situational analysis for Capital Source. $568 million manufacturer of tubing and piping – engaged by CIT to evaluate business plans and possible sale. $87 million producer of recycled paper pulp – FA then became CRO to conduct private sale.
Mark Welch	MorrisAnderson Pittsburgh, PA/Cleveland, OH mwelch@morrisanderson.com	Recent work includes financial advisor to Gulfstream Crane, CRO to Zieger Crane, bank financial advisor on SpringBok, UCC financial advisor on Mount Vernon Monetary Management.
Steven R. Wybo	Conway MacKenzie Birmingham, MI SWybo@ConwayMacKenzie. com	Recently advised a $350 million jail management company; $500 million automotive supplier; $150 million automotive supplier, serving as interim CFO; and Plastech, a $1 billion automotive supplier, assisting in orderly sale of two divisions in a bankruptcy case that resulted in a significant recovery where DIP lenders were paid in full.

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Landscape, *from page 4*

hole in blaming 365(d)(4) for big box retailer liquidations. The reality is that a confluence of factors are responsible, with 365(d)(4) not helping, particularly for the large retailers."

Section 1121

Five years ago, the exclusivity provisions also underwent a change. Section 1121 of the Bankruptcy Code gives a debtor the exclusive right to file a plan of reorganization for 120 days after a bankruptcy petition date. In practice, this deadline was commonly extended – that is, until BAPCPA specifically set a hard deadline of 18 months.

There has been ongoing debate as to whether the new exclusivity provision has hampered reorganizations, especially for complex megadeals, but Carson doesn't think this has necessarily been the case. "In certain restructurings involving government agencies or numerous stakeholders, then, yes, 18 months may not be an adequate amount of time to reorganize."

However, as to any evidence that the average duration of a large company bankruptcy case has decreased, Carson says the cause is mostly a result of the economic crisis, which brought about liquidity challenges and forced companies to pursue shorter bankruptcies. "The fact that companies have moved to bankruptcy in record speed the last couple years is more attributable to macroeconomic conditions within the capital markets than bankruptcy reform," Carson says.

Hammer also does not view Section 1121 as the underlying cause of shorter bankruptcies, nor has it resulted in more companies collapsing in Chapter 11. Still, he notes that successful reorganizations of large-scale corporations such as United Airlines often took years. "While restructuring professionals can understand the motivation behind the 18-month hard cap, it's unrealistic for large, complex restructurings, especially those involving government relationships."

Section 503(b)(9)

Another much-discussed part of the new Bankruptcy Code is Section 503(b)(9), which created a new type of administrative priority claim for the value of any goods received by the debtor within 20 days before the date of the filing.

Thus, in order to confirm a Chapter 11 plan of reorganization, the debtor has to pay such administrative claims in full. The problem, says Hammer, is that "as you start layering on additional significant administrative claims, reorganization becomes that much more expensive – you cannot just jam a 503(b)(9) creditor and pay him 10 cents on the dollar."

While it can significantly impact a reorganization, Hammer says that experienced corporate restructuring professionals have learned to manage vendors in such a fashion as to minimize 503(b)(9) liability by putting suppliers on prepayment COD, which ensures there is no 503(b)(9) claim. On the other hand, unsecured creditors can be disadvantaged, creating a delicate balancing act. Hammer, whose firm often represents creditors' committees, says, "We are more cognizant than ever of 503(b)(9) liability and of the fact that committee members sometimes have significant 503(b)(9) claims in addition to their unsecured claims. This situation can create conflicts of interest among committee members."

"BAPCPA adds layers of complexity to case administration," says Carson. "It challenges corporate restructuring professionals to navigate the Chapter 11 process in new and creative ways."

Section 366

Finally, there's Section 366, which requires utilities to continue to provide service without disruption to a company that files for bankruptcy, provided that the debtor provides adequate assurance that it will pay its utility bills post petition. While Section 366 protects debtors entering bankruptcy from having utilities suspended, Hammer says that the provision effectively allows utilities to decide what constitutes adequate assurance, which is typically some form of large deposit. "That's more cash the debtor needs to navigate this one particular aspect of the reorganization," says Hammer. "Sometimes it can be significant. For example, the primary vendors to a reseller of communication services could be utilities and if they are seeking huge deposits, it might sink a case absent some creative solution."

The last five years have been eventful for bankruptcy professionals. Not long after BAPCPA was enacted, tilting the scales in the direction of creditors, the country plunged into a recession, creating a deluge of debtors.

While restructuring may get easier as the economy rebounds, both Carson and Hammer believe that Chapter 11 cases have and will continue to grow more complex every year. "You need to be more substantive in how you craft solutions," says Carson. "You have to be proactive and in front of creating these solutions, not reactive to the marketplace. This reality applies not just to law firms, but to investment bankers, financial advisors, and claims agents." ¤

The Gnome will return in next month's issue of Turnarounds & Workouts.

In the Next Issue…

- *Special Report: Regional and Local Bankruptcy Accounting Firms*
- *Special Report: Outstanding Young Restructuring Lawyers*
- *Research Report: Who's Who in Borders Groups, Inc.*

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