turnarounds & workouts
News for People Tracking Distressed Businesses
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Inside

Insurers Win!

Landmark Ruling in Thorpe Insulation Settlement Case

by Julie Schaeffer

Insurance companies that were denied standing to challenge Thorpe Insulation Company's plan of reorganization may be heard in the bankruptcy court, the U.S. Court of Appeals for the Ninth Circuit has ruled. This ruling will affect mass tort asbestos bankruptcies, and has the potential to affect commercial bankruptcies in general.

Thorpe Insulation distributes, installs, and removes thermal insulation products at Southern California oil industrial sites, such as oil refineries and power plants, as well as public buildings, such as schools and hospitals. Many of these products, distributed between 1948 and 1972, contained asbestos. By early 2001, more than 12,000 lawsuits claiming asbestos-related injuries had been filed against Thorpe. Unable to handle the

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Large Bankruptcies Creep Upward

First Quarterly Increase Since 2008

by Dave Buzzell

Bankruptcy filings by large U.S. companies are slowly creeping up after three years of decline. Twenty-three businesses with assets of $100 million or more filed for Chapter 11 between January 1 and March 31 of this year (see chart on page 2). After the first quarter of last year, the number stood at eighteen. The number of large Chapter 11 filings through March of this year is higher than the pre-recession years of 2005 through 2007.

Two of the most recent filings are by companies reporting assets of more than $1 billion. Arcapita Bank and MF Global Holdings USA. Arcapita Bank sought Chapter 11 protection on March 19, and MF Global Holdings USA, a subsidiary of MF Global, filed on March 2.

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Who's Subordinate?

Mezzanine Financing Cases Address Intercreditor Rights

by Julie Schaeffer

Mezzanine financing has exploded in the commercial real estate market, thanks in part to the standardization of intercreditor agreements governing the rights and obligations of senior and junior lenders. Although case law regarding these agreements has been limited, in the aftermath of the liquidity crisis it began to increase. According to Katherine A. Burroughs, a partner at Dechert, such case law can tell us much about intercreditor rights.

Mezzanine financing is a hybrid of debt and equity financing. Essentially, it is debt capital that gives the lender the right to convert to an ownership interest in the company if the loan is not paid back in time and in full. It is generally subordinated to the debt provided by senior lenders, such as banks. Mezzanine financing became popular in the last economic

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mounting liabilities, the company filed for Chapter 11 in order to set up an asbestos settlement trust under Section 524(g) of the Bankruptcy Code.

These trusts are typically set up so that people who may have been exposed to asbestos can potentially obtain financial compensation for resulting illnesses, including mesothelioma. Once the trust receives court approval, all claims for asbestos-related personal injury are channeled to the trust, and certain qualifying parties – including debtors, insurers, and corporate officers – are protected by a channeling injunction. Hence, after the trust is established, no more claims can be made in the tort system against any qualifying party. Those claims have to pass through, and be paid out of, the trust.

The problem with these trusts, says Gary Svirsky, a partner with O'Melveny & Myers LLP, is that they often do not give insurers any ability to handle claims. "The way it normally works is that claims come to the insurer, which then reviews them and – on behalf of the policyholder – either settles them or disputes liability and takes them to trial," he explains. "In the case of a statutory Section 524(g) trust, the trust reviews claims and frequently makes distributions without any involvement from the insurance company. The insurer just gets a bill."

Several insurance companies, including Motor Vehicle Casualty Company and Century Indemnity Company, which issued general liability policies to Thorpe, objected to the type of trust and channeling injunction that Thorpe and other plan proponents sought to set up. But the plan proponents argued that because they were not creditors, the insurers did not have standing to object. Svirsky says that about eight years ago, in the Combustion Engineering case, the Third Circuit held that "so long as a party's rights are unaffected by a bankruptcy, it need not be given an opportunity to object." There, the court fashioned "insurance neutrality" language, pursuant to which (notwithstanding anything in the plan, injunction, or confirmation order) insurers would come out of bankruptcy with exactly the same rights that they had before. Though the bankruptcy court in *Thorpe* purported to rely on that principle in confirming the plan while depriving

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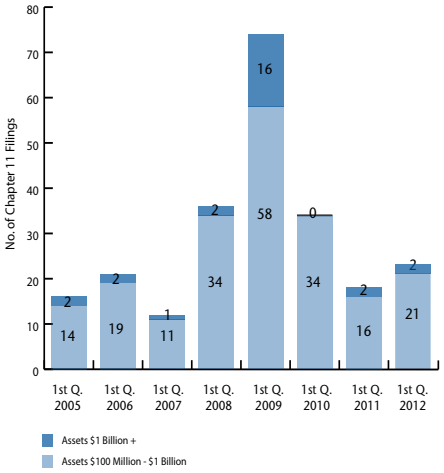
Arcapita Bank is a Bahrain-based private equity firm that manages investments for wealthy Gulf Arab clients. Its holdings, primarily real estate and companies in Europe, Asia, and the U.S., were hit hard by the global financial crisis. Arcapita is being represented by Gibson Dunn & Crutcher. MF Global Holdings USA, a victim of the investment practices of its parent company, is being represented by Morrison & Foerster.

The third largest bankruptcy of 2012 to date is iconic Hostess Brands, maker of Twinkies, Ho-Hos, and Ding-Dongs. In its bankruptcy filing, Hostess estimated assets of nearly $1 billion and debts of $860 million. Jones Day is representing Hostess.

Another notable bankruptcy this year includes Coach America, the country's largest tour and charter bus service operator. Lowenstein Sandler is representing the debtor.

The energy sector remains very much in flux, and neither traditional nor alternative energy suppliers are being spared. The latest casualty in the U.S. solar industry was Energy Conversions Devices, filing on February 14. Around the same time, LSP Energy went bankrupt. LSP owns and operates a gas-fired electric generating facility in Mississippi. Oil and natural gas development company John D. Oil & Gas Company also filed this year.

Chapter 15 filings are also heating up, as many in the restructuring community have predicted. Two of the foreign-owned companies top $1 billion in assets: Elpida Memory, headquartered in Tokyo, makes DRAM products. Catalyst Paper Corp., headquartered in Richmond, Canada, makes paper and newsprint. Those firms are represented by Richards Layton & Finger, and Skadden Arps, respectively. ¤



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boom. Because it is usually provided quickly with little due diligence on the part of the lender and little or no collateral on the part of the borrower, it is aggressively priced, with lenders often seeking returns of 20 to 30 percent.

In 2010, Tishman Speyer Properties, along with its investment partner BlackRock, defaulted on its mortgage at Stuyvesant Town and Peter Cooper Village. A mezzanine lender proposed a UCC foreclosure sale, but it was blocked on the grounds that the intercreditor agreement required the mezzanine lender to first "cure" all senior loan defaults – in essence, repay the mortgage loan prior to foreclosing.

Although a number of facts made the Stuyvesant Town case unique, some courts are following the precedent, as illustrated in the rulings in two cases: *U.S. Bank National Association, Trustee v. RFC CDO 2006-1 Ltd.* and *CSMSC 2007-C2 Broadway Portfolio II, LLC v. OREP/Oxford HY Venture Funding 4, L.P.*

"The emerging trend in these cases has been to determine whether to grant the mortgage lender a preliminary injunction, blocking the mezzanine lender's UCC foreclosure, by focusing primarily on three sections of the intercreditor agreement, addressing, respectively, express conditions to a UCC foreclosure, implied conditions to a UCC foreclosure, and the mortgage lender's right to injunctive relief," says Burroughs.

Specifically, each of the intercreditor agreements in the cases included provisions setting forth express conditions that must precede the mezzanine lender's UCC foreclosure. They also included provisions that the courts interpreted as implying that certain conditions must precede the mezzanine lender's UCC foreclosure.

Additionally, in both cases, the mortgage lender filed suit seeking a preliminary injunction to enjoin the acquisition or sale of the mezzanine collateral until all amounts due under the mortgage loan were paid off in full. "The courts upheld the enforceability of provisions in the applicable intercreditor agreements in which the parties agreed that monetary damages would be insufficient to remedy a breach of the intercreditor and that injunctive relief should be granted," says Burroughs.

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Research Report

Who's Who in Eastman Kodak Company

by Francoise C. Arsenault

Founded in 1889 by George Eastman, Eastman Kodak Company (Kodak) is an imaging and photographic equipment, materials, and services company headquartered in Rochester, New York. During most of the 20th century, Kodak held a dominant position in photographic film. By the late 1990s, however, the company was struggling financially as a result of the transition to digital cameras and the decline in photographic film sales.

In recent years, Kodak has transformed itself from a business primarily based on film and consumer photography to a smaller business with a digital growth strategy focused on the commercialization of proprietary digital imaging and printing technologies. From 2003 to 2010, Kodak negotiated approximately $3 billion of licensing revenue from its digital capture patent portfolio. The company's digital businesses generated approximately 75 percent, or $4.5 billion, of Kodak's revenue in fiscal year 2011. Kodak's digital products include consumer devices, such as self-service photo kiosks and ink jet printers, and business-to-business products and services including its technologically advanced PROSPER commercial inkjet printing systems, electrophotographic printing systems, digital printing plates, high-volume document scanners, and new technologies related to packaging and workflow software solutions.

From 2003 to 2010, Kodak reduced its workforce by about 50,000 employees, and closed 13 of its 15 film plants and 130 photo labs. The transition reduced the workforce to 17,000 employees in 2011 and led to a financially smaller company, with revenues declining from approximately $13.3 billion in 2003 to about $6 billion in 2011. Today, Kodak has 8,900 patent and trademark registrations and applications in the United States, as well as 13,100 foreign patents and trademark registrations or pending registrations in approximately 160 countries.

Since 2008, restructuring costs, legacy post-employment benefits, and recessionary forces have continued to negatively impact the company's liquidity position, ultimately leading to the Chapter 11 filing by Kodak and its U.S. subsidiaries on January 19, 2012, in the United States Bankruptcy Court for the Southern District of New York. In its bankruptcy petition, Kodak listed $5.10 billion in assets and $6.75 billion in liabilities as of September 30, 2011. In February, Kodak obtained court approval for a $950 million DIP credit facility from lenders led by Citigroup Global Markets, Inc. The company anticipates completing its restructuring in 2013.

Attorneys representing Kodak retirees recently filed a motion with the court requesting the appointment of a committee to protect the interests of the retirees. On April 18, the court will hold a hearing on another motion to consider the appointment of an equity security committee to represent shareholder interests (the U.S. Trustee declined to appoint an equity security committee on February 28).

Kodak hopes to complete the sale of more than 1,110 digital imaging patents by this summer. The sale could potentially bring in up to $2 billion. Under the terms of the DIP financing agreement, the bidding procedures must be filed with the court by June 30, 2012.

The Debtor

Antonio M. Perez is the Chairman and CEO of Eastman Kodak. **Philip J. Faraci** is the President and Chief Operating Officer. **Antoinette P. McCorvey** is the Chief Financial Officer and Senior Vice President. **Patrick M. Sheller** is General Counsel, Secretary, Chief Administrative Officer, and Senior Vice President.

Sullivan & Cromwell LLP is bankruptcy counsel to Kodak. The team includes **Andrew G. Dietderich**, a partner, **John J. Jerome**, of counsel, **Michael H. Torkin**, special counsel, and **Mark U. Schneiderman**, an associate specialist.

Young Conaway Stargatt & Taylor, LLP is bankruptcy co-counsel. Working on the case are **Pauline K. Morgan** and **Joseph M. Barry**, partners, and **Sean T. Greecher**, **Kenneth J. Enos**, **Robert F. Poppiti**, **Morgan L. Seward**, and **Ashley Markow**, associates.

Groom Law Group is serving as special employee benefits counsel to Kodak. **Lonie A. Hassel**, a partner with the firm, is the lead attorney.

Linklaters LLP is special foreign counsel. **Rebecca L. Jarvis**, a partner with the firm, directs the work.

Lazard Freres & Co. LLC is the investment banker and financial advisor to Kodak. **David Descoteaux**, a managing director, heads up the team.

AlixPartners LLP is financial advisor to Kodak. **James A. Mesterharm**, a managing director with the firm, is the Kodak Chief Restructuring Officer.

FTI Consulting Inc. is providing Kodak with restructuring advisory services. **Dominic Di Napoli**, vice chairman, and **Randall S. Eisenberg**, a senior managing director, worked on the engagement.

Deloitte Consulting LLP is providing Kodak with actuarial consulting services. **Jason Flynn**, a principal with the firm, leads the engagement.

Ernst &Young LLP is providing Kodak with tax services related to the bankruptcy filing. **Eugene Gramza, Jr.**, a partner, leads the engagement.

PricewaterhouseCoopers is serving as independent auditor, accountant, and tax advisor. The team is led by **Jeff Sorensen**, a partner in the New York office.

The Official Committee of Unsecured Creditors

The Committee includes **Pension Benefit Guaranty Corporation**; **KPP Trustees Limited**; **U.S. Bank National Association**; **Sony Pictures Entertainment Inc.**; **Strategic Procurement Group**; **Walmart Stores, Inc.**; and **Primax Electronics Ltd.**

Milbank, Tweed. Hadley & McCloy LLP is serving as the counsel to the Committee. **Dennis F. Dunne** and **Tyson M. Lomazow**, partners, and **Brian Kinney**, an associate with the firm, are working on the case.

The Trustee

The U.S. trustee is **Tracy Hope Davis**.

The Judge

The judge is the **Honorable Allan L. Gropper**. ¤

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insurers of the chance to be heard, the so-called insurance neutrality provision in *Thorpe* did not leave insurers' rights unaffected post-bankruptcy, according to Svirsky.

In September 2010, the insurers appealed the plan to the U.S. District Court for the Central District of California. Judge Dale S. Fischer approved the bankruptcy judge's creation of a trust to settle Thorpe's asbestos-related debts, noting that the insurers did not have standing to challenge the plan, which he described as "insurance-neutral."

In response, the insurers then appealed to the Ninth Circuit Court of Appeals, which faced two considerations. First, did the insurers have standing to challenge Thorpe's plan of reorganization? Second, was the challenge equitably moot because the trust had started distributing money after plan confirmation, as Thorpe claimed?

Equitable mootness, notes Svirsky, is different from the concept of mootness taught in law schools. "In this context, it refers to the principle that if things have moved so far along before an appeal is heard that it is impossible to correct them, then the appeal is moot," he says. "In the case of *Thorpe*, the debtors argued that they had done all sorts of things that made the plan equitably moot, including paying lawyers, assembling trustees, and distributing money from the trust."

On the issue of standing, the Ninth Circuit ruled that calling the plan insurance-neutral does not settle the issue; the insurers have standing because the plan might increase their liability. The Ninth Circuit held that

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Courts are also following a ruling made in *Bank of America, N.A. v. North LaSalle Limited Partnership,* which held that the assignment of a junior mortgage lender's voting rights contained in an intercreditor agreement was unenforceable in a bankruptcy case.

To illustrate, Burroughs points to *In re SW Boston Hotel Venture, LLC.* In that case, the owner of the Boston SW Hotel and a related condominium project. SW Boston Hotel Venture obtained construction financing from a senior mortgage lender. In order to complete construction of the project, SW Boston also obtained a junior mortgage loan.

The senior and junior lenders entered into an intercreditor agreement. In it, the junior lender agreed to subordinate its rights of payment to the senior lender. The junior lender also assigned its voting rights in the event of any bankruptcy involving SW Boston to the senior lender.

In April of 2010, SW Boston filed for Chapter 11 and, in June 2011, it filed a modified plan of reorganization. The senior lender objected to the plan and, pursuant to the intercreditor agreement terms, submitted a ballot rejecting the plan on behalf of itself as well as the junior lender. The junior lender, however, along with all other classes, voted in favor of the plan, so the senior lender requested that the bankruptcy court strike the junior lender's independent vote. SW Boston and the junior lender opposed the senior lender's exercise of the junior lender's voting rights and further argued that as the senior lender was the only objecting creditor, the plan should be confirmed as a "cramdown" plan.

In its ruling, the bankruptcy court denied the senior lender's request, holding that the assignment of the junior lender's voting rights was unenforceable.

"The bankruptcy court reasoned that an assignment of voting rights in a future Chapter 11 case to a senior lender was contrary to the substantive rights conferred upon creditors under 11 U.S.C. § 1126(a) of the Bankruptcy Code and thus unenforceable," says Burroughs.

The court, says Burroughs, cited the ruling in *North LaSalle*, which noted that because Congress did not intend to permit creditors to alter substantive provisions of bankruptcy law, a creditor cannot waive its rights to vote on a bankruptcy plan.

"The junior mortgage lender's vote accepting the plan was therefore upheld as valid and the bankruptcy court went on to confirm the plan, holding that it satisfied the requirements of a cramdown," says Burroughs.

Brian S. Hermann, a partner in the bankruptcy and corporate reorganization department at Paul, Weiss, Rifkind, Wharton & Garrison LLP, says the intense focus on intercreditor agreements dates back to the mid-2000s, when second-lien debt issuances became prevalent. Key to many intercreditor agreements are bankruptcy give-ups, which, he says, "is all that ever really matters in these things."

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Calendar

American Bankruptcy Institute
30th Annual Spring Meeting
April 19 – 22, 2012
Gaylord Resort & Conference Center
National Harbor, MD
Contact: www.abiworld.org

American Bankruptcy Institute
14th Annual New York City Bankruptcy Conference
May 9, 2012
Marriott Marquis New York
New York, NY
Contact: www.abiworld.org

International Association of Restructuring, Insolvency & Bankruptcy Professionals
Annual Americas Conference
May 20 – 22, 2012
Turnberry Isle Hotel & Resort
Miami, FL
Contact: www.insol.org

Association of Insolvency & Restructuring Advisors
28th Annual Bankruptcy & Restructuring Conference
June 6 – 9, 2012
Grand Hyatt San Francisco
San Francisco, CA
Contact: www.aira.org

Turnaround Management Association
TMA Europe Conference 2012
June 7 – 8, 2012
Hesperia Hotel
Madrid, Spain
Contact: www.tma-europe.org

National Association of Bankruptcy Trustees
2012 Annual Convention
September 5 – 9, 2012
The Broadmoor
Colorado Springs, CO
Contact: www.nabt.com

Beard Group
19th Annual Conference on Distressed Investing
November 26, 2012
The Helmsley Park Lane Hotel
New York, NY
Contact: (240) 629-3300 ¤

Special Report

Regional and Local Bankruptcy Accounting Firms

Firm	Senior Partners/Professionals		Representative Clients
Bederson & Company West Orange, NJ Tel. (973) 736-3333 www.bederson.com	Edward P. Bond Hon. Francis G. Conrad Timothy J. King Charles S. Lunden	Charles N. Persing Sean Raquet Matthew Schwartz	Creditors' committees, debtors, trustees, as well as court-appointed examiners, mediators, fiscal agents, receivers, and fiduciaries. Client industries include automotive, banking and finance, construction, department stores, entertainment, food processors, healthcare, heavy equipment, hospitality, importing & exporting, intellectual property developers, law firms, leasing companies, manufacturing, oil & gas exploration, overseas corporations, publishing, real estate, retail, securities broker/dealers, surgical centers, textiles, trucking, warehousing, and others.
Compton & Wendler Houston, TX Tel. (713) 351-7110 www.cw-cpa.com	Jeff Compton Allen Wendler	Courtney Chlebus	Debtors, creditors, and trustees.
EisnerAmper LLP New York, NY Tel. (212) 949-8700 www.eisneramper.com	Allen Wilen Edward A. Phillips Anthony Calascibetta David Ringer Thomas Buck Joseph Myers	M. Jay Lindenberg Ira Spiegel Ben Kohen Linda Aron William Pedersen Georgiana Nertea	USA United Holdings, Inc. et al, M Slavin and Suns LTD., Yandoli Foods, Inc., PN Chapter 11 Liquidating Trust, Qualteq, Inc. t/a VCT New Jersey, Fabricated Plastics, Global Capacity, Encore Serings, Inc. t/a Peter Nero & The Philly Pops, Miller Healthcare, United Gilsonite, Lower Bucks Hospital, Mill River Foundation, Liberty State Insurance, Emoral, Inc., FKF Madison Partners, Russ Berrie, Burns & Roe Future Claimants Representative, Berlin & Denmar, Room Source, and others.
Ellin & Tucker Baltimore, MD Tel: (410) 727-5735 www.etnet.com	W. Streett Baldwin Edwin R. Brake Todd A. Feuerman Harold I. Hackerman	Joel H. Kaye Steven King Steven S. Manekin Meyer T. Wolman	Industries: automotive, construction, employee benefit plans, health care, hi-tech/ biotech, law firms, manufacturing, professional services, printing, real estate, retail, wholesale distribution.
Ercolini & Company Boston, MA www.recpa.com Tel. (617) 482-5511	William Crane	Michael Bruno	Clients include real estate, professional services, educational institutions, start-up and closely-held businesses, hospitality, retail.
Herbein + Company, Inc. Reading, PA Tel. (610) 378-1175 www.herbein.com	Robert M. Caster Carl D. Herbein	Michael J. Rowley	Debtor, unsecured creditors, trustee, creditors' committee. Industries – banking and financial institutions, construction, energy, food, hospitality and lodging, manufacturing and distribution, nonprofit and government, real estate, senior living.
J.H. Cohn LLP Edison, NJ Tel. (732) 549-0700 www.jhcohn.com	Bernard A. Katz Sharon Bromberg Kevin P. Clancy	Howard Konicov Chad J. Shandler Clifford A. Zucker	Representative Clients: Allen Family Foods (unsecured creditors' committee); Cagle's, Inc. (unsecured creditors' committee); Christ Hospital (unsecured creditors' committee); Hudson Healthcare, Inc. (unsecured creditors' committee); Majestic Capital (unsecured creditors committee); Manistique Papers (unsecured creditors' committee); New Stream Secured Capital, et al. (debtors); PFF Bancorp. (unsecured creditors' committee); TOUSA, Inc., et al. (unsecured creditors' committee); Trans National Communications, International (unsecured creditors' committee).
KCP Advisory Group Boston, MA (offices in NY and Chicago as well) www.kcpadvisory.com	Not Available		Client engagements primarily as debtor advisor but have also served in committee representation and post-confirmation plan trustee. Industry sectors have included healthcare, retail, automotive, services.
Lain, Faulkner & Co. Dallas, TX Tel. (214) 720-1929 www.lainfaulkner.com	Dan B. Lain Dennis S. Faulkner Marla C. Reynolds Paul C. French, III	D. Keith Enger Stephen H. Thomas Lori B. Lowderman Jason A. Rae	Chapter 11 and Chapter 7 trustees, debtors-in-possession, unsecured creditors' committees, debtors, creditors' committees, chief restructuring officers, examiners, settlement and post-confirmation trustees, special claims analysts, secured creditors.
Marcum LLP New York, NY Tel. (212) 485-5500 www.marcumllp.com	Peter Buell Diane Giordano	Paul Pershes	Automotive, Internet & technology, maritime, construction, media & entertainment, real estate, retail & consumer products, talent & literary agencies, healthcare.

Worth Reading

The Turnaround Manager's Handbook

Author: Richard S. Sloma
Publisher: Beard Books
Softcover: 242 pages
List Price: $34.95

In the introduction to this book, the author suggests that an accurate subtitle could be "How to Become a Successful Company Doctor." Using everyday medical analogies throughout, he targets "corporate general practitioners" charged with the fiscal health of their companies.

As with many human diseases, early detection of turnaround situations is critical. The author describes turnaround situations as a continuum differentiated by length of time to disaster: "Cash Crunch," "Cash Shortfall," "Quantity of Profit," and "Quality of Profit."

The book centers on 13 steps to a successful turnaround. Extensive data collection and analysis are required, including the quantification of 28 symptoms, the use of 48 diagnostic and analytical tools, and up to 31 remedial actions.

The first step is to determine which of 28 symptoms are plaguing the company. The symptoms generally pertain to manufacturing firms, but can be applied to service or retail companies as well. Most of the symptoms should be familiar to the reader, but Sloma lays them out systematically and relates them to the analytical tools and remedial actions found in subsequent chapters. The first seven involve the inability to make various payments, from debt service to purchase commitments. Others include excessive debt/equity ratio, eroding gross margin, increasing unit overhead expenses, decreasing product line profitability, decreasing unit sales, and decreasing customer profitability.

Step 2 employs 48 diagnostic and analytical tools to derive inferences from the symptom data and to judge the effectiveness of any proposed remedy. Says the author, "If the only tool you have is a hammer, you will view every problem only as a nail!" He then proceeds to lay out all 48 tools in his medical bag, which he sorts into two kinds: macro tools and micro tools. Macro tools require data from several symptoms or are used to assess and evaluate more than a single symptom, whereas micro tools are more general purpose in function. The 12 macro tools run from "The Art of Approximation" to "Forward-Aged Margin Dollar Content in Order Backlog." The 36 micro tools include "Product Line Gross Margin Percent Profitability;" "Finance/Administration People Related Expenses as Percent of Sales," and "Cumulative Gross $ by Region."

Next, managers are directed to 31 possible remedial actions. The first six actions are to be considered at the Cash Crunch stage, and range from a fire sale of inventory to factoring accounts receivable. The next six deal with reducing people-related expenses, followed by 13 actions aimed at reducing product- and plant-related expenses. The subsequent five actions include eliminating unprofitable products, customers, channels, regions, and reps. Finally, managers are advised on increasing sales and improving gross margin by cost reduction in various ways.

The remaining steps involve devising the actual turnaround plan, ensuring management and employee ownership of the plan, and implementing and monitoring the plan. The advice is comprehensive, sensible, and encouraging, but doesn't stoop to cliche or empty motivational babble. The author has clearly operated on patients before, and his therapeutics have no doubt restored many a firm to financial health. ¤

Richard Sloma, an internationally acclaimed lecturer, has decades of experience as a board member, chairman, chief executive officer, and chief operating officer.

This book may be ordered by calling 888-563-4573 or by visiting www.beardbooks.com. This book and other Beard books are also now available in digital format at a discounted price from Google Books at books.google.com.

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"[i]f the actual amount of payments due from insurance companies is increased by the plan from what those liabilities would be absent the plan, then the plan has monetary impact in the real world of insurance, and is not insurance neutral." Svirsky says that "the court recognized that insurers have a broad right to be heard in bankruptcies where their policies could potentially be impacted."

The Ninth Circuit also rejected the bankruptcy court's ruling that the insurers' appeal was moot because an equitable remedy could no longer be fashioned. According to the court, the insurers immediately sought a stay, the rejection of which does not mean the insurers did not exercise due diligence in trying to protect their rights. "To say that a party's claims, although diligently pursued, are equitably moot because of the passage of time, before the party had a chance to present views on appeal, would alter the doctrine to be one of inequitable mootness," the Ninth Circuit wrote. Or, as Svirsky explains it, "they said it would actually be inequitable if a party that diligently tried to pursue an appeal was barred from having the appeal heard just because the appellee rushes to try to consummate the plan and it then takes a few months to have the case heard."

In remanding the case to the bankruptcy court, the Ninth Circuit noted that although it may be unfair to toss out the plan entirely, there are viable remedies for amending it if the insurers can show their claims have merit. For example, the bankruptcy court could require the settling parties to pay more to the trust, or it could allow the objecting insurers to present evidence and ask for changes to the trust distribution procedures. "In other words, if there's still a remedy that can be fashioned, it should be," says Svirsky.

Thorpe is an extremely important decision, particularly in the asbestos bankruptcy context, says S. Todd Brown, associate professor and director of the center for the study of business transactions at the State University of New York Buffalo Law School. "It reflects the obvious fact that insurers have significant interests at stake in asbestos bankruptcies. The court properly recognized that provisions that purport to preserve all of

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Special Report

Outstanding Young Restructuring Lawyers – 2012

Lawyer	Firm	Outstanding Achievements
Ryan Blaine Bennett	Kirkland & Ellis Chicago, IL ryan.bennett@kirkland.com	Currently represents Global Aviation Holdings, parent company of World Airways, North American Airlines, and other subsidiaries. Principal attorney representing DBSD in negotiating and obtaining court approval of $1.49 billion cash investment from DISH Network. Recently represented Japan Airlines as international restructuring counsel advising JAL on all aspects of global restructuring.
Ronit Jeanine Berkovich	Weil, Gotshal & Manges New York, NY ronit.berkovich@weil.com	Represented Dallas Stars in sale of all hockey-related assets. Represented Apple as bidder in historic Section 363 sale of portfolio of 6,000 patents and patent applications of Nortel Networks. Apple partnered with consortium including EMC Corp., LM Ericsson, Microsoft, Research In Motion, and Sony in winning $4.5 billion bid, topping stalking horse Google.
Mark W. Deveno	Bingham McCutchen New York, NY mark.deveno@bingham.com	Represented first-ever officially recognized secured creditors' committee in reorganization of Spansion Japan. Representation, in case of Takefuji Corporation, of one of first-ever ad hoc bondholder groups to form and enforce its rights in a corporate reorganization. Most recently has begun representing ad hoc group of bondholders in Elpida Memory in Chapter 15 filing.
Shana A. Elberg	Skadden, Arps, Slate, Meagher & Flom New York, NY shana.elberg@skadden.com	Represented DISH Network in $1.4 billion acquisition of 100 percent of equity of DBSD North America. Other client representations include the National Hockey League in sales of Dallas Stars and Phoenix Coyotes; Syms Corp. and wholly owned subsidiaries, including Filene's Basement; Vertis Holdings, Inc. and certain of its affiliates in their prepackaged bankruptcy cases.
Peter M. Friedman	Cadwalader, Wickersham & Taft Washington, DC peter.friedman@cwt.com	Representing US Bank in all aspects of Dynegy, including cutting-edge litigation over certificate holder claims. In Lehman Brothers, represented Morgan Stanley, one of the largest creditors and derivatives counterparties. Headed litigation efforts for Carl Icahn's funds in Blockbuster's bankruptcy. Leader of firm's representation of Yucaipa funds in Inner City Media bankruptcy.
Jeffrey R. Gleit	Kasowitz, Benson, Torres & Friedman New York, NY jgleit@kasowitz.com	Counsel to Borders Group subsidiaries; special litigation counsel to Capmark Financial creditors' committee; counsel to reorganized Capmark Financial Group in $147 million post-confirmation preference suit against Goldman Sachs entities; counsel to Anderson News; counsel to BBU in Great Atlantic & Pacific Tea Co. case; representing Cantor Fitzgerald in Wastequip restructuring.
Todd M. Goren	Morrison & Foerster New York, NY tgoren@mofo.com	Represented unsecured creditors' committee in LA Dodgers's proceedings, helping secure a par plus interest recovery. Successfully negotiated a $24 million insurance buy back from Caribbean Petroleum's liability insurance carrier for general unsecured creditors. Represented Eurohypo Bank AG's NY branch and lenders having more than $2.6 billion exposure to General Growth Properties.
Tyson M. Lomazow	Milbank, Tweed, Hadley & McCloy New York, NY tlomazow@milbank.com	Counsel to unsecured creditors committee in Eastman Kodak case. Played leading role in Capmark Financial Group case, representing ad hoc group of unsecured lenders holding over $2 billion of debt. Representing Wilmington Trust Company as collateral trustee for 7.5% senior secured notes issued by American Airlines. Counsel to unsecured creditors' committee of Sea Launch Company.
Douglas Mannal	Kramer Levin Naftalis & Frankel New York, NY dmannal@kramerlevin.com	One of the lead attorneys representing General Maritime. Represented Plainfield Asset Management in restructuring $300 million of Wolverine Tube debt. Represented American Capital in its significant investment in Appleseed's. On behalf of Smurfit-Stone creditor's committee, negotiated DIP financing, responsible for strategy regarding $200 million "double-dip" claims litigation.
Brian Resnick	Davis Polk & Wardwell New York, NY brian.resnick@davispolk.com	Represents Lehman Brothers Intl. (Europe) in complex settlement of tens of billions of dollars in claims related to Lehman U.S. Chapter 11 cases. Represented JPMorgan as agent under $4.5 billion DIP financing for Delphi, including unprecedented credit bidding for Delphi's businesses. Advising Citigroup as administrative agent and lead arranger of $950 million DIP facility for Eastman Kodak.
Rachel Strickland	Willkie Farr & Gallagher New York, NY rstrickland@willkie.com	Counsel to Dish Networks (acquirer) and EchoStar Corp. (largest creditor) in TerreStar case. Lead counsel to Fidelity National in LendAmerica case, pending in the EDNY. Counsel to JPMorgan Asset Management in connection with Nebraska Book chapter 11 case. Counsel to lenders in Quiznos out-of-court restructuring, led by Caspian Capital and Oaktree Capital Management.
Eric Winston	Quinn Emanuel Urquhart & Sullivan Los Angeles, CA ericwinston@quinnemanuel.com	Represented Hildene Capital in Zais Investment Grade Limited VII case – first-ever bankruptcy filing involving a CDO entity. Lead counsel for putative class of antitrust plaintiffs in SK Foods, negotiating a settlement allowing class action claim in excess of $70 million. Other insolvency matters include SemGroup, Bernard L. Madoff Investment Securities, and Trident Microsystems.

Insurers, *from page 6*

their rights are just window dressing where a plan also increases their liabilities and strips their defenses in coverage actions."

John R. Gotaskie, Jr., a partner at Fox Rothschild LLP, believes the *Thorpe* decision clarifies standing and insurance-neutrality standards in the Ninth Circuit. Gotaskie says, however, it's not possible or wise to attempt to predict *Thorpe's* impact on other 524(g) cases because the facts of each case are unique.

Svirsky and Brown are of the opinion that the holding in regard to standing could impact not just asbestos bankruptcies, but commercial bankruptcies more broadly.

"Beyond asbestos bankruptcies, the opinion suggests that a party whose rights are altered in a plan of reorganization should have standing to argue that the legal conditions for doing so under the Bankruptcy Code have been satisfied," says Brown.

Svirsky says that commercial bankruptcies can be seen as part litigation and part negotiation. "Bankruptcies are often treated as forums for consensual resolutions. While objections are raised, they're likely to be resolved through negotiations – including in hallways before hearings."

Some bankruptcy lawyers may believe that the Ninth Circuit's decision means those consensual resolutions could be subject to change. For his part, Svirsky thinks that allowing a plan of reorganization to be immune from appeal simply because some of the interested parties have agreed to it is the problem. "It upends the entire American legal system," he says. "There's no room for appellate review under *Thorpe's* theory. Judicial decisions should be subject to appellate review, and corrected if wrong." ¤

Subordinate, *from page 4*

According to Hermann, the limitations imposed by intercreditor agreements fell into two categories: (1) things you, as the junior lender, could advocate for in bankruptcy, and (2) rights you, as the junior lender, were giving up or handing to someone else, such as the right to vote on a plan of reorganization, which is a substantive legal right a lender would otherwise have under the Bankruptcy Code.

Much of the debate in the early days, says Hermann, focused on the latter category. "People were split," he says. "Some thought those rights were yours to give up if you wanted to do so, and a court should enforce that. Others thought a fundamental right granted under the Bankruptcy Code can't contractually be relinquished."

Now, as more and more cases have addressed the matter, Hermann says a key principle has emerged. "Unless the intercreditor agreement is explicit, courts are reluctant to enforce creditor give-ups because they generally like people to be heard in a bankruptcy and don't like their voices silenced."

The decisions in *Stuy Town, U.S. Bank,* and *Broadway Portfolio II* certainly support that notion. According to Burroughs, those decisions suggest that courts have little patience with mezzanine lenders – or at least mezzanine lenders that the courts believe will push mortgage borrowers into bankruptcy upon completing a UCC foreclosure. "In each case, the court cited the alleged intent of each mezzanine lender to orchestrate the related mortgage borrower's bankruptcy following the mezzanine lender's UCC foreclosure," she says.

According to Hermann, senior lenders who have obtained a number of give-ups in an intercreditor agreement can expect the courts to enforce them only if they are very specific. "The language had better say exactly what you want it to say, because if it doesn't, the courts will err on the side of not stripping junior creditors of their rights."

Burroughs notes, however, that there may be limits. "The decision in *SW Boston* indicates that there are some limits to how far bankruptcy courts will go to serve senior lenders, particularly where a senior lender seeks to block confirmation of a plan otherwise approved by the debtor and other creditors," she says.

Hermann, for his part, believes that there are some reasons to expect continued confusion as well. First, real estate cases can be tricky. "The parties to intercreditor agreements in real estate deals aren't bankruptcy attorneys. They don't show the agreement to their bankruptcy colleagues, so they don't really know how the provisions might work out in a restructuring scenario. That can lead to an unintended result," he says. "I think if you asked 10 attorneys whether the *Stuy Town* decision was right or wrong, five, all real estate attorneys, would say it was right, and five, all bankruptcy attorneys, would say it was wrong."

Additionally, Hermann points out that the judges hearing these cases often are not bankruptcy judges, as was the case in *Stuy Town*. "We've sometimes seen state or district court judges who aren't familiar with the restructuring process interpreting agreements that were drafted by people who are not restructuring attorneys," Hermann says. "That creates confusion and leads to some results in case that may or may not be right at the end of the day." ¤

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- *Special Report: Major Trade Claim Purchasers*
- *Special Report: Top Internet Bankruptcy Resources*
- *Research Report: Who's Who in Dynegy Holdings*

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