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News for People Tracking Distressed Businesses

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The Year of Leavings

Restructuring Pros Assess the State of Affairs in 2012

by Julie Schaeffer

When Bill Brandt spoke to the attendees of Beard Group's 2012 Distressed Investing Conference, he suggested that the year had been a good one for getting some work done around the house – gardening, wallpapering, remodeling – because of the free time that lasted well beyond the election. "There was decent work, but there weren't groundbreaking cases with new issues," said Brandt, president and CEO of Development Specialists, Inc.

Mark Berkoff, a partner at Neal, Gerber & Eisenberg LLP, concurs. "2012 was another slow year in the restructuring world. Many practitioners – from financial advisors to accountants to attorneys – have told me that, if anything, the year brought a further

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Claims Trading Conundrum

Court Sidesteps Controversial Enron Decision

by Randall Reese

The Second Circuit Court of Appeals recently entered a summary order addressing the interpretation of several key provisions of agreements for the transfer of claims against debtor companies. The agreement at issue in the case, *Longacre Master Fund, Ltd. v. ATS Automation Tooling Sys. Inc.*, contained primarily industry standard terms, according to Martin Eisenberg, the principal of the Law Offices of Martin Eisenberg who represents Longacre. As such, the order's key holdings may be broadly applicable and offer some important lessons for individuals involved in claims trading transactions.

After Delphi Corporation filed for Chapter 11 protection, many of its suppliers, including

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Debt Reinstatement

Important Lessons for Plan Proponents and Lenders

by Julie Schaeffer

The November issue of *Turnarounds & Workouts*, discussed debt reinstatement – which involves the use of the bankruptcy process to restructure a company's bad debt while simultaneously using reinstatement provisions to retain valuable credit with below-market terms – in the context of two bankruptcy-court decisions: *Charter Communications* and *Young Broadcasting*.

"Both looked at the issues of reinstatement of prepetition debt as part of a Chapter 11 process," says Christopher Mirick, a partner at Pillsbury Winthrop Shaw Pittman, LLP. "In *Charter Communications*, the court allowed reinstatement, finding that the change of control provisions in the debt were not triggered by the plan. In contrast,

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The Year, *from page 1*

slowdown in restructuring and bankruptcy activity."

According to Brandt, most of the bankruptcies, such as Kodak and American Airlines, were at the tail end of the last cycle. That said, Berkoff notes that there were pockets of activity in 2012. "There was some activity in single-asset real estate cases, health care, and some financial restructurings."

Lisa Donahue, managing director and co-lead of turnaround and restructuring services at AlixPartners, says it was also a year of struggling shipping, coal, and commodity companies and of lenders that continued to amend and pretend.

According to Berkoff, the state of the industry in 2012 was due, in part, to a lack of liquidity in the market. "There's a ton of money sitting on the sidelines."

In many ways, the situation is counterintuitive, he continues. "Every cocktail party I go to, people ask what I do, and when I say I'm a bankruptcy attorney, they reply, 'Wow, you must be so busy.' But bankruptcy is a sophisticated business tool, and you need money to do it. You need an exit strategy because you can't just file for bankruptcy and see what happens next. Whether a sale or a restructuring, you need money. Buyers can't get financing, and banks don't want to fund the restructuring process."

John Brincko, president of Brincko Group and also a speaker and sponsor at the Distressed Investing Conference, says few companies had the funding to hire consultants in 2012. "Smaller companies have gone directly to liquidation, and middle-market companies that could have used our help have been kicking the can down the road when they haven't been forced to get help by banks," he explains.

Brandt calls 2012 "the year of leavings" because all of the major bankruptcies that were filed were legacy cases. "By that, I mean companies should have filed three to five years ago, when their peers did, but they hung on."

In part, Brandt says, that's because of the election. "Don't ask me why, but a lot of companies hang on in election years, thinking a new administration will immediately save the business."

As a result, Brandt says there was no spectacular surge of bankruptcies in 2012 as there was in 2008, 2009, or even 2001

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Claims, *from page 1*

ATS, transferred their claims to claims traders and received large percentages of face value while it appeared that general unsecured claims would be paid par plus interest. However, as the automotive industry quickly deteriorated, that outcome never came to fruition. When Delphi ultimately emerged in October 2009, unsecured claimholders faced the distinct possibility of receiving no recovery.

Delphi's changed circumstances hurt creditors in other ways as well. While Delphi earlier said that it did not anticipate pursuing preference actions, it did file hundreds of preference complaints. In February 2010, Delphi also filed a document captioned as its 44th omnibus objection to, among other things, "preference-related claims" pursuant to section 502(d).

When the complaint and claim objection were served, ATS and Longacre learned that ATS was one of the preference defendants. Pursuant to the claim objection, Delphi also sought "to object" to the claims that ATS had filed and subsequently transferred to Longacre "pending conclusion of the Avoidance Action" and sought entry of an order "preserving [Delphi's] objection" to the claims.

In May 2010, Longacre said the claim objection constituted an "impairment," which it defined as "all or part of the Claim is either (a) offset, objected to, disallowed, subordinated, in whole or in part, in the Case for any reason whatsoever, pursuant to an order of the Bankruptcy Court …." Longacre asserted it was entitled to repayment of the amounts paid to ATS if the impairment was not "fully resolved" within 180 days "and is not likely to be fully resolved within a reasonable period of time" after the 180 days.

On August 25, Longacre demanded a refund of the purchase price plus interest from ATS because the objection had not been resolved and was not likely to be resolved within a reasonable period of time. ATS did not provide the refund.

On September 15, 2010, Longacre filed a complaint against ATS in the New York Supreme Court. The complaint was removed to the U.S. District Court for the Southern District of New York on October 21, 2010. The claim objection was withdrawn as to ATS's claims on March 30, 2011 and the preference action was dismissed the next day.

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Reinstatement, *from page 1*

Young Broadcasting denied reinstatement, for three reasons. The change of control provision in the debt documents would be triggered by the plan (despite the creative allocation of voting rights); the plan was not demonstrated to be feasible; and the distribution of reorganized equity interests to the prepetition holders violated the absolute priority rule."

"The contrasting outcomes in these two cases, which involved very similar issues, likewise provide valuable lessons on issues associated with reinstatement," says Daniel P. Winikka, a partner at Simon, Ray & Winikka LLP.

According to Winikka, both cases offer an important lesson: that a lender should provide a good explanation for why a proposed debt reinstatement fails to provide the benefit of the original bargain.

"The lenders in *Charter Communications* did not do so, perhaps leaving the court with an incentive to construe narrowly what was necessary to constitute a 'group' in violation of the change in control covenant," he says. "In contrast, the committee in *Young Broadcasting* took an overly technical approach to the voting control covenant, which permitted the lenders to argue, and the court to conclude, that the lenders were not getting the benefit of their bargain."

Financing a reorganized company by reinstating debt continues to be discussed as part of the process of developing Chapter 11 plans, says Mirick, but the factors that undermined that effort in *Young Broadcasting* continue to pose problems for other companies – "particularly incurable defaults, and the issue of how do you not have a change of control if creditors aren't being paid in full – in other words, leaving old equity 'in control' seems likely to violate the absolute priority rule."

Additionally, in the current economic climate, Mirick says the feasibility of the reorganization can be a significant hurdle as well. "In order to succeed as a reorganized company, the debtor may need to shed divisions or sell assets. Those sort of changes may themselves may be a default under the prepetition debt and prevent reinstatement – but without these changes to the corporate structure and operations, the debtor may be unable to persuade the court that its reorganization is feasible."

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Research Report

Who's Who in Digital Domain Media Group, Inc.

by Francoise C. Arsenault

Digital Domain Media Group, Inc. (Digital Domain) is a leading provider of computer-generated imagery animation and digital visual effects for major motion picture studios and advertisers. The company, which is headquartered in Los Angeles, California and based in Port St. Lucie, Florida, was founded in 1993 by film directors James Cameron and Scott Ross and entertainment executive Stan Winston. Digital Domain has produced visual effects for more than 90 films, including "Apollo 13," "Titanic," "Pirates of the Caribbean: At World's End," "Transformers," and "Avatar," and recently created the visual likeness of the late rapper Tupac Shakur at the Coachella Music Festival. The company's artists and technologists have won seven Academy Awards for best visual effects for movies such as "Titanic" and "The Curious Case of Benjamin Button," and for scientific and technical achievement. The company went public less than one year before its bankruptcy filing, raising $42 million in an initial public offering in November 2011. By early September 2012, Digital Domain shares were trading for about 11 cents, down from a high of $9.61 on May 1, 2012.

Digital Domain Media Group, Inc. and 13 of its subsidiaries filed for Chapter 11 reorganization on September 11, 2012, in the United States Bankruptcy Court for the District of Delaware, and for ancillary relief pursuant to the Companies' Creditors Arrangement Act in the Supreme Court of British Columbia on September 18. Factors affecting the recent financial performance of visual effects companies such as Digital Domain include cheaper technology and competition from smaller companies, both in the United States and abroad. As of June 30, 2012, Digital Domain reported approximately $205 million in assets and $214 million in liabilities. At the time of its bankruptcy filing, Digital Domain announced that it was closing its new animation studio in Port St. Lucie and firing the majority of its 350 employees at that studio. The bankruptcy court has approved $11.5 million in DIP financing from Digital Domain lenders.

With its Chapter 11 petition, the company announced that it had entered into a purchase agreement with Searchlight Capital Partners L.P. to acquire Digital Domain Productions and its operating subsidiaries in the United States and Canada for $15 million. However, on September 23, a winning bid in the amount of $30.2 million was submitted for all of the company's businesses, including the commercial production studios in Venice, California and Vancouver, Canada. The winning bid was submitted by a joint venture led by Galloping Horse America LLC, a division of the Beijing-based film and TV company Galloping Horse, in partnership with Reliance MediaWorks (USA) Inc., the post-production company of India's Reliance ADA. The sale was approved by the court on September 24 and closed on September 27. Galloping Horse, which will own 70 percent of Digital Domain, and Reliance ADA have a combined value of more than $25 billion.

The Debtor

Ed Ulbrich is the chief executive officer of Digital Domain Media Group, Inc. **Dennis Morrison** is the chief accounting officer and vice president. **Edwin C. Lunsford, III** is the general counsel, senior vice president, and secretary. **Darin K. Grant** is the chief technology officer.

Pachulski Stang Ziehl & Jones LLP is serving as the bankruptcy counsel to Digital Domain. The team includes **Debra I. Grassgreen** and **Robert J. Feinstein**, partners with the firm, and **Timothy P. Cairns**, **Maria A. Bove**, **Joshua M. Fried**, and **Maxim B. Litvak**, associates.

Cassels Brock & Blackwell LLP is serving as the Canadian counsel to Digital Domain. **Bruce Leonard**, **Deborah S. Grieve**, **David S. Ward**, and **Eleonore Morris**, partners, and **Kelly Gerra**, an associate with the firm, are working on the case.

Cadwalader, Wickersham & Taft LLP is acting as the special counsel to a special committee of independent directors of Digital Domain. **Peter M. Friedman**, a partner, directs the work.

FTI Consulting, Inc. is providing Digital Domain with restructuring advisory services. **Michael E. Katzenstein**, a senior managing director, is serving as chief restructuring officer of Digital Domain and its operating subsidiaries. **John T. Debus**, a managing director, and **Ranjit Mankekar**, a director, are serving as associate chief restructuring officers. **Luke Schaffer**, a senior managing director, and **Roger Scadron**, a managing director, are acting as vice presidents of development. The FTI Consulting team also includes **Zach Huntley**, a restructuring consultant.

Johnson Associates, Inc. is providing Digital Domain with compensation advisory services. The team includes **Alan Johnson**, founder and managing director, and **Jeff Pratas Visithpanich**, a managing director with the firm.

Van Meter Consultants is acting as media and communications advisor to Digital Domain. **Jennifer E. Mercer**, the founder and principal of the firm, leads the engagement.

The Official Committee of Unsecured Creditors

The Official Committee of Unsecured Creditors includes **Minh-Tam Frye; Straticon, LLC**; and L**eighton Security Management, Inc.**

Brown Rudnick LLP is the counsel to the committee. **H. Jeffrey Schwartz**, **Bennett S. Silverberg**, **Andrew Dash**, and **Sigmund S. Wissner-Gross**, all partners with the firm, and **Laura F. Weiss**, an associate, are working on the case.

The law firm of S**ullivan Hazeltine Allinson LLC** is serving as co-counsel to the committee. The team includes **William D. Sullivan**, a partner, and **Seth S. Brostoff**, an associate.

MDT Executive Management Co., LLC is providing the committee with financial advisory services. **Mark D. Thompson**, the managing member of MDT, leads the engagement.

The Trustee

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

The Judge

The judge is the **Honorable Brendan L. Shannon**. ¤

The Year, *from page 2*

and 2002. "It was a sort of a place-holding year, where we dealt with the shelf-life companies that finally got around to filing."

Brandt adds, however, that "there were a couple of seminal moments where we did have some fulcrum events, particularly in the area of labor relations."

Hostess is one such example. The maker of such iconic baked goods as Twinkies and Wonder Bread sought and received bankruptcy court permission to close its operations, blaming a strike by bakers protesting a new contract imposed on them.

For those who are worried about their beloved Ho-Hos, Brandt thinks the treats will live to see another day. "Vultures will come in and buy the factories, equipment, and recipes and employ some of these bakers."

The bigger issue is how the bankruptcy unfolded. The Hostess situation – which

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Claims, *from page 2*

Both parties moved for summary judgment. In an amended opinion dated August 4, 2011, summary judgment was granted in favor of ATS. The district court first rejected the argument that the claim objection constituted an impairment because it only "preserved the Debtor's right to object pending conclusion of the relevant Avoidance Action."

Alternatively, the court also determined that the transfer agreement effectuated a sale of the claims, rather than a pure assignment. Citing *Enron Corp. v. Springfield Assocs., LLC*, the court stated that section 502(d) disallowance is a personal disability of a claim transferor which does not travel to the transferee. Thus, according to the court, "no section 502(d) objection (even if one were to have been made) would have constituted an Impairment in the first instance."

The district court also rejected multiple counts asserted by Longacre based upon representations and warranties contained in the transfer agreement. The court determined that the representations and warranties were made as of the date of the agreement "and do not purport to serve as a guarantee of the future." It held that ATS had not breached its representations and warranties because, among other reasons, ATS's knowledge that it received payments from Delphi in the preference period did not constitute knowledge that the claims were subject to a preference action at the time the transfer agreement was executed.

The Second Circuit Court of Appeals vacated the district court's opinion and remanded the case back for further proceedings. First, the court determined that the claim objection did constitute an impairment. The court noted that "nothing in the language [of the agreement's definition of Impairment] requires that the objection be meritorious" and the agreement's definition of impairment did "not exclude objections intended to be withdrawn after the resolution of some other pending issue." Rather, ATS's impairment obligations were triggered once "Delphi stated that it was 'objecting to' the claim, and the bankruptcy court issued an order stating that the 'Objection' was preserved." The Second Circuit directed

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Reinstatement, *from page 2*

When the *Young Broadcasting* ruling came out in 2010, Nicole B. Herther-Spiro of Dechert thought it was ultimately not the legal arguments for reinstatement that fell short, but the inability to make the business case for the reinstatement.

"*Young Broadcasting* highlights the limits of reinstatement as an exit financing strategy," says Mirick. "The treatment of the debt under the plan needs to comply with the loan documents, and incurable defaults (at least incurable material defaults) are a problem. And, the plan needs to otherwise meet confirmation requirements – including demonstrating that the reorganization is feasible and that the absolute priority rule is met."

Following Herther-Spiro's line of thinking, restructuring professionals wishing to formulate a restructuring transaction around a reinstatement plan may want to remember that a compelling legal argument is insufficient and advance a compelling business argument as well.

In addition, says Winikka, lenders should be careful to avoid creating discoverable communications that suggest their true goal is to create a covenant violation to prevent reinstatement and renegotiate debt at market terms. Meanwhile, plan proponents should be careful to preclude any argument that the lenders are failing to receive the benefit of

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Calendar

American Bankruptcy Institute
18th Annual Rocky Mountain Bankruptcy Conference
January 24–25, 2013
Four Seasons Hotel Denver
Denver, CO
Contact: www.abiworld.org

New York Institute of Credit and the Association of Insolvency and Restructuring Advisors
8th Annual NYIC/AIRA Joint Bankruptcy and Restructuring Event
January 31, 2013
Arno's Ristorante
New York, NY
Contact: www.aira.org

Turnaround Management Association
2013 TMA Distressed Investing Conference
February 6–8, 2013
Bellagio
Las Vegas, NV
Contact: www.turnaround.org

National Association of Bankruptcy Trustees
2013 Spring Seminar
February 22–23, 2013
The Fairmont Scottsdale Princess
Scottsdale, AZ
Contact: www.nabt.com

Turnaround Management Association
2013 TMA Spring Conference
May 14–16, 2013
JW Marriott Chicago
Chicago, IL
Contact: www.turnaround.org

International Association of Restructuring, Insolvency & Bankruptcy Professionals
Ninth World Congress of INSOL International
May 19–22, 2013
The Hague, The Netherlands
Contact: www.insol.org

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Special Report

Sources of Debtor-in-Possession Financing

Company/Debtor	DIP Amount	DIP Sources
Residential Capital	$1,450,000,000	Barclays Bank
Patriot Coal Corporation	$802,000,000	Citigroup Global Markets, Barclays Bank, and Merrill Lynch, Pierce, Fenner & Smith
ATP Oil and Gas Corp.	$617,600,000	Credit Suisse AG and Credit Suisse Securities (USA)
Hawker Beechcraft	$400,000,000	Senior lenders, including Deutsche Bank National Trust Company
RG Steel and WP Steel	$400,000,000	Wells Fargo Capital Finance
Vertis Holdings, Inc.	$150,000,000	General Electric Capital Corp.
Arcapita Bank BSC	$125,000,000	Fortress Investment Group
American Suzuki Motor Corp.	$100,000,000	Suzuki Motor Corp.
Hostess Brands	$75,000,000	Silver Point Capital
Pinnacle Airlines	$74,300,000	Delta Air Lines Inc.
A123 Systems	$72,500,000	Johnson Controls
Reddy Ice Holdings	$70,000,000	Macquarie Bank Limited
HMX Acquisition Corp.	$65,000,000	Salus Capital Partners
Delta Petroleum	$57,500,000	Whitebox Advisors
Lightsquared	$51,400,000	U.S. Bank NA
Buffets Inc.	$50,000,000	Credit Suisse AG, Cayman Islands Branch
AFA Investment	$45,000,000	GE Capital Corp. and Bank of America Corp.
Lee Enterprises	$40,000,000	Deutsche Bank Trust Company Americas
Velo Holdings	$40,000,000	Barclays Bank
United Retail Group	$40,000,000	Wells Fargo & Co.
William Lyon Homes	$30,000,000	ColFin WLH Funding
Coach America Holdings	$30,000,000	J.P. Morgan Securities and JPMorgan Chase Bank, N.A.
Northstar Aerospace (USA)	$29,000,000	Fifth Third Bank
Southern Air Holdings	$25,000,000	Canadian Imperial Bank of Commerce
Journal Register Company	$22,500,000	Wells Fargo & Co.
Ahern Rentals	$20,000,000	Bank of America NA and Wells Fargo Bank NA
Contec Holdings	$20,000,000	Barclays Bank PLC
Allied Systems Holdings	$20,000,000	Yucaipa Companies
LSP Energy	$20,000,000	Aegon USA Investment Management and John Hancock Financial Services

Worth Reading

An Entrepreneurial History of the United States

Author: Gerald Gunderson
Publisher: Beard Books
Softcover: 286 pages
List Price: $34.95

The first American colonists were the earliest entrepreneurs in this country. Bearing a positive outlook and pursuing dreams of success, they were the model for generations of entrepreneurs to follow. Yet, unlike their predecessors who found fortune in Europe and other regions of the world, these "Founding Entrepreneurs....had to create a viable operation out of local resources, which had yet to yield anywhere near a competitive return," says Gunderson in *An Entrepreneurial History of the United States*.

These first capitalists played a critical role in the development of the United States into a global economic power and a country that has, on the whole, created an exemplary standard of living for its citizens. As Gunderson notes, these early entrepreneurs were successful in "redeploying resources...creating exports that were competitive in international trade, and devising organizations that encouraged participants to harness their personal interests toward those of the colony."

An Entrepreneurial History of the United States, first published in 1989, chronicles the story of the nation's economic beginning, and makes the story compelling by including profiles of famed business figures and companies. The stories of such historic figures as Robert Fulton, John Jacob Astor, Andrew Carnegie, Thomas Edison, and Henry Ford and such companies as AT&T, DuPont, and Sears Roebuck are told.

The book, however, is more instructive than that. The author breaks down entrepreneurship into phases tied to ever-changing business conditions and social circumstances. In some cases, entrepreneurship helped to usher in new phases; in other cases, it seized on opportunities for new products or services arising at a particular time. The interplay between entrepreneurs and colonial society is thus a recurrent theme.

This book also looks at the personal attributes shared by entrepreneurs, such as a special knowledge or ability in some field, a drive to apply this knowledge or ability to a business market in a novel way, and a combination of practicality and vision in applying the new idea. The author points out, however, that despite their creativity and drive, few entrepreneurs were overnight successes. Their accomplishments were earned after a long, persistent period of trial and error.

The successful entrepreneur was not an especially ingenious individual who took a big risk and saw it pay off. "A major misconception is that entrepreneurs assume particularly large risks," says Gunderson. Rather, "a development usually unfolds as continuing, small problems, where mismanagement of an individual opportunity often can be corrected and then recouped by persistence." Entrepreneurs are convinced they are on to something even in the face of obstacles and mismanagement in the early stages of their venture. Gunderson notes that, "As an entrepreneurial venture grows, its members learn about the niche that the product serves. Frequently the firm becomes recognized as the best source of such expertise in the world."

Thus is the formula for success unveiled. Anyone wishing to apply history to their own entrepreneurial dreams should read this book. ¤

Gerald Gunderson has held academic positions at Trinity College, the University of Massachusetts, Mount Holyoke College, and North Carolina State University. He is the Associate Editor of the Journal of Private Enterprise.

This book may be ordered by calling 888-563-4573 or by visiting www.beardbooks.com.

The Year, *from page 4*

Brandt calls "a disaster" – is indicative that we're entering an era in which unions are willing to take a stiffer position. "Hostess management said that if unions didn't give way, it would shut the business down, and the unions said 'OK'," Brandt explains. "Management said, 'no, really,' and the unions replied, 'OK'."

Patriot Coal is another example of increasing union activism. In 2007, Peabody Energy spun off Patriot Coal, which subsequently bought Magnum Coal Co., which had acquired three Arch Coal units in 2005. Patriot Coal filed for bankruptcy in July, saying those transactions left it responsible for the benefits of three times as many retirees as active employees, saddling the company with liabilities estimated at $1.3 billion. Retired coal miners may now seek to bring claims against Peabody Energy and Arch Coal if Patriot Coal won't cover the $1.3 billion in benefits.

Donahue also notes that the union and the U.S. trustee in Patriot Coal filed for a change in venue. "The union was looking at West Virginia, I assume on the premise that it might be more sympathetic to the labor side than New York," Donahue says, noting that there was a similar situation with Houghton Mifflin. "We definitely saw more venue challenges, and this may be something to be looking for in 2013 as well."

The rise in municipal bankruptcies and insolvencies was another notable event in 2012, as the downturn worked its way from the private sector into the public sector.

"You're finally beginning to see some municipal bankruptcies that are not structural and not driven by events, such as a problem with an incinerator in Harrisburg or a sewer system in Jefferson County," says Brandt. "Now, they're becoming more budget-driven or pension-driven, such as San Bernardino and, to some extent, Stockton. And that's a harbinger of what I think will be some tougher cases in the future."

Despite the challenging year, Brandt says business has been solid. "The firms that are the best at this business have been adequately busy, and none of them is missing any hours," he says. "But a lot of marginal firms are fighting over the scraps because there isn't that volume of business there was three or four years ago." ¤

Special Report

Outstanding Restructuring Lawyers – 2012

Lawyer	Firm	Outstanding Achievements
Paul Aronzon	Milbank, Tweed, Hadley & McCloy Los Angeles, CA paronzon@milbank.com	Representations include: Franklin Advisors, holders of $1.3 billion in Dynegy public debt, resolving potentially damaging litigation; Chukchansi Economic Development Authority in restructuring $310 million of unsecured bonds and other liabilities; Dial Global, distributor of 200 radio programs to 8,500 stations, in its restructuring; Silver Legacy debtors in chapter 11 case involving restructuring of $175 million of debt.
James Bromley	Cleary Gottlieb Steen & Hamilton New York, NY jbromley@cgsh.com	Leads multi-office and multi-discipline team representing Overseas Shipholding Group and 180 affiliates. OSG, the world's second largest publicly traded oil tanker group, operates a fleet of over 110 oil tankers. Filing is third largest in 2012. Also counsel to Sabre, Inc., in AMR and American Airlines proceedings, and major international financial institution in submission of resolution and recovery plan required under Dodd-Frank Act.
Jay M. Goffman	Skadden, Arps, Slate, Meagher & Flom New York, NY jay.goffman@skadden.com	Global Head of Skadden's restructuring practice with reputation as innovative deal maker. Leading representation of Torm, Denmark firm and one of the world's biggest operators of oil tankers. Representing unsecured creditors' committee in AMR bankruptcy. Other representations include GlobalStar, Synagro, Syms/Filenes, DSW, Quigley, Travelport, Evergreen, CEDC, and numerous other restructurings.
Kristopher M. Hansen	Stroock & Stroock & Lavan New York, NY khansen@stroock.com	Lead counsel for noteholders & acquisition parties in out-of-court restructuring of Aquilex Holdings, resulting in over 98% of senior notes and 100% of bank lenders participating in exchange offer. Represented key noteholders and lenders in A&P, Indianapolis Downs, AMF Bowling, Patriot Coal, AES Eastern, China Medical Technologies, Affirmative Insurance, FiberTower. Represented creditors' comm. in KV Pharmaceutical and U.S. Bank in Kodak.
Marshall Huebner	Davis Polk & Wardwell New York, NY marshall.huebner@davispolk.com	Co-head, Insolvency and Restructuring Group. Lead counsel in Patriot Coal and Pinnacle Airlines in chapter 11 proceedings; U.S. counsel to Lehman Brothers International (Europe) in settlement resolving tens of billions of dollars in claims against LBHI; Citibank in Kodak DIP financing; JPM in A&P exit financing; advising Citibank, American Airlines' affinity card partner and one of its largest creditors, in airline's chapter 11 proceedings.
Stephen Karotkin	Weil, Gotshal & Manges New York, NY stephen.karotkin@weil.com	Currently represents American Airlines and certain of its affiliates in pending chapter 11 cases. Representing Harbinger Capital Partners, indirect owner of 96 percent of LightSquared outstanding common stock in one of biggest bankruptcies of 2012. Other recent representations of chapter 11 debtors include General Motors Corporation and Blockbuster, as well as lenders and borrowers in out-of-court restructuring transactions.
Lawrence A. Larose	Winston & Strawn New York, NY llarose@winston.com	Represents creditors in most major muni restructurings in U.S., including chapter 9's of Vallejo, CA; Stockton, CA; San Bernardino, CA; and Jefferson County, AL. Also representing major creditors in out-of-court restructurings of municipal debt issued by Harrisburg, PA; Scranton, PA; Woonsocket, RI; and Detroit, MI. Lead counsel in restructuring of MBIA Insurance Corp., and parties in Syncora Guarantee and Financial Guaranty restructuring.
Thomas Lauria	White & Case Miami/New York tlauria@whitecase.com	Global Practice Head of Financial Restructuring & Insolvency Group. Representations include lenders of $1.8 billion of secured debt in Torm A/S, one of world's largest shipping companies; secured lenders to General Maritime, negotiating fully consensual $1.385 billion restructuring and exiting chapter 11 within 6 months; Major League Baseball in Los Angeles Dodgers bankruptcy; Dynegy in restructuring $4 billion in debt.
Gary Lee	Morrison & Foerster New York, NY glee@mofo.com	Chair, Bankruptcy & Restructuring Group. Lead counsel to ResCap, largest bankruptcy filing in 2012. Leads advisory team to Iceland's Lansbanki in highly complex restructuring through cross-border jurisdictions. Represents liquidators of hedge funds investing in Madoff Investment Securities. Advised insurance division of RI Dept. of Business Regulation in first-ever discharge/liquidation of obligations of a solvent insurer in the U.S.
Thomas Moers Mayer	Kramer Levin Naftalis & Frankel New York, NY tmayer@kramerlevin.com	Co-chair, Corporate Restructuring & Bankruptcy Department. Represents creditors' committees in Patriot Coal, Hostess, WP Steel, Capmark Financial Group, and Evergreen Solar. Represents ad hoc groups in Eastman Kodak bankruptcy and Jefferson County, AL, chapter 9 bankruptcy. Advised Dutch Trustees of Lehman Brothers Treasury Co. B.V., single largest creditor in the Lehman case with a claim of $34 billion and over 100,000 creditors.
Steven J. Reisman	Curtis, Mallet-Prevost, Colt & Mosle New York, NY sreisman@curtis.com	Co-chair, Restructuring & Insolvency Group. In 2012, was conflicts counsel to debtors in three of the largest corporate bankruptcies: Patriot Coal, Residential Capital, and Hawker Beechcraft. Additional significant engagements in the past year include representation of Gordon Brothers Retail Partners in its successful bid for assets of Daffy's, and representation of Paulson & Co. in General Motors Nova Scotia Note Litigation.
Anup Sathy	Kirkland & Ellis Chicago, IL anup.sathy@kirkland.com	Represented Centerbridge Partners, largest holder of first and second lien indebtedness and rights offering backstop party, in connection with chapter 11 case of Reddy Ice. Restructuring resulted in Centerbridge owning a majority of the restructured company, was completed in just 50 days. Represented Centerbridge Partners in Aquilex out-of-court restructuring transaction with aggregate indebtedness of approximately $500 million.

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Claims, *from page 4*

the district court to consider the issue of whether the claim objection was "likely to be fully resolved within a reasonable time" as of August 9, 2010.

The Second Circuit also vacated the district court's opinion as it related to the breach of ATS's warranty that the claim was not "subject to any…impairment… or preference action…." "The district court erred in finding no reasonable issues of fact," because "[i]t is undisputed that Delphi made a $17.3 million payment within the [preference period], thus giving rise to a possibility that a preference action might impair the claim." The court's only statements regarding the Enron sale versus assignment distinction came in the context of discussing whether ATS could have known at the time it entered into the agreement that the agreement would be determined to be a sale under Enron such that the potential 502(d) disability would not travel to Longacre. The court opined that "this language in the agreement strongly suggests that it was an assignment."

Finally, the Second Circuit also vacated the district court's decision with respect to the claim of a right to indemnification and reimbursement because it relied upon the dismissal of the other counts of the complaint.

The Second Circuit's ruling presents important takeaways for both sellers and purchasers. Eisenberg expressed the view that the "Second Circuit's ruling both broadens and strengthens many of the buy-side repurchase provisions typically found in claim transfer agreements." Eisenberg noted that "the Second Circuit did not rule on the merits of Enron" or rule on whether the agreement effected a sale or an assignment. However, the court's statement suggesting that it was an assignment should cause purchasers to "consider revising their transfer agreement to include provisions which evidence a sale."

Robert Gordon, a member of Clark Hill PLC, who represents ATS in the case, noted that the decision has important implications for trade and other creditors who transfer their claims. In Gordon's view, the Second Circuit's interpretation of the 44th omnibus claim objection very much elevated form over substance. As a result, claimants with the leverage to negotiate terms of the transfer agreement should "place a greater premium on defining what kind of objection will trigger the agreement's impairment provisions – that is, specifically excluding an 'objection' that is nothing more than a reservation of rights to object."

In addition, Gordon noted the difficult position that the Second Circuit's holding creates for many trade creditors that have on-going relationships with the debtor. If the fact that payments were received in the 90-day period is sufficient to constitute knowledge that the claim is subject to a possible impairment or preference action, those creditors "could never provide a representation or warranty" as to preference exposure Gordon stated.

The Second Circuit recently denied ATS's petition for a panel rehearing. The case will now return to the district court for consideration of the issues remaining on remand. ¤

Reinstatement, *from page 4*

the bargain.

Even then, it might not work. According to David Neier, a partner at Winston & Strawn, *Young Broadcasting* doesn't say as much about debt reinstatement as most people think it does. "People think of *Young Broadcasting* as a debt reinstatement case because there are so few cases about debt reinstatement. It's actually a valuation case and a cram-up case (because the debtors were trying to cram up the lenders and put them in a different interest rate)."

According to Neier, it's "unbelievably difficult" to reinstate bank debt. "The debt reinstatement provision – 1124 – really only works with bonds. With bonds it's a lot easier, because there aren't the covenants you have in bank deals that are impossible to cure."

People often threaten debt reinstatement, Neier says, but don't go forward with it and get a judge's decision. "Debtors threaten lenders in the hopes of wrangling out a better deal, but then they understand the hurdles they face in going forward, so they rarely go to decision."

According to Mirick, a broader issue is whether the concept of an incurable default should continue to be part of the reinstatement landscape. "In the 2005 Amendments, Congress essentially removed the incurable default from the commercial landlord's toolkit, amending section 365 to provide that a default that arises from performance or a lack of performance and cannot be cured by performance at the effective date, can be cured by the debtor or assignee agreeing to perform thereafter."

Mirick also points out the incurable default has been curtailed in commercial leases, as illustrated by going-dark provisions, whereby a business that fails to operate a location for a certain number of days defaults under the lease, and there is no way to "cure" that after the fact. Why not curtail it elsewhere?

"Having curtailed the incurable default in commercial leases, perhaps Congress could do the same in connection with reinstatement of debt, which would provide reorganizing debtors with another, more viable, option for funding their reorganizations," Mirick says. ¤

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- *Special Report: Largest Chapter 11s of 2012*
- *Special Report: Successful Restructurings – 2012*
- *Research Report: Who's Who in AMF Bowling Worldwide, Inc.*

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