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DECEMBER 2014 VOLUME 28, NUMBER 12

The New Detroit

Restructuring Plan Rescues City from the Brink

by Julie Schaeffer

The November 7 approval of Detroit's bankruptcy restructuring plan, which came just 15 months after the city filed for Chapter 9, has been hailed as a miraculous achievement.

"Detroit had a complexity way beyond that of any other distressed municipality," says Charles Moore of Conway MacKenzie, which was engaged by the city in January 2013 as its restructuring advisor. "Every issue you could possibly imagine existed."

Conway MacKenzie has perspective gained from its involvement in the Stockton, California, and Jefferson County, Alabama, bankruptcies. "Jefferson County didn't have major issues related to employee obligations, such as pensions and retiree health care, and Stockton didn't have nearly the amount of secured debt as the City of Detroit," Moore

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You're Fired!

Concerns Regarding D&Os Block Plan Confirmation

by Randall Reese

Section 1129 of the Bankruptcy Code requires a proposed plan of reorganization or liquidation to meet a litany of requirements before the plan can be confirmed. Section 1129(a)(5)(A) sets forth two of those requirements. First, the plan proponent must have "disclosed the identity and affiliations of any individual proposed to serve, after confirmation of the plan, as a director, officer, or voting trustee of the debtor, an affiliate of the debtor participating in a joint plan with the debtor, or a successor to the debtor under the plan." Second, the court must also determine that "the appointment to, or continuance in, such office of such individual, is consistent with the interests of creditors and equity security holders and with public policy."

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Momentous Consequences?

Ruling May Pave Way for Below-Market Cramdowns

by Julie Schaeffer

Last month, we discussed the decision in Momentive Performance Materials (MPM) Silicones, LLC, which questions the enforceability of make-whole provisions in the context of a bankruptcy. However, as noted, another element of the decision – that the debtors could satisfy the cramdown provisions of 1129(b) without providing a market rate of interest – is also significant, says Damian S. Schaible, a partner in the insolvency and restructuring group at Davis Polk & Wardwell LLP.

As explained last month, Momentive filed for Chapter 11 in April 2014 in the United States Bankruptcy Court for the Southern District of New York. Under the company's plan

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says. "In addition, Detroit, being such a core part of a region, provided services to a number of surrounding communities."

Conway MacKenzie's first task: Address the liquidity situation, looking for ways that costs could be reduced and revenues increased. That's a fairly normal starting point in these situations, says Moore, but once Conway MacKenzie got to work, it realized the condition of the city's operations was so poor there would be no way to establish a viable city without substantial reinvestment.

"The magnitude of the deferred capital expenditures was astounding," says Van Conway, president and CEO of Conway MacKenzie. As Detroit's population began declining in the 1950s, the city resorted to tactics that many other municipalities use to avoid making difficult decisions and still stay afloat. First, it used the following year's budget to pay for the current year's expenditures. Then, it took on significant debt, for many years running deficits north of $100 million on a general fund budget of $1 billion. It also trimmed spending on infrastructure. As a result, for decades there was no investment in infrastructure – ambulances, accounting systems, water systems, and so forth – which created a challenge. "The amount of the investment was going to be such that it would take the majority of the city's resources and then some to fund a reinvestment plan," says Moore. "Therefore, the cash the city would be able to use to fund its debt obligations and provide various other payments for employee-related items was very limited."

Also a problem was mismanagement, which accelerated during the 2000s under the Mayor Kilpatrick administration. Underfunded pension plans were one example. Unlike in Stockton, where a separate entity, CalPERS, was making decisions about investments and actuarial policies, Detroit's two defined benefit pension plans (one for police and fire, one for general employees) were overseen by elected boards, some of whom were indicted for alleged activities involving investments of plan assets. In addition, the boards authorized the use of plan assets to pay employees benefits that weren't bargained for or promised. Instead, retired employees received whatever monthly pension payments had been bargained for under their union contracts, but also received an additional "thirteenth check."

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"Most plan proponents are aware of the requirement that they must identify any individuals expected to serve as a director, officer, or voting trustee of the reorganized debtor," notes Doron Kenter of Weil, Gotshal & Manges LLP. "Often taken for granted, however, is subsection (ii)." A recent opinion by Chief Bankruptcy Judge Jeff Bohm of the United States Bankruptcy Court for the Northern District of Texas denied confirmation of a proposed plan based on Section 1129(a)(5)(A)(ii) and, in Judge Bohm's words, makes "an effort to develop guidelines for applying this particular provision of the Code."

The opinion arises out of the bankruptcy of Digerati Technologies, Inc. According to court filings, Digerati was a "diversified holding company which own[ed] operating subsidiaries in the oil field services industry and the cloud communications industry." In its Second Amended and Restated Plan of Reorganization, Digerati proposed that Arthur Smith and Antonio Estrada, its CEO and CFO respectively, would continue to serve as the only officers and directors of the reorganized company. Both were also equity holders and creditors of Digerati and both had served as officers and/or directors of Digerati within two years prior to the filing of the Chapter 11 petition.

A group of Digerati's shareholders objected to the proposed Plan. The objection asserted that certain terms of the proposed Plan were inconsistent with the terms of a Bankruptcy Settlement Agreement entered into by the parties and that a number of other factors indicated a "lack of good faith" and "the Debtor's self-dealing." Included in those factors was the following statement: "continued employment of Smith and Estrada is not in the best interest of the estate, the creditors, the equity security holders and fails to satisfy public policy." Nowhere in the objection did the shareholders specifically reference Bankruptcy Code Section 1129(a)(5)(A)(ii) or cite any case law regarding its requirements.

Judge Bohm noted in the opinion that the shareholders and Digerati's executives were entangled in a long-running dispute. "[S]ince 2012, there has been a brutal battle over competing boards as to just who has the authority to make decisions for the Debtor," wrote Bohm. "Smith and Estrada have been on one side of

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of reorganization, senior noteholders were to be paid in full, in cash, but without the interest (of more than $200 million) that would have accrued all the way through the original 2015 maturity of the notes. The senior noteholders objected to the plan on the grounds that it violated the terms of the indenture, which provided for payment of a make-whole premium in the event of any redemption of the notes before October 2015 – and a redemption of the notes occurred with the automatic acceleration of the notes upon the filing of the bankruptcy. Momentive disagreed on the grounds that there was not a voluntary redemption of the notes before October 2015; instead, the maturity date was automatically accelerated by the bankruptcy filing.

In light of this dispute, the noteholders had two choices: (1) accept the debtors' plan, thereby being paid in full, in cash, but without the interest that would have accrued through the original 2015 maturity of the notes, or (2) reject the debtors' plan and be subject to a cramdown that satisfied their claims with replacement notes. Notable here is that the replacement notes of the first-lien noteholders (who had $1 billion of notes) would have a coupon equal to the yield on a U.S. Treasury note of matching maturity as of the effective date plus 1.5% – for an estimated total yield of 3.6%. The replacement notes of the 1.5-lien noteholders (who had $250 million in notes) would have a fixed coupon equal to the yield on the U.S. Treasury note of matching maturity plus 2.0% – for an estimated total yield of 4.1%.

Those options didn't appeal to the noteholders. "Both the first lien and 1.5-lien noteholders voted overwhelmingly to reject the plan, and filed confirmation objections, both asserting their entitlement to make-whole payments and arguing that the treatment afforded to them by the plan – as a consequence of their rejection – was not 'fair and equitable,'" says Schaible.

Specifically, said the noteholders, the interest rate on the replacement notes did not meet the "cramdown standard" of section 1129(b) of the Bankruptcy Code. According to Section 1129(b), if a plan of reorganization does not provide for the immediate payment of secured creditors, it must provide them with "deferred cash payments totaling at least the allowed amount of such claim, of a value, as of the effective date of the plan, of at least

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Research Report

Who's Who in Endeavor Operating Corporation

by Francoise C. Arsenault

Endeavor Operating Corporation (Endeavor), founded in 2004 and headquartered in Houston, Texas, is a privately held independent oil and gas company engaged in the acquisition, exploration, and development of energy reserves and resources onshore in the United States and offshore in the United Kingdom. The company holds working interests in oil and gas leases in the United States and oil and gas licenses in the United Kingdom. These working interests provide Endeavor with the right to receive its portion of the revenues generated by producing oil and gas wells, but obligates the company to pay for its share of the costs of the development and operation of those wells. The vast majority of the company's revenue is generated through the sales of its pro rata share of oil and gas produced from fields operated by third parties.

The company's businesses and assets in the United States include exploration licenses and producing properties in Colorado, Louisiana, Montana, New Mexico, Pennsylvania, and Texas, and comprise approximately 8 percent of its total production and 8 percent of its proven reserves. Endeavor's businesses and assets in the United Kingdom include exploration licenses and producing properties in five oil and gas fields in the North Sea, which comprise the remaining 92 percent of the company's total production and 92 percent of its proven reserves. To manage its global businesses, Endeavor, which operates as a subsidiary of Endeavor International Corporation, employs about 77 full-time employees and independent consultants across three offices.

On October 10, 2014, Endeavor Operating Corporation and five of its affiliated debtors filed for Chapter 11 reorganization in the United States Bankruptcy Court for the District of Delaware. The bankruptcy filing included only certain of the company's U.S.-based entities and one non-operating foreign entity. On October 13, 2014, the New York Stock Exchange suspended trading in the shares of Endeavor and began the process to delist the stock.

According to company officials, a number of unanticipated events outside of Endeavor's control forced the company to borrow funds over the past three years at a high cost of capital and to divert cash from its businesses to satisfy ongoing obligations. In the bankruptcy filing, company officials also cited unfavorable changes in the economic and political climate for the oil and gas industry, natural disasters, volatile commodity prices, and unexpected delays in new oil and gas production arising from operating difficulties in the United Kingdom North Sea as factors contributing to Endeavor's thin liquidity and swift increase in debt by more than $500 million to approximately $1.2 billion.

On November 17, 2014, Endeavor filed a proposed Plan of Reorganization and Disclosure Statement with the bankruptcy court. The proposed Plan of Reorganization, which is supported by more than two-thirds of the company's bondholders and the bankruptcy court, would eliminate more than $550 million of the company's existing debt, including the cancellation of all of its notes, reduce approximately 43 percent of Endeavor's annual interest burden, and free up about $50 million in cash for reinvestment. Under the terms of the proposed Plan of Reorganization, bondholders would receive about $262 million in new bonds, in addition to convertible preferred equity of approximately $237 million.

The bankruptcy court will hold a hearing on the confirmation of the Plan of Reorganization on February 3, 2015. If the Plan of Reorganization is approved, Endeavor would exit bankruptcy by the end of April 2015. The U.S. Trustee has not appointed a committee of unsecured creditors in the case.

The Debtor

William L. Transier is the Chairman of the Board of Directors of Endeavor International Corporation. **David C. Baggett** is the Chief Restructuring Officer. **Catherine (Cathy) L. Stubbs** is the Chief Financial Officer and a Senior Vice President. **Ralph A. Midkiff** is the General Counsel and a Senior Vice President.

Weil, Gotshal & Manges LLP is acting as the lead bankruptcy counsel to Endeavor. The team is being led by **Gary T. Holtzer**, a partner in the firm's New York office, and **Stephen A. Youngman**, a partner in the Dallas office. Also working on the case are **Ted S. Waksman**, **Stuart J. Goldring**, **Matthew D. Bloch**, **Courtney S. Marcus**, **David I. Bower**, and **Kenneth H. Heitner**, partners, **Max A. Goodman**, of counsel, and **Noah B. Kressler**, **Charles M. Persons**, **Jessica Liou**, **Kyle J. Ortiz**, **Debra McElligott**, **Eric D. Remijan**, **Benjamin Farrow**, **Erica Rees**, **Raphaella Ricciardi**, **Christina M. Manthei**, and **Gavin Westerman**, all associates with the firm.

The law firm of **Richards, Layton & Finger P.A.** is serving as the bankruptcy co-counsel to Endeavor. Working on the case are **Mark D. Collins** and **Michael J. Merchant**, partners, and **L. Katherine Good**, **Zachary I. Shapiro**, **Amanda R. Steele**, and **Rachel L. Biblo**, associates with the firm.

Opportune LLP is providing crisis management and restructuring advisory services to Endeavor. **David C. Baggett**, a managing partner, is acting as the CRO for Endeavor and leads the engagement.

Blackstone Advisory Partners L.P. is serving as the financial advisor to Endeavor. The engagement team includes **Peter Laurinaitis**, a senior managing director, **Jonathan Lurvey**, a managing director, **Avi Robbins** and **Joseph Terry**, associates, and **Owen Wurzbacher** and **Jack Robinson**, analysts.

Ernst & Young LLP is providing Endeavor with tax advisory and auditing services. The engagement team is being led by **John Russell**, a partner in the firm's Houston office.

The Trustee

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

The Judge

The judge is **The Honorable Kevin J. Carey**. ¤

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A similar practice occurred in the crediting of interest to individual employees' savings accounts. Employees could set up accounts into which they would direct a percentage of their after-tax income; those assets were then commingled and invested with defined benefit plan assets. The idea, when the practice began, was that over time the rate of return earned on individual employees' savings account assets would approximate the assumed rate of return for plan assets. But beginning in the 1980s, the board of the pension plan for general employees, in years when the actual return of pension plan assets exceeded the assumed rate of return, credited the excess return to the individual employees' savings accounts. The problem was that in down years, when the actual return of pension plan assets was lower than the assumed rate of return, individual employees' savings accounts were still credited with interest at the assumed rate of return. "You had situations in which people would retire, and in addition to their monthly defined benefit plan payments, would get a lump sum check for $1 million," says Moore.

"It's been approximated that more than a couple of billion dollars worth of plan assets went out the door as a result of thirteenth checks and excess interest crediting," says Moore. "It left the pension fund significantly underfunded, and was a big driver of the liquidity crisis that precipitated the city's bankruptcy filing."

With such dramatic problems, many constituents took hits. The city's payout for post-employment benefits such as retiree health care was 10 cents on the dollar ($450,000 vs. $4.5 million). While some general obligation creditors wound up with 74 cents on dollar, others, especially insurers of pension obligations, received less than 25 cents. And Detroit is the first instance of accrued pension benefits impaired. "Not only did Detroit substantially change pension plan benefits earned from now going forward, but also adjusted benefits that had already been accrued," says Moore.

At the same time, there were several innovative accomplishments. Certain creditors, for example, were given assets to redevelop, turning them from opponents of the city's restructuring plan into partners in the city's renewal. Syncora, at one time perhaps the city's most strident opponent, received a long-term lease of the Grand Circus Park parking garage and the tunnel between Detroit and Canada. Financial Guaranty Insurance Company (FGIC), a bond insurer with a $1 billion claim, received the right to redevelop nine acres of land along the Detroit River, including the Joe Louis Arena.

"The Syncora settlement was a very unique solution," says James Doak, a managing director at Miller Buckfire, the investment banker to the City of Detroit. "It offered a junior creditor the opportunity to participate in the revitalization of the city in order to improve its recovery. In that Syncora was one of the most vocal and vested opponents of the city's restructuring process, their settlement marked the beginning of the end of the bankruptcy. It was a tremendously creative and bold act by all involved – the city, Syncora, their advisors and, very importantly, the mediators.

Problems with the Detroit Water and

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these warring factions, while the [objecting shareholders] have been on the other side."

Judge Bohm construed the shareholders' objection as being based upon Section 1129(a)(5)(A)(ii), but also noted that the court has "a mandatory independent duty to determine whether the plan has met all of the requirements necessary for confirmation" even absent an objection. He began analyzing this provision by noting that the phrase "consistent with…public policy" is not defined in the Bankruptcy Code, thereby leaving bankruptcy courts to "exercise their sound discretion on the issue." He then reviewed five earlier opinions that interpreted that phrase in the context of Sections 1129(a)(5) and 1123(a)(7).

Judge Bohm stated that distilling the holdings of those five decisions lead him "to conclude that in assessing whether the appointment of an individual to serve as a director or officer of a reorganized debtor is 'consistent with public policy,' this Court should, at a minimum consider the following factors, giving appropriate weight to each of them based upon the particular circumstances of the case at bar:

(1) Does the proposed plan, if confirmed, keep the debtor in existence as an ongoing company or is the debtor extinguished?

(2) Is the debtor a publicly-held company or a privately-held company?

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Calendar

American Bankruptcy Institute
20th Annual Rocky Mountain Bankruptcy Conference
January 22 – 23, 2015
Four Seasons Hotel Denver
Denver, CO
Contact: www.abiworld.org

The New York Institute of Credit and
Association of Insolvency and Restructuring Advisors
10th Annual NYIC/AIRA Joint Bankruptcy & Restructuring Event
January 29, 2015
Arno's Ristorante
New York, NY
Contact: www.instituteofcredit.org

American Bankruptcy Institute
VALCON 2015
February 25 – 27, 2014
Four Seasons Las Vegas
Las Vegas, NV
Contact: www.abiworld.org

National Association of Bankruptcy Trustees
2015 Spring Seminar
February 27 – 28, 2015
Charleston Place
Charleston, SC
Contact: www.nabt.com

International Association of Restructuring, Insolvency & Bankruptcy Professionals
2015 Annual Regional Conference
INSOL San Francisco
March 22 – 24, 2015
The Fairmont San Francisco
San Francisco, CA
Contact: www.insol.org

Turnaround Management Association
TMA 17th Annual Symposium
April 22, 2015
Fairmont Royal York Hotel
Toronto, Canada
Contact: www.turnaround.org

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Special Report

Sources of Debtor-in-Possession Financing

Company/Debtor	DIP Amount	DIP Source
Energy Future Holdings Corp., Dallas, TX	$5,400,000,000	Citibank, NA
Momentive Performance Materials Inc., Waterford, NY	$570,000,000	JP Morgan Chase Bank NA
Mach Gen LLC, Athens, NY	$200,000,000	Beal Bank USA
Gridway Energy Holdings Inc., Sandwich, MA	$122,000,000	Vantage Commodities Financial Services I, LLC
Optim Energy, LLC c/o Competitive Power Ventures, Inc., Silver Spring, MD	$115,000,000	Cascade Investment, L.L.C.
James River Coal Company, Richmond, VA	$110,000,000	Cantor Fitzgerald Securities
Reichhold Holdings US, Inc., Durham, NC	$106,000,000	Cantor Fitzgerald Securities
Brookstone Holdings Corp. Merrimack, NH	$96,250,000	Wilmington Savings Fund Society, FSB
Tuscany International Holdings (U.S.A.) Ltd. Calgary, Canada	$70,000,000	Credit Suisse AG
Ablest Inc., Santa Barbara, CA	$50,000,000	Credit Suisse AG
Eagle Bulk Shipping Inc., New York, NY	$50,000,000	Wilmington Trust (London) Limited
Coldwater Creek Inc., Sand Point, ID	$42,000,000	Wells Fargo Bank NA
GSE Environmental Inc., Houston, TX	$35,000,000	Cantor Fitzgerald Securities
MModal Inc., Franklin, TN	$30,000,000	Royal Bank of Canada
UniTek Global Services, Inc., Blue Bell, PA	$29,200,000	Wilmington Trust NA
Revel AC Inc., Atlantic City, NJ	$25,000,000	Wells Fargo Bank NA
Event Rentals Inc., Ingelwood, CA	$20,000,000	Ableco Finance LLC - $20 million
Dolan Company, Minneapolis, MN	$10,000,000	Bayside Capital, Inc.
Mississippi Phosphates Corporation, Pascagoula, MS	$10,000,000	STUW LLC
Variant Holding Company, LLC, Tucson, AZ	$10,000,000	Cortland Capital Market Services LLC
Sbarro LLC, Melville, NY	$10,000,000	Cantor Fitzgerald Securities”
Quiznos, Denver, CO	$10,000,000	Wilmington Trust, National Association

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Worth Reading

Corporate Venturing – Creating New Businesses Within the Firm

Authors: Zenas Block and Ian C. MacMillan
Publisher: Beard Books
Softcover: 381 pages
List Price: $34.95

Creating a new business within a firm allows a company to tap its potential while minimizing risk. It is similar to an entrepreneurial venture in that it offers an opportunity to pursue profits outside the confines of the normal corporate structure and decision-making processes. Creating a new business within a company is different from a true entrepreneurial venture, however, in that the business has corporate resources at its disposal and has to answer to company management.

An entrepreneurial enterprise differs in other ways from corporate venturing – to use the authors' term. "When a new entrepreneurial venture is created outside an existing organization, a wide variety of environmental factors determine the fledgling business's survival. Inside an organization...senior management is the most critical environmental factor." This is both the major strength and limitation of a corporate venture, and Block and MacMillan explain how senior management, working with the leadership of a corporate venture, can use this to give the venture the best chance for success.

If the venture succeeds beyond the goals set at its formation, it can always be integrated into the parent company as a new division or subsidiary modeled after the other parts of the company, with the same open-ended commitment, regular hiring practices, reporting and coordination, and so forth. As explained by the authors, done properly with a sense of realism and practicality and preliminary research and ongoing analysis, corporate venturing offers a new path for a company to reach new markets, engage in fruitful business research, and adapt to changing market and industry conditions.

The principle of corporate venturing is the familiar adage, "nothing ventured, nothing gained." While unlikely that a corporate venture can save a dying firm, a characteristic of every dying firm is a blindness to venturing. Just thinking about corporate ventures can bring to a company a vibrancy and imagination needed for business longevity.

While ideas, insights, and vision are the essence of corporate venturing, they are not enough. Corporate venturing is based as much on the right personnel, especially the top leaders. The authors recommend, whenever feasible, that employees of the firm be selected to lead a corporate venture because they already have relationships with senior management, who are the ultimate overseers of a venture, and they understand the corporate culture. Only half jokingly do the authors suggest that the most promising employees to lead a corporate venture are the "troublemakers." These are the employees who, if given freedom and a high level of empowerment, can make the venture workable. They are also the employees who are most suited to adapt rapidly to new information.

Corporate venturing is a melding of the standard corporate structure and operations model with the independent business model that emphasizes entrepreneurial flexibility and a focus on one product or service or, at most, a few interrelated ones, along with simplified operations and streamlined decision-making. From identifying opportunities and getting started, through the business plan and corporate politics, Block and MacMillan provide readers with a blueprint for corporate venturing success. ¤

Zenas Block is a former adjunct professor at the NYU Stern School of Business. Ian C. MacMillan is a professor at the University of Pennsylvania's Wharton Business School.

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

Detroit, *from page 4*

Sewer Department (DWSD) were resolved with the transfer of assets into a new entity called the Great Lakes Water Authority. DWSD, a city entity covering close to half of Michigan's residents and several surrounding counties, wanted greater control over services and rates for its residents. The deal allowed Detroit to maintain control of its local system while leasing its infrastructure to the regional authority.

But by far the biggest item in this case was the Grand Bargain, the agreement between the state, foundations, and the Detroit Institute of Art (DIA) to raise more than $800 million to preserve the city-owned art collection and help fund pensions. "The new cash that came in allowed for the benefit reduction in pensions to be less than it otherwise would have been, and was a linchpin in getting settlements with pension creditors," says Moore.

According to Doak, most significant about the outcome was the fact that the court recognized that Detroit could not cut its costs to achieve solvency as it was "service insolvent," and adequate future resources needed to be set aside to allow the city to return to a place where people can live and work. "Many of those resources will come from new and future regional and state efforts that were beyond the four corners of the credit," he says. He mentions, for example. state and philanthropic contributions to pensions protecting the DIA for the community and regionalization of DWSD. "The Detroit region's future depends on its leaders willingness to continue such collaboration," he adds.

For many, one question remains: What will prevent Detroit from getting into the same mess again? According to Moore, a number of processes have been established. The new pension plans, for example, have trigger points, and corrective actions will be taken if funding levels fall below 100 percent on prospectively earned benefits. The city has essentially exited the retiree health-care business. And, a financial review commission will provide oversight for a number of years, only reducing that oversight when certain thresholds are met. "Judge Rhodes used his own expert to assess the feasibility of the city's plan, and that expert indicated that the plan is tight, but achievable," says Moore. ¤

Special Report

Outstanding Restructuring Lawyers – 2014

Lawyer	Firm	Outstanding Achievements
Andrew G. Dietderich	Sullivan & Cromwell New York, NY dietdericha@sullcrom.com	Advised clients holding majority of preferred shares of Fannie Mae and Freddie Mac, substantial majority of holders of senior notes of RadioShack, stakeholders in Energy Future Holdings bankruptcy, bondholders of Caesars Entertainment Company in an innovative out-of-court transaction, clients holding Overseas Shipping Group's senior notes, and clients in significant remaining contested claims in Lehman Brothers bankruptcy.
Ira S. Dizengoff	Akin Gump Strauss Hauer & Feld New York, NY idizengoff@akingump.com	Representing ad hoc group of holders of approx. $1.7 billion of unsecured PIK notes in Energy Future Holdings bankruptcy. Lead counsel for official creditors' committee in Edison Mission Energy, institutions holding Longview Power's prepetition senior secured debt and backstopping DIP financing, Quiznos and 14 affiliates, and Apollo Global Management and affiliated funds in Momentive Performance Materials case.
Dennis F. Dunne	Milbank, Tweed, Hadley & McCloy New York, NY ddunne@milbank.com	Lead counsel for secured creditors of worldwide dry shipping company Genco. Represented Momentive's ad hoc creditors' committee holding $400 million of second lien notes. Advised first lien group in restructuring of Cengage Learning. Representing Citibank in chapter 11 restructuring of Energy Future Holdings, and continues to counsel ad hoc group of bondholders in complex, cross-border Nortel Networks bankruptcy.
Matthew A. Feldman	Willkie, Farr & Gallagher New York, NY Mfeldman@willkie.com	Successfully steered Momentive through its chapter 11 case extremely quickly while obtaining favorable resolution of cutting edge, highly contested matters such as intercreditor agreement enforcement, make-whole provisions, vote changes, and cram-down rates. Exited bankruptcy just six months after filing. Other representations include Rural/Metro and 65 affiliates in prenegotiated chapter 11 plan.
Kristopher M. Hansen	Stroock & Stroock & Lavan New York, NY khansen@stroock.com	Lead counsel to Trump Entertainment Resorts in its chapter 11 filing, winning issue of first impression granting company's request to reject its CBA. Lead counsel to $5.3 billion class of first lien lenders of Caesars Entertainment in negotiating a restructuring of its almost $20 billion capital structure. Lead counsel to Fortress as plan sponsor and significant bank debt holder of LightSquared in multi-billion dollar restructuring.
David G. Heiman	Jones Day Cleveland, OH dgheiman@jonesday.com	Led City of Detroit chapter 9 case, largest muni. bankruptcy in U.S. history. Confirmation plan, reached after months of out-of-court mediation and negotiations with retiree representatives, bond insurers, labor unions, and other creditors, reduced city's $18 billion debt burden by approx. $7 billion, restoring city's solvency. Currently representing Radio Shack in its out-of-court restructuring and NII Holdings in its chapter 11 case.
Harold L. Kaplan	Foley & Lardner Chicago, IL hkaplan@foley.com	Leading bond default/indenture trustee counsel, including, most recently: Energy Future ($1.6 billion senior notes), Exide ($675 million senior secured notes), Foxwoods ($500 million notes), Travelport ($1.5 billion senior and senior subordinated notes), Hawker Beechcraft ($839 million senior notes), Real Mex ($130 million senior secured notes), and Extended Stay ($8.5 million senior subordinated notes).
M. Natasha Labovitz	Debevoise & Plimpton New York, NY nlabovitz@debevoise.com	Advising Altegrity on ongoing restructuring efforts for approx. $1.8B in funded debt, Standard General in distressed investment in RadioShack, Berkshire Hathaway as DWSD creditor in Detroit chapter 9, Petroleum Equity as acquirer of ATP UK, Oaktree and Crown Holdings (through Elan joint venture) in distressed acquisition of El Ad casino property. On creditor side, representing Disney and CBS in Aereo bankruptcy.
Brett H. Miller	Morrison & Foerster New York, NY bmiller@mofo.com	Lead counsel to official committee of unsecured creditors for Energy Future Holdings, playing critical role in difficult task of uniting creditors with diametrically opposed interests and objectives. Also represented Toshiba and North American affiliate, Toshiba America Nuclear Energy, in pre-filing negotiations and chapter 11 cases of USEC. Lead counsel for MF Global trustee and continues to represent MF Global plan administrator.
Patrick J. Nash, Jr.	Kirkland & Ellis Chicago, IL patrick.nash@kirkland.com	Represented GSE Environmental in its prearranged chapter 11 cases. Represented Sorenson Communications in prepackaged chapter 11 case. Represents ad hoc committee of first lien lenders to Altegrity in connection with potential restructuring. Acted as U.S. counsel to OGX Petroleo e Gas in connection with its bankruptcy in Rio de Janeiro. U.S. counsel to US Steel in connection with the restructuring of its Canadian subsidiary.
Alfredo R. Pérez	Weil, Gotshal & Manges Houston, TX alfredo.perez@weil.com	Represented FGIC in City of Detroit bankruptcy, resolving treatment of certificates of participation and revenue bonds, and FGIC's related claims against the city. Represented DIRECTV in acquisition, along with AT&T, of Houston Regional Sports Network. Represented American Airlines and affiliates in their chapter 11 cases. Represented Lehman in two major settlements with Freddie Mac and Fannie Mae.
Kenneth S. Ziman	Skadden, Arps, Slate, Meagher & Flom New York, NY kenneth.ziman@skadden.com	Currently representing Dendreon Corporation in its chapter 11 cases. Continues to lead Exide Technologies in one of the largest traditional chapter 11 cases in recent years. Represented Select Staffing in its successful prepackaged chapter 11 and Savient Pharmaceuticals in its Section 363 sale. Also represented Walnut Creek Mining Company in connection with Optim Energy chapter 11 cases.

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(3) Does continued service of the individual perpetuate incompetence, lack of direction, inexperience, or affiliations with groups inimical to the best interests of the debtor?
(4) Does the continued service of the individual provide adequate representation of all creditors and equity security owners?
(5) Does the retention of the individual violate state law in any respect?
(6) Is the individual a 'disinterested person'?
(7) Is the individual capable and competent to serve in the proposed capacity assigned to him?
(8) Are the salaries and benefits that the individual will receive reasonable based upon the size of the debtor's operations, the complexity of these operations, and the revenues to be generated?
(9) Are there any new independent outside directors being appointed under the proposed plan?"

In applying his newly-created methodology, Judge Bohm emphasized several considerations. First, he noted that roles of the CEO and CFO as officers and directors of the planned post-reorganization Digerati, which would operate as a holding company for one operational subsidiary, alone did not "seem inconsistent with public policy" and did not "violate any Texas statute concerning corporations and the governance thereof." However, after noting the long-standing disputes between the proposed executives and the objecting shareholders, he referenced the lack of new independent outside directors in finding that the objecting shareholders had "a justifiable concern that Smith and Estrada will not adequately represent their interests as shareholders."

Further, Judge Bohm looked to the employment agreements for Smith and Estrada, which were being assumed pursuant to the terms of the Plan. First, he noted that Smith's employment agreement was, "to put it mildly[,] a very rich deal for Smith." Second, the employment agreement provided Smith with a right to terminate the employment agreement under a variety of circumstances, which would entitle him to significant additional compensation. Bohm determined that this compensation package "is unreasonable given that Smith will be the officer and director of a holding company, which will own the stock of one fairly small and fledgling company."

In addition, Bohm also held that neither Smith nor Estrada were disinterested persons, which "works against a finding that their continuation in their present positions post-confirmation is consistent with public policy – particularly since no new independent officers or directors are being appointed under the Plan." Bohm also expressed concern about Smith's testimony at the confirmation hearing, stating that it was "disconcerting that the CEO of the Debtor . . . cannot satisfactorily explain important provisions of the Plan." Finally, Bohm stressed the publicly-traded equity of Digerati. "It is difficult for this Court to find that the appointment of solely Smith and Estrada is 'consistent with public policy' when the Debtor is a publicly-held company whose 6,000 shareholders deserve to have at least one independent, disinterested voice helping to guide this corporation into future profitability," he wrote.

Therefore, Judge Bohm denied confirmation to the proposed Plan. Digerati and a group of interested parties later reached agreement on the terms of an amended Joint Plan which, among other things, added two independent directors to the reorganized company's Board of Directors. Judge Bohm entered an order confirming that Joint Plan less than two months after the previous denial.

The impact of Judge Bohm's guidelines remains to be determined. "To be sure, this nonexclusive list of factors may yet be supplemented, revised, or ignored by other courts," says Kenter. "And, as with any multi-factor balancing test, application of these questions is more of an art than a science." Nevertheless, Michael Good of the Southbay Law Firm believes that the decision "serves as a reminder that all of Chapter 11's requirements, no matter how seemingly arcane, must be met prior to a plan's confirmation." Further, "these requirements can often be a source of contention and – on occasion – tactical advantage," Good notes.

Kenter concludes that "plan proponents would be well-advised to consider these questions [Bohm's nine factors] in determining who is proposed to lead the reorganized debtor and in whose interest's management should act when establishing a path out of Chapter 11." ¤

Momentous, *from page 2*

the value of such holder's interest in the estate's interest in such property."

"In other words, the present value of secured creditors' replacement notes must equal the value of their secured claims," says Schaible.

To support their position, the noteholders pointed to the Supreme Court's plurality opinion in *Till* that proposed cramdown interest rates in Chapter 11 bankruptcies should be determined by reference to market rates. As a method of calculating cramdown interest rates, the *Till* decision endorsed adjusting the prime rate upward to reflect credit and collateral risk. However, in a footnote, the Supreme Court noted that cramdown interest could be calculated differently, writing "when picking a cramdown rate in a Chapter 11 case, it might make sense to ask what rate an efficient market would produce."

Citing this footnote, the Momentive noteholders argued that the appropriate interest rate for their replacement notes should be determined by reference to the market rate for loans of equivalent priority. And, to come up with such a market rate, the noteholders pointed to the debtors' two pre-arranged credit facilities, which were intended to refinance the notes in the event the noteholders accepted the plan. Both paid higher interest rates than the proposed replacement securities. The facility arranged to refinance the first-lien notes had an interest rate of LIBOR plus 4.0% with a LIBOR floor of 1.0%, or an indicative rate of 5.0%. The exit facility arranged to refinance the 1.5-lien notes had an interest rate of LIBOR plus 6.0% with a LIBOR floor of 1.0%, or an indicative rate of 7.0%, subject to 0.5% step-ups every three months to a capped amount.

In his ruling, Judge Drain held that *Till*'s formula approach was correct, but he rejected the implication of the footnote in *Till* that the appropriate interest rate for replacement notes in a cramdown context should be set by the market if a market rate is available. Instead, Judge Drain said the prime rate was the appropriate benchmark. Thus, he said, the debtors' proposed coupon, which had been benchmarked off of lower U.S. Treasury rates, should be increased by 0.50% for the first-lien replacement notes and 0.75% for the 1.5-lien replacement notes, for a total coupon of 4.10% and 4.85%, respectively.

"The ruling that cramdown can be used to distribute replacement notes paying a

continued on page 9

Gnome de Plume

Highlights of Distressed Investing 2014

by Andy Rahl

Beard Group's Annual Distressed Investing Conference held in New York City this December 1 featured many highlights. The following is a summary of some of the more notable ones.

Steve Gidumal of Virtus Capital LP led a panel on investment predictions for 2015 (consensus: next year's markets will go sideways). Of particular interest was the oil price situation, to which Leon Frankel of Triage Capital Management added some great color. Leon, who is Russian, heard Putin on a domestic Russian TV show say: "I just don't understand why everyone is so concerned about the fall of the ruble. We're better off," said Putin, "because before when we sold a dollar's worth of oil we only got 35 rubles for it and now we get 45. What could be bad about that?"

Harvey Miller presented Jim Millstein of Millstein & Co. with the "Harvey" award this year for his stellar restructuring career. Jim spoke primarily about his role as Chief Restructuring Officer of the Treasury Department for the three years following Obama's election in 2008. Basically, Jim's job was to get the bailout money back, and of course he succeeded.

Jim believes that the problem with the present size and concentration of our major financial institutions is not that they are too big to fail but rather that they have become too complex to manage. He also noted that there still is too much leverage in our financial system, primarily because so much of it is being used to put further leverage on existing assets instead of using leverage to create new infrastructure and capacity.

Jim also believes a major reason for the political gridlock in Washington is that the Democratic and Republican parties each need the other in order to succeed with their own respective constituencies. The Democrats succeed with their base by defining the Republicans as the rich people's party and the Republicans succeed with theirs by defining the Democrats as the poor people's party. And so the agendas each party supports (high entitlement spending and low tax rates, respectively) coexist because they are critical to each party maintaining the support of its base, thereby foisting huge deficits on future generations to pay for it all. I agree and would add that this state of affairs also accounts for much of the increase in income inequality that has become yet another major issue.

The conference also featured an excellent panel on Fannie and Freddie. The primary topic was the status and prospects of the litigations regarding shareholder rights (a range of opinion but too early to tell), but the panelists also had some interesting insights on the question of what to do with the GSEs going forward. First, the real loss that Fannie and Freddie incurred was $60 billion and not $160 billion – the difference was noncash accounting and other charges imposed early in the crisis that have now been reversed. Second, the current GSE legislation will not go anywhere, primarily because the GSEs are the main support for the entire U.S. mortgage market today (sound familiar?). Finally, I was interested to hear David Fiderer stress that Fannie and Freddie have had by far the best track record for mortgage creation of all U.S. financial institutions. Gee, I seem to recall hearing many of the smart people claim that they were the main cause of the entire financial crisis….

So it was a great conference yet again – I hope to see you there next year. ¤

Momentous, *from page 8*

below-market interest rate should not be a surprise to the market given that *Momentive* simply follows *Till*," says Andrew I. Silfen, chair of the bankruptcy and financial restructuring group at Arent Fox LLP.

That said, Schaible points out that, over the years, courts have fluctuated, in some periods seeming inclined to fully protect the rights of secured creditors and in other periods seeming inclined to question some of those rights. This may be one of those times. "If not overturned on appeal and if adopted by other courts, Judge Drain's opinion could shift significant additional leverage to debtors and unsecured creditors, enabling them to satisfy secured lenders with long-term replacement notes at below-market rates potentially, in certain circumstances, avoiding the need to secure additional exit financing and providing increased value to unsecured creditors," Schaible says.

"Judge Drain's ruling will likely shift the balance of power or leverage from secured creditors to unsecured creditors and debtors," says Silfen. "Simply stated, secured creditors claims may be satisfied with below-market replacement notes, which may obviate the need for debtors to obtain exit financing to satisfy such claims, and which in turn could lead to more distributable value for unsecured creditors." ¤

In the Next Issue…

- *Special Report: Largest Chapter 11s of 2014*
- *Special Report: Successful Restructurings – 2014*
- *Research Report: Who's Who in NII Holdings, Inc.*

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Turnarounds & Workouts is published monthly by Beard Group, Inc., P.O. Box 40915, Washington, D.C. 20016 Telephone: (240) 629-3300. ISSN 0889-1699. Editor: Nina Novak (nina@beard.com). Assistant Editors: Dave Buzzell, Julie Schaeffer, Francoise C. Arsenault, and Randall Reese. Subscription Rate: $447 per year per firm for one recipient plus $25 per year for each additional recipient. Send comments and coverage suggestions to above address or david@beard.com.