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Oil & Gas Companies at Risk

Bank Redeterminations May Increase Bankruptices

by Julie Schaeffer

.During the last oil and gas price drop in 2008 and 2009, banks reduced companies' borrowing bases by an average of 10 to 20 percent. This time around it may be worse and could potentially result in increased bankruptcy filings, says Ron Meisler, a partner at Skadden, Arps, Slate, Meagher & Flom LLP.

Twice a year, in the spring and fall, banks that lend to oil and gas companies conduct a "redetermination," which involves running the numbers to determine how much oil and gas the companies have, the likely future of oil and gas prices, and hedging. They plug those numbers into a formula, and the result is how much oil and gas companies can borrow.

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In Search of a Remedy

Delaware Decision Highlights Covenant-Lite Risks

by Randall Reese

Vice Chancellor Laster of the Delaware Court of Chancery recently issued an opinion in *Quadrant Structured Products v. Vertin* determining a dispute between investors in Athilon Capital Corporation. The opinion addresses important issues for distressed investors and their advisors on the topics of fiduciary duties, fraudulent transfers, and indenture protections, particularly as such topics relate to so-called "covenant-lite" loans.

Athilon was formed in 2004 with the intention of selling credit protection products in two markets: workers' compensation reinsurance and credit default swaps. The credit default swap products were successful, and Athilon wrote swaps with a notional value of $45 billion. Between 2004 and 2007, Athilon issued $350 million of senior notes, $200 million of mezzanine notes, and $50 million of junior notes maturing between 2045 and 2047. "All

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Retailers in Bankruptcy

New Study Reveals the Challenges

by Julie Schaeffer

For a retailer, bankruptcy is a bit like "The Hotel California," concludes a new study from AlixPartners. They can check in, but they almost never leave. Instead, they liquidate.

AlixPartners found that 55 percent of all U.S. retailers that have filed for bankruptcy since 2005 – the year the U.S. Bankruptcy Code was amended – ended up in liquidation. Compare that to non-retail bankruptcies during the same period: they resulted in liquidations less than 5 percent of the time.

Certainly, it's no surprise that retailers are struggling, as noted in this newsletter in October. The industry is experiencing a seismic shift from bricks and mortar to on-

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It's difficult to predict which companies will be hit hard because the formula used to calculate redeterminations isn't public information, but professionals who follow these companies have some idea. For example, Kim Brady, a senior managing director at SOLIC Capital Advisors, LLC, says the severity of a borrowing-base redetermination typically depends on a number of borrower variables, including expected oil or gas prices, proven reserves, the discount rate, and price-hedging programs.

Because commodity prices have been depressed throughout 2015, many industry observers have speculated that a large number of bankruptcy filings by domestic exploration and production (E&P) companies could happen. "As a result of the prolonged slump in oil and gas prices, fewer can borrow against reserves," observes Brady. "A reduction in capital expenses for new wells means many potential borrowers don't have new, proven reserves."

In the spring, several factors delayed that expected surge. For example, domestic E&P companies raised approximately $15 billion of equity and $20 billion of bonds in the first half of the year, according to *The Economist*. Many oil and gas companies also used derivatives to hedge their exposure to volatile oil and gas prices. And, banks generally made modest reductions to E&P companies' credit lines. "Nobody knows the duration of the price decline and, as we understand it, the banks were not eager to act as a catalyst for some sort of liquidity event," says Meisler.

Many industry observers speculated that the fall redeterminations will be different. They're coming at a time when low commodity prices show no signs of rising, and there's increasing regulatory pressure on U.S. banks lending to oil and gas companies to reduce their exposure to the highly leveraged sector. Federal banking agencies, including the Office of the Comptroller of the Currency (OCC), the Federal Reserve, and the Federal Deposit Insurance Corp., have reportedly encouraged banks to increase the frequency of oil and gas loan reviews, and classify a significant number of outstanding loans to E&P companies as "substandard" (indicating uncertainty as to the underlying collateral value and/or the borrower's ability to repay the loan).

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of the Notes were issued pursuant to and are governed by indentures," notes Laster's opinion. "The evidence at trial established that the indentures are borrower-friendly documents that contain relatively few covenants and other protective provisions." The decision addresses the terms of the senior note indenture.

In order to write uncollateralized swaps, Athilon needed triple-A ratings from Moody's and Standard & Poor's. To receive the required ratings, Athilon committed to conduct its business in accordance with operating guidelines approved by the agencies. Among other things, the operating guidelines defined a series of items as "Suspension Events." If a Suspension Event persisted more than six months, Athilon was permanently banned from writing new swaps and required to run-off its existing swaps as they matured. The operating guidelines did not, however, specify what would happen after the runoff was completed.

Following Lehman Brothers' collapse, the market for uncollateralized swaps vanished. All of Athilon's swaps suffered mark-to-market losses and the RMBS swap losses were particularly severe. In December 2008, Athilon lost its triple-A rating. On January 15, 2009, Moody's reported that several Suspension Events had occurred. On June 18, Athilon entered runoff. By the end of 2009, Athilon was insolvent and had no operating business.

It is at this point that the key parties to the present dispute enter the picture. In late 2009, defendant Merced Capital, L.P. began purchasing Athilon's senior and mezzanine notes at substantial discounts. In August 2010, Merced acquired 100 percent of Athilon's equity for $47.4 million. The plaintiff Quadrant Structured Products Company, Ltd. began purchasing Athilon's senior and mezzanine notes in early 2011. Quadrant invested in the notes believing that Merced would dissolve Athilon and liquidate its assets, the proceeds of which would pay the senior notes in full and provide a meaningful recovery on the junior notes.

Merced, however, had different plans. Merced believed that Athilon could reposition its portfolio to higher yielding investments post-runoff. Because of the notes' distant maturity dates, virtually non-existent covenants, and low coupon, Athilon could support the interest

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line, and there are still major and minor retailers that either are uninterested in adapting, cannot figure out how to adapt, or are moving too slowly to adapt, says Matthew A. Feldman, co-chair of Willkie Farr & Gallagher LLP.

But the primary cause of retail liquidations, say Holly Felder Etlin and James Hogarth, both with AlixPartners' Turnaround & Restructuring Services, is that bankruptcy gives retailers only a very short time frame to execute a reorganization or sale. They point out in AlixPartners' analysis of its findings that prior to 2005 retailers often spent several years in bankruptcy, during which time they could make changes that might turn around performance. But, the 2005 changes to the Bankruptcy Code effectively gave retailers only a few months to obtain approval for a sale or reorganization before getting forced into liquidation.

"The driver of that accelerated timeline is Section 365(d)(4) of the code, which provides a maximum of just 210 days before unassumed store leases are deemed assumed – absent individual landlord approvals," say Etlin and Hogarth in the report. "Given that rejecting leases before they are assumed creates a general unsecured claim that sits below senior lenders, but that rejecting leases after they are assumed creates an administrative claim above senior lenders, senior lenders will typically enforce a timeline that ensures all unwanted leases get rejected well in advance of the 210-day deadline. And because it can take up to 90 days to run in-store, going-out-of-business sales, senior lenders frequently attempt in as little as 120 days to mandate a decision on whether to liquidate or reorganize a debtor."

As an example, Etlin and Hogarth point to Ritz Camera's 2012 bankruptcy. The provisions of its debtor-in-possession loan required it to have a stalking-horse bidder by August 16 (just 55 days after its June 22 filing), an auction by September 6 (76 days later), and a sale completed by September 14 (84 days later).

Another important 2005 change to the Bankruptcy Code, say Etlin and Hogarth, was the introduction of Section 503(b)(9), which gives "administrative priority" status to vendor claims for the value of goods sold in the 20 days

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Research Report

Who's Who in American Apparel, Inc.

by Dave Buzzell

American Apparel is the largest apparel manufacturer in North America. Founded in 1989 in Los Angeles, California, American Apparel initially focused its operations on the manufacture and wholesale distribution of blank and screen-printed t-shirts. The company later expanded its operations to include retail and online stores, and broadened its manufacturing and marketing operations to include an array of clothing and apparel basics. The company now employs about 4,600 sewing and manufacturing workers in five facilities in and around downtown Los Angeles, California, and 8,500 employees worldwide.

American Apparel operates in three segments: manufacturing, retail, and wholesale. The company's manufacturing business is confined exclusively to the United States, operating five manufacturing facilities and one distribution facility in and around the downtown Los Angeles area and employing more than 4,600 individuals. American Apparel's retail business competes in the highly competitive "fast fashion industry." The company owns and operates approximately 230 retail and outlet stores in 30 states and 18 countries. In addition, the company operates an online store that ships directly to over 29 countries. The retail business employs approximately 4,000 people: 2,200 people in the United States and approximately 1,800 people abroad. American Apparel's wholesale business, which employs 47 people, markets and sells undecorated apparel products to distributors and third party screen printers.

The company's day-to-day operations are operated primarily through five entities – Debtors American Apparel (USA), American Apparel Dyeing & Finishing, Inc., Fresh Air Freight, Inc., and KCL Knitting – which collectively operate the company's manufacturing and wholesale businesses – and American Apparel Retail, Inc., which operates the company's domestic retail business and owns some of the company's international subsidiaries.

On October 5, 2015, American Apparel and its five entities sought Chapter 11 bankruptcy protection in the United States Bankruptcy Court for the District of Delaware. The debtors reported total assets of $199,360,934 and total liabilities of $397,576,744.

In its filing, American Apparel cited continuing and significant operating losses, coupled with a heavy overhang of debt and an accumulation of excess inventory, with having left the company with inadequate liquidity to implement its turnaround plan. In December 2014, the company's former chief executive officer was fired, following charges that he had misappropriated company funds, abused employees, and engaged in other illicit and unlawful behavior that has exposed the company to millions of dollars of legal liabilities and an SEC investigation (not targeting the company) and disrupted operations.

An entirely new management team was installed, but the company – saddled with nearly $300 million of secured debt at an annual interest expense of nearly $40 million – has been unable to produce sufficient liquidity or raise additional equity to fully implement the restructuring.

American Apparel has negotiated an agreement with prepetition secured lenders and holders of over 95 percent of the senior notes (collectively, the Committee of Lead Lenders) that will convert over $200 million of senior notes into equity interests in the reorganized company, provide up to $40 million in exit capital, and provide distributions to general unsecured creditors in the form of units in a litigation trust and a $1 million cash payment.

Plan confirmation is set for January 20, 2016

The Debtor

Hassan Natha is the chief financial officer. **Chelsea A. Grayson** is general counsel, executive vice president, and secretary.

Jones Day is serving as counsel. **Richard L. Wynne** and **Erin N. Brady**, partners in the firm's Los Angeles office, and **Scott J. Greenberg**, partner, and **Michael J. Cohen**, associate in the New York office, head the engagement.

Pachulski Stang Ziehl & Jones LLP is serving as local counsel. **Laura Davis Jones**, managing partner of the firm's Delaware office, and **James E. O'Neill**, partner, lead the engagement.

The company's financial advisor is **FTI Consulting, Inc. Mark Weinsten**, senior managing director at FTI, is serving as American Apparel's chief restructuring officer.

Also representing American Apparel are **Moelis & Company** as investment banker, **DJM Real Estate** as real estate consultant, and **Garden City Group, LLC** as claims and noticing agent.

Committee of Lead Lenders

Milbank, Tweed, Hadley and McCloy LLP is serving as lead counsel. Partners **Gerard Uzzi** and **Alexander M. Kaye**, and **Bradley Scott Friedman**, associate, head the engagement.

Fox Rothschild LLP is serving as local counsel for the lender's committee, with **Jeffrey M. Schlerf** leading the engagement. **Ducera Partners** is serving as financial advisor.

Official Committee of Unsecured Creditors

The committee is comprised of **Atalaya Asset Income Fund I LP**, **Alameda Square Owner**, **Simon Property Group**, **Dunaway Yarns Inc.**, **Andari Fashion Inc.**, **United Fabricare Supply Inc.**, and **Fabric Avenue Inc.**

The committee is represented by **Domenic E. Pacitti** and **Richard M. Beck**, partners at **Klehr Harrison Harvey Branzburg LLP**; **David M. Posner**, partner, and **Gianfranco Finizio**, associate, at **Kilpatrick Townsend & Stockton LLP** in New York; and **Todd C. Meyers**, bankruptcy & financial restructuring chair, and **Paul Rosenblatt**, partner, at **Kilpatrick Townsend & Stockton LLP** in Atlanta.

Trustee

The U.S. trustee is **Andrew Vara**.

Judge

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

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Banks are about halfway through the fall redetermination cycle, however, and so far there have been few companies that have had a heavier redetermination. "We're hearing that the average decline in borrowing base is 5 percent," says Meisler. "That's surprising because the government is putting a lot of pressure on oil."

That said, Meisler is also hearing that banks are doing the easier redeterminations first, leaving the more difficult ones for the end of the cycle.

Regardless, one thing is clear: "It is highly likely that the distress in the oil and gas industry will persist in the near term," Meisler says.

In late 2015, E&P companies will face an additional challenge: hedges are rolling off, giving them increased exposure to market prices. "With hedges falling off for a lot of companies, there is further pressure on redeterminations," says Brady. "It's definitely a matter of time," adds Meisler.

In this environment, cash-strapped E&P companies will have to look beyond the traditional commercial banks for capital. Doors may also close to alternative financing options that provided liquidity during the first half of this year, including equity offerings, the high-yield bond market, and second-lien or mezzanine loans. That could leave E&P companies with limited options to secure sources of capital needed to increase production volumes and build up their proven developed producing reserves, which would restore collateral to the borrowing base and maintain cash flows.

Meisler says E&P companies may look to

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payments with significantly less capital and Merced believed that it could achieve a return by "equitizing" the notes and paying a large dividend.

After unsuccessfully attempting to persuade Merced to liquidate Athilon, Quadrant filed suit in October 2011 alleging that (1) certain payments made by Athilon to affiliates of Merced constituted fraudulent transfers, (2) Athilon had breached an implied covenant of good faith and fair dealing, and (3) Athilon's management and board of directors had breached their fiduciary duties, which Quadrant contended it had standing to bring derivatively. The case progressed slowly and Athilon's financial condition had improved substantially by the end of 2013. By that time, the company was on the brink of solvency and, at the end of 2014, Athilon's audited financial statements showed positive equity of $173 million.

The decision began with the claims premised on the senior indenture, which was governed by New York law. Quadrant contended that Athilon had violated the express provisions of the senior indenture, as well as an implied covenant of good faith and fair dealing, by entering into a January 2015 transaction. In that transaction, Athilon paid Merced $179 million to purchase senior notes with a par value of $194.6 million.

Quadrant asserted that a provision of the senior indenture prohibited selective repurchases that benefit insiders. Laster, however, determined that the provision "authorizes one type of mandatory redemptions," but did not provide holders of senior notes with any broader protections. Therefore, because the January 2015 transaction was not a redemption governed by those provisions, it did not limit Athilon's ability to engage in the transaction.

Quadrant's failure to make a compelling case based on the terms of the senior indenture was quite telling in Laster's eyes. "Quadrant failed to prove any entitlement to relief under what should be its primary source of protection: the express terms of the Senior Indenture," he wrote. "Quadrant's other claims are appropriately evaluated against that backdrop, because through its other claims, Quadrant is seeking to obtain a right that it did not bargain for explicitly."

He then turned to Quadrant's assertion regarding an implied covenant of good faith and fair dealing, which he suggests would amount to "with no business left to pursue, [Athilon] will return capital to its stakeholders, and will *not* return capital only to its insiders." The opinion notes that the senior indenture contains detailed provisions governing the repayment of principal and that the "implied term that Quadrant has proposed is inconsistent with these explicit terms." The court also noted evidence from peer companies that such provisions are expressly included when parties intended to create such limitations.

Laster then analyzed whether the repurchase transaction constituted a fraudulent transfer under the Delaware Uniform Fraudulent Transfer Act. After

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Calendar

New York Institute of Credit and Association of Insolvency and Restructuring Advisors
11th Annual NYIC/AIRA Joint Bankruptcy & Restructuring Event
January 19, 2016
Arno's Ristorante
New York, NY
Contact: www.instituteofcredit.org

American Bankruptcy Institute
21st Annual Rocky Mountain Bankruptcy Conference
January 21 – 22, 2016
Four Seasons Hotel Denver
Denver, CO
Contact: www.abiworld.org

International Association of Restructuring, Insolvency & Bankruptcy Professionals
2016 Annual Regional Conference
INSOL Dubai
January 24 – 26, 2016
Madinat Jumeirah Hotel
Dubai, U.A.E.
Contact: www.insol.org

American Bankruptcy Institute
2016 Caribbean Insolvency Symposium
February 4 – 6, 2016
Ritz-Carlton San Juan
San Juan, Puerto Rico
Contact: www.abiworld.org

American Bankruptcy Institute
VALCON 2016
March 14 – 16, 2016
Four Seasons Las Vegas
Las Vegas, NV
Contact: www.abiworld.org

National Association of Bankruptcy Trustees
2016 Spring Seminar
April 7 – 10, 2016
Loews Atlanta
Atlanta, GA
Contact: www.nabt.com

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Special Report

Sources of Debtor-in-Possession Financing

Company/Debtor	DIP Amount	DIP Source
Molycorp, Inc., Greenwood Village, CO	$291,760,000	Oaktree Capital Management
Chassix Holdings, Inc., Southfield, MI	$250,000,000	PNC Bank
Standard Register Company, Dayton, OH	$155,000,000	Silver Point Capital
Boomerang Tube, Chesterfield, MO	$145,000,000	Wells Fargo Capital Finance and Bank of America
Magnetation, Grand Rapids, MN	$135,000,000	Wilmington Trust
Alpha Natural Resources, Inc., Bristol, VA	$130,000,000	Citibank
Cal Dive International, Inc., Houston, TX	$120,000,000	Bank of America
Patriot Coal Corporation, St. Louis, MO	$100,000,000	Deutsche Bank AG
Great Atlantic & Pacific Tea Company, Inc., Montvale, NJ	$100,000,000	Fortress Credit Corp.
Signal International, Inc., Mobile, AL	$91,000,000	Teachers' Retirement System of Alabama and the Employees' Retirement System of Alabama
American Apparel, Inc., Los Angeles, CA	$90,000,000	Wilmington Trust
Northshore Mainland Services Inc. Orlando, FL	$80,000,000	Granite Ventures Ltd.
Allied Nevada Gold Corp. Reno, NV	$78,000,000	Wilmington Savings Bank
Colt Defense LLC West Hartford, CT	$75,000,000	Wilmington Savings Fund Society and Cortland Capital Market Services
Relativity Fashion, NY	$49,500,000	Cortland Capital Market Services
RadioShack Corporation, Fort Worth, TX	$35,000,000	Cantor Fitzgerald Securities
Altegrity, Inc., Falls Church, VA	$22,500,000	Cantor Fitzgerald Securities
Allen Systems Group, Inc. Naples, FL	$21,500,000	Nestar Business Credit
Miller Energy Resources, Inc., Knoxville, TN	$20,000,000	Apollo Investment Corporation and Highbridge Principal Strategies
University General Health System, Inc., Houston, TX	$16,000,000	MidCap Financial Trust
Milagro Oil & Gas Inc., Houston, TX	$15,000,000	TPG Specialty Lending, Inc.
Saint Michael's Medical Center, Inc., Newark, NJ	$15,000,000	Trinity Health Corporation
Taylor-Wharton International, Minnetonka, MN	$13,800,000	Antares Capital
Health Diagnostic Laboratory, Inc., Richmond, VA	$12,000,000	Branch Banking and Trust Company and BB&T Equipment Finance Corporation
Dune Energy Inc., Houston, TX	$10,000,000	Bank of Montreal and CIT Bank

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Worth Reading

The Folklore of Capitalism

Author: Thurman W. Arnold
Publisher: Beard Books
Softcover: 407 pages
List Price: $34.95

First written in 1937 as the Depression was dragging on with no end in sight, this classic economics book sought to identify the basics of capitalism and its relationship with democratic government.

The Folklore of Capitalism picks up where Arnold's previous book, *The Symbols of Government*, left off. The first few chapters revisit some familiar ground before Arnold addresses the new topics covered in this work, integrating fresh ideas with his previous material. Arnold commends most elements of democracy, but keen-minded and unfailingly realistic as he is, he knows the prolongation of the Depression had put the capitalist system under strain so that questions about its effectiveness and desirability were being raised at a time when alternative economic beliefs and political systems were taking hold.

In an intellectual, yet pragmatic, manner, Arnold hones in on the fundamental principles, processes, and institutions of democracy, showing both implicitly and explicitly why, from an economic perspective, democracy is far superior to the Marxist, communist, and fascist schools of thought pervading European nations and which threatened to take root in the United States as well.

This global economic and political struggle – which came to a head with the outbreak of World War II – has to be kept in mind as the backdrop for Arnold's approach to reassuring readers of democracy's strengths and resources. In the circumstances of the time, it could by no means be taken as self-evident that democracy was a preferable form of government. Though Arnold, with his acumen of human affairs and human nature and both theoretical and practical knowledge of political science, is convinced that it is, he faces the challenge of forthrightly, yet sympathetically, informing others that it is. To do this, he moves back and forth between principles and ideals; actual and hypothetical circumstances; human nature and personal requirements, interests, and desires; and the concepts of "individuality" and general social needs.

The word "folklore" in the book's title denotes a body of persons akin to a state, but is not as literal as the term connotes. To contemporary readers, "folklore" might suggest a book of entertaining anecdotes or yarns about capitalism; something like the foibles or amusing misunderstandings of capitalism. But at the time, "folklore" had a nationalistic and cultural, and, in some cases, ethnological suggestion to it.

In Germany, for instance, "volk" was a concept used by the Nazis in their rise to power. The concept of the "masses" was associated with communism. So Arnold is bringing out how capitalism is embedded in the American public. He's trying to make readers more self-conscious of this so they will not inadvertently allow capitalism to be lost.

Arnold's book was written before today's preoccupation with capitalism's influence on globalism, multiculturalism, consumerism, environmentalism, and a host of other issues. While the author does not address these subjects directly, he captures the essence of why the continuation of capitalism is essential for a democratic society. The subject matter is timeless, as the events of today are demonstrating. ¤

Before serving in Franklin Roosevelt's administration as the chief trust buster, Thurman W. Arnold (1891-1969) was a homesteader and sheep rancher in the still relatively undeveloped West. He was an artillery officer in France in World War I and later founded the Washington, D.C., law firm of Arnold, Fortas, and Porter.

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

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execute debt exchanges, sell non-core assets, turn to alternative third-party lenders (such as private equity funds or hedge funds), or implement farm-out financing arrangements.

If E&P companies are not successful in finding financing, they may be forced into an in-court process.

And, indeed, that's already happening. Over the past year, Meisler says roughly 20 oil and gas companies have filed for bankruptcy.

Some have been successful, including Hercules Offshore, Inc., which entered Chapter 11 in August and obtained confirmation of its prepackaged plan of reorganization just 45 days later.

Others have hired restructuring advisers before resorting to bankruptcy, such as Houston-based Swift Energy Inc. In May, its borrowing base was reduced from $417.6 million to $375 million, and by March 31 it had $247 million, giving it $128 million in liquidity. That led it to hire Lazard to advise it on capital structure alternatives.

But many more companies are in trouble. "Countless others have been flagged by analysts and ratings agencies alike as over-leveraged, high-default risks," Meisler says.

"We expect to see more bankruptcies," predicts Brady.

The first measure for E&P companies in this environment, Meisler says, is to talk to their advisors about what happens if prices continue on this trajectory or get even worse. "They have to consider what their duties are and to whom they owe those duties."

For industry professionals, Meisler says creativity is key. "Circumstances differ by company, but filing for bankruptcy is generally not the best option because it's expensive and time consuming."

"Because the capital structure is likely the issue," Meisler continues, "it may be better to negotiate an out-of-court restructuring or initiate a quick and cost-efficient prepackaged Chapter 11 filing, both of which permit the companies to right-size their liquidity risk profiles and minimize any disruptions to their business operations." ¤

Special Report

Outstanding Restructuring Lawyers – 2015

Lawyer	Firm	Outstanding Achievements
Amy Caton	Kramer Levin Naftalis & Frankel New York, NY acaton@kramerlevin.com	Originating partner and lead counsel for bondholder groups in some of the most prominent municipal restructurings in history: the restructuring of approximately $8 billion of debt of the Puerto Rico Electric Power Authority and seminal lawsuit that produced ruling declaring Puerto Rico's new insolvency law unconstitutional; the City of Detroit, the largest chapter 9 case in history; as well as the Chapter 11 case for Revel Entertainment.
George Davis	O'Melveny & Myers New York, NY gdavis@omm.com	Led firm's representations in several high-profile bankruptcies, including Apollo Global Management with respect to leading investment in first-lien debt of Texas Competitive Electric Holdings, a subsidiary of Energy Future Holdings. Also representing Cal Dive International, securing several victories over a group of objecting maritime lienholders, and Verso Corporation in restructuring highly complex $3 billion capital structure.
Andrew G. Dietderich	Sullivan & Cromwell New York, NY dietdericha@sullcrom.com	Advising Energy Future Holdings UCC in rare example of "small creditors" (trade, retirees, individual bondholders) achieving better terms than large creditors active on ad hoc committees and in bilateral discussions with debtors. Representing Fairholme Capital, largest minority investor in Sears Holdings, and majority of preferred stock investors in Fannie Mae and Freddie Mac in continuing restructuring and recapitalization efforts.
Jay M. Goffman	Skadden, Arps, Slate, Meagher & Flom New York, NY jay.goffman@skadden.com	Lead counsel in ongoing Atlantic City restructuring. Representing Lynn Tilton and Patriarch Partners in Zohar 1's Chapter 11, initiated using innovative involuntary petition. Completed Nautilus Shipping's successful restructuring. Represented Russia Standard Bank in first time a Russian bank reorganized its capital structure through a U K. scheme of arrangement. Also represented Salus, largest creditor in RadioShack Chapter 11.
Gregory M. Gordon	Jones Day Dallas, TX gmgordon@jonesday.com	Lead restructuring counsel to RadioShack in proceedings that have maximized value of company's assets on an accelerated timeframe while preserving iconic brand domestically. Lead counsel to Specialty Products Holding Corp , Bondex International, Republic Powdered Metals, and NMBFiL – subsidiaries of RPM International, with annual sales of approx. $4 billion – in Chapter 11 cases that resolved more than 15,000 asbestos injury lawsuits.
Scott J. Greenberg	Jones Day New York, NY sgreenberg@jonesday.com	Lead lawyer representing NII Holdings, steering company through contentious restructuring in less than 9 months and removing $4 billion of liabilities. Lead counsel to American Apparel in its Chapter 11 case. Representing various bondholders and funds in their exposure to Commonwealth of Puerto Rico and its public corporations and instrumentalities, and MF Global Holdings as plan administrator in implementing its liquidation plan.
Stephen E. Hessler	Kirkland & Ellis New York, NY stephen.hessler@kirkland.com	Represented Patriot Coal and affiliates, achieving approval of sale of substantially all of operating assets in less than five months after petition date. Other representations: ad hoc committee of second lien noteholders of Alpha Natural Resources in restructuring that will address $4.2 billion in funded debt obligations and other legacy liabilities, and Energy Future Holdings and 70 of its affiliates in eighth largest Chapter 11 case filed in history.
M. Natasha Labovitz	Debevoise & Plimpton New York, NY nlabovitz@debevoise.com	Represented Altegrity, cutting $1.8 billion in indebtedness by 40 percent through restructuring agreement that provided unique form of new-money DIP financing, while eliminating make-whole claims and promising a fast-track timeline. Continues to lead Standard General in highly publicized distressed investment in American Apparel, and Logan's Roadhouse and Kelso & Company in privately-negotiated senior secured note exchange.
John C. Longmire	Willkie Farr & Gallagher New York, NY jlongmire@willkie.com	Representing lenders in highly contentious bankruptcy of Colt Defense and affiliates. Representing Deerfield Management Company and certain affiliated funds in successful restructuring and sale of Dendreon Corporation and in connection with bankruptcy of IMRIS and affiliates. Representing Morgan Stanley Senior Funding in $85 million first lien exit loan to Global Geophysical Services. Continues to advise Bronx Parking Development Co.
Brett H. Miller	Morrison & Foerster New York, NY BrettMiller@mofo.com	Represents TCEH official committee of unsecured creditors in the Energy Future Holdings case and official committee of unsecured creditors in the Walter Energy case, as well as HOVENSA in its Chapter 11. In EFH bankruptcy, united lender groups to gain approval of plan support agreement that will lead to implementation of one of the most complex Chapter 11 plans in history. Continues to oversee wind down of MF Global estate.
Sean A. O'Neal	Cleary Gottlieb Steen & Hamilton New York, NY soneal@cgsh.com	Advising Puerto Rico Electric Power Authority, largest muni. utility in U.S., in restructuring over $9.5 billion in debt. No bankruptcy or other debt relief laws apply to PREPA, making restructuring especially complex. Advising Goldman Sachs as creditor in Energy Future Holdings proceedings, and one of the world's largest asset managers in proposed DIP loan to OAS and potential acquisition of OAS's equity interests in Invepar.
Damian S. Schaible	Davis Polk & Wardwell New York, NY damian.schaible@davispolk.com	Lead counsel to noteholders in JW Aluminum restructuring; prepetition and DIP term lenders in Essar Steel Algoma cross-border restructuring; first-lien agent and DIP arranger in Alpha Natural Resources bankruptcy; first-lien lenders in Connacher restructuring; first-out lenders in RadioShack Chapter 11; note purchasers and lenders in Venoco's debt recapitalization; and Tonon Bioenergia S.A. in recapitalization and note exchange.

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noting that Athilon's solvency at the time of the transaction "plays a major role in the fraudulent transfer analysis," he found that Athilon was solvent by July 2014 and likely earlier. Because Athilon was determined to be solvent at the time of the transfer and was not rendered insolvent by the transaction, it could not be a constructively fraudulent transfer.

Similarly, it was not determined to meet the "actual intent" standard. "The fact that a business decision runs contrary to a creditor's generic preference for greater security does not mean that the decision was made with an actual intent to hinder, delay, or defraud any creditor," wrote Laster. "Unless a creditor bargains for an applicable contract right, the creditor does not have the ability to interfere with the operations of a solvent firm."

The final remaining claim was to challenge the transaction, as well as certain others, as breaches of fiduciary duties with Quadrant suing derivatively on behalf of Athilon. However, Quadrant did not raise its specific breach of fiduciary duty challenges until the filing of a supplemental complaint in April 2015, at which point Athilon was solvent. Therefore, the court determined that Quadrant lacked standing to assert its breach of fiduciary duty claims.

Steven Epstein, Co-Head of the Mergers & Acquisitions practice at Fried, Frank, Harris, Shriver & Jacobson, identifies four key takeaways:

1. The court will look first to the contract terms, and then to fraudulent conveyance statutes, to determine creditors' rights.
2. Creditors' derivative claims based on breach of fiduciary duties will succeed under only very unusual circumstances.
3. The court will not stretch to bail out a creditor from an improvident investment when the debtor company has not violated the terms of the indenture governing the debt.
4. The court will be hesitant to interfere with a company's plan to return to solvency, even if the plan has a disproportionate effect on the creditors based on their not being paid out in a liquidation.

In elaborating on the issue of derivative breach of fiduciary duty claims, Epstein questions whether the court would view as valid such a claim based on the adoption of an equity value maximization plan if the plan potentially benefitted only the equity, with no benefit to, and all of the risk on, the creditors. "The language and tone of the prior decision, together with this latest decision, indicate that the answer to that question is likely to be no," according to Epstein. "Based on the language of those decisions, it could

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immediately preceding a bankruptcy filing. "That effectively means a retailer must pay for those goods in their entirety in order to leave bankruptcy because administrative-priority claims must be paid in cash on the effective date of a plan," say Etlin and Hogarth, pointing to Circuit City's 2008 slide into liquidation, which was hastened by the $350 million of 503(b)(9) claims that had been filed with the court, as an example. "That change raises a significant hurdle for many retailers' emergence."

The liquid nature of a retailer's assets complicates the situation. Inventory can make up as much as 50 percent of a typical retailer's assets and can usually be sold at attractive prices. Etlin and Hogart point to Anna's Linens' and Coldwater Creek's bankruptcies as examples.

"Liquidators paid 111 percent of cost for Anna's Linens' inventory in 2015 and 97 percent for Coldwater Creek's in 2014. This is problematic for a retailer looking to reorganize because to emerge from bankruptcy a debtor must pass the best-interests test, proving that each class of creditor does better under a plan of reorganization than if the company liquidated – a much higher bar whereby liquidation can be accomplished easily and with good returns."

This is a trend that shows no sign of abating, the two note. In the past 18 months, only one retail debtor successfully reorganized, whereas 5 were sold in 363 sale processes, and another 10 were liquidated.

But there are steps a retailer can take, even if the best-case scenario provides it with only three or four months before liquidation becomes inevitable.

"Prebankruptcy-petition planning is imperative," say Etlin and Hogarth, noting that successful retail turnarounds involve the development of a feasible plan from the start. "If there's a prospect of achieving an out-of-court turnaround, then a strategy based on store closures, marketing optimization, and merchandising transformation may be right. But if a filing seems unavoidable, then preserving cash may help fund an in-court turnaround."

Indeed, the ability to reject store leases is a valuable tool. Closures are part of almost every successful restructuring, according to the AlixPartners study. Of 44 store-based retailers studied that emerged as going concerns, 33 closed stores in bankruptcy, with 24 of them closing more than 25 percent of stores. "A retailer should conduct a four-wall profitability analysis well in advance of a filing and, in many cases, also initiate rent negotiations with landlords against the backdrop of a potential filing – both to achieve rent savings and to inform store closure decisions with an understanding of potential go-forward lease expenses," Etlin and Hogarth advise.

It's also important to implement liquidity-generating initiatives such as curtailing capital expenditures, reducing expenses, and optimizing the borrowing base. Doing so, the two say, "gives the flexibility to choose the best time to file – for instance, possibly before the winter holidays in order to maximize the ease of selling excess inventory or after the holidays, when retailers are likely to have more cash on hand."

Retailers and their attorneys will also want to be sure they understand capital market options by consulting with existing lenders, both to explore the potential structure of debtor-in-possession financing and assess the lenders' appetite to support reorganization. "The goal is to secure either a stalking-horse bidder or support for a prearranged plan prior to the point of filing," say Etlin and Hogarth. "The importance of this is clear from the fact that, in our study, every successful reorganization of a debtor with more than $500 million in liabilities was based on either a prearranged or a prenegotiated plan."

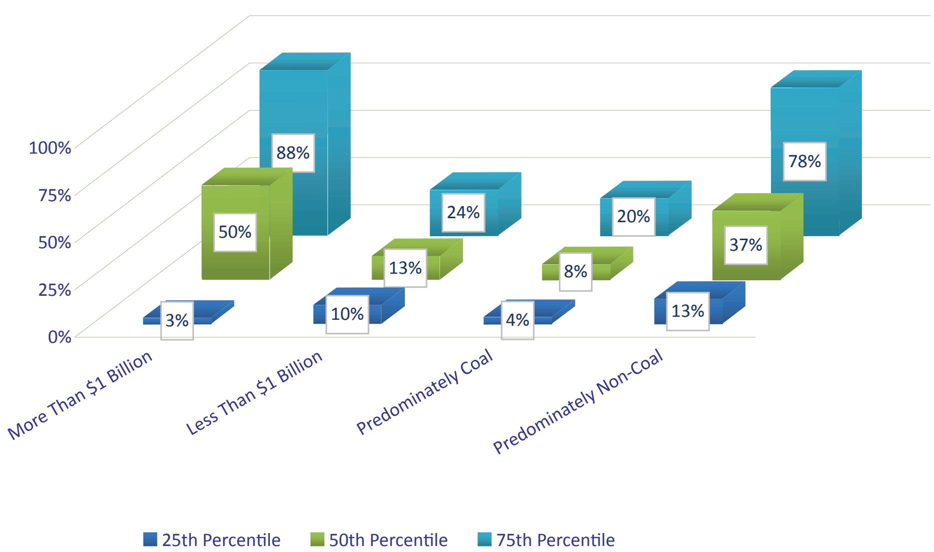
"Even though retail bankruptcies have become tougher since 2005, the bankruptcy process still offers valuable and otherwise unavailable tools for retail turnarounds," they say. ¤

Special Report

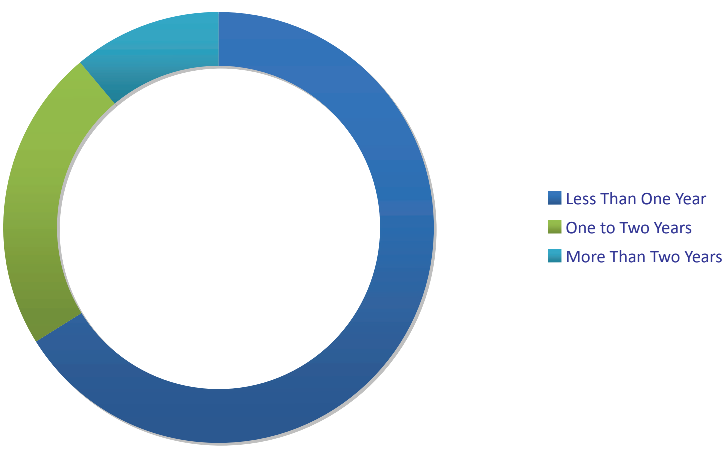
Mining Companies Creditor Recovery

The following charts summarize key findings regarding recoveries by general unsecured creditors in bankruptcy cases filed by large mining companies since January 1, 2004. The data regarding creditor recoveries was generated from an analysis of estimates provided by debtors in disclosure statements. In collecting the data for this study, only the last-filed disclosure statement was used for cases in which multiple versions of the disclosure statement were filed. No attempt was made to independently estimate recoveries. The following charts represent only the plan proponents' estimates of recoveries which may differ from actual recoveries received by creditors in such cases. To view a list of the bankruptcy cases examined in preparing this data, please visit https://www.chapter11dockets.com/about/cases.

Quartile Expected Recovery Rates for General Unsecured Creditors by Debtor's Assets & Primary Industry Segment



Duration of Case: Petition Date to Confirmation of Plan of Reorganization or Liquidation



CHAPTER 11 DOCKETS

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Gnome de Plume

Highlights of Distressed Investing 2015

by Andy Rahl

Beard Group's Annual Distressed Investing Conference in New York City this November 30 featured many highlights. The following is a summary of some of the most notable.

As always, one of the key highlights was the Investors Roundtable led by Steve Gidumal of Virtus Capital LP. Last year, the same panel had a consensus prediction that the market in 2015 would go sideways, which is exactly what it did. The panel this year did not have a general market consensus, but they all would short oil. Gary Hindes of Delaware Bay Company sounded especially prescient when he said that we would see oil trading in the 20's before it gets back up to the 60's. There was bit of a gasp in the room when Gary said that, but the price has since dropped into the mid-30's….

Another outstanding panel was a roundtable led by Jack Butler of Hilco, which included David Resnick of Third Avenue, Ken Buckfire of Miller Buckfire, and Jim Millstein of Millstein & Co., all past recipients of the Harvey award. After a moving tribute to Harvey Miller, they reviewed industries they think will see significant restructuring activity next year. All agreed that energy would see the most. Other active sectors they foresaw were government, mining, and MLPs.

Two other panels worth mention were one on service industry bankruptcies led by Bill Brandt of Development Specialists (absent a contractual agreement to the contrary, a law firm bankruptcy estate does not have an interest in work done by departed partners after they have left). There also was a very good panel on the Energy Future Holdings case led by Harold Kaplan of Foley & Lardner. The panelists provided a clear explanation of how that largest and most complex of cases has played out.

Another major highlight was the presentation of the Harvey Miller award to Ken Buckfire by Jim Millstein. Ken was the lead financial advisor to Detroit and Jim is the lead advisor to Puerto Rico. Their general theme was that it is extremely difficult for politicians to come to grips with the economic realities of bankruptcy and restructuring. They also made the point that when a society and/or an economy declines, people vote with their feet and leave for better opportunities. Once large numbers of people have emigrated, debt that was issued with a larger historical tax base can't be covered by the current, smaller economy.

That led to a fascinating discussion of how restructuring and politics interact in the context of comparing the aftermath of the Detroit bankruptcy with what has happened in Greece and what could happen in Puerto Rico. The Detroit restructuring placed great emphasis on making Detroit a desirable place to live by investing in new infrastructure and city services in order to improve the quality of life there so as to induce people to return. That strategy seems to be working in Detroit – in sharp contrast with Greece. It remains to be seen, of course, whether any of the foregoing happens in Puerto Rico.

Ken and Jim also agreed that the fundamentals for robust economic growth are not present today. We have seen a huge increase in the ratio of debt to GDP world-wide, but future demographics in the form of a declining working-age population strongly suggest that consumption will decline to a point where the cash flow that it generates will not be enough to support the debt levels we already have.

Distressed Investing is always a great conference and, as you can see from the aforementioned, one that provides genuine market insights. So, I hope to see you there next year. ¤

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be argued that a creditor's fiduciary duty claim with respect to the adoption of an equity value maximization plan could succeed only if the directors were so uncareful or so disloyal in formulating the plan, or the plan was so patently flawed, that the plan would not even pass muster under business judgment deference."

Brian Wells of Weil, Gotshal & Manges notes "red flags" that perhaps should have given Quadrant pause. "The covenant-lite loan documents that it invested in did not protect it, and did nothing to ensure that its investment thesis would pan out," Wells explains. "Indeed, even the court's cursory examination of comparable indentures showed that many key protections that would have changed the game entirely were absent." Wells also emphasizes, however, the benefit of hindsight. "We don't know how it thought about a contingency case or whether it made an informed decision of the risk that the company would not liquidate," he states. "But the result stands as a reminder: Investment teams that are considering putting capital behind an investment thesis should not only understand how the thesis works, but how it doesn't." ¤

In the Next Issue…

- *Special Report: Largest Chapter 11s of 2015*
- *Special Report: Successful Restructurings – 2015*
- *Research Report: Who's Who in Offshore Group Investment Limited*

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