turnarounds & workouts
News for People Tracking Distressed Businesses
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Inside

Win-Win

Patriot Coal Emerges from Chapter 11

by Julie Schaeffer

Patriot Coal Corporation has successfully emerged from Chapter 11 with an improved balance sheet and 4,000 jobs preserved.

"With unsustainable legacy liabilities and the potential for years of litigation against its former owners, Patriot's cases came close to liquidation a number of times," says Steve Hessler, a partner in the Restructuring Group of Kirkland & Ellis LLP, which represented an ad hoc group of investors led by Knighthead Capital.

"It's a great achievement," says Thomas Moers Mayer, co-chair of the corporate restructuring and bankruptcy department at Kramer Levin Naftalis & Frankel LLP,

continued on page 2

Rethinking Quick 363 Sales

Is the Ice Cube Really Melting?

by Randall Reese

As the perception has grown that more Chapter 11 cases are being resolved for all meaningful purposes by sales of substantially all of the company's assets which occur quickly following the petition date, there is a debate about whether such sales produce better outcomes than a traditional plan process. In the January 2014 issue of *The Yale Law Journal*, Professors Melissa Jacoby and Edward Janger, of the University of North Carolina at Chapel Hill School of Law and Brooklyn Law School, respectively, offer a proposal that they assert would allow quick asset sales where necessary to preserve value, but discourage opportunistic use of crisis-induced leverage by parties-in-interest to obtain

continued on page 2

Claims Disallowed

"Hobgoblin Without a House to Haunt," says Judge

by Julie Schaeffer

Distressed claims traders breathed a sigh of relief when a federal district court ruled in the Enron Chapter 11 that sold claims are generally not disallowable on the basis of the seller's misconduct. Now, the courts have opened the issue anew in the case of *KB Toys*, which Sean A. O'Neal, a partner at Cleary Gottlieb Steen & Hamilton LLP, says "provides an important reminder that claims traders face bankruptcy-specific risk factors such as disallowance."

After KB Toys sought Chapter 11 protection in the U.S. Bankruptcy Court for the District of Delaware, the bankruptcy court confirmed a liquidating plan. That plan established a trust to realize the value of the debtors' assets for the benefit of creditors. To

continued on page 2

Win-Win, *from page 1*

which represented the official committee of unsecured creditors. "Coal prices were terrible, and this company made it out anyway."

Brian Resnick, a partner in the insolvency and restructuring group at Davis Polk, which represented Patriot, says it was a fascinating case because it had so many different issues. "As a result of the restructuring process, the company succeeded in deleveraging its balance sheet while preserving jobs for over 4,000 workers and ensuring that retirees continued to receive meaningful benefits."

Patriot is a leading coal producer in the eastern United States, with 1.8 billion tons of coal reserves and 10 active mining complexes in Appalachia and the Illinois Basin.

The company filed for bankruptcy protection in July 2012 in the United States Bankruptcy Court for the Southern District of New York. At the time, the company attributed the need for the reorganization to a drop in demand for coal, caused in part by the struggling economy, cheaper natural gas, and stricter environmental regulations.

But, there was more to the story. Peabody Energy Corp. created Patriot in 2007 to shed mounting legacy liabilities associated with its union operations east of the Mississippi. Upon its creation, Peabody sold Patriot 13 percent of its assets, but burdened it with about 40 percent of its health care liabilities. Then, in 2008, Patriot bought Magnum Coal, a similar spinoff of Arch Coal, and in the process ended up with 12 percent of Arch's assets and 97 percent of its retiree health care liabilities. As a result of both deals, Patriot ended up with three times as many retirees as active miners, more than 90 percent of whom had never worked for the company.

At the time of its bankruptcy filing, Patriot was reporting $3.6 billion in assets and $3.1 billion in liabilities, and shortly after, in August 2012, the bankruptcy court approved $802 million in debtor-in-possession (DIP) financing from Citigroup Global Markets, Barclays Bank and Merrill Lynch, Pierce, Fenner & Smith to support the business during the reorganization process.

One of the challenges of the case was a venue change, led by the United Mineworkers of America (UMWA), which

continued on page 4

Rethinking, *from page 1*

a favorable price or reallocate value.

The professors acknowledge that "asset sales are an important source of Bankruptcy-Code-created value." However, they note that quick asset sales are often justified by the assertion that the value of the debtor's assets is quickly diminishing and note their concern that "the melting ice cube metaphor is overused." They "suspect that, in a relevant number of these cases, allowing additional time to price the assets and to evaluate potential deals would not impair the value."

Professors Jacoby and Janger identify two major areas of concern regarding the use of asset sales early in a case. Uncertainty regarding valuation presents several related problems. First, asset sales "demand an immediate decision in an information-poor environment." Second, the information that is available is often distributed asymmetrically – both with regard to price and the urgency of the sale – which can make it "difficult and risky to assess or challenge the melting ice cube argument." Information scarcity and asymmetrical availability "enhance the leverage and chances for opportunistic behavior of informationally advantaged parties."

The professors' second area of concern is that the asset sale process, particularly when combined with the terms of a debtor-in-possession financing facility, can present distributional consequences. "Early sales, coupled with restrictive financing, facilitate the use of transactional leverage for individualized benefit, particularly by creditors holding prepetition undersecured claims," they assert in their paper. At the extreme, asset sales and financing terms can render the plan process "irrelevant."

To address these concerns, they propose a "mandatory holdback of a portion of 363 sale proceeds to allow later resolution of disputes about value and priority," which they term an Ice Cube Bond. They assert that their proposed mechanism is consistent with broader commercial law principles. As an example, they note that a creditor who conducts a procedurally noncompliant foreclosure sale under the Uniform Commercial Code outside of bankruptcy can lose his or her right to a deficiency judgment unless the creditor can show that the debtor has not been

continued on page 4

Claims, *from page 1*

that end, the trustee litigated to avoid as "preferential transfers" various payments made by the debtor to trade creditors during the 90 days prior to its Chapter 11 filing, when the Bankruptcy Code presumes that a debtor is insolvent.

In this case, however, nine of the original holders had sold their claims to ASM Capital. A few key facts: ASM purchased some claims prior to plan confirmation and others after. However, with the exception of one claim, Capital had purchased all before the trustee began its litigation. Each of the transfer documents was entitled an "assignment agreement" and referred to the parties as "assignor" and "assignee." Some of the assignment agreements contained indemnification clauses in favor of ASM in the event the claims were disallowed; others did not.

When the bankruptcy court entered judgments against all nine of the original claim holders, the trustee sought an order disallowing the sold claims pursuant to Section 502(d) of the Bankruptcy Code. Among other things, Section 502(d) provides that the court shall disallow "any claim of any entity" from which property is recoverable under the Bankruptcy Code.

According to Judge Kevin J. Carey, the issue was "whether the purchaser of a trade claim holds the purchased claim subject to the same rights and disabilities, and is subject to Bankruptcy Code Section 502(d) challenge, as is the original holder of the claim." To answer that, however, he had to determine the meaning of the phrase "any claim of any entity."

The trustee argued that because "any claim of any entity" uses the word "claim" rather than "claimant," it should be interpreted to mean that "a disability accompanies the claim through its journey into the hands of others." In other words, the claims transferred to ASM should be considered "assignments" and therefore be disallowed in keeping with a prior ruling in the Enron bankruptcy, at the time the leading case on claims disabilities.

The trustee also argued that because KB Toys' Chapter 11 filings gave ASM knowledge of the preferential transfers to the original holders, ASM purchased its claims in bad faith.

ASM countered that "any claim of any entity" refers only to the claimant, so a disability stays with the original

continued on page 4

Research Report

Who's Who in Cengage Learning, Inc.

by Francoise C. Arsenault

Cengage Learning, Inc. (Cengage), headquartered in Stamford, Connecticut, is a leading provider of innovative teaching, learning, and research solutions for the academic, professional, and library markets worldwide. Cengage, which is the second largest publisher of higher education course materials in the United States, offers textbooks, instructor supplements, digital content, online reference databases, distant learning courses, test preparation materials, corporate training courses, career assessment tools, and materials for specific academic disciplines. The company's learning brands include Brooks/Cole, Course Technology, Delmar, Gale, Heinle, South-Western, and Wadsworth, among others. Cengage employs more than 5,500 people in about 25 countries and has annual revenues of approximately $2 billion.

Cengage Learning, Inc. and all three of its wholly-owned domestic subsidiaries filed for Chapter 11 reorganization on July 2, 2013, in the United States Bankruptcy Court for the Eastern District of New York. Cengage listed $5.8 billion in debt in its bankruptcy filing and attributed its financial difficulties to the move from traditional textbooks to digital media and to cuts in government spending. The company filed an amended Plan of Reorganization and Disclosure Statement on October 3, 2013. In late December, Cengage requested bankruptcy court approval to pay fees associated with $2 billion in exit financing. According to Cengage officials, the success of the company's bankruptcy exit plan is contingent on the financing. Hearings to consider confirmation of the Plan of Reorganization have been scheduled to begin on February 24, 2014. The company has set a target date of March 2014 for exiting bankruptcy.

Cengage Learning was formed in 2007 when Thomson Reuters Corporation sold the company to a private equity consortium consisting of Apax Partners and Omers Capital Partners for approximately $7.75 billion. Cengage was the largest Chapter 11 filing in 2013.

The Debtor

Michael E. Hansen is Chief Executive Officer of Cengage Learning, Inc. **Alexander Broich** is the President, International. **Dean D. Durbin** is Chief Financial Officer. **Kenneth A. Carson** is Executive Vice President, General Counsel, and Secretary.

Kirkland & Ellis LLP is serving as bankruptcy counsel to Cengage. The team includes **Jonathan S. Henes**, **Christopher J. Marcus**, and **Christopher T. Greco**, partners in the New York office, and **James H. M. Sprayregen**, **Ross M. Kwasteniet**, and **Jeffrey J. Zeiger**, partners in the Chicago office.

Willkie Farr & Gallagher LLP is special investigation counsel to the Independent Directors of Cengage. **Shaunna D. Jones**, **Marc Abrams**, **Todd G. Cosenza**, and **Tariq Mundiya**, partners, are working on the case.

Alvarez & Marsal North America, LLC is acting as the restructuring advisor to Cengage. **William C. Kosturos**, a managing director, leads the engagement. The team also includes **Robert Campagna** and **Julie M. Hertzberg**, managing directors, **Justin Schmaltz** and **Jay Herriman**, senior directors, and **Richard B. Stone**, **Scott J. Anchin**, **Todd S. Fleisher**, and **Mark Zeiss**, directors.

Lazard Freres & Co., LLC is providing Cengage with investment banking services. The team includes **David S. Kurtz**, a managing director and vice chairman of U.S. Investment Banking, head of Global Restructuring, **Ed King**, a managing director, and **Tyler W. Cowan**, a director.

Ocean Tomo LLC is the intellectual property valuation consultant to Cengage. **James E. Malackowski**, the firm chairman and CEO, and **Roy D'Souza**, a managing director, are working on the engagement.

PricewaterhouseCoopers LLP is serving as accounting consultant and independent auditor to Cengage. **James M. DePonte**, a partner in the New York office, leads the engagement.

Kekst & Company is communications advisor to Cengage. **Kimberly Kriger**, a managing director, heads up the team.

The Official Committee of Unsecured Creditors

The Committee includes **Wilmington Trust NA**; **Wells Fargo Bank NA**; **Booksource**; **Bennett Management Corporation**; **RR Donnelley & Sons Company**; **Gary B. Shelly**; **Carl S. Warren**; **BOKf, NA d/b/a Bank of Oklahoma**; and **Central National-Gottesman Inc.**

Arent Fox LLP is serving as the counsel to the Committee. Working on the case are **Andrew I. Silfen**, partner and Chair of the firm's Bankruptcy and Financial Restructuring Group, and **Robert M. Hirsh**, **Leah M. Eisenberg**, **Mark B. Joachim**, **Paul M. Fackler**, **George P. Angelich**, **Joshua Fowkes**, **Michael S. Cryan**, **Martin F. Cunniff**, **Jackson D. Toof**, and **Jeffrey N. Rothleder**, partners.

FTI Consulting, Inc. is providing the Committee with financial advisory services. Working on the engagement are **Matthew Diaz**, **Christopher T. Nicholls**, **Steven D. Simms**, **Samuel E. Star**, and **Steven J. Joffe**, senior managing directors, and **Michael Cardasco** and **Ji Yon Park**, managing directors.

Moelis & Company LLC is serving as the investment banker to the Committee. The team includes **Stephen G. Panagos**, **William Q. Derrough**, **Navid Mahmoodzadegan**, and **Andrew Haber**, managing directors, and **Adam Brody Keil**, a senior vice president.

CRA International, Inc. and **IMS Expert Services** are providing the Committee with copyright and intellectual property valuation consulting services. The team is headed up by **Scott D. Phillips**, a vice president in the CRA Chicago office, and **James V. Koch**, a consultant to IMS.

The Trustee

The U.S. Trustee is **William K. Harrington**.

The Judge

The judge is the **Honorable Elizabeth S. Strong**. ¤

Win-Win, *from page 2*

argued the case should be in West Virginia because most of the company's business operations and employees were located there. The U.S. trustee also supported a change in venue, but on the grounds that Patriot was only able to file in New York because it had established two New York subsidiaries shortly before the filing. Patriot and the official committee of unsecured creditors, as well as other key stakeholders, argued against the change in venue.

"We litigated, and Judge Shelley C. Chapman of New York found that venue in New York was chosen in good faith and satisfied the venue statute, but said that in the interest of justice the case should be moved not to West Virginia but to St. Louis, which is where the company's headquarters are located," says Resnick. "As a result, the first part of case was done in New York and the latter part in St. Louis. It was a seamless transition, however, and ultimately the changing of courts didn't have any negative effect on the bankruptcy."

Resnick also notes that Patriot's bankruptcy was a union case that involved Section 1113 and 1114 litigation. Section 1113 of the bankruptcy code allows debtors to reject collective bargaining agreements if it is necessary to the reorganization. Section 1114 is the corollary provision that pertains to certain retiree medical benefits.

Specifically, in May 2013, after a week-long trial, Bankruptcy Judge Kathy Surratt-States ruled that Patriot had done all it could to lower its operating costs, and granted

continued on page 6

Rethinking, *from page 2*

harmed by a low sale price. They further argue that the Ice Cube Bond is consistent with the Bankruptcy Code and Bankruptcy Rules, citing sections 363(e) and 506(c) of the Bankruptcy Code and Bankruptcy Rule 7065.

Even if the adoption of the Ice Cube Bond mechanism is consistent with the Bankruptcy Code, the question still arises how an Ice Cube Bond would work in practice. As an initial matter, Professors Jacoby and Janger suggest that it only be applied to sales of all or substantially all assets of a debtor outside of a plan process, which they view as a "noncompliant" transaction. In such situations, they propose that the burden be placed upon the proponent of the quick asset sale to prove that "(a) the purchase price was not reduced by the expedited nature of the sale; and (b) the claimant is entitled to the funds as proceeds of its collateral, or pursuant to a specified priority entitlement." Absent such a showing, the Ice Cube Bond holdback "would be considered unencumbered property of the bankruptcy estate to be distributed pursuant to a confirmed Chapter 11 plan."

The obvious initial question is how a

continued on page 8

Claims, *from page 2*

claimant. It also noted that the claims should not be disallowed because they were transferred by means of sales rather than assignments. The parties' intention to sell the claims outweighed the fact there were so-called "assignment agreements," said ASM. Although "assignment" and "sale" are often used interchangeably in claim-transfer agreements, ASM argued that claim transfers are always "sales."

ASM also asserted that it had purchased the claims in good faith, and Section 502(d) expressly incorporates the good-faith-purchaser defense set forth in Section 550(b) of the Bankruptcy Code.

Carey observed that "the plain language, legislative history, and decisional law support the view that a claim in the hands of a transferee has the same rights and disabilities as the claim had in the hands of the original claimant. Disabilities attach to and travel with the claim."

Carey did not distinguish between sales and assignments because they are not easily distinguishable, the definition of "transfer" in Section 101(54)(D) of the Bankruptcy Code arguably includes both assignments and sales, and any distinction between the two terms has been widely criticized.

Carey also rejected ASM's good-faith argument. "A purchaser of claims in a bankruptcy is well aware (or should be aware) that it is entering an arena in which claims are allowed and disallowed in accordance with the provisions of the Bankruptcy Code and the decisional law interpreting those provisions," he wrote. "Under such conditions, a claims purchaser

continued on page 9

Calendar

International Association of Restructuring, Insolvency & Bankruptcy Professionals
INSOL Hong Kong
Annual Regional Conference
March 23–25, 2014
Kowloon Shangri La
Kowloon, Hong Kong
Contact: www.insol.org

National Association of Bankruptcy Trustees
2014 Spring Seminar
April 4-5, 2014
The Biltmore
Coral Gables-Miami, FL
Contact: www.nabt.com

Turnaround Management Association
16th Annual Symposium
April 23, 2014
Concert Hall, Fairmont Royal York Hotel
Toronto, ON
Contact: www.turnaround.org

American Bankruptcy Institute
32nd Annual Spring Meeting
April 24–27, 2014
JW Marriott Hotel
Washington, DC
Contact: www.abiworld.org

American Bankruptcy Institute
16th Annual New York City Bankruptcy Conference
May 15, 2014
New York Hilton Midtown
New York, NY
Contact: www.abiworld.org

Association of Insolvency and Restructuring Advisors
30th Annual Bankruptcy & Restructuring Conference
June 4-7, 2014
Westin Denver Downtown
Denver, CO
Contact: www.airacira.org

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Special Report

Nation's Largest Industrial Auctioneers

Firm	Key Professionals	Representative Clients/Industries
Asset Sales Auctioneers Indian Trail, NC Tel. (888) 800-4442 www.asset-sales.com	Gerald Mannion Lance Mannion Mike Stewart	Central Roadways, Metrolina Steel, Rukes Machine & Optics, Apex Tool Group, Dynasteel Corporation, FAC-ETTE Mfg., Davis Steel & Iron, Lentz Automotive, Five Star Airport Alliance, Willyard Company, Southern Mechatronics, Paramount Tool & Engineering, Even Temp, ACAS Landing Gear, NSA Industries, White Hall Machinery, Goodyear Tire & Rubber Company, SWP Industries, Marener Industries.
Biditup Auctions and Appraisals Studio City, CA Tel. (818) 508-7034 www.biditup.com	Steven Mattes	Sabreliner Corporation, Livernois Vehicle Development, Hoku Materials, GMA Protection Technologies, CSC Worldwide, The MRD Group, MetalTech Industries, National Auto Radiator Manufacturing Co., Apex Block, LaFarge, L&M Manufacturing Co., Ariens, Windsor Foods, Kroger, McGraw Hill, Circor Aerospace, Southern Aluminum and Steel, One Source Recycling, Diamond Foods, RG Steel, Murray.
Branford Group Branford, CT Tel. (203) 488-7020 www.TheBranfordGroup.com	William Gardner James Gardner	Global auctioneers of manufacturing-related equipment specializing in the electronics, circuit board, plastics, pharmaceutical, semiconductor, metalworking, printing, solar and construction industries. Clients include: BASF, Celestica, Exelis, Starplast, Jabil, PowerWave Technologies, Elcoteq, Skyline Solar, ACW Technology, Cannon Equipment Company, PPC Electronic AG, Konarka Technologies, Invotronics, CST, Semi South.
CA Global Partners Woodland Hills, CA Tel. (818) 340-3134 www.cagp.com	Adam Alexander Mark J. Weitz	Past machinery and equipment auctions include Innovative Sign & Display, LG Philips Displays, Nissan Mexico, Caldwell Development, Skandik, Clive Christian Furniture, Nu Vacuum Systems, S&J Construction, Mark's Asphalt & Paving, Renaissance Restoration, Solar Syndicate, Eddie Bauer, Young's RV.
Heritage Global Partners San Diego, CA Tel. (877) 303-8040 www.hgpauction.com	Kirk Dove	The Egg, Pfizer, Sangart, Hoku Materials, Prime Plastics, Conair, SVTC, Tower Defense/Aerospace, J.M. Smucker, SMA, Schreck-Mieves, Mylan, America's Cup, Lafarge, Mitsubishi and Hynix, Oberdorfer, Ariens, Nanosolar, Petro River Oil Corp., Kroger, Alion, Thompson River Power, Amonix, Solaria, Power-Tec, SemiSouth, RG Steel, Solyndra, Shuco, ThyssenKrupp, Murray, Alion, Aveos.
Hilco Industrial Farmington Hills, MI Tel. (248) 254-9999 www.hilcoind.com	Robert Levy Stephan Wolf	Otis Elevator Company, Cold Saw Precision, SA Industries 2, Sanyo, Panasonic, Newtek Automotive, Areva Solar, Fraser Manufacturing, Valmont, ESAB, Cemcolift, RaCon, Inc., ACM Wilcox, Kaydon Corporation, BAE Systems, Saturn Industries, David Brown Gear Systems, Kodak, Ovshinsky Innovations, Armacel Armor,
Hunyady Auction Company Hatfield, PA Tel. (800) 233-6898 www.hunyady.com/mhunyady.html	Michael J. Hunyady Timothy D. Schwer	Popple Construction, North Cambria Fuel Co., J.F. Travers, Inc., Shade Enterprises, Mazzuca Enterprises, A&S Services Group, Mingo Creek Construction, Ben Daniels Construction Equipment, H&G Contractors, Ligonier Construction Co. and Coal Loaders, Inc., Lewandowski Equipment Co., Haas Environmental, Inc.
Investment Recovery Services Fort Worth, TX Tel. (817) 222-9848 www.irsauction.com	Gregg Trenor John Henry Britton New	IBM, United Rentals, FMC, Hertz Equipment Rental, Sprint, T-Mobile, Terex, Zurn, Nation's Rent, General Dynamics, Sunbelt Rentals, Thomas Equipment, Rental Service Corp., Hart & Cooley, Triumph Group.
James G. Murphy Co. Kenmore (Seattle), WA Tel. (425) 486-1246 www.murphyauction.com	Tim Murphy Andy Taylor Todd Meyers	Specializing in machine shops, forest products, construction, and transportation. Clients include: U.S. Marshals Service, U.S. bankruptcy court trustees, major forest product companies, financial institutions, utility companies, cities, and counties.
Liquidity Services Marketplace Scottsdale, AZ Tel. (888) 832-7384 www.liquidityservicesinc.com www.go-dove.com	Michael Livatino, Sr. Duncan Ainscough	Mondelez, Molex, DuPont, United Rentals, Roche, Reckitt Benckiser, Dow Chemical, Renault, Intel, Bristol-Myers Squibb, AstraZeneca, LaFarge, GlaxoSmithKline, Honeywell, Eaton, Alcoa, Procter & Gamble, Pepsi, Parker Hannifin, Hewlett-Packard, Blackberry, Georgia-Pacific, NSG Group, Merck, Bechtel, Danone, Motorola, Hallmark.
Maynards Industrial Southfield, MI Tel. (248) 569-9781 www.maynards.com	Taso Sofikitis	ST Ericcson, Sabreliner, Livernois, Hoku Materials, GMA Cover Corporation, CSC Worldwide, The MRD Group, Continental Case Company, USIC Corporation, Metal Tech Industries, Dryden Paper Mill, Hologic, NRG Pipelines, Weathergard Windows, Tower Defense and Aerospace, Apex Block, American Rigging, Lafarge Midwest, E-Biofuels, General Motors, Ariens, Powerwave Technologies, Nanosolar.
PPL Group Northbrook, IL Tel. (224) 927-5300 www.pplgroupllc.com	David Muslin Joel Bersh	InSync Manufacturing, Daimler Buses North America, Milwaukee Boiler International, Fenco Automotive, CareStream, NanoInk, Chicao Air Power, B&M Aerial Equipment, BAE Systems, Kora Industries, One Source Recycling, Power-Tec, Bendix Commercial Vehicle Systems, Racon, Duplicraft, RG Steel, Tru-Way.

Worth Reading

Being the Boss: The Importance of Leadership and Power

Author: Abraham L. Gitlow
Publisher: Beard Books
Softcover: 226 pages
List price: $34.95

Gitlow's book is an informative study of leadership and the exercise of power in business organizations. Leadership is a function of both position and the ability to lead. Power is the capacity to command and influence the behavior of others. A chief executive possesses power by virtue of status, but leadership involves the successful exercise of authority coupled with responsibility and accountability.

Gitlow's book grew from a series of meetings between highly successful active and retired executives and selected graduate students at New York University's Stern School of Business in the early 1990s. At these meetings, held over a period of years, the business leaders related their successes and shortcomings as managers of talent and capital. The successful leader has to manage both in unison. Talent without capital is mere show, with no progress or productivity. On the other hand, no matter how much of it, capital without talent cannot keep a business from decline. To best manage the interplay between talent and capital, Gitlow emphasizes the necessity of ethical principles, behavior, and decisions by management. These alone do not account for successful leadership, though. Also critical are personal characteristics of "courage, competence, health (physical energy), foresight, and ego." Gitlow discusses these in the context of the varied and, at times, unpredictable situations today's business leaders find themselves in; and with an eye on both the competitive realities and social obligations a leader must always be mindful of in providing leadership in any situation.

Being the Boss is not a presentation of simple rules or mottos; nor is it an expounding of a current management theory. The virtue of Gitlow's book is that it recognizes the multiple considerations and pressures leaders have to continually address. Along with this, the book gives guidance on how to assess these and sift through them to reach a satisfactory decision. In this, Gitlow never loses sight of the human component of business leadership. He gives guidance on how top business leaders can deal with complex situations and challenging questions in ways that satisfy the role of respectable leadership and the interests of employees, stakeholders, and the public.

The book also looks at the effects of leadership, both good and bad. A beneficial outcome is not seen as exclusively bringing in the highest profits by any means possible or in creating a compelling, though largely unsubstantiated, image. Gitlow regards "ethical CEOs and corporations as more successful than those that achieve greater financial gains through unethical and shady practices." First published in 1992, long before the ethical lapses demonstrated by Enron, WorldCom, and others, *Being the Boss* still has relevance to central issues in the contemporary business world. It remains must reading for current executives as well as for those with aspirations to become effective leaders in their organizations. ¤

Abraham L. Gitlow is Dean Emeritus of the Stern School of Business at New York University. He is also the author of other books and journal articles.

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

Win-Win, *from page 4*

the company the right to reject its collective bargaining agreement with the UMWA and "adjust wages, benefits and work rules for union employees to a level consistent with the regional labor market." Ultimately, Patriot reached an agreement with the UMWA, entering into modified collective bargaining agreements, which included reducing wages at union mines so they conformed more closely to wages at non-union mines.

Surratt-States also ruled that Patriot could cease providing health care benefits to around 8,000 retirees and their dependents, and instead fund a trust called a Voluntary Employees' Benefits Association (VEBA) to be administered by the UMWA. That was important, says Resnick, because Patriot's largest cost driver – which in part led to the need for the restructuring – was legacy labor liabilities. Patriot thus entered into a separate agreement with the UMWA and Peabody Energy that called for Patriot and Peabody to fund the VEBA trust, which will pay for the health care benefits for thousands of retired miners. The arrangement is reportedly worth around $400 million. In exchange for the cash contributions, the UMWA agreed to give up most of its equity stake in the reorganized Patriot, which had been a key part of an earlier retiree health care funding agreement between the union and the company. "Patriot removed well over $1 billion in retiree health care obligations from its balance sheet, and retirees were able to continue to receive meaningful benefits for some time, which was a great outcome under the circumstances," says Resnick.

Finally, says Resnick, the case was notable for its rights offering and exit financing. Knighthead Capital Management LLC backstopped a rights offering by agreeing to purchase up to $250 million of new notes and warrants. And, Barclays Bank PLC and Deutsche Bank AG arranged and syndicated exit financing worth up to $576 million, which Patriot Coal said in court papers was "the last essential component for the debtors' plan and ultimate successful emergence." Specifically, Patriot's restructuring plan handed senior bondholders, who were owed $250 million, 60 percent of Patriot's new common shares, and also allowed them to participate in the rights offering. The holders of $200 million in convertible bond debt, as well as Patriot's general unsecured creditors, received 5 percent of the new common stock as well as the ability to participate in the rights

continued on page 8

Special Report

Major Financial Advisors – 2014

Firm	Location/Contact	Notable Engagements
AlixPartners	New York, NY www.alixpartners.com	*Debtor:* Pipeline Data, Pemco World Air Services, Patriot Coal *Creditors' Comm.:* American Suzuki Motor Corporation
Alvarez & Marsal	New York, NY www.alvarezandmarsal.com	*Debtor:* Conexant Systems, Fresh & Easy, Sound Shore Stuart McLean, Education Holdings, School Specialty, Christ Hospital, Arcapita Bank, Global Aviation Holdings *Creditors' Comm.:* Orchard Supply, Reader's Digest, Exide Technologies
BDO	New York, NY bdo.com	*Debtor:* Furniture Brands *Creditors' Comm.:* Hampton Capital, Rodeo Creek Gold, Vivaro Corp.
Blackstone Advisory Partners	New York, NY www.blackstone.com	*Debtor:* Ambac Financial Group, Terrestar, W.R. Grace, Residential Capital *Creditors' Comm.:* School Specialty, A123 Systems
CohnReznick	New York, NY www.cohnreznick.com	*Debtor:* Advanced Living Technologies, Eagle Recycling, Fairmont General Hospital, Interfaith Medical Center, Soundview Elite, Anchor Bancorp Wisconsin *Creditors' Comm.:* Allied Industries, Belle Foods, Omtron USA, Zacky Farms *Chapter 11 Trustee:* Pitt Penn Holding Company
Deloitte Financial Advisory Services	New York, NY www.deloitte.com	*Debtor:* Virginia United Methodist Homes of Williamsburg *Creditors' Comm.:* Coda Holdings, Landauer Healthcare Holdings, Sound Shore, Pemco World Air Services
FTI Consulting	New York, NY www fticonsulting.com	*Debtor:* Orchard Supply, Reader's Digest, Ecotality Inc . EWGS Intermediary, Kit Digital, Lafayette Yard Community Development Corp., Overseas Shipholding, THQ, Inc., Rural/Metro Corp., Lifecare Holdings *Creditors' Comm.:* Cengage Learning, Fresh & Easy, Edison Mission Energy, LCI Holding, Personal Communications Devices, Prommis Holdings, Revstone Industries, Hawker Beechcraft
GlassRatner Advisory and Capital Group	Atlanta, GA www.glassratner.com	*Debtor:* El Centro *Creditors' Comm.:* Endicott Interconnect, TLO LLC, Groeb Farms, IPC International
Houlihan Lokey	Los Angeles, CA www.HL.com	*Debtor:* Gatehouse Media, Groeb Farms, THQ Inc., MSR Resort Golf Course, Central European Distribution Corporation, TPO Hess Holdings *Creditors' Comm.:* Patriot Coal
Jefferies & Company	New York, NY www.jefferies.com	*Debtor:* Omega Navigation Enterprises, K-V Pharmaceutical, OnCure Holdings, MSR Resort Golf Course
Lazard	New York, NY www.lazard.com	*Debtor:* Maxcom Telecommunicaciones, Cengage Learning
Mesirow Financial Consulting	New York, NY www mesirowfinancial.com	*Creditors' Comm.:* AMF Bowling, Liberty Medical Supply, Southern Air Holdings, AMR Corp.
Moelis & Company	New York, NY www moelis.com	*Debtor:* AMF Bowling, Trinity Coal, Revel Entertainment, AMF Bowling
Perella Weinberg Partners	New York, NY www.pwpartners.com	*Debtor:* Vertis Holdings, Hawker Beechcraft, School Specialty, Edison Mission Energy
PwC	New York, NY www.pwc.com	*Debtor:* Allied Systems, Big M, Metro Affiliates, National Envelope *Creditors' Comm.:* EWGS Intermediary
Rothschild	New York, NY www rothschild.com	*Debtor:* Geokinetics, AMR Corporation, LCI Holding Company, LifeCare Holdings, Allied Systems, Metro Affiliates

Win-Win, *from page 6*

offering. The arrangement, says Resnick, also provided a meaningful way for the company's creditors to participate in the newly emerged Patriot Coal. "That was another win-win story," he says.

There were also a few environmental issues, which Resnick also says was a win-win. "We reached an environmental settlement with the Sierra Club and other non-governmental organizations that gave the company a reprieve from some environmental obligations but, by and large, obligated it to continue to perform its remediation efforts obligations going forward," he says.

Patriot emerged from bankruptcy on December 18, 2013, just ahead of its December 31 DIP financing expiration. "It was a race to emerge before the DIP matured, and we were able to do that," says Resnick.

"The ad hoc group of investors, led by Knighthead Capital, remained committed to the company's assets, management team, and employees – and backed this belief with a substantial investment in the company's future success," says Hessler, noting that the capital solution crafted by the ad hoc group of investors not only ensured Patriot's survival, but also paved the way for the formation of the VEBA trust. "With the right balance sheet in place, Patriot is well positioned for long-term growth, for the benefit of all of its constituents."

"As a result of the restructuring process, the company succeeded in deleveraging its balance sheet while preserving jobs for over 4,000 workers and ensuring that retirees continued to receive meaningful benefits."

Mayer pays tribute to several major contributors, "First, the United Mineworkers made the sacrifices that were necessary for the company to survive," he says. "Second, Knighthead, the second largest senior noteholder, originally focused on the non-union subsidiaries, but then realized the whole company had to reorganize, so backstopped the exit financing. Knighthead saved this company. Third, Davis Polk did a great job as company counsel – they got a terrific litigation settlement from Peabody Energy Corporation that was critical to the plan."

Kramer Levin, says Mayer, gets credit for helping persuade Knighthead to fund a reorganization, and fighting any termination of Patriot's pension plan that would create a massive unsecured claim. "The pension plan and the union also didn't want termination, so we weren't the only ones, but we went early to the company and said, 'You can't terminate this because it will create almost $1 billion in liabilities and kill the unsecured creditors' recovery," he says. ¤

Rethinking, *from page 4*

court would set the amount of an Ice Cube Bond. The professors point to Federal Rule of Civil Procedure 65 for the principle guiding the determination of the amount of the holdback: "an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained." Professor Janger also notes that courts are familiar with the reserve or holdback concept from, for example, setting disputed claims reserves.

The primary difference with the Ice Cube Bond proposal is that the reserve would be created prospectively, rather than in response to an already-identified dispute. "When doing a sale outside the plan – without full opportunity for investigation, bargaining, and other procedures that the plan process requires – there should be funds available to resolve disputes that might arise in the future, as well as those already identified," says Janger. In their paper, the professors offer conceptual frameworks for calculation of an amount in any specific case, but also note that "precision is not essential" and "implementation of the Ice Cube Bond might benefit from a presumptive amount, such as ten percent of the purchase price."

While Professors Jacoby and Janger set forth this model of judicial determination, they acknowledge that it will not be required in most cases. "We predict that this often would be resolved through post-sale negotiation rather than litigation," says Jacoby. Even where the parties reach a negotiated resolution, the professors assert that the Ice Cube Bond would be beneficial. They believe that pre-sale bargaining is based upon transactional leverage, where the potential buyer "is in the driver's seat" and can extract concessions for its allies "in the form of deviations from the bankruptcy distributional scheme or price concessions." However, after that the sale bargaining is positional and "the conversation is about entitlement" rather than leverage. "At that point, the conversation unfolds in the shadow of a judicial determination of value and entitlement rather than a game of transactional chicken," they argue.

Professors Jacoby and Janger propose a "mandatory holdback of a portion of 363 sale proceeds to allow later resolution of disputes about value and priority," which they term an Ice Cube Bond.

The professors believe that debtors' estates would derive other benefits from the adoption of their proposal as well. Requiring the sale proponent to demonstrate its entitlement to the Ice Cube Bond serves several important purposes. First, "the Ice Cube Bond redresses an imbalance in bargaining power created by the hurry-up sale," says Janger. "It reinstates the balance that would have existed had the sale been conducted under a plan." In addition, it eases the burden on the creditors' committee early in the case. "The Ice Cube Bond ensures that the creditors will have time to reflect on and investigate security and priority issues without preventing the quick sale where one is necessary," notes Jacoby.

The Ice Cube Bond would also assist the debtor when negotiating the terms of an early asset sale or debtor-in-possession

continued on page 9

Rethinking, *from page 8*

financing facility. "The debtor can explain to the sale proponent that lien priorities and valuation may be reexamined after the sale has closed. This gives something to say when they are negotiating the DIP order or the sale order and no one else is in the room," states Janger. "The fact that the money is being set aside and later bargaining or litigation may occur gives the debtor some leverage ex ante when negotiating the terms of the sale." ¤

Claims, *from page 4*

is not entitled to the protections of a good-faith purchaser."

Notably, Judge Carey also took issue with the court's determination in *Enron II* that a disability imposed on a claim would disrupt the distressed debt markets. He wrote, "Buyers of debt, in the court's experience, are highly sophisticated entities fully capable of performing due diligence before any acquisition. However, even without any due diligence, today's claim purchasers are aware of the ever-present possibility of avoidance actions…. Under the circumstances now before me, the assertion that subjecting transferred claims to Section 502(d) disallowance would cause disruption in the claims trading market is a hobgoblin without a house to haunt." According to the judge, KB Toys had put all potential buyers of claims, including ASM, on constructive, if not actual, notice of potential avoidance claims against the original claims holders. ASM, he wrote, "could have discovered the potential for

Distressed claims traders breathed a sigh of relief when a federal district court ruled in the Enron Chapter 11 that sold claims are generally not disallowable on the basis of the seller's misconduct. Now, the courts have opened the issue anew in the case of *KB Toys*.

disallowance with very little due diligence and factored the potential for disallowance into the price it paid for the trade claims." As evidence that ASM had "sufficient understanding and leverage to negotiate for such provisions," Carey pointed to the fact that it had used indemnity clauses in some of the assignment contracts. According to Carey, allowing the claims under these circumstances would essentially make the KB Toys estate the claim purchaser's insurer.

After the U.S. Bankruptcy Court for the District of Delaware disallowed the claims, the Third Circuit affirmed.

In regard to "any claim of any entity," the Third Circuit held that because the statute focuses on claims, not claimants, claims must be disallowed no matter who holds them.

The Third Circuit also held that ASM could not use good faith as a defense under Section 550 because it only applies to purchases of estate property, and claims are not estate property.

A claims purchaser "should know that it is taking on the risks and uncertainties attendant to the bankruptcy process," the court said, and "disallowance of a claim pursuant to Section 502(d) is among these risks."

"*Enron II* has been persuasive authority in the Southern District of New York, and many market participants have viewed disallowance or subordination risk as minimal under the *Enron II* framework so long as they purchased claims through sales (rather than assignments) and acted in good faith and without knowledge of any disability, " says O'Neal.

"*KB Toys* muddies the distressed claims trading landscape as the Third Circuit expressly rejected the seminal decision of the Southern District of New York in *Enron II*, holding "that disallowance is a personal disability of a claimant, not an attribute of the claim," says Timothy J. Durken of Jager Smith P.C.

Now that the Third Circuit has definitively upheld disallowance in *KB Toys*, calling *Enron II* into doubt, "claims buyers will have to perform due diligence on the seller (both in terms of its liability to the estate on an avoidance action, as well as its financial ability to stand behind the indemnity) to evaluate and price those risks," says James Millar, partner in WilmerHale's bankruptcy and financial restructuring practice group

Millar says claims buyers should also ensure that indemnities in purchase agreement are strong enough to provide a right to recover any losses back against the seller.

He also notes that "to the extent that the existing market in trade claims does not already contemplate that an acquired trade claim would be subject to disallowance on this basis, the result of the ruling may be to interfere with the efficiency of the secondary market in bankruptcy claims." ¤

In the Next Issue…

- *Special Report: Restructuring Depts. of European Accounting Firms*
- *Special Report: People to Watch – 2014*
- *Research Report: Who's Who in Excel Maritime Carriers*

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