turnarounds & workouts

News for People Tracking Distressed Businesses

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Inside

Suntech Controversy

Ruling Is Guide to Chapter 15 Eligibility

by Julie Schaeffer

The U.S. Bankruptcy Court for the Southern District of New York has made two controversial rulings in *Suntech Power Holdings Co., Ltd.*: That the company is eligible to be a Chapter 15 debtor by virtue of a U.S. bank account opened specifically for the purposes of establishing U.S. jurisdiction, and that the company's center of main interest (COMI) is the Cayman Islands despite it conducting no business in the Cayman Islands.

The ruling, says Timothy Graulich, a partner in Davis Polk's insolvency and restructuring group, "highlights that the technical eligibility requirements for a Chapter 15 filing can be met with appropriate pre-filing planning by many foreign debtors that wish to avail themselves of the U.S. court system for a proper purpose."

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Successor Not Liable

Sale Free of Pension Underfunding Claim Approved

by Randall Reese

One of the hallmarks of a sale process that occurs pursuant to Section 363 of the Bankruptcy Code is that it allows assets to be sold free and clear of liens and encumbrances. "The primary benefit of section 363(f) is that it both maximizes the value of the debtor's assets and creates certainty for purchasers of the debtor's assets by minimizing the risks associated with buying assets of a debtor in bankruptcy," according to Christopher Hopkins of Weil, Gotshal & Manges LLP. "This not only fosters a vibrant market for distressed assets, but also ensures that the debtor is able to obtain the highest possible value for its assets, thereby conferring a benefit on the debtor and its creditor body."

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Momentous Consequences?

Ruling Puts Senior Creditors at Risk

by Julie Schaeffer

In last month's issue, we reviewed some implications of the ruling in Momentive Performance Materials (MPM) Silicones, LLC – namely, the unenforceability of make-whole provisions in the context of a bankruptcy, and the ability of debtors to satisfy the cramdown provisions of 1129(b) without providing a market rate of interest. On September 30, however, another ruling shook the bankruptcy world.

As explained last month, MPM Silicones filed for Chapter 11 in April 2014 in the United States Bankruptcy Court for the Southern District of New York. Under the company's plan of reorganization, senior noteholders were to be paid in full, in cash, but without the

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"The decision is a welcome one for foreign companies without a history of U.S. assets or business who desire to use Chapter 15 to facilitate international restructurings," adds Ronald J. Silverman, a partner at Bingham McCutchen LLP, which represents an ad hoc group of noteholders in Suntech's Chapter 15 case.

As background, Suntech is the parent of a group of companies in the solar panel business. It was incorporated in the Cayman Islands and its principal American subsidiary, Suntech America, was incorporated in Delaware, registered to do business in California, and based in San Francisco. However, it had historically listed its principal location as China.

In March 2013, Suntech defaulted on $575 million in U.S. bonds. Among its other liabilities were litigation claims, including a $1.5 billion antitrust suit brought by Solyndra in the Northern District of California. Suntech's assets consisted primarily of stock in subsidiaries and $1.46 billion in receivables, mainly due from subsidiaries, whose collectibility was questionable

Later that year, Suntech negotiated with a group of bondholders to restructure its debt through a Cayman Islands "scheme of arrangement" and, if necessary, Chapter 15. A Cayman Island's court placed Suntech into a provisional liquidation proceeding, and appointed joint provisional liquidators (JPLs) to oversee the company's wind-down.

The JPLs, who were authorized to act on behalf of Suntech in many ways, changed Suntech's principal address from China to the Cayman Islands, opened a Cayman Islands bank account, and took physical possession of Suntech's subsidiaries' stock certificates, among other things. They then began to wind down the company's business.

Around that time, a second group of bondholders filed lawsuits against Suntech, seeking to file an involuntary Chapter 7 case against Suntech in the U.S. Bankruptcy Court for the Southern District of New York. The lawsuit was resolved, however, when the JPLs agreed to file Chapter 15 within four weeks.

That was a challenge, given that the company had no operations or assets in the United States. So, to establish jurisdiction in New York, the JPLs

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A recent opinion authored by Judge Mary F. Walrath of the United States Bankruptcy Court for the District of Delaware reinforced the benefits provided by a Section 363 sale by interpreting the statute's provisions to allow a sale free and clear of any successor liability claims of a pension trust for underfunding of a debtor's pension plan. The opinion concluded, other than a request for a stay pending appeal which was denied, a tortured sale process for Ormet Corporation's aluminum smelter located in Hannibal, Ohio.

In February 2013, Ormet began its second trip through bankruptcy by filing for Chapter 11 protection in Delaware. Ormet entered its second bankruptcy with a plan to use the case to sell substantially all of its assets after a fulsome pre-filing marketing process led by its investment bankers at Evercore Partners. The company sought and received approval of a competitive sale process, with an affiliate of Wayzata Investment Partners LLC installed as the stalking horse bidder. When no competing bids were received, Judge Walrath approved the sale to the Wayzata affiliate on June 10, 2013.

There was, however, a catch. There was a condition precedent to the closing of the sale that required Ormet to obtain relief from the Public Utilities Commission of Ohio modifying the terms of its contract for the purchase of electricity from Ohio Power Company and Columbus Southern Power Company. Ormet was ultimately unable to get the required relief and, as a result, the sale did not close. That failure also triggered a default under Ormet's debtor-in-possession financing facility.

Following the failed sale, Ormet ceased operations at the Hannibal facility, sought court approval to wind down its estates, and began a new sale process. By the end of December 2013, Ormet had succeeded in finding buyers for other of its assets, the proceeds of which were sufficient to repay its DIP loan. The second sale process for the Hannibal facility continued well into 2014, with a stalking horse bid not being completed until June. At an auction, Niagara Worldwide LLC submitted the winning bid of $25.25 million.

The only objection to the sale of the Hannibal facility was made by the Steelworkers Pension Trust, which argued that the court should not approve the sale of the assets free of the Trust's potential $5

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interest that would have accrued through the original 2015 maturity of the notes.

The senior noteholders objected to the confirmation of the plan on the grounds that it violated the terms of the indenture, which provided for payment of a make-whole premium in the event of any redemption of the notes before October 2015 – and a redemption of the notes occurred with the automatic acceleration of the notes upon the filing of the bankruptcy. Momentive disagreed on the grounds that there was not a voluntary redemption of the notes before October 2015; instead, the maturity date was automatically accelerated by the bankruptcy filing.

In light of this dispute, the noteholders had two choices: (1) accept the debtors' plan, thereby being paid in full, in cash, but without the interest that would have accrued through 2015, or (2) reject the debtors' plan and be subject to a cramdown that satisfied their claims with replacement notes benchmarked to the U.S. Treasury rate. The noteholders didn't like either option and ended up with (1) their make-whole premium being denied, and (2) the prime rate as the appropriate benchmark interest rate (not as low as the U.S. Treasury rate, but still below market for comparable debt).

Following these rulings, in July 2014, Momentive's first-lien noteholders filed action against some of the second-lien noteholders who were to receive, under the company's plan of reorganization, distributions that included equity of the reorganized company, reimbursement of professional fees, and a possible fee for backstopping a rights offering. To support their action, the first-lien noteholders made two arguments.

First, they argued that the second-lien noteholders could not receive the aforementioned distributions when the first-lien creditors had not been paid in full in cash, and could not sell their replacement notes for the full value of their claims. Instead, the second-lien noteholders had to turn over a portion of their recovery to make the first-lien noteholders whole.

Second, they argued, the second-lien noteholders had violated the intercreditor agreement's prohibition of the second-lien noteholders from enforcing rights or exercising remedies, or objecting to

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Research Report

Who's Who in NII Holdings, Inc.

by Francoise C. Arsenault

NII Holdings, Inc. (NII), a publicly held company headquartered in Reston, Virginia, is a provider of wireless communications services for businesses and consumers in Latin America, operating under the Nextel brand in Brazil, Mexico, and Argentina. The company offers fully integrated wireless communications tools with digital cellular voice services, data services, and wireless Internet access. In August 2014, NII completed the sale of its operations in Chile, which had been generating continuing losses, to Fucata S.A. NII is now exploring the sale of its business in Argentina and plans to focus on Brazil and Mexico, its core markets. At the end of the last quarter, NII had approximately 9 million subscribers. As of its bankruptcy filing date, NII had 70 full-time employees.

On September 15, 2014, NII Holdings, Inc. and eight of its wholly owned subsidiaries filed for Chapter 11 reorganization in the United States Bankruptcy Court for the Southern District of New York. On October 8, 2014, four additional affiliated debtors also commenced Chapter 11 cases. In its bankruptcy, NII listed assets as of June 30, 2014 of $2.88 billion and debts of $3.47 billion. Company officials attributed NII's financial difficulties to the erosion of its competitive advantage, beginning in 2009, by the launch of new 3G networks by competitors; the introduction of smartphone service to the Latin American marketplace by America Movil SAB and Spain's Telefonica SA; and the slowing of economic growth in Latin American countries.

On December 22, 2014, NII filed a Disclosure Statement and proposed Joint Plan of Reorganization under which bondholders would exchange $4.3 billion in debt for new common stock in the company. NII would receive $500 million in new capital through a $250 million rights offering and $250 million in exit financing. The proposed Plan of Reorganization is supported by the company's two largest creditors and by the Official Committee of Unsecured Creditors. A hearing to consider approval of the Disclosure Statement has been set for January 28, 2015.

The Debtor

Steven M. Shindler is the Chief Executive Officer of NII Holdings, Inc. **Gokul Hemmady** is the Chief Operating Officer. **Juan R. Figuereo** is the Chief Financial Officer. **Gary Begeman** is Executive Vice President and General Counsel. **Donald E. Freiman** is a Vice President and Treasurer.

Jones Day is serving as the bankruptcy counsel to NII. The team includes **Scott J. Greenberg**, **David G. Heiman**, **Carl E. Black**, **Lisa G. Laukitis**, **Lee A. Armstrong**, **Brett P. Barragate**, **Theodore M. Grossman**, **Michael A. Platt**, **Nicholas E. Rodriguez**, and **Patricia J. Villareal**, partners, and **Michael J. Cohen**, **Raul A. Farias**, **Laura L. Swanson**, **George R. Howard**, and **Aaron J. Rogers**, associates.

The law firm of **Togut, Segal & Segal LLP** is acting as the conflicts counsel to NII. Working on the case are **Albert Togut**, managing partner, **Jeffrey R. Gleit**, a partner, and **Lara R. Sheikh**, **David A. Paul**, and **Leo Muchnil**, associates.

Quinn Emanuel Urquhart & Sullivan LLP is special counsel to **LuxCo Holdings** subsidiary. **Susheel Kirpalani** and **Benjamin I. Finestone**, partners, and **Kate Scherling** and **William Pugh**, associates, are working on the case.

Alvarez & Marsal North America LLC is providing NII with restructuring advisory services. The engagement team is led by **Byron Smyl**, a managing director. Also working on the engagement are **Julie M. Hertzberg** and **Brian Cumberland**, managing directors, **Luke Lonergan**, a senior director, **Erin McKeighan**, a director, **Jose Fornell** and **Pablo Michel**, senior associates, and **Mauricio Rivera** and **Stacey Fuller**, associates.

McKinsey Recovery & Transformation Services U.S. LLC is the turnaround advisor to NII. **Kevin Carmody**, a partner and practice leader, directs the work.

Rothschild Inc. is serving as the investment banker and financial advisor to NII. The team includes **Homer Parkhill** and **Nick Melton**, managing directors, **Justin Singh**, **Matthew Chou**, and **Jay Johnson**, directors, **Mahir Quraishi** and **Mirag Vamja**, associates, and **Bilal Bazzy**, an analyst.

PricewaterhouseCoopers LLP is providing NII with auditing services. **Suzanne J. Hubbard**, a partner, leads the engagement.

KPMG LLP also is providing NII with auditing services. The engagement is being led by **Robert T. Singleton**, a partner.

Deloitte Tax LLP is tax consultant to NII. **Donald B. Carter** directs the work.

Ernst & Young LLP, directed by **Robert J. Stall**, is providing accounting services to NII.

The Official Committee of Unsecured Creditors

The Committee includes **Wilmington Trust, National Association**; **Capital Research and Management Company**; **Aurelius Investment, LLC**; **Wilmington Savings Fund Society, FSB**; **American Tower do Brasil-Cessao de Infraestructuras LTDA**; **Motorola Mobility LLC**; and **U.S. Bank, National Association**.

Kramer Levin Naftalis & Frankel LLP is acting as the counsel to the Committee. Working on the case are **Kenneth H. Eckstein**, **Adam C. Rogoff**, **Stephen D. Zide**, **Douglas Mannal**, **Norman C. Simon**, **Abbe L. Dienstag**, **Robert T. Schmidt**, **David J. Fisher**, and **Barry Herzog**, partners, and **Anupama Yerramalli**, **Rachel L. Ringer**, and **Mary K. Guccion**, associates.

FTI Consulting is providing financial advisory services to the Committee. **Andrew Scruton**, a senior managing director, directs the work. Also on the team are **Gabriel P. Bresler**, **Steven D. Simms**, **Michael Katzenstein**, **Michael C. Eisenband**, **Samuel E. Star**, and **Steven J. Joffe**, senior managing directors, **Michael S. Baumkirchner**, a managing director, and **Jeremy R. Stern**, a senior director.

The Trustee

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

The Judge

The judge is **The Honorable Shelley C. Chapman**. ¤

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decided to open a bank account for Suntech. When they were unable to do so, they had a bankruptcy professional deposit $500,000 of Suntech's money into one of its own New York accounts, but for the benefit of Suntech.

Solyndra objected to Suntech's Chapter 15 filing. First, it argued that the JPLs manipulated the venue in bad faith, and that the proper venue was not the Southern District of New York, but the Northern District of California, where Solyndra's litigation was pending, because Suntech had operations in San Francisco. Second, it alleged that the JPLs manipulated the COMI in bad faith, from China to the Cayman Islands.

Judge Stuart M. Bernstein first looked at the issue of venue and Chapter 15 eligibility, and in doing so, followed the Second Circuit's December 2013 decision in *Barnet,* which held that Section 109(a) of the Bankruptcy Code – which requires a debtor to have a U.S. residence, domicile, place of business, or property in order to be eligible to be a debtor – applies to Chapter 15 debtors. As a result, said Bernstein, the JPLs' establishment of a bank account prior to the commencement of the Chapter 15 proceeding allowed Suntech to be a debtor.

Bernstein rejected Solyndra's argument that the bank account was not Suntech's, but that of Suntech's bankruptcy professional because all parties understood the account to be Suntech's, and it was Suntech that controlled the account.

Second, Bernstein rejected the "bad faith" argument by ruling that Chapter 15 eligibility simply requires property in the United States; it does not require "an inquiry into the circumstances surrounding the debtor's acquisition of property." Bernstein cited Judge Shelley C. Chapman's Chapter 15 eligibility decision on remand in *Barnet*.

Finally, Bernstein rejected Solyndra's request to transfer venue. Solyndra's position that Suntech had operations or property in California, he said, was mistaken, as it was not Suntech, but a subsidiary, that was based on San Francisco.

Accordingly, the Southern District of New York was determined to be the proper venue based on Suntech's only U.S. asset, a $500,000 bank account.

Next, Bernstein turned to the issue of where Suntech's COMI was located, finding that on the date of its Chapter 15 filing, the company's COMI was the Cayman Islands.

Under Chapter 15, COMI determines whether the foreign proceeding is a "main" or "non-main" proceeding – and that's important because some relief, including the automatic stay, automatically becomes available upon recognition of a foreign main proceeding.

The COMI analysis is flexible, says Graulich, and looks to several optional factors. "Courts in the Second Circuit test COMI on the date of the filing, but when COMI has been alleged to have been manipulated, courts will consider the time period between initiation of the foreign insolvency proceeding and the Chapter 15 filing," he says.

Bernstein acknowledged that Suntech's presumptive COMI was the Cayman Islands, where it was incorporated, but he

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million successor liability claim against the purchaser of the assets for underfunding of a pension plan. Specifically, the Trust asserted that Congress expressed a strong public policy in the Employee Retirement Income Security Act of 1974 and the Multiemployer Pension Plan Amendments Act of 1980 to protect the rights of employees in multi-employer pension plans from the withdrawal of employers from those plans that leave them underfunded. According to the Trust, Congress provided for successor liability of any buyer of substantially all the company's assets if the buyer had notice of the liability and there was a continuity of operations between the seller and the buyer in order to "vindicate [this] important federal statutory policy."

Judge Walrath disagreed. She held that "the instant case is controlled by the Third Circuit's decision in [*In re Trans World Airlines, Inc.*, 322 F.3d 283 (3d Cir. 2003)] (and supported by the Fourth Circuit's decision in [*In re Leckie Smokeless Coal Co.*, 99 F.3d 573 (4th Cir. 1996)])." She noted that the Third Circuit in *TWA* affirmed a sale under Section 363 free and clear of successor liability claims for employment and sex discrimination, even though Congress has "articulated a strong policy in favor of preventing sex and employment discrimination including the

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Calendar

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

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

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

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

American Bankruptcy Institute
33rd Annual Spring Meeting
April 16 – 19, 2015
Renaissance Washington
Washington, DC
Contact: www.abiworld.org

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

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Special Report

Largest Bankruptcy Filings – 2014

Company Name	Industry	Filing Information	Assets	Debtor's Counsel
Energy Future Holdings Corp.	Utilities	Filed: Apr. 29, 2014 Delaware Judge Christopher Sontchi	$36,400,000,000	Edward Sassower Kirkland & Ellis New York, NY
NII Holdings Inc.	Information	Filed: Sept. 15, 2014 New York, Southern District Judge Shelley Chapman	$2,880,000,000	Scott Greenberg Jones Day New York, NY
Momentive Performance Materials Inc.	Manufacturing	Filed: Apr. 13, 2014 New York, Southern District Judge Robert Drain	$2,700,000,000	Matthew Feldman Willkie Farr & Gallagher New York, NY
Genco Shipping & Trading Limited	Transportation & Warehousing	Filed: Apr. 21, 2014 New York, Southern District Judge Sean Lane	$2,448,000,000	Adam Rogoff Kramer Levin Naftalis & Frankel New York, NY
Endeavour International Corporation	Mining	Filed: Oct. 10, 2014 Delaware Judge Kevin Carey	$1,550,000,000	Gary Holtzer Weil, Gotshal & Manges New York, NY
GT Advanced Technologies, Inc.	Manufacturing	Filed: Oct. 6, 2014 New Hampshire Judge Henry Boroff	$1,500,000,000	Daniel Sklar Nixon Peabody Manchester, NH
James River Coal Company	Mining	Filed: Apr. 7, 2014 Virignia, Eastern District Judge Kevin Huennekens	$1,060,000,000	Marshall Huebner Davis Polk & Wardwell New York, NY
Eagle Bulk Shipping Inc.	Transportation & Warehousing	Filed: Aug. 6, 2014 New York, Southern District Judge Sean Lane	$950,000,000	Paul Aronzon Milbank Tweed Hadley & McCloy Los Angeles, CA
MACH Gen LLC	Utilities	Filed: Mar. 3, 2014 Delaware Judge Mary Walrath	$750,000,000	Matthew Barr Milbank Tweed Hadley & McCloy New York, NY
M*Modal Inc.	Manufacturing	Filed: Mar. 20, 2014 New York, Southern District Judge Robert Gerber	$626,810,000	Allan Brilliant Dechert New York, NY
Reichhold Holdings US, Inc.	Manufacturing	Filed: Sept. 30, 2014 Delaware Judge Mary Walrath	$538,000,000	Norman Pernick Cole Schotz Meisel Forman & Leonard Wilmington, DE
Gridway Energy Holdings Inc.	Utilities	Filed: Apr. 10, 2014 Delaware Judge Christopher Sontchi	$500MM-$1BB	Alan Noskow Squire Patton Boggs Washington, DC
Revel AC Inc.	Arts, Entertainment & Recreation	Filed: June 19, 2014 New Jersey Judge Gloria Burns	$500MM-$1BB	Alfred Lechner White & Case New York, NY
Entegra Power Group LLC	Utilities	Filed: Aug. 4, 2014 Delaware Judge Peter Walsh	$500MM-$1BB	George Davis O'Melveny & Myers New York, NY
Tuscany International Holdings (U.S.A.) Ltd.	Professional, Scientific, and Technical Services	Filed: Feb. 2, 2014 Delaware Judge Kevin Gross	$414,624,000	Mitchell Seider Latham & Watkins New York, NY
The Budd Company	Manufacturing	Filed: Mar. 31, 2014 Illinois, Northern District Judge Jack Schmetterer	$387,555,681	Jeremy Stillings Proskauer Rose Chicago, IL

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Worth Reading

Declining Demand, Divestiture, and Corporate Strategy

Author: Kathryn Rudie Harrigan
Publisher: Beard Books
Softcover: 437 pages
List Price: $34.95

Every product – including services – has a life cycle, with its ups and downs. In business, serious thought is rarely given to a product's life cycle. Companies are often slow to understand that products can come to an end, and the realization hits only when there is an irreversible decline leading to that end. During a down phase of the typical cycle, some in management may express concern about a product's viability, but few are willing to face the fact that a product is not going to pull out of a decline.

Harrigan deals comprehensively with a subject that most businesses are reluctant to face. Admitting that a product is in its "endgame" (a term Harrigan uses frequently) goes against the grain of most business people who, in general, are inclined to optimism about prospects, have a stake in the success of the company and its products, have experienced down phases of a business cycle before, and want to rise to the challenge of keeping a product viable. Hence, managers frequently fail to recognize an endgame because of their own experience, identity, hopefulness, faulty research or data, and analytic failures. The author takes up each of these influences and addresses the psychological and technical aspects of each.

A product's down phase and endgame share similarities, but their differences, as pointed out by the author, can help management distinguish between the two. Product endgame is ordinarily a sign of decline or even the endgame of an entire industry. Management can look at its competitors and also changes in the industry for unmistakable signs of a product endgame. There are fewer competitors, constricted product variety, withdrawal from smaller markets, and reduced promotional and developmental budgets by competitors.

Recognizing an endgame and dealing with it are different propositions, though, and this is where *Declining Demand, Divestiture, and Corporate Strategy* is most valuable. The strategies for dealing with it vary from sector to sector. Harrigan offers examples of endgame management for a broad selection of industries, in many cases using well-known companies and brands to illustrate. Baby foods, cigars, electric percolators, and rayon are among the consumer products that the author discusses. She also looks at manufacturers of products for industrial use, such as soda ash and acetylene, which are not well known outside of their sectors. Within these industries, names such as Consolidated Cigar, Mirro Aluminum, Beech-Nut Foods, Gerber Products, Allied Chemical, and Carbide Process once flourished. Harrigan covers each industry by reviewing the conditions that brought about the endgame, describing the endgame for companies in those industries, and analyzing both helpful and mistaken measures taken by management under the circumstances.

In all, 60 companies in seven industry sectors are studied. Harrigan has gathered enough diversified material and organized and analyzed it so knowledgeably that comparisons can be made, not only among the different sectors, but also among companies. When she first wrote this book in 1980, it was a leading influence on the new field of endgame management. Endgames are even more inevitable in today's rapidly changing economy. Harrigan tells managers how they can develop strategies for dealing with product life cycles and, in doing so, reduce the adverse effects as much as possible. ¤

An award-winning scholar and author of many articles and books, Kathyrn Rudie Harrigan is the Henry Kravis Professor of Business Leadership at Columbia University.

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also noted that before the JPLs initiated the provisional liquidation in the Cayman Islands, Suntech conducted no activities there, maintaining its principal location in China, making that country Suntech's COMI. That said, the actions the JPLs took in the Cayman Islands – such as borrowing money on Suntech's behalf and taking physical possession of Suntech's assets in the form of its subsidiaries' stock certificates – shifted management of Suntech from the company to the JPLs. That shifted COMI to the Cayman Islands as of the date of the Chapter 15 filing, and thus Bernstein granted Suntech's petition for Chapter 15 recognition as a foreign main proceeding.

"The court noted that there was an implication that certain of the JPLs' actions were done intentionally to shift COMI away from China," says Graulich. "However, Judge Bernstein found that, overall, the JPLs' actions were in furtherance of the legitimate goal of efficiently winding down Suntech."

According to Silverman, "The court also found that the evidence did not support a finding that Suntech's creditors would have expected it to restructure its businesses in China, observing that the notes indenture was governed by New York law and provided for non-exclusive jurisdiction in the New York courts, and that Suntech's largest creditors urged the Cayman Islands as the restructuring venue."

"The court concluded that where the case is initially brought in a proper venue, the debtor's choice of forum is entitled to great weight. In this case, Solyndra did not establish that the interests of justice or convenience of the parties dictated a transfer to a California court," Silverman adds.

It's a decision Graulich says should guide foreign debtors who wish to avail themselves of the U.S. Chapter 15 process. "If the decision is followed by other bankruptcy courts, debtors that are otherwise ineligible for Chapter 15 would have the ability to locate a relatively small amount of assets in the United States, overcoming the technical jurisdictional requirements of Chapter 15 (at least as interpreted by the Second Circuit in *Barnet*)." ¤

Special Report

Successful Restructurings – 2014, page 1

City of Detroit, Michigan

Consulting Firm: Conway MacKenzie (Van Conway, Charles Moore, Glenn Kushiner, Kevin Hand, Michael Hausman, Chris Gannon, Carl Sekely)

Investment Banking Firm: Miller Buckfire & Co. (Ken Buckfire, Jim Doak, Kevin Haggard, Kyle Herman, Sanjay Marken)

Financial Advisor: Ernst & Young (Gaurav Malhotra, Juan Santambrogio, Dan Jerneycic, Edna Lee, Shavi Sarna, Nick Bugden)

Counsel to Debtor: Jones Day (David Heiman, Heather Lennox, Bruce Bennett, Corinne Ball, Tom Wilson, Evan Miller, Brian Sedlak)

Nature of the Success: Once the fourth largest city in the United States, the City of Detroit had been facing strong economic headwinds for many years as its population decreased from over 1.8 million people in the 1950s to fewer than 700,000 by the 2000s. Over the course of the last decade, Detroit experienced continuing budget deficits leading up to its insolvency, financed primarily by additional debt and under-funding of approximately $3.5 billion in pension obligations. Detroit filed for Chapter 9 bankruptcy on July 18, 2013, and became the largest municipal bankruptcy filing in U.S. history with debt of approximately $18 billion. Despite facing major litigation during every step of its bankruptcy and dealing with precedent-setting legal issues, Detroit was able to successfully confirm a largely consensual Plan of Adjustment resulting in a reduction of roughly $7 billion in liabilities approximately 15 months after the petition date.

Cooper-Booth Wholesale Co.

Investment Banking Firm: SSG Capital Advisors (J. Scott Victor, Luis Pillich, Nicholas Coder, Andrew Finley)

Turnaround Firm: Executive Sounding Board Associates (Michael DuFrayne, Robert Agarwal, Geoffrey DuFrayne)

Counsel to Debtor: Maschmeyer Karalis (Aris Karalis, Camille Spinale, Dustin Kreider)

Nature of the Success: One of the nation's top convenience store wholesale distributors, CBW was pushed into bankruptcy as a result of a cigarette-smuggling investigation by federal and New York state agencies involving one of its customers, although the company itself was not accused of any wrongdoing. Unable to access funds for day-to-day operations because its bank account was frozen by a federal seizure warrant, and losing its line of credit and access to its surety bond, CBW was forced to file Chapter 11. Six months later, CBW settled the seizure warrant investigation with the federal government. CBW was able to secure exit financing of $35 million and the company's stamp tax bonding program was reinstated, providing a substantial improvement in working capital. CBW successfully exited Chapter 11 with a reorganization plan that paid all creditors in full plus interest. More than 200 jobs were preserved.

Entegra Power Holdings

Restructuring Firm: Houlihan & Lokey Capital (Matthew Mazzucchi, Brett Lowrey, Chris Wang, Xander Hector, Daniel Tobin)

Counsel to Debtor: O'Melveny & Myers (George Davis, Richard Shutran, Diana Perez, Matthew Kremer)

Nature of the Success: Entegra, which had $1.5 billion of debt, owns two of the largest gas-fueled power plants in the United States, located in El Dorado, Arkansas and Gila Blend, Arizona. A fully consensual prepackaged chapter 11 case was negotiated with the majority of Entegra's second and third lien lenders as well as existing stockholders, which significantly reduced Entegra's institutional indebtedness to approximately $788 million. The plan was the product of negotiations over several months among the debtors and certain of their stakeholders, resulting in significant majorities of the debtors' stakeholders agreeing to support the restructuring and voting to accept the plan pursuant to a restructuring support agreement. After receiving not a single dissenting vote on the plan, Entegra emerged from bankruptcy on September 19, 2014, seven weeks after filing for Chapter 11 protection.

IAP Worldwide Services

Restructuring Firm: Loughlin Management Partners+Co (Martin Young, Aaron Kibbey)

Counsel to First Lien Lenders: Kaye Scholer (Michael D. Messersmith, Mark Liscio)

Nature of the Success: IAP Worldwide Services is a leading international supplier of services and solutions to the U.S. Army, U.S. Navy, U.S. Air Force, NATO, and others. The IAP restructuring was particularly noteworthy for being the first debt-for-equity restructuring transaction of a defense contractor. The restructuring required the development of innovative non-bankruptcy mechanisms and obtaining the unanimous approval of creditor and equity holders groups with widely differing interests and investment theses, given the widely held perception that the borrower would not be able to remain competitive in the government contracting industry if it sought protection under the Bankruptcy Code. IAP improved cash on hand by over 500%, thereby avoiding the need for a cash infusion from the new owners, and EBITDA has nearly doubled from earlier forecasts. IAP is well positioned for continued success with a 3-year business plan showing EBITDA growing 100%.

LDK Solar Co.

Restructuring Firm: Jefferies (Richard Klein, Augusto King, Jingzhi Dai, Tucker Bryan)

Counsel to Debtor: Sidley Austin (Thomas Albrecht, Timothy Li, Jessica Boelter)

Nature of the Success: A leading global manufacturer of photovoltaic products, with manufacturing facilities in China, LDK experienced significant operating losses as a result of over-capacity and over-supply in the market. In 2012, LDK suspended production and postponed interest payments to senior noteholders. LDK's restructuring required multi-party negotiations across several jurisdictions as well as consistent interaction with local PRC government officials and banks. After months of negotiations, LDK entered into a restructuring agreement that received overwhelming support from all creditor classes and was effectuated through insolvency filings in the Cayman Islands, Hong Kong, and Delaware. LDK's restructuring represents the first judicially approved, multi-jurisdictional debt restructuring of its kind for a China-based entity. The restructuring also rescued the company from liquidation, saving over 8,000 jobs.

Momentive Performance Materials

Restructuring Firms: Houlihan Lokey (David Hilty, Andrew Turnbull, Ryan Sandahl); AlixPartners (Randall Eisenberg, Brian Fox, Steven Spitzer, Robb McWilliams)

Investment Bank: Moelis and Company (William Derrough, David Faris, Zul Jamal)

Counsel to Debtor: Willkie Farr & Gallagher (Matthew A. Feldman, Rachel C. Strickland)

Counsel to Ad Hoc Creditors' Committee: Milbank, Tweed, Hadley & McCloy (Dennis Dunne, Samuel Khalil)

Counsel to Largest Second-Lien Holder: Akin Gump Strauss Hauer & Feld (Ira Dizengoff, Philip Dublin, Adam Weinstein, Daniel Fisher)

Co-counsel to Successor Indenture Trustee: Curtis, Mallet-Prevost, Colt & Mosle (Steven Reisman, James Drew)

Nature of the Success: Momentive's financial restructuring eliminated approximately $3 billion from its balance sheet, allowing it to emerge from Chapter 11 with liquidity of approximately $360 million and net debt of approximately $1.2 billion. Most of the equity of the reorganized company will be distributed to holders of $1.34 billion in second lien notes. As a result, Momentive, one of the world's largest producers of silicones and a global leader in the development and manufacture of products derived from quartz and specialty ceramics, will be able to remain a viable competitor. The restructuring also has major implications for other Chapter 11 cases. The court's ruling on make-whole provisions changes the way indentures need to be written, requiring that they clearly state their intention that a premium payment is due in the event of a bankruptcy filing. The ruling on cram downs also has significant ramifications for secured lenders, opening additional strategies for debtors in negotiations.

Special Report

Successful Restructurings – 2014, page 2

Overseas Shipholding Group

Restructuring Firm: Jefferies (Richard Klein)

Financial Advisor: Chilmark Partners (John C. Haeckel)

Financial Advisors to Unsecured Creditors' Committee: FTI Consulting (Andrew Scruton, Steven Joffe, Mark Greenberg); Houlihan Lokey

Counsel to Debtor: Cleary Gottlieb Steen & Hamilton (Luke Barefoot, James Bromley)

Counsel to Equity Holders: Gibson Dunn (David Feldman)

Counsel to Unsecured Creditors' Committee: Akin Gump Strauss Hauer & Feld (Daniel Golden, Fred Hodara)

Counsel to Official Committee of Equity Security Holders: Brown Rudnick (Steven D. Pohl, James W. Stoll, Jesse N. Garfinkle)

Nature of the Success: The only major tanker organization with both significant U.S. Flag and International Flag fleets, OSG filed for Chapter 11 following a prolonged downturn in the shipping industry and facing a liquidity shortfall and limited access to the capital and credit markets. The restructuring presented a host of challenges, including competing plans. After receiving proposals from senior bank lenders, bondholders, and unsecured creditors, an amended plan was confirmed that provided for a full recovery for all creditors and a meaningful recovery for existing equity holders. OSG's restructuring also created an important new cross-border insolvency precedent with the recognition of the company's Chapter 11 and imposition of a moratorium in the courts of South Africa, in addition to the proceedings' recognition by the High Court of Justice in London. In South Africa, the court's decision led to new law relating to cross-border insolvency cases.

Preferred Proppants (dba Preferred Sands)

Restructuring Firm: FTI Consulting (Sanjeev Khemlani, Bert Conly, Mark Laber, Clark Ansel)

Counsel to Senior Lenders: Kaye Scholer (Mark Liscio, Scott Talmadge, Stephen Castro)

Nature of the Success: One of North America's largest producers of frac sand and proppant materials used for drilling, Preferred Proppants' network of mines can produce more than 9 billion pounds of sand every year annually. Grappling with a liquidity squeeze that threatened to sink its capital structure, the company considered a range of options, including a bankruptcy filing and finding a suitor. Given its tight liquidity and high leverage, though, any potential sale would likely be implemented via a stakeholder unfriendly Section 363 sale. $565 million in first and second lien loans were restructured, stabilizing Preferred Proppants' ratings outlook, and innovative solutions to address complex tax, governance, and corporate issues, and a novel alternative asset disposition strategy were developed. Faced with an impending restructuring that would be adverse to Preferred Proppants' owner, the company refinanced the credit facility and paid the entire lender group in full.

Security National Properties Funding III

Restructuring Firm: George Smith Partners, Inc. (J. Jay Brooks)

Counsel to Debtor: Morris, Nichols, Arsht & Tunnell (Gregory W. Werkheiser, Robert J. Dehney, Andrew R. Remming)

Nature of the Success: All of the company's 34 commercial real estate properties throughout the U.S. were subject to mortgages and security interests granted in connection with an agented loan facility under which approximately $164 million was outstanding at bankruptcy commencement. The company was successfully restructured through a highly complex structured finance transaction in which each property was transferred to a separate newly created and bankruptcy-remote non-debtor affiliate held under common ownership with the debtors. The remaining properties received bridge financing from a second lender. Through this novel approach to exit financing, the company repaid in full its prepetition secured debt and unsecured creditors, and properly capitalized the properties going forward. Moreover, equity was able to retain its investment in 33 out of 34 of the properties — an extraordinary result in commercial real estate bankruptcies.

Select Staffing

Restructuring Firm: AlixPartners, (Randall Eisenberg, Jeff Webb, Mike Hartley, Tom Morrow, Peter Baldwin)

Investment Banking Firm: Goldman Sachs (Bruce Mesterharm, Patrick Armstrong, Will Kim)

Counsels to Debtor: Skadden, Arps, Slate, Meagher & Flom (Ken Ziman); Pachulski, Stang, Ziehl & Jones (Jeffrey Pomerantz, Jeffrey Dulberg, Debra Grassgreen)

Nature of the Success: A national provider of temporary staffing services, Select Staffing was hard hit by the economic downturn and liquidity issues, resulting in the company entering into a definitive agreement and plan of merger in December 2009. The agreement failed, however. After four years of contentious negotiations between the company and among several creditor groups, Select Staffing (now Koosharem Corporation) filed a prepackaged Chapter 11 plan in April 2014. The plan, which received overwhelming support from the company's lenders, implemented a recapitalization that resulted in lien lenders receiving an 80% cash distribution and second lien lenders receiving cash and warrants to purchase equity in the reorganized company. Koosharem's debt and related liabilities were reduced by $450 million and the company gained access to over $719 million of new debt and equity capital. The company is now publicly pursuing the acquisition of a competitor.

USEC

Restructuring Firm: AlixPartners (John R. Castellano, Richard Whitlock, Patrick Hoban)

Investment Banking Firm: Lazard Freres & Co. (Tim Pohl, Tyler Cowan)

Counsels to Debtor: Latham & Watkins (D.J. Baker, Rosalie Walker Gray, Adam S. Ravin, Annemarie V. Reilly, Marc Zelina); Richards, Layton & Finger (Mark D. Collins, Michael J. Merchant, Amanda R. Steele)

Nature of the Success: Despite challenges presented by the absence of current operations and the uncertainty of future necessary governmental and third-party funding, USEC (now Centrus Energy Corp) – a uranium enrichment company with total prepetition liabilities of $1.07 billion – obtained confirmation of its pre-arranged plan in approx. 7 months. The restructuring was precipitated by a significant oversupply of enriched uranium and an attendant 40% drop in market prices following the Japan earthquake and tsunami, and the upcoming maturity of $530 million unsecured convertible notes. USEC's restructuring was ultimately supported by 99% of voting creditors, as well as the preferred stockholders. USEC achieved a 55% reduction in leverage, a maturity extension of as much as 10 years, and a significant reduction in cash interest expense. USEC/Centrus remains the only domestic company with enrichment capabilities to meet the U.S.'s national security objectives.

W.R. Grace & Co.

Restructuring Firm: The Blackstone Group (Jamie O'Connell)

Counsel to Debtor: Kirkland & Ellis (James Sprayregen, Adam Paul)

Nature of the Success: W. R. Grace filed for bankruptcy in 2001 with a share price of $1.52 and facing 65,000 asbestos-related personal injury lawsuits involving 129,000 claims, which the claimants estimated to be valued around $7 billion. An innovative and aggressive bankruptcy case was filed that relied upon a massive litigation effort to provide a reasonable estimate of Grace's asbestos liabilities. That litigation resulted in a global settlement and creditor approval of its plan, which was confirmed in 2011. Three more years were spent resolving appeals and achieving settlements of outstanding significant matters. The plan established personal injury and property damage trusts funded by $4 billion from Grace, asbestos-related insurance proceeds, and two former Grace subsidiaries. All past and future asbestos claims are channeled to the two trusts. Grace left bankruptcy with a $1.55 billion exit facility and its share price at $92.05. All unsecured claims will be paid in full, and Grace shareholders have retained their interests in the company.

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Successor, *from page 4*

creation of successor liability for those claims." Similarly, the Fourth Circuit in *Leckie* authorized a sale free and clear of claims for future medical benefits under the Coal Industry and Retiree Health Benefit Act, despite Congress imposing successor liability for the medical benefits of coal workers.

Judge Walrath also determined that several of the concerns expressed by the courts in *TWA* and *Leckie* were also present in the Ormet asset sale. First, those courts believed that making an exception to the provisions of Section 363(f) for successor liability claims would depress the prices that parties bid for a debtor's assets. Ormet was unable to obtain any bids for its assets that did not include the protections of Section 363(f), including the sale of those assets free and clear of any successor liability claim held by the Trust. While the Trust asserted that bidders could simply have bid less and retained the successor liability claim, Judge Walrath held that the Trust's contention was "not practical" because the amount of the claim was uncertain and that uncertainty could have resulted in bids that were discounted "substantially more" than the Trust's estimate of the claim.

Second, the *TWA* and *Leckie* courts "noted the important policy inherent in the Bankruptcy Code to maximize the value of the debtor's assets for distribution to creditors in accordance with the priority scheme in the Code." Accepting the Trust's position in the Ormet sale would result in the Trust's claim receiving a larger percentage recovery than other general unsecured claims in violation of the Bankruptcy Code's priority scheme, according to Judge Walrath. "Therefore, the Court concludes that the Congressional policy favoring multi-employer pension plans expressed in ERISA and MPPAA does not trump the express provisions of the Bankruptcy Code permitting the sale of the Debtor's assets free and clear of the Trust's successor liability claim," she wrote.

A second aspect of the sale challenged by the Trust was Ormet's request for a waiver of the fourteen day stay of a sale order set forth in Rule 6004(h) of the Federal Rules of Bankruptcy Procedure. Ormet asserted that the waiver of the stay was justified by Niagara's requirement that the sale close by a date that was less than fourteen days after entry of Judge Walrath's order. The Trust, however, relied upon the existence of a back-up bidder, whose bid was $250,000 less than Niagara's winning bid. If Niagara refused to close because of the delay, Ormet could simply close the sale to the back-up bidder instead, argued the Trust. Judge Walrath rejected the Trust's argument, pointing to the fact that Ormet had already failed to sell the Hannibal assets once. "Delay will not make the situation any better," she wrote in finding "ample cause" to waive the stay.

The importance of the *Ormet* decision is clear, particularly given the increasing frequency with which asset sales are utilized in Chapter 11 cases. "Judge Walrath's holding that the express provisions of Section 363(f) are not trumped by the policy considerations embodied in ERISA and the MPPAA should give comfort to debtors and purchasers of assets in a free and clear sale pursuant to Section 363(f)," says Weil's Hopkins. "By refusing to create an exception to the scope of Section 363(f)'s 'free and clear' provision, the court's decision…should help debtors maximize the value of their assets and create certainty for participants in the market for distressed assets." ¤

Consequences, *from page 2*

relief sought by the senior-lien creditors. According to the first-lien noteholders, the second-lien noteholders had done so by signing a restructuring support agreement in respect of the debtors' plan and intervening in the make-whole dispute.

"As a remedy, the senior lien noteholders sought turnover of equity and backstop fees distributed to the second liens until they are paid in full in cash, in addition to unspecified damages to compensate them for violations of the intercreditor agreement," says Damian S. Schaible, a partner in the insolvency and restructuring group at Davis Polk & Wardwell LLP.

In response, the second-lien noteholders argued that the intercreditor agreement concerns only rights with respect to collateral or proceeds of collateral – and equity in the reorganized debtor, professional fee reimbursement, and a potential backstop fee do not constitute proceeds of collateral. For example, the professional fees and potential backstop fee were being paid to the second-lien noteholders in their capacity as backstop parties, not secured creditors. Indeed, they pointed out that Momentive had retained all collateral under its plan of reorganization, and would be re-pledging it to the first-lien creditors in connection with their replacement notes.

As far as intervening in the make-whole premium dispute, the second-lien noteholders argued that their participation might have been as unsecured creditors, and therefore was permitted, as "there is no prohibition against questioning the amount of the [first-lien creditors'] claims."

Ultimately, the bankruptcy court agreed with the second-lien creditors that new equity and certain other distributions are not the proceeds of collateral. "The bankruptcy court ruled that for property to be proceeds of collateral, the property must be the result of a 'transformation of the collateral,'" says Mitchell Seider, global chair of the restructuring, insolvency and workouts group at Latham & Watkins LLP. "The court concluded that the new equity did not represent a transformation of the lenders' common collateral and, therefore, was not 'proceeds.'"

"The case is a reminder of the inherent uncertainty and litigation risk that lien subordination carries as to the division of distributable value between collateral and non-collateral value," Schaible says, noting that this is especially true when lien subordination regarding distributions on secured claims in bankruptcy is not expressly included in an agreement (even if not from collateral or proceeds of collateral).

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Gnome de Plume

Politics Masquerading as Financial News

by Andy Rahl

With the way the U.S. equity markets have been going up for the last five years (now almost six since the market turned up in March 2009), I've had trouble understanding why so many people on fixed incomes are feeling so squeezed when they should have been doing fine in this market.

I mentioned a couple of months ago how amazed I was at the number of people who followed the traditional asset allocation advice for retirement and cut way back on equity or sold out of it entirely. Another reason why so many have been out of equities for the last few years is they believe what they read about the market in the financial press. Generally speaking, the financial press tends to be on the conservative side of the political spectrum and so are many of those who follow it. And that may well be one reason why we've had so many predictions of corrections and bear markets that haven't happened.

Quite some time ago I noticed there is a formula for a certain kind of news story that leads to the conclusion that the markets will go down soon for one reason or another. There typically is a bold face headline leader supported by tales of what "some investors" are doing to sell, go short, etc. – and those investors often are obscure analysts or asset managers with small portfolios. There frequently is also a quote by someone who is better known that doesn't exactly support the down market theme. The formula also includes a ritual caveat along the lines that "of course, the market may go up instead."

Many of these stories are mundane variations on the idea that the market has been going up for so long that it has to go down soon, or how overvalued the market is based on price-earnings ratios, especially the conservative Schiller Index. The latter happens to be true, by the way, but that has been the case for years now and the market still hasn't gone down yet. Like asset allocation, many of the other traditional tools for understanding the markets are not holding up – and the Schiller Index may be another example.

The title of the most recent market-negative article as of this writing was "Buy the Dips Strikes Again" from *The Wall Street Journal* on January 8. The story ostensibly was about why the Dow had gone up more than 300 points that day, but the headline suggests the story's real agenda, which is anti to what the story refers to as the "buy-the-dip-crowd." Among other reasons offered for why that crowd is wrong was the concluding quote by a market technician that, "The risks of above-average downside volatility in the next 12 months seem greater than anytime since the 2009 market lows." So it's predicting that the market will go down soon, even though the story is about why the Dow just went up 300 points.

I first wrote about opinion masquerading as news in the July/August *Gnome de Plume*, and it isn't hard to guess why many with a conservative political bent might have wanted to slant the market down over the last few years – and still may in anticipation of the 2016 elections. But I sure feel sorry for all those retired people and other investors who believed that stuff and went down with them. And, here's my own ritual concluding caveat for this story: "Sooner or later the market will go down again – but I have no idea when." ¤

Consequences, *from page 9*

It's a decision that Schaible says raises important issues for secured creditors in regard to the establishment of priority and other intercreditor rights by agreement. Most importantly, he says, the decision illustrates the limitations of lien subordination "and the limited protections it offers to senior-lien creditors if intercreditor agreements are not drafted to clearly protect the senior creditors, a circumstance that is frequently dictated by market pressures."

Indeed, Seider notes that "the enforcement of waivers and limitations of rights provided for in intercreditor agreements will turn on the precision with which they are drafted." He added that, "In negotiating intercreditor agreements, first-lien lenders are likely to push for each limitation on the rights of second-lien lenders to be express and resist broad reservations of rights for second-lien lenders to assert rights of unsecured creditors, notwithstanding other terms of the intercreditor agreement."

Schaible also says the decision shows that carve outs preserving the rights of subordinated creditors to act as unsecured creditors can potentially be used to undo more specific senior-creditor protections. "Although the court did not rest its decision entirely on this provision, at oral argument Judge Drain noted that preserving the right to act as unsecured creditors might 'trump' the more specific prohibitions in the agreement," he notes. ¤

In the Next Issue…

- *Special Report: Nation's Largest Industrial Auctioneers*
- *Special Report: Major Financial Advisors*
- *Research Report: Who's Who in Deb Stores Holding LLC*

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