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Recourse Carve-Out Limits

Suits Against Guarantors Could be Stayed in Reorgs.

by Julie Schaeffer

Within the context of commercial real estate loans, several cases have tested the validity and scope of recourse carve-out guaranties. And while each court upheld the validity of recourse carve-out provisions, that doesn't mean the limits won't be tested again – especially where reorganization efforts are involved.

A common fixture in commercial real estate lending since the late 1990s has been the non-recourse loan with certain obligations guaranteed by affiliates of the borrower.

These "recourse carve-out guaranties" often provide that, if the borrower commits certain bad acts as defined by the loan documents, the guarantor may be held liable.

The guaranty will trigger recourse against the borrower and affiliates in cases

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The Public Securities Challenge

Failing to Reach Holders Can Hold Up a Restructuring

by Dave Buzzell

When a company is in Chapter 11, the owners of its debt are entitled to have a say in the company's reorganization. That is easier said than done, however, especially when this involves public securities holders – holders of public bonds and equities issued by public companies – which often are accessible only through a myriad of third-party channels.

There are two ways to hold a security. One is as a registered holder. The security shows up on the books of either the transfer agent (in the case of equity) or the trustee (in the case of bonds) in the holder's name. The second way of holding a security is in street name – i.e., in the name of the broker – and that's where it becomes difficult to identify the holders.

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The Pride of Pilgrim's Pride

Creditors Receive 100 percent of Allowed Claims

by Julie Schaeffer

U.S. chicken producer Pilgrim's Pride has emerged from bankruptcy a little more than a year after filing – with all creditors receiving 100 percent of allowed claims.

Pilgrim's Pride is a Pittsburg, Texas-based chicken producer that operates processing plants and prepared-foods facilities in 12 states, Puerto Rico, and Mexico. It employs 41,000 people.

The company was first pummeled by a rally in the commodities market, which led to a sharp increase in fuel costs as well as feed prices (because corn used to feed chickens is linked to the price of ethanol). Because the majority of the company's contracts set prices annually, usually at the beginning of the calendar year, Pilgrim's Pride was not able to pass

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of egregious behavior, such as fraud, misapplication of funds, or transfers of the mortgaged property, for example.

The extent of liability depends on the loan documents. Loan documents usually divide bad acts into two categories: those in which the guarantor is liable for the lender's losses arising from the borrower's bad acts (loss recourse), and those in which the guarantor is liable for the entire amount of the loan (full recourse).

To gain a better understanding of recourse carve-out guarantees, it helps to review the facts of perhaps the classic case, *Blue Hills Office Park v. JPMorgan Chase*.

In September 1999, Blue Hills Office Park LLC obtained a $33 million non-recourse loan (with a recourse carve-out guaranty executed in favor of the lender) secured by a mortgage on a commercial property. The guarantors of the loan were the trustees of Blue Hills' parent company, Royall Associates Realty Trust.

In 2003, Blue Hills settled a zoning dispute with a neighboring property and received $2 million as part of the settlement. Blue Hills pocketed the $2 million, wiring it to a trust account at its law firm. It did not notify or receive the consent of the lender, which was required by the loan documents.

What followed was almost comical. With the zoning dispute settled, the neighboring property was completed. Blue Hills' single tenant liked the neighboring property better than Blue Hills' property, and moved into it. As a result, Blue Hills' property had no tenant and no rent payments. Blue Hills defaulted on its loan by not making a real estate tax payment, resulting in acceleration of the loan and foreclosure sale of the property.

At that point, the lender demanded the full deficiency from the guarantors. The guarantors refused to pay, which ultimately led the lender to file suit against Blue Hills and the guarantors, alleging that Blue Hills and the guarantors had, among other things, breached the loan agreement.

The lender argued that because Blue Hills had failed to notify it of the $2 million settlement and turn over the settlement funds, the guarantors were liable under certain provisions of the guaranty. These provisions, says Jay Zagoren, a partner at law firm Dechert LLP, "imposed full personal liability for the entire loan in the event that (a) the

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David Sharp, Director of Kurtzman Carson Consultants (KCC's) Public Securities Services, explains the challenge: "Very detailed SEC laws apply. If a person goes to, say, a Morgan Stanley broker, and asks him to buy $1,000 of bonds in a company that later restructures, there are specific restrictions about what we can find out about that bondholder. Typically we only know that Morgan Stanley holds a specific amount of bonds in the company for all of its clients; we do not see the details of the underlying beneficial owners."

Although difficult to reach, it is essential that bondholders be contacted during a restructuring. As creditors, bondholders tend to be more active in the restructuring. In a typical Chapter 11 case, it is common to see bondholders voting on the plan of reorganization or participating in a rights offering. Equity holders, as owners of the company, typically are not as involved in these events, other than receiving notices.

Thus, there is more at stake than restructuring professionals may realize when a company has public securities holders, and bondholders in particular. "Managing the public securities process is a critical component in the execution of a Chapter 11," says Jonathan Carson, Co-founder and Managing Director of KCC. "Without proper planning, it would be virtually impossible for a debtor to efficiently tabulate votes of creditors, and handle distributions when public securities are involved. But with proper planning, it is relatively seamless."

Carson notes that more and more Chapter 11 cases now involve complex public securities issues. Financial transactions involving rights offerings and exchange or tender offers were not nearly as prevalent 10 years ago as they are now. "Many restructuring professionals overlook or underestimate potential complications that can result when you don't have a strategy in place for communicating with your public securities holders," says Carson. "Some of the cases we are dealing with today – Six Flags, Idearc, Lear, General Growth Properties – have these issues."

When KCC is brought in to provide public securities services, it first researches all the bond and equity issues associated with the debtor. "We want to make sure we are covering everyone who is supposed to receive information. We obviously

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Pilgrim's, *from page 1*

on rising input costs to customers. As a result, when commodities prices increased in the double digits, the company was forced to sell at negative gross margins.

Later, the global recession led consumers to eat less at restaurants, chipping away at demand for the company's products.

Pilgrim's Pride was also struggling to maintain a heavy debt load, much of it from the company's purchase of smaller rival Gold Kist Inc. for more than $1 billion in 2007. Pilgrim's Pride went from generating a net income of $47 million in fiscal year 2007 to experiencing a net loss of $999 million in fiscal year 2008.

The company filed for bankruptcy in the United States Bankruptcy Court for the Northern District of Texas on December 1, 2008, at which time it claimed to have $3.75 billion in assets and $2.72 billion in debt.

But things didn't get better for the company. Pilgrim's Pride blew through about 60 percent of its $450 million debtor-in-possession (DIP) financing during the first few weeks of the bankruptcy. As a result, "the banks were ready just to bust up the whole thing and liquidate it," says William Snyder, Managing Director with CRG Partners, the company's financial and restructuring advisory firm. "This company could easily have just stumbled into oblivion."

The fact that Pilgrim's Pride didn't stumble into oblivion is what makes its story unique, says Winston Mar, also a Managing Director with CRG Partners. "The company operated throughout its restructuring with the goal of emerging a totally different business," he explains. "We weren't just reshuffling the balance sheet; we actually restructured the company."

First, says Mar, CRG Partners identified a management issue. Within the first three weeks of the bankruptcy, it had worked with the company's board of directors to find a way to install new management.

With new management in place, CRG Partners then worked with new management to effectuate a turnaround.

Specifically, Pilgrim's Pride responded to high feed costs and low chicken prices by cutting production, in some cases by selling or closing chicken processing plants.

The company also changed its product mix to focus on more profitable prepared chicken – specifically, food that is pre-

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Research Report

Who's Who in Mesa Air Group, Inc.

by Francoise C. Arsenault

Mesa Air Group, Inc. (Mesa Air) is a holding company whose principal direct and indirect subsidiaries operate as regional air carriers providing scheduled passenger and airfreight service. Mesa Air, which was founded in 1982, began operations with service between Farmington, New Mexico and Albuquerque with one nine-passenger Piper Chieftain aircraft. Today, Mesa Air operates a fleet of 130 aircraft with about 700 daily system departures. As of January 5, 2010, Mesa Air's airline operations were serving approximately 127 cities in 41 states, the District of Columbia, Canada, and Mexico. The company is headquartered in Phoenix, Arizona, and has approximately 3,500 employees. Mesa Air had revenues of close to $1 billion in 2009. Mesa Air is the direct parent of 12 wholly owned subsidiaries and 2 indirect subsidiaries. The wholly owned subsidiaries include Mesa Airlines, Inc., Freedom Airlines, Inc., and Mesa Air New York, Inc. Mesa Airlines, Inc. operates regional jet and turboprop aircraft under the names of regional carriers of certain major airlines pursuant to code-share agreements.

In 2009, Mesa Air's revenues were derived primarily from the company's code-share agreements with US Airways, United Airlines, and Delta Air Lines.

In its Chapter 11 petition, company officials stated that, following September 2001, the airline industry began to experience ongoing financial difficulties, including reduced customer demand, increased costs, and sustained lower yields. These combined forces resulted in a record number of airline bankruptcies, which in turn affected Mesa Air and its code-share agreements with the airlines. Although Mesa Air attempted to overcome the airline bankruptcy challenges and was able to negotiate new code-share agreements with United Airlines and Delta Air Lines, the company's fleet now far exceeds its code-share fleet requirements. After the decision was made that Mesa Air had to reduce its fleet to eliminate costs, the company pursued a number of opportunities to operate, sublease, or sell its excess aircraft, and to negotiate terms under which the aircraft would be returned to their manufacturers or lessors. Those efforts, however, proved unsuccessful and Mesa Air was unable to effectuate an out-of-court restructuring. Other factors cited in the Chapter 11 petition as affecting Mesa Air include the move away from Mesa Air as a result of the changing model among code-share partners and the costs of code-share-related litigation. Mesa Air is suing Delta Air Lines for more than $70 million in damages over a canceled contract.

Mesa Air and 11 of its subsidiaries filed for Chapter 11 reorganization on January 5, 2010, in the United States Bankruptcy Court for the Southern District of New York (Manhattan). In its bankruptcy filing, Mesa Air listed assets and liabilities in the range of $500 million to $1 billion. The company reportedly has sufficient liquidity to support itself during restructuring and has not filed a motion with the bankruptcy court for approval of DIP financing.

A company spokesman has stated that Mesa Air should be able to exit bankruptcy within six months of its filing. Company officials also have reported that no layoffs are expected as a result of the restructuring, although reducing the company's fleet of aircraft is likely to result in a smaller workforce. Mesa Air's stock was suspended from The NASDAQ Stock Market on January 14, 2010. The stock had been trading for under $1 per share since April 2008.

The Debtor

Jonathan G. Ornstein is Chairman and Chief Executive Officer of Mesa Air Group, Inc. **Michael J. Lotz** is President and Chief Financial Officer. **Keith C. Kranow** is Vice President for Finance. **Paul F. Foley** is Executive Vice President and Chief Operating Officer. **Robert Hornberg** is Vice President and Chief Information Officer. **Brian S. Gillman** is Executive Vice President, General Counsel, and Secretary.

Pachulski Stang Ziehl & Jones LLP is serving as bankruptcy counsel to Mesa Air. Working on the case are **Richard M. Pachulski**, a partner in the Los Angeles office; **Laura Davis Jones**, a partner in the Wilmington office; **Debra Grassgreen** and **Joshua M. Freid**, partners in the San Francisco office; and **John W. Lucas**, an associate in the San Francisco office. Also working on the case out of the firm's New York office are **Maria A. Bove**, of counsel, **Robert J. Feinstein**, a partner, and **David A. Abadir**, an associate.

The law firm of **Jones Day LLP** is serving as special counsel to Mesa Air for issues related to the prepetition litigation arising out of Mesa Air's code-share relationships with major airlines. The Jones Day team includes **G. Lee Garrett, Jr.** and **David M. Monde**, partners in the Atlanta office, **Robert A. Schmoll**, **Jason S. Burnette**, **Kacy G. Romig**, and **Megan A. Taylor**, associates in the Atlanta office, and **Morgan R. Hirst** and **Paula S. Quist**, associates in the Chicago office.

Imperial Capital, LLC is serving as the financial advisor and investment banker to Mesa Air. **Marc A. Bilbao**, a Managing Director in the firm's Los Angeles office, directs the work.

Deloitte Tax LLP is providing Mesa Air with tax compliance and tax consulting and advisory services. **Tiffany Young**, a partner in Deloitte's Phoenix office, is working on the engagement.

The Official Committee of Unsecured Creditors

The Committee includes **Bombardier, Inc.**; **Embraer-Empresa Brasilieire de Aeronautica S.A., c/o Embraer Aircraft Holding, Inc.**; **U.S. Bank National Association**; **AT&T Capital Services**; **Wilmington Trust Company**; **IHI Corporation**; and the **Air Line Pilots Association**.

Morrison & Foerster, LLP is serving as counsel to the Committee. **Brett H. Miller** and **Lorenzo Marinuzzi**, partners, and **Todd M. Goren**, **Erica J. Richards**, and **Stephen Koshgerian**, associates with the firm, are working on the case.

Macquarie Capital (USA) Inc. is serving as the financial advisor and investment banker. **R. Edward Albert III**, a Managing Director and Co-head of Macquarie's New York restructuring advisory business, leads the engagement.

The Trustee

The U.S. Trustee is **Diana G. Adams**.

The Judge

The judge is the **Honorable Martin Glenn**. ¤

Recourse, *from page 2*

borrower failed to obtain the lender's consent to any assignment, transfer, or conveyance of the mortgaged property, or (b) the borrower failed to maintain its status as a special purpose entity (SPE) and comply with related covenants (such as not commingling funds)."

In response, the guarantors argued that Blue Hills' failure to notify the lender of the settlement and turn over the proceeds should have given rise to personal liability only for the lender's losses due to such conduct, but not liability for the entire loan.

In determining that the guarantors were subject to full recourse, the court used basic rules of contract interpretation and ultimately held that the "plain language of the contract governs." According to Zagoren, "the court held that Blue Hills' transfer of the settlement proceeds without lender's written consent was a transfer of

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work very closely with the debtor and the debtor's counsel," says Sharp.

Once this information has been gathered, KCC is positioned to handle every phase of noticing that comes up in the course of the Chapter 11 process – for example, NOL notices to equity holders or notices of commencement to bondholders.

Again, a major challenge is identifying those holding securities in street name. "We have to make sure that banks and brokers can distribute notices to the underlying beneficial owners," says Sharp. "We notify the depositories, both abroad and in the United States, so that they and their clients are familiar with what's going on throughout the course of the case."

The preparatory work is especially important in the case of bondholders because they typically get to vote on the plan of reorganization. "Making sure we know what the different issues of bonds are, talking to the trustees of the bonds so that they are in the loop, having noticing go through the proper channels – it helps us so that by the time we go to solicitation, we are able to reach the bondholders who are ultimately deciding whether they want to accept or reject the plan," says Sharp. "We have to be sure we are receiving the votes back from the beneficial owners and can process the votes in a way that is valid."

Again, when bondholders are involved, the securities management process has many more pitfalls. A case in point is a treatment election when bondholders are choosing whether they would prefer to receive cash or equity. With regular creditors, notes Sharp, the process is very straightforward. "You know who the creditor is. If they would prefer cash instead of equity, you mark it in the claims register and you're done."

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Pilgrim's, *from page 2*

fried, pre-marinated, and pre-chopped – rather than selling "commodity" gutted chicken to food service companies.

At the same time, the company changed its sales contracts, shortening the duration of some and linking the prices of others to market indices. It expressed a willingness to walk away from unprofitable sales or from accounts that wanted multi-year fixed pricing.

Within a few months, the company was making money rather than losing it. By June 2009, Pilgrim's Pride had reportedly fully repaid its DIP financing. It showed even more dramatic financial improvement over the last three quarters of fiscal year 2009. For that period, the company reported net income of $77.2 million on net sales of $5.2 billion.

In December 2009, Pilgrim's Pride announced its emergence from bankruptcy just 13 months after filing.

As a result of these changes, Pilgrim's Pride was able to convince Brazil's JBS SA, the world's largest beef producer, of its value. In exchange for injecting $800 million into Pilgrim's Pride, JBS took a 64 percent stake in the company and obtained the right to select six members of its new board of directors. As a result of the acquisition, JBS is now the world's largest meat company, with more than $30 billion in annual revenues.

Perhaps most notably, the company may have come out with one of the best results for creditors of any bankruptcy in the past year, says Mar. "If we'd done a prepackaged bankruptcy, I'm not sure creditors would have gotten repaid," he says. "As it was, unsecured creditors got paid back in full, in cash; and stockholders, who usually get wiped out in bankruptcies, got a 36 percent equity stake in the reorganized company." ¤

Calendar

Beard Group Audio Conference
Update on Bankruptcy Code Rule 2019 – Recent Rulings and Impacts
March 24, 2010
Cost: No Charge
Contact: http://beardfreeaudioconferences.com/bankruptcy_2019/index.htm

National Association of Bankruptcy Trustees
2010 Spring Seminar
April 7-10, 2010
Westin Hotel
Savannah, GA
Contact: www.nabt.com

Turnaround Management Association
TMA 2010 Spring Conference
April 20-22, 2010
Sheraton New York Hotel and Towers
New York, NY
Contact: www.turnaround.org

American Bankruptcy Institute
28th Annual Spring Meeting
April 29-May 2, 2010
Gaylord National Resort and Convention Center
National Harbor, MD
Contact: www.abiworld.org

Renaissance American Management, Inc. and the Beard Group
Third Annual Southwest Healthcare Transactions Conference
May 6, 2010
Adolphus Hotel
Dallas, TX
Contact: www.renaissanceamerican.com

National Association of Bankruptcy Trustees
2010 Annual Conference
September 29-October 3, 2010
The Fairmont
San Francisco, CA
Contact: www.nabt.com

Renaissance American Management, Inc. and the Beard Group
17th Annual Conference on Distressed Investing
November 29, 2010
The Helmsley Park Lane Hotel
New York, NY
Contact: www.renaissanceamerican.com

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Special Report

Restructuring Departments of European Accounting Firms

Firm	Senior Professionals	Representative Clients/Industries
BDO – London 55 Baker Street London W1U 7EU www.bdo.uk.com	Shay Bannon (shay.bannon@bdo.co.uk) Malcolm Cohen (malcolm.cohen@bdo.co.uk) David Gilbert (david.h.gilbert@bdo.co.uk) David Porter (david.porter@bdo.co.uk) Mike Prangley (mike.prangley@bdo.co.uk) Sarah Rayment (sarah.rayment@bdo.co.uk) Mark Shaw (mark.shaw@bdo.co.uk) Kim Stubbs (kim.stubbs@bdo.co.uk)	Banks and Financial Institutions Bondholders Law firms Debtors
Deloitte Reorganisation Services Athene Place 66 Shoe Lane London EC4A 3BQ www.deloitte.com	Gerry Loftus (geloftus@deloitte.co.uk) Neville Kahn (nkahn@deloitte.co.uk) Guillaume Cornu (gcornu@deloitte.fr) Jochen Wentzler (jwentzler@deloitte.de) Roland Haage (rhaage@deloitte.de) Manuel Roca de Togores (mrocadetogores@deloitte.es) Alex Flatz (alflatz@deloitte.com) David Carson (dcarson@deloitte.ie) Ulf Nolen (unolen@deloitte.se)	Banks and Financial Institutions Corporates Lawyers Government and Public Sector Private Equity and Investors Bondholders Trustees
Ernst & Young 1 More London Place London SE1 2AF www.ey.com/uk	Alan Bloom (abloom@uk.ey.com)	Debtors Banks and Financial Institutions Private Equity Automotive Chemicals Retail
Grant Thornton UK LLP 30 Finsbury Square London EC2P 2YU www.gti.org	Mark Byers (mark.r.byers@gtuk.com) Jean-Pascal Beauchamp (jean-pascal.beauchamp@grant-thornton.fr) Ramón Galcerán (rgalceran@ahgt.es) Stefano Salvadeo (stefano.salvadeo@gtbernoni.it Paul McCann (paul.mccann@grantthornton.ie)	Banks and Financial Institutions Bondholders Corporates Hedge Funds Private Equity Houses
KPMG ELLP 8 Salisbury Square London EC4Y 8BB www.kpmg.com	Philip Davidson (philip.davidson@kpmg.co.uk) Tammo Andersch (tandersch@kpmg.de) Pascal Bonnet (pascalbonnet@kpmg.com) Angel Martin Torres (amartin@kpmg.es) Federico Bonanni (fbonanni@kpmg.it) Klaas Wagenaar (wagenaar.klaas@kpmg.nl)	Lenders Law Firms Private Equity Hedge Funds Corporates
Moore Stephens LLP 1 Snow Hill London EC1A 2DH www.moorestephens.com	Phillip Sykes (phillip.sykes@moorestephens.com) Jeremy Willmont (jeremy.willmont@moorestephens.com) David Rolph (david.rolph@moorestephens.com) Steve Draine (steve.draine@moorestephens.com)	Banks and Financial Institutions Bondholders Law Firms Debtors Private Equity
PricewaterhouseCoopers Business Recovery Services Plumtree Court London EC4A 4HT www.pwc.com	Barry Ross (barry.ross@uk.pwc.com) Tony Lomas (tony.lomas@uk.pwc.com) Steve Russell (steve.j.russell@uk.pwc.com) Steven Pearson (steven.pearson@uk.pwc.com) Mark Batten (mark.c.batten@uk.pwc.com) Ian Schneider (ian.schneider@uk.pwc.com)	Debtors Banks and Financial Institutions Private Equity Bondholders Government and Public Sector International Dynamic for Lenders
Zolfo Cooper 10 Fleet Place London EC4M 7RB www.zolfocooper.com	Simon Freakley (sfreakley@zolfocooper.eu) Simon Appell (sappell@zolfocooper.eu) Alastair Beveridge (abeveridge@zolfocooper.eu) Peter Saville (psaville@zolfocooper.eu) Anne-Marie Laing (alaing@zolfocooper.eu) Paul Hemming (phemming@zolfocooper.eu) Gary Squires (gsquires@zolfocooper.eu) Fraser Gray (fgray@zolfocooper.eu) Peter Holder (pholder@zolfocooper.eu) Nick Cropper (ncropper@zolfocooper.eu) Graeme Smith (gsmith@zolfocooper.eu)	Lenders Private Equity Hedge Funds Bondholders Law Firms Corporates Pension Funds

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Worth Reading

Fraudulent Conveyances, A Treatise Upon Conveyances Made by Debtors to Defraud Creditors, Containing References to All Cases Both English and American

Author: Orlando F. Bump
Publisher: Beard Books
Hardcover: 657 pages
List Price: $34.95

by Henry Berry

Fraudulent Conveyances is a classic work on an important subject for bankruptcy and restructuring practitioners. The author's first chapter covers the history of fraudulent conveyance law in brief. The balance of the book offers a meticulous treatment of the many facets of the law on fraudulent conveyances that have developed over the centuries.

Fraudulent conveyances often arise in debtor/credit relations. As Bump notes, this area of law has a larger number of "opposing authorities...than can be found in any other branch of the law." To keep the treatment as simple as possible while still covering its many facets and opposing authorities, the author addresses fraudulent conveyances as a part of common law. "This work simply considers the subject as it was at common law with the remedies afforded by the common law."

Bump's treatment thus does not go into criminal law or law with reference to statutes. Though statutes regarding fraudulent conveyances have been passed in each state, these statutes have basically copied Elizabethan Anglo-Saxon law and have "always been considered as merely declaratory of the common law." Since there is no wide or radical difference between common law and state statutes concerning fraudulent conveyance, nearly all of Bump's work bears as well on law associated with the statutes. He brings this up in the work's preface so readers will understand the framework by which he treats the subject. In the text itself, Bump does not take up state fraudulent conveyance statutes except where they vary from common law "to warn the practitioner [reader] that the text is not applicable to his particular State." The author does not, however, discuss grounds for this variance between a state's statutes and common law.

Bump begins the voluminous study with definitions that form the foundation of fraudulent conveyance law. Fraudulent conveyances are all transfers made "to the end, purpose, and intent to delay, hinder, or defraud creditors." Whether a conveyance to a creditor is fraudulent is determined by the three "points" (as the author calls them) of intent, the consideration, and the bona fides of the transfer. Consideration generally refers to the right of the debtor to use certain property or other assets to settle a debt. Bona fide means that the debtor was not given the property, loan, or other consideration with fraudulent intent by the creditor.

Bump then moves to the many facets of this area of law that address circumstances in all manner of human relationships. The law of fraudulent conveyances covers not only business dealings, but also any transaction that establishes a debtor-creditor relationship between members of families, neighbors, governments, or just about any two legally recognized parties. Bump systematically takes up subsequent creditors, ambiguous contracts, determining the value of property to pay debts, and other issues that complicate understanding of the law.

Although this book is a reprint of a work first written in 1872, the basics of the law of fraudulent conveyances have not changed much since then – or from when such law was formulated, for that matter. Bump's work remains relevant and illuminating for anyone, from lawyers to businesspersons to lay persons interested in the topic. A detailed index of 50 pages takes readers to specific topics of this involved legal subject. ¤

This book may be ordered by calling 888-563-4573 or by visiting www.beardbooks.com or through your favorite Internet or local bookseller.

Recourse, *from page 4*

mortgaged property, in violation of the loan documents for which the guarantors were personally liable under the full recourse provisions of the guaranty."

The court also found the guarantors personally liable for the entire loan because Blue Hills violated its SPE status. "There were express covenants in the mortgage designed to protect the lenders, including requirements that Blue Hills not commingle funds or assets with those of anyone else and that Blue Hills at all times have an independent director," says Zagoren.

The result: The guarantors were liable for the lender's entire loss of $17.5 million.

A number of cases after *Blue Hills* have asked whether a borrower or guarantor can be held liable for acts outside of the scope of the carve-outs defined in a guaranty.

While each court upheld the validity of recourse carve-out provisions (thereby protecting lenders), in each case the guarantor's liability was determined by the express terms of the guaranty, and the courts did not expand their scope beyond the guaranty itself (thereby protecting borrowers).

According to Zagoren, lenders should thus "be cautioned that bankruptcy courts may, under certain circumstances, utilize their broad equity powers to stay actions against guarantors."

This, he says, is especially true where reorganizations are involved – specifically, "in situations where the creditors are deemed fully secured and the enforcement of the guaranties is deemed to be detrimental to the debtor's reorganization efforts."

The issue is particularly relevant today, says Michael B. Manuel, a principal at Chicago-based law firm Golberg Kohn, because "in the current financial environment, there is an expectation that a material segment of the commercial mortgages in place will face some refinancing pressure. Inevitably, borrowers and lenders will be looking at their situations and devising strategies that make the most sense and have the best chance of preserving the value of their respective investments. Lenders take great risk if the words and actions of their agents vary from the loan documents or are otherwise not fully documented." ¤

Special Report

People to Watch – 2010
Business Professionals Making Their Mark

Name	Firm	Outstanding Achievements
Dave Bagley	MorrisAnderson Chicago, IL dbagley@morrisanderson.com Tel. (312) 254-0880	Restaurant Specialist. Chief restructuring officer of Santa Fe Cattle Company and Fundamental Provisions. Negotiated financial restructuring of Granite City Food & Beverage. Financial advisor for $100M Sonic franchise and interim chief financial officer for a $100M restaurant group.
Patricia Caldwell	Gordian Group, LLC New York, NY pac@gordiangroup.com Tel. (212) 486-3600	Co-Founding Partner. Notable engagements include, among others, Alamo/National Rental Corporation, LTV Steel, Merisel, Morrison Knudsen Corp., Office of Thrift Supervision, Olympia & York, Parmalat SpA, Phar-Mor, Inc., Summit Global Logistics, Tracor Inc., and Zale/Gordon Jewelry.
John Castellano	AlixPartners Chicago, IL jcastellano@alixpartners.com Tel. (312) 551-3287	Chief restructuring officer of Stallion Oilfield Services Ltd., an oilfield services company whose prearranged plan of reorganization eliminated more than $500mm of leverage and received unanimous consent of voting claimants. Also served as financial advisor to Tropicana Entertainment, LLC, and Calpine Corporation.
Gregory S. Ethier	Seabury Group New York, NY gethier@seaburygroup.com Tel. (713) 526-1412	Executed on high-profile bankruptcies, including restructuring aircraft debt and lease financings at US Airways, Air Canada, and Northwest Airlines, resulting in NPV savings to the airlines of $2.6 billion, C$2.3 billion, and $2.3 billion, respectively. Perfected the science of 'due diligence' in aviation industry that is arguably one of the most dynamic in financial restructuring requirements.
Erik Graber	Goldin Associates, LLC New York, NY egraber@goldinassociates.com Tel. (212) 593-2255	CRO for Young Broadcasting. Developed a business plan and implemented an operating turnaround during a period of unprecedented decline in advertising spending. Managed through liquidity crisis and improved operating margins, enabling potential reinstatement of senior debt. Advised Residential Capital directors on restructuring transactions with parent company GMAC.
Julie M. Hertzberg	Alvarez & Marsal Detroit, MI jhertzberg@alvarezandmarsal.com Tel. (248) 936-0850	Head of Claims Management Services and Executive Committee Member for North America Restructuring Practice. Focuses on all aspects of the bankruptcy administrative process. Current engagements include Lehman Brothers, Lear Corporation, Visteon Corporation, Cooper Standard Automotive, and Aleris International.
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Gnome de Plume

Saving Chubby

by Christopher Beard

Chubby comes once a month to my home in Austin, Texas, to spray for scorpions and other unwanted intruders. Chubby learned his craft at Orkin, and went into business for himself some years ago. He is a delightful person, around 60, who goes to church regularly and is attentive to the needs of his family that often seems to need his help. Chubby has coronary issues. In January, he went to the emergency room with some discomfort, and they kept him a week to ten days. The hospital sent him a bill for $216,000, and it wants its money.

Chubby is confronted with demands he can't possibly meet, made by a system he'll never be able to navigate. He faces the problem of supporting himself and his family in his later years with the threat of the hospital blowing his life up hanging over him. This is the end game for an industrious small businessman who has always carried his own weight.

Chubby's crisis is an outrage, and, of course, healthcare needs to be reformed. The current system threatens the financial destruction of many middle-class families.

Obama has bet his presidency on healthcare reform, but not one based on incremental improvements assessing progress and costs during the implementation leading to an efficient and affordable solution. The Democratic healthcare plan is about dismantling a delivery system representing 16 percent of the economy and replacing it with an expensive and unproven model with little public support. It's really about left-wing political triumphs. It's really about big egos. It's really about political splash. Their grandiose reform plan is a roll of the dice under the best of circumstances. No prudent business or individual would take such a gamble.

The process has been marked by slimy deals like the Louisiana purchase and the cornhusker kickback, unforgivable lies about the huge cost, inexplicable exemptions for old friends in labor, and hidden ball tricks like the refusal to disclose the proposed legislation. These are ugly people driven by a religious zeal who will employ any tactic in pursuit of their quest.

The Republicans are worse. In power for eight years, they did virtually nothing to address the healthcare issues. And they gutted the opportunity for a fresh start through bankruptcy.

The Democrats plan to save money by eliminating fraud and abuse. That's just stupid. If the government was going to eliminate fraud and abuse, it already would have happened. The government could, however, save a lot of money by refusing to cover, for example, extraordinary life-sustaining measures for terminally ill patients with a life expectancy of less than 30 days. But, in the U.S., healthcare coverage means paying for everything the patient wants regardless of the benefit or the cost. Healthcare coverage that's affordable requires hard and unpleasant decisions. Giving everyone a blank check for healthcare expenses will be a financial disaster.

Where does this leave Chubby? He needs to work to have an income. His business faces a difficult economic environment. Higher interest rates. Higher unemployment. Higher taxes. Higher spending. He may get some help on his healthcare problems, but they're going to send him a bill in the form of additional challenges he can't afford to pay.

Chubby needs a hedge. He needs some clever financial engineering. He needs to short his own prospects. The Democrats' vision will crush him. More of the past from the Republicans will crush him. ¤

Christopher Beard is the publisher of Turnarounds & Workouts

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- *Special Report: Regional and Local Bankruptcy Accounting Firms*
- *Special Report: Outstanding Young Restructuring Lawyers*
- *Research Report: Erickson Retirement Communities LLC*

Securities, *from page 4*

"Because of the way the bonds are held," Sharp continues, "You don't know who the underlying holder is. You just know that Morgan Stanley has $50 million of the bonds. If one of Morgan Stanley's beneficial owners makes a treatment election, you have to be sure you can track it. If the bond trades, you know, for that bond, the treatment election had been made. We have procedures with DTC to lock up those bonds so we are sure that the people making the elections are getting the treatment that they elected for."

One other aspect of public securities management is working with the new transfer agent, the trustees, and the depositories to be sure that any distributions under the Chapter 11 plans are handled efficiently and effectively. This raises even more complications in cases where bonds are cancelled and new equity is issued.

"We are seeing more and more new shares, particularly shares with rights offerings, that are not necessarily issued under the Section 1145 bankruptcy exemption. They are being issued under Regulation D or one of the other non-1145 exemptions. We have to work with the company and their lawyers to understand exactly what securities are being issued under the plan and figure out exactly how they need to be held," says Sharp.

The bottom line, says Carson, is that management of public securities in Chapter 11 has become very complex. "When a company is reorganizing its balance sheet and that company has public securities, it is important to have a team with experience in this particular niche area. Holders of public debt have to be in the loop in the process. To the extent that they are not properly notified and solicited, there's the potential that they could hold up a restructuring by claiming they were not properly included in the process." ¤

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