turnarounds & workouts

News for People Tracking Distressed Businesses

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Change or More of the Same?

Restructuring Professionals Survey the Landscape

by Julie Schaeffer

Last month we asked a group of restructuring professionals for their take on the events – the challenges and the successes of 2014. Now, we look ahead.

Durc Savini, head of restructuring and recapitalization practice at Peter J. Solomon Company, doesn't think we're in for any wholesale upticks in restructuring activity this year and Matthew Tashman, a partner in the bankruptcy and commercial restructuring practice Reed Smith LLP, agrees.

One thing helping companies avoid default is a robust high-yield debt market that allows companies without investment-grade credit ratings to access the financing necessary to push off debt maturities. Consider that Standard & Poor's expects the U.S.

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Impending Circuit Split?

Courts May Differ on Pension Withdrawal Claims

by Randall Reese

Much has been written of late on the issue of the venue provisions of the Bankruptcy Code. In fact, *The Wall Street Journal's* Bankruptcy Beat section dedicated its most recent "The Examiners" series to the topic. However, surprisingly little has been written about an appeal currently pending before the U.S. Court of Appeals for the Second Circuit which may cement a current split between the two most important venues for Chapter 11 mega cases. Courts in Delaware and the Southern District of New York are currently divided on an issue that could influence the decision of debtors with large unionized workforces on whether to file in one or the other jurisdiction. That issue is the extent to which claims for withdrawal liability resulting from a debtor's withdrawal from a multiemployer defined benefit pension plan are entitled to administrative priority.

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Day of Reckoning?

Energy Companies Try to Wait Out Oil Price Declines

by Julie Schaeffer

As oil prices continue to flounder, companies in the energy industry and their advisors need to consider some unique issues, say three partners at Mayer Brown, which advised Houston-based ATP Oil & Gas on its restructuring and sale in 2012.

Oil prices have fallen significantly, and this has put pressure on companies in the oil industry. But not all are affected equally, says Bob Gray, a partner based in Mayer Brown's Houston office. "We look at it by sector," he says.

For example, the day of reckoning is likely far off for the upstream sector, which includes the exploration and production (E&P) companies that search for underground

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corporate 12-month speculative-grade default rate to rise only modestly, from 1.6 percent in September 2014 to 2.4 percent by September 2015. Fitch, meanwhile, expects the U.S. high-yield default rate to fall this year to between 1.5 and 2 percent (with $28 billion of high-yield debt coming due next year, and only $2.5 billion of it considered to be at the highest risk of default).

A significant rise in interest rates could lead to more defaults, but while the Federal Reserve indicated in December that it will explore raising rates, it also said it would be patient in doing so – so borrowers shouldn't be affected immediately.

"As long as debt and private equity remain readily available, I don't see a major increase in bankruptcy activity in 2015," says Tashman.

All professionals we spoke to noted that there are pockets of activity, however. Both Savini and Tashman, for example, point to ongoing activity in the retail sector. Despite the economic recovery, shoppers haven't returned to stores in droves because of constrained wage growth and disposable income. Teen apparel retailers Delia's and Deb Shops recently filed for Chapter 11, and some restructuring professionals expect others to follow. "Retail as an industry is experiencing a seismic shift from bricks and mortar to on-line," says Matthew Feldman, a partner and co-chair of the business reorganization and restructuring department at Willkie Farr & Gallagher. "It's amazing that there are still major and minor retailers, which either are uninterested in adapting, cannot figure out how, or are moving too slowly to adapt."

Savini is also expecting increased activity in media and entertainment. But newer on the scene, and attracting a lot of attention from the advisory crowd, are distressed oil and gas companies. Crude oil prices are approaching $50 per barrel, their lowest level since 2009. That's good news for businesses that purchase oil, such as transportation companies, but it presents a risk for oil and gas drillers, producers, and distributors, and companies that serve the industry.

"While oil and gas companies comprise less than 5 percent of the S&P/LSTA Leveraged Loan Index, more than 60 percent of sector loans were bid less than

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"Until 2011, no federal circuit court of appeals had ever directly addressed whether multiemployer pension plan withdrawal liability incurred by a debtor-employer that continues to employ workers during a bankruptcy case is entitled (in whole or in part) to administrative expense status," according to Charles Oellermann, who is of counsel in the Business Restructuring & Reorganization practice of Jones Day. "That changed on June 16, [2011], when the Third Circuit handed down its ruling in *In re Marcal Paper Mills, Inc.*, 650 F.3d 311 (3d Cir. 2011)." In that case, the Third Circuit held that withdrawal liability triggered after the date that the debtor filed its petition "should and can be apportioned" between pre- and post-petition service.

The portion attributable to post-petition service was entitled to administrative expense priority, according to the Third Circuit, because the promised pension benefits were akin to direct compensation provided in exchange for post-petition services and the employees' services were necessary for the debtor's continued post-petition operation. In a note written shortly after the 2011 decision, Mark Chehi, J. Eric Ivester, and Ron Meisler, partners in the corporate restructuring practice of Skadden, Arps, Slate, Meagher & Flom, wrote that "[t]he Third Circuit's *Marcal* decision seems to follow the established test for administrative expense liability articulated in the *Jartan* and *Mammoth Mart* cases, *i.e.*, that debts are entitled to payment priority as an administrative claim under the Bankruptcy Code if (1) they arise from a transaction with the debtor-in-possession and (2) payment of the debt is supported by consideration that benefits the estate." However, they also noted that the "ruling appears to conflate a post-petition contribution claim (that may or may not exist due to insufficient post-petition contributions by the withdrawing employer) with a withdrawal liability claim (which is based on the difference between the present value of vested benefits and the current value of the plan's assets)."

The Second Circuit is now set to address this issue as well as a result of an appeal of an August 8, 2014, decision of Judge Nelson S. Román of the United States District Court for the Southern District of New York. The decision – *Food Employers Labor Relations Association and United*

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or underwater crude oil and natural gas fields, then drill and operate the wells that bring the oil and gas to the surface. "An energy company producing 1,000 barrels of hydrocarbons a day may be required by its lender to hedge 50 to 80 percent of production by entering into a contract whereby a counterparty agrees to buy 500 to 800 barrels a day at a set price, protecting the energy company if the price of oil falls below that price," says Gray.

Likely to be affected by price declines, however, are oil field service companies. "They're exposed because they don't hedge their product, and are doing a lot of cutting back," says Gray.

"The biggest question people have is what the duration of the oil price decline will be," says Charles Kelley, a partner based in Mayer Brown's Houston office. "They want to know how much money they need to have to see themselves through to the other side. Some people say 12 months, some say two and a half years. We just don't know."

"We're talking about a commodity that is fairly volatile, which makes for a lot of unpredictability, not only for companies in the industry but for their lenders," says Sean Scott, a partner based in Mayer Brown's Chicago office. "Last year two major companies in the space were predicting vastly different numbers for crude, namely, $115 per barrel on the high side and $70 on the low side. Today, the outlook is still cloudy, with some clients that we are talking to thinking that prices could continue to decline, while others are predicting prices will bounce back quickly to $60 or $70 per barrel."

If it takes longer than a year or two for oil prices to recover, even E&P companies will be vulnerable, because hedges are usually only good for a fixed time – say, a year – and the market price for a new one will depend on the price of oil and the risk to the counterparty.

"Watch the layoffs," says Kelley. "They'll be a good guide."

Also keep an eye out for mergers and acquisitions, which in the oil and gas industry reached a 10-year high in terms of deal value and volume in 2014, according to a PwC US report. Doug Meier of PwC said that debt levels could drive more deal activity this year.

Indeed, in this environment, Gray says, many companies on the sell side

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Research Report

Who's Who in Caesar's Entertainment Operating Company

by Francoise C. Arsenault

Caesar's Entertainment Operating Company (CEOC) is the largest majority-owned operating subsidiary of Caesars Entertainment Corporation (Caesars Entertainment). Caesars Entertainment – formerly Harrah's Entertainment Inc. – is one of the world's largest casino companies. Caesars Entertainment's casino resorts operate under the Caesars, Bally's, Flamingo, Grand Casinos, Hilton, and Paris brand names. The company's corporate headquarters is in Las Vegas, Nevada.

Caesars Entertainment was founded in 1937 when William F. Harrah opened a small bingo hall in Reno, Nevada. Today, Caesars Entertainment owns, operates, or manages 50 casinos in the United States, Canada, the United Kingdom, South Africa, and Egypt. Within this country, Caesars Entertainment has casinos in 14 states, including its flagship property, Caesars Palace in Las Vegas.

In total, Caesars Entertainment oversees approximately 3 million square feet of gaming space, 39,000 hotel rooms, 45 million customer loyalty program participants, and 68,000 employees.

On January 15, 2015, CEOC and 172 other affiliates – operators of 38 gaming and resort properties in 14 states and 5 countries – filed for Chapter 11 in the U.S. Bankruptcy Court for the Northern District of Illinois. CEOC disclosed total assets of $12.3 billion and total debt of $19.8 billion as of September 30, 2014.

In its filing, CEOC cited a burdensome capital structure resulting from one of the largest leveraged buyouts in history. On January 28, 2008, Caesars Entertainment (then Harrah's Entertainment, Inc.) was acquired for approximately $30.7 billion, including the issuance of approximately $24 billion in debt, of which $19.7 billion was secured by liens on substantially all of CEOC's assets and, in most cases, subject to intercreditor agreements.

A number of economic factors and industry trends left CEOC unable to support an overleveraged capital structure and extraordinary interest expense. The purchase closed just as the recession of 2008 was beginning, which left consumers with less discretionary income to spend on gambling and trips to casinos. Although the economy has since rebounded, CEOC is confronting changed consumer habits and increased competition from local and online gambling outlets.

In the past few years, CEOC has repeatedly tried to restructure and manage its debt, executing over 45 asset sales and capital market transactions. Certain creditor groups have filed lawsuits challenging various aspects of these transactions, claiming they were unlawful and/or violated certain covenants.

On March 2, 2015, CEOC filed a joint plan of reorganization. To effectuate the plan, CEOC will, among other things, convert its prepetition corporate structure into two companies – OpCo and PropCo. OpCo will manage CEOC's properties and facilities, while PropCo will hold certain CEOC real property assets and related fixtures, and will lease those assets to OpCo pursuant to a master lease agreement. A REIT will be formed to own and control PropCo as its general partner.

If confirmed, the plan will eliminate approximately $10 billion in funded debt, permitting the debtors to maintain ongoing operations without the burden of their existing debt load.

The Debtor

John Payne is President and Chief Executive Officer of CEOC. **Mary Elizabeth Higgins** is Chief Financial Officer. **Timothy Lambert** is General Counsel.

CEOC and its affiliates are represented by **James H.M. Sprayregen**, **David R. Seligman**, **Paul M. Basta**, and **Nicole L. Greenblatt** of **Kirkland & Ellis LLP**.

Paul, Weiss, Rifkind, Wharton & Garrison LLP is counsel to Caesars Entertainment. Working on the case are **Jeffrey D. Saferstein** and **Samuel E. Lovett**. **Jenner & Block LLP** is also counsel to Caesars Entertainment, with **Daniel R. Murray**, **Charles B. Sklarsky**, and **Vincent E. Lazar** working on the case.

AlixPartners is serving as restructuring advisor. The Chief Restructuring Officer is **Randall S. Eisenberg**, Managing Director of AlixPartners.

Millstein & Co. serves as financial advisor to CEOC. **Blackstone Advisory Partners, LP** is financial advisor to Caesars Entertainment.

DLA Piper LLP is engaged as special conflicts counsel to CEOC. Working on the case are **Chris L. Dickerson** and **David E. Avraham**.

KPMG LLP is serving as tax consultant. **Howard Steinberg** and **Craig Ellis** lead the firm's engagement.

The Official Committee of Unsecured Creditors

The committee is composed of the **National Retirement Fund**, **International Game Technology**, **US Foods, Inc.**, **Law Debenture Trust Company of New York**, **MeehanCombs Global Credit**, **Wilmington Trust, NA**, **Hilton Worldwide, Inc.**, **Earl of Sandwich (Atlantic City) LLC**, and **PepsiCo, Inc.**

Proskauer Rose is lead counsel to the committee. The firm's team includes **Martin J. Bienenstock**, **Judy G.Z. Liu**, **Philip M. Abelson**, **Vincent Indelicato**, **Jeff J. Marwil**, **Mark K. Thomas**, **Paul V. Possinger**, and **Brandon W. Levitan.**

The Official Committee of Second Priority Noteholders

The committee includes **Wilmington Savings Fund Society, FSB, BOKF, N.A.**, **Delaware Trust Company**, **Tennenbaum Opportunities Partner V, LP**, **Centerbridge Credit Partners Master LP**, **Palomino Fund Ltd.**, and **Oaktree FF Investment Fund LP**.

The committee is represented by **Jones Day**. Working on the case are **Brad B. Erens**, **Timothy W. Hoffman**, **Bruce Bennett**, **James O. Johnston**, **Sidney P. Levinson**, and **Joshua M. Mester**.

The Trustee

The U.S. Trustee is **Constantine Harvalis**.

The Judge

The judge is the **Honorable Benjamin Goldgar**. ¤

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90 at year end, up from less than 1 percent at the end of October," notes Savini. "Whether these companies, many of which have high variable cost structures, are truly grist for the restructuring mill remains to be seen. This sectoral play may end up being a huge head fake if oil prices are driven back up in the short-term by any number of geopolitical-driven events."

George Panagakis, partner and one of the deputy practice leaders in the corporate restructuring group at Skadden, Arps, Slate, Meagher & Flom LLP, sees substantial restructurings in the oil and gas industry around the globe, and Damian S. Schaible, a partner in the insolvency and restructuring group at Davis Polk & Wardwell LLP, is already preparing. "Davis Polk is a leader in the energy space from a capital markets and finance perspective," he says. "I have spent a great deal of time with my partners getting up to speed in a very challenging industry to be responsive to the banks and investors focused on the space and the companies that are working hard to weather the current pricing storm."

Tashman is also concerned about the possibility of a Supreme Court decision in *Wellness International* that materially limits the ability of the bankruptcy courts to finally

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Food and Commercial Workers Pension Fund v. The Great Atlantic & Pacific Tea Company, Inc., et al. – arises out of the Chapter 11 cases of A&P. A&P filed for Chapter 11 protection in the Southern District of New York on December 12, 2010. At the time of the bankruptcy filing, certain of the debtors were participants in FERLA, which is a multiemployer defined benefit pension plan subject to the Employee Retirement Income Security Act of 1974 (ERISA).

For approximately 13 months following the bankruptcy filing, A&P continued to operate and participate in FERLA. However, A&P experienced a complete withdrawal from FERLA as of January 31, 2012, following a letter agreement modifying the collective bargaining agreement between debtor Super Fresh Food Markets, Inc. and the United Food and Commercial Workers International Union, Local 27. Thereafter, FERLA asserted a claim for withdrawal liability under ERISA in the amount of $77,420,079, of which it asserted that $7,219,172 was attributable to the post-petition period and was entitled to administrative priority.

On June 27, 2013, bankruptcy judge Robert Drain denied FERLA's motion for payment of the administrative expense claim following an evidentiary hearing. His order was entered on July 2, 2013, and FERLA appealed. In its appeal, FERLA asserted that Judge Drain's decision to apply the Bankruptcy Code to the exclusion of ERISA was incorrect as a matter of law and, further, that he was incorrect in concluding that the bankruptcy court was not bound by ERISA in evaluating FERLA's administrative expense claim motion. In contrast, A&P asserted that the Bankruptcy Code does not permit FERLA to obtain administrative priority for unfunded liabilities that accrued prior to the bankruptcy filing, citing *Trs. of Amalgamated Ins. Fund v. McFarlin's, Inc.*, 789 F.2d 98 (2d Cir. 1986) and *Supplee v. Bethlehem Steel Corp. (In re Bethlehem Steel Corp.)*, 479 F.3d 167 (2d Cir. 2007).

District Judge Román began his analysis by noting that, "A&P paid every dollar it was required to pay FERLA during its bankruptcy case." He further cited Judge Drain's finding that "post-petition contributions to FERLA, for all employees in general *and* for the Debtors' employees in particular, exceeded post-petition benefit accruals." It bears noting that the debtor in the *Marcal Paper Mills* case had also made all required contributions to the relevant multiemployer pension fund during the post-petition period prior to its withdrawal from the pension plan.

Judge Román affirmed the bankruptcy court's ruling, quoting an earlier opinion of the district court that "[w]ithdrawal liability

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An appeal currently pending before the U.S. Court of Appeals for the Second Circuit may cement a current split between the two most important venues for Chapter 11 mega cases.

Calendar

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

American Bankruptcy Institute
New York City Bankruptcy Conference
May 14, 2015
New York Hilton
New York, NY
Contact: www.abiworld.org

Association of Insolvency & Restructuring Advisors
31st Annual Bankruptcy & Restructuring Conference
June 3 – 6, 2015
Ritz Carlton
Philadelphia, PA
Contact: www.aira.org

Turnaround Management Association
13th Annual Mid-Atlantic Regional Symposium
June 10 – 11, 2015
Caesars Hotel & Casino
Atlantic City, NJ
Contact: www.turnaround.org

National Association of Bankruptcy Trustees
2015 Annual Convention
August 27 – 29, 2015
InterContinental Hotel Magnificent Mile
Chicago, IL
Contact: www.nabt.com

National Conference of Bankruptcy Judges
89th Annual NCBJ Conference
September 27 – 30, 2015
Fontainebleau Miami Beach
Miami, FL
Contact: www.ncbj.org

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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 Mark Shaw Jeff Jones Ian Steward Shane Crooks	Dermot Hough Simone Polson Howard Teague Stephen Cooney Kevin Ley	Domestic and international lenders, creditors, companies, pension funds, private equity, alternative investment funds and government agencies. Sectors include football, real estate, healthcare, and financial services.
Begbies Traynor Group 32 Cornhill London EC3V 3BT www.begbies-traynorgroup.com	Andrew Dalton Sorca Hunt	Gary Shankland Philip Dakin	Aviation, automotive, construction, financial services, healthcare, leisure and hospitality, media and entertainment, manufacturing, real estate, retail, sport.
Deloitte Reorganisation Services Athene Place 66 Shoe Lane London EC4A 3BQ www2.deloitte.com/uk/en.html	Neville Kahn Nick Edwards	Bill Dawson	A range of industries, including retail, real estate, business services, healthcare, and manufacturing. Clients include banks and financial institutions, corporates, lawyers, government and public sector, private equity and investors, bondholders, and trustees.
Ernst & Young 1 More London Place London SE1 2AF www.ey.com/uk	Alan Bloom Alan Hudson	Keith McGregor	Corporates, banking, financial sectors, private equity, bondholders, pension interests. Sectors include automotive, retail, real estate, shipping, healthcare, hotels and leisure, financial services, media, mining, oil and gas, utilities, telecoms.
Grant Thornton UK 30 Finsbury Square London EC2P 2YU www.grantthornton.co.uk	Mark Byers	David Dunckley	Consumer markets, emerging markets, energy, financial services, government and public sector, health services, hotels and leisure, industrial and extractives, nonprofit, real estate and construction, technology, media, communications.
Kingston Smith 60 Goswell Road London EC1M 7AD www.kingstonsmith.co.uk	Ian Robert	Chris Purkiss	Automotive, charities, education, financial services, healthcare, hospitality, manufacturing and transport, marketing services, media and entertainment, professional firms, property, sports, technology.
KPMG LLP (UK) 8 Salisbury Square London EC4Y 8BB www.kpmg.com/uk/en	Richard Fleming Paul Kirkbright Richard Heis	Mark Firmin John Darlington	Financial services, insurance, banking, healthcare, automotive, construction, government and public sector, oil and gas, utilities, mining, life sciences, leisure, real estate, technology, telecommunications.
Moore Stephens 150 Aldersgate Street London EC1A 4AB www.moorestephens.co.uk	Jeremy Willmont Brendan Clarkson	Philip Cowan	Aviation and aircraft leasing, energy, mining, renewables, financial services, healthcare, hotels and leisure, insurance, pensions, real estate, shipping, sports, technology and media.
PwC Business Recovery Services 7 More London Riverside London SE1 2RT www.pwc.co.uk	Ian Green Michael Magee Dan Schwarzmann	Nassima Bleszynski Tony Lomas Richard Boys-Stones	Recent clients include Aeroform, Internacionale UK, Lehman Brothers International, London Mining, Manor Pursuits, Marnixhealth, UK Coal Operations, United Petroleum, Wet 'n' Wild Enterprises, WR Refrigeration.
Smith & Williamson Moorgate London EC2R 6AY www.smith.williamson.co.uk	Anthony Spicer Finbarr O'Connell	Henry Shinners Nick Elliott	Aerospace, financial services, international services, media, pensions, property and construction, shipping and marine, sustainable technologies, travel and leisure.
Talbot Hughes McKillop 6 Snow Hill London EC1A 2AY www.thmpartners.com	Julian Gething Matt Hinds Paul Horn Michael Leahy Peter Morgan	Anthony Place Neil Robson David Rowe Andrea Trozzi Edward Wildblood	Recent clients include Apcoa Parking, Punch Taverns, Endeka Ceramics, FCC Environment, Eggborough Power, Airports International, Power International, Hampson Aerospace.
UHY Hacker Young 4 Thomas More Square London E1W 1YW www.uhy.uk.com	Andrew Androniko Ladislav Hornan	Michael Kiely Peter Kubik	Oil, gas, and mining; rural and agricultural; higher education; automotive; retail; nonprofits.

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Worth Reading

The Limits of Corporate Power – Existing Constraints on the Exercise of Corporate Discretion

Authors: Ira M. Millstein and Salem M. Katsh
Publisher: Beard Books
Softcover: 285 pages
List Price: $34.95

The topic of corporate power in America is often controversial. The coauthors' treatment of it, however, is not judgmental or prescriptive. Their in-depth analysis of the varied range of ways corporate power is limited hews to the realities and does not move to critiques, ideals, or recommendations.

Five limits on corporate power are addressed. Three of the five limits on corporate power arise from the influence of government on business. Market conditions also influence decision-making and limit power. Social values are another factor that constrain corporations. With regard to market conditions and social values, government plays a significant, though not always leading or explicit, role. So, as is explained in *The Limits of Corporate Power*, the identifiable, but also the fragmentary and subtle ways government affects society, including the business sector, are the major factors in limiting corporate power.

The first limiting factor is the "organic state and federal constraints related to the creation, structure, and management of the business corporation." These "constraints" – i.e., laws and regulations – apply to the type of business being established. There are laws for incorporation in general, and also laws for industries and individual businesses. Laws applying to a mining company, toy manufacturer, advertising agency, and pharmaceutical company, respectively, are all different. Corporations cannot avoid these laws if they are to be incorporated at all. These laws are "organic" – that is, they are applied at the founding of a business and relate to generalized elements, such as structure, field of business, and relationship of personnel to the business entity. At its creation, a business is subject to laws that identify and treat it as a particular type of business. Just as a plant inevitably grows and flourishes according to its genotype, so does a business follow its "organic" structure. The laws it is subject to at its origination can thus be compared to the laws of nature.

Even the concept "free market system" entails forms of constraint. Competition is a major constraint. "Free market" implies that competing companies are free to enter a market. However, the presence of competitors inevitably limits any corporation's power. A corporation's power is further diminished by the decisions it makes in response to competitors or market conditions. Decisions on products, pricing, market sectors, and even expansion or merger bring limits. Decisions entail risks, commitment to certain courses, and direct resources to certain projects and goals. Decisions on any one or a combination of essential business matters limit a corporation's power and automatically create opportunities for new businesses to emerge or competitors to exploit.

Corporations are not omnipotent, as recent events have shown. No matter how momentarily enriched, successful, or dominant a company may be at present, its leaders should be aware of the limits of a corporation's power. It is the exercise of true power, not imaginary or wishful power, that is vital to the progress and, in some circumstances, the survival of any corporation in an ever-changing, competitive business environment.

Ira M. Millstein and Salem M. Katsh are members of top law firms that work with government agencies and private companies in the fields of patents, intellectual property, antitrust law, and others. ¤

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adjudicate issues. "Such a decision could require a substantial overhaul of the bankruptcy court system," he says.

Bankruptcy court judges have worked under a cloud of uncertainty since a 2011 Supreme Court decision – *Stern* – that bankruptcy judges only have the authority to offer a final ruling on a dispute that "stems from the bankruptcy itself." Other issues, the court said, must be decided by the district court. Prior to that, courts had relied on a division of labor laid out by Congress that differentiated between "core" and "non-core" bankruptcy matters.

Now before the Supreme Court is *Wellness International Network Ltd. v. Sharif*, which stems from the Chapter 7 bankruptcy of Chicago resident Richard Sharif. Wellness International, which was owed $500,000, sued Sharif in bankruptcy court, claiming assets in a family trust tied to Sharif should be used to pay off his debts. According to the Seventh U.S. Circuit Court of Appeals, the bankruptcy court didn't have the constitutional authority to decide whether the property in question belonged to the bankruptcy estate because the dispute also involved state law issues.

The Supreme Court is expected to issue a decision by the end of June, and a decision that materially limits the ability of the bankruptcy courts to finally adjudicate issues "could require a substantial overhaul of the bankruptcy court system," says Tashman.

Michael Etkin, senior bankruptcy and complex litigation partner at Lowenstein Sandler, says another factor that is yet to shake out is bankruptcy reform. The ABI Commission, in its report on how to modernize and improve the bankruptcy code, has recommended changes relating to fundamental trade creditor issues, the treatment of secured creditors, and the ease of Chapter 11 filing for small and mid-sized companies.

Etkin also notes that changes on the bench will also affect restructuring professionals in the coming year. Judge Walsh in Delaware already has retired. In the Southern District Bankruptcy Court in New York, Judge Peck retired in 2014, and Judges Gropper and Gerber are expected to retire in 2015. ¤

Special Report

People to Watch – 2015
Business Professionals Making Their Mark

Name	Firm	Outstanding Achievements
Charles Boguslaski	Carl Marks Advisors New York NY cboguslaski@carlmarks.com	Led a $155MM cross border debt financing for Crane & Co, the chief supplier of currency paper to the United States Treasury; advised rogenSi in its sale to TeleTech Holdings, a $1B technology company; advised the lenders of Corinthian Colleges in its restructuring and asset divestiture; advised the prior lenders of Trident University in its negotiations and refinancing.
Craig Boucher	Deloitte Transactions and Business Analytics LLP, Deloitte CRG McLean, VA crboucher@deloitte.com	Served as financial advisor to Brookstone, Inc., a $500 million specialty retailer. Guided the company through its Chapter 11 filing, operational and financial restructuring, and ultimate confirmation of a plan of reorganization. Accomplished record of bringing value to companies in a variety of complex situations, including rapid growth scenarios, out-of-court restructurings, and Chapter 11 proceedings.
Julie Minnick Bowden	General Growth Properties Northern Virginia and Chicago, IL julie.minnick@ggp.com	Has been involved in many of the largest Chapter 11 retail bankruptcy cases filed in the United States over the last ten years. As GGP's national bankruptcy manager, took a leading role on official committees of unsecured creditors. Her active involvement and pivotal role in numerous cases has been central to those bankruptcy estates.
Esben T. Christensen	AlixPartners New York, NY echristensen@alixpartners.com	Currently has a prominent role in the restructuring of PREPA – the Puerto Rico Electric Power Authority – which has approximately $9 billion in debt and supplies electricity to the island's 3.6 million people. Previously served as chief restructuring officer on the TMT USA Shipmanagement bankruptcy case, receiving accolades for credibility and professionalism in highly contentious international case.
Robert A. Crisafulli	Mesirow Financial Consulting New York, NY rcrisafulli@mesirowfinancial.com	Recent engagements include financial advisor to the Chapter 11 trustee in TS Employment Inc. and senior consulting expert for defendant's counsel in major litigation involving world's largest financial services company. Also advising CalPERS on broad spectrum of financial and litigation related issues, including Chapter 9 bankruptcy.
Ginger Hughes	Seabury Corporate Advisors New York, NY ghughes@seaburygroup.com	Served as a primary strategic architect of Canada-based Chorus Aviation's new Capacity Purchase Agreement with Air Canada and its wholly owned subsidiary Jazz Aviation with respect to 11-year collective agreement with its pilots. Key contributor in implementing a comprehensive set of restructuring initiatives for Air Nostrum, including over €100M in aircraft ownership savings.
Sanjeev Khemlani	FTI Consulting, Inc. New York, NY sanjeev.khemlani@fticonsulting.com	Notable engagements include advising CIT Group on its prepackaged bankruptcy filing. Has also advised the senior secured lenders of CoActive Technologies, Contec Holdings, Coach America, Comcar Industries, Ciena Healthcare Management, Education Management, Fox & Hound, Momentive, Natrol, New Jersey Devils, Preferred Proppants, Senior Care Centers, and Southern States Offshore.
David Orlofsky	Zolfo Cooper New York, NY dorlofsky@zolfocooper.com	Recently served as CRO of Preferred Sands, leading company through a successful one-year turnaround and restructuring. Facilitated a transaction in highly-publicized restructuring of Tronox Incorporated, enabling clients, secured lenders, to be paid in full. Other successful engagements include Orchard Supply Hardware, HMX Group, and Metaldyne.
Mark Renzi	FTI Consulting Boston, MA mark.renzi@fticonsulting.com	Clients have included Residential Capital; CIT; Credit-Based Asset Servicing and Securitization (C-BASS), a large RMBS investor and loan servicer; The Education Resources Institute, the nation's largest guarantor of private loans for education; American Business Financial Services, an originator and servicer of home mortgage loans; Thaxton Financial; and Oakwood Homes Financial Corporation.
Joseph J. Sciametta	Alvarez & Marsal New York, NY jsciametta@alvarezandmarsal.com	Served as CRO for conservation enterprise in successful out-of-court restructuring. Also served as treasurer of Lehman Brothers Holdings, managing cash and assets of up to $25 billion and calculated distributions to creditors in excess of $60 billion. Other representations include Aleris International, SP Newsprint, Interstate Bakeries, Fedders, Bush Industries, National Equipment Services, United Airlines, and Comdisco.
John Skelton	KRyS Global Grand Cayman, Cayman Islands john.skelton@krys-global.com	Managed restructuring of private equity fund holding wide range of trading entities in the Commonwealth of Independent States and the Balkans, with a value of more than $1 billion. These entities faced serious liquidity difficulties and the subject of freezing orders issued in Russia. During two plus years, asset value substantially improved, with successful sale of stake in a well-known Serbian food conglomerate.
Timothy B. Stallkamp	ConwayMacKenzie Chicago, IL TStallkamp@ConwayMacKenzie.com	CRO of $60 million commercial hardware distributor that, within six months, increased EBITDA by 25 percent. CRO of Keywell in its Chapter 11 process and successful section 363 sale to KW Metals. Led negotiations to successfully resolve a commercial dispute through a court-approved 9019 settlement. Led firm's efforts to successfully restructure Groeb Farms, and helped complete its section 363 sale. ¤

Split?, *from page 4*

…is imposed on employers withdrawing from multiemployer pension plans to make up for past failures by employers to fund fully pension plan benefits. Essentially, withdrawal liability is belated compensation for services provided before the start of [the] bankruptcy proceeding." Emphasizing that FERLA's total claim for withdrawal liability was allowed as a general unsecured claim, Judge Román stated that "A&P has not avoided and [is] not attempting to avoid any withdrawal liability."

Following the district court's ruling, FERLA appealed to the Second Circuit Court of Appeals. That appeal has been assigned docket number 14-3349 and remains pending. The panel assignment is not yet available.

If the Second Circuit affirms the rulings of Judges Drain and Román, debtors with the option to file in jurisdictions within the Second and Third Circuits will have an additional strategic consideration to weigh in making their venue choice. "Withdrawal liability claims can be very large," notes Jones Day's Oellermann. "The possibility that a portion of such claims could be entitled to administrative priority if a DIP or trustee continues to employ workers covered by a multiemployer PBGC-guaranteed pension fund should figure prominently in a prospective debtor's strategic planning."

Skadden's Chehi, Ivester, and Meisler also note that these considerations may guide a debtor's pre-bankruptcy planning. "A debtor may find it beneficial to terminate or withdraw from a multiemployer plan earlier in or before a Chapter 11 case," they wrote in regard to the *Marcal* decision. "Withdrawal liability is calculated based on contributions made during the five years preceding withdrawal. Thus, a debtor who withdraws from a multiemployer plan as soon as possible after the commencement of the Chapter 11 case will reduce the post-petition portion of the five-year period and will cut off the accrual of post-petition withdrawal liability." ¤

Reckoning?, *from page 2*

are looking to sell non-essential assets. "But the lesson people need to learn is that when things go south, they go south very quickly," he adds. "Everything seems to accelerate. You have to be prepared."

Gray says that's an important reminder for energy companies. "The guys who run these companies are mavericks," he says. "They believe with technology and science they can go anywhere on Earth and stick a straw that's five to eight inches in diameter two miles below the surface and hit a deposit of hydrocarbons. It takes that kind of confidence to bet $10 million on where to drill, but also leads people to think they're going to be fine."

As a result, Gray says energy companies are sometimes afflicted by "Indonesian monkey-trap syndrome" in times of uncertainty. Indonesian farmers, he explains, are said to keep monkeys from destroying crops by keeping a cage with an apple in it chained to a tree in the field. A monkey reaches into the cage to get the apple, and then the farmer comes along. All the monkey has to do to escape is let go of the apple, but he won't, so he's captured and killed by the farmer. "There's that mentality in the energy industry as well," says Gray. "Everyone down here feels its going to come back, and people don't want to be the first to merge or sell out the month before everything recovers."

The biggest lesson for investors and lenders in the energy space, says Scott, is that values on a reserve report are not always a good indicator of realizable value in distressed scenarios. E&P companies may have significant assets in the ground or deep water off the Gulf of Mexico, but those values are theoretical. "You still need to monetize those assets by getting them out of the ground and bringing them to market," he says.

The biggest lesson for investors and lenders in the energy space is that values on a reserve report are not always a good indicator of realizable value in distressed scenarios.

In addition, the profitability of bringing those assets to market can fluctuate wildly. "A reserve engineer doesn't look at the hydrocarbons in the ground and tell you what they're worth; he or she predicts value based on the economic viability of actually retrieving them," he explains. "You may have a pool of hydrocarbons that look like they have high value at $100 per barrel, but when oil prices fall to $50, it's no longer economical to drill and produce the hydrocarbons."

ATP, an E&P company that went through bankruptcy at $100 oil, provided a close look at this and a number of other pervasive issues in the energy space, say the Mayer Brown partners. "Producing hydrocarbons is frequently oversimplified, but it's complicated to get a resource from a remote region of the world to the pipeline to the purchaser who's buying the crude for processing or gas for treatments," says Kelley. "What do you do with liquids coming off it? What do you do to hedge your pricing? How are you dealing with end-of-life retirement of assets, decommissioning, plugging, and abandonment? What counterparty obligations do you have to continue to develop and explore?

Complex contracts, for example, are part and parcel of the production package. "There are quite a few agreements associated with how you get a resource from underground all the way to market," says Gray. "You may have an agreement with pipeline and platform companies as to how you use their assets. You may be party to a joint operating agreement. How an agreement works when one party is insolvent or suffering from liquidity problems creates a wrinkle that most folks outside the energy space aren't

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Gnome de Plume

What Will the Fed Do Next?

by Andy Rahl

As everyone who follows either the Federal Reserve or the financial markets knows, it is widely anticipated that the Fed will raise its fed funds rate by June or soon thereafter. In the meantime, I'm having lots of fun following the current edition of the eternal raging controversy between the easy money crowd and the hard money crowd (check out the 1832 and 1896 presidential elections) over whether or not the Fed should raise rates at all. As I acknowledged last month, the hard money crowd, to which I have long subscribed, has been calling for higher rates and wrongly predicting inflation and doom from the Fed's easy money regime for the last six years. Not surprisingly, the easy money crowd is predicting deflationary doom if we do raise rates any time before we see "the whites of inflation's eyes."

What about inflation and deflation? We're told by many in both the easy and hard money crowds that inflation above 2 percent and, apparently, deflation of even a minimal amount are both bad, but why? Well, we are told, apart from there being too many winners and losers and too much volatility, etc., either condition can get out of control and run away with our economy. I certainly have had personal experience with bad inflation, although, when we did have it, I seem to recall that the threshold of bad was quite a bit higher than 2 percent.

Deflation is more obscure. The deflation poster child is the economically stagnant "lost decade" of Japan, which has been going on for more than 20 years now. The easy money guys also say that Sweden is experiencing deflation, the EU is severely threatened by it, and that all three of those scenarios were caused by premature and politically motivated interest rate increases at the behest of the hard money crowd. They also say that the dollar is already much too strong and is hurting U.S. competitiveness, and that raising rates will only make the dollar stronger.

So, with inflation going nowhere and all those other risks out there, why do so many at the Fed seem determined to raise rates at all? Are the people there just reading the tea leaves wrong, clueless, or what? Well, one reason may be that the Fed is tired of being stuck in ZIRP. In case you were wondering, ZIRP stands for Zero Interest Rate Policy. ZIRP is a condition of impotence that only afflicts central banks that have slashed rates in order to stimulate their economy. When a central bank is in ZIRP, it can't cut rates any further to stimulate and it accordingly has to raise rates first before it can cut them again.

Regardless of when the Fed moves, be it in June, later in 2015, 2016, or whenever, and after we get through the inevitable market turmoil, volatility, hissy fit, etc., that surely will ensue, doesn't it matter a great deal how much rates actually go up? If the fed funds rate goes from near zero to 1 percent, will that cause the markets to run up treasuries too far, take all of the air out of equities, kill consumer confidence and spending, and trash our recovery from the great recession?

Certainly the markets react strongly to changes in direction, and they doubtless will again this time around. But as long as Yellen is Fed chair – and her current term extends to February 2018 – I don't expect the Fed to raise rates very much and certainly not enough to cause dire consequences. And whatever the Fed does do with rates, I doubt that it will be enough to help the restructuring business get out of its own great recession. ¤

Reckoning?, *from page 8*

accustomed to dealing with."

In the case of ATP, a provision of the Bankruptcy Code effectively put in question the treatment of net profits interests (NPIs) and overriding royalty interests (ORRIs). Prior to filing for bankruptcy, ATP conveyed numerous NPIs and ORRIs in its Outer Continental Shelf properties to a variety of investors. ATP believed that if it filed for bankruptcy, the conveyances would constitute "production payments" that would be excluded from property of the estate under the Bankruptcy Code. But, the U.S. Bankruptcy Court for the Southern District of Texas ruled that under Louisiana law the conveyances could be recharacterized as debt – meaning they would have a much lower priority for payment in bankruptcy. "The interests were not deemed to be owned by the debtor in this case," says Gray.

"A variety of complex issues in the energy space have to be balanced, and they become more challenging when liquidity is tighter, revenues are dropping, and the entire asset base against which a company has borrowed money has reduced in value," adds Scott. ¤

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- *Special Report: Outstanding Young Restructuring Lawyers*
- *Research Report: Who's Who in RadioShack Corporation*

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