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# turnarounds & workouts

News for People Tracking Distressed Businesses

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## **Game Changer?**

### **TOUSA Ruling May Affect How Loans Are Made**

*by Julie Schaeffer*

When the U.S. Bankruptcy Court for the Southern District of Florida issued a decision in the Chapter 11 proceeding of homebuilder TOUSA, Inc., the response from the lending community was one of alarm: What ramifications would the decision have on syndicated loans – particularly given the finding regarding the unenforceability of savings clauses? Although it may be too soon to say, given the potential for appeals, Douglas R. Urquhart, a partner in the banking and finance practice of Weil, Gotshal & Manges, contends that fraudulent conveyance is nevertheless a serious risk to lenders, who should take steps to avoid it. “The potential consequences of a loan being later deemed a fraudulent transfer are too severe to ignore the lessons of the TOUSA ruling,” he says.

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## **Bankruptcy Pace Slows**

### **Smaller Companies Still Filing in Large Numbers**

*by David Buzzell*

The third quarter of the year saw a continuation in the gradual decline in Chapter 11 filings by the nation's largest corporations. However, it appears that the slowly improving economic conditions have not yet benefited smaller companies, which are still going bankrupt in record numbers.

The Beard Group's bankruptcy data finds that four corporations with assets of \$1 billion or more and 72 other companies with assets between \$100 million and \$1 billion filed for bankruptcy between January 1 and September 30 of 2010 (see graph on page 2). For the same period last year, the numbers were truly staggering: 44 of the \$1 billion plus companies and 125 of the \$100-\$1 billion companies had filed. The tremendous number of

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## **Trading Claims**

### **Tips for Creditors Selling Bankruptcy Claims**

*by Julie Schaeffer*

Creditors who have filed claims against a bankruptcy estate may receive offers from claims traders seeking to buy those claims. Many will panic, fail to research the potential recovery value of the debt they are selling, and sell their claims to the first willing buyer – which may be a mistake. With a little effort, creditors can receive a fair price for selling their claims.

Bankruptcy claims can be secured or unsecured and include debts owed to vendors, institutions, landlords, any business, or individuals.

In 2008 and 2009, with many large companies filing for bankruptcy, bankruptcy claims proliferated. While they dropped off in 2010 as large companies such as Smurfit-

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## Game, from page 1

In June 2005, one wholly-owned subsidiary of TOUSA formed a joint venture called Transeastern to acquire Florida homebuilding assets. A group of lenders provided approximately \$560 million of unsecured financing. In 2006, the joint venture ran into hard times, and the lenders sued TOUSA and Transeastern, alleging a default under the credit agreement.

In July 2007, TOUSA agreed to pay Transeastern's lenders \$420 million. To finance the settlement, TOUSA borrowed \$500 million, securing the debt with liens on virtually all of the enterprise's assets, even though the majority of subsidiaries were not defendants in the litigation.

When TOUSA and its subsidiaries filed for bankruptcy protection six months later, the creditors' committee sought to avoid the liens securing \$500 million in loans as fraudulent transfers and recover the \$420 million paid to settle litigation against TOUSA. Their reasoning: the subsidiaries were insolvent at the time TOUSA forced them to incur liabilities.

The United States Bankruptcy Court for the Southern District of Florida agreed, ruling in October 2009 that the liens on the \$500 million TOUSA borrowed in July 2007 fraudulently conveyed value away from the subsidiaries and must be voided.

The court also concluded that the loan documentation's savings clauses – clauses that say obligations will be automatically reduced to an amount that would not render the guarantor insolvent – were unenforceable and thus could not be used as a defense to the claim that the TOUSA subsidiaries were only rendered insolvent by providing the secured guarantees.

As noted previously, the lending community was concerned about the ramifications of the decision, particularly given the finding regarding the unenforceability of savings clauses.

“The judge seemed to imply that savings clauses are per se unenforceable and that reliance by lenders on fraudulent conveyance savings clauses may be misplaced,” wrote Lenard M. Parkins, a partner with Haynes and Boone, LLP, in a client brief.

But Urquhart and Glenn Siegel, a partner at Dechert LLP, both say the initial response to the TOUSA decision has not been to incorporate widespread changes to loan documentation. “There is little evidence the standard savings clauses

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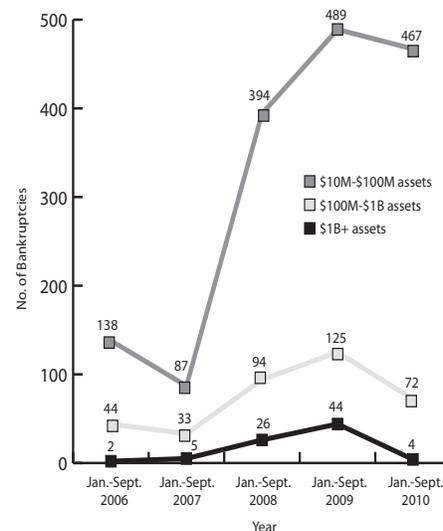
## Bankruptcy, from page 1

filings in 2009 were comparable to those in 2008 when the recession first took hold.

Thus, among the largest of the large corporations, there has been a 90 percent drop in bankruptcies from 2009 to 2010, and, among the \$100 million plus corporation, there has been nearly a 40 percent drop. In contrast, 467 companies with assets between \$10 million and \$100 million had filed by September 30, nearly matching the 489 that had filed by the same time last year, and exceeding by more than 70 the number that had filed during 2008.

This trend is also reflected in the quarterly numbers for this year: bankruptcies among corporations with assets of \$100 million or more have steadily dropped, from 33 to 23 to 20, while filings for companies with assets between \$10 and \$100 million have remained constant and historically high, with 153, 164, and 150 filings for the first, second, and third quarters, respectively.

Interestingly, the four bankruptcies in 2010 by corporations reporting more than \$1 billion in assets in 2010 have all occurred in the third quarter. On July 19, Innkeepers USA Trust filed, followed 10 days later by Protech Holdings. Innkeepers is represented by Kirkland & Ellis; Protech Holdings by Richards Layton & Finger. Boston Generating, which operates gas-fired power plants in the Boston area, declared bankruptcy on August 18. Latham & Watkins is counsel for the company. Lastly, Blockbuster, the nation's largest video chain, sought reorganization on September 20. Blockbuster is being represented by Weil, Gotshal & Manges. □



## Trading, from page 1

Stone Container Corp. emerged from bankruptcy, they've recently picked up thanks to more activity in the Lehman Brothers Holdings, AbitibiBowater, Fontainebleau Las Vegas Holdings, and Circuit City cases. The total number of claims traded rose from 656 in August (marking a year low, according to data from SecondMarket, which runs a bankruptcy claims trading exchange) to 785 in September, a total value of \$2.4 billion.

There are many reasons creditors sell claims. One is immediate cash: Many creditors would prefer to recover less money today than wait for a better return in the future because that cash can be immediately reinvested in a creditor's business. Another is the avoidance of an illiquid equity distribution, such as notes or bonds. Some creditors also like to get out of the bankruptcy process because it can be time consuming and expensive.

Despite the benefits of selling claims, the market for bankruptcy claims has historically been hindered by the absence of standardized contracts, a public pricing index, or a centralized exchange.

That's where bankruptcy claims traders enter the picture. These middlemen typically search bankruptcy claims dockets for potential sellers to connect with their network of potential investors. Their commission: a small fraction of the total value of the transaction.

According to Jon Kibbe, founding partner of Richards Kibbe & Orbe LLP, the rapid evolution of the bankruptcy claims trading market will likely lead to trading conventions and documentation standards, as has been the case in the secondary loan market over the past 15 years – but until such standards exist, counterparties will need to take practical steps to protect themselves.

“Valuing most bankruptcy claims is inherently difficult given the wide-ranging possible outcomes, timing of distribution(s), imperfect or missing information, and the varying illiquidity discounts placed on claims by buyers,” says Jamie Lisac, Managing Director of Financial Restructuring and Corporate Turnaround Services at Dresner Partners. “Ultimately, the seller of a bankruptcy claim has to get comfortable with the selling price, regardless of the final recovery.”

Creditors that express interest in selling

*continued on page 4*

# Research Report

## Who's Who in Blockbuster, Inc.

by Françoise C. Arsenault

*Blockbuster Inc., founded in 1985 and headquartered in Dallas, Texas, is a leading global provider of in-home movie and game entertainment with more than 5,000 stores throughout the Americas, Europe, Asia, and Australia. As of August 29, 2010, there were 3,306 stores operating under the Blockbuster brand in the United States and its territories. Blockbuster stores offer movies and games for rent and purchase, as well as other entertainment-related consumer electronics and accessories, game consoles, confection, and movie-related merchandise for purchase. Approximately 240 of the Blockbuster stores also include store-in-store game locations operating under the Game Rush brand. As of August 2010, Blockbuster also had 2,333 stores in 16 markets outside of the United States operating under the Blockbuster and Game Rush brands. Through its video outlets, Blockbuster rents more than 1 billion videos, DVDs, and video games a year.*

*In addition to its stores, Blockbuster offers access to media entertainment by mail, through vending kiosks, or digitally. To support its retail and by-mail channels, Blockbuster currently manages its inventory out of an 850,000 square foot distribution center located in McKinney, Texas. Blockbuster also operates 39 distribution centers located across the United States to support its subscription program.*

*In connection with its domestic operations, Blockbuster currently employs approximately 25,500 employees, of whom about 7,500 are full-time and 18,000 are part-time. The company reported worldwide revenues of more than \$4 billion in 2009. As of July 4, 2010, Blockbuster reported approximately \$1.2 billion in total assets and approximately \$1.6 billion in total liabilities.*

*In recent years, Blockbuster has faced a number of challenges which, taken together, have had a negative impact on the company's overall financial performance, including declining revenues driven by increased competition in the media entertainment industry from alternative forms of entertainment; technological advances that have changed the landscape of the industry; changing*

*consumer preferences; the rapid growth of disruptive new competitors; and the general economic environment. According to company officials, Blockbuster's ability to transform its business in response to this changing landscape has been severely hindered by the high level of debt the company incurred during earlier periods of significantly lower competition and higher operating performance.*

*Despite efforts to strengthen its balance sheet, Blockbuster officials and company advisors determined that Chapter 11 reorganization would be the best recourse and filed a pre-arranged plan support agreement on September 23, 2010, in the United States Bankruptcy Court for the Southern District of New York. Under the terms of the proposed recapitalization plan, the company's indebtedness would be reduced from nearly \$1 billion to an estimated \$100 million or less when implemented. Blockbuster's non-U.S. operations and its domestic and international franchisees, all of which are legally separate entities, were not included in the bankruptcy filings and are not parties to the Chapter 11 proceedings.*

*Blockbuster has secured \$125 million in debtor-in-possession financing from certain existing senior secured noteholders. The bankruptcy judge approved the financing on October 27, after the loan was revised to meet objections raised by landlords and creditors. The new terms for the financing require Blockbuster to implement a business plan approved by secured lenders by November 30.*

### The Debtor

**James Keyes** is the Chairman of the Board of Directors and Chief Executive Officer of Blockbuster, Inc. **Jeffery J. Stegenga** is the Chief Restructuring Officer. **Dennis McGill** is Executive Vice President and Chief Financial Officer. **Thomas Kurrikoff** is Treasurer and Senior Vice President for Finance. **David Podeschi** is Senior Vice President, Merchandising, Distribution, and Logistics. **Roderick J. McDonald** is the Vice President, General Counsel, and Secretary of Blockbuster, Inc.

**Weil, Gotshal & Manges LLP** is serving as bankruptcy counsel. **Stephen Karotkin**, a partner in the New York

office, and **Martin A. Sosland**, a partner in the firm's New York and Dallas offices, are directing the work on the case.

**Rothschild Inc.** is Blockbuster's financial advisor and investment banker. **Neil Augustine**, a managing director, leads the engagement

**Alvarez & Marsal North America, LLC** is the restructuring advisor. **Jeffery J. Stegenga**, a managing director, leads the engagement and is serving as chief restructuring officer.

Deloitte Tax LLP is providing tax advisory and compliance services to Blockbuster. **Ray VanCleave**, Tax Director, Global Employer Services, and **David Hellman**, Tax Manager, lead the engagement.

**Kekst and Company** is serving as the communications advisor to Blockbuster. The team includes **Michael Freitag**, a partner and head of the firm's restructuring and reorganization practice, and **Wendi Kopsick**, a partner.

**Korn/Ferry International** is providing Blockbuster with executive search services for a new chief executive officer. **Melanie Kusin**, the firm's vice chairman, and **John J. Keller**, a senior client partner, lead the team.

### The Official Committee of Unsecured Creditors

The Committee includes **The Bank of New York Mellon Trust Company, N.A.**; **Scott Siegel**; **David A Segal**; **Universal Studios Home Entertainment, LLC**; **Integrated Process Technologies**; **AT&T Services, Inc.**; **Weingarten Realty**; **Developers Diversified Realty Corp.**; and **Centro Properties Group**.

**Cooley LLP** is serving as the counsel to the Committee. **Jay R. Indyke**, a partner and chair of the firm's Bankruptcy & Restructuring Practice Group, **Richard S. Kanowitz**, **Cathy R. Hershcopf**, and **Jeffrey L. Cohen**, partners, **Nicholas Smithberg**, special counsel, and **Seth Van Aalten** and **Lesley A. Kroupa**, associates with the firm, are working on the case.

### The Trustee

The U.S. Trustee is **Tracy Hope Davis**.

### The Judge

The judge is the **Honorable Burton R. Lifland**. □

**Game**, *from page 2*

found in subsidiary guarantees have been removed or redrafted, or of an increased reluctance by financial institutions to lend to non-investment grade companies supported by subsidiary guarantees,” says Urquhart.

Likewise, Urquhart says, “the adoption of a ‘TOUSA premium’ to loan pricing in order to compensate lenders for the perceived risk that its loans could later be deemed a fraudulent transfer has not become prevalent.”

Urquhart says this wait-and-see approach may be attributable partly to the market’s anticipation that the decision will be overturned on appeal. “Until the appeals are resolved (and thereafter if it is ultimately upheld), the question remains what, if any, long-term effect will there be from the TOUSA ruling and what, if any, precautionary measures a potential lender can take today to prevent a fraudulent transfer claim,” he says.

That said, Urquhart thinks lenders should consider a few modifications to loan documentation to protect themselves against those loans later being deemed fraudulent transfers by a bankruptcy court (and address the related potential unenforceability of savings clauses). These include:

- Make each party to a loan agreement a borrower. Making both the parent company and material subsidiaries borrowers under the loan agreement avoid having to rely on a savings clause, says Urquhart.
- Think about the recording of cash transfers. The former step won’t protect

against a fraudulent conveyance claim, but recording intra-group cash transfers in a manner that demonstrates the value received by each liable borrower would. But Urquhart notes that this would likely meet resistance from borrowers – and if not done properly could potentially bolster an argument that a subsidiary “borrower” has not received any value for its liability and liens.

- Obtain a solvency certificate from individual borrowers. Since the TOUSA ruling limited testing solvency on a consolidated basis, lenders may want to require a solvency certificate from each individual subsidiary guarantor.
- Retain analysis behind solvency certificates. Urquhart notes, however, that a solvency certificate is only as good as the analysis supporting it, and it may be necessary to preserve this analysis as evidence of solvency.
- Increase use of third-party solvency opinions. The TOUSA ruling found fault in the methodology used by third-party financial advisors, so any third party providing a solvency opinion should have recent experience in the company’s line of business and the opinion should not be tied to any sort of success fee.
- Make solvency opinions analyze individual borrowers. Since the TOUSA ruling also found fault in the solvency opinion’s discussion of TOUSA’s solvency on a consolidated basis, any solvency opinion could cover each loan party on an individual basis, says Urquhart.
- Tie guarantees to a fixed amount. The inevitable fluctuations in a

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**Trading**, *from page 2*

will typically receive a confirmation letter outlining the basic terms of the sale, after which the seller will be asked to execute a purchase agreement, commonly referred to as the assignment of claim agreement.

“Some claims traders are quite reputable. Others, to be generous, make used car salesmen look angelic. Regardless, all of them have an incentive to buy claims on trader-favorable terms,” says Nicholas M. Miller, a partner in Neal Gerber Eisenberg’s financial restructuring and bankruptcy practice group. “So, if you’re going to sell your claim, read the fine print on the assignment agreement. And I mean that literally. I once saw an agreement with six-point type size on the reverse side of the agreement that

included some pretty draconian penalties in the event the claim was reduced by any amount for any reason.”

“The more specific one is from the start with a counterparty – whether in oral or written confirmations – the better position one will be in later,” says Kibbe.

Miller also emphasizes the importance of knowing the value of the claim: The more a creditor knows about the bankruptcy, the better it can determine the value of its claim.

Creditors with higher priority claims, such as secured claims, administrative claims, and reclamation claims, will likely generate higher offers than unsecured claims.

But the value of claims may not

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# Calendar

**Beard Group and Renaissance American Management, Inc.**

17th Annual Conference on Distressed Investing  
November 29, 2010  
The Helmsley Park Lane Hotel  
New York, NY  
Contact: [www.renaissanceamerican.com](http://www.renaissanceamerican.com)

**American Bankruptcy Institute**

22nd Annual Winter Leadership Conference  
December 9-11, 2010  
Camelback Inn  
Scottsdale, AZ  
Contact: [www.abiworld.org](http://www.abiworld.org)

**The National Association of Bankruptcy Trustees**

2011 Spring Seminar  
March 25-27, 2011  
Loews Santa Monica  
Santa Monica, CA  
Contact: [www.nabt.com](http://www.nabt.com)

**Practising Law Institute**

Live Seminar: Recent Developments in Distressed Debt, Restructurings and Workouts 2011  
Jan. 27, 2011  
New York, NY  
Contact: [www.pli.edu](http://www.pli.edu)

**Association of Insolvency & Restructuring Advisors**

VALCON2011  
February 23-25, 2011  
Four Seasons Hotel  
Las Vegas, NV  
Contact: [www.aira.org](http://www.aira.org)

**Turnaround Management Association**

TMA 2011 Spring Conference  
April 27-29, 2011  
JW Marriott Chicago  
Chicago, IL  
Contact: [www.turnaround.org](http://www.turnaround.org)

# Special Report

## Nation's Largest Claims Administrators

Firm	Key Contacts	Recent Cases
<b>AlixPartners Information Management Services</b> Dallas, TX Tel. (310) 871-8436 www.alixpartners.com	Meade Monger Michelle Campbell John Franks Todd Brents	Barry Folse Carrienne Basler David Head Claims agent and/or claims administration services in Centaur Gaming, Natural Products Group, Texas Rangers, Victor Valley Hospital, Xerium Technologies, American Safety Razor, Freedom FCH Litigation Trust, Trico Marine Services, Music Gallery post-confirmation, Millennium (LyondellBasell) trust, Madoff Securities, Verasun Energy Corporation, The BearingPoint Liquidating Trust, Motors Liquidation.
<b>BMC Group</b> Los Angeles and New York Tel. (800) 655-1129 www.bmcgroup.com	Tinamarie Feil Varouj Bakhshian	Terri Marshall "MJ" Myrtle John ADS Logistics, Crossroads Wireless, Crusader Energy, Dewey Ranch Hockey, Erickson Retirement Communities, FairPoint Communications, GI Joe's, JL French Automotive Castings, Metaldyne Corporation, NV Broadcasting, On-Site Sourcing, Opus West, and Society of Jesus Oregon Province.
<b>CPT Group, Inc.</b> Irvine, CA Tel (800) 542-0900 www.cptgroup.com	Henry Arjad	Paul Anderson Nextel Communications, Rite Aid, E-Trade, Taco Bell, T Mobile, Best Buy, LA Fitness, Direct TV, 24 Hour Fitness, K&B Homes, AT&T.
<b>Delaware Claims Agency</b> Wilmington, DE Tel. (302) 658-1067 www.delclaims.com	Joseph L. King	DGI Resolution, Inc., Vion Pharmaceuticals, Inc., AATT011, Inc., et al., Moll Industries, et al., and FPD, LLC, et al.
<b>Donlin, Recano &amp; Company</b> New York, NY Tel. (212) 481-1411 www.donlinrecano.com	Louis A. Recano Colleen A. McCormick Elizabeth R. Ellison	Scott Y. Stuart Andrew P. Logan Michael Emrich JW Song Wolverine Tube, Inc., Metro-Goldwyn-Mayer Studios Inc., The Penn Traffic Company, Lower Bucks Hospital, Rock & Republic Enterprises, Inc., Emivest Aerospace Corporation, Professional Veterinary Products, Ltd., Compania Mexicana de Aviacion, S.A. de C.V., Ciena Capital LLC.
<b>Epiq Bankruptcy Solutions</b> New York, Delaware, Hartford, Chicago, Los Angeles, Portland, London Tel. (646) 282-2500 www.epiq11.com	Lorenzo Mendizabal Ron Jacobs Daniel C. McElhinney	James Katchadurian Jane Sullivan W. Lance Wickel Mitch Ryan AbitibiBowater, BankUnited Financial, Chrysler, Frontier Airlines Holdings, Hines Horticulture, Lehman Brothers, Lyondell Chemical, Nortel Networks, Saint Vincents Catholic Medical Centers, Smurfit-Stone Container, Tribune Co., Thompson Publishing, US Concrete.
<b>Kurtzman Carson Consultants</b> Los Angeles, Memphis, New York, Jacksonville Tel. (866) 381-9100 www.kcellc.com	Eric Kurtzman Jonathan Carson Howard Blaustein Francine Gordon	Nellwyn Voorhies Sarah Frankel Jon Orr Michael Frishberg Blockbuster, Claim Jumper Restaurants, Oriental Trading Company, Amcore Financial, American Safety Razor Company, Truvo USA, The Newark Group, Neff Corp., Magic Brands, Regent Communications, Penton Business Media, Movie Gallery, International Aluminum Corp., AmTrust Financial, Citadel Broadcasting, Ambac.
<b>Lain, Faulkner &amp; Co.</b> Dallas, TX Tel. (214) 720-1929 www.lainfaulkner.com	Marla Reynolds	Lori Lowderman First Plus Financial, American LaFrance, Unidynamics, Git-N-Go, Airbase, International Galleries, Gadzooks, Superior Air Parts, Metromedia Co.
<b>Logan &amp; Company</b> Upper Montclair, NJ Tel. (973) 509-3190 www.loganandco.com	Kathleen Logan	Melissa Mendez Amelia Island Company, Barzel Industries, BNA Subsidiaries, Condustral, Freedom Communications Holdings, Goody's, Goody's Family Clothing, JGW Holdco, MPC Computers, PNG Ventures, PPM Technologies Holdings, Inc., PTC Alliance Corporation, Spectrum Jungle Labs Corporation, True Temper Sports, Verso Technologies, Schutt Sports, Specialty Products Holding Corporation, Winn-Dixie Stores. □

# Worth Reading

## The Liquidation/Merger Alternative

**Author:** Michael J. Peel

**Publisher:** Beard Books

**Softcover:** 204 pages

**List Price:** \$34.95

With the wave of mergers in the early 1990s came many studies of this phenomenon – what was driving it and the implications for particular business sectors and the general economy. The accumulation of business information and the development of sophisticated analytical tools in recent years has allowed bankruptcy and restructuring professionals to better analyze distressed companies – the causes of distress and the means by which companies can, in many cases, pull themselves out of it. The author brings these two areas of study – the cause and the solution – together in a book that builds upon the pioneering work of others.

Peel's book provides some new empirical evidence on the liquidation/merger alternative for corporations in the United Kingdom. Nonetheless, the content obviously relates to the U.S. corporate sector, as well, because both countries share capitalist/free-market roots. Using copious statistics, frequent references to studies by others, remarks on the significance of data, discrete sections within chapters to highlight noteworthy subjects, and concise, cogent summations, Peel examines all facets of this major business topic in an era of globalization.

Peel's goal is to provide the tools necessary to assess the quality and prospects of a company in distress along with guidelines for making a decision if a merger with a particular company is desirable. Obviously, distressed companies are attractive when the financial investment is low and the long-term business prospects are favorable. Peel, however, demonstrates how a merger with a troubled company can offer financial benefits to the purchaser apart from whether the company is projected to be profitable any time soon.

Peel's study is distinguished by being grounded in the empirical. There is no anecdotal material, as there is in many business books. Nor does Peel relate the wisdom and experience of a consultant – another familiar genre in business books. There's scant reference to any particular business or discussion of peculiarities of market sectors.

Except for short passages where he summarizes his observations, the author sticks to compiling and interpreting data and proffering knowledge and guidance that can be gleaned from the data. *The Liquidation/Merger Alternative* is for top corporate executives who are strategic planners and decision-makers, top financial management responsible for major investments, entrepreneurs interested in rapid growth by merger, and consultants working with these business types.

The author is also aware of the risks of mergers no matter what volume of data he has been able to gather and no matter how empirical his decision making may appear to be. "Discriminating between those 'distressed' companies which fail, and those where a timely merger appears to serve as a viable alternative to corporate bankruptcy" will always have some degree of risk, notes Peel. He has gone as far as anyone in collecting and assessing the relevant data that can help discern the fine line between an attractive distressed company and a problematic one. □

*Michael J. Peel teaches management courses at both the graduate and undergraduate level at the Cardiff Business School at Cardiff University in the United Kingdom. His latest research is on corporate performance appraisal and business failure prediction.*

This book may be ordered by calling 888-563-4573 or by visiting [www.beardbooks.com](http://www.beardbooks.com) or through your favorite Internet or local bookseller.

## Game, from page 4

company's financial condition mean that a guarantor could end up being unable to fulfill obligations without becoming insolvent. As a result, says Urquhart, lenders may want to consider limiting guaranteed obligations for each subsidiary guarantor to a fixed or easily quantifiable amount.

Even if a fraudulent conveyance suit is filed, Siegel notes that there are steps lenders can take to avoid judgments.

"You have broad fraudulent conveyance risk in these types of transactions, but getting to the end point, which is a successful judgment, is where the action is now," he says. "How do you deal with the obstacles that potential fraudulent conveyance defendants will place in your way so you can get the same result TOUSA did?"

Siegel notes that if creditors' committees, who generally are the parties bringing fraudulent conveyance suits, can get a case to judgment, they might get the result they want – but there are two significant impediments to getting a case to judgment.

The first is the fee issue: Who will fund litigation that can go on for years? "These suits are usually brought by creditors' committees that have limited resources," he says. "TOUSA was unique because plaintiffs found a way to finance litigation so they got to trial."

The second is the 546(e) provision in the bankruptcy code, which is part of a package of regulatory reforms designed to facilitate liquidity in event of a bankruptcy involving financial contracts. For example, it was used in Lehman Brothers to allow people to unwind transactions rapidly.

The 546(e) provision had an unintended consequence, however: It provided that one cannot avoid transactions, including fraudulent conveyance transactions, where payment was made through a financial intermediary.

"This was intended to protect brokers in unwinding trades, but the language was so broadly worded that some litigants have argued successfully that you can't recover fraudulent conveyance payments received by a party that was paid through a financial institution – and most payments are made through banks, which are financial institutions," says Siegel. "As a result, some courts have found that even if you received a fraudulent conveyance, you aren't required to return it if payment passed through a financial institution." □

# Special Report

## Outstanding Turnaround Firms – 2010

Firm	Senior Professionals	Outstanding Achievements	
<b>AlixPartners</b> Detroit, MI Tel. (248) 227-1694 www.alixpartners.com	Al Koch Ted Stenger Jim Mesterharm Larry Young	Holly Etlin Alan Holtz Lisa Donahue Peter Fitzsimmons	Advisor and/or interim manager to General Motors/Motors Liquidation Co.; General Growth Properties; Reader's Digest; Neff; White Birch and US Concrete; SemGroup, Abitibi/Bowater-Canada; AIG. GM was largest industrial restructuring in history.
<b>Alvarez &amp; Marsal</b> New York, NY Tel. (212) 759-4433 www.alvarezandmarsal.com	Joseph A. Bondi Bill Kostouros Doug McIntosh Douglas Rosefsky	William Runge Jeffery J. Stegenga John Suckow Richard Williamson	Advisor and/or interim manager at Blockbuster, Chemtura, Crescent Resources, Lehman Brothers, Philadelphia Media Holdings, Rossignol, Stabilus, Tribune Company, Tronox, Visteon, and Washington Mutual.
<b>Conway MacKenzie</b> Detroit, MI Tel. (248) 433-3100 www.ConwayMacKenzie.com	Van E. Conway Donald S. MacKenzie A. Jeffrey Zappone Joseph M. Geraghty	Charles M. Moore John T. Young, Jr. Gregory A. Charleston Kenneth J. Malek	Financial and restructuring advisor to Greektown Casino-Hotel; FA and interim management to Finger Furniture and JT Packard; FA to creditor group of Neenah Enterprises; FA to a group of bondholders for a large automotive supplier.
<b>Development Specialists, Inc.</b> Chicago, IL Tel. (312) 263-4141 www.dsi.biz	William A. Brandt, Jr. Geoffrey L. Berman Bradley D. Sharp Daniel J. Stermer	A. Kyle Everett Elizabeth M. Lynch John C. Wheeler Joseph J. Luzinski	Financial consultant to debtor and creditor committee of Heller Ehrman; Plan administrator for Coudert Brothers; receiver for Hess Kennedy; liquidation trustee for Rouge Industries; CRO and plan administrator for Equipment Acquisition Resources.
<b>Focus Management Group</b> Tampa, FL Tel. (813) 281-0062 www.focusmg.com	J. Tim Pruban Gerard Paez James Hopwood Jay Kelley	Jeffrey Granger John Bambach, Jr. Peter Dominici Robert Riiska	Debtor advisor: Downey Medical, Gems TV, Protein Solutions, Majestic Liquors. Lender advisor: AeroThrust, Coast Crane. Trustee advisor: American Housing. Receiver: 32 entities. Successfully exited Johnson Memorial Hosp. out of bankruptcy.
<b>FTI Consulting, Inc.</b> West Palm Beach, FL Tel. (561) 515-1900 www.fticonsulting.com	DeLain Gray Michael Buenzow Keith Cooper Bob Duffy	Randall Eisenberg Ron Greenspan Kevin Lavin Bob Medlin	CRO to GSI Group, Baylor College of Medicine, Hines Horticulture. FA to Orleans Homebuilders, Caribbean Petroleum, CIT, Sea Island, Yellowstone. FA to UCC of General Growth Prop., Lehman, GM. FA to lenders of Fairpoint Communications.
<b>Getzler Henrich &amp; Associates</b> New York, NY Tel. (800) 225-1025 www.getzlerhenrich.com	Joel Getzler William Henrich Peter Furman Mark Samson	Lee Goldberg Frank Melazzo Marc Adelson Stephan Pinsky	CRO and FA to National Envelope Company and Rand; CRO to Moonlight Basin, Ronson Corp., USA, Precision Valve Corp., Innovative Stone, and Hudson & Keyse; FA to SED International Holdings and Spa Chakra; advisor to lender to GDC Acquisitions.
<b>Goldin Associates</b> New York, NY Tel. (212) 593-2255 www.goldinassociates.com	Harrison J. Goldin David Pauker Seymour Preston Jr. Rob Vanderbeek	David Prager Gary Polkowitz Erik Graber Deborah Friedland	Advisor or interim manager to company/trustee: Copperfield, Lehman, Rescap (directors), Syncora Guaranty, Thornburg, Young Broadcasting. Creditor/lender/committee advisor: AbitibiBowater, Boston Generating, Lyondell, Point Blank.
<b>Huron Consulting Group</b> Chicago, IL Tel. (866) 229-8700 www.huronconsultinggroup.com	Hugh Sawyer Chris Martorella Laura Marcero Rich Caruso	Dan Wikel Jeff Beard Dalton Edgecomb Shaun Martin	Chief Restructuring Officer to Neenah Foundry, Forum Health, INTERMET, JHT Holdings, Inc, and Boulder Bay. Financial Advisor to Nortel Networks Inc., Abitibi Bowater, Inc., and Burlington Technologies Industries, Inc.
<b>Mesirow Financial Consulting</b> New York, NY Tel. (877) 632-4200 www.mesirowfinancial.com	Ralph Tuliano Tom Allison Larry Lattig Jim Feltman	Jack Williams Ben Pickering Melissa Knoll Steve Darr	Financial advisors to UCC: LyondellBasell, Neff Corporation, LLC and Oscient Pharmaceuticals Corporation. Financial advisors to company: Franciscan Healthcare, Chicago Sun Times, Brown Publishing Company, and Lake County.
<b>NHB Advisors, Inc.</b> Narberth, PA Tel. (610) 660-0060 www.nhbteam.com	Thomas D. Hays, III Edward T. "Ted" Gavin John Tittle, Jr.	Harvey L. Nachman Keith M. Northern	Turnaround of \$300 MM luxury goods multimedia company. Success in Vion Pharmaceuticals; TLC; Vermilion; Barcalounger; several plaintiff law firms and auto dealers; Abitibowater advisor to ad hoc equity committee.
<b>Sitrick Brincko Group</b> Santa Monica, CA Tel. (310) 553-4523 www.brincko.com	John Brincko Thora Thoroddsen Larry Candido Alan Faigin	Paul Meyaart James Cunningham Yolanda Hoelscher	CRO/CFO/litigator with Spansion with plan confirmation; CRO, Franchise Pictures with plan confirmation; Advisors to \$300M food company, Coachella Water District, One West Bank, and NAMA in Ireland; Trustee, NCMortgage. ☐

## Gnome de Plume

# Gathering Storm

by Christopher Beard

The market has been roaring. The bulls are running. The talking heads are excited. Why the optimism? I have no idea.

We have huge problems and few solutions. We need government leadership to address our more intractable economic and financial issues.

This morning, on the Monday, November 15, edition of CNBC's Squawk Box, Congressman Paul Ryan, one of the most important Republican congressional leaders who wrote the much-discussed Roadmap for America's Future and is the incoming Chairman of the House Budget Committee, said he does not even know Speaker Nancy Pelosi. He said they spoke for about 30 seconds six years ago. Sam Rayburn and Tip O'Neill wouldn't recognize her leadership model, much less her tone. And she reflects administration attitudes. So much for government solutions.

Last week, the Fed, obviously very concerned, initiated QE2 to establish a virtuous circle of higher income and profits to support economic expansion and increased employment and sustain price stability. Higher stock prices will propel the virtuous circle by boosting consumer wealth and increasing consumer confidence. Whatever all that means, they're printing money, and the confidence they hoped to engender is coming across as desperation. They're out of bullets.

The overriding problem the country faces is the unsustainable deficits. President Obama appointed a non-partisan panel, headed by Erskine Bowles and Alan Simpson, that issued its findings last week, which proposed, in essence, a broad allocation of the pain. The proposal is drawing withering fire, and there's little interest in serious negotiation. With considerable focus and political cost, I suppose the president could bring various interest groups together and attempt to hammer out a compromise. Theoretically that might be feasible, but playing a Dutch uncle to his base is not his thing. It's not going to happen.

The financial condition of the states and municipalities continues to deteriorate. There has been talk of a federal bailout, but that won't be easy. Nobody wants to pony up for the extravagances of others, and the energetic and now influential Tea Party will drive the opposition. Soon the muni markets will reject the spendthrifts.

The EU financial crisis got less ink following the bailout of Greece, but the worsening financial problems in Ireland, Portugal, and Spain suggest their difficulties are unlikely to be resolved easily or soon. The best hope is the EU can keep kicking the can down the road. The Germans don't want to pay. The PIGS probably can't effect enough change in time.

Recently both food and commodity prices have climbed significantly and soon those costs will start being passed along to customers. With unemployment 9.6%, it's unlikely those of us who don't work for Google will get raises to compensate for the additional expenses. Lower discretionary income means reduced consumption and higher unemployment. Not helpful.

Some people have the vague idea that the growth in Brazil, Russia, India, and China will somehow drive a solution for the United States. I don't think so. They have their own dreams, and none involve underwriting the American standard of living.

These problems are not insignificant and time is short. The leverage is substantial. The discipline is lacking. The leadership is largely irrelevant. The existing commitments are enormous. Our global influence is declining. There is financial linkage everywhere. We're in trouble. The storm is almost upon us, and trouble is near. ☐

*Christopher Beard is the publisher of Turnarounds & Workouts*

### Future Issues:

- *Special Report: Sources of DIP Financing*
- *Special Report: Outstanding Restructuring Lawyers – 2010*
- *Research Report: Who's Who in TerreStar Networks, Inc.*

### Trading, from p. 4

always be obvious, so creditors should pay particular attention to the disclosure statement, which projects potential distributions on allowed claims.

You can also ask around. "If a claims trader wants to buy your claim, shop the claim like you would anything else," says Miller. "Call other claims traders and discover the market for your claim. It's amazing what a little competition will do for your sales price."

That said, keep expectations realistic. In some Chapter 11 cases, creditors ultimately recover pennies on the dollar – if anything at all.

Many sellers sign assignment of claim agreements without negotiating any terms, which isn't necessary, as there are usually numerous distressed debt firms that are interested in purchasing bankruptcy claims.

"Everything is negotiable," says Miller. "Whatever a claims trader says is his final price, ask for more. You probably have a 50/50 chance that the price will move further, especially after you've consulted with other traders and know the market value of your claim. An experienced bankruptcy professional can help with these negotiations."

Because sale documents can include a multitude of contractual obligations, creditors should be sure they know what they're getting into. "Upon receiving an offer to purchase a claim in bankruptcy, the best practice is to immediately contact counsel who can advise you on these transactions," says Felice Yudkin, an associate in the Bankruptcy & Corporate Restructuring Department of Cole, Schotz, Meisel, Forman & Leonard. "A careful review of the purchase agreement with a knowledgeable reader can result in enhanced protections to selling creditors." ☐