turnarounds & workouts
News for People Tracking Distressed Businesses
NOVEMBER 2012 VOLUME 26, NUMBER 11

Inside

Latest Reports:

Research Report:

Special Report:

Worth Reading:

Special Report:

Goldin Receives Miller Award

Recognized for Service to Restructuring Industry

by Dave Buzzell

On January 2, 1990, Goldin Associates was born. Its founder, Harrison J. (Jay) Goldin, had already given his country a career's worth of public service, first as a young attorney helping advance integration in the South, then as a four-term New York State senator. Thereafter, during an unprecedented sixteen years as New York City's comptroller, Goldin led America's largest city through the biggest municipal restructuring in history, introduced GAAP reporting to municipal finance, and pioneered an array of "best practices" at New York's $40 billion pension system, which he managed. During his tenure, he was named by Crain's as the "Best Comptroller in America" and co-founded the Council of Institutional

continued on page 2

TOUSA Reversal

Lenders Liable for Fraudulent Transfer Claims

by Julie Schaeffer

The U.S. Court of Appeals for the Eleventh Circuit has reversed a district court's decision that lenders are not liable for fraudulent transfer claims – suggesting to some that lenders now have an uphill battle to fight.

In June 2005, a wholly-owned subsidiary of TOUSA formed a joint venture called the Transeastern Lenders 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 the Transeastern Lenders, alleging a default under the credit agreement. In July 2007,

continued on page 2

Debt Reinstatement

Important Lessons for Plan Proponents and Lenders

by Julie Schaeffer

In the past few years, businesses have raised a significant amount of debt at historically low interest rates, and, in many cases, with few restrictive covenants – making debt reinstatement a potentially good restructuring strategy for overleveraged companies, says, Daniel P. Winikka, a partner at Jones Day.

"Debt reinstatement involves the use of the bankruptcy process to restructure a company's bad debt while simultaneously using the Bankruptcy Code's reinstatement provisions to retain valuable credit with below-market terms," says Winikka.

"Reinstatement can be attractive to a reorganizing company if the loans are at a

continued on page 2

Goldin, *from page 1*

Investors, the nation's leading organization on pension investing, and remains its active chair emeritus.

But after 24 years in elected office, Goldin decided he wanted to try something new. He went into the workout and restructuring business, bringing his talents to the private sector. Now, 23 years and a full second career later, Goldin has earned the reputation as one of the top workout and restructuring professionals in the business. And for that he has been named the recipient of this year's Harvey R. Miller Outstanding Achievement Award for Service to the Restructuring Industry. Goldin will be honored at the 19th Annual Distressed Investing Conference, which will be held at the Helmsley Park Lane Hotel in New York on November 26.

"It was a big move to form my own company," Goldin says. "But I'm happy I did. It's been an exciting 23 years for me. We've been fortunate. We have an interesting and challenging mix of business that covers financial advisory work, turnaround management work, and litigation support."

Striking out on his own, Goldin formed a financial advisory firm, Goldin Associates, and began applying his turnaround acumen to the private sector. The firm achieved immediate success. Soon after setting up shop, Goldin was hired to serve as financial advisor to the largest group of unsecured creditors in the bankruptcy of Drexel Burnham Lambert, one of the most influential investment banking firms of the 1980s that was brought down by securities fraud charges leveled against Michael Milken and others.

The engagements that flowed to Goldin Associates read like a who's who of the corporate bankruptcy and restructuring world. Goldin served as chief executive officer for Refco, the multi-billion dollar commodities, futures, and stock brokerage firm that was one of the largest-ever U.S. bankruptcy filings. He was chief restructuring officer of Rockefeller Center Properties, one the largest U.S. real estate bankruptcy filings. He served as court-appointed examiner in the bankruptcies of Enron North America, Coudert Brothers, Bruno's Supermarkets, Loral Space & Communications, and Cityscape Financial Group. His work as a financial advisor included serving the likes of Lehman Brothers, the Tribune Company, and

continued on page 4

TOUSA, *from page 1*

TOUSA agreed to pay the Transeastern Lenders $420 million and, to finance the settlement, 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 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. Thus, this could not be used as a defense to the claim the TOUSA subsidiaries were only rendered insolvent because they provided the secured guarantees.

The bankruptcy court opinion was controversial on two levels: 1) for its finding that no reasonably equivalent value was given to the conveying subsidiaries in exchange for their pledge of assets in connection with the term loans, and 2) for its rejection of the loan documentation's savings clauses.

In early 2011, the United States District Court for the Southern District of Florida resolved half of the controversy by reversing the bankruptcy court's determination that no reasonably equivalent value was given to the conveying subsidiaries.

In a 113-page opinion, Judge Alan Gold called the previous ruling "clearly erroneous," finding that the bankruptcy court had erred in its legal definition of such terms as "value" and noting that the bankruptcy court's decision would place an "impossible burden" on lenders.

Specifically, Gold held that reasonably equivalent value need not be concrete dollar-for-dollar value, but can be found where the value given is intangible, such

continued on page 4

Debt, *from page 1*

favorable interest rate (i.e., below the rates that would be available to the company as part of its exit from Chapter 11) and have some period left before maturity," says Christopher Mirick, a partner at Pillsbury Winthrop Shaw Pittman, LLP.

"Such a strategy may be particularly appealing when the pricing of credit risk increases substantially, as it did following the financial crisis in late 2008," adds Winikka.

When a company defaults on its debt, the lender typically has the right to accelerate the loan and collect any outstanding debt. Debtors can reinstate debt as part of the bankruptcy process, however – and in doing so, continue with the original terms and maturities without obtaining the lender's consent.

To succeed, however, the debtor must meet three criteria. First, it must cure any prepetition defaults. Second, it must ensure that the plan does not "otherwise alter the legal, equitable, or contractual rights" of the lender. Third, it must compensate the lender for any damages incurred as a result of reasonable reliance on the acceleration of the obligation, and for any actual loss arising from the failure to perform a non-monetary obligation.

In other words, reinstatement requires a reorganized company to comply with all existing financial covenants, such as maintaining a certain level of earnings before interest, taxes, depreciation, and amortization (EBITDA) following consummation of its reorganization plan. "Potentially problematic covenants may include restrictions on a change in control," says Winikka.

That said, Winikka continues, "if the reinstatement requirements are satisfied, the lender's claim will be deemed unimpaired and the lender will be deemed to have accepted the plan."

As a result of these requirements, Winikka notes that reinstatement may not be a viable strategy for all companies. Certainly, it can work with a financial restructuring designed solely to deleverage a company's balance sheet. In situations requiring a significant operational restructuring, however, debt reinstatement may be less likely to succeed. "If lines of business will be sold or shut down, there may be an inability to meet financial covenants based upon the

continued on page 9

Research Report

Who's Who in Patriot Coal Corporation

by Francoise C. Arsenault

Patriot Coal Corporation, headquartered in St. Louis, Missouri, is one of the nation's largest coal mining production and marketing companies east of the Mississippi River. Patriot Coal is the largest producer of thermal coal in the Eastern United States and a leading producer of metallurgical coal. The company ships to domestic and international electricity generators, industrial users, and metallurgical coal customers. Patriot Coal, which was founded in 2007 when it was spun off from Peabody Energy Corporation, controls approximately 1.9 billion tons of proven and probable coal reserves. The company's operations are comprised of 16 mining complexes, 13 in West Virginia and 3 in Kentucky. Patriot Coal now employs about 3,500 workers.

On July 9, 2012, Patriot Coal Corporation and the majority of its wholly owned subsidiaries filed for Chapter 11 reorganization in the United States Bankruptcy Court for the Southern District of New York. On August 6, the bankruptcy court approved $802 million in DIP financing from Citigroup Global Markets Inc., Barclays Bank PLC, and Merrill Lynch, Pierce, Fenner & Smith Inc. At the time of its bankruptcy filing, Patriot Coal reported $3.6 billion in assets and $3.1 billion in debts. Company officials attributed the need for the reorganization to a drop in demand for coal, caused in part by cheaper natural gas and the struggling economy, along with stricter environmental regulations.

The United Mineworkers of America has led the effort to move the Chapter 11 case from the Southern District of New York to West Virginia, on the basis that most of the company's business operations and employees are located in West Virginia. The U.S. trustee also is advocating for the change in venue, but on the basis that Patriot Coal established two New York subsidiaries shortly before the filing solely to establish venue in New York. The company, the official committee of unsecured creditors, and other key stakeholders are advocating against the change. The bankruptcy judge is expected to soon issue her decision on venue.

The Debtor

Irl F. Engelhardt is the Chairman of the Board of Directors and the Chief Executive Officer of Patriot Coal Corporation. **Bennett K. Hatfield** is the President and Chief Operating Officer. Kenneth A. Hiltz is Chief Restructuring Officer. **John E. Lushefski** is the Chief Financial Officer and Senior Vice President. **Joseph W. Bean** is General Counsel, Senior Vice President, and Assistant Secretary.

Davis Polk & Wardwell LLP is serving as the bankruptcy counsel. The team is being led by **Marshall S. Huebner**, **Damian S. Schaible**, and **Brian M. Resnick**, partners, and **Michelle M. McGreal**, an associate with the firm.

Curtis, Mallet-Prevost, Colt & Mosle LLP is acting as conflicts counsel. **Steven J. Reisman** and **Michael A. Cohen**, both partners with the firm, direct the work.

Jackson Kelly PLLC is serving as special counsel to Patriot Coal for issues related to mining and environmental law. **Michael T. Cimino** and **Williams F. Dobbs, Jr.**, partners, head up the team.

Bowles Rice McDavid Graff & Love LLP is special counsel for issues related to energy, occupational health, and the environment. **Mark B. D'Antoni**, a partner with the firm, directs the work.

Thompson Coburn LLC is acting as special counsel to Patriot Coal for issues related to coal suppliers. The team is led by **Roman P. Wuller**, **David Warfield**, and **Mark Mattingly**, partners.

Steptoe & Johnson PLLC is special counsel for litigation, environmental, safety, tax, and labor matters. **C. David Morrison**, **Jeffrey K. Phillips**, and **David E. Dick**, partners, direct the work.

AlixPartners, LLP is providing Patriot Coal with financial advisory services. **Kenneth A. Hiltz**, a managing partner with the firm, leads the engagement and is serving as the CRO. The team also includes **Christopher Blacker**, **Scott Mell**, and **Robb McWilliams**, directors, and **Dipes Patel**, an associate.

Blackstone Advisory Partners L.P. is acting as investment banker to Patriot Coal. The engagement is being led by **Timothy Coleman** and **Paul P. Huffard**, senior managing directors, and **Mark Buschmann**, a managing director.

Ernst & Young LLP is providing Patriot Coal with auditing and tax advisory services. **Michael W. Hickenbotham**, a partner with the firm, leads the engagement.

Joele Frank, Wilkinson Brimmer Katcher is serving as the media relations advisor to Patriot Coal. **Michael Freitag**, a partner, and **Jonathan Keehner** and **Aaron Palash**, directors, are working on the engagement.

The Official Committee of Unsecured Creditors

The Committee includes **Wilmington Trust Company**; **U.S. Bank National Association**; **United Mine Workers of America**; **United Mine Workers of America 1974 Pension Plan and Trust**; **Gulf Coast Capital Partners, LLC**; **Cecil Walker Machinery**; and **American Electric Power**.

Kramer Levin Naftalis & Frankel LLP is serving as the counsel to the Committee. The team is led by **Thomas Moers Mayer**, **Adam C. Rogoff**, and **Gregory G. Plotko**, partners with the firm.

Cole, Schotz, Meisel, Forman & Leonard, P.A. is conflicts counsel to the Committee. **Michael D. Warner**, **Michael D. Sirota**, and **Stuart Komrower**, partners, are working on the case.

Houlihan Lokey Capital, Inc. is providing investment banking and financial advisory services to the Committee. **Matthew A. Mazzucchi**, a managing director, leads the engagement.

Mesirow Financial Consulting, LLC is serving as accounting advisor to the Committee. The engagement is being led by **Monty Kehl**, a senior managing director with the firm.

The Trustee

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

The Judge

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

Goldin, *from page 2*

bondholders in the Adelphia case.

Goldin is also recognized as one of the nation's leading authorities in municipal finance. This is obviously attributable to his work for New York City, but he also has taught extensively on the subject at institutions ranging from Columbia Law School to New York University's Graduate School of Business.

and then attended Harvard Graduate School and Yale Law School. Upon receiving his law degree from Yale, he went to work for the United States Department of Justice as a civil rights lawyer, where he handled education and voting rights cases for the government during the height of the American civil rights movement.

It was during this time that James Meredith, an African-American student, decided that he wanted to attend the

During an unprecedented sixteen years as New York City's comptroller, Goldin led America's largest city through the biggest municipal restructuring in history.

In the last several years, Goldin has had several significant assignments that relate to municipal distress. For example, Goldin is playing a major role in the bankruptcy of Jefferson County, the largest Chapter 9 bankruptcy in U.S. history. In that case, he is leading his firm's engagement as financial advisor to the indenture trustee for approximately $3 billion in warrants issued by the county. Goldin is assisting the indenture trustee in litigation relating to the indenture and the right of warrantholders to be paid. Jefferson County has attempted to withhold money due to the warrantholders and use it for other purposes, effectively suspending payments to warrantholders. At a two-day trial this year, Goldin testified in support of the indenture holders. The bankruptcy court subsequently ruled that Jefferson County could not reduce or suspend the payments in the proposed manner.

Goldin's role on the national stage began well before his career in municipal government. He graduated summa cum laude from Princeton University in 1957

University of Mississippi. Segregated since Reconstruction, the University of Mississippi had for 100 years refused to educate African Americans. Meredith had applied twice for admission to the university and twice had been rejected. He sued, and his case eventually made its way to the Supreme Court, which ruled that he had a constitutional right to be admitted.

Anticipating the uproar that Meredith would face when he arrived on campus in the fall of 1962, U.S. Attorney General Robert Kennedy sent Goldin to the university to become Meredith's roommate. "Kennedy felt that Meredith should have a young government lawyer living with him in his dormitory room," Goldin recounts. "I was the liaison between Meredith and [Deputy Attorney General] Nick Katzenbach. My job was to coordinate Meredith's college activities with all the security forces the government had sent in to protect him on the campus of Ole Miss, which included the

continued on page 6

TOUSA, *from page 2*

as an economic benefit.

"Contrary to the Bankruptcy Court's legal conclusion, the indirect, intangible, economic benefits, including the opportunity to avoid default, to facilitate the enterprise's rehabilitation, and to avoid bankruptcy, even if it proved to be short lived, may be considered in determining reasonably equivalent value," wrote Gold, noting that it is enough that the transaction left the conveying subsidiaries "in a better position to remain as going concerns than they would

have been without the settlement."

In sum, the Eleventh Circuit held that the bankruptcy court's factual findings were accurate and should not have been reversed by the district court.

The Eleventh Circuit rejected the district court's finding that corporate subsidiaries had received "reasonably equivalent value" when they encumbered their assets to secure a loan made to them and their corporate parent.

Agreeing with the bankruptcy court's

continued on page 8

Calendar

Beard Group
19th Annual Conference on Distressed Investing
November 26, 2012
The Helmsley Park Lane Hotel
New York, NY
Contact: (240) 629-3300

American Bankruptcy Institute
18th Annual Rocky Mountain Bankruptcy Conference
Four Seasons Hotel Denver
Denver, CO
January 24–25, 2013
Contact: www.abiworld.org

New York Institute of Credit and the Association of Insolvency and Restructuring Advisors
8th Annual NYIC/AIRA Joint Bankruptcy and Restructuring Event
January 31, 2013
Arno's Ristorante
New York, NY
Contact: www.aira.org

Turnaround Management Association
2013 TMA Distressed Investing Conference
February 6–8, 2013
Bellagio
Las Vegas, NV
Contact: www.turnaround.org

Turnaround Management Association
TMA Spring Conference
April 10–12, 2013
JW Marriott Chicago
Chicago, IL
Contact: www.turnaround.org

International Association of Restructuring, Insolvency & Bankruptcy Professionals
Ninth World Congress of INSOL International
May 19–22, 2013
The Hague, The Netherlands
Contact: www.insol.org

¤

Special Report

Nation's Largest Claims Administrators

Firm	Key Contacts		Recent Cases
AlixPartners Information Management Services Dallas, TX www.alixpartners.com	Carrianne Basler Todd Brents Michelle Campbell Ross Meade Monger	Barry Folse David Head John Franks Bryan Porter	Kodak, Patriot Coal, Energy Conversion Devices, RE Loans, Nebraska Book Co, United Retail, Think3, Innkeepers Trust, AHL, Victor Valley Community Hospital, Movie Gallery, Trico Marine, Delta Financial, Nellson Nutraceutical, Motors Liquidation, Madoff, Lyondell, Solyndra, Centaur, Arbonne, ASARCO, Texas Rangers.
BMC Group Los Angeles, Minneapolis, New York, London www.bmcgroup.com	Tinamarie Feil		Dickinson Theatres, TWG Capital, Piccadilly Restaurants, FiberTower Network Services, Hess Industries, GameTech International, Cano Petroleum, Community Memorial Hospital, CCG Liquidation, Coach Am Group Holdings.
CPT Group, Inc. Irvine, CA Tel (800) 542-0900 www.cptgroup.com	Henry Arjad Julie Green	Timothy Phillips Mike Moore	Safeway, Jack in the Box, UPS, Barclays, LA Fitness, 24 Hour Fitness, AHS-White Memorial.
Donlin Recano New York, NY, Chicago, IL www.donlinrecano.com	Alexander Leventhal Andrew Logan	Scott Stuart	Ames Department Stores, Bakers Footwear Group, Betsey Johnson, Butler Services International, Chef Solutions Holdings, Daffy's, First Place Financial Corp., Food Processing Liquidation Holdings, Morgan Industries, The Penn Traffic Company, Saab Cars North America, Tanner and Haley Destination Clubs, United Retail Group.
Epiq Bankruptcy Solutions NY, Del., Hartford, Chicago, LA, Portland, Phoenix, London, Hong Kong, Brussels www.epiq11.com	Lorenzo Mendizabal James Katchadurian	Jane Sullivan W. Lance Wickel	AMR Corporation, Dewey & LeBouef, Lehman Brohters, MF Global, Noretel Networks, Residential Capital, Tribune Company, Bicent Power, Buffets Inc, Contract Research, Daytop Village, Dynegy, Hawker Beechcraft, International Media, K-V Pharmaceutical, LSP Energy, Pinnacle Airlines, Satcon Technology.
GCG Lake Success, NY www.gcginc.com	Karen B. Shaer Jeff Stein Angela Ferrante	Emily Gottlieb Greg Haber	AMR Corporation (a/k/a American Airlines Inc.), General Maritime Corporation, Patriot Coal Corporation, MF Global Holdings, Arcapita Bank B.S.C., America West Development, Inc., SP Newsprint Holdings, Ener1, Inc., CHL, Ltd., The Fuller Brush Company, US Fidelis, Inc., Securities National Properties Funding III, Northern Berkshire Healthcare, ShoreBank Corporation, Spectrum Healthcare.
KCC www.kccllc.com	Eric Kurtzman Jonathan Carson Michael Frishberg	Benjamin Schrag Bryan Butvick Howard Blaustein Francine Gordon	Residential Capital, LightSquared Inc., ATP Oil & Gas,Catalyst Paper, Houghton Mifflin Harcourt Publishing, WP Steel Venture, Energy Conversion Devices, Global Aviation Holdings, Hostess Brands, Vertis Holdings, Reddy Ice Holdings, Cinram International, Trident Microsystems, Circus and Eldorado Joint Venture, AFA Investment
Logan & Company Upper Montclair, NJ loganandco.com	Kathleen Logan	Melissa Mendez	RHI Entertainment, Open Range Communications, Amelia Island Company, Barzel Industries, BNA Subsidiaries, Condustrial, Freedom Communications Holdings, Goody's, Goody's Family Clothing, JGW Holdco, MPC Computers, PNG Ventures, PPM Technologies Holdings, PTC Alliance Corporation, Spectrum Jungle Labs Corporation, True Temper Sports, Verso Technologies, Schutt Sports, Specialty Products Holding Corporation, Winn-Dixie Stores, Christ Hospital, a New Jersey not-for-profit Corporation, Northstar Aerospace (USA), A123 Systems.
Rust Consulting/Omni Bankruptcy Woodland Hills, CA, New York, NY www.omnimgt.com	Brian Osborne Paul Deutch Eric Schwarz	Mitch Ryan Nellwyn Voorhies Katie Nownes	City of San Bernardino, Allied Auto Group, Peregrine Financial Group, Tully's Coffee, Fast Ship, Dewey & LeBeouf (committee), MF Global (committee), Perkins Marie Callenders, Innkeepers USA, Mervyn's Holdings, LLC, Metropark USA, Lehr Construction, Molecular Insight Pharmaceuticals, Blockbuster (committee), Barnes & Noble (committee), Harry & David (committee), Round Table Pizza (committee), Crystal Cathedral (committee).
X Roads Santa Ana, CA www.xroadsllc.com	Kathryn Tran	Tauheed Williams	Axium International,CyberDefender Corporation, Factory 2-U Stores, Fresh Choice, Gardenburger, Intrepid USA, M Waikiki, New Century TRS Holdings, People's Choice Home Loan, Inc. (Creditor's Committee)Receivership for McKnight and Legisi Holdings, Renaissance Surgical Arts at Newport Harbor, SunCor Development Company, Tanner and Haley Destination Clubs, Zante, Inc. ¤

Worth Reading

Panic on Wall Street: A History of America's Financial Disasters

Author: Robert Sobel
Publisher: Beard Books
Softcover: 469 pages
List Price: $34.95

"Mere anarchy is loosed upon the world, the blood-dimmed tide is loosed, and everywhere the ceremony of innocence is drowned; the best lack all conviction, while the worst are full of passionate intensity." With this quote by William Butler Yeats, Sobel thus begins his terrific book on the nation's history with financial catastrophes.

First published in 1968, *Panic on Wall Street* covers 12 of the most painful episodes in American financial history between 1792 and 1962. Author Robert Sobel chose these particular cases, among several dozen, to demonstrate the complexity and array of settings that have led to financial panics, and to show that we can only make "the vaguest generalizations" about financial panic as a phenomenon. In his view, these 12, which had been neglected by other financial historians, all had a great impact on Americans of the time. In Sobel's view, "they were dramatic, and drama is present in most important events in history." The panics he writes about are:

- William Duer Panic, 1792
- Crisis of Jacksonian Finances, 1837
- Western Blizzard, 1857
- Post-Civil War Panic, 1865-69
- Crisis of the Gilded Age, 1873
- Grant's Last Panic, 1884
- Grover Cleveland and the Ordeal of 1893-95
- Northern Pacific Corner, 1901
- The Knickerbocker Trust Panic, 1907
- Europe Goes to War, 1914
- Great Crash, 1929
- Kennedy Slide, 1962

Sobel tells us there is no universally accepted definition of financial panic. He quotes William Graham Sumner, who died long before the Great Crash of 1929, describing a panic as "...a wave of emotion, apprehension, alarm. It is more or less irrational. It is superinduced upon a crisis, which is real and inevitable, but it exaggerates, conjures up possibilities, takes away courage and energy." Sobel could find no "law of panics" which might allow us to predict them, but notes their common characteristics. Most occur during periods of optimism ("irrational exuberance?"). Most arise as "moments of truth," after periods of self-deception, when players not only suddenly recognize the magnitude of their problems, but are also stunned at their inability to solve them. He also notes that strong financial leaders may prove a mitigating factor, citing Vanderbilt and J.P. Morgan. Sobel concludes by saying that although financial panics have proven as devastating in some ways as war, and while much research has been carried out on war and its causes, little research has been done on financial panics. *Panic on Wall Street* stands as a solid foundation for later research on the topic. ¤

Robert Sobel was a prolific historian of American business life, writing or editing more than 50 books and hundreds of articles and corporate profiles. He was a professor of business at Hofstra University for 43 years and held a Ph.D. from New York University.

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

Goldin, *from page 4*

U.S. Army, the U.S. Border Patrol, U.S. Prison Guards, the U.S. National Guard, the FBI, and the U.S. Marshal Service."

The extraordinary security was necessary. Outside agitators converged on the university and students rioted en masse. The riots resulted in several deaths and hundreds of injuries to U.S. law enforcement personnel, but Meredith and the civil rights movement prevailed.

After leaving the Department of Justice, Goldin returned to New York and practiced law at Davis Polk. Goldin was at Davis Polk when he decided to run for the New York Senate. "My experience at the Justice Department from 1961 to 1963 was really the impetus for my deciding to spend at least part of my career in public service," says Goldin. Taking on an entrenched incumbent supported by the New York political machine, Goldin was elected in an upset. He represented a portion of the Bronx for many years before setting his sights on the position of comptroller of New York.

During his sixteen years as comptroller, Goldin revamped how the city dealt with its finances, an experience he has brought to bear on his work in the current nationwide municipal finance crisis. "New York City's management information, financial information, and oversight mechanisms are now among the most robust in the country," says Goldin. "At the first sign of difficulty, the facts are made known, thereby reducing the risk that bad news will be papered over or camouflaged. Should there be any indications of early-onset distress, those symptoms can be dealt with promptly."

"I've been fortunate in having had such a varied career," observes Goldin. "Part of what has made my work so enjoyable is that the substance, challenges, and rewards in each of my jobs have been so different."

Goldin's advice to others hoping to emulate his success: "You need to immerse yourself in the details of the substance, not try to fake it. Make sure you are fully prepared and do nothing to compromise your integrity."

Goldin is entertaining no thoughts of retiring. "I'm lucky to be the son of a father who died at 100 and was fully *compos mentis* the day he left us. I enjoy what I do, and as long as the Lord spares me, I'll continue working." ¤

Special Report

Outstanding Turnaround Firms – 2012

Firm	Senior Professionals		Outstanding Achievements
AlixPartners New York, NY www.alixpartners.com	John Castellano Lisa Donahue Holly Etlin Alan Holtz	David Johnston James Mesterharm Rebecca Roof Larry Young	Advisor and/or interim manager to Contec Holdings, DeepOcean Group Holding AS (TMA's "International Turnaround of the Year"), Eastman Kodak, Patriot Coal, Provo Craft and Novelty, ResCap creditors' committee, SP Newsprint, Synagro Tech.
CDG Group (formerly Conway, Del Genio, Gries & Co.) New York, NY www.cdggroup.com	Michael Gries Robert Del Genio Benjamin Jones Michael Monaco	Eric Ek Christine Kim Michael Meenan William McManus	Interim CEO/CRO and CFO of ATI Enterprises; interim CEO of Panavision; interim CFO of Hines Growers; CRO of Boston Generating; advisor to The Cooper Union, Hart Schaffner Marx, leading trans. logistics company, leading prefab housing mfr.
Conway MacKenzie, Inc. Detroit, MI www.conwaymackenzie.com	Van E. Conway Donald S. MacKenzie A. Jeffrey Zappone Joseph M. Geraghty	Charles M. Moore Gregory A. Charleston John T. Young Jr. Lawrence R. Perkins	Receiver for Turkington USA; CRO of Dippin Dots; CRO of Delta Petroleum Corp., helping preserve over $1 billion of net operating losses under 382(1)(5) for buyers; CRO of RG Steel, one of largest U.S. steelmakers; CRO of Bristol Compressor.
Development Specialists, Inc. Chicago, IL dsi.biz	William A. Brandt, Jr. Fred C. Caruso Patrick J. O'Malley Robert B. Weiss	Bradley D. Sharp Joseph J. Luzinski Geoffrey L. Berman Steven L. Victor	CRO, Ruden McClosky, HearUSA, and BankUnited Financial Corp.; Act 47 Coordinator, Altoona, PA; Chief Admin. Officer, Sonoma Valley Bancorp; FA, Dewey & LeBoeuf and Howrey; CRO /COO, Giordano's; Plan Admin., Coudert Brothers.
FTI Consulting, Inc. New York, NY www fticonsulting.com	Michael Buenzow Keith Cooper Bob Duffy Michael Eisenband	Ron Greenspan Kevin Lavin Bob Medlin Carlyn Taylor	CRO, Digital Domain Media Group, Food Service Holdings, Hostess Brands; FA, Residential Capital, MF Global, Dynegy Holdings, FiberTower; Represent UCC of Arcapita, Friendly's Ice Cream, Hawker Beechcraft; Represent lenders of Patriot Coal.
Getzler Henrich & Associates New York, NY www.getzlerhenrich.com	Joel Getzler William Henrich Peter Furman George Gerstein	Marjorie Kaufman Frederick Langer Frank Melazzo Colleen Palmer	CRO of $500MM road construction company, Kurt Weiss Greenhouses, Leedom Financial/AutoMax of Georgia/Y2K, major private equity firm, major pharmaceutical marketing company, National Envelope Corp., OneStar Long Distance.
GlassRatner Advisory and Capital Group Atlanta, Chicago, Florida, California, New York www.glassratner.com	Ron Glass Ian Ratner Steve Kunkel Tom Santoro	Mike Issa Evan Blum Margaret Smith Sam Hewitt	CRO of PJ Finance; FA to indenture trustee/holders of Travelport; CRO/FA to AmTrust Bank Holding Co., FA to Gibraltar Capital on portfolio restructurings and acquisition operations; FA to Fairfield Residential creditors' committee.
Goldin Associates New York, NY www.goldinassociates.com	Harrison J. Goldin David Pauker Marti Murray Seymour Preston Jr.	Rob Vanderbeek David Prager Gary Polkowitz Erik Graber	Company advisor or interim manager to: Dewey & LeBoeuf, Fletcher Asset Management, PMI, Thornburg Mortgage, Madoff, ChemRx, Ellen Tracy, Bearing Point. Creditor/lender/comm. advisor to Jefferson County, Ocala, MBIA, Fiber Tower.
Huron Consulting Group Chicago, IL www huronconsultinggroup.com	John DiDonato Hugh Sawyer Dawn Gideon Dan Wikel	David Bitterman Geoff Frankel Laura Marcero Jeffrey Beard	CRO: Kazi Foods of New York, New United Motor Manufacturing, LifeCare Hospitals, Doctors Medical Center, Richfield Equities; Financial Advisor to Allen Systems Group, Ally Financial, Revstone Industries, RG Steel.
Mesirow Financial Consulting New York, NY www mesirowfinancial.com/mfc	Ralph Tuliano Larry Lattig Jim Feltman Jack Williams	Jim Atkinson Steve Darr Melissa Kibler Knoll Kevin Krakora	FA to examiner in Residential Capital. FA to UCC: AMR Corporation, Chef Solutions, Patriot Coal, Nebraska Book Company. FA to online marketing and advertising services company. Interim mgmt. to major pharmaceutical company.
Sitrick Brincko Group Santa Monica, CA www.brincko.com	John Brincko Thora Thoroddsen Alan Faigin	Paul Meyaart Yolanda Hoelscher James Cunningham	CRO of FLO TV; Advisor to AIG re food co.; advisor to Fortune 50 co. re h-tech subsidiary; expert witness for major financial institution in $2+ billion damages claim; Liq. trustee for Franchise Pictures; expert witness in a major real estate litigation.
Zolfo Cooper New York, NY www.zolfocooper.com	Joff Mitchell John Boken Scott Winn Sherman Edmiston III	Kevin Nystrom David Orlofsky Mark Rechan	CRO of Dewey & LeBoeuf, American Laser Centers; Advisor or interim manager to BCBG Max Azria, Blitz USA, Cinram International, Friendly's, Marco Polo Seatrade BV, Southern Air; FA to Dynegy trustee; Advisor to committee in Kodak, AMR.

TOUSA, *from page 4*

earlier 2009 decision, the Eleventh Circuit held that the "bankruptcy court did not clearly err" and the subsidiaries "did not receive reasonably equivalent value for the liens" they had granted to the so-called term lenders.

According to the Eleventh Circuit, because of the admitted insolvency of the subsidiaries, the plaintiff committee only had to prove under the Bankruptcy Code that they received less than reasonably equivalent value in exchange for the liens on their assets – and that wasn't the case. "The dispute in the lower courts was whether indirect economic benefits (e.g., avoidance of bankruptcy by the subsidiaries) constituted 'value' and, if so, whether that value was reasonably equivalent to the obligations incurred by the subsidiaries," says Michael L. Cook, a partner at Schulte Roth & Zabel LLP. "Declining to adopt either lower court's definition of 'value,' the court of appeals instead deferred to the bankruptcy court's reasoning. Even if the subsidiaries received some value in the form of indirect economic benefits in the 2007 settlement, they failed to receive 'reasonably equivalent value' for the $403 million in obligations that they incurred."

The Transeastern Lenders and term lenders argued that the subsidiaries had benefited from the 2007 transaction by avoiding an earlier bankruptcy. According to the court, however, "assuming that all of the TOUSA entities would have spiraled immediately into bankruptcy without the July 31 transaction, the transaction was still a more harmful option." And, the Eleventh Circuit believed the subsidiaries' bankruptcy filing was "inevitable" based on the circumstances at the time of the July 31 settlement payment to the Transeastern Lenders. Therefore, any "benefits to the…subsidiaries were not close to being reasonably equivalent in value to the $403 million of obligations…they incurred," wrote the Eleventh Circuit.

Once the liens were avoided, the bankruptcy court allowed the recovery of property from the initial transferee or an entity for whose benefit such transfer was made (called a transfer beneficiary).

The bankruptcy court held that the Transeastern Lenders were transfer beneficiaries because the loan transaction was intended for its benefit.

The Transeastern Lenders disagreed, arguing that it was not a transfer beneficiary of the initial transfer (the grant of liens) but of the loan proceeds.

"The distinction between transfer beneficiary liability and subsequent transferee liability was critical because only a subsequent transferee can avail itself of a good faith defense," says Cook.

The Eleventh Circuit agreed with the bankruptcy court because the Transeastern Lenders directly received the benefit of the new loans and "the transaction was undertaken with the unambiguous intent that they would do so."

According to the Eleventh Circuit, the loan documentation showed that when the subsidiaries granted liens to the term lenders, the loan proceeds went through a conduit entity directly to the Transeastern Lenders, but not through the parent, TOUSA. "The Transeastern Lenders, in the court's view, should have questioned the source of the payment, exercised 'some diligence,' and apparently should have rejected payment," says David M. Hillman, also a partner at Schulte Roth & Zabel LLP.

Thus, once the bankruptcy court had avoided the subsidiaries' grant of liens, it directed the return of $403 million from the Transeastern Lenders. It also imposed damages and ordered the disgorgement of professional fees.

The Eleventh Circuit's TOUSA decision is not the typical upstream guaranty fraudulent transfer case, say Cook and Hillman.

"It essentially holds that a secured 'rescue loan' to help a troubled company avoid bankruptcy will probably not constitute reasonably equivalent value," says Cook, pointing to the Eleventh Circuit's statement that "the opportunity to avoid bankruptcy does not free a company to pay any price or bear any burden."

Additionally, says Hillman, and even more provocative, was the Eleventh Circuit's casual warning to lenders that "every creditor must exercise some diligence when receiving payment from a struggling debtor [and] when it is being repaid hundreds of millions of dollars by someone other than its debtor."

Essentially, say Cook and Hillman, the Eleventh Circuit – with no supporting authority – ignored the district court's reliance on case law, which cautioned against imposing exhaustive duties to investigate upon banks and other creditors.

"The litigation will continue on remand," says Hillman. "But the lenders here have an uphill fight."

"It's an important decision, but I think it will have limited impact on the industry as a whole," says Nicholas M. Miller, a partner at Neal Gerber & Eisenberg LLP.

The first reason, offers Miller, is that the decision is limited to the Eleventh Circuit. "I think there's probably a good chance that the court's reasoning won't be adopted outside the Eleventh Circuit," he says. "Though anecdotal, the commentary I have seen is much more sympathetic to the district court's reasoning than to the Eleventh Circuit opinion overturning that district court decision. So, you may not see other jurisdictions following the Eleventh Circuit's lead."

Second, adds Miller, the decision is very fact specific. "The whole issue in TOUSA was whether you could have a fraudulent transfer in the context of a potential indirect benefit to the debtor subsidiary. But that issue disappears entirely when the subsidiary receives a direct benefit from the transaction."

Third, he continues, even if the subsidiary receives no direct benefits from the transfer, "the Eleventh Circuit opinion still leaves open the possibility that indirect benefits could qualify as reasonably equivalent value." He further notes that the Eleventh Circuit established no test and provided no guidance to bankruptcy courts evaluating the value of any such indirect benefits.

Finally, future drafters of these types of loan transactions will probably just draft around the problem, says Miller. "They can make sure there's some sort of direct benefit to the subsidiary. They can do more diligence to ensure that a subsidiary is not insolvent or made insolvent by the transaction. Or, they can include a fraudulent conveyance savings clause that gets the parties to warrant that they won't be made insolvent by the loan." ¤

In sum, the Eleventh Circuit held that the bankruptcy court's factual findings were accurate and should not have been reversed by the district court.

Debt, *from page 2*

premise of a much larger operation, and sale proceeds may not be available as a source of capital," says Winikka

The viability of a reinstatement plan may also be an issue if the debtor's financial situation is precarious – specifically, if the debtor projects little cushion in its ability to meet future financial covenants or if it's possible that the debtor may not be able to pay or refinance the reinstated debt at maturity.

Lenders may also be wary of reinstatement, says Winikka. Although the lender receives the full benefit of its original bargain, it may be hoping that a default will provide an opportunity to renegotiate to prevailing market terms. "Because of the inability to renegotiate to current market rates, lenders may view reinstatement of their debt as the functional equivalent of a coerced loan."

Indeed, according to Winikka, outcomes of debt reinstatement typically depend upon whether the court is convinced the lender is essentially receiving the benefit of its original bargain.

Winikka points to two recent decisions by the Bankruptcy Court for the Southern District of New York decisions – in *Charter Communications* and *Young Broadcasting* – to illustrate how courts perceive whether a lender is receiving the benefit of its bargain. "The contrasting outcomes in these two cases, which involved very similar issues, likewise provide valuable lessons on issues associated with reinstatement," says Winikka.

In the first case, Charter Communications prior to bankruptcy developed a restructuring strategy premised on reinstating its senior debt to take advantage of a favorable interest rate.

However, a change-in-control provision in the credit agreement required Charter's controlling shareholder, Paul Allen, to retain at least 35 percent voting power over Charter's board of directors, and to retain more voting power than any other person or group.

Thus, Charter's prepackaged Chapter 11 plan proposed a settlement with Allen wherein he would retain 35 percent of the voting power and receive approximately $375 million, but retain no meaningful ongoing economic interest in the reorganized company.

JPMorgan Chase Bank, agent for the senior lenders, attempted to prevent the deal by arguing that the plan would violate the credit agreement's change of control provisions. Specifically, JPMorgan Chase Bank argued that the credit agreement required Allen to retain an ongoing economic interest as well as 35 percent voting interest, and that four bondholders constituted a "group" that together had 38 percent voting rights, more than Allen.

The court found that the requirement that Allen have 35 percent of the voting power did not require that he have a commensurate ongoing economic interest. As to JPMorgan Chase Bank's second argument, the court ruled that the four bondholders did not constitute a "group" for purposes of the credit agreement because there was no proof that they had reached any formal agreement, or that any such agreement would matter. Charter was thus successful in reinstating its debt.

After *Charter Communications*, another Chapter 11 debtor, Young Broadcasting, attempted to reinstate its senior debt in a similar manner.

"Reinstatement can be attractive to a reorganizing company if the loans are at a favorable interest rate and have some period left before maturity."

In *Young Broadcasting*, the official committee of unsecured creditors proposed a plan of reorganization that provided for, among other things, reinstatement of the senior secured debt.

The credit agreement required Young to retain control of at least 40 percent of voting stock. In the event of a triggering default, the plan granted Young all Class B stock in the reorganized company, which shares would be entitled to cast over 40 percent of the total number of votes for the directors, but only permitted Young to elect one of the seven directors.

The lenders, in turn, argued primarily that reinstatement was not permitted because the plan violated the credit agreement's change-of-control provision.

This time the court sided with the lenders on the grounds that the benefit of the bargain and the plain meaning of the credit agreement required Young to have the power to influence 40 percent of the composition of the board – not simply the power to cast 40 percent of the total votes for directors.

The next issue of *Turnarounds & Workouts* will offer advice for restructuring professionals wishing to formulate a restructuring transaction around a reinstatement plan. ¤

In the Next Issue…

- *Special Report: Sources of DIP Financing*
- *Special Report: Outstanding Restructuring Lawyers – 2012*
- *Research Report: Who's Who in Digital Domain Media Group*

Turnarounds & Workouts is published monthly by Beard Group, P.O. Box 4250, Frederick, MD 21705 (240) 629-3300. Fax (240) 629-3360. ISSN 0889-1699. Publisher: Christopher Beard. Editor: Nina Novak (nina@beard.com). Assistant Editors: David Buzzell, Julie Schaeffer, Francoise C. Arsenault. Subscription Rate: $397/year. Send comments and coverage suggestions to above address or david@beard.com.

BEARD GROUP
LAW & BUSINESS PUBLISHERS