turnarounds & workouts

News for People Tracking Distressed Businesses

SEPTEMBER 2011 VOLUME 25, NUMBER 8

Inside

Bye Bye, Borders

Book Retailer Couldn't Compete in Changing Industry

by Julie Schaeffer

Borders Group, Inc., the second-largest U.S. book retailer, has won bankruptcy court approval to liquidate, effectively spelling the end of the road for the 40-year-old business. The move came as no surprise to many. In the words of George Mason Economist Tyler Cowen, "not one single investor, in the whole wide world, thought Borders had a real economic future."

The reason, says Schuyler Carroll, a partner with Perkins Coie's business practice, is the same as it has been for a number of other businesses that have filed for bankruptcy in the past few years: They couldn't compete in a changing industry. As other examples, Carroll points to Blockbuster, Books-a-Million, and even Circuit City. "Although Circuit

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New Rules of the Game?

LA Dodgers Owner Uses Bankruptcy To Regain Control

by Dave Buzzell

The basic rules governing the game of baseball are set in stone. Four balls. Three strikes. Three outs. Nine innings.

The rules governing the business of baseball and, more broadly, all professional sports, are another story. The rules are often what the league say they are.

Thomas J. Salerno, co-Chair of Squire, Sanders & Dempsey's International Restructuring Group, knows better than anyone the challenge this presents to bankruptcy attorneys. Salerno was lead counsel for the Phoenix Coyotes professional hockey team when it battled the National Hockey League (NHL) in 2009 over rights that most business owners take for

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Emivest Deal Takes Off

DIP Financing from an Unlikely Source: Liquidators

by Julie Schaeffer

After more than 30 lenders declined to provide DIP financing to Emivest Aerospace, the company obtained the necessary financing from an unlikely source: liquidators.

"The creative structure of the DIP loan provided Emivest both the short-term liquidity it needed to afford it an opportunity to be sold as a going concern in the Chapter 11 case and a backstop to maximize the value of its assets in the event of a liquidation," says Gary Leibowitz, a member of the bankruptcy and corporate restructuring practice at Cole, Schotz, Meisel, Forman & Leonard, P.A.

Emivest, a business jet manufacturer, was formed when Emirates Investment and Development purchased 80 percent of Sino Swearingen Aircraft's shares in 2008. The

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City isn't in the same kind of dying industry as Borders, it did have a much smaller target market than it did 10 years ago, when everyone went to the store to buy electronic equipment," he says. "Now everything is at the Apple Store or online. Circuit City didn't have the ability to continue to stock its stores with the latest stuff, and unless it's the latest stuff, people don't want to pay full value for it, so they buy it on Amazon.com or eBay."

Borders, which was founded in 1971 in Ann Arbor, Michigan, had 203 stores by 1997, but was unable to compete with larger rivals Barnes & Noble and Amazon.com, which began to dominate the retail book business when the industry shifted most of its business online.

According to Carroll, Borders hoped to take advantage of a good working relationship with its vendors, which consisted primarily of large book publishers, as party supply retailer Oriental Trading did in its 2010 bankruptcy filing. But Borders, says Carroll, "was never able to develop the same relationship with its vendors, and that, as the company described it, was the reason they had to file for bankruptcy."

"Ultimately, it became clear that Borders had to find a buyer to move forward, and while the company attracted some interest from parties with sufficient cash, those parties decided they weren't interested," says Carroll, speaking partly of potential buyout firm Najafi Cos, which owns the Book-of-the-Month Club, and was willing to pay $215 million in cash and take on another $220 million in liabilities to acquire Borders.

The deal fell apart when creditors objected to terms that would have allowed Najafi to liquidate after completing the sale.

"When you have a company that's not generating enough cash flow to meet its obligations, and you don't have an equity or lender group interested in funding it through a turnaround, there's not much you can do but find a buyer and liquidate," says Carroll. Ultimately, the company sold itself to a group of liquidators led by Hilco Merchant Resources. Borders' roughly 400 remaining stores will close, and nearly 11,000 jobs will be lost, reports the company.

According to Carroll, in this case the

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granted, such as the right to take the best deal on the table.

In the Coyotes case, the owner wanted to sell the team to Jim Balsillie, who planned to move the team from Phoenix to Hamilton, Ontario. The NHL opposed the move without the unanimous vote of every other team in the league. The Coyotes, which had lost a total $300 million in the fifteen years in Arizona since moving from Winnipeg, filed for bankruptcy and asked the judge to approve the sale to Balsillie. Squire Sanders filed an antitrust action against the NHL in the bankruptcy case, arguing that the unanimous vote requirement gave, in effect, every team in the league a veto power over the owner's decision, including any team that stood to profit at the Coyotes' expense.

The NHL said it had several buyers for the team who would keep the team in Arizona, but none ultimately surfaced. As a scheduled auction neared at which the only bidder would be Balsillie, the NHL submitted its own offer to buy the team for $100 million less than Balsillie's offer.

As Salerno recounts, "In any other bankruptcy where there are two buyers that are $100 million apart, there wouldn't even be a question as to which one would be picked. After all, the maxim of bankruptcy cases is the maximization of asset value for all concerned. Not so in sports team bankruptcies."

In the sports world, however, normal rules of business don't always apply. The NHL eventually prevailed, and, for the first time in its 90-year plus history bought one of its own teams.

"The Coyotes case," says Salerno, "was about using a bankruptcy process to overrule a league veto over who was going to own the team and where they were going to play. Those were very high hurdles to overcome and, in fact, we didn't overcome them. It was the first time a bankruptcy was used for this express purpose."

Today, Salerno is an intrigued observer of the drama unfolding in the Los Angeles Dodgers bankruptcy case pending in Delaware, where its owner, Frank McCourt, has resorted to a bankruptcy filing in an effort to wrest control of his team and its operations away from Major League Baseball (MLB) and its Commissioner, Bud Selig.

McCourt is also battling his wife in

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renamed firm vowed to inject $1 billion into the company to expand its product line, but in October 2010 it filed for Chapter 11 protection, listing $80 million in assets (including specialized aircraft in various stages of completion, tooling for the manufacturing of engines, and airport ground leases) and $77 million in debt.

In an attempt to sell the company as a going concern, Emivest sought DIP financing from traditional lenders, Hilco Industrial, Hilco Real Estate, and Counsel RB Capital. While the lenders were willing to make the loan, they had somewhat unusual requirements. Emivest had to (1) use the proceeds to work toward a going-concern sale to be consummated by an agreed-upon deadline, (2) give the DIP lenders the customary super-priority claims and liens subordinate only to permitted liens and the professional fee carveout, and (3) give the DIP lenders the exclusive right to liquidate Emivest's assets if the company defaulted or could not consummate the going concern sale in a timely manner.

"In what may be the first court-approved DIP loan of its kind, the DIP lenders obtained not only the customary super-priority claims, liens, and foreclosure rights found in most DIP loans, but also the exclusive right to liquidate the assets of the debtor and earn a commission on the sales in the event of default," says Leibowitz.

Thomas E. Pabst, President of Hyper AMS, which specializes in asset disposition for lower- to middle-market companies, says he thinks this structure served all of the stakeholders. "The liquidators provided the company much-needed capital to get through a sale process, and was only trying to protect its loan through the right to conduct a liquidation," Pabst says. "As long as the debtor did its homework to ensure that the commission and expense structure in the loan agreement was reasonable and at 'market rates,' so to speak, it seems as if the stakeholders should have been happy with the arrangement."

Still, there was significant opposition to the DIP financing. The official committee of unsecured creditors and the U.S. Trustee's office both objected on the grounds that the DIP lenders would be acting as both lenders and liquidators.

"The unsecured creditor's committee and the U.S. Trustee's office argued that Section 327 of the Bankruptcy Code

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Research Report

Who's Who in Perkins & Marie Callender's Inc.

by Francoise C. Arsenault

Perkins & Marie Callender's Inc. (PMCI) operates or franchises more than 500 family restaurants in the United States, Canada, and Mexico under the brand names Perkins Restaurant & Bakery and Marie Callender's Restaurant & Bakery. The company also licenses food products for sale in retail grocery stores. The New York-based investment firm Castle Harlan, Inc. acquired Marie Callender's in 1999 and Perkins in 2005 for $245 million in cash. In 2006, Castle Harlan joined the two companies. Based in Memphis, Tennessee, PMCI has about 14,000 employees.

Founded in 1958 in Ohio as a pancake house, Perkins is the leading operator and franchisor of more than 400 restaurants located primarily in the Midwest, Pennsylvania, and Florida. With a presence in 34 states and 5 Canadian provinces, Perkins offers a wide menu selection of high quality, moderately priced breakfast, lunch, dinner, snack, and dessert items. The company also has a bakery goods manufacturing division, Foxtail Foods, which manufactures pies, pancake mix, cookie dough, and muffin batters for Perkins' in-store bakeries and third parties.

The legacy of Marie Callender's began in the early 1940s when Marie Callender first launched her legendary pie business. In 1948, her home-based bakery became a bona fide business in Orange County, California. With 92 company and 42 franchised full-service restaurants, Marie Callender's serves up a variety of classic American foods. The company is famous for its fresh-baked pies and has a national presence through its licensed supermarket frozen entree lines.

On June 13, 2011, Perkins & Marie Callender's Inc. and 11 of its subsidiaries filed for Chapter 11 reorganization in the United States Bankruptcy Court for the District of Delaware. Company officials cited the languishing economy as the primary factor leading to the restructuring, including declines in consumer confidence, sluggish consumer spending, and increased commodity costs. PMCI sales in the 2010 third quarter fell to $108.7 million from $115.5 million a year earlier as the net loss widened to $12.3 million from $11.2 million. In its bankruptcy filing, PMCI listed assets of approximately $290 million and debts of approximately $441 million.

On July 14 and July 15, 2011, respectively, PMCI filed a joint Plan of Reorganization and Disclosure Statement incorporating a restructuring support agreement entered into by the company with holders of 100 percent of the company's 14 percent senior secured notes and more than 80 percent of the holders of the company's 10 percent senior notes.

On July 12, the bankruptcy court entered a final order authorizing PMCI to access funds under a $21 million DIP financing credit facility. If approved, the plan of reorganization provides that PMCI will obtain exit financing of up to $35 million, which will replace the $21 million DIP financing. Company officials have stated that they will close about 75 underperforming restaurants and eliminate about 2,500 jobs. The company expects to exit bankruptcy by the fall 2011.

The Debtor

Joseph F. (Jay) Trungale is President and Chief Executive Officer. **Fred T. Grant, Jr.** is Executive Vice President and Chief Financial Officer. **Cheryl Ahlbrandt** is Executive Vice President, Marketing and Research. **Bob Winters** is Senior Vice President, Franchise Sales and Development.

Troutman Sanders, LLP is serving as the lead bankruptcy counsel to PMCI. The team includes **Mitchel H. Perkiel**, **Lee W. Stremba**, **Hollace Topol Cohen**, **Mark A. Goldsmith**, **Timothy I. Kahler**, **Mitchell P. Portnoy**, **Carolyn P. Richter**, **Richard A. Rubin**, and **Mark S. VanderBroek**, partners, and **Karl M. Zielaznicki**, of counsel.

Young Conaway Stargatt & Taylor, LLP is acting as the local Delaware counsel to PMCI. **Robert S. Brady**, a partner with the firm, directs the work.

Whitby, Santarlasci & Co. is serving as the financial advisor to PMCI. **Joseph H. Santarlasci, Jr.**, Chairman and Chief Executive Officer of the Washington, D.C. firm, leads the engagement.

Deloitte Tax LLP is providing tax advisory services to PMCI. **Vincent DeGutis**, a partner, leads the engagement.

The Creditors

The Official Committee of Unsecured Creditors includes **The Coca-Cola Company**; **Wilmington Trust Company**; **Standard General Master Fund LP**; **News America Marketing**; **Luna Family Trust**; **Northgate Station, L.P.**; and **Benjamin Monroy**.

Ropes & Gray LLP is serving as counsel to the Committee. **Mark R. Somerstein**, a partner in the firm's New York office, is working on the case.

Landis Rath & Cobb LLP is local Delaware counsel to the Committee. The team includes **Richard S. Cobb** and **William E. Chipman, Jr.**, partners.

FTI Consulting, Inc. is restructuring and financial advisor to the Committee. **Steven D. Simms**, a senior managing director with the firm, leads the engagement.

Akin Gump Strauss Hauer & Feld LLP is representing the majority noteholder, **Wayzata Investment Partners, LP. Scott L. Alberino**, a partner in the firm's Washington, D.C., office, directs the work, along with **Ira S. Dizengoff**, a partner in the New York office.

Paul, Hastings, Janofsky & Walker LLP is counsel to the PMCI pre-petition credit facility and post-petition DIP financing facility lenders. **Jesse H. Austin, III**, a partner in the Atlanta office, is working on the case.

Edward P. Zujkowski, a partner with **Emmet, Marvin & Martin LLP**, is representing the indenture trustee for the senior secured notes.

Douglas E. Spelfogel, a partner with **Foley & Lardner LLP** and head of the firm's Bankruptcy and Business Reorganizations Practice in the New York office, is serving as counsel to the indenture trustee for the senior notes.

The Trustee

The U.S. Trustee is **Roberta A. DeAngelis**.

The Judge

The judge is the **Honorable Kevin Gross**. ¤

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move was the only option. "There was good reason there weren't a lot of people interested in a turnaround," he says. "It wasn't a business you could turn around at that point. Borders could have done something early on, but they didn't, and as a result were put into a position where market forces took over the company's ability to effect change."

Although Borders blamed the turbulent economy in part on its demise, according to Carroll the company just couldn't compete in a changing business environment.

The poor decision-making started more than a decade ago. According to Borders' 2000 annual report, "our online investment will be channeled to support our in-store platform, while Borders.com will continue to be utilized as a convenience retail channel. In other words, Borders decided to invest not in its web site but in self-help computer stations in its stores. Then, starting in 2001, in an effort to lose less money, Borders outsourced its online sales to Amazon, essentially handing customers over to the bigger, better site during the most formative years of e-commerce.

Borders' poor choices continued with a miscalculation about the importance of e-readers. Amazon.com debuted its Kindle in November 2007, Barnes & Noble debuted its Nook in November 2009, and Apple debuted its iPad in April 2010. Borders, meanwhile, waited until late 2010 to debut its Kobo. (Yes, there's an e-reader called a Kobo.) While one could certainly argue that the Kindle is so dominant the Kobo wouldn't have had a chance even if was released earlier, the Nook suggests otherwise. While it's certainly less popular than the Kindle, it is competitive in the e-reader market, and Barnes & Noble's share of the e-book market is larger than its share of the paper book market in the United States.

There were other problems as well. For example, Borders didn't diversify, relying too heavily on sales of CDs and DVDs, which

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divorce court. Strapped for cash, McCourt thought he had an answer when he agreed to a $3 billion television deal with Fox Broadcasting Co. The league vetoed the contract, however, saying it was not in the best interests of baseball.

"McCourt's position is that he owns the team and he wants the broadcasting deal he negotiated to go through," says Salerno. "MLB's stated reasons for vetoing the deal is they didn't believe it was in the best interest of the team because so much money was going to flow from the deal to McCourt personally, and that the deal was made without an auction process for the rights."

Salerno believes that MLB has an unstated reason as well. "Based on my experience in the Coyotes case, the leagues, and especially

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precluded the DIP lenders from serving as both lender and liquidator because they did not satisfy the 'disinterested' requirement of Section 327, and because the Bankruptcy Code requires the appointment of a liquidator to be approved by the court," says Leibowitz.

The creditor's committee was satisfied before the final hearing to approve the DIP loan when the DIP lenders agreed to certain terms. Specifically, they agreed to place a percentage of any commission they received in the event of liquidation and a fixed portion of the redemption fee in the event of a sale transaction into a trust for the unsecured creditors.

The U.S. Trustee, however, persevered in its objection, noting that Section 327 provides that "with the court's approval," the debtor "may employ one or more attorneys, accountants, appraisers, auctioneers or other professional persons, that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist" the debtor in carrying out its duties.

"The U.S. Trustee argued that the DIP lenders were seeking to act as the debtor's liquidation agent under the terms of the loan, and thus must be approved by the court," says Leibowitz. "Furthermore, the DIP lenders could not be approved as the debtor's liquidation agent under Section 327 because, as DIP lenders, they held an adverse interest to the estate and were not disinterested as required by the statute."

The DIP lenders refuted the U.S. Trustee's argument on several grounds. First, they

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Calendar

American Bankruptcy Institute
Bankruptcy 2011: Views from the Bench
September 16, 2011
Georgetown University Law Center
Washington, DC
Contact: www.abiworld.org

The National Association of Bankruptcy Trustees
2011 Annual Conference
September 22-25, 2011
The Ritz-Carlton
Amelia Island, FL
Contact: www.nabt.org

National Conference of Bankruptcy Judges
85th Annual Conference
October 12-15, 2011
Tampa, FL
Contact: www.ncbj.org

American Bankruptcy Institute
7th Annual International Insolvency & Restructuring Symposium
October 21, 2011
The Westin Dublin
Dublin, Ireland
Contact: www.abiworld.org

Turnaround Management Association
2011 TMA Annual Convention
October 25-27, 2011
Hilton San Diego Bayfront
San Diego, CA
Contact: www.turnaround.org

Practising Law Institute
Nuts and Bolts of Corporate Bankruptcy 2011 Seminar
November 17-18, 2011
San Francisco, CA
Contact: www.pli.edu

Beard Group
18th Annual Conference on Distressed Investing
November 28, 2011
The Helmsley Park Lane Hotel
New York, NY
Contact: (240) 629-3300 ¤

Special Report

Restructuring Departments of National Accounting Firms

Firm	Senior Professionals		Representative Clients
BDO Consulting New York, NY 212-885-8340 www.bdoconsulting.com	William K. Lenhart (NY) David Berliner (NY) Marlene Rabinowitz (NY) Kevin Kaden (NY) Jerry Shapiro (NY) Richard Moskwa (NY)	Richard Hauer (NY) William Creelman (CA) Baker Smith (GA) John Kokoska (GA) Greg Baracato (TX)	Financial advisors to UCC: Borders, Jackson Hewitt, Böwe Bell & Howell, No Fear, Robb & Stucky, Raser Technologies, and KH Funding Company. Financial advisor to indenture trustee: Blockbuster and Trico Marine. Also, out-of-court workouts for lenders and companies: franchisees, retailers, and manufacturers.
Crowe Horwath Chicago, IL 312-857-7419 www.crowehorwath.com	John B. Weykamp John A. Grivetti Dennis Kalten Michael Kenny	Robin Reinhard Brian R. Chmiel Barret Bloenk	Financial advisory, interim mgmt., and bankruptcy services for debtors, creditors (secured and unsecured), and private equity groups in restructurings of middle-market businesses, including manufacturing, distribution, transportation, financial institutions, entertainment, and retail.
Ernst & Young New York, NY 212-773-3000 www.ey.com	David Williams (NY) Ivan Lehon (NY) Florence Lentini (NY) John Llewellyn (NY) Rick Haughey (Atlanta)	Rocky Ho (SF) Christopher Mack (Denver) Alicia Masse (Detroit) Michael Scott (Dallas)	Distressed companies and stakeholders across numerous industries, including Blockbuster, Borders, Calpine, Circuit City , General Motors, Laidlaw, Nortel, PJ Finance, Satellites Mexicanos, Schutt Sports, Trico Marine, White Birch.
Grant Thornton New York, NY 212-542-9730 www.grantthornton.com	Mark Toney (NY) John Bittner (Dallas) Loretta Cross (Houston) Scott Davis (Charlotte) Steve Korf (NY)	Paul Melville (Chicago) James Peko (NY) James Porter (Charlotte) Sandra Reese (Chicago) Timothy Skillman (LA)	AMBAC Financial, Flying J, Forum Health, Idearc Media, Mesa Air Group, Lower Bucks Hospital, Nassau County Interim Finance Authority, Opus West Corporation, Rubicon US REIT, St. Vincent Catholic Medical Centers, Sunbelt Steel, The Education Resources Institute (TERI), several private equity firms and international banks.
J.H. Cohn Edison NJ 732-549-0700 www.jhcohn.com	Bernard A. Katz Kevin P. Clancy Sharon Bromberg	Howard Konicov Chad Shandler Clifford A. Zucker	Creditors' committee: Amfin Financial Corp., Credit-Based Asset Securitization, Orleans Homebuilders, PFF Bancorp., RCLC, Thornburg Mortgage, TOUSA, Hudson Healthcare, The Merit Group. Debtors: Meridian Behavioral Healthcare, New Stream Secured Capital.
KPMG New York, NY 212-758-9700 www.kpmg.com	Drew Koecher (Dallas) J. Gregg Pritchard (NY) Tom Bibby (Dallas) GR Christon (Dallas) Tim Dumond (Detroit) Lou Frost (NY) Ben Gonzalez (NY)	Bill Haegele (SF) Tony Murphy (NY) Vince Pavlak (Detroit) Kimberly Rodriguez (Detroit) Howard Steinberg (NY)	Ambac Financial Group, Capmark Financial, Charter Communications, Chemtura, Chicago Newspaper Liquidation Corporation (Sun Times Media), Circuit City, CIT, Crabtree and Evelyn, Fairpoint Communications, Jennifer Convertibles, Movie Gallery, Quebecor World, Reader's Digest Association, RH Donnelly, Six Flags, Spansion, Thornburg Mortgage, and others.
McGladrey Chicago, IL 312-634-3400 www.mcgladrey.com	Scott Peltz Mitchell Hirsh	David Bart Steven Blake	FDIC, Genmar Boat Co., Lehman Brothers Asset Consulting, Major International Media Company, Mercury Companies, multiple national and international lenders, National Food Products Producer, Pappas Telecasting, Pasquinelli Homebuilders, various private equity firms and respective portfolio companies.
Mesirow Financial Consulting New York, NY 877-632-4200 www.mesirowfinancial.com	Ralph Tuliano Tom Allison Larry Lattig Jim Nugent	Ben Pickering Kevin Krakora Stephen Darr Melissa Kibler Knoll	Interim management to Vibrant Living Communities and Triax Pharmaceuticals. Financial advisors to debtor: Brown Publishing Company, Lake County Press and Franciscan Healthcare. Financial advisors to UCC: Neff Corporation, Sbarro Inc., Nebraska Book, Gas City, Bigler, NAPCUS, and Local Insight Media.
Plante & Moran Detroit, MI 248-223-3613 www.plantemoran.com	Tim Weed David Priestley Jeff Jenkins	Michael Colella Phil Brown Jamey Schalter	Primarily represents privately-owned or private equity-owned companies.
PwC New York, NY 646-471-7589 www.pwc.com/us/recovery	Perry Mandarino (NY) Curt McClam (LA) Cyrus Pardiwala (NY)	Dan Williams (Chicago) Colin Wittmer (NY)	Champion Enterprise, Chrysler, Closter Plaza, deCODE Genetics, Filene's Basement, HearUSA, Hoboken University Medical Center, National Envelope, Royal Worcester Spode, Sage Crest, Sbarro, Smurfit Stone Container, Sportsman's Warehouse, Strauss Discount Auto, Velocity Express, The Newark Group, Urban Brands.

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Worth Reading

Lost Prophets – An Insider's History of the Modern Economists

Author: Alfred L. Malabre, Jr.
Publisher: Beard Books
Softcover: 256 pages
List price: $34.95

As Economics Editor of *The Wall Street Journal* from 1969 to 1993 and author of its weekly "outlook" column, Malabre observed the U.S. economy for four decades, during which time he had access to the major academic and political figures of the day.

For the most part, Malabre does not put much stock in economists. "In sum, the profession's record in the half century since Keynes and White sat down at Bretton Woods [after World War II] provokes dismay." In support of this critique, Malabre references a noted fellow economist who said that the Nobel prize in this field should be discontinued. In doing so, he also points out that a Nobel for economics was not one that was originally endowed by Alfred Nobel, but was added at a later date, funded by the central bank of Sweden apparently in an effort to give the profession of economists the prestige of medicine, science, literature, and the other Nobel categories.

While Malabre's views of economists are widely shared, they are rarely expressed publicly in economic circles, even though modern economists, even hugely influential ones like John Maynard Keynes, are rarely consistently right, and are often wrong. They promote their economic theories even while those theories are being proved wrong by real world events. Malabre refers to leading economist Milton Friedman and his "monetarist colleagues" as "super salesperson, successfully merchandising…an economic medicine that promised far more than it could deliver" from the 1960s through the Reagan years of the 1980s.

The author does more, however, than simply cite examples of how the economy has, again and again, rejected the theories and exposed the wrongheadedness of the policy recommendations of the most influential economists of the day. Malabre also presents abundant economic data and describes contemporary marketplace and social activities that show how the economy performs almost independently of the best analyses and ideas of economists.

Malabre's critique of noted economists and prevailing economic ideas is not an end in itself. What emerges in *Lost Prophets* is a consistent, clear-eyed, nonideological analysis and commentary from someone who has a broad, seasoned view of the importance of economics. Malabre believes in the predominance of the business cycle. Human nature – which is, after all, the substance of economics – is often overlooked by professional and academic economists who are preoccupied with monetary and fiscal policy, exchange rates, unemployment, inflation, and so forth. "The business cycle, like human nature, is here to stay" is the lesson Malabre aims to impart to readers interested in understanding the fundamental, abiding nature of economics. When, once again, the U.S. economy appears to be beyond the fine tuning at the hands of today's leading economists and government economic advisors, *Lost Prophets* is as relevant as ever. ¤

In addition to his top position at The Wall Street Journal, Malabre is also the author of several books, receiving the George S. Eccles Prize from the Columbia Business School for the book Beyond Our Means.

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were killed by the same forces that killed bookstore sales (iTunes, Netflix, and file-sharing networks). It also failed to generate additional revenues through coffee or alcohol sales.

Finally, it opened too many stores, including several overseas, despite lackluster sales. The latter was cited in the company's February 2011 bankruptcy filing, which indicated that the company "still [has] a sizeable core of profitable stores," but "in analyzing their cost structure, the debtor has found that they also have a number of stores which are simply unprofitable and are substantially impacting the debtor's overall performance and ability to pay their debts."

"Barnes & Noble may well not be around in five years," says Annie Lowrey of Slate.com. "But at least it has built a business that recognizes the trends in bookselling – toward the Internet, toward e-readers, toward a more boutique retail experience, and away from big-box stores. It is remarkably similar to the strategy Borders laid out in its bankruptcy filing. The company's management said it wants to "aggressively [grow] Borders.com and eBook market share" and '[expand] the company's overall retail mix…to improve profitability and offset the digital effect.' Alas, that strategy came too late."

According to Carroll, the lessons learned from Borders are the same as those learned from Blockbuster, Books-a-Million, and Circuit City. "The most important thing is to act early," he says. "I've seen so many situations where a company will say, 'I hear that advice but I just want to talk to my landlord, talk to my bondholders, make it through this quarter,' etc. And by the time the company wakes up and realizes it doesn't have that option, it's too late. The company doesn't have cash to make the needed changes, and the market has passed the company by."

"Things happen quickly, and companies need to be nimble and aggressive when making changes or their changes aren't going to stick," Carroll adds. "Most professionals know this, but most clients resist it." ¤

Special Report

European Restructuring Practices of Major U.S. Law Firms

Firm	Senior Professionals		Representative Clients
Bingham McCutchen +44-20-7661-5300 www.bingham.com	James Roome Barry G. Russell Stephen Peppiatt James Terry	Tom Bannister Elisabeth Baltay Sarah Smith	Noteholders/investors in Alliance Medical, Anglo Irish Bank, Bulgarian Telecommunications/Vivacom, Connaught, Dometic, European Directories, Gala Coral, Technicolor S.A. (Thomson S.A.), Icelandic banks, Irish Nationwide Building Society, Petrojack, Phoenix Pharmahandel, Preem AB, Remedial (Cyprus) PCL, Straumur, The Quinn Group, and others.
Brown Rudnick +011-44-20-7851-6000 www.brownrudnick.com	Louise Verrill Peter J.M. Declercq Adrian M. Harris Patrick Elliot	Neil Micklethwaite Neill Shrimpton Sonya Van de Graaff Steven Friel	LyondellBasell (creditors' comm.) and numerous matters related to Lehman Brothers collapse. Advising creditors in Northern Rock, Bradford & Bingley, Commerzbank, WestLB, Santander, Anglo Irish, Allied Irish Bank, Bank of Ireland, and Irish Life & Permanent. Senior creditors in SIV restructurings, Golden Key, Mainsail, and Axon Financial.
Cadwalader, Wickersham & Taft 212-504-6000 www.cadwalader.com	Richard Nevins	Gregory Petrick	Intrawest (lenders), LyondellBasell (debtor), Eircom (noteholders), Punch Taverns (MBIA), SEAT Pagine Gialle (creditors), A13 road in East London (MBIA), JSC BTA Bank (creditors), Truvo and Gallery Media (creditors' committees), Four Seasons Healthcare (creditors), Centro Properties (JPMC).
Cleary Gottlieb Steen & Hamilton +011-44-20-7614-2200 www.clearygottlieb.com	Andrew Shutter Glen Scarcliffe Michael McDonald Werner Meier Roberto Bonsignore Pietro Fioruzzi	Carlo de Vito Piscicelli Fabrice Baumgartner Valerie Lemaitre Jacques Reding	Agfa-Gevaert, Dexia, Daewoo, ESCADA, Goldman Sachs, The Hellenic Republic, Kaufman & Broad, Manitou, Morgan Stanley, Nortel Networks, lenders (Oerlikon), lenders (Queens Moat Houses hotel group), Republic of Argentina, Telenet, super senior lenders (TI Automotive), Truvo, UC RUSAL, Vita Group, Wind Hellas.
Davis Polk & Wardwell +44 20-7418-1300 www.davispolk.com	Donald S. Bernstein Karen E. Wagner Andrés V. Gil Arnaud Pérès Marshall S. Huebner Benjamin S. Kaminetzky	Jeffrey R. O'Brien Timothy Graulich Elliot Moskowitz Thomas J. Reid Christophe Perchet	Citibank in Lyondell; Lehman Brothers International (Europe) and its U.K. Lehman affiliates; Sterling Equities in Madoff SIPA liquidation; Technicolor S.A. (formerly Thomson); JP Morgan in connection with several monoline insurance company restructurings, Castle HoldCo 4; HeidelbergCement AG; Goldman Sachs in connection with exposures to BP.
DLA Piper +011-44-8700-111-111 www.dlapiper.com	Gregg Galardi Richard Chesley Stephen Halladay Peter Jark Ernesto Apuzzo	Marc Molhuysen Christian Van Buggenhou Luis Martin	Barclays, Royal Bank of Scotland, Lloyds Banking Group, Credit Suisse, GE, HSBC, National Australia Bank, Clydesdale, Dunbar, Santander, Jones Lang LaSalle, Anglo Irish Bank, NAMA, KPMG, Deloitte, PricewaterhouseCoopers, Ernst & Young.
Gibson, Dunn & Crutcher +44 (0)-20-7071-4000 www.gibsondunn.com	Gregory Campbell Wayne McArdle Thomas Budd	James Barabas Paul Harter Alan Samson	Almatis Group on successful $1 billion balance sheet restructuring, one of the highest profile restructurings in London credit market of 2010. Also advising Almatis Group in obtaining commitments for $600 million bankruptcy exit financing, arranged by GSO, Sankaty, Goldentree, and JP Morgan/BoA.
Hunton & Williams +011-44-20-7220-5700 www.hunton.com	Roger Dyer Raul Grable	Ferdinand Calice Peter Partee	Investment and commercial banks; U.S./European corporates on restructuring assignments; hedge funds; insolvency accountants; NPL and distressed debt traders.
Jones Day 202-879-3939 www.jonesday.com	Corinne Ball Paul Bromfield Kay V. Morley Sion Richards Michael Rutstein Volker Kammel	Ansgar Rempp Olaf Benning Victor Casarrubiose Francesco Squerzoni Roberto Truffi Laurent Assaya	Glitnir Bank Actavis Group, General Motors (Strasbourg facility share capital purchase), ESO Capital – Duet Real Estate Partners 1 LP, Weavering Capital (UK) Limited (Acting for MCR joint liquidators), Standard Bank Plc, Connaught group (Acting for KPMG joint administrators).

Special Report

European Restructuring Practices of Major U.S. Law Firms, cont.

Firm	Senior Professionals		Representative Clients
Kirkland & Ellis +44 20 7469 2000 www.kirkland.com	Kon M. Asimacopoulos Partha Kar	Bernd Meyer-Löwy Leo Plank	Eircom (senior lenders), Regency Entertainment, European Directories, Almatis (primary investor), Gala Coral (primary investors), Reader's Digest Association, Endemol (lenders), Japan Airlines, TeleColumbus (primary investors), Codemasters, Public Safety Equipment, Borsodchem (primary investors), Chemtura, Visteon, Tronox, and others.
Latham & Watkins +011-44-20-7710-1000 www.lw.com	José Luis Blanco James Chesterman Hervé Diogo Amengual Christopher Hall	John Houghton Frank Grell Andrea Novarese Mikhail Turetski	Major international and domestic financial institutions, hedge funds, sponsors, multi-national corporations, creditors' committees, insurance companies, and other institutions involved in complex national and international restructurings.
Milbank Tweed Hadley & McCloy +44 (0) 7884 438257 www.milbank.com	Nick Angel Suhrud Mehta	Peter Newman	Ad hoc group of noteholders in Afrisam, ad hoc group of noteholders in Novasep, creditors in Ideal Standard. Clients include Goldman ESSG, Citibank, JP Morgan, Centerbridge, Anchorage, York, KKR, Avenue, and ICG.
Paul, Hastings, Janofsky & Walker +44 20 3023 5238 www.paulhastings.com	Karl Clowry Bruno Cova	Christopher Wolff	Capita Asset Services (Ireland) and Capita Asset Services (UK) in Fleet Street Finance Two CMBS transaction, CB Richard Ellis Loan Servicing on £1.15 billion White Tower 2006-3 CMBS transaction, Oaktree's portfolio company Conbipel, Lucchini on €1 billion restructuring; lender of Orion Cable on restructuring of German telecom company; and others.
Sidley Austin Tel. 011-44-20-7360-3600 www.sidley.com	Patrick Corr Phillip Taylor Marc Wassermann Robin Parsons Benjamin Klinger	Lorna Mendelsohn Richard Strachan Alice Morgan Wayne Beck	Alvarez & Marsal, Alix Partners, GE Capital, Bank of America, Merrill Lynch, Ernst & Young, Federal Mogul Corporation, Grant Thornton, Owens-Corning, Regus, Zolfo Cooper.
Skadden, Arps, Slate, Meagher and Flom +44 20 7519 7000 www.skadden.com	Jay M. Goffman Chris Mallon Ken Ziman George Panagakis John Wm. Butler, Jr.	J. Gregory Milmoe Matthias Horbach Pascal Bine Johannes Kremer	Access Industries (LyondellBasell), British Vita, CIT Group Inc., Credit Agricole Corporate & Investment Bank, Evraz Group S.A., Hayes Lemmerz International Inc., Intrawest, Koenigsegg Group AB, Mark IV Industries, Metro-Goldwyn-Mayer Inc., Nokia Siemens, Network BV., Tele Columbus Group, and Weather Investments S.p.A.
SNR Denton 212-768-6700 www.snrdenton.com	D. Farrington Yates Thomas A. Labuda, Jr. Carole Neville Jo Christine Reed	Robert E. Richards Arthur H. Ruegger Peter D. Wolfson Fruman Jacobson	PricewaterhouseCoopers, Ernst & Young, Deloitte, KPMG, Zolfo Cooper, Grant Thornton, BDO Stoy Hayward, Barcalys Bank plc, HSBC, Royal Bank of Scotland plc, BNP Paribas, Citibank, Law Debenture Trust, Young Broadcasting, Movie Gallery, NewComm Wireless Services, Plan B Communications, Salton, Lehman Brothers, and others.
Squire Sanders Tel. 011-44-20-7655-1000 www.ssd.com	John Alderton Timothy Cooper Laura Crawford Andreas Fillman Daniel E. French Stephen P. George Susan M. Kelly Andreas Lehmann	Graeme D. Levy Paul Muscutt Thomas J. Salerno Markus Schmucker Devinder Singh Frank Walter-von Gierke Cathryn E. Williams	Financial institutions, hedge funds, distressed funds, lenders, pension fund trustees, security trustees, bondholders, insolvency practitioners, turnaround professionals, and corporates.
Willkie Farr & Gallagher + 33 1 53 43 45 00 www.willkie.com	Alexandra Bigot Maurice Lantourne Andreas Hautkappe Stephanie Schmidt-Ehemann	Michèle Grégoire Marc-David Weinberger	Butler Capital, Gilde Buy Out Partners, Anovo, Wendel and Deutsch Connectors, CMA CGM, Wagon Automotive, Pragma Capital, Oaktree, Kingstreet, CVC Capital, AlixPartners, 3i, AXA Private Equity GmbH, Palamon Capital Partners, H.I.G Capital Partners, Gores Group, Novum Capital, Management Capital Holding, ING Bank, and others.

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New Rules, *from page 4*

the commissioners, are used to ruling with an iron fist. It is clear that MLB wants to take control of the team from McCourt. They realized that the Fox Broadcasting deal would have put McCourt in a stronger position economically and they would have less control."

Salerno says McCourt has a stronger hand than did the Phoenix Coyotes ownership. Unlike the Coyotes case, which involved both a sale and a franchise move, McCourt is merely trying to get approval of the Fox deal over the objection of the MLB. However, having said that, Salerno does not believe there is much hope for settlement. "I don't think this is something that can settle because, from the league's perspective, it fears losing control over the other owners, who you can bet are watching this case very closely."

Salerno continues: "Some people say it's not personal, it's business. But when you get involved with sports teams like this, it's hard to distinguish between the personal and business. It's such a small group of owners and the egos of the personalities can't be underestimated. It becomes a battle of the super egos. "

Judge Kevin Gross, who is presiding over the Dodgers bankruptcy, had his own taste of personal feelings trumping business judgment. With McCourt needing to borrow money to pay for player salaries and other expenses, Judge Gross ruled that McCourt must borrow the money from the MLB, which had intervened and offered financing as an alternative to a costly $150 million loan that McCourt had arranged from a hedge fund. McCourt refused the league's offer, perhaps fearing further loss of control of his team. The MLB continued to sweeten its deal and it continued to be rebuffed by McCourt until he was finally forced by Judge Gross to take the lower cost financing.

Meanwhile, the battle rages on. "I think we're going to see some real case law made in the Dodgers case because I don't see it settling. I could be wrong, but this case has an owner who can operationally hold off," says Salerno.

Regardless, all the major players in professional sports are due for a reality check. The clock is winding down and the leagues, owners, and players seem oblivious to it. Before the Coyotes case, there had only been four bankruptcy filings of professional sports teams under the Bankruptcy Code (all NHL teams). Since the Coyotes 2009 filing, there have been three team filings (the Chicago Cubs, the Texas Rangers, and the Dodgers).

The U.S. Supreme Court finally took away the defense that sports leagues are "single entities" that are not separate businesses, and definitively ruled in the summer of 2010 (in the much anticipated *American Needle* decision) that professional sports leagues are businesses that can engage in unlawful anti-competitive activities.

"More and more of these teams are going to go into bankruptcy," predicts Salerno. "As they do, these bankruptcy cases will seem less extraordinary to the bankruptcy judges and hopefully they will start applying general rules of business to leagues that don't want it." ¤

Editor's Note: Salerno is co-author of a chapter in *Collier on Bankruptcy*, entitled "Chapter 11 Cases Involving Professional Sports Franchises: Special Issues," available in late August 2011. He is also co-author of *The Executive Guide to Corporate Bankruptcy,* published by the Beard Group.

Emivest, *from page 4*

argued that since the DIP lenders were not prepetition lenders, they brought new money to the case, and Section 327 does not disqualify an entity acting as an agent of a debtor from court approval for simply accruing administrative claims against the estate.

Second, they contended that they were in a unique position. The DIP loan was the only one available, they said, and the DIP lenders had the unique ability to liquidate aircraft-related collateral. "The DIP lenders argued that the debtor, creditors, and estate would all benefit from the DIP lenders' experience in liquidating the specialized assets in the event of a default, thus maximizing their value for the benefit of creditors and the estate," says Leibowitz.

Ultimately, the U.S. Bankruptcy Court for the District of Delaware overruled the U.S. Trustee's objection and approved the DIP loan despite its unique liquidation terms. According to Leibowitz, the impact of the Emivest decision is yet to be seen. "While courts may not approve similarly structured loans where the DIP lender has prepetition claims, the loan structure may provide new access to the loan market and breathe life into cases where a debtor needs a quick infusion of new money to survive."

Pabst notes that liquidation firms are capable of handling such transactions, as many have had financing divisions for years. "Gordon Brothers just made a DIP loan to No Fear that was 'shopped' by an investment banker on the West Coast, and no traditional lender wanted to underwrite it," he notes. "Either way, Gordon Brothers is comfortable with the collateral – which really is the most important issue here – so they decided to do the loan."

Pabst, however, says he does not think this transaction will have a significant impact on the DIP financing market. "If the collateral value is there to support a DIP, I believe that restructuring professionals generally find a way to make it happen. I do not suspect a rash of DIP financings being driven by liquidators champing at the bit to liquidate assets and earn a fee. The fundamentals of a sound loan still will have to drive the process." ¤

In the Next Issue…

- *Special Report: Major Chapter 11 Cases by Industry Sector*
- *Special Report: European Law Firms With Restructuring Practices*
- *Research Report: Who's Who in the Los Angeles Dodgers*

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