turnarounds & workouts
News for People Tracking Distressed Businesses
JUNE 2017 VOLUME 31, NUMBER 6

Inside

FHFA Finds New Way to Irk GSE Shareholders

Says Secondary Market Sale of Stock Creates New Contract

by Julie Schaeffer

Fannie Mae and Freddie Mac's conservator, the Federal Housing Finance Agency (FHFA), has taken the position in a brief filed in the U.S. Court of Appeals for the D.C. Circuit that similarly situated shareholders should be treated differently, arguing that the sale of stock in the secondary market creates a *new* contract between the corporation and shareholder different from the contract created at the time the stock was issued.

"You would think securities of the same type and same class and same entity would

continued on page 2

L'Eggo My Logo

Court Addresses Rights of Trademark Licensees

by Randall Reese

As the United States moves to an increasingly knowledge-based economy, intellectual property rights grow in importance. The Bankruptcy Appellate Panel for the First Circuit Court of Appeals recently issued an opinion addressing an important intellectual property issue – the rights of parties to trademark licenses when such licenses are rejected in a bankruptcy case. As noted by Latham & Watkins in a client alert, the court's ruling is significant because, among other reasons, it "marks the continuation of a trend of cases where courts have found various ways to provide some protection to trademark licensees from the perceived inequity that would result from complete termination of the licensee's rights."

continued on page 2

A Long Road Ahead

Puerto Rico Undertakes Title III Restructuring

by Julie Schaeffer

Puerto Rico has filed for a form of bankruptcy protection in the biggest restructuring ever by a local government. The commonwealth's $123 billion of debt and pension obligations far exceeds Detroit's $18 billion of debt when it filed in 2013 and Jefferson County, Ala.'s seemingly paltry $4 billion owed when it sought protection from creditors in 2011.

Puerto Rico is in dire straits. Its economy has been contracting for a decade, strikes are frequent, blackouts regular, and businesses have taken their factories elsewhere. Last year, around 65,000 people departed Puerto Rico, keeping pace with the previous

continued on page 2

FHFA, *from page 1*

be fungible given how the securities markets work, and it seems problematic if your rights in a security depend on when you purchased it," says Pete Patterson of Cooper & Kirk, PLLC, which is representing Fairholme Funds, one of the shareholders in the litigation.

Background

Fannie Mae and Freddie Mac were placed into conservatorship in the fall of 2008. Under the Housing and Economic Recovery Act (HERA), the Treasury Department advanced funds to the GSEs in exchange for new senior preferred stock.

Under the 2008 agreement, Fannie and Freddie were supposed to pay a 10% annual cash dividend or 12% "in kind" dividend on the amounts drawn from Treasury. In 2012, FHFA and Treasury amended the senior preferred stock's terms to accelerate the transfer of cash from Fannie and Freddie to Treasury by implementing a so-called "net worth sweep" in perpetuity.

Large investors who purchased shares of Fannie and Freddie, including hedge funds Perry Capital LLC and the Fairholme Funds, have argued this net worth sweep is unconstitutional and have been attempting to undo it for years. Their primary argument has been that implied covenant claims deriving from stock ownership depend on the "reasonable expectations" of the corporation and the first shareholder who ever owned the stock. In other words, intervening developments are irrelevant.

GSE shareholder litigation, however, has largely failed. Preferred shareholders sued FHFA and Treasury in U.S. District Court. In 2014, Judge Royce Lamberth dismissed the complaint in its entirety, upon which the plaintiffs appealed the ruling. On appeal, in February 2017, the Court of Appeals for the D.C. Circuit upheld the lower court decision. Essentially, the courts held that FHFA had the authority to impose the sweep. "Judge Lamberth basically said this is a political issue and you, the litigants, have to go talk to Congress," says Christopher Whalen, chairman of Whalen Global Advisors LLC, who works as a consultant and analyst focused on the financial services and mortgage finance sectors.

continued on page 4

Logo, *from page 1*

The First Circuit BAP's decision arises out of the bankruptcy of Tempnology LLC, which was a New Hampshire-based company that developed chemical-free cooling fabrics for use in consumer products under the brand name "Coolcore." In 2012, Tempnology entered into a Co-Marketing and Distribution Agreement with Mission Product Holdings, Inc., a company focused on marketing and distributing sports products. Pursuant to the agreement, Mission was granted the exclusive right to sell certain of Tempnology's products (dubbed "Cooling Accessories") to sporting goods retailers in the United States and the exclusive right to sell a subset of the Cooling Accessories to anyone in the United States. Additionally, Mission received a nonexclusive but perpetual license to exploit the Debtor's intellectual property and a limited license during the term of the Agreement to exploit the Coolcore brand and logo.

The agreement provided that either party could terminate the agreement with or without cause by providing written notice. Any event of termination triggered a two-year winddown period during which Mission would retain certain rights to purchase, distribute, and sell the Cooling Accessories. In June 2014, Mission exercised its rights to terminate the agreement without cause, triggering the winddown period and the following month, Tempnology issued a notice of termination for cause, asserting that Mission had breached the agreement, which led the parties to arbitration. In June 2015, the arbitrator rendered a decision in the first phase of the arbitration, determining that the agreement remained "in full force and effect." The arbitration was then to continue to a second phase to determine whether either party had breached the agreement. That phase was halted, however, by Tempnology's September 1, 2015 bankruptcy filing.

The day following its bankruptcy filing, Tempnology sought to reject the Mission agreement and, separately, to sell substantially all of its assets. Mission objected to both motions and filed a notice of election pursuant to section 365(n)(1)(B) of the Bankruptcy Code. Mission and Tempnology disagreed over the implications of the section 365(n) election and the bankruptcy court authorized the

continued on page 5

Puerto Rico, *from page 1*

two years, when the exodus reached the worst since at least the 1980s. Almost all of those who remain live in poverty (with median household income at $19,350). Unemployment is more than twice the U.S. average. A quarter of the labor force works for the government.

Puerto Rico's total debt load is roughly $73 billion (excluding pension obligations). But governor Ricky Rossello's fiscal plan for the island, approved by its oversight board in March, gave Puerto Rico only $800 million a year to pay debt, less than a quarter of the roughly $3.5 billion a year it would cost to make those payments on time. This angered bondholders. Negotiations with angry bondholders for a consensual restructuring deal faltered, and that led to the court filing on May 3.

Because Puerto Rico's status as a commonwealth prevents it from using traditional bankruptcy laws, its central government resorted to an in-court restructuring process called Title III, which was created under the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA) last year. Title III is akin to U.S. bankruptcy protection, so now a federal district court judge will decide how Puerto Rico's debt will be restructured.

A few days after the central government filed, the island's sales tax authority, known as Corporación del Fondo de Interés Apremiante (COFINA), made its own filing days later – and other public agencies that are restructuring out of court could enter bankruptcy as well.

Given differences between a mainland bankruptcy process and Title III, the decision as to who hears the case was left to Chief Justice John Roberts, who selected U.S. District Court Judge Laura Taylor Swain in the Southern District of New York. Swain previously served for four years as bankruptcy judge in the Eastern District of New York.

Court filings show that more than 100 lawyers have already requested permission to appear before Swain, including those for a group comprising 91,000 retirees, who belong to a system with roughly $50 billion in underfunded pension liabilities.

continued on page 5

Research Report

Who's Who in Commonwealth of Puerto Rico's Title III Cases

by Carlo Fernandez

With a debt-to-GDP ratio of 68%, negative economic growth in nine of the last ten years, and a 12.4% unemployment rate, the Commonwealth of Puerto Rico, a self-governing commonwealth in association with the United States, has sought court protection to restructure its massive $74 billion debt-load and $49 billion in pension obligations.

The debt restructuring petition was filed by Puerto Rico's financial oversight board in U.S. District Court in Puerto Rico (Case No. 17-01578) on May 3, 2017, and was made under Title III of the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA). The Oversight Board later commenced Title III cases for the Puerto Rico Sales Tax Financing Corporation (COFINA) and the Employees Retirement System (ERS) and the Puerto Rico Highways and Transportation Authority (HTA).

The Commonwealth

Puerto Rico's governor-elect is **Ricardo Antonio "Ricky" Rossello Nevares**, the son of former governor Pedro Rossello Nevares.

O'Melveny & Myers LLP is counsel to the Commonwealth's Puerto Rico Fiscal Agency and Financial Advisory Authority (AAFAF), the agency responsible for negotiations with bondholders. The engagement is headed by co-chair of global restructuring practice **John J. Rapisardi**, chair of U.S. restructuring practice **Suzzanne Uhland**, and counsel **Diana M. Perez**.

Richard A. Chesley at **DLA Piper LLP (US)** represents the ERS.

Oversight Board

The Financial Oversight and Management Board consists of seven members appointed by the U.S. President and one ex-officio member designated by the Governor. The Board is comprised of chair and member **Jose B. Carrion III**, members **Andrew G. Biggs**, **Carlos M. Garcia**, **Arthur J. Gonzalez**, **Jose R. Gonzalez**, **Ana J. Matosantos**, and **David A. Skeel Jr.**, and ex-officio member **Elias Sanchez**. The Board's executive team is composed of executive directors **Natalie Jaresko**, **Ramon Ruiz** and legal counsel **Jaime El Koury**.

Proskauer Rose LLP is serving as the Oversight Board's legal counsel. Proskauer's engagement is headed by **Martin J. Bienenstock**, chair of the firm's business solutions, governance, restructuring and bankruptcy group, and partner **Paul V. Possinger**.

McKinsey & Co. is the Board's strategic consultant, with the engagement led by senior partner **Bertil Chappuis** and expert associate principal **Aaron Bielenberg**.

Ernst & Young is the Board's financial advisor, with the engagement led by partner **Arturo Ondina**, U.S. restructuring advisory services leader **Gaurav Malhotra** and senior manager for restructuring **Juan Santambrogio**.

Citigroup Global Markets Inc. is the Board's municipal investment banker, with managing director **John C. Gavin** leading the engagement.

Prime Clerk LLC is the claims and noticing agent. **Epiq Bankruptcy Solutions, LLC**, is the service agent in the Title III cases of ERS and HTA.

The Oversight Board named **Professor Nancy B. Rapoport** as fee examiner and to chair a committee to review professionals' fees.

Bondholders

Kramer Levin Naftalis & Frankel LLP serves as counsel to the Mutual Fund Group, comprised of mutual funds managed by **Oppenheimer Funds, Inc.**, **Franklin Advisers, Inc.**, and **First Puerto Rico Family of Funds**, which collectively hold over $3.5 billion in COFINA Bonds and over $2.9 billion in other bonds issued by Puerto Rico and other instrumentalities, including over $1.8 billion of Puerto Rico general obligation bonds. The Kramer Levin team is led by corporate restructuring and bankruptcy co-chair **Thomas Moers Mayer**, and partners **Amy Caton** and **Philip Bentley**.

White & Case LLP represents **UBS Family of Funds** and **Puerto Rico Family of Funds**, which hold $613.3 million in COFINA bonds. The White & Case engagement is headed by Florida partners **John K. Cunningham** and **Jason N. Zakia** and New York partner **Glenn M. Kurtz**.

Andrew N. Rosenberg, **Richard A. Rosen**, and **Walter Rieman** at **Paul, Weiss, Rifkind, Wharton & Garrison LLP** and **Mark T. Stancil**, **Gary A. Orseck**, and **Donald Burke** at **Robbins, Russell, Englert, Orseck, Untereiner & Sauber LLP** are co-counsel to the ad hoc group of General Obligation Bondholders, comprised of **Aurelius Capital Management, LP**, **Autonomy Capital (Jersey) LP**, **FCO Advisors LP**, **Franklin Mutual Advisers LLC**, **Monarch Alternative Capital LP**, **Senator Investment Group LP**, and **Stone Lion Capital Partners L.P.**

Susheel Kirpalani at **Quinn Emanuel Urquhart & Sullivan, LLP** represents the ad hoc coalition of holders of senior bonds issued by COFINA, comprised of at least 30 institutional holders, including **Canyon Capital Advisors LLC** and **Värde Investment Partners, L.P.**

Correa Acevedo & Abesada Law Offices, P.S.C., is counsel to **Canyon Capital Advisors, LLC**, **River Canyon Fund Management, LLC**, **Davidson Kempner Capital Management LP**, **OZ Management, LP**, and **OZ Management II LP** (the QTCB Noteholder Group), with the engagement headed by attorneys **Roberto Abesada-Aguet** and **Sergio E. Criado**.

Morell, Bauza, Cartagena & Dapena is representing **Goldman Sachs Asset Management, LP.**, with the engagement headed by **Ivan J. Llado**, **Ramon E. Dapena** and **Victor J. Quinones Martinez**.

Milbank, Tweed, Hadley & McCloy LLP represents **Ambac Assurance Corporation**, a holder and insurer of $2.7 billion of bonds. The Milbank team is

continued on page 4

Research Report

Who's Who in Commonwealth of Puerto Rico's Title III Cases

(Continued from page 3)

headed by **Andrew M. Leblanc** in D.C. and **Dennis F. Dunne** and **Atara Miller** in New York.

Kenneth R. David and **Daniel A. Fliman** at **Kasowitz Benson Torres LLP** represent **Whitebox Multi-Strategy Partners, L.P.**, and **Pandora Select Partners, LP**.

Christopher R. Maddux and **Martin A. Sosland** at **Butler Snow LLP** represent **Financial Guaranty Insurance Company**.

Marcia Goldstein at **Weil, Gotshal & Manges LLP** serves as counsel to **Assured Guaranty Corp.**, **Assured Guaranty Municipal Corp.**, **Financial Guaranty Insurance Company** and **National Public Finance Guarantee Corporation**, providers of financial guaranty insurance that insure bonds.

Dechert LLP partners **Allan S. Brilliant**, **Robert J. Jossen**, **G. Eric Brunstad, Jr.**, and **Stuart T. Steinberg** represent **Peaje Investments LLC**.

Robin E. Keller at **Hogan Lovells US LLP** represents **U.S. Bank**, **National Association**, as trustee for certain bond issues.

Eric A. Schafferand and **Luke A. Sizemore** at **Reed Smith LLP** represent **The Bank of New York Mellon**, as trustee.

Statutory Committees

The U.S. Trustee formed a nine-member Official Committee of Retirees and a seven-member Official Committee of Unsecured Creditors of the Commonwealth.

The Creditors Committee members are **The American Federation of Teachers, Doral Financial Corporation, Genesis Security, Puerto Rico Hospital Supply, Service Employees International Union, Total Petroleum Puerto Rico Corp.**, and **Unitech Engineering**. The Creditors Committee has hired **Luc A. Despins, Andrew V. Tenzer, Michael E. Comerford** and **G. Alexander Bongartz** at **Paul Hastings LLP** for legal advice and counsel.

The Retiree Committee is represented **Jenner & Block LLP**, with the engagement led by **Robert Gordon, Richard Levin, Catherine Steege** and **Melissa Root.**

Solicitation, Notice & Claims Agents

The Commonwealth hired **Prime Clerk LLC** to serve as the official solicitation, notice and claims agent and, because of the volume of anticipated work, wants to hire **Epiq Bankruptcy Solutions, LLC**, to perform non-duplicative services.

Judges

U.S. District Judge Laura Taylor Swain of the Southern District of New York has been appointed by Chief Justice John Roberts to oversee the Title III cases.

U.S. Magistrate Judge Judith G. Dein in the District of Massachusetts has been designated to preside over discovery and other pretrial matters that may be referred to her by Judge Swain.

Chief Bankruptcy Judge Barbara Houser in the Northern District of Texas has been designated to serve as the lead judicial mediator in the four Title III cases. ¤

FHFA, *from page 2*

The appeals panel did allow shareholders with valid contract-based claims to pursue that part of the lawsuit. According to Bloomberg, Perry Capital attorney Matthew D. McGill of Gibson, Dunn & Crutcher LLP paraphrased the court's conclusion as, "You may have been allowed to do it, but if you breached the contracts with the stockholders, you may still have to pay."

New Contracts?

Refusing to give up the fight, Perry Capital requested a panel rehearing and, in early June, FHFA responded in a manner that has many supporters of the shareholders irked anew.

According to FHFA, the shareholders' argument suggests that stock is a fixed contract pegged to the moment of its issuance. This, FHFA argues, conflicts with well-established principles of law viewing stock as an evolving contract that renews itself every time it's traded. Essentially, FHFA says, the sale of a security in the secondary market creates a *new* contract between the corporation and shareholder.

"Plaintiffs' position that the 'reasonable expectations' relevant to a shareholder implied covenant claim are fixed at the historical moment a share of stock was originally issued by the corporation is wrong," Howard N. Cayne and a team of lawyers at Arnold & Porter Kaye Scholer LLP representing FHFA contend. "A purchaser of stock takes its shares subject to the governing law and corporate governance regime then in effect, and as may be amended from time to time in the future. . . . When a shareholder purchases stock, whether directly from the issuing corporation or on the secondary market, it enters into a broad, flexible contract with a corporation. That contract consists not only of the terms of the stock certificate in isolation but also the governing law and organic corporate documents, which often will have been amended—as they were in the case of [Fannie and Freddie]—following the original issuance of the stock."

As an example, FHFA cited a hypothetical investor who in 2017 purchased stock that was issued in 2000. Those shareholders rights, FHFA asserts, would be determined by the law and expectations in effect in 2017, not what was in effect in 2000. So if there was a possibility at the time of purchase that the government might take actions that would impair the investments, investors should not be able to recover damages based on such actions.

Opinion

Many followers of the matter have expressed shock and outrage at the treatment of Fannie and Freddie shareholders, and from a policy perspective objected to the notion implicit in FHFA's argument. "FHFA

continued on page 8

Logo, *from page 2*

rejection "as of the petition date subject to Mission Product Holdings' election to preserve its rights" under section 365(n).

Tempnology then filed a motion seeking a determination that Mission's post-rejection rights were limited exclusively to a non-exclusive intellectual property license excluding Tempnology's trademark and logo and that the balance of Mission's rights under the agreement, including any exclusive product distribution rights or the right to use the trademark and logo, did not survive rejection. Mission argued that the section 365(n) election also protected its exclusive product distribution rights and the right to use Tempnology's trademark and logo for the remainder of the winddown period.

The bankruptcy court held a non-evidentiary hearing, after which it ruled that "(1) Mission's election pursuant to § 365(n) protected Mission rights as a nonexclusive licensee only as to any patents, trade secrets, and copyrights as were granted to Mission in section 15(b) of the Agreement (the section identifying the property subject to the IP License); (2) Mission's election pursuant to § 365(n) provided no protectable interest in the Debtor's trademarks or trade names; and (3) Mission's election pursuant to § 365(n) provided no protectable interest in the Debtor's "Exclusive Products" and the "Exclusive Territory" as those terms were defined in the Agreement." Mission appealed that ruling to the First Circuit BAP.

On appeal, the First Circuit BAP focused on two key issues. First, the court considered whether Mission's exclusive product distribution rights were protected by the section 365(n) election. On this issue, the court agreed with the lower court that these rights were not protected by the 365(n) election. The court noted that "an executory contract which may be subject to a § 365(n) election can contain terms and provisions unrelated to the licensing of intellectual property" and held that the election applied only to intellectual property rights, not all rights, granted pursuant to such a contract. "To conclude otherwise would allow the narrow exception of § 365(n) to upend the very purpose of § 365," the court continued. "Any executory contract could be made 'rejection proof' by inserting in it an intellectual property license no matter how remote or untethered the license provision was from the other terms of the agreement." The fact that provisions of such an agreement might provide exclusivity did not change the court's view, despite a reference in section 365(n) to "a right to enforce any exclusivity provision of such contract."

The second issue the First Circuit BAP considered was whether Mission's rights in Tempnology's "Coolcore" trademark and logo were protected by the section 365(n) election. Here, the court began with the definition of "intellectual property" from Bankruptcy Code section 101(35A) and noted that trademarks and trade names are "conspicuously absent" from that definition. This absence has led to several lines of authority, which the court described as "negative inference" and "equity-based." However, the court also emphasized that the Seventh Circuit Court of Appeals declined to follow either approach in its entirety in a 2012 ruling (*Sunbeam Products, Inc. v.*

continued on page 10

Puerto Rico, *from page 2*

Although a judge needs prior authorization from a federal control board to seize Puerto Rico's assets (unlike in Chapter 11), Puerto Rico should be able to impose significant discounts on creditor recoveries. That said, the elected government of Puerto Rico plays almost no role in the bankruptcy. But any discounts on creditor recoveries could drive away other bond buyers, and limit Puerto Rico's access to debt markets.

David Tawil, whose fund, Maglan Capital, previously held Puerto Rico's general-obligation debt, has spoken out, saying he is not sure whether bondholders are going to get any better treatment or recovery under this course of action. "The governor needed to show that his primary allegiance lies with the citizens of Puerto Rico, and that was the justification for the filing," he told Fox News.

In addition, Title III has never been used before, which means any cuts imposed by Swain will be more likely to face years of appeals than a typical case.

How will it play out? William A. Brandt, Jr., founder and executive chairman of Development Specialists, Inc. (DSI), says while there is a natural division among

continued on page 10

Calendar

Turnaround Management Association
2017 TMA Western Regional Conference
July 26 – 28, 2017
Ritz Carlton Laguna Niguel
Dana Point, Calif.
Contact: www.turnaround.org

American Bankruptcy Institute
22nd Annual Southeast Bankruptcy Workshop
July 27 – 30, 2017
The Westin Hilton Head Island Resort & Spa
Hilton Head Island, S.C.
Contact: www.abi.org

Association of Insolvency & Restructuring Advisors
ARIA 2017 Annual Meeting
August 6 – 9, 2017
Marriott Eaton Centre Hotel
Toronto, Canada
Contact: www.aria.org

American Bankruptcy Institute
13th Annual Mid-Atlantic Bankruptcy Workshop
August 3 – 6, 2017
Hotel Hershey
Hershey, Pa.
Contact: www.abi.org

American Bankruptcy Institute
Midwest Regional Bankruptcy Seminar
August 23 – 24, 20177
Westin Cincinnati
Cincinnati, Ohio
Contact: www.abi.org

Turnaround Management Association
2017 TMA Northeast Conference
August 29 – 30, 2017
The Gideon Putnam Resort
Saratoga Springs, N.Y.
Contact: www.turnaround.org

National Association of Bankruptcy Trustees
2017 Annual Convention
September 13 – 17, 2017
The Marriott
New Orleans, La.
Contact:: www.nabt.com ¤

Special Report

Bankruptcy Tax Specialists in the Nation's Major Law Firms

Firm	Senior Bankruptcy Tax Partners	Recent Representative Clients
Akin Gump Strauss Hauer & Feld LLP New York, NY www.akingump.com **Bankruptcy Tax Attys:** 22	Howard Jacobson Thomas Weir Dan Micciche Joshua Williams Stuart Sinclair Alison Chen	Energy Future Holdings/TXU Corp (informal group of unsecured noteholders; Adeptus Health (Official Committee of Unsecured Creditors); CHC Group Ltd. (Ad hoc group of secured noteholders); SeaDrill Limited (Ad Hoc Bondholders Group); International Shipholding Corporation (Debtor); Goodrich Petroleum (Official Committee of Unsecured Creditors); Templar Energy (Ad Hoc Group of Second Lien Lenders); Atlas Resources (Unsecured noteholders).
Andrews Kurth Kenyon LLP Houston, Dallas, New York www.andrewskurth.com **Bankruptcy Tax Attys:** 22	Will Becker Andrew Feiner Thomas Ford, Jr. Matthew B. Grunert Allison Mantor Robert J. McNamara Tom Popplewell Angela Richards	Warren Resources, Inc.; Miller Energy Resources, Inc.; Victory Park Capital; and others.
Bracewell LLP New York, NY www.bracewelllaw.com **Bankruptcy Tax Attys:** 8	Michele J. Alexander Lance W. Behnke Gregory M. Bopp R. Todd Greenwalt Elizabeth L. McGinley	Energy & Exploration Partners (now Pardus Oil and Gas); Veneco; Linc Energy; Eastern Outfitters; QTCB Noteholder Group; Trinity River Resources, LP.
Brown Rudnick New York, NY www.brownrudnick.com **Bankruptcy Tax Attys:** 6	Vincent Guglielmotti Barbara Kelly Tracy Fisher	Bonanza Creek (Ad hoc Equity Committee); Essex Crane/ Coast Crane Company (Represented company on sale of assets in multiple subsidiaries and related lender issues); Ultra Petroleum (Ad hoc Equity Committee); IMX (Official Equity Committee); Performance Sports Group (Official Equity Committee); Dewey Leboeuf Liquidating Trust (Wind-down issues); B456 Liquidating Trust (Addressed state and local tax controversies); and Dewey & LeBoeuf Liquidation Trust.
Cadwalader, Wickersham & Taft New York, NY www.cadwalader.com **Bankruptcy Tax Attys:** 6	Linda Z. Swartz Edward S. Wei Adam Blakemore	Centerbridge (ATU); Morgan Stanley (EFH and Bridon); Oaktree Capital (Maple and Hilton); CQS; Farallon Capital Management; US Bank (Dynegy); Whippoorwill and Edge Asset (Trailer Bridge); noteholders (AES, Roust); LyondellBasell; Xerium Technologies; Vertis Holdings; EDF Trading (Glacial Energy); Caribbean Petroleum; US Treasury (CIT, GM, Chrysler); Icahn Global (Blockbuster); JPMorgan (Centro Properties and Station Casinos); Citigroup (Lehman), Merrill Lynch (Fred Leighton and BLB Mgmt.); and others.
Davis Polk & Wardwell New York, NY www.davispolk.com **Bankruptcy Tax Attys:** 15	Michael Farber Lucy W. Farr Kathleen L. Ferrell Rachel D. Kleinberg Michael Mollerus David H. Schnabel	Arch Coal; Bonanza Creek; Delta Air Lines; SunEdison; Investor Groups in Aretec Group; Ascent Resources; Basic Energy; C&J Energy; Essar Steel Algoma; Global Development Bank of Puerto Rico; JW Aluminium; Larchmont Resources; Memorial Production Partners; Midstates Petroleum; Pacific E&P; Pinnacle Operating Corporation; SandRidge Energy; Tervita; Venoco; Citibank (Alpha Natural Resources; Avaya; Peabody; PetroAmazonas).
Fried, Frank, Harris, Shriver & Jacobson LLP New York, District of Columbia, London, Frankfurt, Paris www.friedfrank.com **Bankruptcy Tax Attys:** 6	Alan S. Kaden Eli Weiss	C&J Energy Services; Fidelity Management & Research Company as the largest creditor of Energy Future Holdings; Members of Ad Hoc Groups of Senior Debt Noteholders in connection with the restructurings of Basic Energy Services; Forbes Energy Services and Nuverra Environmental Solutions; Gates Capital Management, Inc. as the largest holder of secured debt of ION Geophysical Corporation, in connection with ION's exchange offer.
Jones Day New York, Washington, D.C. www.jonesday.com **Bankruptcy Tax Attys:** 12	Candace Ridgway Colleen Laduzinski Richard Nugent	Debtors: Peabody Energy; Alpha Natural Resources; Molycorp; American Apparel; Oncor (EFH non-debtor subsidiary); Transtar; Swift Energy. Creditors: Caesars Entertainment; MF Global; rue21; Answers Corp.; Ameriforge; 77 Energy; Southcross Energy; RCS Capital; Shoreline Energy.

continued on page 7

Special Report

Bankruptcy Tax Specialists in the Nation's Major Law Firms

(Continued from page 6)

Firm	Senior Bankruptcy Tax Partners	Recent Representative Clients
Kirkland & Ellis LLP Chicago www.kirkland.com **Bankruptcy Tax Attys:** 20	Todd Maynes Gregory Gallagher William Levy Thad Davis Sara Zablotney	BCBG Max Azria Global Holdings, LLC, Payless Holdings LLC, Goodman Networks Inc., Rue21 Inc., Gymboree Corp., Gordmans Stores Inc., GenOn Energy Inc., 21st Century Oncology Holdings Inc., Energy Future Holdings, Caesars Entertainment Operating Co., Sabine Oil & Gas, Samson Resources, Magnum Hunter Resources, Midstates Petroleum Co., Linn Energy, Penn Virginia Corp., SandRidge Energy, Sherwin Alumina, Ultra Petroleum Corp., and Avaya Inc.
Latham & Watkins LLP Chicago, Los Angeles, New York www.lw.com **Bankruptcy Tax Attys:** 15	Timothy Fenn Joseph Kronsnoble Jiyeon Lee-Lim Ana O'Brien Jocelyn Noll David Raab Kirt Switzer Samuel Weiner	Antares Capital (Numerous out-of-court restructurings); Atlas Resource Partners (Second lien lenders in Chapter 11 reorganization); Chaparral Energy (Debtor in Chapter 11 reorganization); Halcon Resources (Third lien lenders in Chapter 11 reorganization); Illinois Power Generation Company (Debtor in Chapter 11 reorganization); Stone Energy Corporation (Debtor in Chapter 11 reorganization).
Milbank, Tweed, Hadley & McCloy LLP New York, NY www.milbank.com **Bankruptcy Tax Attys:** 28	Russell Kestenbaum	Linn Energy; Boart Longyear; Energy XXI; Dex Media; Alpha Natural Resources; SH 130; Verso; Energy Future Holdings Corp. (EFH).
Morrison & Foerster LLP New York & San Francisco www.mofo.com **Bankruptcy Tax Attys:** 13	Thomas Humphreys Remmelt Reigersman	Maxus Energy Corporation and four affiliated debtors; Official committee of unsecured creditors of Avaya; Official committee of unsecured creditors of Peabody Energy Corporation; Official committee of unsecured creditors of Republic Airways; Official committee of unsecured creditors of Energy Future Holdings; Official committee of unsecured creditors of Patriot Coal; Official committee of unsecured creditors of Walter Energy and its affiliates; HOVENSA LLC; and LBI Winding-up Board.
Skadden, Arps, Slate, Meagher & Flom New York, NY www.skadden.com **Bankruptcy Tax Attys:** 21	Kenneth Betts Stuart Finkelstein Cliff Gross Brian Krause David Levy Steven Matays David Rievman Sean Shimamoto	Roust Corporation; SunEdison; Atlas Resource Partners; Triangle USA Petroleum Corporation; EMAS CHIYODA Subsea Limited; Ryckman Creek Resources; Toshiba Corporation (with respect to Westinghouse Electric Company); Quiksilver.
Squire Patton Boggs New York, NY www.squirepattonboggs.com **Bankruptcy Tax Attys:** 10	Alan Doris Lindsay Faine James Gray George Schutzer Mitch Thompson	AmFin Financial Corporation; Apache Junction Hospitals; Blue Wolf Capital Partners LLC; Cocopah Nurseries; Unsecured Creditors Committee for D&L Energy; Flat Out Crazy; Legacy Fund partners II; Suncor Development Bank; US Bank.
Weil, Gotshal & Manges New York, NY www.weil.com **Bankruptcy Tax Attys:** 20	Larry Gelbfish Mark Hoenig Martin Pollack Robert Frastai Stuart Goldring William Horton Stanley Ramsay Paul Wessel	Aéropostale (debtor); American Gilsonite (debtor); Angelica (debtor); Azure Midstream Partners (debtor); Basic Energy (debtor); Breitburn Energy (debtor); CHC Group (debtor); Golfsmith Int'l (debtor); GulfMark Offshore (debtor); Halcón Resources (debtor); Memorial Production Partners (debtor); Noranda Aluminum (creditor group); The Great Atlantic & Pacific Tea Company (debtor); Paragon Offshore (debtor); SandRidge Energy (creditor group); Seventy Seven Energy (creditor group); SunEdison (official creditors committee); Tidewater (debtor); Westinghouse Electric (debtor). ¤

Worth Reading

Merchants of Debt: KKR and the Mortgaging of American Business

Author: George Anders **Publisher: Beard Books**
Softcover: 364 pages **List Price: $34.95**

For the first fourteen years of KKR's existence, the buyout firm's hallmark could be expressed in one word: debt. As KKR grew evermore powerful, Kravis and Roberts derived their economic clout from a single fact: They could borrow more money faster than anyone else. KKR acquired $60 billion worth of companies in wildly different industries in the 1980s: Safeway Stores, Duracell, Motel 6, Stop & Shop, Avis, Tropicana, and Playtex. They made piles of money by deducting interest expenditures from their taxes, cutting costs in their new companies and riding a long-running bull market.

The juggernaut of Kohlberg Kravis Roberts & Co. began rolling in 1976 when Jerome Kohlberg and cousins Henry Kravis and George Roberts left Bear Stearns with about $120,000 to spend. The three wunderkinder shortly invented and dominated the leveraged buyout as they sought investors and borrowed money to acquire Fortune 500 companies in dizzying succession. They put up very little money of their own funds, but their partnerships made out like bandits. Consider the case of Owens-Illinois: KKR put up only 4.7 percent of the purchase price. The company's chairman earned $10 million within a few years, the takeover advisors got $60 million, Owens-Illinois was left "gaunt and scaled back," and about five years later, KKR took it public at $11 a share, more than twice what the KKR partnership had paid for it.

In this reprint of his 1992 book Merchants of Debt: KKR and the Mortgaging of American Business, George Anders tells us how they worked: "(t)ime after time, the KKR men presented a tempting offer. The CEO could cash out his company's existing shareholders by agreeing to sell the company to a new group that would be headed by KKR, but would include a lot of room for existing management. The new ownership group would take on a lot of debt, but aim to pay it off quickly. If this buyout worked out as planned, the KKR men hinted, the new owners could earn five times their money over the next five years. Presented with such a choice in the frenzied takeover climate of the 1980s, managers and corporate directors again and again said yes. To top management a leveraged buyout was the most palatable way to ride out the merger-and-acquisition craze."

The author includes a detailed appendix of KKR's 38 buyouts during the period 1977-1992 that presents the following on each purchase: price paid by KKR; percentage of the purchase price paid by KKR's equity funds; length of time KKR owned the company; financial payoff for the ownership group; and the annualized profit rate for investors over the life of the buyout. KKR used less than 9 percent of its own funds in 18 of the 38 cases. In only four cases did KKR put up more than 30 percent of the price. KKR owned the 38 companies for an average of about 5 years. As Anders puts it, "(a)s quickly as the KKR men had roared into a company's life, they roared off."

This behind-the-scene account shows the ambition, pride, envy, and fear that characterized the debt mania largely engineered by KKR, a mania that put millions out of work and made a very few very rich. This book is a must-read in understanding what happened to corporate American in the 1980s. ¤

George Anders is an American business journalist and the author of four books. Mr. Anders worked at Fast Company magazine, The Wall Street Journal and Bloomberg View, and was part of a seven-person reporting team that won the Pulitzer Prize for national reporting in 1997.

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

FHFA, *from page 4*

seems to be arguing that there are at least two classes of shareholders, if not more, depending on when investors purchased their shares," says Patterson. That said, Patterson notes that FHFA's argument is not entirely clear. "They go on to suggest these things amount to unilateral contract amendments, and if that is that their case, it wouldn't matter when you purchased shares," he says.

Whalen, for his part, doesn't think the shareholders win this one, because it's a constitutional issue. "Fannie Mae and Freddie Mac have the trappings of being private so they can push their debt off the U.S. balance sheet, but there are many other indicia of government control, such as the major rating agencies being willing to assign them AAA ratings because sovereigns stand behind them," he says. "So there's a conflict: Sometimes the courts rule that they're private entities; sometimes the courts rule that they're instruments of the United States. But because the government never really released control over the two entities, the reality is that the 'shareholders' are in fact creditors. And as a practical matter, the power of the U.S. Treasury and, ultimately, Congress over the GSEs is absolute. I think, ultimately, the shareholders have a problem, which is that no federal judge is going to step in between Congress and the executive branch."

Patterson has a different perspective. "FHFA's authorities are set out by statute, and there was disagreement in the D.C. Circuit Court between the majority and the dissenting judge as to whether what FHFA did was within those authorities," he says. "Judge Janice Rogers Brown of the D.C. Circuit detailed in her dissenting opinion the reasons why the net worth sweep is illegal. There are cases making similar arguments pending in other circuits as well."

As to the extent that it is a constitutional issue, Patterson notes that there are federal takings claims pending. Federal takings claims are based on the Fifth Amendment to the U.S. Constitution, which provides "nor shall private property be taken for public use without just compensation."

Once the panel makes a decision, the case will return to the D.C. District Court, or one of the parties will petition for review by the U.S. Supreme Court. ¤

Special Report

U.S. Turnaround and Restructuring Firms With European Offices

Firm	Senior Professionals		Representative Clients
AlixPartners 26 offices in the Americas, Europe, and Asia Tel. 44 20 7098 7400 www.alixpartners.com	Simon Appell Michael Baur Alastair Beveridge Lisa Donahue	Laurent Petizon Lorenzo Pietromarchi Peter Saville Axel Schulte	Agrokor Group, Ocean Rig UDW Inc., National Bank of Ukraine, The Jaeger Company, CGG Holding, ABB Asea Brown Boveri Limited, NextiraOne, Nederland B.V., BARD Holding, GmbH, A.T.U. Auto-Teile-Unger Handels GmbH & Co., Piaggio Aero Industries S.p.A., Elettra Produzione Srl., MCS ITALIA S.p.A., Eurpoles GmbH & Co. KG, Austin Reed, Afren plc, Parabis, Vivarte S.A., Air Berlin.
Alvarez & Marsal Europe London Tel. 44 207 715 5200 www.alvarezandmarsal.com	Antonio Alvarez III Richard Fleming Mike Corner-Jones Stefaan Vansteenkiste Adriano Bianchi	Mark Sanders Johann Stohner Mark Firmin Paul Kirkbright	Well established CRO (Abengoa, Edcon in last 12 months) and Performance Improvement businesses recently supplemented with Creditor Advisory and Insolvency senior hires creating a full service independent European Restructuring house.
BDO London Tel. 44 020 7486 5888 www.bdo.co.uk	Shay Bannon Mark Shaw		Domestic and international lenders, creditors, companies, pension funds, private equity, alternative investment funds and government agencies.
Deloitte London Tel. 44 20 7936 3000 www.deloitte.com	Andrew Grimstone Nick Edwards Henry Nicholson	Dan Butters Bill Dawson	Lenders, private equity, corporates, bondholders, trustees, government and public sector.
FTI Consulting London Tel. 44 20 3727 1000 www.fticonsulting.com	Kevin Hewitt Romain Begramian Andreas Fluhrer Simon Granger Chad Griffin Paul Inglis Andrew Johnson Simon Kirkhope	Michael Knott John Maloney David Morris Christopher Ruell Rajesh Sennik Sergio Velez Andreas Von Keitz	Retained as lender-side advisers to companies in the automotive, renewable energy, financial services, steel, oil and gas, retail, healthcare, and technology sectors; retained as financial and operational company-side advisers to companies in the automotive, renewable energy, consumer services, software, financial services, oil and gas, professional services, technology, and media sectors.
Grant Thornton London Tel. 44 20 7383 5100 www.grant-thornton.co.uk	Kevin Hellard David Dunckley Daniel Smith David Ingram Hugh Dickson Keith Hinds Martin Barron Michael Leeds	Nick Wood Nigel Morrison Roy Welsby Sarah Bell Sarah O'Toole Sean Croston Steve Akers	Saad Investments Company Limited; Avocet Mining; Wellgrain; Brandtone; banks and financial institutions, bondholders, corporates, hedge funds, and private equity houses.
Houlihan Lokey (Europe) London Tel. 44 20 7839 3355 www.hl.com	Peter Marshall Joseph Swanson David Preiser Ansgar Zwick		Codere Group bondholders; Roust Corporation; Promotora de Informaciones (Prisa), representing HSBC, BNP Paribas and other creditors including Och-Ziff Capital Management; Grupo Isolux Corsan, S.A.; Waste Italia SpA

Logo, *from page 5*

Chicago American Manufacturing, LLC, 686 F.3d 372 (7th Cir. 2012)).

The bankruptcy court followed the negative inference line of authority in ruling on Tempnology's motion but the First Circuit BAP elected to follow the Seventh Circuit. In so doing, the court noted its agreement with the bankruptcy court that Mission's rights in the Debtor's trademark and logo were not and could not be protected by its § 365(n) election, but continued that it "must part company with the bankruptcy court, however, on the effect the Debtor's rejection of the Agreement had on Mission's licensee rights in the Debtor's trademark and logo." It held that Tempnology's rejection of the agreement "did not vaporize Mission's trademark rights" and that whatever post-rejection trademark and logo rights retained by Mission "are governed by the terms of the Agreement and applicable non-bankruptcy law."

"*Mission Product* addresses issues important to companies and industries where trademark licenses play a key role in business strategies," say Eric Goodman and Dena Kessler of Baker & Hostetler. "Both licensors and licensees, and parties that make loans to such parties, would be wise to continue to monitor the impact the First Circuit BAP's decision has on this field." As noted earlier, Latham & Watkins also highlighted the significance of the ruling in a recent client alert. "The practical impact of the concept that 'after rejecting a contract, a debtor is not subject to an order of specific performance' (which the *Sunbeam* court outlined and the BAP in *Tempnology* upheld), is to makes it relatively clear that rejection of an exclusive trademark license will likely render the license non-exclusive as a practical matter following rejection," Latham noted. "Further the concept would also not allow the licensee to mandate that the licensor comply with provisions of the license requiring ongoing registration, maintenance, enforcement or defense of the licensed trademark(s)."

That general concept "leaves many open questions." An example is the process required to ensure that a trademark is not abandoned under the Lanham Act. "Thus, the *Sunbeam* and *Tempnology* decisions illustrate the importance of careful attention to the rights the licensee retains following a breach of the contract by the licensor when drafting license agreements," according to Latham. "Licensees should seek to clarify the continuing effect of provisions under the license agreement that would restrict the licensee's continued use of the trademark following the licensor's breach." ¤

Puerto Rico, *from page 5*

some bondholders, he thinks Judge Swain will do what she can to try and replicate some of the successes accomplished in Detroit by pushing all parties toward mediation. "But Detroit was manageable as compared to something the size of Puerto Rico, so doing mediation on this scale is truly untested," he notes.

Brandt believes that the road ahead is likely very long. "Unless they can find a way to get to a successful mediation process promptly, this matter has the potential to last at least five years," he predicts.

Brandt is adamant that this structure will not be the blueprint for how insolvent states eventually resolve their obligations. "No state will ever file bankruptcy or be subject to anything like PROMESA," he says.

First, Brandt notes, Congress can pass laws affecting Puerto Rico, as it is an unincorporated Commonwealth.

In addition, he says one cannot look at a struggling municipality as one does a struggling corporation. "With corporations, any restructuring involves people in our profession gravitating to look through the prism of bankruptcy: 'It didn't work out, so let's file bankruptcy and reorganize,'" says Brandt. But one cannot do that with municipalities, because you cannot disconnect the political obligations of issuers in the municipal market, especially the issuers of general obligation bonds, from the full faith and credit guarantee that underpins those instruments. Brandt believes there will "never come a time when governments can, willy-nilly, issue bonds then casually renege on them." He believes that the market for municipal bonds could not long abide that or sustain itself if that practice became prevalent.

"I don't think Puerto Rico created all of its problems, so I don't think Puerto Rico can fix them all by itself."

Under that scenario, bond prices would push most municipal and state structures out of the issuing market. Beyond that, disconnecting the taxpayers from their liabilities through bankruptcy would be a real blow to the responsibilities of American democracy. "Folks who don't deal in the municipal finance markets often just don't understand that," Brandt says.

As to whether this filing will ultimately fix Puerto Rico's problems, Brandt says no. "I don't think Puerto Rico created all of its problems, so I don't think Puerto Rico can fix them all by itself." He notes that beginning in the 1970s, the U.S. government passed a tax law that made many manufacturing profits earned in Puerto Rico non-taxable, leading pharmaceutical companies, among others, to relocate there and take advantage of a very educated population. There were also large naval facilities in and around the island. After the Cold War, everything changed. "Now the U.S. government wants Puerto Rico and its dwindling population to somehow cover the losses, and it's just not possible," Brandt says. "It's inescapable that at some point the federal government is going to have to weigh in here with some funding, some rescue financing, and possibly some guarantees."

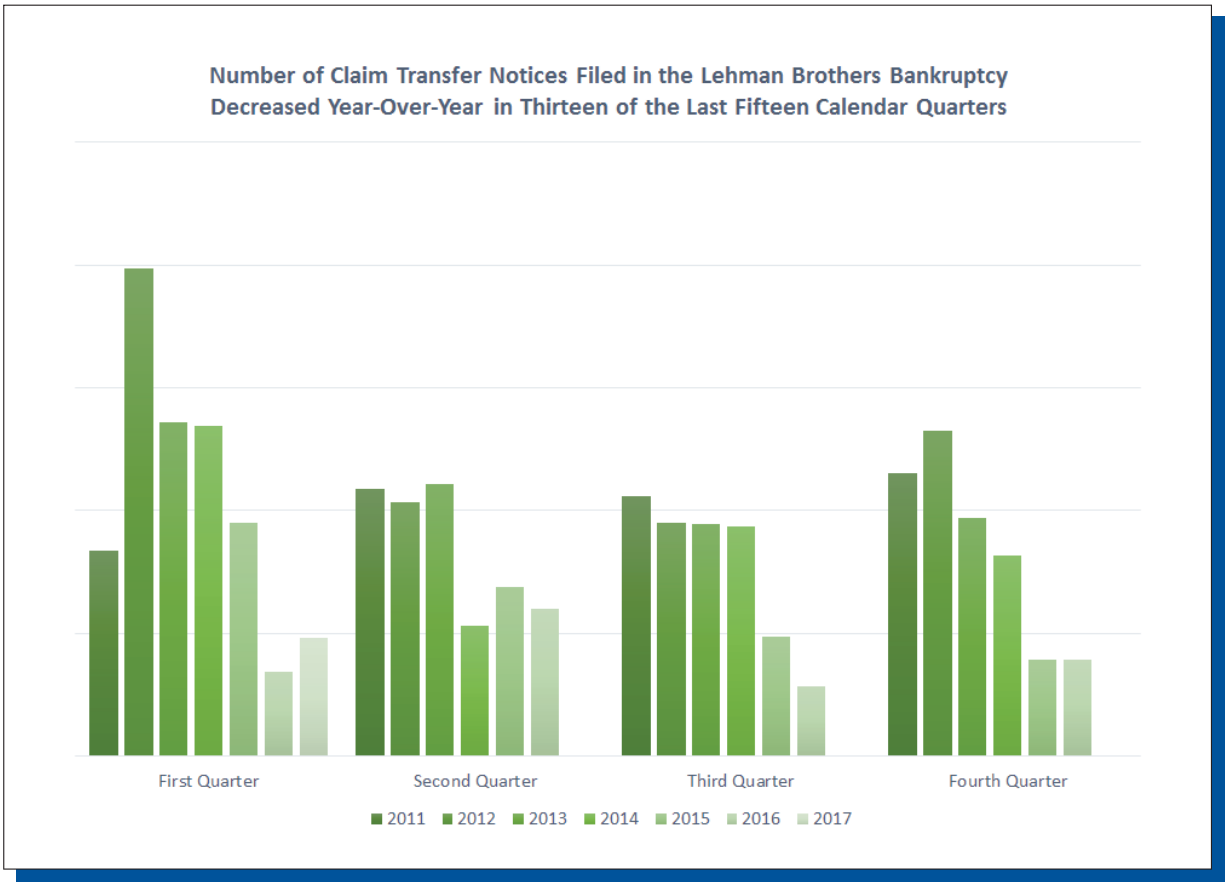
Brandt also points out that the same is true of the Northern Mariana Islands, whose public pension funds are funded at low levels, just like Puerto Rico's. "We are either going to have to make the two of them states (and include Guam within the Marianas) and deal with it or–if they are to remain commonwealths–find a better way to do this than just crushing their populations and economic future with bankruptcy proceedings," Brandt says.

¤

Special Report

CHAPTER 11 DOCKETS

These charts from chapter11dockets.com show the continuing decline in the number of claims transferred in Lehman Brothers record-setting chapter 11 proceeding. Lehman Brothers sought chapter 11 protection from creditors owed $600 billion on Sept. 15, 2008. The Bankruptcy Court confirmed Lehman's Modified Third Amended Joint Chapter 11 Plan on Dec. 6, 2011, and a twelfth distribution to Lehman creditors occurred on Apr. 6, 2017.



Gnome de Plume

Building the Post Reorg Board

by Deborah Hicks Midanek

The odds are stacked against companies coming out of Chapter 11. Some of this is due to noise created by arbitrary performance projections; some to industry issues. Many, though, suffer from the difficulty of making good and timely decisions, which is a function of leadership, and most particularly, the board of directors.

Whether new management is in place or the old group has survived, effective oversight is critical to success. Yet often the board is ineffective, demanding disproportionate attention from management, directors, and counsel alike.

Post reorg boards are rarely well thought through from the point of view of what will make them successful at safeguarding the welfare of the enterprise, participating in development and monitoring execution of strategy, supporting management while holding them accountable, and building the decision making framework needed for consistent performance.

Why is this? Those assembling the board fail to understand or respect the work of the board. Boards bear some responsibility for this, as they have often been treated like mushrooms, kept in the dark, and they have allowed that.

Attorneys often contribute to the mess as they recommend poor candidates–folks who represent a majority fallacy, inoffensive but lacking the depth to contribute, or, worse, celebrities. Former senators or think tank leaders are mostly worse than useless as they demand way too much attention and generally deliver little in the way of substance.

Search firms are wonderful at finding skill sets, but focus on industry expertise as the simplest measure of fit, without knowing the particular challenges of the early days of the new company's operations. They have a much harder time understanding and thus finding the folks who know how to work in that environment.

The money interests are busy horse-trading to garner votes for a confirmable plan. Frequently lacking perspective on board function, they tend to prefer folks who have money at stake, or put their lackeys forward, expecting them to follow instructions. Their perception that only those who have significant holdings can be effective muddies the water, as those folks frequently have trouble thinking objectively about building value, and think their voices carry more weight than others.

The result is often a mishmash of people who may not know the first thing about board service and how they are to perform. Once the plan of reorganization is approved, they are often left alone to fight their way forward in the dark. They frequently have legacy counsel at least at the outset, and have trouble perceiving that counsel, while always appearing to have the answers, may also not really know how to help the board do its job well.

What to do? The first step is to think about the board, not the POR, and identify what it needs to do. Is the company well capitalized but in a dying industry? Is there an old management team in place due to horse-trading? Where are the most critical challenges to the new company's viability?

Next, given that the board will be comprised of folks selected through a less than optimal process, influenced by the factors outlined above, develop a serious on-boarding process: training in company matters, industry dynamics, board and committee function, fiduciary function, bylaws and indemnification. Once seated, their first loyalty is to the enterprise.

Finally, look for folks comfortable in changing situations, who listen closely, with experience in governance and corporate success, and who can create a functioning team capable of serving as the stewards they are intended to be. This person, and not the CEO, needs to serve as board chairman. ¤

Ms. Midanek is an independent corporate director and the President of Solon Group, Inc. Contact: dhmidanek@solongroup.com.

In the Next Issue...

- *Special Report: Canadian Bankruptcy Law Firms*
- *Special Report: Outstanding Investment Bankers – 2017*

Turnarounds & Workouts is published eleven times each year by Beard Group, Inc., Telephone: (240) 629-3300. Copyright 2017 by Beard Group, Inc. ISSN 0889-1699. All rights reserved; unauthorized reproduction strictly prohibited. Editor: Peter A. Chapman (peter@beardgroup.com). Assistant Editors: Julie Schaeffer, Randall Reese and Frauline Maria S. Abangan. Subscription Rate: $447 per year per firm for one recipient plus $25 per year for each additional recipient. Contact peter@beardgroup.com with comments and coverage suggestions.