turnarounds & workouts
News for People Tracking Distressed Businesses
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Inside



# Molycorp

## Carve-Out Does Not Equal Fee Cap

*by Julie Schaeffer*

A Delaware judge has ruled that a standard carve-out for professional fees of an official creditors' committee does not limit the ability of those professionals to later obtain more – and the decision could have significant impact.

"As with many decisions which come out of the Delaware bankruptcy court, this ruling could have a broad impact on chapter 11 practice in courts across the country," says Benjamin D. Feder, special counsel at Kelley Drye.

The decision came in the Chapter 11 case of Molycorp, an American mining corporation headquartered in Colorado. As is the case in most bankruptcies, the official

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# Have Transfer, Will Travel?

## SDNY Addresses Extra-Territorial Transfers

*by Randall Reese*

As technology makes it easier to transact with businesses and individuals located anywhere in the world, an ever-increasing number of international entities find themselves entangled in U.S. bankruptcy proceedings. One area of entanglement relates to potentially avoidable transfers. The bankruptcy case of Ampal-American Israel Corp. – a holding company organized under New York law headquartered in Israel presented Judge Stuart Bernstein of the Southern District of New York bankruptcy court with the opportunity to provide some additional guidance on those issues.

Within the ninety days prior to its 2012 bankruptcy filing in the Southern District of New York, Ampal made a transfer of approximately $89,000 to an Israeli law firm –

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# Retail Restructuring Lessons

## From Beard Group's Recent Webinar

*by Julie Schaeffer*

In March, Beard Group assembled four restructuring experts to discuss the state of retail. Here are some lessons we learned:

**It's not your granddad's shopping mall.** "The top-end malls are not the top-end malls that we knew when we were kids," says Frank Merola, a partner in the Financial Restructuring Group at Stroock & Stroock & Lavan LLP. "They don't have a Sears on one end and a JC Penney's on the other. Those are now B- and C-level malls. Today, at the A-level malls, we're seeing some really innovative ideas being integrated into them to create some foot traffic, everything from hotels to condo projects to day-care

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## Molycorp, *from page 1*

committee of unsecured creditors retained counsel (Paul Hastings LLP in this case) and other professionals. However, the company had almost no unencumbered assets with which to pay the fees of those professionals.

The only way those professionals could be paid, then, was via a "carve-out" from proceeds of collateral agreed to by the company's secured lenders. Widely used, a carve-out (which does not derive its substance from any particular section of the Bankruptcy Code) is an agreement between a secured lender and the trustee or debtor in possession providing that a portion of the secured creditor's collateral may be used to pay administrative expenses. The agreement usually limits the nature, amount, and timing of expenses, and is subject to court approval.

Secured lenders typically agree (albeit grudgingly at times) to carve-outs because they prefer Chapter 11 cases, where value can be preserved through a reorganization or a sale of the debtor's business, instead of liquidations under Chapter 7. "The agreement usually comes only after hard negotiations (typically after sabers have not only been rattled but also drawn), as part of an order that provides new financing and/or permits a debtor to use cash proceeds of collateral in order to operate during the pendency of the bankruptcy case," says Feder.

**The committee argued that once Molycorp's plan was confirmed, Section 1129(a)(9) controlled and that the carve-out in the financing order was no longer operative.**

Molycorp's secured lender, very early in the case, consented to a carve-out of up to $250,000 to cover the fees and expenses of the counsel for the creditors' committee. But ultimately, after confirming a plan of reorganization, the committee's professionals sought payment of nearly $8 million.

In making its case, the committee turned to Section 1129(a)(9) of the Bankruptcy Code, which states that

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## Transfer, *from page 1*

Goldfarb Seligman & Co. – as a payment toward outstanding invoices. Both Ampal and Goldfarb had accounts with Bank Hapoalim, located in Tel Aviv, and the payment was made by transferring funds from Ampal's account at Bank Hapoalim to Goldfarb's account at the same institution. Following Ampal's bankruptcy filing and the subsequent conversion of its Chapter 11 case to one under Chapter 7, the Chapter 7 trustee filed an adversary proceeding to avoid and recover this transfer as a preference pursuant to Bankruptcy Code sections 547 and 550.

By the time of Judge Bernstein's opinion earlier this year, the dispute in the adversary proceeding had been boiled down to a single defense asserted by Goldfarb: that the trustee's preference claim was barred by the presumption against extraterritoriality. In a 1991 decision, the Supreme Court described this presumption as a "longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." The presumption "serves to protect against unintended clashes between our laws and those of other nations which could result in international discord."

The Ampal decision is not the first to consider this issue, but comes at a time where it represents "the most recent event in a developing saga in this Bankruptcy Court's treatment of foreign transfers," according to Matthew Skrzynski of Weil, Gotshal & Manges. "The prevailing view in the Southern District had been that the avoidance provisions do not apply to foreign transfers," he explains. However, Judge Gerber issued a 2016 decision in *In re Lyondell Chemical Co.* that held that section 548 of the Bankruptcy Code could apply to foreign transfers, thereby muddying the waters.

In evaluating the application of the presumption against extraterritoriality to Ampal's transfer to Goldfarb, Judge Bernstein utilized the two-step approach outlined by the Supreme Court in *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247, 130 S.Ct. 2869, 177 L.Ed.2d 535 (2010). As a first step, the test requires the court to "ask whether the presumption against extraterritoriality

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## Retail Lessons, *from page 1*

facilities to entertainment options like theatres and skating rinks. And we're going to see enormous capital go into them. I would guess it's a matter of time before you have a hotel like a Great Wolf Lodge incorporated into a regional mall, so you can have a weekend away, and the whole family can do some shopping and have a selection of restaurant and entertainment options."

**Landlords are going to have to incentivize certain tenants.** Merola says that in the redevelopment of A-level malls, where landlords are seeking significantly more entertainment features, tenants are getting anchor-tenant-like rents that are being used as the draw for the rest of the retail. It's not a low-risk proposition for landlords, because in addition to lower rent on a per-square-foot basis, there are also other costs involved in establishing those tenants, such as technological changes for new theaters. "But I think that type of entertainment draw is going to become absolutely essential for signing high-end tenants, and you'll see real competition for the type of tenants people want at the top-tier malls," says Merola.

**Getting the mix right may take time.** "You're not going to have malls with Versace and Duane Reed," says Merola. "But as landlords get desperate to fill space, weird things happen. So we will see some mismatches, especially in malls under redevelopment. But as they get finished, there will be a push to get rid of some of the middle-range customers and try to make it more high end. There's just an end to how many of those stores you can put in one mall."

**Mall operators will have to adjust to a more agile world.** "The old mall was financed by giving fee title to the two anchors, usually Sears and Montgomery Ward or JC Penney's, then, signing up the rest of the tenants to fairly long-term leases that could be financed," says Merola. "But in today's world, in which retail is changing so dynamically, tying a tenant down to a retail lease for five, ten, fifteen, or twenty years when you don't know what retail is going to look like is going to become increasingly challenging. Mall operators are going to have to decide how to best address that."

**The availability of perfect pricing information is driving creative sales**

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# Research Report

## Who's Who in Bonanza Creek Energy

*by Carlo Fernandez*

*Denver, Colorado-based Bonanza Creek Energy, Inc., is an independent oil and natural gas company engaged in the acquisition, exploration, development and production of onshore oil and associated liquids-rich natural gas in the United States.*

*Bonanza Creek was incorporated in Delaware in December 2010 and went public in December 2011, with shares trading on the New York Stock Exchange under the BCEI ticker symbol.*

*As of Sept. 30, 2016, Bonanza had $1.22 billion in total assets against $1.13 billion in total liabilities. Bonanza is a borrower under a $150 million revolving credit agreement with KeyBank National Association, as successor to BNP Paribas as the administrative agent. Bonanza had issued $300 million of unsecured 5.75% senior notes due 2023 and $500 million of 6.75% unsecured senior notes due 2021.*

***Chapter 11 Filing***

*As oil prices remained at depressed levels, it became clear to the debtors that revenues from operations wouldn't be able to support the existing capital structure and that a restructuring under chapter 11 was necessary.*

*On Jan. 4, 2017, Bonanza Creek and six affiliated debtors each filed a voluntary petition for relief under Chapter 11 of the U.S. Bankruptcy Code (Bankr. D. Del. Case No. Case No. 17-10015), to seek court approval of its prepackaged plan of reorganization. The debtors are Bonanza Creek Energy Operating Company, LLC, Bonanza Creek Energy Resources, LLC, Holmes Eastern Company, LLC, Rocky Mountain Infrastructure, LLC, Bonanza Creek Energy Upstream LLC and Bonanza Creek Energy Midstream, LLC.*

*The debtors' Chapter 11 plan will shed $850 million of Bonanza's $1 billion debt load through note-to-equity swaps and provide Bonanza with $200 million of fresh capital from a rights offering.*

*Bonanza signed a deal to divert all volumes of their crude oil production to NGL. It later signed a deal to terminate its supply agreement with Silo Energy LLC.*

*Constituencies entitled to vote on the Plan – the holders of secured claims and general unsecured claims – returned 436 ballots voting to accept the Plan; no creditor voted to reject the Plan.*

*An Ad Hoc Committee of Equity Holders contested plan confirmation. The equity holders – out of the money under the Company's initial proposal – complained the Plan undervalued the debtors and wrongly rewarded select creditors. The supporting noteholders defended the Plan, pointing out that the estimated total enterprise value is only $575 million to $765 million, giving a recovery of 56% to noteholders. Thus, they countered, any distribution to equity holders would violate the absolute priority rule. At the conclusion of a three-day confirmation hearing, the Court entered an order confirming Bonanza Creek's consensually modified plan. Bonanza expects to emerge from bankruptcy before the end of April.*

*Under the confirmed Plan, all prepetition equity is cancelled. Secured claims and unsecured trade claims will be paid in full. Noteholders will receive 95.5% of new equity and subscription rights for the rights offering. A settlement with the Company's equity holders gives them 4.5% of new equity (subject to dilution) plus three-year warrants for up to 7.5% of the new equity in reorganized Bonanza Creek. Bonanza says the Plan positions it to succeed in the highly competitive oil and natural gas industry.*

**The Debtor**

**Davis, Polk & Wardwell LLP** is acting as legal counsel Bonanza Creek, with the engagement led by partners **Marshall S. Huebner** and **Brian M. Resnick**, and associate **Daniel M. Silberger**. **Richards, Layton & Finger, P.A.**, acts as local counsel, with the engagement headed by director **Mark D. Collins** and associates **Amanda R. Steele** and **Brendan J. Schlauch.**

**Perella Weinberg Partners LP** is acting as financial advisor, with the engagement led by partner **Kevin M. Cofsky**.

**Alvarez & Marsal LLC** is acting as restructuring advisor, with **Seth Bullock**, a managing director in Houston, leading the engagement.

**PricewaterhouseCoopers LLP** is the debtors' accounting advisor, with the engagement headed by partner **Steve Lilley**.

**Prime Clerk LLC** is the notice, claims and solicitation agent to the Company in connection with its restructuring efforts, with **James Daloia** leading the engagement. Prime Clerk is also the subscription agent under the rights offering.

**Creditors**

No official committee of unsecured creditors was formed in the Chapter 11 cases.

**Apollo Energy Opportunity Management LLC, Aristeia Capital, L.L.C., Barclays Bank PLC, Continental Casualty Company, D.E. Shaw Galvanic Portfolios, L.L.C., Gen IV Investment Opportunities, LLC, Lord, Abbett & Co. LLC, Luxor Capital Group, LP, Mangrove Partners, Nomura Corporate Research and Asset Management, Inc., Oaktree Capital Management, L.P., Paloma Partners Management Company, Par-Four Investment Management, LLC, Perry Creek Capital Fund 1, Socratic Fund Management LP, Venor Capital Management LP, Wells Fargo Securities, LLC, and Whitebox Advisors LLC**, comprise the Ad Hoc Group of Noteholders.

**Kirkland & Ellis LLP** represents the Ad Hoc Group of Noteholders. **Edward O. Sassower**, a partner in the firm's New York office; **Steven N. Serajeddini** and **John R. Luze**, partners in the Chicago office; and **Stephen T. Schwarzbach Jr.**, a partner in the firm's Houston office, head the engagement. **Pachulski Stang Ziehl & Jones LLP** is local counsel to the Ad Hoc Group of Noteholders, led by partners **Laura Davis Jones** and **Peter J. Keane**.

**Evercore Group L.L.C.** is serving as financial advisor to the Ad Hoc Group of Noteholders.

**Equity Holders**

The Ad Hoc Committee of Equity Security Holders is comprised of **Fir Tree Inc., HHC Primary Fund, Ltd., CVI Opportunities Fund I, LLP, Silver Point Capital Offshore Master Fund, L.P., Silver Point Capital Fund, L.P.**, and **MatlinPatterson Global Opportunities Master Fund LP**.

**Brown Rudnick LLP** serves as counsel to the Ad Hoc Equity Committee. The engagement is led by **Edward S. Weisfelner**, head of the firm's Bankruptcy and Corporate Restructuring Practice Group; **Bennett S. Silverberg**, a partner in the firm's New York office; **D. Cameron Moxley**, an associate in the New York Office; and **Mark S. Baldwin**, a partner in the firm's Hartford, Connecticut office. **Chipman Brown Cicero & Cole, LLP**, is local counsel to the Ad Hoc Committee of Equity Security Holders, with the engagement led by partner **William E. Chipman, Jr**.

**Judge**

The **Hon. Kevin J. Carey** is the case judge.

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## Molycorp, *from page 2*

when a plan of reorganization is confirmed, all administrative claims must be paid in full. And the professional fees incurred by an official creditors' committee were administrative claims, the committee argued. Essentially, says Feder, "the committee argued that once Molycorp's plan was confirmed, Section 1129(a)(9) controlled and that the carve-out in the financing order was no longer operative."

Naturally, Oaktree Capital Management, L.P., the secured lender, objected. Oaktree, represented by Milbank Tweed, Hadley & McCloy LLP, argued the only source of funds was its collateral, and the proceeds of its collateral could not be used without its consent. "The secured lender responded by noting that Section 1129(a)(9) provides that the holder of an administrative claim may agree to accept less than full payment," says Feder. "In its view, the carve-out had effectively served as such an agreement."

Judge Christopher S. Sontchi agreed with the creditors' committee, ruling that the carve-out did not limit the payment of the committee's counsel's fees as administrative expenses under a confirmed plan of reorganization. The payment of administrative expenses under Section 1129(a)(9), Sontchi said, is "a fundamental statutory requirement of the Bankruptcy Code."

"In Judge Sontchi's view, the carve-out

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## Transfer, *from page 2*

has been rebutted – that is, whether the statute gives a clear, affirmative indication that it applies extraterritorially." If the conclusion is that the statute applies extraterritorially, the inquiry ends. If not, the court must continue to the second step to determine whether the litigation involves an extraterritorial application of the statute. "If the statute is not extraterritorial, then at the second step we determine whether the case involves a domestic application of the statute, and we do this by looking to the statute's 'focus,'" the Supreme Court wrote in *Morrison*. "If the conduct relevant to the statute's focus occurred in the United States, then the case involves a permissible domestic application even if other conduct occurred abroad; but if the conduct relevant to the focus occurred in a foreign country, then the case involves an impermissible extraterritorial application regardless of any other conduct that occurred in U.S. territory."

"[Judge Bernstein in] *Ampal–American* disagreed with the approach in *Lyondell* as to the first question, and clarified it as to the second," notes Weil's Skrzynski. In *Lyondell*, Judge Gerber found the reasoning of the Fourth Circuit Court of Appeals in a 2006 decision in *French v. Liebmann (In re French)*, 440 F.3d 145 (4th Cir. 2006), *cert. denied*, 549 U.S. 815, 127 S.Ct. 72, 166 L.Ed.2d 25 (2006), persuasive. That court looked to the broad language of section 541 of the Bankruptcy Code to note that "all

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## Retail Lessons, *from page 2*

**strategies.** "In a world in which everyone has a mobile device in his or her pocket, there is almost perfect pricing information," says Merola. "Shoppers know if the name-brand good they're looking for is $3.00 cheaper down the street or $5.00 cheaper online with free shipping, then the idea of going to a mall, looking around, and buying something to buy is almost dead. As a result, I think you're going to see specialized or custom goods that are only available for a limited period of time. Both Target and H&M have played with having designers doing a limited number of pieces, and it's created tremendous traffic in the stores."

**Demographics need to broaden.** According to Paul Huygens, a principal at Province, Inc., a financial advisory firm, many retailers attempt to age up or down to broaden their demographics by targeting older and younger shoppers so they have those customers for a longer span of time. "Teen retailers have to acquire new customers every few years, because their customers are only good between the ages of 13 and 17," he says. As a result, their intellectual property is generally less valuable. "Brands, such as Coldwater Creek, have a 30-year life span with their customers once they acquire them."

**Marketing has changed.** Retailers today are marketing themselves and their products in ways that were unheard of 20 years ago. They used to place

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# Calendar

**Turnaround Management Association**
11th Annual Southwest Regional Conference
May 10, 2017
JW Marriot Hill Country Resort & Spa
San Antonio, TX
Contact: www.turnaround.org

**American Bankruptcy Institute**
New York City Bankruptcy Conference
May 18, 2017
New York Hilton
New York, NY
Contact: www.abiworld.org

**International Association of Restructuring, Insolvency & Bankruptcy Professionals**
INSOL International São Paulo One Day Seminar
May 25, 2017
Hotel Unique
São Paulo, Brazil
Contact: www.insol.org

**Association of Insolvency & Restructuring Advisors**
33rd Annual Bankruptcy & Restructuring Conference
June 7 – 10, 2017
Four Seasons Resort & Club
Dallas, TX
Contact: www.aira.org

**American Bankruptcy Institute**
Central States Bankruptcy Workshop
June 8 – 10, 2017
Grand Traverse Resort and Spa
Acme, Mich.
Contact: www.abi.org

**Turnaround Management Association**
2017 Europe Annual Conference
June 15 – 16, 2017
Waldorf Hotel
London, United Kingdom
Contact: www.turnaround.org

**International Association of Restructuring, Insolvency & Bankruptcy Professionals**
INSOL International / INSOL Europe Tel Aviv One Day Seminar
June 25 – 27, 2017
Hilton Tel Aviv
Tel Aviv, Israel
Contact: www.insol.org ¤

# Special Report

## Regional and Local Bankruptcy Accounting Firms

| Firm | Partners & Professionals | Representative Clients & Industries |
|---|---|---|
| **Anchin, Block & Anchin**<br>New York, NY<br>(212) 840-3456<br>www.anchin.com | Marc A. Newman<br>E. Richard Baum<br>Paul Gevertzman<br>Sol Lipshitz<br>Richard H. Stieglitz | Client industries include architecture and engineering, chemicals and energy, construction, fashion, financial services, food and beverage, insurance, law firms, life sciences, manufacturing and distribution, private equity, public relations and advertising, real estate, and technology. Recent clients include Nordic Interior, Inc. and Newbury Common Associates LLC. |
| **Bachecki, Crom & Co., LLP**<br>South San Francisco, CA<br>(415) 398-3534<br>www.bachcrom.com | Jay D. Crom<br>Kimberly Lam<br>Austin Wade<br>Gerald W. Bachecki<br>Alice Yee | Experienced in assisting troubled companies with development and implementation of turnaround plans, investigation of preferences and fraudulent conveyance matters, and analysis of solvency. Recent clients include Lake Tahoe Partners LLC, KineMed Inc., and Mathioupoulos 3M Family Limited Partnership. |
| **Baker Tilly Virchow Krause, LLP**<br>Chicago, IL<br>(312) 729-8000<br>www.bakertilly.com | Thomas F. Walker | Identifies and opines on complex issues involving distressed businesses. Provides an array of turnaround management, bankruptcy, and litigation services; and provides expert testimony for parties involved in a myriad of restructuring related disputes. Professionals serve as experts, examiners, receivers, and trustees in bankruptcy litigation. Recent clients include Haubert Homes, Inc., Dunlap Street LLC, and KDP Bellefonte, Inc. |
| **Bederson LLP**<br>West Orange, NJ<br>(973) 736-3333<br>www.bederson.com | Edward P. Bond<br>Timothy J. King<br>Charles S. Lunden<br>Charles N. Persing<br>Matthew Schwartz | Creditors' committees, debtors, trustees, as well as court-appointed examiners, mediators, fiscal agents, receivers, and fiduciaries. Client industries include automotive, banking and finance, construction, department stores, entertainment, healthcare, heavy equipment, hospitality, importing and exporting, intellectual property developers, leasing companies, oil and gas exploration, and others. Recent clients include Scripsamerica Inc, Binder Machinery, Strategic Environmental, Juroma Properties, and Toz-Bel LLC. |
| **Citrin Cooperman & Company LLP**<br>New York, NY<br>(212) 697-1000<br>www.citrincooperman.com | Howard Fielstein<br>Peter Brown | Analyzes debtors' financial operations, prepares reports to aid in evaluation of any proposed Chapter 11 plan, assists in reviewing the financial aspects of asset sales and any bankruptcy plan, and provides other accounting services. Focus areas are attest and assurance, tax compliance & research services, consulting and specialty services, and business advisory solutions. Recent clients include Hospital Audiences, Inc, COSI Inc., and Sirgold Inc.'s creditors' committee. |
| **Dennis & Company, PC**<br>Greenwood Village, CO<br>(720) 528-4087<br>www.denniscocpa.com | Mark D. Dennis<br>Mariem Skalli<br>David E. Dennis | Advises bankruptcy trustees, attorneys and debtors on bankruptcy matters such as the value, character and basis of assets in the hands of bankruptcy estates, the treatment of tax attributes on debtor and bankruptcy estate tax returns and forecasting tax liability from proposed transactions. Recent clients include Firebird Enterprises LLC, Grizzly Land LLC, Draft Contracting, LLC, DVR LLC, Equity Holdings Group, Inc. |
| **EisnerAmper LLP**<br>New York, NY<br>(212) 949-8700<br>Iselin, NJ<br>(732)-243-7000<br>www.eisneramper.com | Ira Spiegel<br>Thomas Buck<br>David Ringer | Provides restructuring and investigative advisory services to distressed companies, unsecured creditors, senior lenders, and trustees in the middle market environment. Bankruptcy and Restructuring is a dedicated practice, staffed with experienced restructuring professionals with large advisory firm backgrounds such as PricewaterhouseCoopers, Protiviti, Huron, Deloitte and Zolfo Cooper. Recent clients include Congregation Achpretvia Tal Chaim Shar Hayushor, Inc., Fremak Industries Inc.'s examiner, Metcom Network Services, Inc., Steelcore Capital Master Fund, L.P., Powell Valley Health Care, Inc.'s creditors committee. |
| **Gollob Morgan Peddy & Co., P.C.**<br>Tyler, TX<br>(903) 534-0088<br>www.gmpcpa.com | Robert W. Peddy<br>Kevin R. Cashion<br>Dianne Johnston<br>Pamela Nash | Services include pre-bankruptcy consulting; preparation of bankruptcy schedules; general accounting services; forensic accounting services; maintenance of claim register; identification of preferential payments; preparation of operating reports for U.S. Trustee; preparation of specialized financial reports. Recent clients include AIX Energy, Inc.'s Chapter 11 trustee, Continental Exploration's Chapter 11 trustee, Maricopa Resources, LLC's Chapter 11 trustee, and Torqued-Up Energy Services Inc. |
| **Kapila Mukamal**<br>Fort Lauderdale, FL<br>(954) 761-1011<br>www.kapilamukamal.com | Soneet R. Kapila<br>Barry E. Mukamal | Practice areas include fiduciary, bankruptcy and creditors' rights, valuations, litigation support, and insolvency tax consulting. Recent clients include Miami Neurological, Nassau Development, and Pinnacle Resort. |
| **Lain, Faulkner & Co.**<br>Dallas, TX<br>(214) 720-1929<br>www.lainfaulkner.com | Dan B. Lain<br>Dennis S. Faulkner | Trustees, debtors-in-possession, unsecured creditors' committees, debtors, creditors' committees, chief restructuring officers, examiners, settlement and postconfirmation trustees, special claims analysts, and secured creditors. Recent clients include Frac Specialists, LLC, Frymire Services, Inc., and One Source Industrial Holdings. |
| **Marcum**<br>New York, NY<br>(212) 485-5500<br>www.marcumllp.com | Morris Hollander<br>Frank Rudewicz<br>Alan Winters<br>James Ashe | Scope of services includes preparation of business tax returns for bankruptcy clients, review of all bankruptcy filings, the disposition of assets to determine tax implications, tax issues related to discharge of indebtedness, accounting for bankruptcy estates, and use of net operating losses. Recent clients include Transgenomic, Inc., and Hebrew Health Care, Inc. |
| **Squar, Milner, Reehl & Williamson LLP**<br>Newport Beach, CA<br>(949) 222-2999<br>www.squarmilner.com | Stephen P. Milner | Expertise includes Chapter 11 cases, Chapter 7 cases, payroll and trust fund recovery penalties, short-period elections, tax ramifications and planning around discharge of indebtedness, business reorganizations, priority and dischargeability of tax claims, and tax consequences of legal settlements. The firm serves real estate, manufacturing and distribution, technology, eCommerce and companies and individuals in professional service businesses. A recent client is Freedom Communications, Inc. ¤ |

# Worth Reading

## A Legal History of Money in the United States, 1774-1970

**Author: James Willard Hurst**
**Publisher: Beard Books**
**Softcover: 388 pages**
**List Price: $34.95**

This book chronicles the legal elements of the history of the system of money in the United States from 1774 to 1970. It originated as a series of lectures given by James Hurst at the University of Nebraska in 1973. Mr. Hurst is quick to say that he, as a historian of the law, took care in this book not to make his own judgments on matters outside the law. Rather, he conducted an exhaustive literature review of economics, economic history, and banking to recount the development of law over the operations of money. He attempted to "borrow the opinions of qualified specialists outside the law in order to provide a meaningful context in which to appraise what the law has done or failed to do."

Mr. Hurst defines money, for the purposes of this book, as "a distinct institutional instrument employed primarily in allocating scarce economic resources, mainly through government and market processes," and not shorthand for economic, social, or political power held through command of economic assets. From the beginning, public and legal policy in the U.S. centered on the definition of legitimate uses of law affecting money and allocation of power over money among official agencies, both federal and state. The foundations of monetary policy were laid between 1774 and 1788. Initially, individual state legislatures and the Continental Congress issued paper currency in the form of bills of credit. The Constitutional Convention later determined that ultimate control of the money supply should be at the federal level. Other issues were not clearly defined and were left to be determined by events. The author describes how law was used to create and maintain a system of money capable of servicing the flow of resource allocations in an economy of broadly dispersed public and private decision making. Law defined standard money units and made those units acceptable for use in conducting transactions.

Over time, adjustment of the money supply was recognized as a legitimate concern of law. Private banks were delegated expansive monetary action powers throughout the 1900s and private markets for gold and silver were allowed to affect the money supply until 1933-34. Although the Federal Reserve Act was not aimed clearly at managing money for goals of major economic adjustment, it set precedents by devaluing the dollar and restricting the use of gold.

Mr. Hurst devotes a large part of his book to key issues of monetary policy involving the distribution of power over money between the nation and the states, between legal and market processes, and among major agencies of the government. Until about 1860, all major branches of government shared in making monetary policy, with states playing a large role. Between 1908 and 1970, monetary policy became firmly centralized at the national level, and separation of powers questions arose between the Federal Reserve Board, the White House (The Council of Economic Advisors), and the Treasury.

The book was an enormous undertaking and its research exhaustive. It includes 18 pages of sources cited and 90 pages of footnotes. Each era of American legal history is treated comprehensively. The book makes fascinating reading for those interested in the cause and effect relationship between legal processes and economic processes and those concerned with public administration and the separation of powers. ¤

*James Willard Hurst (1910-1997) is widely regarded as the grandfather of American legal history. He graduated from Harvard Law School in 1935 and taught at the University of Wisconsin-Madison for 44 years.*

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

## Molycorp, *from page 4*

agreed to in Molycorp, which he referred to as 'standard,' was only intended to be applicable if Molycorp's reorganization had failed," says Feder. "If the case had been converted to Chapter 7 or dismissed, and the collateral liquidated, the $250,000 would have been the maximum that the committee's professionals could have received."

Judge Sontchi did acknowledge that a carve-out provision might serve as an agreement to accept less than full payment under a later plan of reorganization, but the language in Molycorp's carve-out provision before him did not contain any specific language that would "compel an automatic disallowance" of the committee's fees. And he indicated that in other cases, he might not be willing to approve a carve-out provision if it contained such language.

Robert E. Kaelin, a partner at Murtha Cullina, says Sontchi distinguished Molycorp, which was a successful reorganization, from a failed reorganization. "Had the case been a failed Chapter 11, then the judge agreed that the 'carve-out' presented a limitation on how much money the committee professionals would be entitled to out of the lender's collateral or money, but not so, at least not as written, in a successful reorganization," he explains.

It is a possible lesson for secured lenders in future cases. The situation that arose in Molycorp – the company having almost no unencumbered assets with which to pay the fees of those professionals – has become common, especially in large cases with complicated capital structures.

"The first few weeks of representing a creditors' committee in a large, complex and fast-moving case have been likened by some practitioners as comparable to trying to slow down a freight train by stepping in front it," says Feder. "Judge Sontchi's analysis, if followed by other courts, will provide committee counsel during these fraught periods with at least a bit more leverage in negotiations with secured lenders over carve-out provisions and payment of fees." ¤

# Special Report

## Outstanding Young Restructuring Lawyers - 2017

| Lawyer & Firm | Outstanding Achievements |
|---|---|
| **Jonathan Canfield**<br>Stroock & Stroock & Lavan LLP<br>New York, N.Y.<br>jcanfield@stroock.com | Advised the ad hoc group of bank lenders in Caesars Entertainment Corporation; senior lenders to multinational satellite and communications company Intelsat; the ad hoc group of second lien noteholders, DIP financing lenders and foreign loan lenders to multinational electronic dance music and festival company SFX Entertainment; and certain noteholders and new money lenders of the global military contractor DynCorp International in a transaction that averted default on $662 million in debt. |
| **Rosa J. Evergreen**<br>Arnold & Porter Kaye Scholer LLP<br>Washington, D.C.<br>rosa.evergreen@apks.com | Led the representation of Quad/Graphics, Inc., the post-confirmation successor to Quebecor World (USA) Inc., the second largest printing company in the U.S., and Quad/Graphics' $250 million acquisition in Vertis' chapter 11 proceedings. Played a leading role in the firm's representation of PMI Mortgage Insurance Co. and its state law receiver, helping effectuate a global $2.2 billion NOL settlement. Currently advising a Fortune 500 company regarding bankruptcy issues related to mass settlements in multi-district litigation. |
| **Adam J. Goldberg**<br>Latham & Watkins LLP<br>New York, N.Y.<br>adam.goldberg@lw.com | Co-led representing the official creditors' committee in Energy XXI, proposing competing plans and alternative transactions that materially increased unsecured creditors' recoveries. Advised the second lien lenders in connection with Atla Resource Partners' $1.5 billion restructuring – one of few successful E&P MLP reorganizations. Represented DTEK Holdings (generating approximately one-third of the electricity in Ukraine and employing over 100,000 people) in an English law scheme of arrangement of its Dutch subsidiary. |
| **Chad J. Husnick**<br>Kirkland & Ellis LLP<br>Chicago, Ill.<br>chad.husnick@kirkland.com | Recently represented Energy Future Holdings Corp. and 70 of its affiliates, the largest generator, distributor, and certified retail provider of electricity in Texas, with more than $49 billion in liabilities and $36 billion in assets; C&J Energy Services, in its pre-negotiated restructuring that preserved nearly 5,000 jobs and trimmed the company's debt by about $1.4 billion; and Southcross Holdings LP and its subsidiaries (in its 15-day bankruptcy). |
| **Richard S. Kebrdle**<br>White & Case LLP<br>Miami, Fla.<br>rkebrdle@whitecase.com | Currently the lead partner handling the debtor representation of Oi, S.A., in Brazil, the largest filing of a telecom giant in Latin America with over $15 billion in debt. Also active in the restructurings of OAS S.A. (a Brazilian-based construction company), Aralco S.A. (a Brazilian sugar and ethanol producer), and Sifco S.A. (a Brazilian auto parts manufacturer), as well as New World Resources (a UK-based coal producer) in its successful Chapter 15 case. |
| **Meredith A. Lahaie**<br>Akin Gump Strauss Hauer & Feld LLP<br>New York, N.Y.<br>mlahaie@akingump.com | Played a key role in Stone Energy's negotiation and implementation of a prepackaged Chapter 11 plan on behalf of an ad hoc group of senior noteholders that resulted in a consensual swap of equity for senior notes. Represented an ad hoc group of prepetition secured noteholders and DIP lenders in Horsehead Holdings' restructuring, securing confirmation of a plan following an extensive valuation hearing. Helped double recoveries by Quiksilver, Inc.'s unsecured creditors. |
| **Michele C. Maman**<br>Cadwalader, Wickersham & Taft LLP<br>New York, N.Y.<br>Michele.Maman@cwt.com | Lead U.S. team member when Roust Corp. sought bankruptcy protection in a "chapter 22" proceeding after advising an ad hoc committee of U.S. and European noteholders of vodka producer Central European Distribution Corporation in its chapter 11 proceeding. Represents MBIA in connection with its financial guaranty of nearly $1 billion in notes issued in connection with two Zohar CLO investment funds. Represents Morgan Stanley Capital Group, Inc., as first-lien swap counterparty and an intervenor-defendant in an intercreditor adversary proceeding in the chapter 11 cases of Energy Future Holdings Corp. |
| **Jennifer L. Marines**<br>Morrison & Foerster LLP<br>New York, N.Y.<br>jmarines@mofo.com | Counsel to Maxus Energy Corporation, an oil and gas company owned by YPF SA, Argentina's state-run oil company, with over $12 billion in liabilities, relating to environmental remediation, litigation claims, retiree benefits, and other obligations; Sungevity, Inc., one of the largest private residential solar installation companies in the United States, with $185 million in prepetition debt; and the official committee of unsecured creditors in Peabody Energy Corporation's $11-billion restructuring. |
| **David S. Meyer**<br>Vinson & Elkins LLP<br>New York, N.Y.<br>dmeyer@velaw.com | Represented Goodrich Petroleum Corporation, Sundevil Power Holdings, LLC, and Energy XXI Ltd. Represented a confidential bidder in SunEdison. Active in other energy cases and represented the Houston Astros in connection with an involuntary chapter 11 case commenced against the Houston Regional Sports Network and the launch of Root Sports Southwest. |
| **Sunny Singh**<br>Weil, Gotshal & Manges LLP<br>New York, N.Y.<br>sunny.singh@weil.com | Recently represented hydrocarbon resin supplier American Gilsonite in a prepackaged chapter 11 reorganization converting $270-million in second lien notes to 98% of the equity in the reorganized company; General Electric in Homer City Generation's balance sheet deleveraging that will eliminate $600 million of secured debt; and Fairway Group Holdings' right-sizing of its balance sheet that allowed it to emerge from bankruptcy as a leaner, healthier grocery store chain. |
| **Matthew B. Stein**<br>Kasowitz Benson Torres LLP<br>New York, N.Y.<br>mstein@kasowitz.com | Recent clients include the Ad Hoc Group of Second Lien Lenders of SunEdison (suing directors and officers for fraudulent misrepresentation); the Official Committee of Equity Security Holders of Hercules Offshore (contesting a prepackaged plan and increasing creditor recoveries); Aman Resorts Group (obtaining dismissal of an involuntary petition); and Harbinger Capital Partners (protecting its rights and interests in various troubled companies' capital structures). |
| **Eli J. Vonnegut**<br>Davis Polk & Wardwell LLP<br>New York, N.Y.<br>eli.vonnegut@davispolk.com | Recently represented Pernix Therapeutics in its evaluation of strategic and financial alternatives; the senior term loan agent in Key Energy's prepackaged bankruptcy; an ad hoc group of second lien noteholders in the restructuring and pre-arranged chapter 11 of SandRidge Energy; creditors in JW Aluminum's out-of-court restructuring; the first-lien agent and DIP arranger in Alpha Natural Resources; numerous financial institutions in connection with Dodd-Frank Resolution Planning; and hedge funds with respect to investments in complex distressed businesses. ¤ |

## Transfer, *from page 4*

of a debtor's property, whether domestic or foreign, [was] 'property of the estate' subject to the bankruptcy court's *in rem* jurisdiction." Judge Bernstein did not, however, find this similarly persuasive. "The Court agrees . . . that the avoidance provisions of the Bankruptcy Code, in this case 11 U.S.C. § 547(b), do not apply extraterritorially," Bernstein wrote. "Property transferred to a third party prior to bankruptcy in payment of an antecedent debt is neither property of the estate nor property of the debtor at the time the bankruptcy case is commenced, the only two categories of property mentioned in Bankruptcy Code § 541(a)(1)."

Judge Bernstein therefore turned to the second part of the *Morrison* analysis. "As to the second inquiry, Ampal–American solidified the framework for determining whether the conduct was essentially foreign or domestic," according to Skrzynski. "The key fact is where the 'initial transfer' occurred." In this case, the transfer occurred outside the United States. "The Transfer occurred in Israel between a U.S. transferor headquartered in Israel and an Israeli transferee accomplished entirely between accounts at the same Tel Aviv bank," wrote Bernstein. "Although the Trustee argues that Goldfarb's legal services had some U.S. connections – Ampal's Class A shares traded on the NASDAQ, and Goldfarb's services included legal work related to Ampal's SEC and NASDAQ filings, and rendering opinions on Israeli law for inclusion in the annual report – most of these services were performed in Israel."

**The key fact is where the "initial transfer" occurred. In this case, the transfer occurred outside the United States.**

The *Ampal-American* decision appears thus far to have received mixed reviews. Professor Jay Westbrook, the Benno C. Schmidt Chair of Business Law at the University of Texas Law School, has written that the opinion "may have reached the right result by the wrong path" and that its reasoning "may seriously weaken section 547 of the Bankruptcy Code." Professor Westbrook, whose writings on the topic of extraterritoriality have been cited in several of the decisions referenced in Judge Bernstein's opinion, is generally critical of the presumption against extraterritoriality, calling it a "wrong-headed notion" and "a doctrine that makes a fool of Congress." However, he says that it is "especially destructive of true Congressional intent when applied to bankruptcy" and its application amounts to "an abandonment of reorganization or any other maximization of the value of a multinational debtor." In its place, Professor Westbrook argues for "a traditional choice of law analysis based upon significant contacts, giving a strong weight to the debtor's home-country law."

In assessing where potential parties to preference actions stand in the wake of the *Ampal-American* decision, Skrzynski notes lingering uncertainty. "The upshot is that parties can have greater confidence that purely foreign transactions would likely escape avoidance actions in this district," he observes. "But because a split between the Judges still exists, case assignment remains a major consideration on this issue. It remains to be seen whether companies with predominant or even significant foreign operations find the uncertainty or the law in this venue to be too unfavorable, and instead tilt towards filing elsewhere – in the Fourth Circuit, for example, where the *French* reasoning remains persuasive." ¤

## Retail Lessons, *from page 4*

advertisements in local newspapers. Today, they're gathering personal data in order to be in touch with the consumer on a constant basis so they're present when the consumer is most likely to want to make a purchase. "Retailers are using demographics to know when someone's birthday or anniversary is taking place in order to make special promotions," says Ken Rosen, partner and chair of bankruptcy, financial reorganization, and creditors' rights at Lowenstein Sandler. "So when you walk into a shopping mall, you receive notifications on your mobile device telling you about special promotions available only that day."

**The pop-up store is gaining traction.** Rosen says he's spoken to many retailers who are anxious to expand but are not ready to take on the commitment of several new leases within malls. The answer, for them, may be the pop-up store. "It's a great way to test the market in a particular mall," he says. And it's also good for a landlord that doesn't have time to retrofit a store, because they get to fill dark spaces during the critical fourth quarter of the year."

**There's a blend of an online presence and a bricks and sticks presence.** Some retailers are creating online "showrooms" and special facilities for pickups to make it easy for shoppers to obtain their products without walking through a mall. Others are delivering on Saturdays, Sundays, even next day. "They're mimicking what Amazon has done so well," says Rosen.

**Good management is still important.** It's easy to blame the Internet for the malaise of today's retailers, but Rosen says it's not all their fault. "It's not simply an inability to keep up in a digital world; that's just one more thing that pounds the nail in the retailer's coffin," he says. "There are a lot of Chapter 11s by retailers who haven't really moved into the 21st century in terms of accommodating the customer, selling the right product, or choosing the right locations," he says. "In other words, retailers that have just suffered from mismanagement."

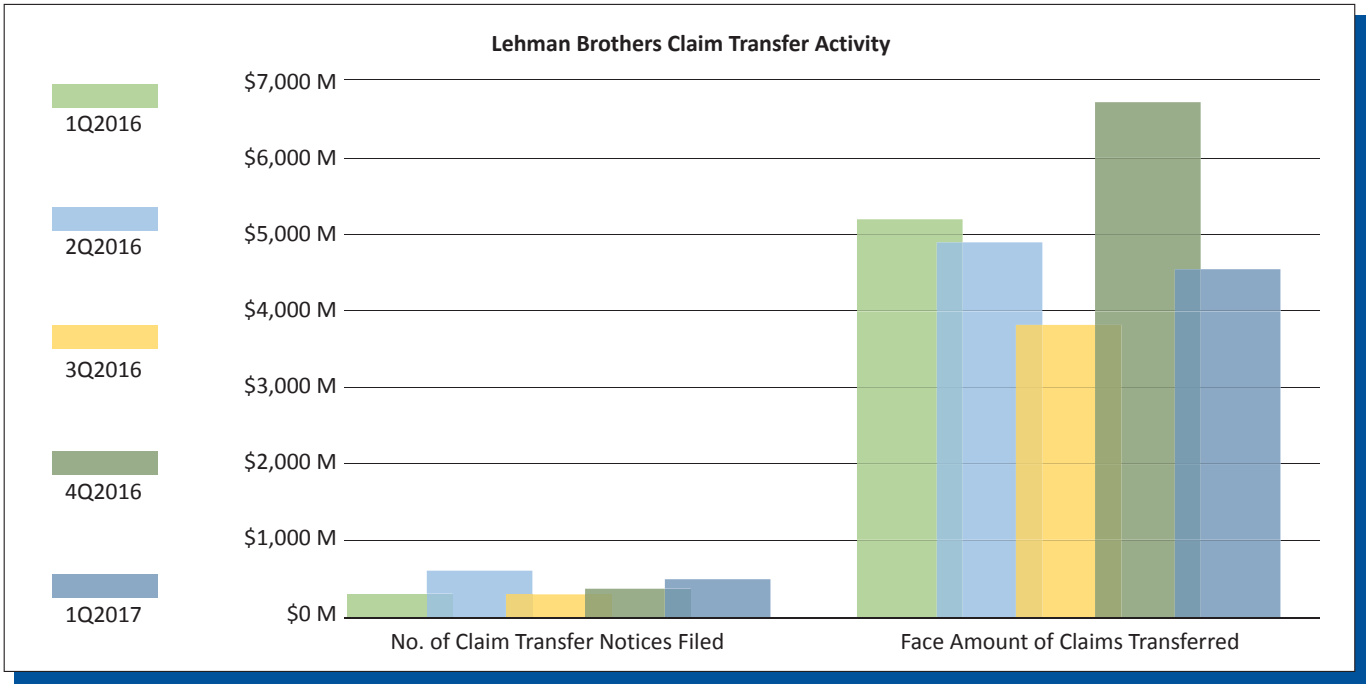
**Plan.** You're really not going to be able to restructure in Chapter 11 unless you have a real game plan going in," says Sunny Singh, a partner in the business finance and restructuring department at Weil, Gotshal & Manges LLP. "There's going to be a short window." ¤

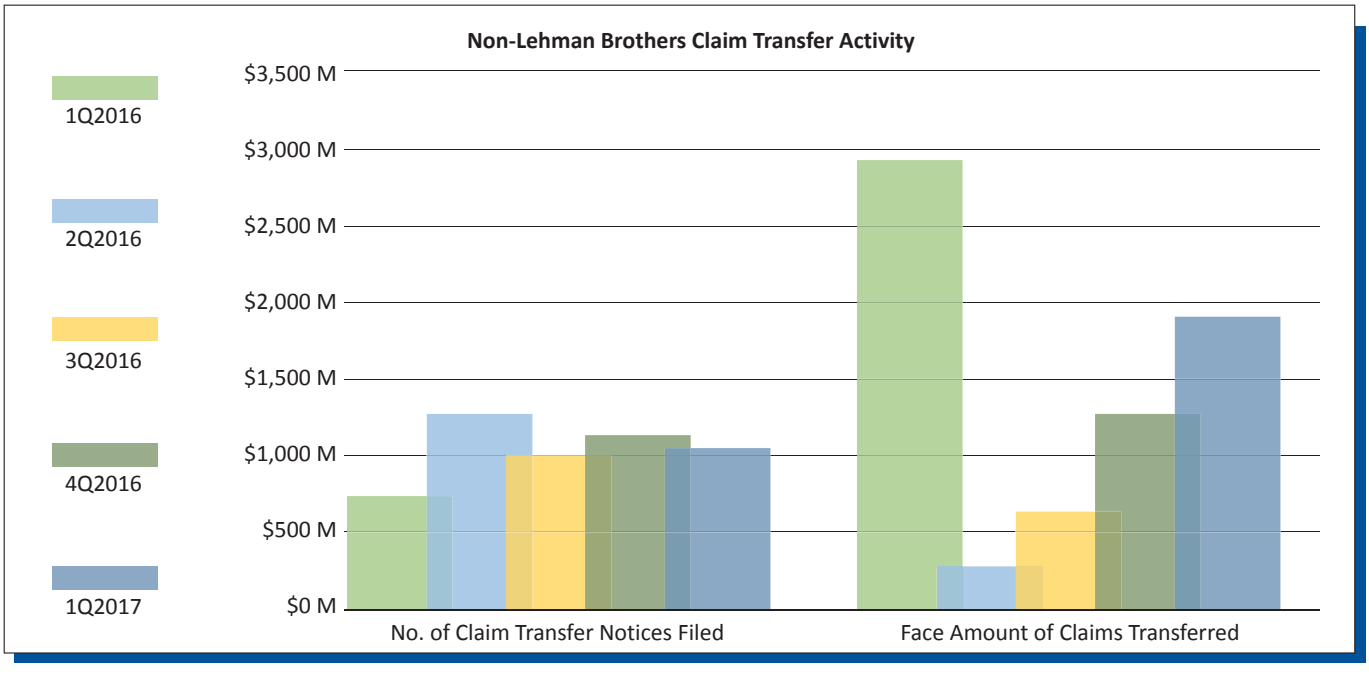
# Special Report

## Claims Trading Activity

CHAPTER 11 DOCKETS

These charts reflect our analysis of over 7,000 notices of claim transfers filed in large Chapter 11 bankruptcy cases nationwide from January 1, 2016, to March 31, 2017. The court filings were aggregated from a review of court dockets across more than 2,400 cases. A list of the cases covered by our analysis can be found at https://www.chapter11dockets.com/about/cases. Charts of dollar amounts exclude claims denominated in currencies other than U.S. dollars and claims not specifying a fixed dollar amount.



## *Gnome de Plume*

# Fish Cannot See Water: Why Companies Fail

*by Deborah Hicks Midanek*

Why do companies fail? Economist Hyman Minsky posits that stability itself breeds instability. When an organization is successful, it becomes increasingly difficult to deviate and take new risk of any kind. While a company striving to become successful is required constantly to anticipate changing circumstances, these habits are very difficult to maintain in the successful market leader. Vision tends inevitably to narrow.

**Assumptions are not facts.** One once highflying technology company was supposed to be able to see into the future, by matching supply and demand trends precisely, in real time, thus proving the ability to generate tightly focused forecasts. The technology worked very well, it seems, but the forecasts did not. The company analysts had not included the ability to adjust the forecasts to reflect changes in one key variable: the rate of growth. Company executives believed they had a superior grasp of reality and acted on the information they had, to the company's disadvantage.

**Data is not information.** In another company, cash flow was falling and its lenders were insisting on asset sales and deleveraging, along with the appointment of outside advisors. The company, in the waste management sector, had 52 profit centers, and no method of easily aggregating the data into useful information. To make matters even harder to understand, the company thought about its business activity by product line: residential and commercial hauling, and landfills. This method ignored the functional connection between the hauling activity and the company owned landfills. The use of landfills not owned by the company required tipping fees, which significantly reduced profitability. Once the advisors rearranged the data by geographic market segment and reduced the number of profit centers, the resulting information made it easy for management to see which assets were not profitable, and sell them forthwith. Instead of forcing a liquidation, their banks were suddenly competing to offer the company new financing on much better terms.

**Accounting does not equal reality.** The subprime meltdown, analyzed ad nauseam elsewhere, provides another example of participants blinded by bad information. One company's loans were sold into a securitization each quarter, prompting recognition as income the discounted value of the difference between the expected interest income from the loans, adjusted for expected losses and prepayments, and the interest rate the securitized vehicle would pay to investors. Using the accounting procedure required, the assets resulting from each securitization were capitalized as assets on the balance sheet.

It is easy to see how the company lost sight of the fact that the asset on its books represented only assumptions as to likely future receipts. Its "earnings" showed attractive growth, not because the company was earning more, but because it was valuing the expected future cash flows on ever more aggressive assumptions, to support the stock price. Even its lenders had been caught up in the momentum, lending the company large amounts on an unsecured basis. When the opportunity to securitize dried up and the company had to sell its loans directly to buyers, it could not support itself. Had the company not been blinded by what it believed to be the value of its main asset, the capitalized value of expected future cash flows, its board would have been able to take advantage of an offer to buy the company. Instead they faced liquidation.

**Challenge the Status Quo.** It is difficult to challenge the status quo and get appropriate attention paid to considering whether the information available matches the nature of the decisions to be made, and more so to persevere in testing data quality and resulting conclusions. Organizations that do not support such questions, however, and perpetuate the making of decisions based on flawed information are often destined to disappear.

Remember that fish cannot see water, and build the habit of always taking the time to ensure that the information provided, and the assumptions it is based upon, reflect the nature of the decisions to be made. ¤

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

### *In the Next Issue...*

- *Special Report: Top Internet Bankruptcy Resources*
- *Special Report: Major Trade Claim Purchasers*
- *Research Report: Who's Who in Westinghouse Electric*

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