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News for People Tracking Distressed Businesses
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Inside

Lessons from WaMu

Insider Trading Rules Apply in Bankruptcy, Court Says

by Julie Schaeffer

What investors do with the allegedly inside information they gain from bankruptcy plan negotiations may significantly affect their recovery and expose them to potential liability. That's because general insider trading principles apply to material non-public information obtained in bankruptcy plan negotiations, according to a recent decision by the United States Bankruptcy Court for the District of Delaware.

The court issued a clear reminder in its Washington Mutual (WaMu) ruling: Creditors who want to participate in settlement discussions in which they receive material nonpublic information about the debtor must either restrict their trading or establish an ethical wall between participants in the bankruptcy case and their traders.

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Crisis Averted

Caribbean Petroleum Explosion Ends in Orderly Sale

by Dave Buzzell

This is the second of a two-part article.

In October 2009, a major oil refinery and depot in Bayamon, Puerto Rico, ignited into a massive fireball. The explosion triggered a chain of events that resulted in the facility's owner, Caribbean Petroleum Corporation, filing for bankruptcy less than a year later.

Cadwalader, Wickersham & Taft, hired as lead counsel for Caribbean Petroleum, entered a situation where the prospect of an orderly liquidation was made highly unlikely by operational disruptions, enormous environmental cleanup costs, government investigations, and tort claims.

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Are Pre-Packs Always Preferred?

The Benefits and Risks of Expedited Restructurings

by Julie Schaeffer

When Jay Goffman, global head of corporate restructuring for Skadden, Arps, Slate, Meagher & Flom LLP, began his career in 1983, companies called bankruptcy lawyers at the last minute, when their only choice was to file a Chapter 11 petition.

So-called "free-fall" Chapter 11 cases, in which a debtor initiates a Chapter 11 case without agreement from creditors on the form or parameters of a restructuring plan, usually take a year or longer to reach resolution, and that has the potential to harm the debtor. The longer a company is subject to an in-court bankruptcy, the greater the greater the risk of disruption to its business and the greater the cost.

Goffman had a new idea. "I said, 'I bet we could negotiate with a subset of [debt

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Lessons, *from page 1*

Although the court vacated portions of its decision earlier this year, the implications may still impact settlement discussions moving forward, says Glenn Walter, a partner at Skadden, Arps, Slate, Meagher & Flom.

Specifically, the decision raises questions about the precautions distressed investors should consider when participating in bankruptcy plan and settlement negotiations.

On September 25, 2008, the Office of Thrift Supervision seized WaMu's banking unit and placed it into the receivership of the FDIC, which, as receiver, sold WaMu to JPMorgan Chase for $1.9 billion. The following day, WaMu filed for bankruptcy, and disputes arose among WaMu, the FDIC, and JPMorgan Chase regarding, among other things, claims to billions of dollars of assets. Those disputes were resolved by May 2010, and WaMu proceeded with a plan of reorganization.

In July 2010, there was a hiccup when WaMu's equity committee sought to equitably disallow claims of four hedge funds on the basis that they had violated insider trading laws. The dispute centered on the nature of the information the hedge funds possessed and whether they had improperly traded in WaMu's securities while in possession of inside information.

During the settlement negotiations that took place between March 2009 and May 2010, WaMu and the hedge funds executed confidentiality agreements. These agreements permitted the hedge funds to receive material non-public information during "confidentiality periods." In return, WaMu was required to publicly disclose such information at the end of the confidentiality periods.

On the surface, it appeared that the parties had complied: All four of the hedge funds claimed to have restricted trading during the confidentiality periods, and WaMu honored its agreement to publicly disclose information in the hedge funds' possession at the end of the confidentiality periods.

The problem: WaMu did not disclose the fact that settlement negotiations had begun, or disclose the status and terms of those negotiations.

According to the equity committee, the existence, status, and terms of the settlement negotiations in and of themselves

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To make matters worse, Cadwalader's attorneys had to deal with Caribbean Petroleum's franchise contracts with its network of gas stations, some leased and some owned.

As FTI Consulting, brought in as crisis manager and CRO for Caribbean Petroleum after the explosion, and Cadwalader conducted a due diligence process in preparation for a Section 363 sale, some of the bidders expressed concern that these contracts, going back decades, had not been updated and the terms were onerous. To get top dollar bids, Caribbean Petroleum needed to shed the contracts and allow the successful purchaser to negotiate new contracts with market terms. Cadwalader filed a motion to reject all of the franchise agreements contingent upon the closing of the sale.

"It was precedential," says Zachary Smith, one of Cadwalader's attorneys working on the case. "We weren't asking the court to approve the rejection effective immediately. We were asking the court to allow us to tell the bidders that the contracts *could* be rejected in their entirety if required by the successful purchaser, which in turn would enhance bids and maximize estate value. The court agreed with that argument."

Cadwalader also prevailed in a battle with franchisees over the Petroleum Marketing Practices Act. This federal statute provides gas station operators with extra protections – such as being entitled to various notice periods and allowing some franchisees to purchase their stations outright before they are sold to a third party. The gas station operators argued that the statute preempted the right to reject contracts under Section 365 of the Bankruptcy Code. The court agreed with Cadwalader's position that the company had an unfettered right to reject.

The court also supported Cadwalader's argument that another provision in the Bankruptcy Code, Section 365(h), which gives lessees of commercial property the right to remain in possession of the property after rejection of the lease and basically pay what the rent would have been under the lease, did not apply in this case. "We argued that the franchise agreements were not actually leases for various reasons, including that they did not give franchisees an exclusive possessory interest in the property they occupied,"

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Pre-Packs, *from page 1*

holders], get them to agree on a deal, then file and get the court to make it binding on everyone else," he recalls.

Thus the pre-packaged bankruptcy was born, and today, many companies opt to speed up the process by utilizing a pre-packaged or pre-negotiated plan of reorganization. A pre-packaged plan results when a debtor solicits and receives formal acceptances to a plan prior to filing its petition. It is generally confirmed between 30 and 60 days from the date of the bankruptcy filing. A pre-negotiated plan, meanwhile, results when a debtor negotiates plan support agreements with key creditor groups, but does not solicit acceptances of a plan until after its petition is filed. It is generally confirmed between 60 and 120 days after a bankruptcy filing.

"A pre-packaged or pre-negotiated bankruptcy provides a compromise between an out-of-court consensual restructuring and a "free-fall" Chapter 11 filing," says Richard J. Cooper, a partner based in the New York office of Cleary Gottlieb Steen & Hamilton LLP.

It may seem as if pre-packs are the way to go, but that's not always the case. According to Cooper, pre-packs appeal most to overleveraged companies that have concentrated creditor groups and are seeking to clean up their balance sheets. On the other hand, pre-packs may not work for companies that require significant operational restructuring. "The nature and timeline of pre-packs may not allow debtors the time necessary to complete comprehensive operational restructurings," Cooper explains, "because such restructurings often involve contentious and costly legal skirmishes with stakeholders who seek to avoid the financial loss that such adjustments seek to allocate to them."

Because speed matters in the restructuring process, pre-packaged and pre-arranged Chapter 11 plans are routinely confirmed by U.S. bankruptcy courts. In fact, the speed with which pre-packs can be confirmed leads to a number of benefits. It gives committees and other creditor groups less time to organize, reducing the prospect of litigation from dissenting parties. It reduces professional fees and other administrative costs. And, it creates momentum. "By shortening the duration of a Chapter 11 proceeding, debtors generally have an easier time

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Research Report

Who's Who in Residential Capital LLC

by Francoise C. Arsenault

Residential Capital LLC is a residential real estate finance company indirectly owned by Ally Financial Inc., the lending arm of General Motors Corporation. Ally Financial, formerly GMAC Inc., is one of the world's largest automotive financial services companies. Ally Financial's other business units include mortgage operations and commercial finance, and the company's subsidiary, Ally Bank, offers online retail banking products. The U.S. Treasury, which owns 74 percent of Ally Financial after providing the company with bailout funds, attempted but was unable to find a buyer for Residential Capital in 2010.

The principal activities of Residential Capital are brokering, originating, purchasing, selling, securitizing, and servicing residential mortgage loans throughout the United States. Residential Capital operates the fifth largest servicing business and the tenth largest mortgage origination business in the U.S. In the years ended December 31, 2010 and 2011 and the 3 months ended March 31, 2012, Residential Capital brokered $7.4 billion, $7.3 billion, and $3.6 billion, respectively, of mortgage loans to Ally Bank. As of March 31, 2012, Residential Capital was servicing more than 2.4 million mortgage loans, with an aggregate unpaid principal balance of approximately $374 billion. Residential Capital's executive offices are located in New York City, and the company has major operations in Fort Washington, PA; Minneapolis, MN; Waterloo, IA; Dallas, TX; and Burbank, CA. As of April 30, 2012, Residential Capital had approximately 3,625 employees.

Residential Capital, along with 50 subsidiaries, filed for Chapter 11 on May 14, 2012, in the United States Bankruptcy Court for the Southern District of New York. Ally Financial and Ally Bank were not included in the bankruptcy filings. The Chapter 11 filings are intended to facilitate Residential Capital's sale of substantially all of its assets and mortgage servicing businesses to Fortress Investment Group LLC and Nationstar Mortgage Holdings LLC, and its legacy portfolio, consisting mainly of mortgage loans and other residual financial assets, to Ally Financial. The asset sales are expected to generate about $4 billion in proceeds.

Berkshire Hathaway Inc., which owns more than $500 million of Residential Capital's unsecured bonds and more than $900 million of the company's junior secured bonds, asked the court to appoint an examiner to investigate deals made by Residential Capital before it filed. Berkshire Hathaway also offered to replace Fortress and Ally Financial as the stalking-horse bidder for Residential Capital's assets. Residential Capital rejected the offer.

Former judge Arthur Gonzalez was appointed as examiner, and the bankruptcy judge has granted the request for an investigation of Residential Capital's deals.

According to company officials, Residential Capital filed for bankruptcy because of continuing industry challenges, including credit concerns and housing market contractions, rising litigation costs and claims, and regulatory uncertainty. As a result of these factors, Residential Capital had losses of $5.6 billion and $4.5 billion in 2008 and 2009, respectively. As of March 31, 2012, Residential Capital reported $15.68 billion in assets and $15.28 billion in liabilities. Residential Capital has received interim approval for DIP financing in the amount of $1.45 billion from Barclays Bank PLC as sole lead arranger and administrative agent.

The Debtor

Thomas F. Marano is Chairman of the Board and Chief Executive Officer of Residential Capital. **Craig J. Chapman** is the President of Residential Finance Group. **James Whitlinger** is the Chief Financial Officer. Tammy P. Hamzehpour is **General Counsel**.

Morrison & Foerster LLP is serving as bankruptcy counsel to Residential Capital. **Larren M. Nashelsky**, **Gary S. Lee**, **Joel C. Haims**, **Lorenzo Marinuzzi**, **Stefan W. Engelhardt**, partners in the firm's New York office, and **Alexandra Steinberg Barrage**, of counsel in the Washington, D.C. office, are working on the case.

Curtis, Mallet-Prevost, Colt & Mosle LLP is conflicts counsel to Residential Capital. The team includes **Steven J. Reisman**, **Michael A. Cohen**, and **Theresa A. Foudy**, partners in the New York office, and **Maryann Gallagher**, of counsel in the New York office.

Morrison Cohen LLP is counsel to the Residential Capital Board of Directors. **Joseph T. Moldovan** and **Michael Connolly**, partners, direct the work.

Kirkland & Ellis LLP is representing Ally Financial Inc. in the proceedings. The team includes partners **Richard M. Cieri**, **Ray C. Shrock**, **Stephen E. Hessler**, **Patrick M. Bryan**, and **Craig A. Bruens**, and **Anthony Grossi**, an associate.

Centerview Partners LLC is acting as the investment banker to Residential Capital. **Marc D. Puntus** and **Samuel M. Green**, both partners and co-heads of the Restructuring Group, lead the engagement. The team also includes **Stephen S. Crawford**, a partner, and **Karn Chopra**, a principal.

FTI Consulting Inc. is providing financial advisory services to Residential Capital.

The Official Committee of Unsecured Creditors

The Committee includes **Wilmington Trust, N.A.**; **Deutsche Bank Trust Company Americas**; **The Bank of New York Mellon Trust Company, N.A.**; **MBIA Insurance Corporation**; **Rowena L. Drennen**; **AIG Asset Management (U.S.), LLC**; **U.S. Bank National Association**; **Allstate Life Insurance Company**; and **Financial Guaranty Insurance Company**.

Kramer Levin Naftalis & Frankel LLP is counsel to the Committee. **Kenneth H. Eckstein**, **Thomas Moers Mayer**, **Douglas H. Mannal**, and **Gregory Aaron Horowitz**, partners in the New York office, and **Kimberly E. Friedman** and **Craig L. Siegel**, associates, are working on the case.

The Trustee

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

The Judge

The judge is the **Honorable Martin Glenn**. ¤

Lessons, *from page 2*

constituted material non-public information, and because the four hedge funds had traded on the basis of that information, they were guilty of insider trading.

WaMu and the four hedge funds disagreed, arguing that the terms of the failed negotiations were non-material and that their involvement in discussions outside of the confidentiality periods did not expose them to material non-public information.

In her September 13 opinion denying confirmation of WaMu's plan of reorganization, Judge Mary Walrath found that the equity committee had stated a "colorable" claim against the hedge funds for violations of insider trading laws – and equitable disallowance could be an appropriate remedy.

In finding that all hedge funds had likely violated insider trading rules, Walrath made four particularly notable points.

1. Negotiating creditors may become temporary insiders. The hedge funds argued that they were creditors, not "insiders." In rejecting this argument, Walrath held that the hedge funds had become temporary insiders. According to Douglas P. Bartner, a partner in Shearman & Sterling LLP's bankruptcy and reorganization group, "the ruling by Judge Walrath that a creditor who has a blocking position with respect to a plan of reorganization may become an insider and thereby take on a fiduciary duty to other creditors within its class is a significant departure from the usual rule that a creditor owes no fiduciary duty to its fellow creditors and may act in its own self-interest." However, Walrath said the hedge funds did so by executing confidentiality agreements, receiving material non-public information, establishing a blocking position in a class of claims, and participating in multi-party negotiations with the shared goal of reaching a settlement that would form the basis of a plan of reorganization.

2. Negotiations themselves can be inside

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Smith says. "The agreements were akin to licenses that granted the franchisees a right to use the property for a certain period of time. With few exceptions, the court found that these agreements were licenses and therefore section 365(h) did not apply."

Peter Friedman, Cadwalader financial restructuring partner who successfully argued these contested matters on behalf of Caribbean Petroleum, including the company's opposition to motions to transfer venue, adds, "the aggressive legal positions we took – all of which were approved by the bankruptcy court – maximized the value of the estate and ensured the most efficient and effective bankruptcy case possible."

With these and other hurdles overcome, the court allowed the Section 363 sale to proceed under traditional bidding procedures conducted simultaneously at Cadwalader's office in New York and at the office of its local counsel in Puerto Rico. The company

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Pre-Packs, *from page 2*

maintaining market confidence among customers, vendors, and regulators," says Cooper.

Speed was certainly a benefit with Reddy Ice, which recently exited its pre-arranged Chapter 11 bankruptcy after successfully negotiating a unique debt-restructuring deal orchestrated by Gregg Galardi and his team at DLA Piper LLP.

In April 2012, the company decided its best option was to launch a Chapter 11 bankruptcy that already carried the support of a majority of its lenders and major creditors. A challenge arose, however, in that Reddy Ice was – at the same time it was contemplating bankruptcy – attempting to buy competitor Arctic Glacier, and there was a bid deadline.

Galardi's solution was a combination of a pre-arranged and pre-packaged bankruptcy. "We decided to begin pre-bankruptcy solicitation in accordance with the securities laws as if we were doing a traditional pre-pack, but then filed the bankruptcy case, continuing the solicitation for the balance of the 20 business days during the bankruptcy case," Galardi says. "So, on March 28, 2012, we made the initial bid for Arctic Glacier. On April 11, we started the solicitation of our plan of reorganization with the support of a majority of the first- and second-lien creditors and the discount note holders. Then, on April 12, we filed our pre-arranged Chapter 11 bankruptcy

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Calendar

National Association of Bankruptcy Trustees
2012 Annual Convention
September 5 – 9, 2012
The Broadmoor
Colorado Springs, CO
Contact: www.nabt.com

American Bankruptcy Institute
20th Annual Southwest Bankruptcy Conference
September 13 – 15, 2012
Four Seasons Las Vegas
Las Vegas, NV
Contact: www.abiworld.org

National Conference of Bankruptcy Judges
86th Annual Conference
October 24 – 27, 2012
San Diego, CA
Contact: www.ncbj.org

Turnaround Management Association
2012 Annual Convention
November 1 – 3, 2012
Westin Copley Place
Boston, MA
Contact: www.turnaround.org

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

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

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

Special Report

Canadian Bankruptcy Law Firms

Firm	Attorneys	Bankruptcy Attnys.	Senior Bankruptcy Partners		Representative Clients/Cases
Aird & Berlis 416-863-1500 www.airdberlis.com	135	15	Harry Fogul Robb English Steven Graff	Richard Epstein Sanj Mitra Sam Babe	Toronto-Dominion Bank, Royal Bank of Canada, Bank of Nova Scotia, Bank of Montreal, Canadian Imperial Bank of Commerce, Wells Fargo, HSBC, Roynat / Priszm Income Fund, Clothing for Modern Times, PCAS, CarCap Inc., Palmyra Resort and Spa, Aveos Fleet Performance Inc., Bodkin Leasing.
Alexander Holburn Beaudin + Lang 604-628-2700 www.ahbl.ca	78	10	Sharon M. Urquhart Michael Dery David A. Garner	Larry J. Gwozd Judy A. Rost	Landlords in various retail insolvencies, lien claimants in cross-border insolvencies, insurers, equipment lessors, suppliers, Minister of Finance, trustees and interim receivers, asset bidders and purchasers.
Bennett Jones 416-863-1200 – Toronto 403-298-3100 – Calgary www.bennettjones.com	334	16	S. Richard Orzy Ken Lenz Kevin Zych	Raj Sahni Chris Simard	Nortel Networks bondholders, Sino-Forest Corporation, OPTI Canada noteholders, Catalyst Paper noteholders, Gateway Casinos secured lenders, AbitibiBowater UCC, Smurfit-Stone UCC, Quebecor World UCC, Newpage Bondholders, Terrestar, Crystallex Noteholders, Hollinger, Canwest.
Blake, Cassels & Graydon 416-863-2400 www.blakes.com	554	25	Bernard Boucher Kelly Bourassa Milly Chow Sebastian Guy Susan Grundy Pamela Huff	William Kaplan Michael McGraw Linc Rogers Peter Rubin Steven Weisz	Angiotech Pharmaceuticals, Alvarez & Marsal, Aveos Fleet Performance, Blockbuster Canada, Caterpillar Financial, Catalyst Paper, CIBC, Canwest, Cinram, Credit Suisse, Deloitte, Edgeworth, Ernst & Young, FTI Consulting, First Leaside, Ford Motor Company, General Motors of Canada, Grant Thornton, JPMorgan Chase, Kraus Carpet, Natl. Bank of Canada.
Cassels Brock & Blackwell 416-869-5300 www.casselsbrock.com	200	16	Joseph Bellissimo Bill Burden Deborah Grieve Bruce Leonard	Alison Manzer Marc Mercier David Ward	AIG Commercial Equipment Finance, BDO Canada, Bendix Commercial Vehicle Systems, CapitalSource Finance, Cisco Systems, Govt. of Canada/ Industry Canada (GM/Chrysler), Govt. of England Pension Protection Fund (Nortel), Sony, 20th Century Fox, Warner Brothers (Blockbuster).
Dickinson Wright 416-777-0101 www.dickinsonwright.com	25	4	Lisa Corne Eric Kay	David Preger Michael Weinczok	Creditors, debtors and court-appointed officers in bankruptcy, insolvency and restructuring cases, including Johnson Controls Inc., Visteon Corp., Romspen Investment Corporation, Ontario Wealth Management Corporation, MNP Ltd., A. Farber & Partners Inc., and SF Partners Inc.
Farris, Vaughan, Wills & Murphy 604-684-9151 www.farris.com	103	5	David Gruber Robert Sloman	Rebecca Morse	Steels Industrial Products Ltd. (counsel for the Petitioner), Blackburn Developments Ltd. (counsel for Streetwise Capital Partners Inc.), Catalyst Paper Corporation (counsel for a group of certain 2014 unsecured noteholders and 2016 noteholders), Angiotech Pharmaceuticals Inc. (counsel for the petitioner).
Fasken Martineau DuMoulin 416-366-8381 www.fasken.com	700	44	John F. Grieve Alain Riendeau Edmond Lamek Aubrey Kauffman	Kibben Jackson Luc Beliveau Stuart Brotman M. Peerson	Alvarez & Marsal Canada Inc - Angiotech Pharmaceuticals and Sterling Shoes; PricewaterhouseCoopers Inc.- Catalyst Paper and Pope & Talbot; FTI Consulting Canada Inc - New Food Classics; Ernst & Young Inc - Glendale International and Aquattro; HSBC Bank of Canada - Bear Mountain.
Fraser Milner Casgrain 416-862-3407 www.fmc-law.com	540	48	Jane Dietrich Ryan Jacobs Shayne Kukulowicz David Mann	Ray Rutman John Sandrelli Roger Simard Michael Wunder	Medican Holdings - debtor counsel; Catalyst Paper - first lien lender group; Nortel Networks - counsel to UCC; Crystallex - counsel to DIP lender,; Lightsquared - debtor counsel; New Solutions - debtor counsel; TerreStar - debtor counsel; AVEOS - debtor counsel; Abitibi - counsel to bondholders.
Goodmans 416-979-2211 www.goodmans.ca	210	17	Jay A. Carfagnini Robert J. Chadwick Gale Rubenstein Fred Myers Brian Empey	L. Joseph Latham Joseph Pasquariello Brendan O'Neill Melaney Wagner	Nortel Networks, Sino Forest Corporation, Cinram, Catalyst Paper, Terrestar Networks, LightSquared, MF Global Canada, First Leaside Securities, Angiotech Pharmaceuticals, Graceway Pharmaceuticals, Cervelo Cycles, NewPage Corporation, White Birch Paper, Grant Forest Products.
Gowling Lafleur Henderson 416-862-7525 gowlings.com	750+	73	David F.W. Cohen Derrick Tay Colin Brousson Thomas Cumming	John McLean Clifton Prophet Patrick Shea Denis St-Onge	Nortel Networks (CCAA proceedings), CNOCC Ltd. (acquisition of OPTI), FTI Consulting (Sino-Forest Corporation CCAA proceedings), Bank of Montreal (New Food Classics and Sterling Shoes CCAA proceedings), Canadian Imperial Bank of Commerce, NAV Canada (Skyservice receivership).
Heenan Blaikie 416-360-6336 www.heenan.ca	575	20	Renée Brosseau Michael J. Hanlon Kenneth David Kraft Claude Paquet Nicolas Plourde	John Salmas William E. J. Skelly Keith Wilson Edward A. Wooldridge	Alvarez & Marsal, Aveos Bank of America, BDO Canada, Canexus Chemicals, Chubb Insurance , DBRS Limited/Asset Backed Commercial Paper, Deloitte & Touche, Elephant & Castle, Federal Insurance, Hart Stores, Hollinger, Mistral Pharma , National Bank of Canada, Nortel, PwC, Rolls Royce.
Osler, Hoskin & Harcourt 416-362-2111 www.osler.com	429	65	Sandra Abitan Robert Anderson Jeremy Dacks Michael De Lellis Martin Desrosiers	Steven Golick John MacDonald Edward Sellers Tracy Sandler Marc Wasserman	Allied Systems, Alvarez & Marsal, Angiotech Pharmaceutical, Arctic Glacier, Avenue Capital, Bank of America, Bank of Montreal, Canwest Global, Catalyst Paper, Cinram International Income Fund, Circuit City, Credit Suisse, Davie Yards, Deloitte, Duff & Phelps, Ernst & Young, FTI Consulting.
Stikeman Elliott 416-869-5500 www.stikeman.com	512	32	Marc Barbeau David R. Byers Sterling Dietze Jean C. Fontaine Stephen Hamilton Peter Howard	Kevin Kyte Jean Lamothe Daphne MacKenzie Guy P. Martel Elizabeth Pillon Ashley John Taylor Claire Zikovsky	AbitibiBowater, Air Canada, Apple, Bank of America, CIT Business Credit Canada, FTI Consulting, Grant Forest Products, Groupe Jacob, Priszm Income Fund, RSM Richter Chamberland, Samson Bélair/Deloitte & Touche, Smurfit-Stone, Stichting Homburg Bonds and Stichting Homburg Capital Securities, TerreStar Networks (Canada), Timminco Ltd. and Bécancour Silicon.
Thornton Grout Finnigan 416-304-1616 www.tgf.ca	23	12	Robert Thornton James Grout Grant Moffat	D.J. Miller Leanne Williams	AbitibiBowater, Nortel, Fraser Papers, Blockbuster, Stelco, Air Canada, Portus, Norshield, Hollinger, JTI Macdonald, Calpine, Royal Bank of Canada, National Bank of Canada, HSBC Bank Canada, The Toronto-Dominion Bank, Ernst & Young, PricewaterhouseCoopers, Deloitte, KPMG, FTI Consulting.
Torys 416-865-0040 www.torys.com	260	16	Tony DeMarinis Michael Rotsztain	Scott Bomhof David Bish	Canada Pension Plan Investment Board, West Face Capital, PricewaterhouseCoopers, Brookfield Asset Management Inc., Fairfax Financial Holdings Limited, Nortel Networks Inc., The Cadillac Fairview Corporation Limited, Goldman, Sachs & Co., Royal Bank of Canada.

Worth Reading

Unique Value: The Secret of All Great Business Strategies

Andrea Dunham and Barry Marcus, with Mark Stevens and Patrick Barwise
Publisher: Beard Books
Softcover: 303 pages
List Price: $34.95

"Never stop leveraging what you do uniquely well," the authors advise. Every good manager knows how to leverage business strengths. The challenge is identifying a corporation's unique value, which, in most cases, is an interrelated set of strengths. This 1993 reprint instructs the reader on the process and method for determining unique value: how to recognize it, how to inculcate it into the corporate culture, and how to keep it in focus and preserve it during changing business conditions.

Employing charts and diagrams, Dunham and Marcus illustrate their trademarked Unique Value = ROI Model. ROI – return on investment – is a familiar measure of business productivity. However, it is not ordinarily linked to something called "unique value." The authors make a compelling argument that the two are related. In fact, a case can be made that nearly every business achieves its ROI from its unique value. With Dunham and Marcus offering this new perspective on ROI, one quickly realizes that unique value (and ROI) is a function of marketing, customer relations, strategic planning, and other less tangible factors. The reader draws the conclusion that ROI is as much a result of image or market presence as it is financial planning and management.

The Unique Value Model is best seen as a pyramid with the "informing concept" of unique value at its peak. The pyramid has four bases: Consumer/Customer, Business Systems and Skills, Product/Technology, and Competition. These are the four major interrelated factors of any business organization. The authors posit that each of these factors must be analyzed, structured, and fully understood for the Unique Value = ROI Model to be informative and effective.

Unique value is ultimately concerned with decision-making and operations. This is what Marcus and Dunham mean by their advice to "never stop leveraging what you do uniquely well." The authors demonstrate how corporate leaders can apply their knowledge of unique value to shape employee behavior and interactions with customers and clients, plan marketing campaigns, decide upon the content and style of advertising, follow closely what certain competitors are doing, look for profitable acquisitions, and adroitly manage all the other activities upon which the success of the corporation depends. Mid- and lower-level employees may not even know there is a core concept of unique value, but they will embody it when it is practiced by executives and managers.

IBM, Frito-Lay, Seagram's, Yamaha, and Holiday Inn are some of the many companies used as examples of how unique value can be applied to ROI. Aspects of the model are already widely practiced by many successful corporations. After reading this book, it's hard to imagine how a corporation can be successful without heeding the principles of unique value. The challenges posed by today's business environment are greater than ever. Competition is fierce, both at home and from abroad; consumer demands are fickle; and government policy pervades everything from taxes to the environment to health care. Corporations that can clearly articulate and unerringly implement their unique value have an advantage over their competitors. ¤

Andrea Dunham and Barry Marcus were partners in founding Dunham & Marcus. Marcus is co-founder and CEO of Unique Value International, a consulting firm in the areas of marketing and brand development.

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

Lessons, *from page 4*

information. The hedge funds argued that knowledge of the negotiations and the positions taken by parties is not in and of itself material non-public information because it can change. In rejecting this argument, Walrath said that the U.S. Supreme Court "has explicitly rejected the argument that there is no materiality to discussions until an agreement-in-principle has been reached."

3. Application of insider trading laws will not limit creditor participation. The hedge funds argued that the equity committee's pursuit of insider trading in this context would stifle a debtor's ability to discuss a settlement. In rejecting this argument, Walrath noted that restricting trading or creating an ethical wall in exchange for a seat at the negotiating table does not place an undue burden on creditors, and is even common in bankruptcy cases. Bartner disagrees, however. "It is not difficult to imagine that the *Washington Mutual* decision may discourage some creditors from actively participating in key settlement discussions in Chapter 11 cases," he says. "If this were to occur, it could ultimately harm debtors whose aim is to emerge from Chapter 11 by obtaining consensus among their various creditor groups."

4. You can't hide behind the debtor. The hedge funds also argued that WaMu had the burden to assure that all material non-public information was disclosed at the conclusion of each confidentiality period. In rejecting this argument, Walrath held that each hedge fund had its own obligation to comply with securities laws.

In February 2012, the court confirmed WaMu's seventh amended joint plan of reorganization, approving a global settlement reached among the major constituencies and vacating portions of its prior decision granting standing to the equity committee. Although the controversial portions of the WaMu decision have been vacated and do not have precedential value, Walter says it is notable that the court did not vacate its earlier decision based on substantive grounds. "Rather, it appears that the court was primarily motivated by the desire to avoid further protracted litigation and termination of the global settlement agreement," he says. "Thus, the implications of the vacated decision may still impact settlement discussions moving forward." ¤

Special Report

Outstanding Investment Banking Firms – 2012

Firm	Senior Professionals		Outstanding Achievements
Barclays New York, NY 212-526-7000 www.barclays.com	Mark Shapiro Gil Sanborn	George Mack Firdaus Pohowalla	DIP: Residential Capital $1.45bn (sole underwriter), Patriot Coal $500mm (new money, joint lead). Restructuring advisory: Pinnacle Airlines ($1.4bn liabilities), EME Homer City ($1.7bn liabilities). AES Eastern Energy ($660mm leveraged lease termination value). Distressed M&A: US Airways (potential acquisition of AMR).
Blackstone New York, NY 212-583-5000 www.blackstone.com	Tim Coleman Flip Huffard Steve Zelin Nick Leone	Mike Genereux Martin Gudgeon David Riddell	Advisor in many large, high profile transactions closed in 2012, including Greece, Houghton Mifflin Harcourt, Kerzner, LA Dodgers. Ranked #1 for worldwide and U.S. completed restructurings for 1st Half 2012, according to Thomson Reuters. Currently advising Patriot Coal, Terrestar, MBIA re: Rescap, Dynegy creditors, Kodak creditors, among others.
CDG Group New York, NY 212-813-1300 www.cdggroup.com	Robert A. Del Genio Michael F. Gries Mark Hopkins M. Benjamin Jones	Seth Arnold Christine Kim Jonathan Miller John Strek	Selected engagements include AFA Foods, Buffets, Diagnostic Imaging Group, DSI Holdings (Deb Shops), Hostess Brands, Vertis Communications, Jobson Medical Information, Small Smiles Holdings (Forba), and Sbarro Holdings, among others. Effective February 1, 2012, Conway, Del Genio, Gries & Co changed its name to CDG Group.
Goldman, Sachs & Co New York, NY 212-902-1696 www.gs.com	Bruce Mendelsohn	Roopesh Shah	Has had an active restructuring presence, providing innovative financing solutions, liability management, M&A and strategic advice to companies facing challenging capital structures. Goldman's restructuring practice is international in scope with key restructuring professionals in NY, London, and Sydney.
Gordian Group New York, NY 212-486-3600 www.gordiangroup.com	Henry Owsley Peter Kaufman Patricia Caldwell	Dennis McGettigan David Herman	Advising Alexander Gallo Holdings in its sale to HIG for $100+MM and Jobson Healthcare in orchestrating its prepackaged POR in which it emerged from bankruptcy in little more than one month with the sponsor retaining 80% ownership. Additional disclosable engagements include work on Ambac, American Airlines, Refco.
Greenhill & Co. New York, NY 212-389-1500 www.greenhill.com	Bradley A. Robins Andrew Kramer Martin Lewis	Eric Mendelsohn Gareth Davies	Advising PBGC with respect to restructurings of AMR and Hawker Beechcraft, DVB Bank on TBS International's restructuring, Stora Enso on NewPage's restructuring, U.S. Treasury with respect to AIG, Department of Energy, Inergy L.P., Minerva plc, Yell, MediClinic, Miller Group, Virgin Money, Viridian, Southern Cross Healthcare, and others.
Houlihan Lokey Howard & Zulkin NYC, LA, Minneapolis 212-497-4245 www.hlhz.com	Saul Burian Eric Seigert	Michael Fazio Bradley Geer	Preeminent investment bank in the workout space. Extensive experience in mega cases (Lehman, General Motors, CIT Group, GGP) involving asset sales totaling billions of dollars. Recent engagements include Ranger International Services Group, Schiff Nutrition International, Alacer Corp., Extended Stay Hotels, 3i, MGM, and Visteon.
Lazard Freres & Co. Chicago, IL 312-407-6640 www.lazard.com	Daniel Aronson	Sachin Lulla	Recent major engagements include the debtor 363 sale auction process on behalf of Graceway Pharmaceuticals. Was able to successfully orchestrate an auction process amidst a highly complicated cross border bankruptcy process and ongoing IP and patent life cycle management process. Ultimately sold the assets to Medicis Pharmaceuticals for $455 million.
Rothshild New York, NY 212-403-5411 www.rothschild.com	Neil Augustine Anthony Calouri	Jay Johnson	Investment banker to Harry & David, leading marketing process to obtain financing and providing critical expert testimony to support termination of underfunded pension plan that together enabled H&D to successfully emerge from bankruptcy before the fall inventory build-up for the holiday season.
SSG Capital Advisors West Conshohocken, PA, New York, NY 610-940-1094 www.ssgca.com	J. Scott Victor Mark E. Chesen Robert C. Smith Matthew P. Karlson Michael S. Goodman	Teresa C. Kohl Michael J. Gorman Terry Kohler Luis A. Pillich	Recent transactions include Hussey Copper, Next Generation Vending and Food Service, American Laser Skincare, Burner Systems International, Lower Bucks Hospital, Gorham Paper Mill, O.K. Industries, BroadSign International, Weaber, Wolverine Tube, and Tobacco Rag Processors, and Frank Parsons. ¤

Caribbean, *from page 4*

received multiple bids for substantially all of its assets, as well as some piecemeal bids, mostly by gas station operators bidding on their own stations. When the auction concluded, Puma Energy Caribe was determined to be the best and highest bidder.

The sale proceeds were fully accounted for under the negotiated plan structure – going not only to the secured lenders, but also to pay environmental cleanup costs, regulatory fines, tax liabilities, and a liquidation trust charged with liquidating remaining assets post-sale for the benefit of unsecured creditors.

Representing the creditors' committee, Morrison & Foerster sought to identify assets not subject to liens. The primary asset that the firm was able to identify were proceeds from liability insurance policies. "Those provided the primary distribution to unsecured creditors in the case," says Todd Goren, a partner at Morrison & Foerster. "We settled with two liability insurers, one during the case and one recently. It netted the estate in excess of $25 million." Morrison & Foerster also struck a good deal with the banks, Goren says. "We were able to identify certain other assets that were not subject to a lien and receive 10 percent of the proceeds from the sale of those assets for the unsecured creditors."

Altogether, unsecured creditors will receive around $30 million, although what percent each unsecured creditor will recover on the dollar is not known at this point, as the claims administration process is ongoing. "A case of this sort triggers a lot of contingent tort claims," Goren notes. "These claims are in the process of being worked out." The liquidation plan established an alternative dispute resolution process for resolving the claims, an approach intended to expedite and facilitate the resolution of thousands of tort claims related to the explosions.

In the end, all of the parties – including the lenders, unsecured creditors, federal agencies, Puerto Rico authorities – reached agreement on the liquidation plan. "Negotiations were a challenge," Smith recalls. "Any agreement with one party affected where we were with another party, and vice versa. There was a lot of back and forth to see if we could reach a fully consensual agreement among all of the stakeholders." Cadwalader financial restructuring department co-chair and partner George Davis agrees, "Through extensive negotiations aimed at reaching a consensual outcome, we achieved a global solution acceptable to all of the competing parties in interest. It was a major accomplishment for all parties involved."

"The creditors' committee was pretty happy with the plan and thinks we got a good result in the case," says Goren. "We freed up assets that no one thought would be available. In the end we obtained in excess of $30 million for unsecured creditors."

"Constructing a fully consensual plan out of a chaotic and difficult situation was a great outcome," says Smith. "By working together we devised and implemented a strategy of using Chapter 11 to effectuate a Section 363 sale and a consensual liquidating plan that produced the best result for everyone." ¤

Pre-Packs, *from page 4*

case with the U.S. Bankruptcy Court in Dallas."

As compelling as that may sound, Cooper notes that restructuring by way of a pre-pack exposes a debtor to a number of risks.

First, says Cooper, pre-packs require a company to engage in contentious negotiations with key creditor groups prior to seeking court protection and receiving the protective shield of the automatic stay. As a result, "the company may be susceptible to involuntary bankruptcy filings or attachment actions by creditors who do not support a proposed restructuring, particularly in cases where a company has defaulted on certain obligations prior to initiating negotiations."

Second, if a company is seeking to impair more than one class of creditors or equity holders, negotiations can be protracted and complex, and that can increase professional fees. "A company may ultimately determine that it has no choice but to file a free-fall Chapter 11 case after first attempting to build consensus among classes with disparate interests," says Cooper.

Third, soliciting votes on a plan prior to filing a Chapter 11 petition may raise securities law issues. Section 1145 of the Bankruptcy Code exempts companies from registration requirements under U.S. federal securities laws. However, according to the SEC, this exemption does not apply to solicitations of votes undertaken prior to a bankruptcy filing, as is the case with pre-packaged bankruptcies. "Given this uncertainty, debtors often look to non-bankruptcy exemptions from the registration requirements under U.S. securities laws in connection with pre-bankruptcy solicitations of votes on Chapter 11 plans," says Cooper.

Finally, says Cooper, there's the risk that a bankruptcy court will not approve the disclosure statement accompanying the plan or will refuse to count votes if it believes that the votes were solicited in bad faith or determines that the way classes of claimants were divided was improper. ¤

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- *Special Report: Restructuring Depts. of National Accounting Firms*
- *Special Report: European Restructuring Practices of U.S. Law Firms*
- *Research Report: Who's Who in Hawker Beechcraft*

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