turnarounds & workouts
News for People Tracking Distressed Businesses

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JULY/AUGUST 2014 VOLUME 28, NUMBER 7/8

All or Nothing?

Court Allows Debtor to Reject Some License Agreements

by Julie Schaeffer

The United States Bankruptcy Court for the District of Delaware has ruled that a debtor may assume some license agreements while simultaneously rejecting others.

"As a result of this case, careful drafters will consider whether and to what extent to include provisions expressly stating that specific agreements are non-severable and constitute an integrated whole," says Nicholas Miller, a partner at Neal, Gerber & Eisenberg LLP.

In January 2011, Physiotherapy Holdings, Inc., which provides outpatient physical therapy services, hired Huron Consulting Services to help improve its revenue cycle. As part of that engagement, through 2011 and 2012, Physiotherapy Holdings and Huron

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Breaking Up is Hard to Do

Break-Up Fee Denied Administrative Priority

by Randall Reese

On April 8, Frank R. Alley, III, the Chief Bankruptcy Judge for the United States Bankruptcy Court for the District of Oregon, issued an opinion that could potentially have wide-ranging application to many of the large sale and financing transactions that have become commonplace in Chapter 11 bankruptcies. Judge Alley was presented with the question of whether a claim for a break-up fee for a prospective debtor-in-possession lender was entitled to administrative expense priority. In a controversial ruling, he held that the prospective DIP lender was entitled to a general unsecured claim for the amount of the break-up fee, but that the claim was not entitled to administrative expense priority.

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Rescue and Recovery

EU Begins to Embrace a New Restructuring Culture

by Julie Schaeffer

Europe has long been considered a poor place to commence an insolvency because its laws encourage liquidation rather than rehabilitation – but there's now an effort to create a "rescue-and-recovery" culture. In the past few months, the European Union (EU) has taken a significant step toward establishing such a culture in its 28 member states. As a result, more American companies with financially troubled European affiliates may decide to commence reorganization proceedings overseas.

The EU's current regulations for insolvency proceedings date back to 2000, when the 27 member states of the EU (except Denmark) agreed to be subject to Regulation (EC) No.

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Consulting entered into a number of agreements, including a master agreement and a software license agreement that gave Physiotherapy Holdings the right to use Huron Consulting's accounting software.

In November 2013, Physiotherapy Holdings filed for Chapter 11, and in December 2013, its plan of reorganization was confirmed. That plan, among other things, transferred any potential claims Physiotherapy Holdings might have against Huron Consulting to a litigation trust. Huron Consulting was planning to seek indemnity from Physiotherapy Holdings for those claims under the broad indemnity provisions in the master agreement. (The software licensing agreement also had an indemnity provision, but it was much narrower than that in the master agreement.)

Shortly after confirmation of the Chapter 11 plan, Physiotherapy Holdings filed a motion to assume the software license agreement while rejecting the other agreements, including the master agreement.

The reason for Physiotherapy Holdings' selective assumption was no secret, says Jessica Diab, an associate in the Business, Finance & Restructuring Department of Weil, Gotshal & Manges, who has written on the topic in a recent post on the Weil bankruptcy blog. Physiotherapy Holdings wanted the software licensing agreement because it gave the firm access to much needed (and already paid for) accounting software for a period of time post-emergence. On the other hand, the firm did not want the master agreement because of the broad indemnity provisions in it. "The debtors could not afford to take on this indemnification risk especially in light of the lawsuit that the prepackaged plan's litigation trust had commenced against the consulting firm for alleged problems relating to the software," says Diab.

Huron Consulting objected to Physiotherapy Holdings' motion, arguing that Physiotherapy Holdings could not assume the software license agreement without also assuming the other agreements. Huron Consulting wanted all three agreements treated as one single agreement.

In a March 2014 ruling, Judge Gross addressed two threshold matters. First,

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The issue arose in the Chapter 11 case of C & K Market, Inc., a company that owned and operated approximately sixty grocery stores and pharmacies in Southern Oregon and Northern California prior to its bankruptcy filing. In the summer of 2013, C & K Market's management anticipated a need for an in-court reorganization and began negotiations, which Judge Alley describes as "arduous," with its pre-petition secured lender US Bank for a DIP financing facility.

By autumn, management determined that alternative sources of DIP financing would be necessary and approached multiple other potential lenders. The only lender that was able to respond in the required time frame was Sunstone Business Finance, LLC. On October 25, 2013, C & K Market and Sunstone executed a term sheet for a $5 to $7.5 million DIP financing facility. The term sheet also provided for, among other things, a $250,000 break-up fee "to induce [Sunstone] to enter into this Term Sheet, to incur time and expense in participating in the negotiations contemplated herein, and to set aside the funds necessary to fund the DIP loan while foregoing pursuit of other lender opportunities." Sunstone's commitment would remain enforceable until a final order approving alternate financing was approved by the bankruptcy court.

Concurrently, C & K Market's management continued to negotiate with US Bank and had made "substantial progress" in negotiating the terms of a DIP facility with an interest rate that was less than half the rate provided in the Sunstone term sheet. According to Judge Alley, C & K Market's management told US Bank that they had entered into a term sheet with another, unidentified lender, but US Bank's representatives were "unimpressed" and threatened a "hotly contested" and expensive battle if the company sought court approval of a DIP facility provided by a lender other than US Bank.

C & K Market filed for bankruptcy protection in mid-November and sought and received approval of a DIP facility that US Bank had agreed to provide the prior day. Sunstone subsequently filed both a proof of claim for the break-up fee and a motion seeking the allowance of the claim as an administrative expense. The motion and the claim were objected to by

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1346/2000. That regulation specified the rules for resolving conflicts of jurisdiction and laws between the member states. While the goal of the regulation was to coordinate insolvency proceedings opened in several member states, it actually created a series of difficulties. According to the European Commission, half of EU enterprises survive less than five years, with around 200,000 becoming insolvent each year, with 1.7 million jobs lost as a result. And, a quarter of these insolvencies have a cross-border element.

With that in mind, in 2012 the European Commission began a comprehensive review of how the EU's insolvency regulation had worked during its first 10 years, and found that there were some problems. Insolvency frameworks in many EU countries, the Commission found, channel viable enterprises in financial difficulties towards liquidation rather than restructuring. Challenges, however, are numerous.

First, restructuring before formal insolvency proceedings are started is not possible in several countries (such as Bulgaria, Hungary, the Czech Republic, Lithuania, Slovakia, and Denmark) – and where it is an option, it can be inefficient or costly.

Second, in some countries (including Austria, Belgium, Estonia, Greece, Italy, Latvia, Lithuania, Luxembourg, Malta, Croatia, Poland, Portugal, and Romania) it can take many years before entrepreneurs who have gone bankrupt can be discharged of their old debts so they can try another business idea.

Third, the difference between laws in different EU member states affects the recovery rates of cross-border creditors, on cross-border investment decisions, and the restructuring of groups of companies.

According to the European Commission, which is the EU's executive arm, it's essential to have modern laws and efficient procedures in place to help businesses overcome financial difficulties and give entrepreneurs a second chance. To that end, the Commission proposed five key amendments to Regulation (EC) No 1346/2000:

- First, facilitate the restructuring of businesses in financial difficulties at an early stage, before starting formal insolvency proceedings, and without lengthy or costly procedures;

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Research Report

Who's Who in Sbarro LLC

by Francoise C. Arsenault

Sbarro LLC, headquartered in Melville, New York, was founded in Brooklyn, New York, in 1956 by Gennaro and Carmela Sbarro, immigrants from Naples, Italy. The success of the family's first Italian grocery store led to the opening of additional locations in New York City. By 1970, the company had opened its first mall-based eatery that incorporated the Sbarro concept of New York style pizza and other Italian-American cuisine prepared in an open kitchen and delivered with quick self-service in a casual table dining atmosphere. Sbarro restaurants are typically located in department stores, shopping malls, casinos, airports, travel service areas, cinemas, and college campuses. The company was taken private by the Sbarro family in 1999.

Sbarro currently has 799 restaurants, with about one-half in North America and the rest located overseas in 35 countries. The company's restaurants in North America are all located in high pedestrian traffic locations in 39 states, the District of Columbia, and Canada. Key international markets include Russia, Turkey, the Philippines, Mexico, and India. Today, Sbarro employs more than 2,700 workers and has annual revenues of approximately $290 million. The company recently closed more than unprofitable 180 restaurants, and may close an additional 50 restaurants once it exits from bankruptcy. To raise additional cash, Sbarro also may sell 50 profitable locations in some markets to franchisees.

On March 10, 2014, Sbarro LLC and its affiliated debtors filed for Chapter 11 reorganization in the United States Bankruptcy Court for the Southern District of New York. Along with its bankruptcy petition, Sbarro filed a proposed joint pre-packaged Plan of Reorganization and Disclosure Statement, the terms of which proposed to discharge about $148 million, or almost 85 percent of the company's debt. Lenders holding almost 99 percent of Sbarro's pre-petition secured claims voted in favor of the plan and will recover approximately 24 percent on their claims. General unsecured creditors will share a recovery of about $1.25 million. The court approved the statement and confirmed the plan on May 19, 2014. Sbarro emerged from bankruptcy on June 2, 2014.

In its Chapter 11 filing, the Sbarro management team attributed the company's financial difficulties to "an unprecedented decline in mall traffic that continues to hamper retailers and restaurant operators," price surges for key raw materials such as cheese and flour, and increased pressure from aggressive and innovative competitors in a fragmented marketplace. In its bankruptcy filing, the company reported assets of approximately $175.4 million and debts of about $165.2 million. The Chapter 11 filing does not affect the nearly 600 Sbarro restaurants owned by franchisees.

The company, which was acquired from the Sbarro family by MidOcean Partners III, L.P. in January 2007 for $417 million, emerged from its previous bankruptcy in November 2011. The new owners of Sbarro have provided the company with up to $20 million in exit financing and include the private equity firms Apollo Global Management, Babson Capital, and Guggenheim Investments, the investment management business of Guggenheim Partners, LLC.

Sbarro plans to move its headquarters from Melville to Columbus, Ohio to save costs and to be closer to its new Pizza Cucinova business, a premium Neapolitan style made-to-order concept that allows customers to create their own personal pizzas before they are baked in a wood-fired stove. The company also is investing in Sbarro Brooklyn Fresh, a fast casual Italian concept featuring made-to-order New York style pizza, pasta, and salads.

The Debtor

J. David Karam is the Chief Executive Officer and the President of Sbarro LLC. **Anthony J. Missano** is the President for Business Development and a Corporate Vice President. **Carolyn M. Spatafora** is the Chief Financial Officer. **Stuart M. Steinberg** is the General Counsel and the Secretary.

Kirkland & Ellis LLP is serving as the bankruptcy counsel to Sbarro. The team incudes **James H.M. Sprayregen**, a partner in the Chicago office, and **Edward O. Sassower**, **Nicole L. Greenblatt**, and **David S. Meyer**, all partners in the firm's New York office.

Moelis & Company LLC is providing Sbarro with investment banking services. The engagement team includes **Adam B. Keil**, a managing director in the firm's New York office, **Tarik Rguem**, a senior vice president, **Usman Saleem**, a vice president, and **Jonathan Tenan**, an associate.

Loughlin Management Partners & Company is serving as the financial advisor to Sbarro. **Patrick J. Fodale**, a managing director with the firm, is leading the engagement.

PricewaterhouseCoopers LLP is providing Sbarro with independent auditing and tax consulting services. The engagement is led by **Carrie Quinn**, a partner in the firm's New York City office.

A&G Realty Partners, LLC is serving as the real estate advisor to Sbarro. **Emilio Amendola**, co-president of **A&G Realty Partners**, directs the work.

The Official Committee of Unsecured Creditors

The Committee includes the **Performance Food Group, Inc.**; **PepsiCo Sales, Inc.**; **GGP Limited Partnership**; **Simon Property Group, Inc.**; and **The Macerich Company**.

The law firm of **Cooley LLP** is serving as the counsel to the Committee. **Jay R. Indyke** and **Cathy Hershcopf**, both partners in the New York office, and **Seth Van Aalten** and **Alex R. Velinksy**, associates in the New York office, are working on the case.

Mesirow Financial Consulting, LLC is providing the Committee with financial advisory services. **Monty L. Kehl**, a senior managing director in the firm's Chicago office, heads up the engagement team.

The Trustee

The U.S. Trustee is **William K. Harrington**.

The Judge

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

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Gross determined that Physiotherapy Holdings' assumption of the software license agreement and rejection of the other agreements was a sound exercise of business judgment, that being the standard for assumption or rejection of a contract under section 365 of the Bankruptcy Code. Second, Gross determined that the software license agreement was of a type that was assumable by Physiotherapy Holdings – something Huron Consulting had argued against pursuant to intellectual property law and section 365(c) of the Bankruptcy Code, which prohibits a debtor from assuming or assigning an executory contract without the consent of the non-debtor party in certain circumstances. In other words, Huron Consulting claimed Physiotherapy Holdings could not assume the software license agreement without Huron Consulting's consent, which was not granted. "Here, however, the court concluded that…the explicit terms of the agreements overrode any potential prohibition on the assumption or assignment of the software license," says Diab.

With those matters addressed, Gross then turned to the central issue: whether Physiotherapy Holdings could assume the software license agreement while simultaneously rejecting the other agreements. Gross made four points.

First, the indemnity provision in the master agreement was much broader than the indemnity provision in the software license agreement. If the two agreements were to be read as one, however, there would be no need for indemnity language in the software license agreement because the broader provisions of the master agreement would be sufficient.

Second, although the software license

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Breaking Up, *from page 2*

the creditors' committee, US Bank, and C & K Market's mezzanine lenders.

Judge Alley first determined in his opinion that the claim for the break-up fee was at least allowable as a prepetition claim. In rejecting a number of objections, he held that the "Term Sheet represents an enforceable contract subject to a condition subsequent that the bankruptcy court either approve the Sunstone DIP facility (in which case Sunstone would lend Debtor up to $7 million on the terms approved by the court) or enter an order approving a DIP facility from another lender (in which case the Breakup Fee would be due)."

The opinion then turned to the question of whether the break-up fee claim was entitled to administrative expense priority under sections 503(b)(1)(A) of the Bankruptcy Code. Judge Alley determined that the claim was not entitled to administrative expense priority because the "alleged beneficial effects of the Debtor and Sunstone entering into the Term Sheet…occurred pre-petition, as did the execution of the Term Sheet itself." In evaluating the argument that Sunstone provided consideration post-petition by holding its offer to provide DIP

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- Second, allow debtors to restructure their business without needing to formally open court proceedings;
- Third, give businesses in financial difficulties the ability to request a temporary stay of up to four months (renewable up to a maximum of 12 months) to adopt a restructuring plan before creditors can launch enforcement proceedings against them;
- Fourth, facilitate the process for adopting a restructuring plan, keeping in mind the interests of both debtors and creditors, with a view to increasing the chances of rescuing viable businesses; and
- Fifth, reduce the negative effects of a bankruptcy on entrepreneurs' future chances of launching a business, in particular by discharging their debts within a maximum of three years.

The European Commission asked member states to put appropriate measures in place within one year and, in 18 months, it will determine whether additional measures are needed. The European Parliament voted overwhelmingly to implement the European Commission's so-called "Recommendation." For the proposals to become law, the EU Council – the institution representing the member states' governments – must approve the proposals.

The Recommendation invites member states to implement the Commission's proposals by March 2015. The Commission

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Calendar

Turnaround Management Association
10th Annual Northeast Regional Conference
August 27 – 28, 2014
The Gideon Putnam Spa Resort
Saratoga Springs, NY
Contact: www.turnaround.org

National Association of Bankruptcy Trustees
2014 Annual Convention
September 11 – 14, 2014
The Grand America
Salt Lake City, UT
Contact: www.nabt.com

Turnaround Management Association
TMA 2014 Annual Conference
September 29 – October 1, 2014
Westin Harbour Castle
Toronto, ON
Contact: www.turnaround.org

National Conference of Bankruptcy Judges
88th Annual Meeting
October 8 – 11, 2014
Chicago Hyatt Regency
Chicago, IL
Contact: www.ncbj.org

Association of Insolvency and Restructuring Advisors
13th Annual Advanced Restructuring & Plan of Reorganization Conference
November 17, 2014
The Union League Club
New York, NY
Contact: www.aira.org

Beard Group
21st Annual Conference on Distressed Investing
December 1, 2014
The Helmsley Park Lane Hotel
New York, NY
Contact: (240) 629-3300

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Special Report

Canadian Bankruptcy Law Firms

Firm	Attorneys	Bankruptcy Attnys.	Senior Bankruptcy Partners	Representative Clients/Cases
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., R. Hoops Harrison	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, and others.
Bennett Jones 416-863-1200 – Toronto 403-298-3100 – Calgary www.bennettjones.com	358	16	S. Richard Orzy, Ken Lenz, Raj Sahni, Kevin Zych, Chris Simard	Nortel Networks bondholders, Sino-Forest Corporation, Yellow Media noteholders,OPTI Canada noteholders, Catalyst Paper noteholders, Gateway Casinos secured lenders, AbitibiBowater UCC, Smurfit-Stone UCC, Quebecor World UCC, Newpage bondholders, SkyLink Aviation noteholders,Trident Exploration, Bank of Montreal, CIBC, Ernst & Young, PricewaterhouseCoopers.
Blake, Cassels & Graydon 416-863-2400 www.blakes.com	566	19	Bernard Boucher, Kelly Bourassa, Milly Chow, Sébastien Guy, Pamela Huff, William Kaplan, Michael McGraw, Linc Rogers, Peter Rubin, Steven Weisz	First Leaside (receiver), League Assets (secured lender), Georges Marciano (trustee), Aveos (secured syndicate), Colossus Minerals (DIP lender), Great Basin Gold (DIP lenders), Timminco (monitor), Northern Star Mining (secured lender), Do All Ind. (secured creditor), RS Technologies (debtor), Kraus Canada (receiver/trustee), Northstar Aerospace (DIP lenders), Clients: Various Canadian and U.S. banks and financial institutions.
Cassels Brock & Blackwell 416-869-5300 www.casselsbrock.com	200	19	Joseph Bellissimo, John Birch, Bill Burden, Jane Dietrich, Deborah Grieve, Ryan Jacobs, Shayne Kukulowicz, Bruce Leonard, Alison Manzer, Marc Mercier, David Ward, Michael Wunder	Nortel Networks (UCC), Great Basin Gold (bondholders), Crystallex International (DIP lender), Jaguar Mining (senior secured lender), Lone Pine Resources (equity holders), Sino Forest, SkyLink Aviation (directors), First Leaside (investor group), Cline Mining (debtor), AVEOS Fleet Performance (debtor), NorthStar Aerospace (Wynnchurch Capital), Grant Forest Products (debtor), First Uranium (debtor), Digital Domain Media Group (debtor), Quiznos (debtor), Catalyst Paper (lenders).
Dickinson Wright 416-777-0101 www.dickinsonwright.com	41	8	Lisa Corne, Eric Kay, John Leslie, David Preger, Mark Shapiro, 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	91	5	David Gruber, Robert Sloman, Rebecca Morse	Tangerine Financial Products (receiver), League Assets Corp. (petitioners), Douglas Channel LNG (Pacific Northern Gas), Lemare Lake Logging Ltd. (The Toronto-Dominion Bank), City of Vancouver (Olympic Village restructuring), Steels Industrial Products (petitioner), Blackburn Developments (Streetwise Capital Partners), Catalyst Paper Corporation (certain 2014 unsecured noteholders and 2016 noteholders), Angiotech Pharmaceuticals (petitioner).
Fasken Martineau DuMoulin 416-366-8381 www.fasken.com	770+	42	John F. Grieve, Alain Riendeau, Aubrey Kauffman, Kibben Jackson, Luc Beliveau, Stuart Brotman, Jon Levin, Travis Lysak, Luc Morin, Marcel Peerson, Robert Miller	PwC, Alvarez & Marsal, Catalyst Capital Group (Mobilicity), Ernst & Young (Penson Financial Services Canada), Samson Bélair / Deloitte & Touche (Century Mining Corp), HSBC (Bear Mountain, Arthon Industries), Honeywell (Comstock), Canadian Pacific Railway (Montreal Maine and Atlantic Railway), Royal Bank of Canada (Copper Point, Please Mum), Colossus Minerals, Azure Dynamics, Investissement Québec, FTI Consulting, Canada Deposit Insurance Corporation.
Goodmans 416-979-2211 www.goodmans.ca	209	14	Jay A. Carfagnini, Robert J. Chadwick, Gale Rubenstein, Brian Empey, L. Joseph Latham, Joseph Pasquariello, Brendan O'Neill, Melaney Wagner, Logan Willis	Nortel Networks, Mobilicity, Lone Pine Resources, Jaguar Mining, The Cash Store, Crystallex, XL Insurance Company, Indalex, Nelson Education, Eagle River Casino, Cline Mining, Aurcana Corporation, Canadian Investor Protection Fund, Deposit Insurance Corporation of Ontario, Ernst & Young, Alvarez & Marsal, KPMG, FTI Consulting, PwC, Deloitte, and others.
Gowling Lafleur Henderson 416-862-7525 gowlings.com	750+	85	Colin Brousson, David F.W. Cohen, Derrick Tay, Thomas Cumming, John McLean, Clifton Prophet, Patrick Shea, Alex MacFarlane, Jennifer Stam	Nortel Networks (CCAA proceedings), FTI Consulting (Sino-Forest Corporation CCAA proceedings), Korea Resources Corporation and Korean consortium (Boleo Mine Project), KPMG (Great Basin Gold CCAA), Bank of Montreal (Standen's Group of Companies), City of Montreal, as sole secured creditor of the debtor, Public Bike System Company (application of PBSC under the Bankruptcy and Insolvency Act), Montreal, Maine & Atlantic Canada Co.
McMillan 416-865-7000 www.mcmillan.ca	315	22	Yoine Goldstein, Max Mendelsohn, Peter Reardon, Andrew J.F. Kent, Sheryl E. Seigel, Wael Rostom, Adam Maerov, Éric Vallières, Marc-André Morin, Brett Harrison, Markus Koehnen.	Montreal, Maine & Atlantic (Fortress Investment Group through Railway Acquisition Holdings), North American Palladium (The Bank of Nova Scotia), Comstock Canada (The Williams Companies), Great Basin Gold Limited, Catalyst Paper Corporation (JPMorgan), Crystallex International Corporation, Nortel (The Bank of New York Mellon), Yellow Media (Bank of Nova Scotia), Canwest (senior secured / DIP lenders), Homburg Invest (Catalyst Capital Group), and many others.
Stikeman Elliott 416-869-5500 www.stikeman.com	467	40	Jean C. Fontaine, Marc Barbeau, Michel Gélinas, Sophie Lamonde, Jean Lamothe, Matthew Liben, Guy P. Martel, Yves Martineau, Claire Zikovsky, Elizabeth Pillon, Ashley John Taylor, David R. Byers, Lorna Cuthbert, Daphne MacKenzie, Daniel Murdoch, Nancy Ramalho, Alexander Rose, Andrea Boctor, David Brown, Hein Poulus	Air Canada, Alliance Grain Traders Inc., Ernst & Young Inc., (court-appointed monitor of Landdrill International Inc., Crystallex International Corporation, NewPage Port Hawkesbury Corp.), FTI Consulting Inc., GE Capital Canada, H.I.G Capital, KPMG LLP, Northstar Aerospace, Inc., Ontario Teachers' Pension Plan, Timminco Limited.
Torys 416-865-0040 www.torys.com	260	15	Tony DeMarinis, Scott Bomhof, David Bish	Nortel Networks Inc., Canada Pension Plan Investment Board, Brookfield Asset Management Inc., West Face Capital, Alvarez & Marsal, PricewaterhouseCoopers, Duff & Phelps, KPMG, Grant Thornton, Deloitte, Fairfax Financial Holdings Limited, The Cadillac Fairview Corporation Limited, The Toronto-Dominion Bank, Assuris.

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Worth Reading

From Industry to Alchemy: Burgmaster, A Machine Tool Company

Author: Max Holland
Publisher: Beard Books
Softcover: 349 pages
List price: $34.95

From Industry to Alchemy tells the story of people caught in the middle of global competition, the institutional restraints within which smaller companies had to operate after the Second World War, the rise of Japanese industry, and the conglomeration frenzy of the 1980s. The author's purpose in writing this book was to chronicle the decline in American manufacturing through the story of that company.

Burgmaster was the culmination of the dream of a Czechoslovakian immigrant, Fred Burg, who described himself as a "born machinist." After coming to America in 1911, he learned the tool-and- die trade, becoming so adept that he "could not only drill the hole, but also make the drill." A life-long inventor, he designed an electric automatic transmission that was rejected by GM's Charles Kettering; GM came out with a hydraulic version six years later. Forced by finances to work in retailing, Burg retired after World War II, moved to California, and set up a machine-tool shop with his son and son-in-law to manufacture the turret drill, his own design. With the help of the Korean War, and a previous shortage of machine tools, business took off. It was a hands-on operation from the start and remained that way. Burg once fired an engineer who didn't want to handle a machine part because his hands would get dirty. Management spent time on the shop floor, listening to employee ideas. Burg lived and breathed research and development, constantly fiddling to devise new machines and make old ones better. Between 1955 and 1962, sales grew 13-fold and employees from 62 to 272. Burg Tool was featured on Richland Oil Company's broadcast "Success Stories."

By 1965, however, Burg was getting old and the three partners knew that Burgmaster needed to fund an expensive, risky expansion to fill back orders or lose market share. Although companies had made offers before, Houdaille, a company named for the Frenchman who invented recoilless artillery during World War I, seemed a good match. The two had similar origins, it seemed. Houdaille had begun an ambitious acquisition program, and saw Burgmaster fitting into an unfilled niche. With a merger, new capacity would be financed, and "Burgmaster would continue to operate under present management, personnel and policies but as a Houdaille division."

What comes next is management by numbers rather than hands-on decisionmaking; alienation of skilled blue-collar workers; pushing aside of management; squelching of innovation; bitter trade disputes; leveraged buyouts; the politics of U.S. trade policy; Japan-bashing; and the inevitable liquidation of Burgmaster and loss of livelihood of more than 400 employees.

Named one of the ten best books of 1989 by Businessweek, *From Industry to Alchemy* book provides valuable insight into the changes within an industry. It combines fascinating, creative characters; number crunchers; growing corporate disdain for manufacturing; and tangible consequences of Washington and Wall Street gone crazy. ¤

Max Holland has been published widely. His father worked for the Burgmaster machine tool company for twenty-nine years.

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

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agreement and master agreement were executed at the same time, not all of the agreements were, suggesting they were separate.

Third, in the event of a contradiction in the terms between the license agreement and the master agreement, it was specifically states that the master agreement would take "the back seat." This wouldn't be necessary if they were the same agreement.

Fourth, the integration clause in the master agreement did not reduce the software license agreement to a mere component of the master agreement. Instead, it indicated that the intentions of the parties were reflected in the agreements as written.

Ultimately, Gross concluded that the agreements did not constitute an integrated agreement, allowing Physiotherapy Holdings to simultaneously assume the software license agreement and reject the master agreement .

It was the ruling that Physiotherapy had sought: to be successful, it had to assume one contract and reject the other. If Gross had ruled in favor of Huron Consulting, Physiotherapy would have found itself in a difficult position, forced to reject the agreements wholesale and lose access to the critical accounting software, or accept the agreements wholesale and take on the cost of indemnifying Huron Consulting. That could have doomed the company's reorganization plan.

More broadly, however, the case serves as a reminder of the importance of drafting agreements. "The case is interesting because it turned on a relatively common omission from an otherwise fulsome set of agreements between the parties," says Miller. "Specifically, none of the agreements expressly stated that the various writings constituted a single integrated agreement between the parties. According to Judge Gross, the 'entire agreement' clause that Huron relied upon merely eliminated parol evidence regarding the parties' intent – it did not cause the separate agreements to become an integrated whole. And the 'incorporation of terms' provision cited by Huron also did not convert the various agreements into a single integrated whole – it merely provided for the incorporation of certain terms found outside the four corners of that particular agreement."

"The risk of being in this undesirable bind might just be enough to encourage contracting parties to consider whether their related agreements are, in fact, a single agreement or whether such agreements are separate stand-alone agreements, and to explicitly negotiate terms to reflect such considerations," says Diab. ¤

Special Report

Outstanding Investment Banking Firms – 2014

Firm	Senior Professionals	Outstanding Achievements
Blackstone New York, NY 212-583-5000 www.blackstone.com	Tim Coleman CJ Brown Mark Buschmann Mike Genereux Peter Laurinaitis Nick Leone Jamie O'Connell Steve Zelin	Leading advisor in many high-profile transactions, including Cengage, Edison Mission Energy, Excel Maritime, Foxwoods, Genco, Kodak, Jefferson County (AL), Patriot Coal, ResCap, and W.R. Grace. Currently working on 30 live assignments, including Detroit, Energy Future Holdings, Endeavour, Essar Steel (Algoma), Homex, Iceland, and OGX.
Carl Marks Advisory Group New York, NY 212-909-8400 www.carlmarks.com	Mark Claster Duff Meyercord Chris Wu Evan Tomaskovic Warren Feder	Representing debtors Green Field Energy Services, Landauer-Metropolitan Inc., American Bancorporation; represented secured lenders in sale of Biofuel Energy's ethanol assets to Green Plains Renewable Energy; representing secured lenders in Corinthian Colleges; representing UCCs in Rogers Bancshares, North Texas Bancshares, First Mariner, Natrol.
Evercore New York, NY 212-857-3100 www.evercore.com	J. Stephen Worth David Y. Ying Lloyd Sprung Paul Billyard	Recent representative engagements include Inspiration Biopharmaceuticals, Inc., RDA Holding Co. (Reader's Digest), Fisker Automotive Holdings, Inc., Energy Future Holdings Corp., and Ormet Corp.
Goldman Sachs New York, NY 212-902-1696 www.goldmansachs.com	Bruce Mendelsohn	Lead arranger for J.C. Penney (upsized original $1.75 billion in financing to $2.25 billion in face of strong market demand), American Airlines ($2.9 billion in financing provided critical incremental liquidity), and W.R. Grace ($1.2 billion in exit financing). Advised Select Staffing in its Chapter 11, reducing liabilities from $651 million to approx. $370 million.
Gordian Group New York, NY 212-486-3600 www.gordiangroup.com	Henry Owsley Peter Kaufman Patricia Caldwell Dennis McGettigan David Herman	Advised Xtreme Power in avoiding liquidation and navigating to 363 sale at roughly 3.5 times LTM revenue, and Montreal, Maine & Atlantic Railway in complex and distressed cross-border sale to Fortress. Other engagements include All Smiles, Ambac, American Airlines, ATP Oil & Gas, Hostess, Interfaith Medical Center, Jobson Healthcare, Refco, Stereotaxis.
Houlihan Lokey New York, NY 800-788-5300 www.hl.com	Dave Hilty Eric Siegert Peter Marshall Ansgar Zwick Joe Swanson J.P. Hanson Saul Burian Tuck Hardie	Recent engagements include American Airlines, Cengage Learning, Central European Distribution, Dex One Corp., Edison Mission Energy, Furniture Brands, Gatehouse Media, Groeb Farms, iGPS Company, Patriot Coal, Residential Capital. CEDC restructuring eliminated $665.2 million in debt in first prepack of Russian or Polish operating business.
Jefferies New York, NY 212-284-2300 www.jefferies.com	Richard Morgner Leon Szlezinger Tero Janne Robert White Richard Klein Alex Rohan Rory Keenan Andrew Speirs	Recent engagements include American Airlines, ATP Oil & Gas, Brookstone, Classic Party Rentals, Eastman Kodak, Energy Future Holdings, Excel Maritime, Genco Shipping & Trading, GMX Resources, KV Pharmaceuticals, LDK Solar, Momentive, Overseas Shipping Group, and Velti.
Lazard Freres & Co. New York, NY 212-418-3211 www.lazard.com	Brandon Aebersold David S. Kurtz Timothy Pohl Barry W. Ridings Andrew Torgove	Recent engagements include Mmodal Inc, USEC Inc., Satcon Technology Corporation, Maxcom Telecomunicaciones, S.A.B. de C.V., Rural/Metro Corporation, Quiznos Corp, Exide Technologies, Longview Power, Savient Pharmaceuticals, Inc., Allens Inc., and All Veg.
Miller Buckfire & Co. New York, NY 212-895-1800 www.MillerBuckfire.com	Kenneth A. Buckfire James Doak Stuart E. Erickson John A. McKenna, Jr. Ron Kubick Morgan Suckow Alexander Tracy	FA to City of Detroit, Oncor Electric, Excel Maritime, Borealis Maritime, Furniture Brands, Unitek Global Services, Foxwoods Resorts; advisor to first lien lenders of Caesars Entertainment, Coldwater Creek, Synagro, AMF Bowling; advisor to bond insurers of City of Stockton and Harris County–Houston Sports Authority; advisor to Lehman Brothers trustee.
Millstein & Co. New York, NY 212-416-5800 www.millsteinandco.com	Jim Millstein Jane Vris Elizabeth Abrams Brendan Hayes Adam LaVier Billy Nix Mike Tae	Recent engagements include Government Development Bank for Puerto Rico (advising on management of $70+ billion of debt), US Airways (developed strategy for successful merger with American Airlines), Fannie Mae and Freddie Mac, Affinion Group, Texas Competitive Electric Holdings (ad hoc group of first lien creditors), and 21st Century Oncology.
Moelis & Company New York, NY 212-883-3666 www.moelis.com	Bill Derrough Thane Carlston Steve Panagos Mark Hootnick Jared Dermont Rob Flachs Zul Jamal Barak Klein Adam Keil	Recent company-side assignments include Sbarro, Edison International/Edison Mission Energy, Sorenson Communications, MACH Gen, Trinity Coal, Source Interlink Companies, McCarthy & Stone, and Alinta Holdings. Creditor assignments include Cengage Learning, Magyar Telecom B. V. (Invitel), AMR Corporation, The Co-Operative Bank, and others.
SSG Capital Advisors West Conshohocken, PA 610-940-1094 www.ssgca.com	J. Scott Victor Mark E. Chesen Robert C. Smith Matthew P. Karlson Michael S. Goodman Michael J. Gorman Teresa C. Kohl Terry Kohler Luis A. Pillich	Transactions include: exit financing facility for Cooper-Booth Wholesale Company and affiliates; senior secured credit facility for The H&K Group; restructuring of senior secured notes and second lien notes for FriendFinder Networks; senior secured credit facility for Cotton Holdings; Spectral Response and Skinny Nutritional Corporation financings.

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Breaking Up, *from page 4*

financing open until the court entered a final order approving the DIP facility with US Bank, he held that this did not provide the "'direct and substantial benefit' to the estate that would transform a pre-petition contingent claim to an administrative expense claim." Rather, any benefit provided by Sunstone was "too indirect and intangible to qualify for priority treatment."

Judge Alley further determined that Sunstone's offer to provide alternate DIP financing did not make a "substantial contribution" and, therefore, the break-up fee also failed to meet the standard for administrative expense priority under section 503(b)(3). After noting that section 503(b)(3)(D) allows, as an administrative expense to a creditor, "the actual, necessary expenses" incurred by a creditor in making a substantial contribution in a bankruptcy case, Judge Alley stated that the break-up fee is not an expense of Sunstone at all. Therefore, "even if the Court could find that costs associated with pre-petition services by a creditor which make a substantial contribution in a later-filed bankruptcy could be accorded administrative expense priority under § 503(b)(3), it would not help Sunstone in this instance," wrote the judge.

Douglas S. Mintz, of counsel with Orrick, Herrington & Sutcliffe LLP, notes that the decision presents risks to both potential DIP lenders, as well as other parties negotiating break-up fees with a debtor-to-be. "If embraced outside the District of Oregon, Judge Alley's decision casts doubt on the ability to be paid in full as an administrative creditor with respect to a breakup fee that a debtor might agree to prepetition," says Mintz. "Thus, if the opinion were to gain acceptance beyond this case, Judge Alley's opinion could chill prepetition offers to serve as new DIP lenders, or possibly even as stalking horse bidders in a section 363 sale." Mintz and others also question the court's conclusions on the question of administrative priority. "It is difficult to understand why the judge did not believe the Sunstone financing benefited the debtor's estate," Mintz notes. A recent newsletter from Reed Smith's Commercial Restructuring & Bankruptcy Group echoes this sentiment, stating "we think the court came out on the wrong side of law on this one."

Moving forward, there appear to be several steps that lenders and others may consider taking to avoid finding themselves in Sunstone's shoes in a future case. "One potential way to prevent this result would be to execute final agreements surrounding DIP financing or sale terms immediately after the filing of a Chapter 11 case, ensuring that the counterparty is a debtor in possession and thus that the claim is more likely to constitute an administrative claim rather than a general unsecured claim," suggests Mintz. Matthew Goren, a senior associate in the Business Finance & Restructuring Department of Weil, Gotshal & Manges, agrees that lenders should be wary of relying simply on prepetition agreements to secure break-up fees. "First and foremost, a lender significantly increases its prospects for being selected as a DIP lender or collecting on a break-up fee by actively managing the process," notes Goren. "In the C & K Markets case, it did not appear as if Sunstone imposed a deadline (at least not a short one) on their commitment to lend. Without such deadline, a borrower benefits from a lengthy runway to use the commitment it has in hand to leverage competing offers prior to filing."

The opinion may also encourage lenders to make additional demands of potential DIP borrowers. "In other circumstances, a lender may want to consider more creative solutions, such as insisting that the break-up and other administrative fees be transferred to the lender or an escrow account immediately upon document execution," says Goren. "Such a solution may be at risk of attack or clawback in a bankruptcy but would still place the lender in a more advantageous position than taking its place at the back of the line with the other general unsecured creditors." ¤

EU, *from page 4*

will assess member states' implementation of the Recommendation by September 2015 and will then consider whether, in its view, additional measures are required.

Susan Kelly, who leads Squire Sanders' restructuring and insolvency practice group in the United Kingdom and Europe, says the news is positive, bearing in mind that the European Commission has adopted a Recommendation. "This is a Commission Recommendation pursuant to Article 292 of the Treaty on the Functioning of the European Union," she says. "It is not a proposal for legislation, which would need to be in a Directive."

She notes that anything stronger than Recommendations with regard to members' domestic legislation would be new territory for the EU. Several member states are not persuaded that there is a justification for EU intervention and indeed the U.K. government has already published its view that domestic insolvency legislation should be a matter for individual member states and, as a matter of principle, it is not in favor of EU action to harmonize legislation in this area.

The proposed changes shouldn't be surprising, says Patrick E. Mears, partner and co-chair of the New York Law Practice group at Barnes & Thornburg, as there has been a flurry of legislative changes throughout the European member states towards adopting and streamlining the Chapter 11 approach, citing Switzerland as an example.

Professor Bob Wessels from Netherlands' Leiden University, and an independent advisor to the European Commission, agrees, noting that Germany, Italy, France, Belgium, and Portugal are just a few of the countries to enact legislation generally reflecting the aims of the European's Commission's recommendations.

As an example, says Mears, "On January 1 of this year, a new restructuring law became effective in Switzerland that strengthens the 'automatic stay' protections granted to the debtor during the initial phases of the debt-composition proceeding, permitting the court to appoint a creditors committee and permitting a 'debt-for-equity' swap in the composition plan, much like what is now in the 2012 German legislation."

Kelly says it is unlikely that there will be any changes to legislation in the United Kingdom, but other member states are likely to take steps to align their legislation in the way that Germany, France, and Spain have already started to do.

Wessels, however, foresees "a non-insolvency hiccup." Elections for the European Parliament are in May, with a new composition for the European Commission, so there will be new commissioners. "Whether the new

continued on page 9

Gnome de Plume

Financial Entertainment

by Andy Rahl

The financial media has a significant effect on our markets and economy. For me, the key aspect of understanding that effect is the distinction among information, opinion, and entertainment. A story is real news when its information is the story, and honest opinions are declared as such. Everything else, while it may contain elements of fact, is entertainment and opinion disguised as news.

Filling Space – Every Day

Our media needs new stories and headlines every day. How many of those 365 headline events we get each year really have made a difference – one or two per month if that? And of course many days we have more than one "big" event. But what about the 90+ percent of these stories that are pseudo news? Aren't they just inventory – like widgets with an ephemeral shelf-life?

Most pseudo news has recognizable elements: a headline about a bit of data or a new angle on an opinion is presented as important and either brand new or a follow-on to something that recently was "new." As Mick Jagger said, "who wants yesterday's papers"?

Then we have those expert panels that every financial news organization uses to add gravitas to pseudo news about bits of new data. Any deviation from the collective expectation of the anonymous 'experts' is declared to be news for that day. Not to mention the obligatory anecdotal quotes from obscure analysts and traders validating the story du jour while advocating whatever their positions might be. Remember the run on Jefferies in 2011 caused by a downgrade from a 'ratings agency' with two employees that no one ever heard from before or since? Jefferies seems to be doing quite well now, thank you.

And of course bad news sells better than good news. It's much more interesting to write about theories as to why a market is a future bubble, or will soon crash, etc., than about how things are going well and up. As Tolstoy observed, all happy families have the same story but every unhappy family's story is different and, I would add, almost always more newsworthy.

The Entertainment Factor

Of course, all news is exploited for its entertainment value; entertainment is what really fills the news holes. My favorite news joke is from an obscure summer theatre skit worthy of "Saturday Night Live": a guy in combat gear who resembles Geraldo Rivera is shown breathlessly reporting on June 5, 1944, "from Omaha Beach, where the Normandy invasion is scheduled for tomorrow."

CNBC and Fox News are good examples of entertainment media that pretend to be news and opinion channels. Financial news for them is far less important than political and social coverage, but they still play an important role in setting the tone of our financial discourse. Their aggressive, confrontational style closely resembles the traditional 'in your face' negotiating posture that good restructuring practitioners employ when they need to. The problem is that a confrontational style is just one part of a professional's toolbox, but CNBC and Fox do it relentlessly.

So…

What results from the media bombardment of all of these authoritative, confrontational, falsely newsworthy, widget entertainments? One thing for sure is increased volatility. Every trading day has stories about why the markets did what they did that day and it's clear that many of those pseudo stories and disguised opinions move the markets – at least for awhile and sometimes much longer. Another is an open question: how much misinformation have we all bought into and where will it lead us down the road? ¤

EU, *from page 8*

Commission will give business rescue just as high a priority as the existing Commission remains to be seen," he says, adding that, "it's odd that rescue of business, which is a challenge for the market, in the end is in the hands of politicians."

Businesses in the United States will undoubtedly be affected in many ways by these upcoming changes to national insolvency laws. "The Recommendation is another positive step down the road for global corporates who seek legal systems that facilitate a predictable, controlled, and enabling restructuring process," Kelly says. "Currently the United Kingdom leads the field, but our EU colleagues are beginning to close the gap. These developments should be good news for global corporates and restructuring professionals alike." ¤

In the Next Issue…

- *Special Report: Restructuring Depts. of National Accounting Firms*
- *Special Report: European Restructuring Practices of U.S. Law Firms*
- *Research Report: Who's Who in Energy Future Holdings Corporation*

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