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MAY 2016 VOLUME 30, NUMBER 5

Liquidity Woes

Preparing Oil Companies for Ongoing Turbulence

by Julie Schaeffer

Oil prices don't appear poised to rise anytime soon and, until they do, oil companies and their capital providers must decide if they can survive and, if so, how.

"Most companies have a significant ways to go in making structural cost improvements," says Dennis Ulak, a senior director at Huron Consulting Group. He says that the companies that make the appropriate adjustments will likely be the leaders when the cycle finally returns to the growth phase.

Freeport-McMoran is well acquainted with the challenge. The minerals producer aggressively diversified into the oil and gas business in 2012 with two acquisitions focused

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Landlords: Proceed with Caution

Court Addresses Pre-Bankruptcy Lease Termination

by Randall Reese

A recent decision by the United States Court of Appeals for the Seventh Circuit may present new problems for landlords who enter into lease termination agreements with distressed tenants. Addressing the pre-bankruptcy termination of leases for several profitable store locations, the court reversed a lower court decision – and, in the view of many, departed from prior case law – and held that the lease terminations constituted transfers under the Bankruptcy Code that were subject to avoidance.

"Landlords dealing with troubled tenants often enter into termination agreements that dictate terms for the consensual terminations of unexpired leases," according to John T. Carroll, III and Keith Kleinman of Cozen O'Connor. "Among other

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Secured Lenders Beware

A Debtor's Right to Pledge Collateral Cast in Doubt

by Julie Schaeffer

The Seventh Circuit Court of Appeals has ruled that a secured lender's claim can be rendered unsecured because the lender ignored warning signs that cast doubt on the debtor's right to pledge the collateral.

The case involved Sentinel Management Group, which invested its customers' money and held the purchased securities for its customers' accounts. It also traded on its own account, and borrowed money to do so.

When Sentinel did not have sufficient assets to collateralize a loan of the magnitude it needed, it pledged its customers' securities to collateralize a loan from the Bank of

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on offshore production in the Gulf of Mexico: Plains Exploration and McMoran Exploration. Now the company, which paid $9 billion through a combination of cash and shares for the acquisitions, is completely restructuring those businesses and is looking to monetize the assets.

The decline in oil prices began in July 2014, and with oil now hovering around $40 per barrel, the drop is the most precipitous in 35 years. The number of active drill rigs is one measure of just how dire the situation is. After reaching a recent high of 1,931 during September 2014, the U.S. active rig count plummeted to 619 in January 2016 – a decrease of nearly 70 percent .

In this environment, many exploration and production (E&P) companies are tightening their purses to ensure that they have enough liquidity to stay within their financial covenant ratios, service debt now, and survive until prices recover, however long that takes.

"The usual playbook has been to cut vendors, squeezing them to the lowest possible marginal cost, then cut staff," Ulak says. "There are efficiency gains elsewhere in the supply production stream, but those are the two easiest cuts."

Freeport, for example, is firing its top oil and gas executives and is undertaking a near-term deferral of exploration and development activities by idling the three deep-water drill ships it has under contract.

And, in March, the Canadian Association of Petroleum Producers (CAPP) issued a news release that made international headlines: Capital investment by the group's members would be only $31 billion in 2016, down from $81 billion in 2014 and the largest reduction in CAPP's history of data collection, dating back to 1947.

But such cost-cutting measures may not be enough to ensure the survival of E&P companies. Freeport, in mothballing its drill ships, expects to incur idle rig costs of $600 million in 2016 and another $400 million in 2017.

"Better surviving companies will adopt best practices in terms of how they create structural alignments and standardize their operations," says Ulak.

One option he proposes is selling underperforming or non-core properties. "It's very much part of the playbook to

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benefits, such termination agreements provide certainty and allow landlords to move on from unprofitable tenant relationships. Additionally, by entering into termination agreements, troubled tenants can be prevented from later assuming or assigning such terminated leases to an undesirable third-party if the tenant later files for bankruptcy."

In the case before the Seventh Circuit, the debtor – Great Lakes Quick Lube LP – operated a chain of over 100 oil change stores throughout the Midwest. In a typical transaction, Great Lakes would buy a store location, sell it to investors, and then lease it back from the investors under a long-term contract. Great Lakes had entered into such agreements with respect to a number of its stores with T.D. Investments I, LLP. Fifty-two days prior to Great Lakes filing a Chapter 11 petition, it entered into termination agreements with T.D. Investments covering five store locations. Of those five stores, three were agreed to be unprofitable, but two would later be alleged to be operating profitably.

Approximately nine months after filing for bankruptcy protection, Great Lakes was successful in reorganizing around a much smaller base of store locations. Pursuant to the terms of its confirmed plan of reorganization, the right to pursue certain claims and causes of action were assigned to the Official Committee of Unsecured Creditors appointed in the case. Several months later, the Committee filed an adversary complaint against T.D. Investments.

In the complaint, the Committee contended that the pre-bankruptcy termination of the leases with respect to the two allegedly profitable stores constituted either a preferential or a constructively fraudulent transfer and sought to recover the value of those leases. The Committee asserted that the value of the leases was on the order of several hundred thousand dollars. T.D. Investments denied that the terminations were transfers and Judge Susan Kelley of the United States Bankruptcy Court for the Eastern District of Wisconsin agreed. The Seventh Circuit accepted a direct appeal of that ruling.

Judge Richard Posner, writing for a panel including Judges Joel Flaum and Ann Claire Williams, began with a discussion of the circumstances surrounding the

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New York (BNY) Mellon – a violation of Sentinel's agreements with its customers as well as federal law.

When Sentinel later filed for bankruptcy, it owed BNY Mellon $312 million – but the trustee of the Sentinel's estate sought to avoid the pledge of the customers' securities as a fraudulent transfer. If the trustee succeeded, BNY Mellon would be left with a general unsecured claim.

Clearly seeking to avoid that, BNY Mellon sought to utilize a "good faith" exception to fraudulent transfer liability, which holds that a recipient of a fraudulent transfer may be immune from avoidance to the extent that it provides value to the debtor – and in this case, said BNY Mellon, that value would be loan advances.

One problem: According to the Seventh Circuit, that good-faith argument would be null and void if BNY Mellon had what the court called "inquiry notice" that something was amiss.

According to the court, "inquiry notice" is "an awareness of suspicious facts that would have led a reasonable firm, acting diligently, to investigate further and by doing so uncover wrongdoing." Inquiry notice, the court explained, requires "information that would cause a reasonable person to be suspicious enough to investigate."

One event was concerning. Emails showed that a BNY Mellon executive, when reviewing a list of Sentinel's collateral prepared by another bank employee, asked, "How can they have so much collateral? With less than $20MM in capital I have to assume most of this collateral is for somebody else's benefit. Do we really have rights on the whole $300MM?" The email received no response, and the executive didn't pursue the issue.

While Sentinel assured BNY Mellon that it was permitted to use its customers' segregated funds as collateral, the court believed that the assurance was insufficient in the face of such red flags.

"The quoted exchange and other similar events were sufficient, in the court's view, to put the bank on inquiry notice and to lose its senior secured claim, demoting its claim to unsecured status," says Eric G. Pearson, senior counsel at Foley & Lardner LLP.

And it only got worse for BNY Mellon. After determining that the bank was

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Research Report

Who's Who in Arch Coal, Inc.

by Dave Buzzell

Arch Coal, Inc. (Arch) is a producer and marketer of coal in the United States, with operations and coal reserves in each of the major coal-producing regions of the country. The company is the second-largest holder of coal reserves in the U.S. today, owning or controlling over five billion tons of proven and probable reserves.

Arch's principal business is the mining and preparation of metallurgical and thermal (or steam) coal. Metallurgical coal is sold primarily to steel mills and independent coke producers for the manufacture of steel. Steam coal products are sold to electricity generators to produce electricity, steam, or both. The company's principal customers are domestic and foreign utilities (including 159 power plants in the U.S.), steel producers, and other industrial facilities. Arch sold approximately 134 million tons of coal in 2014.

The company was founded in 1969 as Arch Mineral Corporation and initially produced coal primarily from the eastern U.S. Through a series of acquisitions beginning in the late 1990s the company expanded its holdings into the western U.S. Today, Arch Coal has mining operations at ten active mine complexes, with operations in Wyoming, West Virginia, Kentucky, Maryland, Virginia, Colorado, and Illinois.

Over the past several years, a confluence of economic and regulatory factors have hurt the coal industry, with Arch among the victims. Economically, coal consumption by electricity and steel industries in the U.S. and around the world has sharply declined. Weak domestic and international economies and lower prices for competing fuels for electricity generation, especially natural gas, have been key factors. By mid-2015, the price of metallurgical coal had fallen to its lowest point since 2004, down more than 70% from its previous high in 2011. The price of steam coal has similarly declined.

Increasingly stringent environmental and other government regulations have also severely dampened coal demand. Stricter pollution control laws have made it more costly for companies to use coal as an energy source and, as a result, electric utilities retired nearly 13 gigawatts of coal-fired generating capacity in 2015. Other regulations, such as those governing mining and reclamation, have imposed even more direct costs on the coal industry.

In 2014, Arch reported a net loss of $558 million and, in 2015, a loss of more than $2.9 billion, leading to a financial situation where the company said it could no longer support a highly leveraged capital structure, consisting of more than $5 billion in outstanding indebtedness and approximately $360 million in annual debt service.

On January 11, 2016, Arch Coal and 71 of its affiliates filed for Chapter 11 protection in the U.S. Bankruptcy Court for the Eastern District of Missouri. The debtors disclosed total assets of $5.84 billion and total debts of $6.45 billion. Arch has approximately 4,600 full- and part-time employees.

The court has granted the company final approval to use cash collateral and obtain postpetition DIP financing in the amount of $275 million from a syndicate of financial institutions.

The Official Committee of Unsecured Creditors and other unsecured creditors had asked the court to reject the financing, proposing an alternative $100 million DIP facility that they said was less expensive, less restrictive, and more responsive to the debtors' specific needs.

Arch said that restructuring its debt obligations and capital structure will allow the company to return to viability. Unlike almost all other coal producers that have sought bankruptcy protection, Arch has no labor-related issues that need to be resolved in Chapter 11.

The Debtor

John W. Eaves is chairman and chief executive officer. **John T. Drexler** is senior vice president and chief financial officer. **Paul A. Lang** is president and chief operating officer.

Davis Polk & Wardwell LLP has been engaged as counsel, led by **Brian M. Resnick**, **Marshall S. Huebner**, **Michelle M. McGreal**, and **Kevin J. Coco**.

Bryan Cave LLP is serving as local counsel. **Lloyd A. Palans**, **Brian C. Walsh**, and **Cullen K. Kuhn** lead the engagement.

FTI Consulting, Inc. is the restructuring advisor, led by managing directors **Alan Boyko** and **Paul Hansen**.

PJT Partners is serving as investment banker. **Mark Buschmann**, a partner, is working on the engagement.

Ernst & Young LLP is the independent auditor and tax advisor, led by partner **Jeffrey R. Hoelscher**.

Official Committee of Unsecured Creditors

The committee members are **Kinder Morgan, Inc.**; **UMB Bank, National Association**; **GSO Capital Partners, LP**; **Nelson Brothers, LLC** and **Nelson Brothers Mining Services, LLC**; **Bennett Management Corporation**; **Wyoming Machinery Company**; and **Pension Benefit Guaranty Corp.**

Kramer Levin Naftalis & Frankel LLP is counsel to the committee. **Thomas Moers Mayer**, **Douglas H. Mannal**, **P. Bradley O'Neill**, and **Andrew M. Dove**, lead the engagement.

Also representing the committee is Spencer Fane LLP, with **Eric C. Peterson**, counsel, and **Sherry K. Dreisewerd**, partner, in the St. Louis office, and partners **Scott J. Goldstein**, **Erica Johnson**, and **Lisa Epps** in the Kansas City office working on the case.

Jefferies LLC is serving as the committee's investment banker, led by **Leon Szlezinger**, managing director and joint global head of restructuring & recapitalization.

Berkeley Research Group, LLC is serving as financial advisor, with **Peter C. Chadwick**, managing director, heading the engagement.

W. Douglas Blackburn, Jr., founder of **Blackacre LLC** is serving as the committee's coal consultant.

Trustee

The trustee is **Daniel J. Casamatta**.

Judge

The judge is the **Honorable Charles E. Rendlen III**. ¤

Liquidity, *from page 2*

add liquidity," he says, "both from the direct proceeds of the sale and from the lowered costs due to the new operating footprint. The challenge is that valuations are very low because we're in the lowest part of the cycle. People have been holding off in sales, widening the bid-ask."

Lowering the unit cost of remaining production is also important, Ulak says. "Unfortunately, the easiest way to do so is to increase volume so you have more throughput through fixed-cost facilities. Since that's not viable right now given a decrease in drilling, E&P companies will want to look at lowering lease operating expenses and general and administrative costs.

"There are industry metrics as to what they should be per flowing barrel; just make sure you're examining all the cost components of each of those so you're in line with industry peers," he adds.

Another tip: E&P companies can improve capital productivity by improving drilling and completion costs, which account for a significant part of a company's budget during

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pre-bankruptcy termination. He noted the testimony of the head of Great Lakes offering several reasons for the termination of profitable leases, including a "strained relationship" with the head of T.D. Investments, fear of eviction, and fear of being sued. Judge Posner appears to have discounted that testimony, however, noting that it seemed "unlikely that Great Lakes terminated leases on two profitable stores just because the landlord was being difficult and making threats." He also offered two possible alternate explanations of his own. First, he noted that Great Lakes might have been willing to part with the leases due to even "slight irritation" with T.D. Investments if the company "knew it was going down the tubes." Alternatively, if Great Lakes anticipated emerging from bankruptcy, "a fresh start may be easier for Great Lakes' management to obtain without its needing to deal with the irritating [head of T.D.]."

Judge Posner then turned to the question of whether the termination of the leases constituted a "transfer." As noted above, Judge Kelley held that it did not. "If a nonresidential lease has been terminated under state law prior to the petition, the termination is not an avoidable transfer under § 547 or § 548 of the Bankruptcy Code," she wrote. "The specific statutory provision regarding validly terminated nonresidential leases in § 365(c)(3) must control over the more general statutes allowing the avoidance of preferences and fraudulent transfers."

Judge Posner, however, noted that "the Bankruptcy Code [in section 101(54)(D)] defines 'transfer' broadly, as including 'each mode, director or indirect, absolute or conditional, voluntary or involuntary, of disposing or parting with – (i) property; or (ii) an interest in property.'" The leaseholds that Great Lakes held were an interest in property, according to Judge Posner. When it parted with those interests in property by entering into the termination agreements with T.D. Investments, it made "a transfer to one creditor of what might have been an asset to Great Lakes' other creditors had the transfer not taken place; and if so it was a preferential transfer and therefore avoidable."

T.D. Investments – and Judge Kelley in the lower court – invoked section 365(c)(3) of the Bankruptcy Code, which provides that "the trustee may not assume or assign any…unexpired lease of the debtor… if…such lease is of nonresidential real property and has been terminated under applicable non-bankruptcy law prior to the order for relief." According to Judge Posner, however, this section "is aimed at facilitating the re-leasing of commercial property during bankruptcy proceedings by forbidding the trustee to interfere with the occupancy of the new tenants." The section was inapplicable in his view because "the creditors are seeking not the leases but the value of the leases that Great Lakes transferred to T.D."

He concluded by expressing the view that Judge Kelley's reading of section 365(c)(3) placed it in "needless conflict" with the definition of "transfer" in section 101(54)(D). "This distinction between the value of the leases (value to which the creditors may be entitled) and the leases themselves (which cannot lawfully be transferred to them) enables the purpose of section 365(c)(3) to be fulfilled without making inroads into section 101(54)(D)."

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Calendar

Association of Insolvency & Restructuring Advisors
32nd Annual Bankruptcy & Restructuring Conference
June 8 – 11, 2016
Coronado Island Marriott Resort & Spa
Coronado, CA
Contact: www.aira.org

Turnaround Management Association
2016 TMA Europe Annual Conference
June 9 – 10, 2016
Grand Hotel Plaza
Rome, Italy
Contact: www.turnaround.org

American Bankruptcy Institute
23rd Annual Northeast Bankruptcy Conference
July 14 – 17, 2016
Omni Mount Washington Resort
Bretton Woods, NH
Contact: www.abi.org

Turnaround Management Association
12th Annual Northeast Regional Conference
August 31 – September 1, 2016
The Gideon Putnam Resort
Saratoga Springs, NY Contact: www.turnaround.org

National Association of Bankruptcy Trustees
2016 Annual Convention
September 7 – 10, 2016
Hard Rock Hotel & Spa
San Diego, CA
Contact: www.nabt.com

National Conference of Bankruptcy Judges
90th Annual NCBJ Conference
October 26 – 29, 2016
Marriott Marquis Hotel
San Francisco, CA
Contact: www.ncbj.org

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Special Report

Major Trade Claim Purchasers

Firm	Location	Contact	Phone/Fax
Argo Partners www.argopartners net	New York, NY	Matthew A. Gold matthew@argopartners net	Tel. (212) 643-5444 Fax (212) 643-6401
ASM Capital www.asmcapital.com	Woodbury, NY	Adam S. Moskowitz info@ASMCapital.com	Tel. (516) 422-7100 Fax (516) 422-7118
Bowery Investment Management www.boweryim.com	New York, NY	Bradley Max bmax@boweryim.com	Tel. (212) 259-4300 Fax (212) 259-4345
CRG Financial www.crgfinancial.com	Cresskill, NJ	Robert M. Axenrod info@crgfinancial.com	Tel. (201) 266-6988 Fax (201) 266-6985
Corre Partners Management www.correpartners.com	New York, NY	Ryan Quinn ryan.quinn@correpartners.com	Tel. (646) 863-7155 Fax (646) 863-7161
CRT Special Investments www.crtspi.com	Stamford, CT	Joseph E. Sarachek JSarachek@crtspi.com	Tel. (203) 569-6400 Fax (203) 569-6499
Contrarian Capital Management www.contrariancapital.com	Greenwich, CT	Keith McCormack kmccormack@contrariancapital.com	Tel. (203) 862-8200 Fax (203) 629-1977
Debt Acquisition Company of America www.daca4.com	San Diego, CA	Jim Wade jwade@daca4.com	Tel. (619) 220-8900 Fax (619) 220-8112
Fair Harbor Capital www fairharborcapital.com	New York, NY	Fredric Glass info@fairharborcapital.com	Tel. (866) 967-4035 Fax (212) 967-4148
Fair Liquidity Partners www fairliquidity.com	San Jose, CA	info@fairliquidity.com	Tel. (408) 973-0650 Fax (408) 973-0610
Hain Capital Group www haincapital.com	Rutherford, NJ	Robert J. Koltai rkoltai@haincapital.com	Tel. (201) 896-6100 Fax (201) 896-6102
Liquidity Solutions www.liquiditysolutions.com	Hackensack, NJ	David Fishel dfishel@liquiditysolutions.com	Tel. (201) 968-0001 Fax (201) 968-0010
Pioneer Funding Group www.pioneerfundingllc.com	New York, NY	Adam D. Stein-Sapir, Daniel B. Plaxe adam@pfllc.com, dan@pfllc.com	Tel. (646) 237-6969 Fax (888) 907-3227
Sierra Liquidity Fund www.sierrafunds.com	Irvine, CA	Scott D. August saugust@sierrafunds.com	Tel. (949) 660-1144 Fax (949) 660-0632
Solus Alternative Asset Management www.soluslp.com	New York, NY	Christopher Pucillo info@soluslp.com	Tel. (212) 284-4300 Fax (212) 284-4320
Tannor Capital Management www.tannorpartners.com	White Plains, NY	Robert J. Tannor management@tannorpartners.com	Tel. (914) 509-5000 Fax (214) 299-8980

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Worth Reading

Grounded: Frank Lorenzo and the Destruction of Eastern Airlines

Author: Aaron Bernstein
Publisher: Beard Books
Softcover: 272 pages
List Price: $34.95

Much has changed since the rise and fall of Eastern Airlines in the 1980s. It could be argued that the actions of Frank Lorenzo, who headed the airline at the time, were responsible for the pendulum swinging away from management and toward unions in matters of contract negotiation. However, the pendulum has reversed direction, and while Lorenzo may have lost his battle, private sector unions have been in retreat ever since. *Grounded* offers a fascinating look back at the man in the center of one of the pivotal moments in the history of labor-management relations.

Barbara Walters once referred to Lorenzo as the "most hated man in America." Since 1990, when this work was first published and Eastern Airlines' troubles were front-page news, there have been many worthy contenders for the title. Nonetheless, readers sensitive to labor-management concerns, particularly in the context of corporate restructurings, will find in this book much to support Barbara Walters' characterization.

To recap, for a few brief and discordant years Lorenzo was boss of the biggest airline conglomerate in the free world (Aeroflot was larger), combining Eastern, Continental, Frontier, and People Express into Texas Air Corporation (TAC). He financed his empire with junk bonds. TAC ultimately comprised a fleet of 451 planes and 50,000 employees, with revenues of $7 billion. But Lorenzo was lousy on people issues, famously saying, "I'm not paid to be a candy ass." The mid-1980s were a bad time to take that approach. Those were the years when the so-called Japanese model of management, which emphasized cooperation between management and labor, was creating a stir. The Lorenzo model was old school: If the unions give you any trouble, break 'em.

That strategy had worked for him at Continental, where he'd filed Chapter 11, despite the airline's $60 million in cash reserves, in order to exploit a provision in the Bankruptcy Code allowing him to abrogate his contracts with unions. But Congress plugged that loophole by the time Lorenzo went to the mat with the International Association of Machinists (IAM). Lorenzo might have succeeded in breaking the machinists alone, but when flight attendants and pilots honored the picket lines, he should have known it was time to deal. He didn't.

Instead, he tried again for a strategic advantage through the bankruptcy courts by filing Chapter 11 in the Southern District of New York where bankruptcy judges were believed to be more favorably disposed toward management than in Miami where Eastern was headquartered. Eastern had to hide behind the skirts of its subsidiary, Ionosphere Clubs, Inc., a New York corporation, in order to get into SDNY. Six minutes later, Eastern itself filed in the same court as a related proceeding.

The case was assigned to Judge Burton Lifland, whom Eastern's bankruptcy lawyer, Harvey Miller, knew well. Lorenzo was mistaken if he believed that serendipitous lottery assignment would be his salvation. A year later, Judge Lifland declared Lorenzo unfit to run the airline and appointed Martin Shugrue as trustee.

Most hated man or not, one wonders whether the debacle was all Lorenzo's fault. Eastern's unions, in particular the notoriously militant machinists, were perpetual malcontents. Lorenzo may be as responsible for the destruction of unions as he was for the airline he built. In these turbulent times, *Grounded* is a fascinating look back at history. ¤

Aaron Bernstein has won numerous awards during with career as a professional journalist.

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

Liquidity, *from page 4*

the growth part of the cycle. Ulak points to the use of new technologies pad drilling, or drilling multiple wells from one location, which substantially cuts the time it takes to drill and cost. It also allows for batch bidding. "You can drill and hold off completion until you have 10 or 20 wells ready to go, then bid in bulk," he says. "That allows for a much more competitive price because the cost of the completions vendor is lowered."

Finally, E&P companies (as well as oilfield service companies, which provide products and services for E&P companies) can explore the possibility of negotiating a restructuring with their capital providers. Indeed, Houston financial restructuring firm HSSK reports that a poll of more than two dozen bankruptcy attorneys in seven Texas cities shows that those attorneys expect business bankruptcy filings and restructurings to increase 30 percent this year, with oil being a main driver.

When it comes to restructurings, Ulak says total debt and debt service must be reduced to the new price and activity realities. But companies have to determine if they're simply gaining near-term liquidity or if they're making significant changes. "I recommend they make structural changes first to de-lever and either lower debt or give up equity, such that when they complete the restructuring they have fixed the problem and not just pushed it down the road," he says.

Ulak also predicts that consensus is building that oil prices bottomed in the high twenties and the market is on the rebound. "If we see that firming in the next six months, we'll likely see a correction in the supply-demand imbalance in the fourth quarter of this year or first quarter of next year," he says.

But Ulak believes the industry landscape will look different, with less competition. "I think there will be a lot of competition removed in the smaller and middle end of the spectrum among oilfield service companies and for some time into the next cycle."

"We'll probably see 25 to 35 percent fewer E&P companies for a while, but they'll come back faster due to the enormous amount of capital on the sidelines." ¤

Special Report

Top Internet Bankruptcy Resources

On-Line Source	URL	Summary of Site Contents
American Bankruptcy Institute	www.abi.org	Bankruptcy headlines and statistics, courts and opinions, meetings and events, bankruptcy research center, legislative news, bankruptcy-related organizations, international bankruptcy laws and news, online publications and resources, bankruptcy blog exchange.
Bankrupt.com	www.bankrupt.com	Resource for worldwide troubled company information. Includes detailed information on commercial bankruptcies updated daily. Wide range of search functions. Comprehensive bankruptcy archives online. Links to bankruptcy blog, bankruptcy professionals in the news, bankruptcy cases in the news, conferences, periodicals, and books.
BUSINESS-BANKRUPTCIES.com	business-bankruptcies.com	Daily email notification of new Chapter 7 and Chapter 11 case filings, with ability to save tailored searches and receive notifications relating to saved search. Also captures case and debtor information from the court's docket sheet. Fee service.
Chapter 11 Dockets	www.chapter11dockets.com	Provides access to over 3.4 million court filings in more than 2,200 of the largest Chapter 11 case filings. Cases and docket entries are categorized to facilitate precedent research. Fee service.
Daily Bankruptcy News	www.bkinformation.com	Source for Chapter 11 bankruptcy news and case summaries. Links to Chapter 11 cases, code, and rules. News aggregation service providing links to Chapter 11 bankruptcy-related news stories from publications around the world. Fee service.
Legal Information Institute	www.law.cornell.edu	Academic source for federal statutes, uniform laws, agency regulations, judicial decisions, and rules. Site also covers state statutes, judicial decisions, and appellate decisions; links to other Internet bankruptcy resources. Maintained by Cornell Law School.
LexisNexis	www.lexisnexis.com	Provides authoritative legal sources, public records, company data, and business information. Tax and regulatory publications available online, in print, or on CD. Fee service.
PACER (Public Access to Court Electronic Records)	www.pacer.psc.uscourts.gov	A service of the Administrative Office of the U.S. Courts, PACER allows users to obtain case and docket information from U.S. district, bankruptcy, and appellate courts, and from a U.S. party/case index. Fee service.
Troubled Company Reporter	http://bankrupt.com/periodicals/tcr/tcr html	Source of daily news and updates about companies throughout the United States, with assets of $10 million or more, that are reorganizing, restructuring, or showing signs of financial strain. Separate editions cover North America, Asia Pacific, Europe, and Latin America. Subscription service.
UCLA-LoPucki Bankruptcy Research Database	http://lopucki.law.ucla.edu	Data collection, data linking, and data dissemination project of the UCLA School of Law. Includes docket searcher, case summaries, professionals fees data, trend information and graphs, and published and ongoing research.
U.S. Courts	www.uscourts.gov	Provides comprehensive menu of official bankruptcy forms, voluntary and involuntary petitions, schedules, proof of claim, notices and orders, and forms used in Chapter 7, 9, 11, 12, 13, and 15 cases. Source of bankruptcy statistics, federal court fees, and bankruptcy rules and regulations.
U.S. Trustee Program	www.usdoj.gov/ust	A service of the Department of Justice's U.S. Trustee Program. Links to each U.S. bankruptcy district. Nationwide office locator for U.S. trustees; regional staff directory. Information on bankruptcies, trustee's program, trustee's role in Chapter 11 cases.
Westlaw	www.westlaw.com	Provides comprehensive legal sources, public records, company data, and business information. Commercial bankruptcy publications available online, in print, or on CD. Fee service.

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Landlords, *from page 4*

Several aspects of the Seventh Circuit's ruling may be deserving of mention. "Notably, the Circuit Court did not discuss the significant body of case law (cited in the Bankruptcy Court decision (528 B.R. 893)) holding that the prepetition termination of a lease is not an avoidable transfer," according to Audrey Noll of Fox Rothschild. "Neither did the Court mention section 8(e)(1) of the Uniform Fraudulent Transfer Act, specifically stating that a transfer is not voidable if it results from the 'termination of a lease upon default by the debtor when the termination is pursuant to the lease and applicable law.'"

Cozen O'Connor's Carroll and Kleinman note that, while the issue is not settled in all circuits, the decision provides an avenue for challenges to pre-bankruptcy terminations in future cases. Therefore, they recommend that landlords "should be diligent in documenting the value (or lack thereof) of such leases to tenants, including an analysis of any potential liability for non-payment of rent and/or other defaults and/or other current or future obligations (including obligations for lease rejection damages under Section 502(b)(6) of the Bankruptcy Code) of the tenant under the subject lease" and should "consider specifically identifying in the termination agreement any value being exchanged for the termination." The value provided by the landlord to the tenant in exchange for entering into such an agreement can constitute a defense to a later avoidance action and well-documented lease burdens and value exchanged may therefore reduce the landlord's exposure to such a challenge. ¤

Secured, *from page 2*

on inquiry notice, the Seventh Circuit considered the trustee's argument that the bank's conduct "was sufficiently egregious" to justify the use of equitable subordination, which would render the bank's claim subordinate even to those of the other unsecured creditors.

Fortunately for BNY Mellon, the court didn't buy that argument. According to Pearson, that's because the standard for equitable subordination is not the same as it is for inquiry notice. "It's a higher hurdle to overcome," Pearson says, explaining that a bank executive's negligence might have been sufficient to destroy the bank's secured claim, but the use of a bankruptcy court's equitable-subordination powers under Section 510 of the bankruptcy code requires conduct not only inequitable, but seriously so, and harmful to other creditors. "Bank of New York Mellon's conduct had harmed other creditors, but the court did not think that the bank had engaged in 'purposeful avoidance of the truth' by failing to follow up on its executive's suspicions. Its conduct amounted to nothing more than negligence, and that, the court held, still permitted the bank to stand in line with the other unsecured creditors – for whatever that might one day be worth."

The ruling creates a potentially conflicting standard in analyzing a third-party transferee's "good faith" defense to a fraudulent transfer claim, because about a year ago, in a case involving *Equipment Acquisition Resources,* the Seventh Circuit took a different view.

In that case, the former owners of *Equipment Acquisition Resources* (Sheldon Player and Donna Malone) received approximately $17 million from the debtor as a result of a fraudulent scheme, then lost $8 million of these funds gambling at the Horseshoe Casino.

When Equipment Acquisition Resources' estate attempted to recover those funds from the casino as proceeds from a fraudulent transfer, Horseshoe argued that it did not need to turn over the funds because it had received them in good faith.

But did it? Horseshoe extended Player and Malone credit despite the fact that credit checks revealed that they had understated their liabilities on their credit application by more $2 million. The casino also observed, but did not act on, suspicious activity by Player and Malone, including leaving the casino with chips rather than cashing them in.

The Seventh Circuit agreed with Horseshoe, holding that it was not required to inquire as to the nature of the proceeds of the transaction or chase down red flags in order for it to have acted in good faith.

Why the discrepancy between this case and *Sentinel*? According to industry professionals, the Seventh Circuit may be differentiating between intended forms of relief sought by a debtor's estate. In Sentinel, the bankruptcy trustee did not attempt to recover any proceeds; the transaction involved the acquisition of a lien and the bankruptcy trustee attempting to disqualify it, for which a separate good faith defense may apply.

The Seventh Circuit Court of Appeals has ruled that a secured lender's claim can be rendered unsecured because the lender ignored warning signs that cast doubt on the debtor's right to pledge the collateral.

Regardless, the end result is clear. "A lender has an affirmative obligation to investigate suspicious activity," says Paul S. Arrow, a shareholder at Buchalter Nemer, adding "the consequences of failing to exercise appropriate diligence may be catastrophic." Specifically, Arrow

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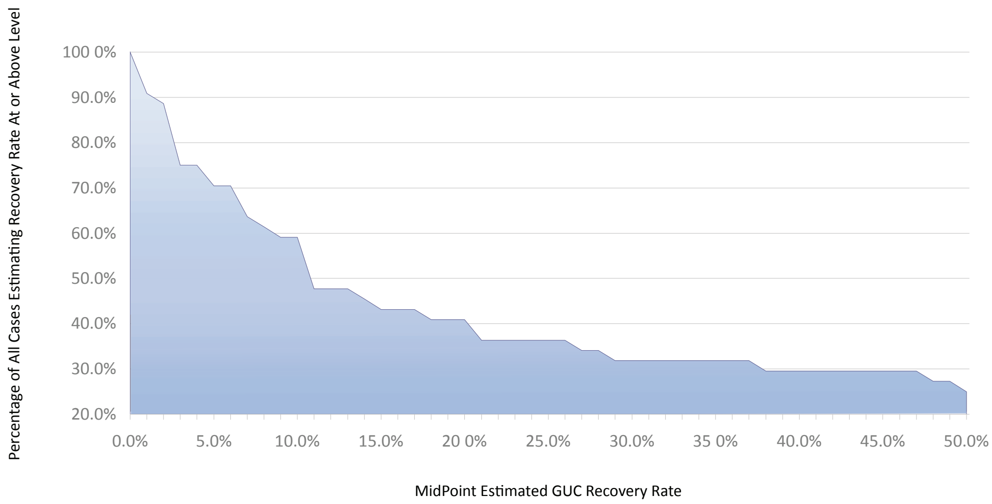
Special Report

General Unsecured Creditor Recoveries—Retailers

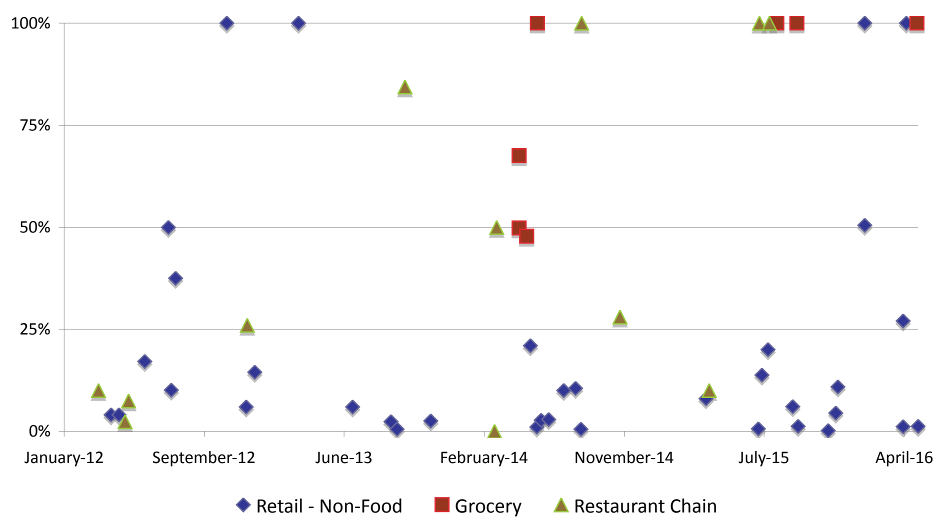
The following charts summarize key findings regarding recoveries by general unsecured creditors in bankruptcy cases filed by large retailers, grocery stores and restaurant chains. The data regarding creditor recoveries was generated from an analysis of estimates provided by debtors in disclosure statements filed between January 1, 2012 and May 15, 2016. Some of the cases covered in our study were filed as early as 2001, but most were also filed in the 2012-2016 time frame. In collecting the data for this study, only the last-filed disclosure statement was used for cases in which multiple versions of the disclosure statement were filed. Additionally, disclosure statements which did not provide an estimate of the percentage recovery for general unsecured creditors were excluded in charting recovery estimates. No attempt was made to independently estimate recoveries in such cases. The following charts represent only the plan proponents' estimates of recoveries which may differ from actual recoveries received by creditors in such cases. To view a list of the bankruptcy cases examined in preparing this data, please visit https://www.chapter11dockets.com/about/cases.

CHAPTER 11 DOCKETS

Almost Half of All Large Retailer Bankruptcies Estimated GUC Recoveries of Less Than 10% (and 75% of Cases Estimated GUC Recoveries of Less Than 50%) for Plans Proposed Between 2012 and 2016 YTD



Midpoint Estimated General Unsecured Creditor Recoveries: Retail, Grocery & Restaurant Chain Plans Proposed 2012-2016 (YTD)



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Gnome de Plume

The Debtor

by Andy Rahl

Like many others, I certainly didn't foresee the success that Donald Trump and Bernie Sanders would have in the primaries. When I wrote critically last fall of the outsized and unfortunate influence the media was having on the presidential election campaign, Sanders was barely on my radar screen and I said the following about Trump:

> "I'm skeptical that The Donald really wants to be President; I think he was just out to build his brand and enjoy the attention. It may be that getting more traction will turn his head and lead his ego to run away with him, but I doubt it. That said, I'd love to write about Trump's bankruptcy escapades in the context of his claims to be a great businessman and manager."

So here goes. Trump's bankruptcies certainly do come up in the discourse about him, but not to the degree you might expect. I now see much more in that than mere unconcern about how they imply weak management skills.

First, I appreciate that getting through those bankruptcies evidenced impressive political and marketing skills. There were four of them, they all bore Trump's name and were highly visible, and they were spread out in time through each of the last three recessions.[1] I used to say in my bankruptcy practice, notably in the context of bringing in new management, that hardly anyone gets a chance to run more than one company into insolvency. To have survived four highly visible bankruptcy cases over the course of three recessions and then credibly run for President is an amazing feat – has anyone else ever matched that?

Then there is the facile way Trump has explained away his four-bankruptcy track record. Most people have some understanding of personal bankruptcy, but a common problem for bankruptcy professionals is that few lay people – including other bankers and lawyers – understand Chapter 11. Many times after I've mentioned I was a bankruptcy lawyer the response has been, "Oh I hope I never have to deal with you!" Bankruptcy still is stigmatized, and that is all the more reason to credit Trump for being pure Teflon with his bankruptcy record.

Trump's campaign style also reminds me of a number of debtor entrepreneurs I have encountered – and not just in terms of brashness. One clear example of a debtor's mentality is Trump's recent suggestion that the United States could solve any debt problem that might arise by haircutting its creditors. Paul Krugman wrote that, in doing so, Trump was tapping into a widely held Republican "insouciance" about a U.S. government default, but I don't agree; I suspect Trump was just thinking like a debtor who in his (most unusual) experience has been able to restructure his business debts four successive times.

Another example of Trump thinking like a debtor is his reluctance to disclose his tax returns after filing a 92-page financial disclosure statement with the Federal Election Commission last year. How many of us have seen debtors put out fanciful financial information and then try to prevent a less favorable but more accurate picture from coming out?

I suspect there is a good insight into America's political DNA in the old British joke about the people who settled the former British colonies: South Africa was colonized by adventurers, Australia by convicts, and America by religious fanatics and debtors. Religion of course remains prominent in our political discourse, but sympathy for debtors does not. That said, I believe that sympathy also persists; among other things, we still have a very debtor-friendly bankruptcy system. So perhaps it should not be that surprising after all that the Debtor prevailed over both the religious right and the Republican establishment in this year's primaries. ¤

Opinions are those of the author.

[1] Trump Taj Mahal 1991, Trump Plaza Hotel 1992, Trump Hotels and Casinos Resorts 2004, and Trump Entertainment Resorts 2009.

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from page 8

notes, "like the lender in *Sentinel*, a lender may lose its security interest and be left with merely an unsecured claim. If so, ultimate recovery may be pennies on the dollar at best."

To avoid this result, Arrow says a lender should implement structured procedures to demonstrate adequate investigation of suspicious activity. ¤

In the Next Issue…

- *Special Report: Bankruptcy Tax Specialists in the Nation's Major Law Firms*
- *Special Report: U.S. Turnaround Firms With European Offices*
- *Research Report: Who's Who in Republic Airways Holdings, Inc.*

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