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OCTOBER 2016 VOLUME 30, NUMBER 10

The Ship Has Sailed

Hanjin Enters Chapter 15, But Confusion Remains

by Julie Schaffer

Hanjin Shipping Company has won a ruling protecting its U.S. assets against creditors while the shipping line proceeds with its reorganization in South Korea, but there are still many unknowns as the insolvency proceedings around the world's seventh-largest shipper unfold.

"We just have not been a situation in which a shipping entity has thrown up its hands in the middle of operations without any sort of process to it," says Jason DeJonker, a partner in Bryan Cave's Bankruptcy, Restructuring & Creditor's Rights and Financial Services Client Service groups. "You basically have the worst-case scenario for Hanjin, its creditors, and its vendors: multiple jurisdictions, different laws, and admiralty legal

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Energy Assets for Sale?

Canadian Court Addresses BIA/Provincial Conflict

by Randall Reese

The Alberta Court of Queen's Bench recently decided a case concerning Redwater Energy Corporation holding that there was an operational conflict between the applicable provisions in the Bankruptcy and Insolvency Act (BIA) and provincial legislation. Dual compliance was not possible, the court said. Barring a reversal on appeal or amended legislation, this decision will most certainly mean a significant change in the process for receiverships and bankruptcies of oil and gas companies in the province.

Chief Justice Wittman's May 19 opinion specifically explained that, although the Bankruptcy and Insolvency Act permitted the trustee to renounce some assets and

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No Safe Harbor

Seventh Circuit Holds § 546(e) May Not Offer Shield

by Julie Schaeffer

The United States Court of Appeals for the Seventh Circuit has held that section 546(e) of the U.S. Bankruptcy Code does not protect transfers that are simply conducted through financial institutions. The decision, which revives a long-standing circuit split on the issue, has important implications for various counterparties in securities transactions, most notably selling stockholders in leveraged buyouts (LBOs) where a bankruptcy trustee later claims the buyout rendered the company insolvent and thus the transaction amounted to a fraudulent transfer.

As background, in 2003, Valley View Downs, the owner of a Pennsylvania racetrack,

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issues, which can be difficult for the average attorney – let alone business entity – to navigate."

For the past five years, global shipping companies have made significant investments in vessels, seeking to shore up profits by doing business on a larger scale as global trade bounced back after the recession. But the new business never came, causing freight rates and shippers' revenues to decline. Today, the supply of ships far exceeds demand, which became clear with the August 31 court receivership filing of South Korea's Hanjin Shipping Co.

The South Korean court receivership filing, which is similar to bankruptcy in the United States, temporarily marooned $14 billion of goods when seaborne ships were denied access to ports across the world. Some estimates had more than 90 vessels being stranded at numerous ports at the time of the filing.

Hanjin subsequently filed for relief under Chapter 15 of the Bankruptcy Code in the United States Bankruptcy Court for the District of New Jersey, and the case – considered an ancillary to a pending insolvency proceeding in a foreign country – was commenced.

After a hearing, the bankruptcy court entered an order recognizing Hanjin's Korean insolvency proceeding, allowing various provisions of the U.S. Bankruptcy Code, including the automatic stay, to apply with regard to Hanjin's U.S. assets.

Specifically, the bankruptcy court stayed "the commencement or continuation of any actions against Hanjin or its assets located within the territorial jurisdiction of the United States," and it specified that assets within the territorial jurisdiction of the United States "including owned, operated or chartered (leased) vessels or property thereon (including bunkers) and any other transportation equipment (containers and chassis)."

The immediate effect of the stay was that ships could enter U.S. ports without fear that the ports would seize them and prevent them from leaving. "In the United States, at least, ships are now unloading," says DeJonker. "But almost every other place else they are still in a holding pattern."

The Chapter 15 filing didn't totally solve Hanjin's problems in the United

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not be responsible for abandonment and remediation work, provincial laws would not allow renunciation of assets by a licensee – including receivers and trustees.

Redwater, a publicly-listed oil and gas company with assets in Alberta, felt the sting of low oil prices, like many in the industry. Just a year ago, a receiver was appointed over all of its assets. Of interest in this case is that fact that the Redwater receiver (who is now also the trustee in bankruptcy) challenged the application of the regulatory regime by the Alberta Energy Regulator (AER) on constitutional grounds. The receiver argued against AER's position that the receiver was required as a "licensee" to comply with provisions of the regulatory regime and also was prohibited from transferring operating licenses of economic wells without the posting security for the abandonment liabilities for all of the other Redwater wells.

"While the case has important impacts on industry, it is at its heart an analysis of the constitutional interplay between federal and provincial legislation," according to a client alert authored by several partners in the Calgary office of Dentons. "The doctrine of paramountcy provides that in cases of genuine conflict between otherwise valid federal and provincial legislation, the provincial legislation is deemed inoperative to the extent of the conflict."

To determine if the doctrine is engaged, the chief judge explained that the court must first consider whether there is an operational conflict between the two pieces of legislation. This, he said, occurs "when it is not possible to comply with both the federal and provincial law," and then whether – notwithstanding the ability to comply with both pieces of legislation – the provincial law frustrates the purpose of the federal legislation. Nonetheless, if either component of the test is satisfied, the court said that the doctrine is engaged, and the provincial legislation is rendered inoperative to the extent of the conflict.

The chief justice noted his agreement with Redwater's trustee that "a plain reading of section 14.06 of the BIA leads to the conclusion that another purpose of section 14.06 is to permit receivers and trustees to make rational economic assessments of the costs of

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purchased 100 percent of the stock of another racetrack, Bedford Downs, in exchange for $55 million in cash. The plan was to operate a so-called "racino," a combination of a horse track and casino.

To finance the acquisition, Valley View borrowed money from Credit Suisse and other lenders. Another financial institution, Citizens Bank of Pennsylvania, served as escrow agent, receiving the funds before passing it along to the selling stockholders.

Unfortunately, after the transfer took place, Valley View was unable to obtain a gambling license, and ultimately filed for Chapter 11 bankruptcy.

FTI Consulting, the trustee of the litigation trust created in that bankruptcy, subsequently sued Merit Management Group, which had been a 30 percent stockholder of Bedford Downs. According to FTI, Valley View's transfer of $16.5 million (30 percent of the $55 million purchase price) to Bedford Downs was avoidable as a constructive fraudulent transfer under sections 544, 548, and 550 of the Bankruptcy Code.

Merit, meanwhile, asserted a defense under section 546(e) of the Bankruptcy Code (referred to as a safe-harbor provision). That section prohibits a trustee (or debtor-in-possession) from avoiding transfers that are "margin" or "settlement" payments made by or to certain entities defined in the statute, including "financial institutions." It also protects transfers made by or to these entities "in connection with a securities contract." According to Merit, that was the case in Valley View's purchase of Bedford Downs: The transfers were made by or to a financial institution when the funds passed through Citizens Bank and Credit Suisse.

The district court agreed with Merit, and FTI appealed to the Seventh Circuit, which reversed the judgment of the district court.

According to the Seventh Circuit, the section 546(e) safe harbor does not protect "transfers that are simply conducted *through* a financial institution … where the entity is neither the debtor nor the transferee but only the conduit."

In its analysis, the Seventh Circuit noted that section 546(e) is ambiguous, forcing the court to "search beyond the statute's plain language" and "consider its purpose and context for further guidance."

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Research Report

Who's Who in CHC Group Ltd.

by Dave Buzzell

CHC Group, Ltd. (CHC) is one of the largest commercial helicopter services companies in the world. Headquartered in Irving, Texas, CHC maintains bases on six continents, with major operations in the North Sea, Brazil, Australia, and several locations across Africa, Eastern Europe, and South East Asia. The majority of CHC's customers are major national and independent oil and gas companies, including Statoil, Total, Apache, Petrobras, and Royal Dutch Shell.

CHC maintains a fleet of 230 medium helicopters that carry 8 to 15 passengers and heavy helicopters that carry 16 to 26 passengers. Of the total 230 helicopters in the fleet, CHC owns 67 helicopters and leases the remainder from various third-party lessors.

CHC's business consists of two main operating segments: 1) helicopter services, which provides the bulk of the company's revenue, and 2) helicopter maintenance, repair, and overhaul (MRO) operations. CHC's helicopter services segment consists of flying operations in the Eastern North Sea, the Western North Sea, the Americas, the Asia Pacific region and the Africa-Euro Asia region, primarily serving offshore oil and gas customers. These services facilitate large, long-distance crew changes on offshore production facilities and drilling rigs. CHC's helicopter services also provides search and rescue and emergency medical services to various government agencies.

CHC's MRO segment provides services for CHC's helicopter fleet and for CHC's external customer base, primarily in Europe, Asia, and North America. CHC is the largest commercial operator of helicopter flights in the world that also provides MRO services.

CHC employs 3,800 people worldwide, and has customers from jurisdictions across the globe.

Because CHC's principal business is to provide helicopter services for oil and natural gas companies, its financial performance is closely tied to that of the oil and natural gas industry.

Beginning in the summer of 2014, oil prices declined sharply, falling by nearly 50 percent during the last six months of that year. The rapid drop in oil prices led to a significant decline in offshore oil exploration. This, in turn, resulted in a sharp drop in demand for CHC's helicopter services, with CHC's customers also demanding price concessions and new flexible contract terms.

Compounding CHC's troubles, in late April of 2016, one of the company's Airbus EC 225 helicopters was involved in an accident in Norway that killed all thirteen crew members and passengers and caused the company to temporarily suspend some of its operations.

Faced with declining revenues and the prospect of a prolonged depression in oil prices, on May 5, 2016, CHC and 42 of its wholly-owned subsidiaries each filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code in the U.S. Bankruptcy Court for the Northern District of Texas.

In its filing, the company reported operating revenues for the fiscal year ending April 30, 2016, of approximately $1.4 billion, which was 15 percent below that for the previous year. As of January 31, 2016, CHC had $2.16 billion in total assets and $2.19 billion in total liabilities. Outstanding debt obligations totaled approximately $1.6 billion, consisting of $370 million in secured borrowings under a revolving facility, $139 million in secured borrowing under an ABL facility, $1.0 billion in senior secured notes, and $95 million in unsecured notes.

CHC said it will use the "breathing spell" afforded by the automatic stay granted under Chapter 11 to work with creditors and lessors to substantially reduce its debt obligations and restructure its fleet, including shedding at least 90 unproductive aircraft.

The Debtor

Karl S. Fessenden is President and Chief Executive Officer. **David Belevicis is** Senior Vice President, Engineering & Operations. **Lee Eckert** is Senior Vice President, Finance, and Chief Financial Officer.

CHC is represented by **Weil, Gotshal & Manges LLP**. **Stephen A. Youngman**, partner in the firm's Dallas office, and **Gary T. Holtzer** and **Kelly DiBlasi**, partners in the New York office, lead the engagement.

Robert A. Del Genio, founder of **CDG Group, LLC**, is the chief restructuring officer.

PJT Partners LP is serving as investment banker. **Michael Genereux**, partner in the restructuring and special situations group, leads the engagement.

Seabury Corporate Advisors LLC is the financial advisor, with **Michael B. Cox** leading the engagement.

Debevoise & Plimpton LLP is special aircraft counsel. Partners **Jasmine Ball** and **Richard F. Hahn** lead the engagement.

DLA Piper LLP is special counsel to CHC, with **Louis Lehot**, a partner, leading the representation.

Official Committee of Unsecured Creditors

The committee members are the **Global Helicopters Pilots Association**, **Airbus Helicopters (SAS)**, **The Milestone Aviation Group Limited**, **Law Debenture Trust Company**, and **Sikorsky Commercial, Inc.**

Kramer Levin Naftalis & Frankel LLP is counsel to the Committee. **Kenneth H. Eckstein**, co-chair of the firm's corporate restructuring and bankruptcy department and **Douglas H. Mannal**, partner, head the engagement.

Gardere Wynne Sewell LLP is also representing the Committee. **Marcus A. Helt**, partner, leads the engagement.

Greenhill & Co., LLC is serving as investment banker, with **Andrew Kramer**, managing director, heading the engagement.

VLC Associates, Ltd. is serving financial advisor, led by **Victoria L. Creason**, founder and senior managing director of the firm.

The Trustee

The trustee is **William T. Neary**.

The Judge

The judge is the **Honorable Barbara J. Houser**. ¤

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States, either. Ports can refuse to accept vessels when they are concerned that the vessel's shipping line cannot pay various charges, including towage, pilotage, demurrage, dockage, and wharfage. Hanjin reported that some port authorities were requiring cash up front before its vessels could enter ports and berth at terminals.

Korean Air Lines, Hanjin's biggest shareholder, has proposed lending the troubled company roughly $53.96 million, and the state-run Korea Development Bank up to $45 million. So, there is reason to believe that Hanjin will be able to assuage port authorities and unload vessels in U.S. ports going forward. That said, Richard Ormond, a shareholder of Buchalter Nemer, points out that Hanjin is a part of a larger, family-owned conglomerate of which these entities are also a part, and there are some complaints that the conglomerate is simply pushing money around. "It's also important to note that these sums are proposed for the U.S. Chapter 15; they will have little impact on international claims," he adds.

A number of towage and bunker suppliers have now requested the intervention of a district court to clarify whether the bankruptcy court has authority to "effectively extinguish…maritime liens" on chartered vessels. They believe that the bankruptcy court's stay should not extend to chartered vessels – i.e., those that are not actually owned by Hanjin – and argue that only a federal district court judge, sitting in admiralty, has the authority to effectively clear liens off of an arrested vessel. But maritime law serves the interests of maritime creditors, in contrast to the goal of bankruptcy law to rehabilitate the debtor.

The root of the issue, says DeJonker, is that there are maritime liens against the ships related to the fact that Hanjin did not own its own ships, which is fairly commonplace in the shipping industry. "The U.S. process could theoretically resolve issues between vendors, creditors, and the ship owners with regard to the goods on the boats, like in a U.S. bankruptcy, when certain trade creditors with interests in goods may contest the priority of a senior lender with a blanket lien on a debtor's assets," he explains. "In the United States, we are used to having an effective process to address these issues."

Ultimately, the result could test the boundaries of maritime and bankruptcy court jurisdiction to enjoin creditor actions against maritime assets – and, in the meantime, the appeal may further delay much-needed clarification by the U.S. bankruptcy court.

According to DeJonker, part of the problem was the lack of advanced knowledge about the true situation facing Hanjin. Unlike most U.S. entities, Hanjin was a family-owned business (which is more common in South Korea than the United States). As a result, there's much less transparency. "In the U.S., a publicly-traded entity will make regular SEC filings, so most creditors have some knowledge about a company's problems in advance," he says. "Here, most business entities did not have the same visibility into Hanjin's liquidity and financial issues."

DeJonker also notes that Hanjin also did not set up, prior to filing, a process by which to address the issues inherent with a global shipping company. It also sought insolvency protection in a jurisdiction – South Korea – that lacked the ability to handle legal and business issues on an expedited basis. "U.S. lawyers and bankruptcy courts are skilled at creating processes around difficult

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remedying environmental conditions, and gives receivers and trustees the discretion to determine whether to comply with orders to remediate property affected by these conditions." He therefore saw an operational conflict between section 14.06(4) of the BIA and the definition of licensee under the OGCA and Pipeline Act. Specifically, under the BIA, a trustee is permitted to renounce some assets and not be responsible for environment abandonment and remediation work. But the OGCA and Pipeline Act do not permit it to renounce licensed assets, in light of the definition of a "licensee" which includes receivers and trustees.

As a result, the chief justice and the court held that the trustee was able to renounce some of the assets pursuant to section 14.06 of the BIA – which it did one year ago by advising the AER, pursuant to paragraph 3(a) of the receivership order, that it took possession and control of only some of the AER licenses, permits, and approvals. The court noted that pursuant to the OGCA and the Pipeline Act, it was not possible to

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Calendar

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

Turnaround Management Association
28th Annual Conference
November 2 – 4, 2016
Disney's Yacht Club Resort
Orlando, FL
Contact: www.turnaround.org

American Bankruptcy Institute
13th Annual Complex Financial Restructuring Program
November 10, 2016
Ritz Carlton Philadelphia
Philadelphia, PA
Contact: www.abiworld.org

Association of Insolvency and Restructuring Advisors
15th Annual Advanced Restructuring and POR Conference
November 14, 2016
The Union League Club
New York, NY
Contact: www.aira.org

Beard Group
23rd Annual Conference on Distressed Investing
November 28, 2016
Park Lane Hotel
New York, NY
Contact: (240) 629-3300

American Bankruptcy Institute
VALCON 2017
March 1 – 4, 2017
Four Seasons Hotel Las Vegas
Las Vegas, NV
Contact: www.abiworld.org

INSOL International
Tenth World Quadrennial Congress
March 19 – 22, 2017
International Convention Centre
Sydney, Australia
Contact: www.insol.org ¤

Special Report

Major Chapter 11 Cases by Industry Sector

Industry Sector	Company	Date Filed	Court	Assets	Debtor's Counsel
Accommodation	Roadhouse Holding	Aug. 8	Delaware	$389,520,000	Young Conaway Stargatt & Taylor
Agriculture	BFN Operations	June 17	Texas, N.D.	$100 - $500 million	Gardere Wynne Sewell
Arts, Entertainment	SFX Entertainment	Feb. 1	Delaware	$661,600,000	Greenberg Traurig
& Recreation	19 Recordings	Apr. 28	New York, S.D.	$100 - $500 million	Willkie Farr & Gallagher
Healthcare	Vanguard Healthcare	May 6	Tennessee, M.D.	$100 - $500 million	Bradley Arant Boult Cummings
Finance & Insurance	RCS Capital	Jan. 31	Delaware	$1,970,000,000	Young, Conaway, Stargatt & Taylor
Information	Dex Media	May 16	Delaware	$1,260,000,000	Young Conaway Stargatt & Taylor
	Aspect Software Parent	Mar. 9	Delaware	$940,000,000	Kirkland & Ellis
Manufacturing	SunEdison DG	Apr. 21	New York, S.D.	$20,700,000,000	Skadden, Arps, Slate, Meagher & Flom
	Verso Paper Holdings	Jan. 26	Delaware	$2,900,000,000	O'Melveny & Myers
	Abengoa Bioenergy US Holding	Feb. 24	Missouri, E.D.	$1,300,000,000	DLA Piper
	Horsehead Holding	Feb. 2	Delaware	$1,000,000,000	Kirkland & Ellis
	Abengoa Bioenergy New Technologies	Apr. 6	Delaware	$1,300,000,000	DLA Piper
	Noranda Aluminum Holding	Feb. 5	Missouri, E.D.	$1,087,600,000	Paul, Weiss, Rifkind, Wharton
	ESML Holdings	July 8	Delaware	More than $1 billion	White & Case
Mining	Linn Energy	May 11	Texas, S.D.	$11,610,000,000	Kirkland & Ellis
	Peabody Energy	Apr. 13	Missouri, E.D.	$11,020,000,000	Jones Day
	SandRidge Energy	May 16	Texas, S.D.	$7,010,000,000	Kirkland & Ellis
	Arch Coal	Jan. 11	Missouri, E.D.	$5,840,000,000	Bryan Cave
	BreitBurn Energy Partners	May 15	New York, S.D.	$4,700,000,000	Weil Gotshal & Manges
	Halcon Resources Corporation	July 27	Delaware	$2,840,000,000	Weil, Gotshal & Manges
	Paragon Offshore	Feb. 14	Delaware	$2,470,000,000	Weil, Gotshal & Manges
	Seventy Seven Energy	June 7	Delaware	$1,770,000,000	Baker Botts
	Atlas Resource Partners	July 27	New York, S.D.	$1,320,000,000	Skadden, Arps, Slate, Meagher & Flom
	Chaparral Energy	May 9	Delaware	$1,229,373,000	Richards, Layton & Finger
	Hercules Offshore	June 5	Delaware	$1,060,000,000	Akin Gump Strauss Hauer & Feld
	Southcross Holdings	Mar. 27	Texas, S.D.	More than $1 billion	Kirkland & Ellis
	Venoco	Mar. 18	Delaware	$930,300,000	Bracewell
	Midstates Petroleum Company	Apr. 30	Texas, S.D.	$679,000,000	Kirkland & Ellis
	Penn Virginia Corporation	May 12	Virginia, E.D.	$517,700,000	Kirkland & Ellis
	Triangle USA Petroleum	June 29	Delaware	$500 million - $1 billion	Skadden, Arps, Slate, Meagher & Flom
	C&J Energy Services	July 20	Texas, S.D.	$500 million to $1 billion	Kirkland & Ellis
	Emerald Oil	Mar. 22	Delaware	$405,440,000	Pachulski, Stang, Ziehl & Jones
Professional,	Abeinsa Holding	Mar. 29	Delaware	$1 - $10 billion	DLA Piper
Scientific, and	Abengoa Bioenergy Meramec Renew.	June 12	Missouri, E.D.	$500 million - $1 billion	Armstrong Teasdale
Technical Services	Global Geophysical Services	Aug. 3	Texas, S.D.	$100 - $500 million	Pachulski, Stang, Ziehl & Jones
Rental & Leasing	SH 130 Concession Company	Mar. 2	Texas, W.D.	$1,182,401,000	Gibson, Dunn & Crutcher
	Light Tower Rentals	Aug. 30	Texas, S.D.	$100 – $500 million	Proskauer Rose and Jackson Walker
Retail Trade	Sports Authority	Mar. 2	Delaware	$1,600,000,000	Gibson, Dunn & Crutcher
	Pacific Andes Resources Development	Sept. 29	New York, S.D.	More than $1 billion	Klestadt Winters Jureller Southard
	Aeropostale	May 4	New York, S.D.	$354,380,000	Weil, Gotshal & Manges
	Pacific Sunwear of California	Apr. 7	Delaware	$298,853,000	Klee, Tuchin, Bogdanoff & Stern
Transportation	Republic Airways Holdings	Feb. 25	New York, S.D.	$3,560,000,000	Zirinsky Law Partners
	CHC Group	May 5	Texas, N.D.	$2,160,000,000	Weil, Gotshal & Manges
	International Shipholding Corp.	July 31	New York, S.D.	$305,080,000	Akin Gump Strauss Hauer & Feld
	Primorsk International Shipping	Jan. 15	New York, S.D.	$205,000,000	Skadden, Arps, Slate, Meagher & Flom
Utilities	Sundevil Power Holdings	Feb. 11	Delaware	$248,800,000	Vinson & Elkins

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Note Chapter 11 filings between January 1-September 30, 2016

Worth Reading

Risk, Uncertainty and Profit

Author: Frank H. Knight
Publisher: Beard Books
Softcover: 381 pages
List Price: $34.95

The tenets Frank Knight set out in this book have become an integral part of modern economic theory. Still readable today, it was included as a classic in the 1998 *Forbes* reading list. In *Risk, Uncertainty and Profit*, Knight examines the relationship between knowledge on the part of entrepreneurs, and changes in the economy. He quite famously distinguished between two types of change: risk and uncertainty. He defined risk as randomness with knowable probabilities, and uncertainty as randomness with unknowable probabilities. Risk, he said, arises from repeated changes for which probabilities can be calculated and insured against, such as the risk of fire. Uncertainty rises from unpredictable changes in an economy, such as resources, preferences, and knowledge – changes that cannot be insured against. Uncertainty, he said, "is one of the fundamental facts of life."

One of the larger issues of Knight's time was how the entrepreneur, the central figure in a free enterprise system, earns profits in the face of competition. It was thought that competition would reduce profits to zero across a sector because any profits would attract more entrepreneurs into the sector and increase supply, which would drive prices down, resulting in competitive equilibrium and zero profit.

Knight argued that uncertainty itself may allow some entrepreneurs to earn profits despite this equilibrium. Entrepreneurs, he said, are forced to guess at their expected total receipts. They cannot foresee the number of products they will sell because of the unpredictability of consumer preferences. Still, they must purchase product inputs, so they base these purchases on the number of products they guess they will sell. These factors are all uncertain and impossible to know. Profits are earned when uncertainty yields higher total receipts than forecasted total receipts. Thus, Knight postulated, profits are merely due to luck. Such entrepreneurs who "get lucky" will try to reproduce their success, but will be unable to because their luck will eventually turn.

At the time, some theorists were saying that when this luck runs out, entrepreneurs will then rely on and substitute improved decision making and management for their original entrepreneurship, and the profits will return. Knight saw entrepreneurs as poor managers, however, who will in time fail against new and lucky entrepreneurs. He concluded that economic change is a result of this constant interplay between new entrepreneurial action and existing businesses hedging against uncertainty by improving their internal organization.

Knight has been called "among the most broad-ranging and influential economists of the twentieth century" and "one of the most eclectic economists and perhaps the deepest thinker and scholar American economics has produced." He stands among the giants of American economists that include Schumpeter and Viner. His students include Nobel Laureates Milton Friedman, George Stigler, and James Buchanan. At the University of Chicago, Knight specialized in the history of economic thought. He revolutionized the economics department there, becoming one of the leaders of what has become known as the Chicago School of Economics. Under his tutelage and guidance, the University of Chicago became the bulwark against the more interventionist and anti-market approaches followed elsewhere in American economic thought. He died in 1972. ¤

Hanjin, *from page 4*

situations such as numerous creditors with competing interests," he says. "The Korean insolvency process is not structured to react in the same manner."

Ormond says these developments will have an immediate impact on a number of manufacturers, retailers, and asset-based lenders. "It has what I call tertiary victims," he says. "The companies affected are not just those with goods on the ship, but the entire supply chain – lenders who provide loans based on these manufacturers' collateral, ground transport companies, retailers, even consumers who could be affected by higher prices or empty shelves."

Sellers and buyers of goods stranded on Hanjin ships should also consider whether agreements between the buyers and sellers have been breached by non-delivery of goods as required by the terms of their agreements, which may require careful analysis of the agreements to determine who has title to the goods.

"A lot of people will need professional advice on getting foods delivered, getting paid, financing manufacturing, and selling goods being transported," says Ormond.

"One advantage these U.S. entities with connections have is that they can interface with a U.S. law firm, and a U.S. bankruptcy court will provide a hearing," says DeJonker. "They may not get instantaneous results, but at least they have a venue to attempt to address their issues."

That said, Ormond notes that the filing could be challenging. Chapter 15 is not a common bankruptcy filing, and sporadic financing is coming from Korea, so practitioners will need to be familiar with international issues. And, because Hanjin is a Pacific shipper, a significant number of its clients are based on the West Coast, he says, and they will have to hire East Coast counsel. "The number of practitioners available is limited, especially to companies that can't afford out-of-state counsel for a complex case like this."

Ormond also notes that this may not be the end of the shipping industry's woes. "There is a lot of outstanding debt in the shipping industry," he says. "Of the ten major global shipping companies, seven are in similar situations as Hanjin. I think that is unsustainable, and we'll either see more bankruptcies or consolidation in the industry." ¤

Special Report

Major European Law Firms with Restructuring Practices

Firm	Senior Professionals		Representative Clients
Addleshaw Goddard London Tel. +44 20 7606 8855 www.addleshawgoddard.com	John Joyce Andy Bates Daniel Redstone Fraser Ritson	Alison Goldthorp Ged Barnes Graham Briggs Simon Thomas	Clients include administrators of UK Coal, BDO in restructuring of Motorworld group, Deloitte as administrator of Bank Fashion, Duff & Phelps as administrator of Puma Hotel Group, Endless in acquisition of Charpentes Francaises, Bright Blue Foods, and Kiddicare, Grant Thornton as administrators of Carcraft and Eco Plastics; KPMG as administrators of De Stefano Property Group and Newsfax Printers.
Allen & Overy London Tel. +44 20 3088 0000 www.allenovery.com	Ian Field Earl Griffith	Gordon Stewart Mark Sterling	Specializes in cross-border restructurings and insolvencies, utilizing the full range of international options, including Chapter 11 reorganizations, U.K. schemes of arrangement, pre-packaged sales, and debt for equity swaps. Clients include lenders and investors at all levels of the capital structure, as well as corporates/directors, central banks, insolvency officeholders/trustees, and government institutions.
Ashurst London Tel. +44 20 7638 1111 www.ashurst.com	Giles Boothman James Collis Lee Doyle Jane Fissenden	Olga Galazoula Dan Hamilton Lynn Dunne Nigel Ward	Advisor to: UCC of Nortel, ad-hoc senior lender committee on Apcoa debt restructuring, FSA in first-ever appointment by High Court of "Special Administrators" over MF Global, KPMG as special administrators of Alpari, Vivarte on debt and share capital restructuring, Punch Taverns on £2.3bn debt restructuring, bondholders on Petropavlovsk's US$1 5bn debt restructuring, and BT Bakrie Telecom Tbk on US$900m restructuring.
Clifford Chance London Tel. +44 20 7006 1000 www.cliffordchance.com	Philip Hertz John MacLennan	David Towers Iain White	Advised on many major global restructurings and insolvencies, including Seat PG SpA, Saur, Apcoa, Imtech, Vivacom, Mercator, CEMEX, Dubai World, Drydocks World, Co-operative Bank, Colonial, Southern Cross, Punch Taverns, Independent News & Media, Metrovacesa and PRISA.
Herbert Smith Freehills London Tel. +44 20 7374 8000 www.herbertsmithfreehills.com	Kevin Pullen Laurence Elliot	Ben Ward Natasha Johnson	Advisory representations include Seven Group in acquisition and restructuring of the Nexus Group, Deutsche Bank in acquisition of approx. $1 billion of distressed debt in Top Ryde Shopping Centre, Macquarie Bank on two major restructurings and distressed investments in Australia, Allegro Funds in acquisition of Hastie Services business and Custom Bus business, KKR in acquisition of BOSI Mackeller loan portfolio.
Hogan Lovells London Tel. +44 20 7296 2000 www.hoganlovells.com	Stephen Foster Tom Astle Joe Bannister Laurence Crowley Deborah Gregory Matthew Ditchburn	Don McGown Paul McLoughlin Crispin Rapinet John Tillman Andrew Fleming Philip Gershuny	Debtor: AEA, Verbatim, Leiser Group. Creditor: Trustee of Nortel Networks UK pension plan, Deutsche Bank in Saur Groupe restructuring, Bank of America in Autobar Group restructuring. Cross border: Kodak pension plan, Madison Pacific as security trustee, FMS Wertmanagement and Erste Abwicklungsanstalt on various debt restructurings. Loan portfolio: GE on sale of international real estate worth US$23bn.
Linklaters London Tel. +44 20 7456 2000 www.linklaters.com	Tony Bugg Bruce Bell Richard Bussell Euan Clarke Iain Fenn	Richard Hodgson Rebecca Jarvis Dan Schuster-Woldan Yen Sum Jo Windsor	Advised Wells Fargo as agent to first lien lenders in chapter 11 cases of Sabine Oil & Gas and affiliated debtors on over US$1bn of debt, EBOK lenders on Afren restructuring, international lenders on US$360m extension of Lonmin plc's credit facility, Towergate Insurance Group on its £1bn restructuring, group of lenders on oVivarte Group's c.EUR2.8bn restructuring, coordinating committee in US$3.4bn restructuring of ZIM.
Orrick Rambaud Martel Paris, London Tel. + 33 (0) 1 53 53 8192 www.orrick.com	Michael Crosby	Stephen Phillips	Counsel for bonds trustee in Afren insolvency, Belvédère Group in its restructuring, BrightSource Energy in successful Section 363 bid for power facility of Solar Trust, Citigroup in purchase, sale, and restructuring of claims, loans and/or leases relating to over 60 aircraft for American Airlines, City of Stockton, CA, in its Chapter 9 bankruptcy, lender counsel in enforcement proceedings against Cliffs Natural Resources.
Simmons & Simmons London Tel. +44 20 7628 2020 www.simmons-simmons.com	Richard Cook Alan Gar Alistair Hill Alyson Lockett	Iain Macfarlane Peter Manning Ross Miller	Advising Avenue Europe on acquisitions for and ongoing management of student accommodation platform, director of French branch of Alitalia on bankruptcy proceedings, Bank of America in relation to German Trevira GmbH, BBVA in claim for €125m in insolvency proceedings of Fernando Martin, UK commercial bank on litigation in relation to Codere SA, GHG in its restructuring, 120 clients in relation to the failure of Lehman Brothers.
Slaughter and May London Tel. +44 20 7600 1200 www.slaughterandmay.com	Steve Cooke Ian Johnson Richard de Carle	Tom Vickers Miranda Leung Andrew McClean	HM Treasury on numerous aspects of government support of banking industry, Zeiss AG on restructuring of US$389 million financing of Carl Zeiss Vision GmbH, Icelandic bank on its winding up, Uniq on a pension debt for equity exchange , Taylor Wimpey on refinancing of its debt, Ernst & Young as administrators of Hellas Telecommunications on pre-pack sale.

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Energy, *from page 4*

disclaim licensed assets, and hence, under the provincial scheme, the trustee would be responsible for all abandonment, remediation, and reclamation obligations. Stated differently, the BIA allows the trustee to renounce and avoid liability for abandonment, remediation, and reclamation expenses; however, the provincial legislation stipulates that the trustee is still liable for those same obligations.

In light of the conflict and the application of the doctrine of federal paramountcy, the court held section 1(1)(cc) of the OGCA and section 1(1)(n) of the Pipeline Act were inoperative to the extent that they conflict with the federal legislation. Further, the Abandonment Orders issued by the AER pursuant to the OGCA and the Pipeline Act were deemed to be inoperative to the extent that they would have the effect of requiring the trustee to comply with or provide security deposits pursuant to the Abandonment Orders of the Renounced Licensed Assets. Sections 24(1), 24(2) and 106(3) of the OGCA, §§ 18(1) and 18(3) of the Pipeline Act, Article 6 of Directive 006, and Articles 4, 8 and 10 of Appendix 2 of Directive 006 were also rendered inoperative to the extent that these provisions were in conflict with the purpose of section 14.06 of the BIA.

The court's holding may have broad implications. "The Canadian oil and gas industry is currently under significant financial hardship, as evidenced by tens of thousands of job terminations, termination of billions in capital spending, 10 percent rig utilization, and 25 percent office vacancy rates," says Craig Spurn, Kimberly Howard and Kimberly Macnab of Canadian law firm McCarthy Tétrault. "Nonetheless, the oil and gas industry remains a substantial part of the Canadian economy, and it is the backbone of the provincial economy." Therefore, many expect that the ruling could lead to more insolvency proceedings which result in the abandonment or sale of wells.

However, Bracewell's Evan Flaschen and David Lawton believe that the impact may be muted by several factors. In addition to pending appeals and the potential of amendment of the BIA, the AER issued Bulletin 2016-16 on June 23 which served to shift the economic risk of most non-producing well liabilities back to acquirers. The bulletin made three significant regulatory changes. First, it changed the application process which will cause applicants to "face heightened scrutiny, uncertainty and delays, which means that lenders/noteholders will need to wait longer until their collateral can be monetized, assuming the would-be acquirers are even approved for licenses to begin with," according to Flaschen and Lawton. Second, the AER will re-review pending applications thereby creating more uncertainty and delay. Finally, the AER doubled the liability management ratio required of a transferee for approval. "The same reason that licensees are seeking protection under the BIA will likewise prevent certain transferees from increasing their LMR – they're overleveraged and under-capitalized," they note. "The BIA may have prevailed over the original regulations, but there isn't anything in the BIA about the rights of acquirers to obtain operating licenses, so query whether we are back to square one after all, *Redwater* notwithstanding." ¤

No Safe Harbor, *from page 2*

One such context is the statute's legislative history. Congress amended the Bankruptcy Code in 1982 to create a safe harbor to protect the commodities and securities markets from disruption in the event of a major bankruptcy affecting those industries. Although the safe harbor in section 546(e) doesn't reference financial market disruptions, the Seventh Circuit found that it is, indeed, intended to reduce "systematic risk in the financial marketplace" and there is "no evidence" that Valley View's bankruptcy would have any impact on Credit Suisse, Citizens Bank, or any other financial institution named in section 546(e).

The court also analyzed other sections of the Bankruptcy Code relating to a trustee's avoidance powers, attempting to determine how the section 546(e) safe harbor fits into this framework – namely, sections 544, 547, and 548, which state that only transfers *made by a debtor* prior to a bankruptcy petition are avoidable. The court thus decided that Section 546(e) ought also to refer to a transfer of property only by the debtor.

In addition to this reasoning, the court looked at the economic impact of its ruling, finding that "Merit's interpretation of the safe harbor "would be so broad as to render any transfer non-avoidable unless it were done in cold hard cash."

The decision revived a long-standing circuit split on the issue. It was consistent with the minority view from the Eleventh Circuit 20 years ago in *Munford v. Valuation Research Corp.*, and inconsistent with decisions since then by the Second, Third, Sixth, Eighth, and Tenth Circuits, which have applied the section 546(e) safe harbor when a financial institution is nothing more than a conduit. (Next month we'll discuss the Second Circuit's recent decision in *In re Tribune Co. Fraudulent Conveyance Litig.).*

"Quite simply, the courts in these circuits will apply the law in different ways and, for the time being, the outcome of avoidance litigation could easily depend on where the litigation is venued," says Michael J. Venditto, a partner at Reed Smith. "That could change if the U.S. Supreme Court grants certiorari and settles the conflict among the circuits."

So, unless and until the Supreme Court is willing to weigh in, *Merit* is the law of the Seventh Circuit, and parties other than those listed in section 546(e) (commodity brokers, forward contract merchants, stockbrokers, financial participants, securities clearing agencies, and financial institutions) will not receive the safe harbor's protection in cases filed there.

According to a legal update from Dechert's business restructuring and reorganization group, this is probably most significant for selling stockholders in LBOs, where there is risk that years later a trustee or debtor-in-possession will argue that the consideration provided to the stockholders rendered the company insolvent and the buyout is thus a fraudulent transfer. "Notably, in such a scenario, sellers of identical securities and in the same transaction face drastically different outcomes in the Seventh Circuit," Dechert writes. "Private stockholders that do not qualify for safe harbor treatment, i.e., are not financial institutions, stockbrokers and the like, are open to liability, while beneficial holders who qualify as safe harbor protected parties are not."

"These decisions most commonly arise

continued on page 10

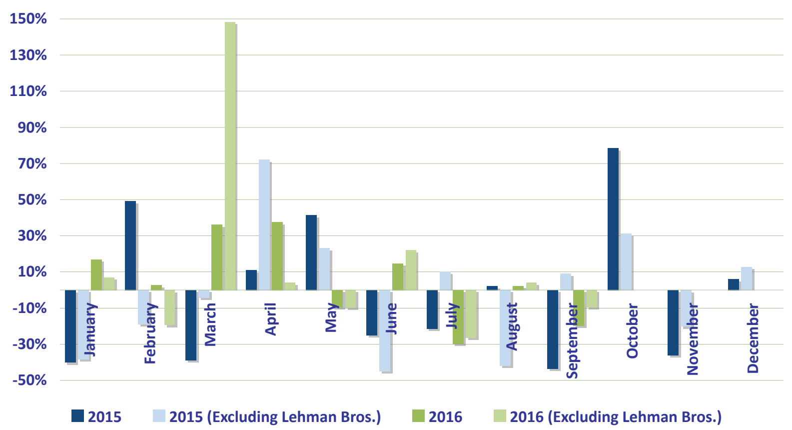
Special Report

Claims Trading Activity

The following charts reflect our analysis of over 16,000 notices of claim transfers filed in large Chapter 11 bankruptcy cases nationwide from January 1, 2014 to September 30, 2016. The court filings were aggregated from a review of court dockets across more than 2,300 cases. A list of the cases covered by our analysis can be found here: https://www.chapter11dockets.com/about/cases.

CHAPTER 11 DOCKETS

Month-Over-Month Changes in Number of Claim Transfer Notices Filed



Most Active Bankruptcy Cases for Claims Trading Activity: 3rd Quarter 2016

By Asserted Amount of Claims Transferred

Lehman Brothers Holdings Inc.

Republic Airways Holdings Inc.

Emerald Oil, Inc.

Life Partners Holdings, Inc.

Ultra Petroleum Corp.

Peabody Energy Corporation

GT Advanced Technologies Inc.

Lyondell Chemical Company

Energy XXI Ltd.

SS Body Armor I, Inc. (f/k/a Point Blank Solutions, Inc.)

Most Active Bankruptcy Cases for Claims Trading Activity: 3rd Quarter 2016

By Number of Claim Transfer Notices Filed

Life Partners Holdings, Inc.

Lehman Brothers Holdings Inc.

Energy XXI Ltd.

Caesars Entertainment Operating Company, Inc.

Horsehead Holding Corp. (2016)

UCI International, LLC

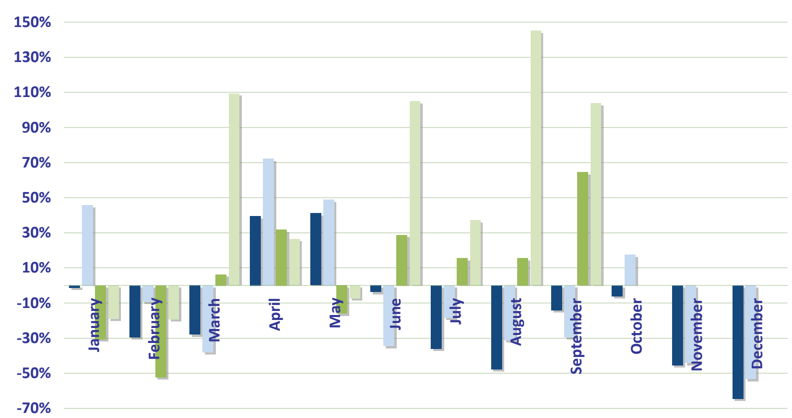
Peabody Energy Corporation

Ultra Petroleum Corp.

Nortel Networks Inc.

Alpha Natural Resources, Inc.

Year-Over-Year Changes in Number of Claim Transfer Notices Filed



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Gnome de Plume

The Tribal Village

by Andy Rahl

Once widely heralded, the influence of Marshal McLuhan has faded since he passed away in 1980. We've all heard that "the medium is the message," and many suspect that "Understanding Media" is one of the keys to contemporary life, but there is very little discussion of what those concepts mean or how to apply them. In the case of bankruptcy and restructuring, I'm not sure I have ever even seen them raised, with the narrow and rare exception of an occasional reference in the marketing context.

Tribal behavior was one of McLuhan's central concerns: "Tribalism is our only resource since the electromagnetic discovery." In case you're wondering, the electromagnetic discovery was the invention of electronic communication; first the telegraph, then the telephone, radio, cinema, and television, which of course was the point to which electronics had progressed when McLuhan passed away.

McLuhan's theory was based upon the distinction between oral and written culture. Throughout human history, social culture was predominantly oral until the invention of printing. As I've noted before, social organization then was primarily tribal and characterized by conformity and intolerance. After Gutenberg, written culture progressively superseded the oral. Ultimately, human culture and thought were profoundly influenced by the physical characteristics of print. Wide dissemination of ideas led to wider social organizations such as nationalism, while religion, in general, and the sacred nature of existence, in particular, diminished. Sequential thinking, including a sequential sense of history in general and of progress, in particular, predominated. Those are all examples of the ways in which the medium of print itself shapes the messages it conveys.

That circle is turning again because television, the internet, and social media have restored the importance of oral communication. The media-linked "global village" is primarily an oral village where we increasingly are seeing the resurgence of tribal behavior. Thus, the meltdown in the Middle East is in many ways the reassertion of dominance by local and regional tribes and warlords. Isis employs a sophisticated media strategy while asserting a radically tribal agenda that restores religion to primacy, insists on conformity, and tolerates no dissent.

The current U.S. election campaign is a good example of a direct conflict between the oral and print modes. Donald Trump is much more media savvy and his base more tribal. His campaign is primarily oral in that it relies heavily on social media and personal rhetoric while Trump has demonstrated little interest in policy and generated very little in the way of position papers and the like. Hillary Clinton on the other hand personifies the traditional print based approach – less self-assured in media appearances and wonkish with lots of policy content and position papers that have largely been ignored by the media. Both candidates would do better if their campaigns were more balanced between oral and print expression.

The U.S. bankruptcy business as it has evolved since the 1960s is another example of a clash between written and oral styles. Prior to the innovations of Harvey Miller and the enactment of the 1978 Bankruptcy Code, bankruptcy was primarily an oral arena and, not coincidentally, widely considered less respectable by what then were the print-dominated corporate legal and financial professions. That changed rapidly after 1978, as anyone who has had to wade through disclosure statements, plan support agreements, and financing documents from a public case can testify.

Still, a strong oral tradition continues to coexist in bankruptcy in the extensive negotiating process and active court supervision of debtors that characterize most complex bankruptcy cases. Given this dual oral and written character of bankruptcy and restructuring, its professionals, like the candidates, would be well advised to be proficient in both oral and written modes. ¤

No Safe Harbor, *from page 8*

during a bankruptcy when a trustee or creditors try to claw back the proceeds of a leveraged buyout," says Venditto, and "are not instructive on how a transaction should be structured to avoid liability. Instead they deal with a silver-bullet defense, the availability of which may now depend on geography."

Dechert's business restructuring and reorganization group also notes that while *Merit* and *Munford* are in the minority, *Merit* could "prove persuasive to courts in which there is no circuit-level precedent."

FTI was represented by Greg Schwegmann of Reid Collins & Tsa. Merit was represented by Jason J. DeJonker and James B. Sowka of Seyfarth Shaw LLP. They were not available to comment or did not respond to requests for comment. ¤

In the Next Issue…

- *Special Report: Nation's Largest Claims Administrators*
- *Special Report: Outstanding Turnaround Firms, 2016*
- *Research Report: Who's Who in Linn Energy, LLC*

Turnarounds & Workouts is published monthly by Beard Group, Inc., P.O. Box 40915, Washington, D.C. 20016 Telephone: (240) 629-3300. ISSN 0889-1699. Editor: Nina Novak (nina@beardgroup.com). Assistant Editors: Dave Buzzell, Julie Schaeffer, and Randall Reese. Subscription Rate: $447 per year per firm for one recipient plus $25 per year for each additional recipient. Send comments and coverage suggestions to above address or david@beardgroup.com.