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Mid-Year 2018 Update (Part II)

by Julie Schaeffer

About 2,400 commercial Chapter 11 petitions were filed through May 2018 versus 2,434 at the same point last year (and 5,757 in calendar-year 2017), according to data from American Bankruptcy Institute. Data refined by *Troubled Company Reporter* editors, to exclude contemporaneously filed cases being jointly administered, shows that about 752 of the corporate Chapter 11 cases filed through the end of May involved debtors with more than \$1 million in assets. This count is down from 814 such cases filed through May of last year. According to *TCR*, there were 1,836 corporate Chapter 11 filings by debtors with more than \$1 million in assets for all of calendar year 2017.

Beyond the numbers, how has 2018 restructuring activity been year to date? What have been the significant events? And what sectors have dominated?

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A Token Exception to Bankruptcy's "Keep off the Grass" Sign

by Dov Kleiner

Marijuana is an unusual substance, in that its sale can be explicitly legal in some states while at the same time being a federal crime everywhere else in the United States. While this oddity has many implications, the ever-increasing number of states that have legalized the use of medical, and in some cases, recreational, marijuana presents a particular dilemma for bankruptcy courts, which are creatures of federal law. That is because, regardless of what may be permitted under state law, the sale of cannabis and certain related activity is prohibited by the federal Controlled Substances Act, 21 U.S.C. §§ 801-904 (the "CSA"). In general, that

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Mid-Year Update, *from page 1*

We asked five bankruptcy experts: **Randall Eisenberg**, managing director at AlixPartners; **Benjamin Feder**, special counsel at Kelley Drye & Warren LLP; **George N. Panagakis**, partner at Skadden, Arps, Slate, Meagher & Flom LLP; **Paul Share**, managing director at Conway MacKenzie; and **R. Scott Williams**, partner at Rumberger Kirk & Caldwell.

We continue to see retailers in two baskets: those that have a strong reason to survive and those that have yet to differentiate themselves.

In many ways, the experts say, 2018 has brought more of the same: activity in retail, energy, and healthcare. But there were also some new developments, including the possibility of significant trade restrictions creating turmoil in a number of industries, particularly for leveraged companies with high debt service commitments and tax cuts pushing back the timetable for the next recession.

Here's the second part of our 2018 mid-year update.

What have been the significant cases year-to-date? What made them significant?

Eisenberg: Toys “R” Us was notable because it converted to a

wind-down early in 2018. It shows you how difficult it is for retailers to survive Chapter 11 if they fail to have a positive and well-orchestrated first holiday season after entering Chapter 11. They botched the holiday season. We continue to see retailers in two baskets: those that have a strong reason to survive and those that have yet to differentiate themselves.

Feder: Cumulus Media was a significant case that filed in the Southern District of New York in late 2017. The battle lines were drawn from the outset regarding enterprise valuation. It wound up with a contested confirmation hearing in April before Judge [Shelley] Chapman. Despite strong arguments presented by the official committee, Judge Chapman accepted the valuation presented by the debtors and supported by the senior lenders. Her ruling rested in part on there being no evidence of any third-party offers for the company, notwithstanding the lack of any formal sale process by the debtors. She believed if the company were as undervalued as asserted by the committee then such offers would have been forthcoming. Judge Chapman's decision reflects a tendency among many judges to look for market evidence to bolster valuation arguments. Parties seeking to contest a debtor's enterprise valuation for plan purposes are well advised if at all possible to find a party, either from within or outside of the case, who is willing to write a check (as a purchaser or a backstop party) consistent with the asserted enterprise valuation. (Kelley Drye & Warren LLP represented the indenture

trustee for unsecured noteholders who were opposed to the debtor's valuation. The indenture trustee sat as a member of the official creditors' committee.)

Panagakis: Significant outcomes in the restructuring sector included SunEdison Inc. and its emergence from Chapter 11 as a newly reorganized, privately held company. The Bankruptcy Court for the Southern District of New York confirmed the plan of reorganization on July 28, 2017. The plan went into effect right around the new year. This matter spanned every continent except Antarctica and involved 2,000 affiliated companies with liabilities around \$8 billion.

Healthcare is a very complicated and ever-changing area that requires constant attention in order to be relevant and able to give meaningful advice to clients.

Williams: I think the Merit Management case will have a significant impact on the restructuring industry. The case will impact how prepetition payments are viewed and ultimately helps level the playing field amongst creditors. Since the court indicated that “safe harbor” transfers will be scrutinized on a case-by-case basis there may not be immediate results that are easily observable, but that doesn't mean that insolvency professionals' advice to their clients will not be substantially modified.

Mid-Year Update, *from page 2*

What has been your greatest challenge thus far this year?

Williams: Trying to stay informed on the law and practices in new areas of insolvency. Healthcare is a very complicated and ever-changing area that requires constant attention in order to be relevant and able to give meaningful advice to clients.

Panagakis: The firm’s closing of the Takata transaction, in which we

represented Key Safety Systems, and the execution of several large out-of-court restructurings.

Feder: My greatest challenge (and success) so far in 2018 was representing the purchaser in a small Chapter 11 case involving a failed residential condominium property. Operational mistakes and mismanagement had caused the building to be abandoned, with most of the individual units burdened by mortgages, tax liens, and judgments. It was falling into ruin and becoming

an eyesore and public hazard.

What has been your greatest success thus far this year?

Feder: [The location of the failed residential condominium property mentioned above] gave it significant potential value and there were purchasers willing to acquire the property and rehabilitate it if free and clear title could be delivered. Bankruptcy, real estate and tax counsel worked together with



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local government officials to obtain a state court ruling that terminated the condominium regime and vested authority in the condominium's board of directors to file for bankruptcy and conduct a sale process that would allow for a sale pursuant to a plan of liquidation. The plan allocated the sale proceeds in a manner such that the liens against the individual units could be satisfied and some residual value paid to the unit owners. Following a very competitive auction, the plan was confirmed and title transferred to our client, who is converting the property to an upscale rental building. This case is a very gratifying example of using Chapter 11 in a creative fashion to be able to realize value from a nearly worthless asset.

Panagakis: In addition to the firm's work on SunEdison and Takata, our greatest success stories continue to be those that are able to restructure without the need to file for Chapter 11. Over the past few months we have successfully restructured several large companies in the shipping, pharmaceutical and manufacturing industries. No client ever really wants to file for Chapter 11 and it is always a huge accomplishment for the professionals and relief for the clients when an out-of-court workout can be achieved.

Share: The debt markets are extremely hot right now, so if a company is in the market to refinance, now is the time to do it. The markets are rewarding companies as there is a lot of cash chasing deals right now. I have seen clients get more debt and

reduced rates, which was unexpected when we were testing the market.

Williams: I represented a trustee in helping reveal and beginning to unwind a substantial fraud against a bankruptcy estate.

No client ever really wants to file for Chapter 11 and it is always a huge accomplishment for the professionals and relief for the clients when an out-of-court workout can be achieved.

Has anything changed about your outlook for Chapter 11s since early January?

Eisenberg: Activity remains strong in restructurings and we anticipate more activity throughout 2018. Factors include disruption due to digitalization, demographics and innovation. In addition, there are a number of companies showing early signs of distress [that] will need to take proactive measures to avoid restructuring down the road. Companies that will need to refinance debt in two to three years need to focus on improving their operations and EBITDA now. These companies need to develop a multi-faceted plan to preserve equity's position. Fixes will not occur overnight and therefore will require careful planning and execution.

Feder: The possibility of significant trade restrictions has

the potential to create turmoil in a number of industries, particularly for leveraged companies with high debt service commitments.

Panagakis: The same drivers continue to fuel restructuring work—rising interest rates, technology shifts on both producers and consumers, and changes in regulatory frameworks. Also, less predictable geopolitical factors will continue to play a role as they did, for example, with the energy sector and might as a result of pending tariff talks.

Share: While it is difficult to predict the future, I am seeing the slow-creeping interest rate affect a lot of companies. Weak companies with high debt loads are unable to sustain the continued water board effects. I am currently working on a healthy company with \$1.6 billion in debt and free cash flow of \$80 million after debt service. They are in no risk of any debt violations. The challenge is [that] every 25-basis-point increase by the Federal Reserve is a \$4 million interest impact. There are currently six 25-basis-point increases forecasted through the end of 2019, which for my current company translates into \$24 million of incremental debt service regardless how the core business performs. While this won't put them out of business, it will impact the cash generated and their willingness to invest or pay dividends.

Williams: I had expected a substantial increase in restructuring work in the first half of the year, but I think the recently passed tax cuts have pushed back the timetable for the next recession. ✘

Research Report

Who's Who in Claire's Stores' Bankruptcy Cases

by Carlo Fernandez

Claire's Stores, Inc., is a specialty retailer of jewelry, accessories, and beauty products for young women, teens, "tweens," and kids. A key aspect of the "Claire's experience" is its ear piercing services, and, to date, the Company has pierced over 100 million ears worldwide.

The Claire's Group has a presence in 45 countries, through a total combination of more than 7,500 company-owned stores, concessions locations, and franchised stores, and has 17,000 employees.

Within the Claire's Group, the Debtors operate a combination of more than 5,300 store locations and concession locations in the U.S. and Puerto Rico under the Claire's and the Icing trademarks, and have about 10,000 employees.

Headquartered in Hoffman Estates, Illinois, the Company began as a wig retailer by the name of "Fashion Tress Industries" founded by Rowland Schaefer in 1961. In 1973, Fashion Tress Industries acquired the Chicago-based Claire's Boutiques, a 25-store jewelry chain that catered to women and teenage girls. Following that acquisition, Fashion Tress Industries changed its name to "Claire's Stores, Inc." and shifted its focus to a full line

of fashion jewelry and accessories.

In 2007, the Company was taken private and acquired by investment funds affiliated with, and co-investment vehicles managed by, Apollo Management VI, L.P.

As of Oct. 28, 2017, Claire's Stores reported \$1.98 billion in total assets against \$2.53 billion in total liabilities. As of the commencement date, the Debtors' capital structure includes \$1.9 billion in funded debt.

Claire's Stores and seven affiliates sought Chapter 11 protection (Bankr. D. Del. Lead Case No. 18-10584) on March 19, 2018, after reaching terms of a balance sheet restructuring with their first lien lenders and sponsor Apollo.

Under the deal, the Debtors agreed to a file a reorganization plan that contemplates \$575 million of new money financing, with the ad hoc group of first lien lenders and Apollo agreeing to backstop rights offerings to ensure that the new money investment is fully funded. Pursuant to the plan, first lien lenders will receive 100% of the equity in the reorganized debtor, and equity holder Apollo will receive releases.

Oaktree Capital, holder of the second lien notes, is not a party to the restructuring support

agreement and called for a more open and longer process for soliciting alternative offers.

The hearing to consider approval of the disclosure statement explaining the plan has been adjourned to a "date to be determined" after the bankruptcy judge ordered a more open and an extended bidding process.

DEBTORS

Weil Gotshal & Manges LLP is serving as the Debtors' lead counsel, with the engagement led by **Ray C. Schrock, P.C.**, co-chair of the firm's Business Finance & Restructuring Department. Business Finance & Restructuring Department co-chair **Matt S. Barr**, partner **Paul Genender**, partner **Ryan Preston Dahl**, and associate **Danielle D. Donovan** are also onboard as attorneys.

Richards, Layton & Finger, PA, is serving as co-counsel to the Debtors. **Daniel J. DeFranceschi**, a director at the firm, is leading the engagement. Other Richards Layton professionals designated to represent the Debtors are counsel **Zachary I. Shapiro**; and associates **Brendan J. Schlauch**, **Brett M. Haywood** and **Megan E. Kenney**.

FTI Consulting, Inc., is the restructuring advisor to the

Research Report

Who's Who in Claire's Stores' Bankruptcy Cases

Continued from page 5

Debtors, with the engagement led and supervised by senior managing directors **Michael C. Buenzow** and **Daniel Hugo**.

Lazard Freres & Co. LLC is serving as the Debtors' sole investment banker, with managing director **Tyler W. Cowan** and vice chairman **David Kurtz** leading the engagement.

Grant Thornton LLP is the Debtors' auditor, with the engagement led by **Gustavo Hernandez**, an audit partner at the firm.

Deloitte Tax LLP is the tax service provider, with **Jeffrey van Gelder**, a partner, leading the engagement.

Hilco Real Estate, LLC, is the real estate advisor, with **Ryan O. Lawlor**, the firm's vice president, assistant general counsel and managing member, leading the engagement.

CBIZ Inc. is providing financial reporting valuation services to the Debtors. The engagement is led by **Tony Kancijanic**, managing director in the Central Region of **CBIZ Valuation Group, LLC**, a subsidiary of CBIZ, Inc.

Norton Rose Fulbright US LLP, led by senior counsel **Howard S. Beltzer**, is providing corporate and litigation services to the independent members of

Claire's Stores' board of directors.

Prime Clerk LLC is serving as the Company's claims and notice agent, solicitation agent, and administrative advisor.

DIP LENDER

Latham & Watkins LLP is representing Citibank, which is providing debtor-in-possession financing. Latham's Chicago partner **Richard A. Levy** and associate **Annemarie V. Reilly** are the professionals responsible for the engagement.

Duane Morris LLP, led by partner **Michael R. Lastowski** and associate **Jarret P. Hitchings**, is the local counsel to Citibank.

David Feldman and **Matthew P. Porcelli** of **Gibson, Dunn & Crutcher LLP** and **Jeremy W. Ryan** of **Potter Anderson & Corroon LLP**, are serving as counsel for Credit Suisse as agent on behalf of the prepetition ABL lenders.

FIRST LIEN LENDERS

Willkie Farr & Gallagher LLP, led by co-chairman **Matthew A. Feldman**, partner **Brian S. Lennon**, partner **Todd G. Cosenza**, and associate **Daniel I. Forman**, is serving as counsel to the ad hoc first lien group.

Morris Nichols Arsht &

Tunnell LLP, led by partner **Robert J. Dehney**, partner **Curtis S. Miller**, and associate **Paige N. Topper**, is local counsel to the ad hoc first lien group.

According to the RSA, **Millstein & Co.** also advised the first lien holders prepetition.

As of June 13, 2018, the members of the first lien group are **Elliott Management Corporation**, **Monarch Alternative Capital LP**, **The Cincinnati High Yield Desk of J.P. Morgan Chase Bank, N.A.**, **The Indianapolis High Yield Desk of JPM**, **Venor Capital Management LP**, and **Diameter Capital Partners LP**.

Emmet, Marvin & Martin LLP, led by its Banking and Finance Department partner **Thomas A. Pitta**, is representing Bank of New York Mellon Trust Company, N.A., the indenture trustee and collateral agent under the indenture governing the 9% senior secured first lien notes with \$210 million outstanding as of the Petition Date.

Ballard Spahr LLP, led by partner **Matthew G. Summers** and associate **Laurel D. Roglen**, is representing Wilmington Trust, National Association, as administrative and collateral agent under the first lien term loan, which

Research Report

Who's Who in Claire's Stores' Bankruptcy Cases

Continued from page 6

has \$32.3 million outstanding as of the Petition Date.

SECOND LIEN LENDERS

White & Case LLP, led by partners **Thomas E. Lauria** and **Jason N. Zakia**, in Miami, Florida, and partners **J. Christopher Shore**, **Harrison L. Denman** and **David M. Turetsky**, and associate **Ian J. Silverbrand**, in New York, is representing Oaktree Capital Management, L.P., the holder of 71% of the second lien debt.

Fox Rothschild LLP, led by partners **Jeffrey M. Schlerf** and **Carl D. Neff**, and associate **Margaret M. Manning**, is serving as Oaktree's Delaware co-counsel.

Houlihan Lokey, Inc., is the investment banker to Oaktree. **David Hilty**, managing director and co-head of Houlihan Lokey's Financial Restructuring Group, leads the engagement.

Pryor Cashman LLP, led by partners **Seth H. Lieberman** and **Patrick Sibley**, and associate **Matthew W. Silverman**, is representing Wilmington Savings Fund Society, the successor indenture trustee under the indenture governing the 8.875% senior second lien notes with outstanding principal of \$222.3 million.

UNSECURED CREDITORS

On March 27, 2018, the United States Trustee for the District of Delaware appointed an official committee of unsecured creditors. The members of the creditors' committee are: (a) **BOKF, N.A. as Indenture Trustee**, (b) **Studex Corporation**, (c) **PopSockets, LLC**, (d) **Simon Property Group, L.P.**, (e) **GGP Limited Partnership**, (f) **Washington Prime Group, Inc.**, and (g) **AT&T Corp. and affiliates**.

Cooley LLP is serving as lead counsel to the creditors' committee. Professionals primarily staffed on this matter are partners **Jonathan Bach**, **Cathy Hershcopf**, **Ian Shapiro** and partner **Seth Van Aalten**; and special counsel **Michal Klein**, as well as associates **Robert Winning**, **David Bright**, **Sarah Carnes**, **Summer McKee**, and **Lauren Reichardt**.

Bayard, P.A., is the Delaware co-counsel to the creditors' committee. The primary attorneys working on this representation are director **Justin R. Alberto**, counsel **Erin R. Fay**, associates **Daniel N. Brogan**, and **Gregory J. Flasser**.

Province, Inc., is the committee's financial advisor. **Peter Kravitz**, the firm's principal,

leads the engagement.

Arent Fox LLP is serving as counsel to BOKF, National Association, the indenture trustee for the unsecured notes, representing the interests of holders of the notes (those parties to the RSA and those who are not). Managing partner **Andrew I. Silfen** and **Beth M. Brownstein**, in New York, and partner **Jackson D. Toof**, in Washington, D.C., are part of the team handling the case.

Morris James, LP, led by partner **Eric J. Monzo** and attorney **Brenna A. Dolphin**, in Delaware, and **Frederic Dorwart, Lawyers, PLLC**, led by **Samuel S. Ory**, are also representing BOKF.

SPONSOR

Paul, Weiss, Rifkind, Wharton & Garrison LLP, led by partner **Jeffrey D. Saferstein**, is representing sponsor Apollo Management VI, L.P.

Young, Conaway, Stargatt & Taylor, LLP, led by partners **Pauline K. Morgan** and **Sean T. Greecher**, is the local counsel to Apollo.

BANKRUPTCY JUDGE

The Honorable **Mary F. Walrath** is the case judge. ✎

Cannabis, *from page 1*

has meant that cannabis and cannabis-related businesses do not have access to the bankruptcy courts. But, as a recent Ninth Circuit Bankruptcy Appellate Panel decision has shown, that exclusion is beginning to bump up against some limits, and judges may increasingly find ways to keep cannabis-related, if not focused, bankruptcies in their courtroom.

Where debtors are directly involved in the cannabis business, bankruptcy courts have been fairly uniform in dismissing cases or otherwise denying access to the bankruptcy process. Even when the debtor's business does not directly involve the growing, sale or distribution of cannabis, the United States Trustee's office, the agency charged with overseeing the administration of bankruptcy cases, has taken a clear position that the bankruptcy courts should be a closed off avenue. As Clifford J. White III, director for the Executive Office for U.S. Trustees wrote in a December 2017 ABI Article, "rather than make its own marijuana policy, the USTP will continue to enforce the legislative judgment of Congress by preventing the bankruptcy system from being used for purposes that Congress has determined are illegal." "Why Marijuana Assets May Not be Administered in Bankruptcy" (Clifford J. White III and John Sheahan), ABI Journal, December 2017, p.34.

While the US Trustee program has taken a strong advocacy position, federal courts must struggle with a delicate balancing act when the cannabis-related activity may be only tangential to the debtor's business. So, among the many activities prohibited by the CSA is leasing property to a cannabis grower or making a property available for the sale or

Where debtors are directly involved in the cannabis business, bankruptcy courts have been fairly uniform in dismissing cases or otherwise denying access to the bankruptcy process.

distribution of marijuana regardless of how important or unimportant that particular parcel may be to a property owner's overall business. 21U.S.C. § 856(a). In addressing these concerns, the federal bankruptcy courts have been careful to ensure that the bankruptcy process is not used to enable a debtor to continue to participate in a federal crime and, for the most part, they have dismissed cases that were cannabis-related. So, for example, in *In re Arm Ventures, LLC*, 564 B.R. 77 (Bankr. S.D. Fla. 2017), the bankruptcy court dismissed the case of a commercial property owner when the debtor was unable to propose a chapter 11 plan that was not reliant on funding by a tenant that was engaged in manufacturing medical

marijuana. See also, *In re Rent-Rite Super Kegs*, 484 B.R. 799 (Bankr. D. Col. 2012) (bankruptcy case dismissed where rent from cannabis business comprised 25% of debtor's income); *In re Medpoint Management, LLC*, 528 B.R. 178 (Bankr. D. Ariz. 2015) (involuntary petition dismissed because debtor provided management services and intellectual property to cannabis business). This is consistent with the reasoning federal courts have followed outside the bankruptcy arena when dealing with cannabis activity authorized under state law, see., e.g., *The Fourth Corner Credit Union v. Federal Reserve Bank of Kansas City*, (10th Cir. 2017)(court dismissed complaint filed by credit union challenging the Federal Reserve Bank of Kansas City's denial of a master account to the credit union because the credit union provided banking services to marijuana-related businesses).

While dismissal of cases by federal courts where the debtor continues to be involved in activity that is criminal under federal law is not surprising, the question becomes more complicated when the prohibited activity is ancillary to the debtor's business or may not even be ongoing. In those circumstances, using the CSA to deny debtors the protection of federal insolvency laws to an entire enterprise based on a portion of its activity may give courts pause as the interest of debtor rehabilitation

Cannabis, *from page 8*

and creditor protection start to look more significant measured against what appears to be only a tangential connection to illicit activity. In what might be the signaling of a slight change of direction in the courts, the Bankruptcy Appellate Panel (“BAP”) for the Ninth Circuit has taken that approach and given some guidance as to limited circumstances that may allow a cannabis-related business to avail itself of the bankruptcy courts. In *In re Olsen*, the BAP vacated a bankruptcy court order that dismissed a chapter 13 case on the grounds that the debtor’s receipts of rents from a state law authorized marijuana dispensary was an ongoing criminal activity. *Olson v. Van Meter (In re Olsen)*, 2018 Bankr. LEXIS 480 (B.A.P. 9th Cir. Feb. 5, 2018). In *Olsen*, the BAP refused to accept a dismissal based on a conclusory finding predicated on the mere fact that the debtor had a lease with a marijuana business and remanded the case for further findings delineating the specific criminal activity and the legal standard for dismissing the case.

The facts of the Olsen case were complicated, even if the issues were simple. Mrs. Olsen, a partially blind 92-year old nursing home resident, was the principal of a shopping center that leased space to (among other tenants) a marijuana dispensary operating legally under California

law. Pre-petition, she had entered into a contract for the sale of the shopping center to the dispensary’s owner though that contract eventually became embroiled in litigation. At the same time as the sale litigation was underway, the property’s secured lenders began foreclosure proceedings. To bring both the sale and the foreclosure litigations to

In addressing these concerns, the federal bankruptcy courts have been careful to ensure that the bankruptcy process is not used to enable a debtor to continue to participate in a federal crime, and, for the most part, they have dismissed cases that were cannabis-related.

halt, Mrs. Olsen filed for bankruptcy protection under Chapter 13. While the debtor filed a plan, which would have resulted in the sale of the property, the bankruptcy case never got that far. The bankruptcy court, on its own, dismissed the case based on its finding that the debtor was in violation of federal law for leasing its property to and collecting rent from a marijuana dispensary, even if the dispensary was operating legally under California state law. In dismissing the case, the bankruptcy court was not dissuaded by the debtor having attempted to distance

herself from the cannabis business, having already ceased to take rent from the dispensary and moving to terminate rather than assume the lease. For the bankruptcy court, the critical factor was that the debtor had been collecting rent from an illegal activity for some period of time during the pendency of the case and was therefore a participant in criminal activity. *Olsen*, at *8.

On first blush, the bankruptcy court decision below was not an outlier. As the B.A.P. noted:

Some courts have held that, to the extent estate assets are used for or generated by the operation of a federally prohibited marijuana business, a trustee or debtor in possession may not administer those assets without violating federal law. *Arenas v. U.S. Tr. (In re Arenas)*, 535 B.R. 845, 852 (10th Cir. BAP 2015); *In re Medpoint Mgmt., LLC*, 528 B.R. 178, 184-85 (Bankr. D. Ariz. 2015), vacated in part, *Medpoint Mgmt., LLC v. Jensen (In re Medpoint Mgmt., LLC)*, BAP No. AZ-15-1130-KuJaJu, 2016 WL 3251581 (9th Cir. BAP Jun. 3, 2016); *In re Johnson*, 532 B.R. 53, 56-57 (Bankr. W.D. Mich. 2015); *In re Rent-Rite Super Kegs W., Ltd.*, 484 B.R. 799, 810 (Bankr. D. Colo. 2012).

Olsen, at *13.

In that context, the lower court’s decision was unremarkable and

Cannabis, *from page 9*

followed a line of cases that emphasize the need to prevent federal courts from being complicit in a federal crime. But that rigid approach results in a mechanical analysis that leads to dismissal anytime cannabis is involved, no matter how tangential. And such appears to have been the concern in *Olsen* that underlined the approach taken by the BAP for the Ninth Circuit. Rather than adopting a rigid approach where any cannabis connection results in dismissal, the BAP focused on the specific “knowledge” requirement that the CSA imposed for prohibiting leasing space to a cannabis business and addressed the unique facts of this case, remanding the dismissal back to the bankruptcy court for additional findings. Specifically, the BAP required the bankruptcy court to make detailed finding about the degree to which the nearly blind, elderly debtor, residing in a nursing home and relying on others to operate the business, had actual knowledge of the source of rental income from a portion of her property, which was necessary to find that the debtor was a criminal under the federal statute. Further, the BAP required the bankruptcy court to detail with specificity the precise legal basis for the dismissal as no finding had been made in the lower court regarding the debtor’s bad faith or “unclean hands”.

While the *Olsen* decision was unanimous at the BAP level, Judge Maureen A. Tighe filed a concurring opinion that highlighted the overgrowing dilemma that state law marijuana legalization brings to the federal courts:

With over twenty-five states allowing the medical or recreational use of marijuana, courts increasingly need to address the needs of litigants who are in compliance with state law while not excusing activity that violates federal law. A finding explaining how a debtor violates federal law or otherwise provides cause for dismissal is important to avoid incorrectly deeming a debtor a criminal and denying both debtor and creditors the benefit of the bankruptcy laws. Bankruptcy courts have historically played a role in providing for orderly liquidation of assets, equal payment to creditors, and resolution of disputes that otherwise would take many years to resolve.

Olsen, at *14 (Tighe, dissenting).

While *Olsen* does not represent a dramatic opening of the bankruptcy courts to cannabis businesses, it does suggest that the mere “presence of marijuana near the case should not cause mandatory dismissal.” *Olsen*, at *17 (Tighe, dissenting). Rather, courts will continue to struggle to find a way to permit debtors to avail themselves

of the protections of the bankruptcy code when the debtor’s own ongoing activity is not in direct violation of federal law. More importantly, *Olsen* provides some guidance for property-owning debtors, who can attempt to pro-actively use the lease-rejecting powers of a bankruptcy proceeding to, as was done in *Olsen*, separate from the cannabis-related activity. Certainly, lenders to landlords that may be leasing property to legal dispensaries or distribution facilities will want to consider including provisions in their documents to ensure as much as possible that they, not the debtor, control the right to reject leases for any cannabis related business in the event of a bankruptcy and that cannabis-related leases can be terminated upon a foreclosure sale or bankruptcy sale or assignment of the property or lease. ✕

About The Author

Dov R. Kleiner is a partner with Kleinberg, Kaplan, Wolff & Cohen, P.C., in New York. Dov has worked on a wide range of restructuring and reorganization matters during his more than 20 years in practice. Dov has represented a variety of debtors, creditors, official and unofficial committees, borrowers, lenders, and purchasers of assets or securities of distressed companies. Dov can be reached at dkleiner@kkwc.com.

Research Report

Who's Who in Nine West's Bankruptcy Cases

by Carlo Fernandez

Nine West Holdings Inc. is a footwear, accessories, women's apparel, and jeanswear company with a portfolio of brands that includes Nine West, Anne Klein, and Gloria Vanderbilt. The company is a wholesale partner to major U.S. retailers and has international licensing arrangements covering more than 1,200 points of sale around the world.

The Debtors operated five business units, four of which design, contract, manufacture, and distribute women's footwear and handbags (the "Nine West Group"), women's and men's jeanswear (the "One Jeanswear Group"), women's suit separates, dresses, and sportswear (the "Kasper Group"), and fashion jewelry ("The Jewelry Group"), and one that has a growing licensing and brand management business ("Anne Klein"). The five major business units employ 1,500 people across the U.S. and generated \$1.6 billion in net revenue in fiscal year 2017.

In April 2014, Sycamore Partners Management, L.P., acquired The Jones Group Inc. for \$2.2 billion via leveraged buyout. As part of the transaction, Jones Group merged with several affiliates, and the newly merged company was renamed as Nine West Holdings, Inc. The LBO was funded primarily by a \$300 million unsecured term loan and a \$445 million secured term loan.

In August 2017, to ensure a fair and thorough review of the Debtors' strategic alternatives, the board of directors or managers of Nine West Holdings, Jasper Parent LLC, and One Jeanswear Group, Inc., appointed Alan Miller and Harvey Tepner to the boards

as disinterested directors. As part of this mandate, the independent directors commenced an investigation into the 2014 LBO transaction and related carve-out transactions to determine whether the Debtors' estates may have any claims.

On April 6, 2018, Nine West Holdings and 10 affiliates sought Chapter 11 protection (Bankr. S.D.N.Y. Lead Case No. 18-10947) to right size their balance sheet, sell the Nine West Group's assets, and execute on their turnaround strategy to concentrate exclusively on their remaining businesses.

The Debtors signed a restructuring support agreement with certain members of the ad hoc secured lenders group, certain members of the ad hoc crossover group, and Brigade Capital Management, LP, who collectively hold more than 78% of the Company's secured term loan and more than 89% of the unsecured term loan. The RSA contemplates:

(a) the sale of the Debtors' footwear and handbag business,

(b) the issuance of new equity in Reorganized Holdings, and

(c) the commitment of exit financing that will repay secured term loan claims in full in cash (but with interest paid at the non-default rate).

In addition to the chapter 11 cases, Jones Canada, Inc., and Nine West Canada LP commenced foreign insolvency proceeding under the Bankruptcy and Insolvency Act in Canada.

As of the Petition Date, the Debtors had \$1.562 billion in outstanding funded-debt obligations:

* \$108.0 million outstanding under

a \$250 million secured revolving credit facility ("ABL Facility");

* \$22.1 million outstanding under a \$25 million first in, last out loan (the "FILO Loan");

* \$427.1 million outstanding under a secured term loan facility;

* \$300 million outstanding under an unsecured term loan facility;

* \$426.7 million outstanding under 8.25% senior unsecured notes due March 2019;

* \$28.5 million outstanding under 6.875% senior unsecured notes due March 2019 ("Stub 2019 Notes"); and

* \$250.0 million outstanding under of 6.125% senior unsecured notes due Nov. 2034.

The Debtors have filed a reorganization plan in accordance with the terms of the RSA. The plan is expected to slash \$900 million from the Debtors' \$1.6 billion debt. Under the plan, holders of unsecured term loan claims will receive proceeds from the \$150 million second lien facility and most of the new common stock of reorganized Nine West. General unsecured creditors will receive their pro rata share of the value of the Debtors' unencumbered property. Holders of equity interests in the holding company won't receive anything on account of those interests.

A majority of the Debtors' prepetition secured lenders are providing \$297.5 million of debtor-in-possession financing, which refinanced the prepetition ABL facility and FILO loan and provides \$50 million of new money loans.

An affiliate of brand developer and marketing company Authentic Brands

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Who's Who in Nine West's Bankruptcy Cases

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Group served as stalking horse with a \$140 million bid for the Company's Nine West, Bandolino and associated brands. At a June 8 auction, Authentic Brands' ABG-Nine West LLC outbid shoe retailer DSW Inc. with a final offer of \$340 million in cash and other consideration.

The official committee of unsecured creditors in the Chapter 11 cases in June filed a motion seeking to conduct an examination of, and discovery from, the Debtors and third parties pursuant to F.R.B.P. Rule 2004. The creditors' committee, which filed a redacted version of its discovery motion, explains that its initial investigation indicates there are a number of potential estate claims arising from the 2014 LBO. As part of the LBO, the Debtors raised hundreds of millions of dollars to cash out their former shareholders. The committee contends that the 2014 LBO and carve-out transactions left the Debtors heavily levered, with far more debt and substantially fewer assets than beforehand, raising the possibility that some or all of the Debtors were rendered insolvent.

DEBTORS

Kirkland & Ellis LLP is serving as the Debtors' counsel. Attorneys handling the case are New York restructuring partners **James H.M. Sprayregen, P.C.**, and **Christopher J. Marcus, P.C.** and Chicago partners **James A. Stempel** and **Joseph M. Graham**, and associate **Angela M. Snell**.

Lazard Freres & Co. is serving as the Debtors' investment banker, with vice chairman **David S. Kurtz** leading

the engagement.

Alvarez & Marsal North America LLC is providing interim management and financial advisory services to the Debtors. A&M managing director **Ralph Schipani** has been named interim CEO to assist the Debtors with their reorganization effort.

Consensus Advisory Services LLC and **Consensus Securities LLC** serve as the Debtors' investment bankers in connection with the sale of intellectual property associated with the Nine West and Bandolino brands. **Michael A. O'Hara**, founder and managing member of Consensus, leads the engagement.

Deloitte Tax LLP is the Debtors' tax services provider. **Elias Tzavelis**, partner, is leading the engagement.

BDO USA LLP is the Debtors' auditor and accountant. **Anthony Castellano**, a partner of BDO, has primary responsibility for providing services to the Debtors.

Munger, Tolles & Olson LLP is serving as the Company's independent counsel, rendering services at the direction of independent directors Alan Miller and Harvey Tepner. Los Angeles partners **Thomas B. Walper** and **John W. Spiegel** are the attorneys assigned to supervise this matter.

Berkeley Research Group is serving as independent financial advisor, rendering professional services at the direction of Nine West's independent directors. The Berkeley professionals expected to provide the services are **Ed Ordway, Duncan Pickett, William Epstein, Jack Surdoval, John Fenn**, and **Sal Tajuddin**, and led by **Jay Borow**, managing director.

Prime Clerk LLC is the Debtors' claims and noticing agent.

SECURED LENDERS

Davis Polk & Wardwell LLP is serving as counsel to (i) the ad hoc group of secured term loan lenders, and (ii) **Cortland Market Services, LLC**, as the administrative agent under the prepetition secured term loan facility and the administrative agent under the DIP term loan facility. The Davis Polk restructuring team includes partners **Marshall S. Huebner, Brian M. Resnick** and **Darren S. Klein** and associates **Adam L. Shpeen, Jacob Weiner** and **Michael Pera**. The credit team includes partner **Jinsoo H. Kim**, counsel **Christian Fischer** and **Benjamin Cheng** and associate **Phoebe Jin**.

As of April 29, 2018, the ad hoc secured lenders group is comprised of **Farmstead Capital Management, LLC**, and **KKR Credit Advisors (US) LLC**, which hold a combined \$227.5 million of the principal amount of the prepetition secured term loan, \$17.54 million principal amount of the DIP term loan, and \$17.54 million in commitments for future funding under the DIP term loan.

Ducera Partners LLC is the financial advisor to the ad hoc secured lenders group.

King & Spalding LLP is serving as counsel to the ad hoc crossover group of secured and unsecured term loan lenders. New York partners **Michael C. Rupe** and **Jeffrey D. Pawlitz**, and associate **Michael R. Handler**, and Chicago partner **Bradley Thomas Giordano** are the professionals

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involved in the case.

Guggenheim Securities LLC is the financial advisor to the ad hoc crossover group.

Members of the ad hoc crossover group are **Alden Global Capital LLC**, **Carlson Capital, L.P.**, **CVC Credit Partners, LLC**, **Silvermine Capital Management LLC**, and **Trimaran Advisors**. As of April 18, 2018, the members held \$101.8 million of principal amount of the prepetition secured term loan, \$162.6 million of the unsecured term loan, and \$12.54 million of the DIP term loan.

Kramer Levin Naftalis & Frankel LLP is counsel to **Brigade Capital Management, LP**. The Kramer Levin team is led by New York partner **Douglas H. Mannal** and associate **Rachael L. Ringer**. Counsel to Brigade has engaged **Moelis & Co.** to act as its financial advisor in connection with the restructuring of the Debtors.

Morgan, Lewis & Bockius LLP, led by associate **Matthew C. Ziegler**, in New York, and partner **Julia Frost-Davies**, and associate **Amelia C. Joiner**, in Boston, Massachusetts, is representing **Wells Fargo Bank, National Association**, the agent under the prepetition ABL facility and the postpetition ABL facility.

UNSECURED CREDITORS

William K. Harrington, the U.S. Trustee for Region 2 appointed seven creditors to serve on an official committee of unsecured creditors, presently comprised of: (1) New York-based **Aurelius Capital Master Ltd.**, a holder of \$128.3 million of the 6.125% unsecured notes, and \$35.7 million of

the 8.25% unsecured notes; (2) New York-based **GLAS Trust Company LLC**, the administrative agent under the unsecured term loan; (3) Washington D.C.-based **Pension Benefit Guaranty Corporation**, which holds claims arising from pension obligations of the Debtors; (4) Indianapolis-based **Simon Property Group**, a holder of a \$6.7 million claim arising from the rejection of certain leases; (5) Kowloon, Hong Kong-based **Stella International Trading (Macao Commercial Offshore) Limited**, a trade creditor with a claim of not less than \$34 million; (6) Kowloon, Hong Kong-based **Surefield Limited**, a trade creditor owed at least \$18.24 million; and (7) St. Paul, Minnesota-based **U.S. Bank National Association**, the trustee under the 8.25% unsecured notes and the 6.875% unsecured notes.

Akin Gump Strauss Hauer & Feld LLP is serving as counsel to the creditors' committee. Partners **Daniel H. Golden**, **Arik Preis**, **David M. Zensky**, **Deborah Newman**, and **Jason P. Rubin**, counsel **Kevin Zuzolo**, and associate **Anthony Loring** are the principal attorneys assigned to the case.

Houlihan Lokey Capital, Inc., is serving as investment banker to the creditors' committee, with the engagement led by managing director **Saul Burian**.

Protiviti Inc. is the committee's financial advisor and forensic accountant. **Michael Atkinson**, **Suzanne Roski**, and **Guy Davis** are the project managing directors, and **Jason Crockett** is the project director.

Kilpatrick Townsend & Stockton LLP, led by partner **Todd C. Meyers**,

partner **David M. Posner**, senior associate **Gianfranco Finizio**, and associate **Kelly Moynihan**, and **Friedman Kaplan Seiler & Adelman LLP**, led by founder **Edward A. Friedman**, partner **Robert J. Lack**, and counsel **Stan Chiueh**, are representing **Wilmington Savings Fund Society, FSB**, the indenture trustee for the 6.125% senior notes.

Prepetition, **Jones Day** represented the 2034 Noteholder Group, comprised of holders of 6.125% unsecured notes.

EQUITY HOLDERS

Proskauer Rose LLP, led by partner **Michael T. Mervis**, and associate **Jared Zajac**, in New York, partner **Mark K. Thomas**, in Chicago, and partner **Peter J. Young**, in Los Angeles, is representing **Sycamore Partners Management, L.P.**, owner of 90.2% of the equity interests in the Debtors.

Milbank, Tweed, Hadley & McCloy LLP, led by New York partner **Dennis F. Dunne**, and Washington, D.C., managing partner **Andrew M. Leblanc**, is representing **KKR Asset Management**, parent of **KKR Credit Advisors (US) LLC**, holder of 9.8% of the equity interests in the Debtors' ultimate parent.

BUYER

DLA Piper Global Law Firm, led by Chicago partner **Richard A. Chesley**, and New York partner **Rachel Ehrlich Albanese**, is representing **ABG**.

BANKRUPTCY JUDGE

The Honorable **Shelley C. Chapman** is the case judge. ✪

Special Report

Canadian Bankruptcy Law Firms 2018

Firm	Key Professionals	Recent Representative Clients
BENNETT JONES LLP 416-863-1200 – Toronto 403-298-3100 – Calgary www.bennettjones.com Bankruptcy Attorneys: 20 Total Attorneys: 400	Ken Lenz S. Richard Orzy Chris Simard Raj Sahni Kevin Zych	Argent Energy Trust; Banro Corporation (VR Global Partners, L.P.); Canso Investment Counsel Ltd.; Connacher Oil & Gas first lien lenders; Danier Leather; Discovery Air (Gwich'in Development Corporation); Ivanhoe Energy; KSV Kofman; Northern Transportation Company; Performance Sports Group Ltd. Board of Directors; Quicksilver Resources Canada; Sanjel Corporation; Sino Forest; SecureCare Capital; Stelco, formerly U.S. Steel Canada (Ernst & Young Inc. as CCAA monitor); SunEdison Canada; Target Canada landlords; Tervita Corporation; The Catalyst Capital Group; Urbancorp (Alan Saskin); Walton Group of Companies; and Wilmington Trust National Association
BLAKE, CASSELS & GRAYDON LLP 416-863-2400 www.blakes.com Bankruptcy Attorneys: 20 Total Attorneys: 609	Bernard Boucher Kelly Bourassa Milly Chow Sébastien Guy Pamela Huff William Kaplan Linc Rogers Peter Rubin Ryan Zahara	1715439 Ontario fka Index Energy Mills Road (as Construction Lien Counsel); BioAmber Inc.; Carillion Canada; CGG Canada Services Ltd.; Crystal Wealth Group (BDO Canada); Express Fashion Apparel Canada (Alvarez & Marsal Canada as Monitor); Performance Sports Group Ltd. (buyers Sagard Holdings Inc. and Fairfax Financial Holdings Limited)
CASSELS, BROCK AND BLACKWELL LLP 416-860-6463 www.casselsbrock.com Bankruptcy Attorneys: 28 Total Attorneys: 206	Joseph J. Bellissimo John Birch Mary Buttery Jane Dietrich Larry Ellis Deborah S. Grieve Lara Jackson Ryan Jacobs Shayne Kukulowicz Natalie E. Levine	1715439 Ontario fka Index Energy Mills Road; 1735825 Ontario Inc, fka Grafton-Fraser (Richter Advisory as Monitor); Aspen Air (Trustee); Banro Corporation; Express Fashion Apparel Canada (Merchant Retail Solutions ULC); Murrayville House condo project receivership (625536 B.C. Ltd., one of the mortgagees); Purcell Basin Minerals (Highland Pacific); Sears Canada Inc. (GACP Finance Co., as administrative agent for the DIP Term Loan Lenders); Stonebriar Commercial Finance; Toys "R" Us Canada (Grant Thornton as CCAA Monitor)
DICKINSON WRIGHT LLP 416-777-0101 www.dickinsonwright.com Bankruptcy Attorneys: 7 Total Attorneys: 46	Lisa Corne Eric Kay John Leslie David Preger Mark Shapiro	Creditors, debtors and court-appointed officers in bankruptcy, insolvency and restructuring cases, including Johnson Controls, Visteon Corp., Romspen Investment Corporation, Ontario Wealth Management Corporation, MNP Ltd., A. Farber & Partners, and SF Partners

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Firm	Key Professionals	Recent Representative Clients
GOODMANS LLP 416-979-2211 www.goodmans.ca Bankruptcy Attorneys: 14 Total Attorneys: 195	Chris Armstrong Jay Carfagnini Robert Chadwick Caroline Descours Brian Empey Joe Latham Brendan O'Neill Joseph Pasquariello Gale Rubenstein Melaney Wagner	1715439 Ontario fka Index Energy Mills Road (Grant Thornton as Monitor); Banro Corporation (Gramercy Funds Management LLC); IPO and debt refinancing of Ceridian HCM Holding; Concordia International Corp.; Discovery Air (KSV Kofman as Monitor); Toys "R" Us Canada; Sears Canada Inc. (Wells Fargo Capital Finance Corporation Canada, as administrative agent for the DIP ABL Lenders); U.S. Steel Canada (Her Majesty the Queen in Right of Ontario and the Superintendent of Financial Services (Ontario));
GOWLING WLG (CANADA) LLP 416-862-7525 www.gowlingwlg.com Bankruptcy Attorneys: 40 Total Attorneys: 700+	Patrice Benoit Colin Brousson David F.W. Cohen Thomas Cumming John McLean Clifton Prophet Jonathan Ross Patrick Shea Jennifer Stam Derrick Tay	1735825 Ontario Inc, fka Grafton-Fraser (Jaytex of Canada); Discovery Air (ECN Aviation Inc.); Dundee Energy; Orbite Technologies Inc. (Computershare Trust Company of Canada as DIP Lender); and Purcell Basin Minerals
McCARTHY TÉTRAULT LLP 416-362-1812 www.mccarthy.ca Bankruptcy Attorneys: 24 Total Attorneys: 567	Philippe H. Bélanger Peter Birkness Barbara J. Boake Miguel Bourbonnais Sean F. Collins James D. Gage Geoff R. Hall Marjolaine Hémond Hotte Walker W. MacLeod Marc J. MacMullin	1031084 Alberta Ltd. and 623735 Saskatchewan Ltd.; Banro Corporation (Baiyin International Investment Ltd./Baiyin Nonferrous Group Company); BioAmber Canada (Maynbridge Capital); DragonWave (Transform-X Inc. as buyer); Mosaic Energy Limited (National Bank); SquareTwo Financial Services (Resurgent ~ Capital Services as buyer); Takata Corp.; and U.S. Steel Canada

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Firm	Key Professionals	Recent Representative Clients
McMILLAN LLP 403-531-4700 www.mcmillan.ca Bankruptcy Attorneys: 26 Total Attorneys: 256	Sidney Elbaz Yoine Goldstein Michael J. Hanlon Brett G. Harrison Andrew J.F. Kent Adam C. Maerov Max Mendelsohn Peter J. Reardon Wael Rostom Tushara Weerasooriya	Aspen Air; Banro Corporation (FTI Consulting Canada as Monitor); BioAmber Canada (Comerica Bank); and Sears Canada (Edward S. Lampert and ESL Investments)
OSLER, HOSKIN & HARCOURT LLP 416-862-4908 www.osler.com Bankruptcy Attorneys: 12 Total Attorneys: 470+	Michael De Lellis Martin Desrosiers Tracy Sandler Randal Van de Mosselaer Marc Wasserman	1735825 Ontario Inc, fka Grafton-Fraser (Joint Venture of Gordon Brothers Canada and Merchant Retail Solutions); Acasta Enterprises in sale of Stellwagen unit to Martello Finance (Special Committee of Independent Directors); BioAmber Canada (Ingredion Incorporated); Corbeil Électrique in sale of business to AM-CAM Électroménagers; Stelco Inc. (Brookfield Capital Partners Ltd.); Half Moon Lake Resort Ltd. and Armac Investments Ltd. (KPMG as receiver); Express Fashion Apparel Canada; Payless Holdings; RCR International (Loxreen Canada Ltd. as buyer); and Sears Canada Inc.
STIKEMAN ELLIOTT LLP 416-869-5500 www.stikeman.com Bankruptcy Attorneys: 53 Total Attorneys: 500	Marc Barbeau David R. Byers C. Jean Fontaine Guy P. Martel Daphne MacKenzie Elizabeth Pillon Joseph Reynaud Ashley J. Taylor Claire Zikovsky	BioAmber Canada (Mitsui & Co.); Mood Media; and Tyhee N.W.T. Corp. (RMB Australia Holdings Limited as largest secured creditor)
TORYS LLP C416-865-0040 www.torys.com Bankruptcy Attorneys: 15 Total Attorneys: 324	David Bish Scott Bomhof Tony DeMarinis Kyle Kashuba Adam Slavens	1031084 Alberta Ltd. and 623735 Saskatchewan Ltd. (KPMG Inc. as Monitor); 1715439 Ontario fka Index Energy Mills Road (Index Energy Sweden AB (publ), Index Residence AB and Index Equity US); 1735825 Ontario Inc, fka Grafton-Fraser (Cadillac Fairview); Discovery Air (Clairvest Group Inc. and certain of its affiliates and managed investment funds); Express Fashion Apparel Canada (Cadillac Fairview); Performance Sports Group Ltd. (buyers Sagard Holdings and Fairfax Financial Holdings Limited); Toys "R" Us Canada (Fairfax Financial Holdings as buyer)



Worth Reading

BOARD GAMES

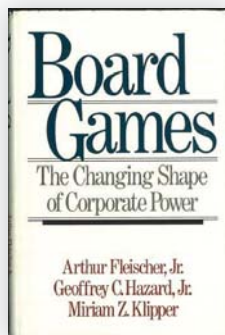
The Changing Shape of Corporate Power

Authors: Arthur Fleischer, Jr., Geoffrey C. Hazard, Jr.,
and Miriam Z. Klipper

Publisher: Beard Books

Softcover: 248 pages

List Price: \$34.95



Order This Book Online Now »

A ruling by the Delaware Supreme Court on January 29, 1985 was a wake-up call to directors of U. S. corporations. On this date, overruling a lower court decision, the Delaware Supreme Court ruled that the nine board members of Chicago company Trans Union Corporation were “guilty of breaching their duty to the company’s shareholders.” What the board members had done was agree to sell Trans Union without a satisfactory review of its value. The guilty board members were ordered by the Court to pay “the difference between the per share selling price and the ‘real’ market value of the company’s shares.”

Needless to say, the nine Trans Union directors were shocked at the guilty verdict and the punishment. The chairman of the board, Jerome Van Gorkom, was a lawyer and a CPA who was also a board member of other large, respected corporations. For the most part, it was he who had put together the terms of the potential sale, including setting value of the company’s stock at \$55.00 even though it was trading at about \$38.00 per share. News of the possible sale immediately drove the stock up to \$51.50 per share, and was commented on favorably in a “New York Times” business article. Still, Van Gorkom and the other directors were found guilty of breaching their duty, and ordered by Delaware’s highest court to pay a sum to injured parties that would be financially ruinous. This was clearly

more than the board members of the Trans Union Corporation or any other corporation had ever bargained for. It was more than the board members had ever conceived was possible without evidence of fraud or graft.

The three authors are all attorneys who have worked at the highest levels of the legal field, business, and government. Fleischer is the senior partner of the law firm Fried, Frank, Harris, Schriver & Jacobson at the head of its mergers and acquisitions department. He’s also the author of the textbook “Takeover Defenses” which is in its 6th edition. Hazard is a Professor of Law and former reporter for the American Bar Association’s special committee on the lawyers’ ethics code; while Klipper has been a New York assistant district attorney prosecuting corporate and financial fraud, and also a corporate attorney on Wall Street. Using the Trans Union Corporation case as a watershed event for members of boards of directors, the highly-experienced legal professionals lay out the new ground rules for board members. In laying out the circumstances and facts of a number of cases; keen, concise analyses of these; and finding where and how board members went wrong, the authors provide guidance for corporate directors, top executives, and corporate and private business attorneys on issues, processes, and decisions of critical importance to them.

Household International, Union

Carbide, Gelco Corp., Revlon, SCM, and Freuhauf are other major corporations whose merger-and-acquisitions activities resulted in court cases that the authors study to the benefit of readers. The Boards of Directors of these as well as Trans Union and their positions with other companies are listed in the appendix. Many other corporations and their board members are also referred to in the text.

With respect to each of the cases it deals with, *BOARD GAMES* outlines the business environment, identifies important individuals, analyzes decisions, and discusses considerations regarding laws, government regulations, and corporate practice. In all of this, however, given the exceptional legal background of the three authors, the book recurringly brings into the picture the legalities applying to the activities and decisions of board members and in many instances, court rulings on these. Passages from court transcripts are occasionally recorded and commented on. Elsewhere, legal terms and concepts—like “gross non-attendance”—are defined as much as they can be. In one place, the authors discuss six levels of responsibility for board members from “assure proper result” through negligence up to fraud. Without being overly technical, the authors’ legal experience and guidance is continually in the forefront. Needless to say, with this, *BOARD GAMES* is a work of importance to board members and others with the responsibility of overseeing and running corporations in the present-day, post-Enron business environment where shareholders and government officials are scrutinizing their behavior and decisions. ✎

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Special Report

Outstanding Investment Banking Firms 2018

Firm	Key Professionals	Recent Representative Clients
COHNREZNICK CAPITAL MARKETS New York, NY 917-549-0312 www.cohnreznickcapital.com	Nick Knapp Jeffrey R. Manning Conor McKenna	Alevo USA and Alevo Manufacturing; Folts Home and Folts Adult Home; Garces Restaurant Group; Rupari Holding Corp. (Unsecured Creditors' Committee); Stonebridge Financial Corp.; and Zero Energy Systems
EQUITY PARTNERS HG Easton, MD 866-969-1115 www.EquityPartnersHG.com	Matthew LoCascio Kenneth W. Mann	Accubuilt; BTH Quitman Hickory; C & D Fruit and Vegetable Co.; Florida Organic Aquaculture; Franchise Services of North America; LORAC Cosmetics; Ramada Morgantown Hotel and Conference Center; Sustainable Aquaculture Initiative; and USI Services
EVERCORE GROUP New York, NY 212-857-3100 www.evercore.com	Daniel M. Aronson Daniel A. Celentano Stephen Goldstein Stephen Hannan Roopesh Shah David Ying	Algoma; Castex Energy Partners; Catalina Marketing (creditor); CGG (creditor); Chicago Bridge and Iron (creditors); Clipper; Danaos; David's Bridal; Enduro; Fieldwood Energy; Gulfmark Offshore; Jones Energy; MachGen; Norske Skog; Northern Oil; Pacific Drilling; Proserve; QGOG (creditor); Southeastern Grocers; Tops Holding II Corporation; Toys R Us (creditor); and Vanguard Natural Resources
GUGGENHEIM SECURITIES New York, NY 212-739-0700 www.guggenheimpartners.com	Ronen Bojmel Stuart Erickson Dure Savini Morgan Suckow	Appvion; Charming Charlie Holdings; Limited Stores Company; and Payless Holdings
HOULIHAN LOKEY CAPITAL Los Angeles, CA 310-553-8871 www.hl.com	Saul Burian John-Paul Hanson William "Tuck" Hardie David Hilty Bradley Jordan Andrew Miller P. Eric Siegart Reid Snellenbarger Stephen J. Spencer Eric Winthrop	4 West Holdings; Adeptus Health and ADPT DFW Holdings; Angelica Corporation; Ciber Inc.; Cobalt International Energy; EBH Topco; Gander Mountain Company; Montco Offshore and Montco Oilfield Contractors; Mountain Creek Resort; Nine West Holdings (Unsecured Creditors' Committee); Oconee Regional Health Systems; Orion HealthCorp; The Rockport Company; Roust Corporation; Seadrill Limited; Violin Memory; Walter Investment Management Corp.; and Westinghouse Electric Company (Statutory Unsecured Claimholders' Committee)

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Firm	Key Professionals	Recent Representative Clients
IMPERIAL CAPITAL Los Angeles, CA 310-246-3700 www.imperialcapital.com	Mark Bilbao Jeff Finn Joseph Kazanovski John E. Mack, III Kenneth Morris Chris Shepard Robert Warshauer	Aina Le'a; Arecont Vision Holdings; Bertucci's Holdings; Keystone Tube Company; Lockwood Holdings; and Perfumania Holdings and Model Reorg Acquisition
JEFFERIES LLC New York, NY 212-284-2300 www.jefferies.com	Douglas Brickley Jeffrey Finger Matthew Hart Richard Morgner Leon Szlezinger Robert White	Armstrong Energy (Unsecured Creditors' Committee); Avaya (Unsecured Creditors' Committee); BCBG Max Azria Global Holdings; CAN Capital; Eletson Corporation; Forbes Energy Services Ltd.; Gibson Brands; iHeartMedia (Unsecured Creditors' Committee); La Paloma Generating Company; M&G USA Corporation (Unsecured Creditors' Committee); and Real Industry
LAZARD FRERES & CO. New York, NY 212-632-6000 www.lazard.com	Brandon Aebersold Jason A. Cohen Tyler W. Cowan David S. Kurtz Ari Lefkovits Richard Stables (UK) Andrew Torgove Andrew Yearley Kenneth S. Ziman	Ameriforge Group; CGG Holding (U.S.); Claire's Stores; Expro Holdings US; FirstEnergy Solutions Corp.; GST AutoLeather; Gymboree Corporation; Nuverra Environmental Solutions; Remington Outdoor Company; Stone Energy Corporation; Takata Corp. and TK Holdings; Tidewater; and Toys R Us
LINCOLN INTERNATIONAL Chicago, IL 312-580-8339 www.lincolninternational.com	Brendan Murphy Alexander Stevenson Brent C. Williams	CRS Reprocessing; Eastern Outfitters; Hobbico; and Katy Industries
LIVINGSTONE PARTNERS Chicago, IL 312-670-5900 livingstonepartners.com	Joseph Greenwood	Green Flash Brewing (Muirlands Capital as asset buyer); Lectrus Corporation; Maurice Sporting Goods; Quadrant 4 System Corp. and subsidiary Stratitude Inc.

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Outstanding Investment Banking Firms 2018

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Firm	Key Professionals	Recent Representative Clients
MOELIS & COMPANY New York, NY 212-883-3800 www.moelis.com	Thane Carlston Jared Dermont William Derrough Robert Flachs Zul Jamal Bassam Latif Adam Keil Barak Klein Steve Panagos	Charlotte Russe Holdings; Cobalt Energy Inc.; Drydocks World LLC; Global A&T Electronics Limited; HCR ManorCare; iHeartMedia; Oi S.A.; Seadrill Limited (Unsecured Bondholders); Takata Corp. and TK Holdings (Unsecured Creditors' Committee); The Weinstein Company Holdings; Toy R Us (Unsecured Creditors' Committee); Walter Investment Management Corp. (Ad Hoc Group of Senior Unsecured Noteholders); and Woodbridge Group of Companies
PERELLA WEINBERG PARTNERS New York, NY 212-287-3200 ww.pwpartners.com	Kevin M. Cofsky Bruce Mendelsohn Brian Silver Alexander Tracy	EV Energy Partners; iHeartMedia; Memorial Production Partners; Orexigen Therapeutics; R.E. Gas Development; and Seadrill Limited (Unsecured Creditors' Committee)
PIPER JAFFRAY & CO. Minneapolis, MN 800-333-6000 www.piperjaffray.com	Jean Hosty Richard Shinder Teri Stratton	Aerogroup International; Arhaus Furniture, Ignite Restaurant Group; Portrait Innovations; Quintana Energy and rue21 Inc.
PJT PARTNERS New York, NY 212-364-7800 www.pjtpartners.com	Jamie Baird Mark Buschmann James Cuminalo Peter Laurinaitis Michael O'Hara Steven Zelin	Ascent Resources Marcellus Holding; The Bon-Ton Stores; EXCO Resources; Homer City Generation; PES Holdings; Toisa Limited; and Westinghouse Electric Company
SSG CAPITAL ADVISORS West Conshohocken, PA 610-940-1094 www.ssgca.com	Mark E. Chesen Michael S. Goodman Michael J. Gorman Neil Gupta Matthew P. Karlson Teresa C. Kohl J. Scott Victor Robert C. Smith	A'GACI LLC; American Fuel Cell; BillNat; CHI St. Luke's Health Emergency Center; Costume Gallery; DFW Grating; Green Flash Brewing; Holliston; National Label Company; New England Orthotic & Prosthetic Systems; Nighthawk Royalties; North Philadelphia Health System; Peekay Boutiques; Polar Windows of Canada; Prestige Industries; Short Bark Industries; Unilife Corp.; United Road Towing; Vander-Bend Manufacturing; Verengo Inc.; Vitamin World; and Wood-Mode Incorporated
THREE TWENTY-ONE CAPITAL PARTNERS Columbia, MD 443-325-5290 www.321capital.com	Erik Endler Devin Hudgins Ervin M. Terwilliger Tim Zahrobsky	Bask Technology; MedCision LLC; Scandia Packaging Machinery Company; Troverco.; and U.S.A. Dawgs

Gnome de Plume

Short-Termism Really Is a Problem

by Deborah Hicks Midanek

What is the proper goal of the public company's board of directors? To maximize shareholder value, you suggest? I believe that is not only not correct, but it can be one of the reasons companies end up in the eager hands of the restructuring community. While it can seem heretical to argue that it is not in the shareholders' best interest to run the company that way, the impact of short-term focus is clearly damaging. The damage, however, is difficult to measure.

Maximizing shareholder value as the board and management's focus took root in the 1970s, and is not easy to shake. As it is difficult analytically to define what maximizing shareholder value means, we naturally default to the simplest measures: the current stock price and quarterly earnings trends. When the stock price is the measure of success, perspective is lost.

In his October 2015 Harvard Business Review article "Yes, Short-Termism Really Is a Problem" Roger Martin points out that it is not easy to isolate specific causes of results; in his words it is "much more likely that a whole lot of x's combine to cause y and a bunch of other stuff."

In short, pun intended, Martin observes mildly that results produced by businesses are a function of the decisions made by executives, and if those decisions do not focus on the long term, it seems reasonable to expect long-term performance of business will suffer.

Several studies help us to see this. John Graham, Campbell Harvey, and Shiva Rajgopal interviewed 400 CFOs of large US public companies. Almost 80% of them said that they would sacrifice economic value in order to meet that quarter's earnings expectations. Though in reality it may be that all respondents would do it, fully 80% actually admitted it, when executives might reasonably be expected to avoid any answer that would identify them with that unsavory activity called earnings manipulation.

The second and third studies are linked. Research by Bill Lazonick into the rise of corporate buybacks demonstrates that a disproportionate share of corporate earnings are being dedicated to repurchasing company stock rather than investing in future growth. Maybe not an unreasonable action in certain market conditions. A University of Illinois study indicates that a buyback often occurred when a corporation would miss its earnings per share target if not for the effect of the buyback. And the research suggests buybacks do boost share price in the short term. So buybacks, plain and simple, are a tool for boosting short-term performance, regardless of their impact over the long haul.

I believe that executives want their companies do as well as

possible in the long run. They believe, however, that the capital markets place unproductive constraints on them. According to Martin, they are constantly assessing how much they can invest in the long term before Wall Street makes their lives so miserable that their ability to manage at all is at risk. CEOs already under pressure, especially from activists, can invest almost nothing at all.

The focus of research analysts on organic growth continues the relentless demand for profit growth this quarter and every quarter. For many companies, buybacks are an explicit, ongoing part of their EPS growth formula, which may include, for example, 5% from organic growth, plus 3% from acquisitions, plus 2% from stock buybacks to arrive at the desired double-digit EPS growth.

Martin offers a compelling analogy. As Malcolm Gladwell pointed out in his piece about concussions and chronic traumatic encephalopathy (CTE) in football, when clever interested parties employ lack of definitive scientific evidence as their defense, they can keep the gravy train going for a long, long time. Coal-mining companies did it to stave off concerns about black lung for half a century. Tobacco companies did it to ignore concerns about lung cancer for decades.

Despite unclear scientific data, if you were a coal miner's wife or the husband of a two-pack-a-day smoker, you would not need definitive scientific evidence. You could see the damage with your own eyes. Yes, we see it with our own eyes. Short-termism is chronic, pervasive, damaging, and a problem. ✘

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