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TOUSA Revisited

Bankruptcy Court's Ruling Overturned

by Julie Schaeffer

When a bankruptcy court ruled that loan obligations and related asset pledges made by homebuilder TOUSA prior to its bankruptcy filings were fraudulent conveyances, the response from the lending community was one of alarm. But now a federal district court has reversed that ruling in what some bankruptcy professionals consider an astonishing decision – leaving many in the industry awaiting a circuit court analysis of what it all means.

“What is surprising about this decision is how broad it is,” says Glenn Siegel, a partner at Dechert LLP. “Usually a court will make a finding on one point, and say that point is sufficient to reverse. Here, the district court basically said the bankruptcy court is wrong in regard to everything. The thoroughness of this reversal and the energy that has been

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Release Denied

Restructuring Plans Undermined by Broad Requests

by Dave Buzzell

Earlier this year, Judge Mary Walrath of the Delaware Bankruptcy Court rejected Washington Mutual's restructuring plan on the grounds that some of the legal releases from liability in plan documents were written too broadly. While causing a stir in the bankruptcy community, the ruling was not surprising says Stephanie Wickouski, a bankruptcy partner with Bryan Cave LLP in New York.

“Improperly written releases are a huge topic these days. Releases being written in plans are becoming too broad, either with respect to the persons getting released or the scope of conduct being released.” Wickouski called Judge Walrath's ruling a bellwether decision

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Municipal Bond Irony

Bankruptcy Process Doesn't Apply to Likeliest Defaults

by Julie Schaeffer

Although Bill Brandt, who serves as President and CEO of Development Specialists, Inc., understands why municipal bond defaults are all the talk in the bankruptcy and restructuring industry, he thinks many industry professionals could benefit from an attempt to shed some further light on the subject.

“When most people hear about municipal bonds, they think of general obligation bonds or, to a lesser extent, revenue bonds,” he says. “What they aren't aware of, since they normally don't operate in this environment, is the wide array of debt instruments that are tax exempt and are referred to as municipal bonds by most people, but actually differ widely in their purposes and can be subject to a wide array of potential treatments

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applied to it is virtually unprecedented.”

In June 2005, a wholly-owned subsidiary of TOUSA formed a joint venture called Transeastern to acquire Florida homebuilding assets. A group of lenders provided approximately \$560 million of unsecured financing.

In 2006, the joint venture ran into hard times, and the lenders sued TOUSA and Transeastern, alleging a default under the credit agreement. In July 2007, TOUSA agreed to pay the Transeastern lenders \$420 million and, to finance the settlement, borrowed \$500 million, securing the debt with liens on virtually all of the enterprise’s assets, even though the majority of subsidiaries were not defendants in the litigation.

When TOUSA and its subsidiaries filed for bankruptcy protection six months later, the creditors’ committee sought to avoid the liens securing \$500 million in loans as fraudulent transfers and recover the \$420 million paid to settle litigation against TOUSA. Their reasoning: the subsidiaries were insolvent at the time TOUSA forced them to incur liabilities. The United States Bankruptcy Court for the Southern District of Florida agreed, ruling in October 2009 that the liens on the \$500 million TOUSA borrowed in July 2007 fraudulently conveyed value away from the subsidiaries and must be voided.

The court also concluded that the loan documentation’s savings clauses – clauses that say obligations will be automatically reduced to an amount that would not render the guarantor insolvent – were unenforceable and thus could not be used as a defense to the claim the TOUSA subsidiaries were only rendered insolvent by providing the secured guarantees.

The bankruptcy court opinion was controversial on two levels: 1) its finding that no reasonably equivalent value was given to the conveying subsidiaries in exchange for their pledge of assets in connection with the term loans, and 2) for its rejection of the loan documentation’s savings clauses.

Now the United States District Court for the Southern District of Florida has resolved half of the controversy, at least, by reversing the bankruptcy court’s determination that no reasonably equivalent value was given to the conveying subsidiaries.

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that presages judicial thinking on an emerging topic. Consequently, bankruptcy and restructuring professionals would be well advised to take a closer look at what they put in their bankruptcy filings and restructuring plan documents.

A highly respected judge who has, over the years, presided over some of the most highly advocated, complex, and well-reasoned presentations in bankruptcy cases, Judge Walrath’s ruling reverberated throughout the legal community. “Walrath takes a somewhat traditional analysis, but what I find refreshing about her decision is that she is very intellectually honest, says Wickouski. “She looked at the criteria and applied it to the case. When the releases went beyond the criteria, she didn’t just slip them under the rug. She said these individuals have not met these criteria.”

It’s an outcome that can and should be avoided, says Wickouski. “From the viewpoint of the practitioner, when you’re participating in the plan process, regardless of what you say to your clients, their expectation is that what is in the documents is going to get approved. And when it doesn’t, it can be very unsettling and embarrassing. You have to go back to the drawing board.”

While acknowledging that attorneys, by their nature, “push the envelope” Wickouski says that they must still “keep it real” and present a plan that is close to what the court is likely to approve. Otherwise it becomes a waste of time and is disturbing for clients. And judges, while they want to be accommodating, have to draw the line in the sand when they are presented with a document that deviates too much from well-established precedent. That appears to have been the basis for Judge Walrath’s ruling in Washington Mutual.

In Washington Mutual, Walrath criticized reorganization plan documents for providing releases of liability to directors, officers, and other parties, including some hedge funds, who Walrath said did not contribute anything to the settlement. For example, some shareholders, who stand to get nothing from the settlement, have claimed that hedge funds engaged in insider trading. In rejecting the part of the reorganization plan that granted the hedge funds, known

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in a bankruptcy setting.”

Generally there are four categories of debt instruments primarily issued by governmental units, most of which carry tax-exempt status. The most common and well known is, as Brandt noted, the general obligation bond.

Municipalities issue general obligation bonds, usually in anticipation of tax revenues, to pay for services such as garbage collection. These bonds are customarily backed by the full faith and credit of the issuer, meaning that the municipality pledges to use tax revenues to repay bondholders.

Because of this, general obligation bonds are considered the safest form of municipal investment. “Most municipalities will go to huge lengths never to default on their general obligation bonds because doing so all but precludes them from being able to go back to that market for years, if ever,” says Brandt.

Attesting to that, in the 1920s, when the bond market wasn’t as established, yields for general obligation bonds were customarily a point or two higher than their current levels of 1.25 percent to 3 percent, meaning that, through the last 90 years of municipal bond issuance history, rates for these types of general obligation bonds have actually gone down.

One likely factor is the virtual absence of any meaningful defaults over that period of time on these types of bonds, says Brandt. James E. Spiotto, head of the special litigation, bankruptcy and workout group at Chapman and Cutler LLP, notes that, of the 54 rated municipal bonds defaulting in the past 40 years, according to Moody’s only three have been general obligation bonds (Baldwin County, Alabama, in 1988; Jefferson County, Alabama, in 2008; and Sierra Kings Health Care District, California, in 2009).

In contrast, revenue bonds when issued by a municipality or governmental unit, are usually specific to a particular project, such as a toll road, a port facility, a waste treatment plant or, in the case of Las Vegas, Nevada, a monorail. Traditionally, revenue bonds are not backed by the full faith and credit of the municipal issuer. Repayment is limited to the income stream and, in some cases, the collateral

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Research Report

Who's Who in Harry & David Holdings, Inc.

by Françoise C. Arsenault

Harry & David Holdings, Inc. (Harry & David) is a leading multi-channel specialty retailer and producer of branded premium gift-quality fruit, gourmet food products, and other gifts marketed under the Harry & David, Wolferman's, and Cushman's brands. Company favorites include Royal Riviera pears, Moose Munch popcorn snacks, and Tower of Treats gifts. The company also runs the Fruit-of-the-Month Club. Harry and David sells its products through about 70 Harry & David and Cushman's seasonal stores in more than 35 states. Harry & David also markets its products through catalogs distributed through the mail, the Internet, business-to-business and consumer telemarketing, and wholesale distribution to other retailers. For the 12 months ending December 25, 2010, Harry & David generated approximately \$416 million in revenue.

Harry & David was founded in 1910, when Seattle hotel magnate Samuel Rosenberg purchased pear orchards in Medford, Oregon. His sons, Harry and David, took over the company on his death in 1914. The founding family sold the company to RJR Nabisco in 1986. In 2003, Wasserstein & Company, along with Highfields Capital Management, acquired Harry & David. In 2008, the company acquired Wolferman's from Williams Foods and Cushman's, a family-owned marketer of citrus and specialty foods. The company is still headquartered in Medford, Oregon, and today has more than 1,000 employees.

According to analysts, there were a number of factors contributing to Harry & David's financial difficulties. Sales had declined in recent years, as recession-strapped consumers and corporations cut back on discretionary gift purchases. Other factors included new competition, such as Amazon, and the acquisition of Harry & David by Wasserstein & Company for \$254 million, which weighed down the company with \$250 million of debt.

Harry & David Holdings, Inc., filed a pre-arranged Chapter 11 reorganization on March 28, 2011, in the United States Bankruptcy Court for the District of Delaware. In its bankruptcy filing, the

company listed debts and assets in the range of \$500 million. In May, Harry & David received final court approval for a \$100 million DIP facility provided by the company's secured lenders and for a \$55 million second-lien DIP term loan provided by a group of holders of the company's public notes. The court also gave final approval for up to \$100 million in exit financing, which will be provided by the company's current lenders, as well as for an amended agreement by supporting noteholders to backstop a \$55 million rights offering.

On May 10, 2011, company officials announced a resolution with the Official Committee of Unsecured Creditors and holders of approximately 81 percent of the company's public notes on a proposed joint plan of reorganization. Based on the terms of the plan, filed on May 20, Harry & David should emerge from bankruptcy by late summer.

The Debtor

Stephen Heyer is Chairman. **Kay Hong** is serving as the interim Chief Executive Officer and Chief Restructuring Officer. **Bruce Wasserstein** is Executive Director. **Edward F. Dunlap** is the Chief Financial Officer. **Paul Kosturos** and **Robert Montgomery** are acting as Assistant Restructuring Officers. **David Charne** is the interim Treasurer.

Jones Day is serving as bankruptcy counsel. **David G. Heiman**, a partner in the Cleveland office, **Robert A. Profusek**, a partner in the New York office, and **Brad B. Erens**, a partner in the Chicago office, are working on the case.

Richards, Layton & Finger, P.A. is acting as the bankruptcy co-counsel to Harry & David. The team includes **Daniel J. DeFranceschi** and **Paul N. Heath**, partners with the firm.

Alvarez & Marsal North America, LLC is the restructuring and financial advisor. **Kay Hong** and **Paul Kosturos**, managing directors in the San Francisco office and **Robert Montgomery**, a director in the San Francisco office, direct the work.

Rothschild Inc. is providing Harry & David with investment banking and

financial advisory services. **Neil A. Augustine**, a senior managing director and co-head of the firm's North America Debt Advisory and Restructuring Group, heads the team.

McKinsey Recovery & Transformation Services U.S., LLC is providing Harry & David with management consulting services. **Seth Goldstrom**, a vice president with the firm, leads the engagement.

DJM Realty Service, LLC is serving as the real estate consultant to Harry & David. **Edward P. Zimmer**, a senior managing director, directs the work.

Sard Verbinnen & Co. is providing public relations consulting services to Harry & David. **Stephanie Pillersdorf**, a managing director in the New York office, and **Cassandra Bujarski**, a principal in the New York office, are working on the engagement.

The Official Committee of Unsecured Creditors

The Committee includes the **Pension Benefit Guaranty Corporation**; **Convergys Customer Management Group Inc.**; **RR Donnelley**; **American List Counsel Inc.**; **Simon Property Group, Inc.**; **Marich Confectionery Assoc.**; and **Wells Fargo, N.A.**, as indenture trustee for senior fixed rate notes.

Lowenstein Sandler PC is serving as the lead counsel to the Committee. The team includes **Kenneth A. Rosen** and **Sharon L. Levine**, partners with the firm, and **Thomas A. Pitta**.

Pachulski Stang Ziehl & Jones LLP is acting as co-counsel and conflicts counsel to the Committee. **Laura Davis Jones** and **Bradford J. Sandler**, partners with the firm, are working on the case.

FTI Consulting, Inc. is serving as the financial advisor to the Committee. **Samuel Star**, a senior managing director with the firm, leads the engagement.

The Trustee

The U.S. Trustee is **Roberta A. DeAngelis**.

The Judge

The judge is the **Honorable Mary F. Walrath**. □

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In a 113-page opinion, Judge Alan Gold called the previous ruling “clearly erroneous,” arguing that the bankruptcy court had erred in its legal definitions of such terms as “value,” and noting that the bankruptcy court’s decision would place an “impossible burden” on lenders.

Specifically, Gold held that reasonably equivalent value need not be concrete dollar-for-dollar value, but can be found where the value given is intangible, such as an economic benefit.

“Contrary to the Bankruptcy Court’s legal conclusion, the indirect, intangible, economic benefits, including the opportunity to avoid default, to facilitate the enterprise’s rehabilitation, and to avoid bankruptcy, even if it proved to be short lived, may be considered in determining reasonably equivalent value,” wrote Gold, noting that it is enough that the transaction left the conveying subsidiaries “in a better position to remain as going concerns than they would have been without the settlement.”

Bankruptcy professionals say the ruling is surprising for a number of reasons.

First, the district court completely discounts testimony, which the bankruptcy court found persuasive, that the uninvolved subsidiaries could have obtained credit elsewhere. “District court judges typically give bankruptcy court judges some amount of deference since they saw the witnesses, and this was a departure from that tradition,” says Siegel.

Second, the district court embraces an enterprise approach, treating TOUSA as virtually one enterprise. “You almost inevitably conclude that as long as one member of a corporate group benefits, all of the members benefit, and that is somewhat unprecedented,” says Siegel.

Finally, instead of being a reversal and remand, the decision is an outright reversal.

One question: Will the district court’s ruling regarding reasonably equivalent value comfort lenders? In other words, will the various intangible values applicable to a reasonable equivalency analysis enhance a lender’s ability to defend against fraudulent transfer claims?

“The district court opinion appears to

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as the settlement noteholders, protection from lawsuits, Walrath wrote, “The court is reluctant to approve any releases of the settlement noteholders in light of those allegations.”

The releases granted to officers and directors in the Washington Mutual reorganization plan documents are an example of a bridge too far, says Wickowski. “There was no evidence of factors being present that would qualify them for release, such as a substantial contribution to the plan, so they weren’t entitled to an affirmative release.”

Bankruptcy attorneys applied a broad brush to others as well. For example, a release was requested for the liquidating trustee, which had not been named yet. “You can’t release someone who hasn’t even been appointed,” says Wickowski. “Those are the kinds of things that just go too far. It wasn’t really necessary.”

Wickowski further notes that indenture trustees got a separate release, but because they were also on the creditors’ committee and the creditors’ committee was getting released, it was not necessary for the trustees to be released. Consequently, the judge found

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associated with the specific project being financed. Yields are generally higher than those of general obligation bonds, suggesting higher risk.

However, it’s worth noting that some revenue bonds have an added layer of safety: They’re covered by insurance from a monoline insurer on top of the general obligation or revenue pledge. Some may also be prerefunded, meaning that their cash flows are no longer provided by the

municipal issuer, but from bonds (such as treasury bonds) the issuer purchases and places in escrow for the sole purpose of servicing the debt.

Interestingly, says Brandt, the treatment of general obligation bonds and revenue bonds in Chapter 9 is somewhat counterintuitive, given the average yield differential between the two. “Unlike revenue bonds, general obligation bonds are not pegged to a specific project, so

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Calendar

American Bankruptcy Institute
18th Annual Northeast Bankruptcy Conference

July 21-24, 2011
The Hyatt Regency
Newport, RI

Contact: www.abiworld.org

The National Association of Bankruptcy Trustees

2011 Annual Conference
September 22-25, 2011
The Ritz-Carlton
Amelia Island, FL

Contact: www.nabt.org

National Conference of Bankruptcy Judges

85th Annual Conference
October 12-15, 2011
Tampa, FL

Contact: www.ncbj.org

American Bankruptcy Institute
7th annual International Insolvency & Restructuring Symposium

October 21, 2011
The Westin Dublin
Dublin, Ireland

Contact: www.abiworld.org

Turnaround Management Association

2011 TMA Annual Convention
October 25-27, 2011
Hilton San Diego Bayfront
San Diego, CA

Contact: www.turnaround.org

Practising Law Institute

Nuts and Bolts of Corporate
Bankruptcy 2011 Seminar

November 17-18, 2011
San Francisco, CA

Contact: www.pli.edu

Special Report

Bankruptcy Tax Specialists in the Nation's Major Law Firms

Firm	Bankruptcy Tax Attyn.	Senior Bankruptcy Tax Partners		Recent Representative Clients
Akin Gump Strauss Hauer & Feld New York, NY (212) 872-1000 www.akingump.com	10	Howard Jacobson Patrick Fenn Stuart Leblang Doug Killip	Dan Micciche Robin Schacter Thomas Weir	Creditors' committees in Washington Mutual, Nortel Networks, General Growth Properties, TOUSA, and Quebecor. Creditors in Tribune, Lyondell Chemical, and Refco. Debtors in American Media, TerreStar, Trident, Edge Petroleum, and Foothills Resources.
Andrews Kurth Houston, Dallas, New York (713) 220-4200 (Houston) www.andrewskurth.com	7	Andrew Feiner (New York) Thomas Ford, Jr. (Houston) Thomas R. Popplewell (Dallas)		Six Flags Inc. (debtor's special tax counsel); Pilgrim's Pride (creditors' comm.); Fairpoint (creditors' comm.); Lexington Precision (creditors' comm.), Primus Telecommunications (ad hoc creditors' bondholders comm).
Bracewell & Giuliani Houston, TX (713) 223-2300 www.bgllp.com	4	Lance Behnke Elizabeth McGinley	James Reardon	Creditors of Greektown Casinos, Erickson Retirement Communities, Griffin Coal, Tribune Company, Centro Properties Group, Boston Generating, Crescent Resources, Arrow Air, and Trico Marino Group.
Cadwalader, Wickersham & Taft New York, NY (212) 504-6000 www.cadwalader.com	21	Linda Z. Swartz Adam Blakemore Mark P. Howe	David S. Miller Richard M. Nugent Gary T. Silverstein	LyondellBasell; Xerium; Caribbean Petroleum; St. Vincent's Medical; Northwest Airlines; US Treasury (CIT, GM, Chrysler); Icahn Global (Blockbuster); JPM (Centro Properties and Station Casinos); Citigroup (Lehman), Merrill Lynch (Fred Leighton and BLB Mgmt.), and others.
Davis Polk & Wardwell New York, NY (212) 450-4000 www.davispolk.com	13	Samuel Dimon Kathleen L. Ferrell Michael Mollerus	Rachel D. Kleinberg Neil Barr	Federal Reserve Bank of New York in transactions involving AIG. Ford, Frontier Airlines, JPMorgan in Tribune, C-BASS and Delphi. Joint administrators and liquidators of Lehman Brothers International and its U.K. Lehman affiliates, Citi, San Antonio Internacional.
Debevoise & Plimpton New York, NY (212) 909-6000 www.debevoise.com	10	Andrew N. Berg Peter A. Furci Vadim Mahmoudov	Burt Rosen David H. Schnabel	Sea Island Acquisition, LLC. (Oaktree Capital Management, L.P., Avenue Capital Group, The Anschutz Corporation and Starwood Capital Group), Oriental Trading Company, Syncora Holdings Ltd.
Gibson, Dunn & Crutcher New York, NY (212) 351-4000 www.gibsondunn.com	16	David Rosenauer Paul Issler Jeffrey Trinklein	Art Pasternak David Sinak Dora Arash	Represents Wilmington Trust in connection with GM bankruptcy; represented new equity investors in connection with restructuring of Trident Resources; represents major stockholder of Solyndra in its financial restructuring.
Kirkland & Ellis Chicago, IL (312) 862-2000 www.kirkland.com	20	Todd Maynes Gregory Gallagher	Steven Clemens Thomas Evans	Tronox, Chemtura, Visteon, The Great Atlantic & Pacific Tea Company, Corus Bankshares, The Reader's Digest Association, Financial Guaranty Insurance Company, MSR Resort Golf Course, Innkeepers USA Trust, Neff, U.S. Concrete, South Bay Expressway, Appleseed's, and others.
Kramer Levin Naftalis & Frankel New York, NY (212) 715-9100 www.kramerlevin.com	7	Barry Herzog Howard J. Rothman	Maria T. Jones	Significant recent creditors' committees representations include Motors Liquidation Corp. (old GM), Capmark Financial Group, and Smurfit Stone Container. Represented a large creditor in restructuring of Appleseed's Intermediate Holdings. Represented St. Vincents (debtor).
Milbank New York, NY (212) 530-5100 www.milbank.com	3	Dale Ponikvar Russ Kestenbaum Bruce Kayle	Andrew Walker Mark Regante	Recent representative clients: Lehman Committee; secured lenders in Lyondell, bank lenders in Capmark; debtors in Protostar, PCAA, and Stations Casino, among others; bonds in Nortel.
Morrison & Foerster New York, NY & San Francisco, CA (212) 468-8000 www.mofo.com	6	Thomas A. Humphreys Robert A.N. Cudd Stephen Feldman		Official Creditor Committee - Amba; Official Creditor Committee - FGIC.
Sidley Austin New York, NY (212) 839-5300 www.sidley.com	12	Suresh T. Advani Laura M. Barzilai	Ivy H. Jones David C. Miller	Blackrock, Budget Rent A Car Corporation, Drawbridge, Federal-Mogul Corporation, Fortress, Meridian Automotive Systems, Merisant, MI Developments, Northstar, Owens Corning, Pliant, RH Donnelley, Smurfit-Stone, Tribune, WestLB AG, Ambac Assurance Corporation.
Skadden, Arps, Slate, Meagher & Flom New York, NY (212) 735-3000 www.skadden.com	42	Michael Beinus Kenneth Betts Katherine Bristor Stuart Finkelstein Cliff Gross	Moshe Kushman André LeDuc David Levy Maxwell Miller David Rievman	Access Industries (for LyondellBasell), Capital Trust, Centro Properties, Paul Allen and Vulcan Inc. (as principal shareholder of Charter Communications), the equity committee of Chemtura Corp., CIT Group, Delphi Corp., Hartmarx, Interstate Bakeries, Jackson Hewitt Tax Service, Mark IV Industries/Dayco Products, MGM, and others.
Squire, Sanders & Dempsey New York, NY (212) 872-9800 www.ssd.com	10	Terrence G. Perris Alan S. Doris Robert J. Eidnier	James D. Gray Eliot L. Kaplan	AmFin Financial (debtor), Coyotes Holdings (debtor), EuroFresh (debtor), Fulton Homes (debtor), Mercedes Homes (debtor), Rubicon US REIT (debtor), Station Casinos (debtor/special board committee counsel), US Bank, Comerica Bank
Sullivan & Cromwell New York, NY (212) 558-4000 www.sullcrom.com	4	Ronald E. Creamer, Jr. Andrew S. Mason	Andrew P. Solomon David C. Spitzer	Fiat/Chrysler; Fairholme Funds, Inc. and Pershing Square Capital Management, LP; Technicolor; First Southern Bancorp, Inc.; AIG; ING; JPMorgan Chase Bank; The Weinstein Company.
Weil, Gotshal & Manges New York, NY (212) 310-8007 www.weil.com	20	Kimberly Blanchard Robert Frastai Larry Gelbfish Stuart Goldring Mark Hoenig	William Horton Martin Pollack Jared Rusman Marc Silberberg Scott Sontag	Ongoing representations include AIG, Blockbuster, Centro Properties, General Growth Properties, Lehman Brothers Holdings, Washington Mutual. Completed restructurings include Advanta, BearingPoint, Crescent Resources, Extended Stay Hotels, General Motors, Magna Entertainment, Nortek, Panolam Intl., Pilgrims Pride, and others. ☐

Worth Reading

Takeover: The New Wall Street Warriors – The Men, The Money, the Impact

Author: Moira Johnston

Publisher: Beard Books

Softcover: 395 pages

List Price: \$34.95

Takeover is a well-researched, even-handed account of three 1980s corporate takeover wars: Crown Zellerbach, TWA, and Unocal. The author selected these three as examples of the leverage buyouts, proxy fights, tender offers, and negotiated mergers that characterized one of the most notable decades in American financial history. The cases demonstrate how the fate of corporations intertwine, with Texaco, Getty, CBS, Revlon, Household, and Union Carbide also playing roles.

Takeover is also a cautionary tale. Johnston characterizes the takeover phenomenon as a social issue and places it in the continuum of U.S. business history. The author paints in broad strokes, lamenting the clash the takeover wars represent between “two conflicting elements in our national character: the capitalist, who has marched to the beat of Adam Smith’s free trade theories since the nation’s founding; and the humanist, marching to nonmaterialistic values, who tries to buffer the poor from the law of the jungle with benevolent social programs.”

What made these megadeals feasible was the convergence of several dynamics. First, companies with stock prices below the appraised value of their underlying assets were prevalent. Second, institutional investors, who owned large blocks of stock and whose jobs depended on quick profits, were emerging. Third, risk arbitrageurs began buying up stock as soon as a bid was announced, driving stock prices up further. And finally, junk bonds became popular, attracting larger sums of money than ever could have been attained through traditional channels. Johnston scrutinizes the players themselves: lawyers, investment bankers, arbitrageurs, entrepreneurs, money managers, and financial analysts, seeking to find what drives them. She admires them as individualists in the true American mold, exemplifying the ultimate American dream. She believes they act in defiance of the “code of gray caution lived by post World-War corporate man [that] falls pitifully short of a full-blown experience of life.” But, she questions their disregard for the long-term consequences of their actions on companies, employees, communities, the economy, society as a whole, and even national security.

Takeover speaks to laymen and professionals, with a style that combines technical description and delightful readability. Here’s a description of Nicholas Brady of Dillon Reed: “He is tall and elegant, with a lean, patrician face and a gracious manner that lets him serve a wax paper-wrapped roast beef sandwiches at his boardroom table as if it were a champagne hunt breakfast.”

Johnston’s extensive research yields brilliant quotes, such as Ivan Boesky’s closing remarks in a speech to UC Berkeley business school students: “Greed is all right by the way. I want you to know I think greed is healthy. You can be greedy and still feel good about yourself.” That quote has been widely disparaged in the years since then, but it is fascinating to return to the period in U.S. history that produced it. □

Moira Johnston is an investigative journalist whose work has appeared in the New York Times Magazine, Vanity Fair, National Geographic, and Esquire. She is also the author of several books.

This book may be ordered by calling 888-563-4573 or by visiting www.beardbooks.com. This book and other Beard books are also now available in digital format at a discounted price from Google Books at books.google.com.

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support TOUSA’s business judgment, which may give comfort to parties that bankruptcy courts will respect the arms’-length financial decisions of sophisticated parties if those decisions were reasonable and legitimate,” says Robin Russell, a partner at Andrews Kurth LLP. “Evidence that material information was unknown by the parties exercising their ‘business judgment’ or that they were unjustified in relying on their legal or financial advisors could change the outcome.”

But Siegel notes that, “at the end of the day, this decision comes from a district court in one particular jurisdiction, so it is not binding on any other districts.” Unless the decision is appealed to the circuit court level, he says, it is important not to read too much into the consequences. But such an appeal could be interesting. “When this goes to appeal, the circuit court will have two diametrically opposed decisions that are so at odds with each other that it will be virtually impossible to reconcile them and steer a middle course,” Siegel says.

Finally, several attorneys noted that there is one issue left open: the bankruptcy court’s rejection of the fraudulent conveyance savings clauses as invalid. “The decision of the district court did not address the validity of the savings clause, which is of primary concern to the lending community from both a deal structure and documentation standpoint,” says Douglas R. Urquhart, a partner in Weil, Gotshal & Manges LLP’s banking and finance practice.

“It remains to be seen whether the bankruptcy court’s *per se* rejection of the savings clause will be addressed in further proceedings or applied by other bankruptcy courts,” says Russell. “For the moment, however, it appears that the lending community must continue to be cognizant of that aspect of the bankruptcy court’s decision.”

Urquhart agrees, noting that “market practice remains unchanged and the general assumption is that savings clauses are enforceable. Nevertheless, several law firms are still including a specific TOUSA qualification in their legal opinions.” □

Special Report

U.S. Turnaround and Restructuring Firms With European Offices

Firm	Senior Professionals		Representative Clients
AlixPartners London Tel. 44 20 7098 7400 www.alixpartners.com	Michael Baur Eugenio Berenga Don Featherstone Jan Kantowsky	David Lovett Luca Ramella Axel Schulte Stephen Taylor	Drydocks World, Nuova Pansac, Bluewater Holdings, Appliance Components Companies, Bard Holdings, Welcome Financial services, Viking Moorings, Dinosol Supermercados, Piaggio Aero Industries, Government of Dubai's Department of Finance, Bianchi Vending, Selcom Elettronica.
Alvarez & Marsal Europe London Tel. 44 20 7715 5200 www.alvarezandmarsal.com	Antonio M. Alvarez III Peter Briggs Stefaan Vansteenkiste Ann Cairns Mike Corner-Jones Malcolm McKenzie	Scott Pinfield Just Spee Shepard C. Spink Walter Bickel Adriano Bianchi Gerald Corbae Thomas Kolaja	CEO for Lehman Brothers Holdings, Silent Night, and Mosmart. Chairman & CEO of European Directories, SA. CEO and CFO of Sport 2000. CRO for Wind Hellas. CFO for Endemol. Chief Restructuring Advisor to European Gas, Ltd. Advisor to Seat Pagine Gialle. Plus a wide variety of advisory and due diligence cases across Europe.
Deloitte London Tel. 44 20 7936 3000 www.deloitte.com	Timothy Mahapatra William Dawson	David Stark	Lenders, Private Equity, Corporates, Bondholders, Trustees, Government & Public Sector.
Development Specialists, Inc. London Tel. 44 20 7250 3260 www.dsi.biz	William A. Brandt, Jr.	Joseph L. Luzinski Yale S. Bogen	Banks, Private Equity, Hedge Funds.
FTI Consulting London Tel. 44 20 3077 0500 www.fticonsulting.com	Mark Dewar Simon Granger Chad Griffin	Kevin Hewitt Paul Inglis David Morris	Jarvis plc, Gate Gourmet, Treofan, Torex Retail, Carlsberg Group, European entities of a U.S. automotive supplier, Dutch gaming provider.
Grant Thornton London Tel. 44 20 7383 5100 www.grant-thornton.co.uk	Mark Byers Andrew Conquest Sean Croston David Dunckley	James Earp Martin Ellis Andrew Hosking	Banks and Financial Institutions, Bondholders, Corporates, Hedge Funds, Private Equity Houses.
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Huron Consulting Group London Tel. 44 20 8895 4006 www.huronconsultinggroup.com	Steven Koinis		Works across industries, including automotive, biotech, retail, and financial services.
KPMG London Tel. 44 20 7311 1000 www.kpmg.com	Philip Davidson Richard Fleming Tammo Andersch	Angel Martin Torres Klaas Wagenaar	Lenders, Stakeholders, Corporates, Private Equity, Hedge Funds, Public Sector.
Zolfo Cooper London Tel. 44 (0) 20 7332 5000 www.zolfocooper.eu	Alastair Beveridge Simon Appell Simon Freakley Paul Hemming	Gary Squires Peter Saville Simon Longfield Anne-Marie Laing	Corporates, clearing banks, investment banks, private equity, hedge funds, asset based lenders, law firms, pensions trustees, government and public sector.

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should a Chapter 9 occur, holders of general obligation bonds are the ones most likely to take a haircut because, as bizarre as it may seem, and even with full faith and credit guarantees, their instruments are essentially unsecured. On the other hand, in most cases, revenue bondholders only take a haircut to the extent that the revenue stream isn't sufficient to cover their indebtedness."

Moving beyond general obligation and revenue bonds, Brandt says default risk increases. Conduit revenue bonds, which came into vogue around 25 years ago, are not actually issued by municipalities. Instead, a development authority fosters the issuance of the bonds, which are used for job growth, civic purposes, housing, or health care service expansion. A classic example of this type of bond would be an industrial revenue bond issued to help a local manufacturer expand its plant and thereby create more jobs.

According to Brandt, conduit revenue bonds are similar to standard commercial bonds in that the debt instrument is only as good as the underlying credit, and the city has really nothing to do with it; if the project fails, the bondholders have no resource to city or any governmental unit.

There can be one exception, however: Some bond-issuing authorities, such as the Illinois Finance Authority, which Brandt chairs, can enhance the creditworthiness of a conduit revenue bond by offering a full faith and credit guarantee of the governmental entity that created the issuing authority.

"While it's rare, and probably occurs in less than 2 percent of conduit financing, it does change the nature and potential of the debt instrument measurably," says Brandt. "Nevertheless, these bonds normally are not involved in a Chapter 9 because, in the rare cases they do offer a guarantee, that guarantee is customarily backed by a state rather than a local government, and since states can't file bankruptcy, if the bond goes into default, the state winds up writing a check from its treasury."

A fourth type of municipal bond instrument, which has only really come into use in the last 15 years or so, is the certificate of participation (COP).

COPs, says Brandt, maybe shouldn't even be considered bonds as they more resemble something like limited partnership interests or trust certificates.

To illustrate, he points to a COP offering issued by Telluride, Colorado. In that offering, Telluride created a trust that purchased a number of assets from the

city, including city hall. The idea was that the city would then rent the city hall and other of the assets it sold to the trust. The trust offered COPs in the trust to investors, who would receive a return on account of the rental income paid by the city.

"You would assume that since the city is the one making the lease payments, the COP has a full faith and credit guarantee," says Brandt. "However, if you look carefully at the language in the offering prospectus, that's just not so. In fact, if the city defaults on its ability to make the payments, so it goes. The trust thereafter then has to rely on the underlying value of the assets that were sold to it, since the trust does not have a full faith and credit guarantee of the payment stream due from the city."

Brandt notes that the general thinking is that COPs will not normally be involved in Chapter 9s, although given their somewhat recent appearance and their ever-increasing cutting edge use, that issue may not be so clear, as issues of whether the governmental entity transferred these assets for reasonably equivalent value may be open to some later debate.

Brandt's point is that rumors regarding a coming wave of municipal bond defaults certainly may be accurate – but it might not matter to bankruptcy and restructuring professionals.

He notes that the Telluride COP has a yield of 5.07 percent, which is a rate all but unheard of in the municipal bond market, where general obligation bonds customarily yield between 1 percent and 3 percent. Similarly, a Moore Haven, Florida, development authority recently issued a \$66 million COP connected to financing for a new high school located in Guam, and those bonds have a yield of 7 percent.

"That interest rate shows you that although these bonds are still tax-exempt financing, they are far more risky than the classic general obligation bond, which is the type of instrument that any investor should truly be worried about in a Chapter 9 setting," says Brandt.

Next month we'll look at municipal bond bankruptcies in more detail, examining how they differ from other bankruptcies and offering some practical considerations for participants. □

Release, from page 4

the indenture trustees were covered twice and there was a redundancy. "As a lawyer who represents indenture trustees, I would always prefer them to have a separate release, so I can certainly understand why it was requested, but I think that because there were other infirmities in the release language, the judge took the opportunity to troubleshoot the whole thing."

Wickowski continues, "If that redundancy had been the only issue, the plan documents

would probably have been approved. But the problem when you write the language too broadly is that it gets revised wholesale. Things that are borderline in passing muster will get identified and changed because there are larger problems in the document. This is another reason why, as a practitioner, you want to avoid problems in plan documents."

In next month's issue of *Turnarounds & Workouts*, Wickowski identifies other mistakes in plan documents, and offers tips on how to avoid them. □

In the Next Issue...

- *Special Report: Canadian Bankruptcy Law Firms*
- *Special Report: Outstanding Investment Bankers – 2011*
- *Research Report: Who's Who in Caribe Media, Inc.*