turnarounds & workouts

News for People Tracking Distressed Businesses

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Detroit and More

2013 a Year of Notable, Precedent-Setting Cases

by Julie Schaeffer

If there was one event that defined 2013 for restructuring professionals, it was likely Detroit. Likely to be a precedent-setting case for municipal restructurings due to the complex pension and retiree health-care claims involved, it is what Lisa Donahue calls a historic undertaking. "[It's] the turnaround of a major American city, says Donahue, global leader of turnaround and restructuring services at at AlixPartners, LLP, which is representing a group of significant bondholders in the bankruptcy.

But Detroit wasn't the only story in 2013; there were numerous other notable bankruptcies, but perhaps not an industry-wide recovery. Any uptick, says William H. Schrag, a partner in the New York office of Thompson Hine, was modest and in certain specific areas.

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Charting a New Course

Hedge Fund's Involvement Facilitates Quick Resolution

by Randall Reese

When hedge fund Putnam Bridge first became involved in the chapter 11 case of Marina Puerto del Rey, Inc., there were serious doubts about the debtor's prospects for a successful reorganization. The bankruptcy filing was the result of a long-running dispute between the debtor and its secured lender, FirstBank Puerto Rico, and that lender was aggressively challenging the propriety of the bankruptcy. Within the first three weeks of the case, FirstBank filed motions to prohibit the debtor's use of cash collateral and to dismiss the debtor's case. In a stunning about-face, Putnam's counsel would announce at a hearing less than two months later that FirstBank and Putnam had entered into a

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Pension Obligations, Part 2

Lessons for Distressed Investors

by Julie Schaeffer

The First U.S. Circuit Court of Appeals has ruled: If a private equity fund buys a company that contributes to a multiemployer pension plan and that company goes bankrupt, the private equity fund may be on the hook for pension obligations. And that ruling, according to industry professionals, will undoubtedly make it harder for private equity funds to walk away from the unfunded pension liabilities of portfolio companies that go bankrupt. In the case before the court, the private equity funds were managed by Sun Capital Advisors and the company was Scott Brass, Inc. (see the November issue of *T&W*).

One problem with offering guidelines to action in response to the decision is the First Circuit's guidelines were vague. Under the Employee Retirement Income and Security Act

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As an example, Schrag points to health-care bankruptcies, which increased as a result of mounting financial pressures and costs placed upon hospitals, coupled with widespread uncertainty with new industry-wide regulation. Cross-border insolvencies have also increased as a result of the increasingly global economy, slower-paced financial recoveries and higher interest rates overseas, and increased familiarity with the use of chapter 15 and parallel plenary chapter 11 cases in the United States. But, other professionals saw upticks in other industries.

"I think the best way to describe things was 'uneven,'" says Scott Lepene, a partner in the Cleveland office of Thompson Hine, explaining that he saw an excellent start to 2013, but things tapered off in the second and third quarters, with a slight uptick in the fourth quarter.

Most professionals agreed there was a pickup in restructuring activity in the middle market. Ted Gavin, managing director & founding partner of Gavin/Solmonese LLC says he saw a significant increase, with 2013 approaching 2010 levels in terms of number of engagements.

The companies that saw activity, says Donahue, fell into one of three situations: those that were too small to access the high-yield bond market, those in industries particularly stressed by technological or regulatory changes, and those in consumer-oriented industries impacted by the lackluster economy.

Gavin agrees that the consumer was big: "We saw increases in bankruptcy filings in the middle market of consumer-driven industries such as consumer products." According to Gavin, retail was a particularly challenging area in which to find a legitimately successful restructuring. Shrinking margins, fixed cost structures, competition with Internet resellers, and general disintermediation of the retail segment stressed working capital among the traditional brick-and-mortar segment, adding the oft-told tales of woe observed across the board in the middle market.

In terms of notable bankruptcies, the year started off with a bang, says Gavin, referring to new motions alleging broad ethics violations in GSC Group's chapter 11 case. GSC filed in Manhattan in August 2010, its portfolio deflated by the economic collapse of 2008. In early January, following a discovery made

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plan support agreement resolving many disputes and paving the way for a rapid emergence from bankruptcy.

Putnam had experience acquiring substantial distressed assets in Puerto Rico prior to becoming involved in the Marina Puerto del Rey case. Several months earlier, Putnam had made an $80 million acquisition of a mixed-used development in San Juan. However, the marina acquisition presented a new set of unique challenges. Marina Puerto del Rey owned and operated the largest marina in the Caribbean, but had been mired in protracted state court litigation arising out of an approximately $47 million secured loan agreement entered into in 2009.

By the time Marina Puerto del Rey filed for bankruptcy protection in late December 2012, it faced "a liquidity and operational crisis, jeopardizing its employees and going concern, and threatening to result in a chapter 7 liquidation," says Zachary Smith, Putnam's lead counsel in the transaction who is now a partner in the Charlotte office of Moore & Van Allen PLLC. "I have been involved in contentious cases like this before, in Puerto Rico and elsewhere," he notes, "but this case was particularly tense."

Smith's view is shared by Roberto Abesada-Agüet of Correa-Acevedo & Abesada Law Offices and Juan A. Cuyar Cobb of Fernandez, Collins, Cuyar & Pla, local Puerto Rico counsel who also represented Putnam Bridge in the transaction. "From a legal perspective, my opinion is that if our client had not acquired the marina and the process proceeded smoothly and on time, the case would likely have continued along a litigation path for an extended period of time and ultimately may have converted to chapter 7, which would have had a negative impact not only on the marina and its employees, but potentially on Puerto Rico generally," says Abesada-Agüet.

The case presented a situation fraught with risks, but also ripe with opportunity for a fund experienced in distressed transactions and familiar with the Puerto Rico market. "The marina was a high-profile real estate asset in Puerto Rico," Smith says. "There was attention to it and we follow cases and developments in Puerto Rico constantly. When we first became involved, the debtor was not actively seeking an investor or acquirer,

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(ERISA), employers that withdraw from multiemployer pension plans (or terminate single-employer pension plans) are liable for their share of the plan's unfunded liabilities at the time of withdrawal. This liability for pension obligations extends beyond the employer to reach "trades or businesses" under its common control, with common control generally defined as a controlling interest of 80 percent or greater. Although the First Circuit adopted what it called an "investment plus" test to determine if the Sun Capital funds were trades or businesses of its acquisition, Scott Brass, it did not provide broad guidelines for using this test elsewhere.

"Because many of the factors cited by the court could be present in various private equity scenarios, it is difficult to determine how a private equity firm might be structured or operated to distinguish its approach from the elements noted in *Sun Capital*," says Ann Becchina of Davis Polk & Wardwell. In light of this, Becchina says, "private equity funds should be more circumspect about relying on the 'trade or business' prong of the controlled group test"

Private equity funds will, however, want to consider the risk of unfunded pension liabilities when valuing potential acquisitions. "When deciding to invest in a portfolio company over which a fund may have 80 percent ownership, funds should perform thorough due diligence of the company's pension liabilities, both direct and contingent, since the fund and its other portfolio companies are potentially exposed to the unfunded liabilities of these pensions," says Veronica M. Wissel, also at Davis Polk & Wardwell.

The decision may also change how private equity funds structure their investments , i.e., they could start grouping portfolio companies in a manner designed to take advantage of pension rules.

"Under the *Sun Capital* decision, any private-equity fund that owns an 80 percent or greater interest in a portfolio company and actively participates, either directly or through its general partner (or other affiliated entities), in the management of the portfolio company or receives any economic benefit directly attributable to such management activity, is at risk of being viewed as part of a controlled group with that company," says Regina Olshan, a partner in the executive compensation

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Research Report

Who's Who in Electric Transport Engineering Corporation

by Francoise C. Arsenault

The Electric Transport Engineering Corporation, d/b/a ECOtality North America, Inc., is a provider of clean electric transportation and storage technologies. The company, which was founded in 1989 in Phoenix, Arizona, develops and tests electric vehicle infrastructure products and technologies for use in on-road, grid-connected vehicles, material handling, and airport electric ground support applications. The ECOtality Minit-Charger line of advanced battery fast-charge systems takes about 15 minutes to charge the batteries for vehicles such as electric forklifts, golf carts, airport trucks, and other off-road electric transportation. ECOtality has sold approximately 6,000 chargers since 2008. ECOtality also markets its Blink Network of car charging stations in select cities across the country. The Blink Network includes a mobile app and website where customers can access personal charging statistics, charger maps, and account information. ECOtality also develops, manufactures, and sells specialty solar products, advanced battery systems, and hydrogen and fuel cell systems.

In 2009, ECOtality had received almost $100 million in American Recovery and Reinvestment Act funds from the U.S. Department of Energy (DOE) to participate in the EV Project, a DOE program designed to install charging stations and electric vehicle infrastructure for vehicles such as the Chevrolet Volt and Nissan Leaf at selected sites in major metropolitan areas around the United States. During its participation in the program, ECOtality installed more than 12,500 home and commercial charging units in 18 U.S. cities. ECOtality has been headquartered in San Francisco since 2010 and has about 30 employees (40 workers were laid off at the time of the bankruptcy filing).

ECOtality is one of a number of companies to receive federal stimulus funds for the development of green technology that has failed. Other companies include the solar panel manufacturer Solyndra, which had received more than $500 million in stimulus funds; A123 Systems, which received about $250 million in DOE funds to build battery production facilities; and Beacon Power, which received $43 million in DOE loan guarantees to construct a flywheel power plant.

The Electric Transport Engineering Corporation and five of its U.S. subsidiaries filed for reorganization on September 16, 2013, in the United States Bankruptcy Court for the District of Arizona, Phoenix Division. In its filing, ECOtality listed assets ranging from $10 million to $50 million and liabilities from $100 million to $200 million owed to almost 1,000 creditors. The DOE, which is owed $6.5 million, is the company's largest creditor.

According to company officials, the suspension of payments by DOE in August 2013 when the company's financial problems came to light was the primary reason for the bankruptcy. Once this occurred, company officials announced that ECOtality would not be able to make the transition to a profitable independent company without government support. Other contributing factors were significant liquidity constraints resulting from weak sales of commercial electric vehicles and service equipment, performance shortfalls with its Minit-Charger performance line, customer dissatisfaction, and difficulty in obtaining long-term financing.

On September 19, 2013, the judge approved interim DIP financing for ECOtality from Nissan North America, Inc. in the amount of $1.25 million. On October 19, 2013, the Car Charging Group, Inc., a Miami Beach-based operator of electric vehicle charging stations, was announced as the successful bidder for ECOtality's Blink Network in a court auction. The Car Charging Group's cash bid of $3.34 million prevailed over a stalking horse bid of $3 million by California-based Tellus Power. Two ECOtality branches, Minit-Charger and Etec Labs, were purchased by two other companies. The Etec Labs research and testing business was sold for $750,000 to Intertek Testing Services NA, Inc. and the Minit-Charger line was sold to Access Control Group, LLC for approximately $250,000.

The Debtor

H. Ravi Brar is President and Chief Executive Officer of Electric Transport Engineering Corporation. **Murray Jones** is Chief Operating Officer. **Susie Herrmann** is Chief Financial Officer. The Chief Technical Officer is **Paul Gordon** and **Joshua Katz** is Chief Marketing Officer. **Martin T. Felli** is General Counsel and Corporate Secretary.

Akin Gump Strauss Hauer & Feld LLP is serving as the bankruptcy counsel to ECOtality. The team includes **Charles R. Gibbs**, a partner in the Dallas office, **David P. Simonds**, a partner in the Los Angeles office, and **Arun Kurichety**, of counsel in the Los Angeles office.

The law firm of **Parker Schwartz PLLC** is acting as the local bankruptcy co-counsel to ECOtality. **Jared G. Parker**, a partner in the Phoenix office, directs the work on the case.

FTI Consulting, Inc. is serving as the financial advisor and restructuring and crisis manager to ECOtality. The FTI Consulting engagement team includes senior managing directors **David J. Woodward** in the firm's Detroit office, **Christopher R. LeWand** in the Denver office, and **Dewey Imhoff** in the New York office.

The Official Joint Committee of Unsecured Creditors

The Committee includes the **Board of Regents of the University of Nebraska**; **Saturn Electric Inc.**; **Hannah Solar, LLC and/or Worry Free Energy, LLC d/b/a Worry Free Power**; **Kortman Electric Inc.**; and **GMA Manufacturing LLC**.

Jennings, Strouss & Salmon, P.L.C. is serving as the counsel to the Committee. **Carolyn J. Johnsen** and **Todd B. Tuggle**, partners, and **Kami M. Hoskins**, an associate, are working on the case.

The Trustee

The U.S. Trustee is **Ilene J. Lashinsky**.

The Judge

The judge is the **Honorable Randolph J. Haines**. ¤

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reviewing newly uncovered documents, the U.S. Trustee sought to disgorge any fees paid to GSC's bankruptcy advisor and financial advisor on the grounds that they violated bankruptcy laws in failing to disclose that Capstone Executive Director Robert Manzo was an independent contractor working via a fee-sharing agreement with the firm.

Then there was Oreck Corporation, which filed for chapter 11 in May. The 50-year-old vacuum manufacturer, a household name, sought court approval to enter into a DIP financing facility of up to $11 million in order to support a potential sale as a going concern and thus avert a liquidation and wind-down. But the bankruptcy judge tossed the proposed DIP financing terms out of court on the first day. Later, the judge authorized $ 9.5 million, reportedly without explaining the reason for granting less financing than Oreck requested. "That sort of thing doesn't happen often, so when it does, we pay attention, particularly because what one learned judge does sends ripples throughout the judiciary and, therefore, the restructuring profession," says Gavin.

Also in May, just 33 days after filing for bankruptcy, Central European Distribution Corp., one of the largest vodka producers in the world, won court approval of its prepackaged restructuring plan. The company used a Dutch tender process to get bondholder support for its quick trip through bankruptcy, eliminating about $665.2 million in debt from its balance sheets, says Jay Goffman, a partner and global head of corporate restructuring at Skadden, Arps, Slate, Meagher & Flom, which advised CEDC, fielding a multi-office team that included Goffman, among others.

Another notable bankruptcy was Montreal, Maine & Atlantic Railway Ltd., the operator of a runaway oil train that exploded and killed 47 people in a Quebec town, which was forced to file for bankruptcy in August because of potential liability from the crash. In addition to being notable as the result of one single event, says Lepene, rail line bankruptcies are fascinating because of the importance that the rail lines play

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we did not have any existing connection to the debtor, and we had to create the necessary momentum and drive forward," says Smith.

One of Putnam's initial goals was to create an atmosphere that would be conducive to negotiating a consensual resolution. Those efforts bore fruit quite rapidly. By early March, Putnam and FirstBank had entered into a plan support agreement. That was quickly followed by a series of separate but interrelated agreements among Putnam, FirstBank, the debtor, various non-debtor affiliates, and the debtor's controlling shareholder. On April 29, the parties filed their proposed joint plan of reorganization, which provided for Putnam's purchase of the marina and certain non-debtor assets "free and clear," the settlement of all pre-petition litigation, and payment in full in cash of all allowed, non-insider unsecured claims. No solicitation of the plan was necessary and the plan was confirmed by Judge Enrique Lamoutte Inclan on May 30, 2013. The sale transactions closed and the plan became effective on the same day.

While plan support agreements and the transaction structures utilized in the Marina Puerto del Rey case are seen with some

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and benefits practice at Skadden, Arps, Slate, Meagher, & Flom.

It may logically follow that when a private equity fund is determined to be in a portfolio company's controlled group, any other portfolio company in which the private equity fund owns a stake of 80 percent or greater could also be considered to be in the same controlled group. "Accordingly, advisors to private equity funds will need to consider carefully the potential financial impact, both on the private equity fund and its other portfolio company investments, of any investment in a portfolio company that maintains or contributes to a multiemployer plan or single employer pension plan," says Neil M. Leff, a partner in the executive compensation and benefits practice at Skadden, Arps, Slate, Meagher, & Flom.

"Funds should be particularly cautious when considering pricing, negotiating, and structuring investments in portfolio companies with underfunded pension liabilities, and should consider structuring their investments in such a way as to share the risks and opportunities and keep their

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Calendar

The New York Institute of Credit Association of Insolvency and Restructuring Advisors
9th Annual NYIC/AIRA Joint Bankruptcy & Restructuring Event
January 30, 2014
Arno's Ristorante
New York, NY
Contact: www.instituteofcredit.org/

Turnaround Management Association
2014 TMA Distressed Investing Conference
February 5–7, 2014
Bellagio
Las Vegas, NV
Contact: www.turnaround.org

American Bankruptcy Institute
VALCON 2014
February 26–28, 2014
Four Seasons Las Vegas
Las Vegas, NV
Contact: www.abiworld.org

International Association of Restructuring, Insolvency & Bankruptcy Professionals
INSOL Hong Kong
Annual Regional Conference
March 23–25, 2013
Kowloon Shangri La
Kowloon, Hong Kong
Contact: www.insol.org

National Association of Bankruptcy Trustees
2014 Spring Seminar
April 4-5, 2014
The Biltmore
Coral Gables-Miami, FL
Contact: www.nabt.com

American Bankruptcy Institute
32 Annual Spring Meeting
April 24–27, 2014
JW Marriott Hotel
Washington, DC
Contact: www.abiworld.org

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Special Report

Sources of Debtor-in-Possession Financing

Company/Debtor	DIP Amount	DIP Sources
Exide Technologies	$500,000,000	Chase Bank, N.A.
Revel AC LLC	$250,000,000	JPMorgan Chase Bank, N.A.
Orchard Supply Hardware Stores Corp.	$176,000,000	Wells Fargo Bank N.A.
Longview Power LLC	$150,000,000	Citibank NA, Union Bank NA, and Longview Lenders
Furniture Brands International Inc.	$140,000,000	Bank of America NA
Allens, Inc. Siloam Springs	$114,358,560	Bank of America NA
Reader's Digest Association Inc.	$105,000,000	Wells Fargo Principal Lending, LLC
Central European Distribution Corp.	$100,000,000	Alfa Group
Ormet Corporation	$90,000,000	Wayzata Investment Partners LLC
Rural/Metro Corporation	$75,000,000	Credit Suisse AG
National Envelope Corporation	$65,000,000	Salus Capital Partners LLC
Global Aviation Holdings Inc.	$51,000,000	Cerberus Business Finance, LLC
GMX Resources Inc.	$50,000,000	Cantor Fitzgerald Securities
Personal Communications Devices LLC	$46,000,000	JPMorgan Chase Bank, N.A.
EWGS Intermediary LLC	$38,000,000	PNC Bank, NA
Sound Shore Medical Center of Westchester	$33,000,000	MidCap Financial, LLC
Rotech Healthcare Inc.	$30,000,000	Silver Point Finance LLC
OnCure Holdings Inc.	$25,000,000	Wells Fargo Bank N.A.
Conexant Systems Inc.	$15,000,000	Soros Fund Management LLC
Simply Wheelz LLC	$14,800,000	The Catalyst Capital Group, Inc.
IGPS Company LLC	$12,000,000	Crystal Financial
Metro Affiliates Inc.	$10,000,000	Wells Fargo Bank N.A.
Fisker Automotive Inc.	$8,000,000	Hybrid Technology LLC
Education Holdings 1 Inc. aka The Princeton Review	$7,000,000	General Electric Corporation

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Worth Reading

Wildcatters: A Story of Texans, Oil, and Money

Author: Sally Helgesen
Publisher: Beard Books
Softcover: 216 pages
List price: $34.95

Following three generations of Texas oilmen, *Wildcatters* covers the history of the Texas oil business, a business that has always enjoyed the image as a rough-and-tumble enterprise attracting the adventurous and bold.

Helgesen does not spoil the image. If anything, her book gives it support by her portrayals of a number of men of different generations. In those early days of the oil industry in the United States, Texas was the "wild cutting edge of the industry." Before the big oil companies gained control of the business it was "open to any white man who could hustle up the money for a rig, talk a farmer into leasing the mineral rights to his land, and then maintain enough optimism or pigheadedness to drill up his leasehold until he either found oil or convinced himself that he had made a mistake." Helgesen's portrayal of the first generation of Texas oilmen conveys their characteristic energy, enthusiasm, and risk-taking, and also their visions of success that were the basis for the myth that grew up around them.

The ones who did tap into deposits of oil used the profits to buy up new leases and found family dynasties. Monty Moncrief was one such man. A good part of *Wildcatters* focuses on the life of Dick Moncrief, Monty's grandson. Helgesen sees a symmetry between the first generation and the third generation of Texas oilmen. The second, or middle generation, was left mainly to the task of overseeing the dynasties founded by their fathers. With the giant oil companies supplying the United States from abroad with all the oil it needed at low cost, the Texas oil business slowed down. "The young bulls of the middle generation found no terrain on which they might challenge the old bulls' achievements," observed Helgesen.

But circumstances changed for the third generation. In 1973, a cartel named the Organization of Petroleum Exporting Countries (OPEC) decided to raise the price of its oil. Suddenly the Texas oil fields were lucrative again, and this also presented opportunities for developing oil fields overseas.Dick Moncrief and other third-generation oilmen throughout Texas swung into action. Separated by decades in age from their pioneering grandfathers and facing government bureaucratic regulations in the oil industry, the third generation nonetheless showed the same initiative, boldness, enterprise, and ambition as the first generation. By finding overlooked or underdeveloped oil fields in foreign countries, forming partnerships with Mexico's state-controlled oil industry, reviving Texas's moribund oil business, and searching for new oil fields in the West, the younger generation of Texas oilmen made their mark in the world,just as their grandfathers had.

Wildcatters is a well-woven narrative about this legendary sector of American business. Beyond this, Helgesen sees the Texas oil business as exemplifying and, to some degree, preserving the frontier spirit of overcoming challenges with determination, ingenuity, confidence and optimism. ¤

Sally Helgesen is the author of many books, including The Web of Inclusion: A New Architecture for Building Great Organizations, *also reprinted by Beard Books.*

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in commerce. "Numerous carriers unrelated to Montreal, Maine & Atlantic Railway still need to be able to use the rail line to engage in business," he says. "As a result, any type of bankruptcy filing involving a rail line creates issues involving numerous parties in interest. Like many bankruptcies, it's interesting to see the interplay between the debtor and the other parties in interest."

A success story came in September when Eastman Kodak Company, which filed for bankruptcy in January 2012 after earlier spending $3.4 billion to shrink and restructure, had its plan of reorganization confirmed in August 2013. It was a notable emergence for numerous reasons. First, says Schrag, it emerged from chapter 11 as a substantially smaller and more highly focused company in a different industry – commercial printing and packaging – than the film and camera company most people had associated with the Kodak name. Second, there was a high degree of consensual activity. Third, says Schrag, there was a global settlement agreement that satisfied the staggering pension liabilities of Kodak's U.K. affiliate. It's this latter point that Donahue of AlixPartners, whose James Mesterharm held the CRO position, found most notable. "The company was able to emerge after transferring assets of its personalized imaging business to the company's 15,000-member U.K. pension fund – a unique method of settling that eliminated a $2.8 billion claim against the company," she says.

Finally, in December, American Airlines emerged from bankruptcy protection, merging with US Airways to create the world's biggest airline. The airline had declared bankruptcy in November 2011, weighed down by labor liabilities and other debt. It became the last of the major airlines to restructure. The $11 billion merger deal, which is anticipated to pay all unsecured creditors in full and give shareholders a distribution, is "a seminal case," says Goffman.

If anything was a problem in 2013 it was interest rates, says Jeremy Campana, a partner at Thompson Hine. "Interest rates are too low, which is keeping companies afloat." Donahue agrees. "Credit remained available to many more companies in stressed or distressed situations than we have seen historically, particularly large companies that in general have better access the high yield market."

That said, Donahue notes that she has lately been seeing certain larger companies in need of an operational fix in order to get access to the capital markets, which "is a trend worth paying attention to," she says. ¤

Special Report

Outstanding Restructuring Lawyers – 2013

Lawyer	Firm	Outstanding Achievements
D.J. (Jan) Baker	Latham & Watkins New York, NY dj.baker@lw.com	Led legal team advising US Airways in their successful work to merge with American Airlines through American's chapter 11 process. Historic deal required careful strategy to best position US Airways to be successful. Because American's management rebuffed any notion of a merger at the outset of the case, USAirways worked to build support amongst American's creditor and labor groups to push for a parallel path.
Bruce Bennett	Jones Day Los Angeles, CA Bbennett@jonesday.com	Lead counsel to City of Detroit in largest chapter 9 municipal bankruptcy; MFGlobal bank debt/bondholders as plan proponents (now plan administrator) for successfully confirmed plan; Travelport Noteholders/ComputerShare Trust Co. as indenture trustee in restructuring with above-par recoveries; Tribune Company holders of $3 billion-plus of senior loans in negotiating plan and litigating confirmation.
Martin J. Bienenstock	Proskauer New York, NY mbienenstock@proskauer.com	Lead counsel to Rotech Healthcare, which entered and exited chapter 11 in 2013. After a dozen years in bankruptcy, helped pull Ames Department Stores out of chapter 11 in 2013. As counsel to creditors' committee, helped bring MF Global's 2011 implosion to a conclusion in 2013. Counsel to NewPage Corp. avoidance suits, which emerged from chapter 11 in late December 2012. Represented unsecured creditors in School Specialty.
Kenneth H. Eckstein	Kramer Levin Naftalis & Frankel New York, NY keckstein@kramerlevin.com	Lead counsel to official creditors' committees of ResCap, achieving fully consensual resolution of one of the most complex and vexing bankruptcies in history. In ResCap, spearheaded multi-faceted program resulting in ResCap's parent company, Ally Financial, increasing contribution for creditors from $750 million to $2.1 billion. Represented JPMorgan Chase in Dewey & LeBoeuf and cred. committee in Old HB, Inc., fka Hostess Brands.
Jay M. Goffman	Skadden, Arps, Slate, Meagher & Flom New York, NY jay.goffman@skadden.com	Lead counsel to unsecured creditors' committee of AMR Corporation in company's $12 billion merger with US Airways Group. Committee-driven merger has already been approved by the bankruptcy court. Led Central European Distribution Corporation prepack, which involved innovative reverse Dutch tender offer. Other representations include Excel Maritime Carriers, Pfizer, Evergreen International Aviation, and Better Place.
Timothy Graulich	Davis Polk & Wardwell New York, NY timothy.graulich@davispolk.com	Lead U.S. counsel to Lehman Brothers International (Europe) in prosecution and settlement of $38B of claims in Lehman Brothers SIPA liquidation, which settlement transferred more than $10B in value to LBIE. Lead U.S. counsel to Elpida Memory in first-ever U.S. recognition of a Japanese plan of reorganization under chapter 15; advised Citibank, largest creditor to American Airlines, in American's highly successful chapter 11 case.
Scott L. Hazan	Otterbourg New York, NY shazan@otterbourg.com	Represented the creditors' committees in Reader's Digest Association, Rotech Healthcare, Bermo Enterprises, Inc., Pemco World Air Services, Inc. n/k/a WAS Services, Fillpoint LLC, Ames Department Stores, and Wells Fargo in Journal Register Co. Each of the debtors successfully emerged from chapter 11 in 2013. Representing the liquidating trustee in TerreStar Corporation.
Gary T. Holtzer	Weil, Gotshal & Manges New York, NY gary.holtzer@weil.com	Represented Benjamin M. Lawsky, NY Superintendent of Financial Services, as court-appointed rehabilitator of Financial Guaranty Insurance Company in NY's first ever rehabilitation proceeding involving a financial guaranty insurance company. Represented FGIC and Syncora in ResCap chapter 11 cases and currently represents FGIC in chapter 9 case filed by City of Detroit. Advised LodgeNet Interactive chapter 11 prepack.
Susheel Kirpalani	Quinn Emanuel Urquhart & Sullivan New York, NY susheelkirpalani@quinnemanuel.com	Representing Eike Batista in restructurings of OGX and OSX, oil and gas and related shipping and equipment companies. Both companies are largest in Brazil history to commence proceedings for judicial recovery (reorganization). Represented ResCap in global mediation with the debtors, Ally Financial, and most of the other major creditor constituencies. Other representations include Syncora Guarantee in Jefferson County chapter 9.
Gary S. Lee	Morrison & Foerster New York, NY glee@mofo.com	Lead bankruptcy counsel to ResCap and affiliated debtors. Represented unsecured creditors committee in Ambac Financial Group. Ambac successfully emerged from chapter 11 with issuance of new capital stock with market capital and corresponding recoveries to creditors of over $1 billion. Representing 12 offshore funds, financial institutions, and individuals holding over $1.5 billion in claims against Madoff Investment Securities.
Edward O. Sassower	Kirkland & Ellis New York, NY edward.sassower@kirkland.com	Lead partner advising Energy Future Holdings and certain affiliates in restructuring more than $40 billion, the largest leveraged buyout restructuring in history. Lead partner representing Oaktree Capital Management as secured lender and plan sponsor in acquisition of General Maritime Corporation and subsidiaries. Other engagements include MSR Resort Golf Course in all aspects of its chapter 11 reorganization and Horizon Lines.
Mark Shinderman	Milbank, Tweed, Hadley & McCloy New York, NY mshinderman@milbank.com	Represented creditors in some of largest and most contested cases of the year. In Cengage, representing first lien group in $7 billion restructuring. Lead attorney in Gatehouse, a $1.2 billion prepack. In Koosharem a/k/a Select Staffing, representing steering committee of 1st and 2nd lien lenders owed in excess of $600 million. Representing special servicer of $1 billion first lien mortgage debt in restructuring and sale of MSR Resort Golf. ¤

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frequency in complex cases, the case seems to denote one of a relatively small number of times that such a mechanism has been employed in a complex chapter 11 case in Puerto Rico.

Additional complexity came from incorporating settlements of non-bankruptcy litigation into the plan. "It becomes complicated because you are dealing with litigation in Puerto Rico local courts that has been going on for some time," says Smith. "There are very specific local requirements for addressing and consensually concluding litigation of that sort, including through a chapter 11 plan." The nature of the assets being transferred and their importance also necessitated additional attention. "It is a different type of asset that had to be documented very carefully to ensure various specific protections, not just as a matter of federal bankruptcy law, but also local Puerto Rico law," according to Smith.

Smith points to several aspects of the case strategy that were crucial to moving forward quickly. "There was a concerted effort to move things forward with the parties [the debtor and FirstBank] simultaneously and also to keep the court informed of our presence and our interest in trying to work with the parties." Additionally, Smith emphasized the importance of coordinating seamlessly and constantly with a seasoned group of professional advisors who had local knowledge and experience. "We worked with a pretty extensive advisor team because it is critical to draw from concerted and deep resources in navigating the environment."

Under Putnam's ownership, Marina Puerto del Rey appears poised to prosper. The successful acquisition of the project "opened a window of opportunity to enhance the island's overall economy," Abesada-Agüet notes. "The acquisition included an agreement to acquire other adjacent land in order to develop it and create an integrated cross-services tourism project next to the marina that will enable hundreds of new jobs in construction and tourism." After the transaction closed, a $450 million renovation and expansion project was announced. "The confidence of foreign investors shows that we are back on track to achieve growth and development of a strong tourism industry, capable of supporting the foundation of a prosperous society," Puerto Rico Governor Alejandro Garcia Padilla says. "I see in the history of Puerto del Rey a metaphor for what is going to happen in Puerto Rico." ¤

Pensions, *from page 4*

ownership of each portfolio company under 80 percent," says Wissel.

Another impact could be on single-employer pension plans. The First Circuit's decision addressed only ERISA's multiemployer plan withdrawal liability rules. However, the First Circuit could employ the investment-plus test to determine if a private equity fund is a trade or business under ERISA's single-employer plan termination liability rules as well. That remains to be seen.

Finally, the implications for the First Circuit's decision extend beyond pension law to tax law. The taxation of private equity funds, for example, is built on the premise that the funds are not engaged in a trade or business. Since the First Circuit court found that Sun Capital was engaged in a trade or business for purposes of ERISA, one could easily argue that the fund was also engaged in a trade or business for tax purposes.

"This raises the issue of whether foreign investors in a private equity fund could be taxed as effectively connected with a United States trade or business," says Victor Fleischer, a professor of law at the University of San Diego, who notes that under current law those foreign investors are usually untaxed and need not file tax returns in the United States. "Similarly, tax-exempt investors like pension funds and university endowments could face tax liability for unrelated business taxable income on their investments. And if, as Steven M. Rosenthal of the Tax Policy Center has argued, the fund is in the trade or business of developing portfolio companies for sale to customers, the profit share paid to the fund's managers, which is often taxed at lower long-term capital gains rates under current law, may instead be taxed as ordinary income."

Fleischer notes, however, that for now the *Sun Capital* decision does not changes the definition of trade or business for tax purposes. "The court's holding is an interpretation of ERISA, not tax law, and unless the Internal Revenue Service decides to make the argument in the tax context, nothing has changed," he says.

As to whether courts outside the First Circuit will be persuaded by the decision, there may be a final factor to consider: Fleischer notes that there were "human aspects" that might have influenced the First Court's decision, and those aspects might not be present in other cases that address the issue of private equity fund obligation for pension liabilities.

Specifically, Sun Capital was co-founded by Marc Leder, whom Fleischer calls "a flashy investor who has gotten attention for using the bankruptcy process to shed legacy pension liabilities."

The case, Fleischer says, evokes the movie "Other People's Money," in which Danny DeVito plays "Larry the Liquidator," who seeks to take over a struggling company.

"I'm not surprised that the court wanted to write a Hollywood ending for the pensioners of Scott Brass," says Fleischer. ¤

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- *Special Report: Largest Chapter 11s of 2013*
- *Special Report: Successful Restructurings – 2013*
- *Research Report: Who's Who in Groeb Farms, Inc.*

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