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Year in Review

by Julie Schaeffer

There were 6,016 Chapter 11 filings through November 2017, versus 6,179 at the same point in 2016. But beyond the numbers, how did 2017 restructuring activity compare to prior years? What were the significant events? And what sectors dominated?

We asked six bankruptcy professionals: **Thomas Califano**, co-chair of DLA Piper's U.S. restructuring practice; **Benjamin D. Feder**, special counsel at Kelley Drye & Warren LLP; **Harve Light**, a managing director at Conway MacKenzie; **Michael J. Musso**, a managing director at Conway MacKenzie; **Paul Share**, a managing director at ConwayMacKenzie; and **Michael J. Venditto**, a partner in the financial industry group

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Keep The Receipt

Third Circuit Courts Define Receipt for § 503(b)(9) Purposes

by Randall Reese

Those shipping goods to companies in distress are entitled to administrative expense status for the value of goods "received by the debtor within 20 days before" the debtor's bankruptcy filing pursuant to § 503(b)(9) of the Bankruptcy Code. The question of precisely when goods are deemed to be "received" for the purposes of determining whether a creditor is permitted to recover the value of the goods as an allowed administrative expense claim under § 503(b)(9) was addressed in a recent U.S. Court of Appeals decision. The Third Circuit acknowledged in *World Imports* that its decision "has important ramifications for a creditor that sells goods to a debtor soon before the debtor files a

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Lenders: The New Owners

by Julie Schaeffer

There's a new pattern emerging in retail bankruptcies.

"The new breed of lenders is increasingly willing to become owners," says Kenneth A. Rosen, partner and chair of the bankruptcy, financial reorganization, & creditors' rights group at Lowenstein Sandler LLP. "It doesn't scare them in the least."

In the old days, the primary question in a retail Chapter 11 was how you could reorganize the business in a traditional way by closing stores, warehouses, and distribution centers. Indeed, until this year, most bankrupt retailers, such as American Apparel, The Limited, and Sports Authority, were dismantled. Their intellectual property and other assets were acquired, and at times some of their brands were sold online, but they ceased to

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at Reed Smith LLP.

From what they told us, in many ways, 2017 brought more of the same: activity in retail and energy. But there were also some new considerations, including activity in healthcare and the changing dynamic of the private-equity market.

Chapter 11 Filings Nationwide

2017 YTD	6,016
2016	6,591
2015	6,651
2014	6,787
2013	8,577
2012	10,057
2011	11,459

Source: ABL, as of November 2017.

Overall, what did restructuring activity look like in 2017?

Venditto: The trend to pre-negotiated cases has helped reduce the length and cost of Chapter 11 cases. Even liquidations have benefitted from pre-filing coordination by the debtor and lenders. This increases the significance of the first-day-orders, which can significantly impact case outcomes.

What sectors saw the most restructuring activity? Why?

Feder: The turmoil in the retail industry continues unabated, and ongoing changes and uncertainty in other sectors such as media and healthcare are giving rise to a great deal of activity.

Musso: Without question, the changing retail landscape took front and center headlines. It appears that this is a trend that will continue in 2018. Its ripple effect will continue to reach far into other industries especially in Consumer Packaged Goods and Consumer Products. The battle is on between Wal-Mart and Amazon, and consumers will ultimately be winners as this ultra-competitive environment will lead to better shopping

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Chapter 11 bankruptcy petition.”

The appellants, creditors Haining Wansheng Sofa Company and Fujian Zhangzhou Foreign Trade Company, were Chinese companies that sold furniture and similar goods to the debtor – World Imports, Ltd. – in the ordinary course of business. The goods were shipped via common carrier from China to the U.S. “free on board” (FOB) at the port of origin. As such, the risk of loss or damage passed to World Imports upon transfer at the port.

Haining and Fujian both sought to have their claims relating to those shipments allowed as administrative priority claims under 11 U.S.C. § 503(b)(9). Section 503(b)(9) grants administrative priority to claims if: “(1) the vendor sold ‘goods’ to the debtor; (2) the goods were received by the debtor within twenty days [before the bankruptcy] filing; and (3) the goods were sold . . . in the ordinary course of business.” The parties agreed that Appellants shipped the goods from China “more than 20 days before the bankruptcy filing,” and that World Imports “took physical possession of the goods in the United States fewer than 20 days before the bankruptcy filing.” However, they disagreed on which action – shipment or physical acceptance – constituted “receipt” under § 503(b)(9).

Circuit Judge Hardiman, writing in his opinion for the Third Circuit, explained that the Bankruptcy Code doesn’t define the word “received,” so the Court normally construes it “in accord with its ordinary or natural meaning.” Although the dictionary definitions are not identical, Judge Hardiman said that all the definitions require physical possession. As a result, applying the definitions to § 503(b)(9), a debtor must “take” goods into its “possession,” “custody,” or “hands” in order to receive them.

The court further stated that many cases have looked to Article 2 of the UCC when analyzing § 503(b)(9) claims. The legal and dictionary definitions correspond with the definition found in

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operate as a going concern because no one saw value in assuming costly store leases.

Today, the norm in a typical retail Chapter 11 is becoming a debt-to-equity conversion as creditors, as well as landlords and vendors, are seeing an opportunity to minimize their losses by cashing in on whatever value is left.

Certainly, a quick sale of assets is still popular. Many lenders, whether they are bondholders or banks, do not have the patience to spend years in bankruptcy or the inclination to spend a fortune on legal and accounting fees. “In many of my retail bankruptcies, the lender will tell us we have 60 to 90 days to find a buyer, and if we can’t find a buyer, we have to liquidate,” Rosen explains.

But more and more often, especially in mega-cases such as the Toys R Us bankruptcy, where institutional debt that was used for acquisition purposes is still on the balance sheet, the debt-to-equity conversion is popular.

“In highly leveraged retailers, where a sale to a third party is not a viable option, and the debt is the fulcrum security, the best option for the debt holders is a debt for equity conversion,” says Perry Mandarino, a senior managing director at B. Riley FBR, Inc. “The other alternative is a liquidation, which would most likely be less favorable economically. So, in the event of a sale not happening, debt-to-equity conversion will be the ‘norm’ if the liquidation option is less appealing.”

“What makes these retail cases unique is that they have a lot of institutional debt, and the reorganization is a question of how much of the debt will get converted to equity,” says Rosen. A retailer might have multiple tiers of debt, he explains. Perhaps tier 1 is secured debt, tier 2 is subordinated debt, and then there is institutional debt, typically bonds. “Whether the bonds are secured or unsecured, the only question in the case is how far up the balance sheet you will go to convert debt to equity,” says Rosen.

Rosen believes that in the Toys R Us case, the equity will be substantially

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Research Report

Who's Who in Toys "R" Us' Bankruptcy Cases

by Carlo Fernandez

Toys "R" Us, Inc. is an American toy and juvenile-products retailer founded in 1948 and headquartered in Wayne, New Jersey, in the New York City metropolitan area.

Toys "R" Us and certain of its U.S. subsidiaries and its Canadian subsidiary sought Chapter 11 protection (Bankr. E.D. Va. Lead Case No. 17-34665) to restructure \$5 billion of long-term debt and establish a sustainable capital structure.

The Company's Canadian subsidiary, Toys "R" Us (Canada) Ltd., which operates 82 retail stores across Canada, commenced parallel proceedings under the Companies' Creditors Arrangement Act ("CCAA") in the Ontario Superior Court of Justice.

The Company said in September that the 1,600 Toys "R" Us and Babies "R" Us stores around the world -- the vast majority of which are profitable -- are continuing to operate as usual despite the Chapter 11 filing

As of Oct. 28, 2017, the Company's consolidated balance sheet showed \$7.262 billion in assets against \$9.261 billion in liabilities.

Toys "R" Us is presently a privately owned entity but still files with the Securities and Exchange Commission as required by its debt agreements. A consortium of Bain Capital Partners LLC, Kohlberg Kravis Roberts, and Vornado Realty Trust invested \$1.3 billion to complete a \$6.6 billion leveraged buyout of the company in July 2005.

The committee of unsecured creditors formed in the Chapter 11 case said it is investigating debt transactions that took place in the years leading up to the bankruptcy filing, including the 2005 leveraged buyout.

Funding the Company's restructuring is a \$3.125 billion postpetition financing, comprised of (i) \$1.850 billion of revolving commitments, (ii) \$450 million of "first in last out" term loan financing, (iii) \$450 million of term loan financing, and (iv) \$375 million of Taj DIP notes.

The Company said in December that it is working to finalize its real estate analysis and business plan -- and has begun plan negotiations and discussions

with their stakeholders.

The Company intends to emerge from chapter 11 before the 2018 holiday season.

CCAA APPLICANT

Grant Thornton LLP is the monitor appointed in the CCAA case, with the engagement headed by **Michael Creber**, as senior vice-president.

Cassels, Brock And Blackwell LLP is the Monitor's Canadian counsel, with the engagement headed by partners **Shayne Kukulowicz, Jane Dietrich, and Ryan C. Jacobs.**

Allen & Overy LLP is the Monitor's counsel with respect to U.S. matters.

Goodmans LLP is serving as legal advisor to Toys Canada, with the engagement headed by partners **Brian F. Empey, Melaney Wagner, and Christopher Armstrong.**

Alvarez & Marsal Canada ULC is Toys Canada's financial advisor.

CHAPTER 11 DEBTORS

Kirkland & Ellis LLP is serving as principal legal counsel to Toys "R" Us, with the engagement headed by partners **Joshua Sussberg and Edward O. Sassower.**

Kutak Rock LLP is the Virginia co-counsel to Toys, Inc., with the engagement headed by partners **Michael A. Condules, Peter J. Barrett, and Jeremy S. Williams.**

Alvarez & Marsal is the restructuring advisor, with the engagement led by **Jonathan Goulding**, managing director and co-Head for the West Region with A&M's North American Commercial Restructuring Practice in Los Angeles.

Lazard Freres & Co. LLC is serving as investment banker, with the engagement led by **David S. Kurtz**, global head of the firm's restructuring practice.

A&G Realty Partners LLC is the Company's real estate advisor, with the engagement headed by **Andrew Graiser**, co-president.

Ernst & Young LLP is the Company's outside auditor, with the engagement led by **Carmine Romano**, partner.

KPMG LLP is the Company's tax consultant and internal audit advisor, with the engagement headed by **Howard Steinberg**, partner.

Prime Clerk LLC is the claims and noticing agent.

U.K. PROCEEDING

News reports emerged in early-December 2017 saying that Toys "R" Us is preparing to close 26 of its 105 stores located in the U.K. Toys "R" Us wants to do that under the terms of a company voluntary arrangement, but a reported demand by the **Pension Protection Fund** for a £9 million payment on account of a £25 million shortfall in the pension fund might force the company to commence a formal administration proceeding. **PricewaterhouseCoopers** is advising the PPF.

DISINTERESTED DIRECTORS

Munger, Tolles & Olson LLP is lead conflicts counsel, rendering professional services at the direction of Alan B. Miller and Mohsin Y. Meghji, the disinterested directors of Toys "R" Us, Inc., in connection with conflict matters. Partner **Seth Goldman** heads the engagement.

Ronald Page, PLC, is Virginia counsel to Toys Inc., to render professional services at the direction of Alan B. Miller and Mohsin Y. Meghji, the disinterested directors of Toys, in connection with conflict matters. The engagement is headed by **Ronald Page Jr.**, managing partner.

Curtis, Mallet-Prevost, Colt & Mosle LLP is conflicts counsel to Toys "R" Us - Delaware, Inc., at the direction of its independent directors Alan J. Carr and Neal P. Goldman. The engagement is headed by partner **Steven Reisman.**

Crenshaw, Ware & Martin, P.L.C., is local co-counsel for Toys Delaware, providing legal advice to Toys Delaware's independent directors. The engagement is headed by partner **Donald Schultz.**

Shaw Fishman Glantz & Towbin LLC is serving as legal counsel to Giraffe Holdings, LLC, and two other debtors, for the purpose of advising independent managers Gary Begeman and Kurt Cellar in connection with conflict matters. The engagement is headed by member **Robert Fishman.**

Canfield Wells & Kruck LLP is local co-counsel to Giraffe Holdings, et al., for

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Research Report

Who's Who in Toys "R" Us' Bankruptcy Cases

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the purpose of advising the independent managers in connection with conflict matters.

Proskauer Rose LLP is providing legal advice to Jeffrey Stein and David Weinstein, directors of TRU Taj LLC and TRU Taj Finance, Inc., with respect to conflict matters. **Peter J. Young**, a partner of Proskauer, heads the engagement.

Dabney, PLLC, is co-counsel to TRU Taj, at the direction of disinterested directors Jeffrey S. Stein and David N. Weinstein in any conflicts matters. The engagement is headed by **H. Slayton Dabney, Jr.**, partner.

Klehr Harrison Harvey Branzburg LLP is serving as legal counsel to Jonathan Foster and Paul Leand who were appointed as independent managers of debtor Wayne Real Estate Parent Company, LLC. The engagement is headed by **Morton R. Branzburg**, a partner and founding member of the law firm of Klehr Harrison.

COMMITTEE

The nine-member official committee of unsecured creditors is comprised of **Mattel, Inc., Huff Corporation, Evenflo Company Inc., KIMCO Realty, Simon Property Group Inc., The Bank of New York Mellon, Euler Hermes North America Insurance Co., LEGO Systems Inc., and Veritiv Operating Company.**

Kramer Levin Naftalis & Frankel LLP is serving as counsel to the Creditors Committee, with the engagement led by New York partners **Robert Schmidt, Kenneth H. Eckstein, and Stephen D. Zide.**

Wolcott Rivers, P.C., is the Committee's local counsel, with the engagement led by **Cullen D. Speckhart**, shareholder and Co-Chair of the Restructuring & Bankruptcy Litigation practice group of the firm.

FTI Consulting, Inc., is the Committee's financial advisor, with the engagement led by FTI senior managing director **Samuel Star.**

Moelis & Company LLC is the Committee's investment banker, with the engagement headed by **Barak Klein,**

managing director.

JND Corporate Restructuring is the Committee's information services agent, with the engagement headed by **Travis K. Vanell**, CEO.

CREDITORS

Paul, Weiss, Rifkind, Wharton & Garrison LLP is serving as counsel, and **Whiteford, Taylor & Preston LLP** is co-counsel to the Ad Hoc Group of Taj Noteholders. The Whiteford team is headed by partner **Christopher A. Jones** and associate **Jennifer E. Wuebker**, and the Paul Weiss team is headed by partner **Brian S. Hermann**, counsel **Samuel E. Lovett**, and associate **Kellie A. Cairns.**

As of Nov. 10, 2017, the Ad Hoc Group of Taj Noteholders is comprised of holders of the (i) \$518.7 million of 12% senior secured notes due 2021 issued by Tru Taj LLC and Tru Taj Finance, Inc., and (ii) \$374 million of 11% senior secured ABL DIP notes issued by Tru Taj. As of Oct. 10, 2017, the members of the Ad Hoc Group were **BlueMountain Capital Management LLC, CarVal Investors LLC, Grantham, Mayo, Van Otterloo & Co. LLC, Loomis Sayles & Company LP, Owl Creek Asset Management L.P., OZ Management LP and OZ Management II LP, and Silver Point Capital Fund, L.P. Aurelius Capital Management LP, River Birch Capital LLC, and Stonehill Capital Management, LLC**, later joined the group.

Andrews Kurth Kenyon LLP and **Kepley Broscious & Biggs, PLC** are representing the Ad Hoc Committee of Taj Secured Noteholders. The Andrews Kurth team is headed by partners **Paul N. Silverstein, J. Wiley George, and Joseph Buoni.** The Kepley team is headed by member **William A. Broscious.**

As of Oct. 24, 2017, the TAJ Notes Committee consists of holders of \$117.3 million of the 12% Senior Secured Notes Due 2021 issued by TRU Taj LLC and TRU Taj Finance. As of Oct. 17, 2017, members of the Committee were **River Birch Capital, LLC, Owl Creek Asset Management, L.P., Cerberus Capital Management, L.P., and Marble Ridge Capital LP. Stonehill Capital**

Management LLC later joined the TAJ Notes Committee.

Arnold & Porter Kaye Scholer LLP is representing the Ad Hoc Group of B-2 and B-3 Lenders, with the engagement led by partners **Rosa J. Evergreen, Michael D. Messersmith, and D. Tyler Nurnberg.**

The Ad Hoc Group members are lenders that hold term loans in two tranches: (i) B-2 loans maturing on May 25, 2018, in an initial aggregate principal of \$400 million; and (ii) B-3 loans maturing on May 25, 2018, in an initial aggregate principal of \$225 million. The Ad Hoc Group is comprised of funds and accounts managed by nine entities: **American Money Management Corporation; Columbia Management Investment Advisers, LLC; Ellington Management Group, LLC; First Trust Advisors L.P.; MJX Asset Management LLC; Pacific Coast Bankers Bank; Par-Four Investment Management, LLC; Sound Point Capital Management, LP; and Taconic Capital Advisors LP.**

McGuireWoods LLP and **Wachtell, Lipton, Rosen & Katz** are serving as counsel to the Ad Hoc Group of B-4 Lenders. The McGuireWoods team is headed by partner **Dion W. Hayes**, counsel **Sarah B. Boehm**, and partner **Douglas M. Foley.** The Wachtell team is headed by partners **Joshua A. Feltman** and **Emil A. Kleinhaus.**

The Ad Hoc Group of B-4 Lenders holds over 50% of the debtors' \$998 million in Term B-4 Loans, and its members have agreed to provide \$450 million in postpetition financing to Toys Delaware. As of Nov. 6, 2017, the Group is comprised of certain funds and/or accounts managed or advised by **Angelo, Gordon & Co., L.P.; Franklin Mutual Advisers, LLC; Highland Capital Management, LP; HPS Investment Partners, LLC; Marathon Asset Management, LP; Redwood Capital Management, LLC; Roystone Capital Management LP; Solus Alternative Asset Management LP; and Highland Capital Management, LP.**

JUDGE

The Hon. **Keith L. Phillips** is the case judge.

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experiences, easier access to goods and services and more access to smaller boutique brands.

Share: Retail was increasingly impacted in 2017 and marked by several large retailers that sought bankruptcy (e.g., Toys “R” Us, The Limited, hhgregg). Retail’s demise, which started in 2015, is the result of people buying more goods online each year and America being “over-retailed,” from a footprint perspective, with more than 1,200 malls. The U.S. has 40 percent more shopping space per capita than Canada, five times more than the U.K. and 10 times more than Germany.

Therefore, the continued impact to brick-and-mortar stores is no surprise as mobile trends continue. The best on-the-ground research is when your four-year-old asks you, “Why go to a store when you can order it on your phone and it will arrive in a box?” That’s when you understand why the retail industry is in trouble.

Venditto: Brick-and-mortar retailers closed thousands of stores; they were caught between changes in consumer habits, high retail rent, and large debt loads.

Was it all about retail?

Califano: Healthcare saw the most

activity, in my opinion—caused by changes in the industry, changes in reimbursement, and government enforcement.

What’s going on with energy?

Feder: The wave of energy bankruptcies that began when oil prices collapsed back in 2014-2015 finally abated somewhat, although the collateral effects are still being felt in ancillary industries, such as deep sea drilling companies.

Venditto: The persisting slump in commodity prices has affected the oil and gas industry, oilfield services and

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Receipt, *from page 2*

the UCC, the Circuit Judge noted. Section 2–103(1)(c) defines “receipt” of goods as “taking physical possession of them.” The Third Circuit reasoned that based on the ordinary meaning of “received,” the legislative context of the Bankruptcy Code, and persuasive decisions finding that Congress meant to use the UCC definitions for this particular amendment to the Bankruptcy Code, the goods are “received” when the debtor or its agent takes physical possession of them.

Hardiman found further support in the court’s decision in *In re Marin Motor Oil, Inc.*, which interpreted a related

provision of the Bankruptcy Code (11 U.S.C. § 546(c)), and held that “receipt” occurs when the buyer takes physical possession of the goods. He explained the interrelationship between that section and § 503(b)(9) was clear: § 503(b)(9) is an exemption to the general bankruptcy reclamation scheme established by § 546(c). This connection between the two code sections and the Court’s holding that Congress meant for terms used in § 546(c) to bear the definition used in the UCC at the time of BAPCPA’s enactment means that the UCC definitions also apply to the § 503(b)(9) exception. Given that *Marin* stated that the term “receipt” used in § 546(c) means “taking physical

possession,” “received” means the same thing in § 503(b)(9), the court held.

The Third Circuit also rejected the bankruptcy court’s reasoning that the goods were “constructively received” when shipped from China. The Third Circuit acknowledged that a buyer may be deemed to have received goods when its agent takes physical possession of them; however, common carriers are not agents. As a result, constructive receipt doesn’t include “FOB delivery” to a common carrier. “Delivery, or transfer of title or risk of loss, has been treated as distinct from actual receipt of goods by the buyer.” While “possession by an

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Lenders, *from page 2*

diluted and some of the debt will be converted into some form of ownership. “Everyone is trying to determine the value of the company,” Rosen says. “A restructuring firm was hired and that restructuring firm is undoubtedly trying to figure out which doors to close, which doors to keep open. And once it knows the value of the company, it will then go to the company’s institutional lenders and say, ‘The value of the company is a billion dollars, but there’s a billion dollars of debt ahead of you, so your claim is worth nothing.’ And then settlement talks

will begin.”

One reason for the increase in debt-to-equity conversions: Compared to 25 years ago, lenders are different. “If we were having this discussion in 1980, the lenders we were talking about would be Chase Manhattan Bank, Manufacturers Hanover Bank, La Salle Bank, Security Pacific Bank, etc.,” says Rosen. “But if you look at who the lenders are in retail bankruptcies, you will see a lot of hedge funds and private equity shops.”

Indeed, a consortium comprised of Vornado Realty Trust and private-equity firms KKR & Co. and Bain Capital bought Toys R Us for \$6.6 billion in 2005.

Lenders such as these are very willing to say, “Convert my debt to equity, and if I have to own it for a while, I’ll own it for a while, then talk to you later about converting into cash.”

Why would lenders be willing to do that? According to Rosen: “A lot of lenders will say, ‘Why should we spend two years in Chapter 11 trying to rebuild value for the benefit of the unsecured creditors? I don’t want do that. Let’s get out of bankruptcy and rebuild value for ourselves. Convert my debt to equity, we’ll come out of bankruptcy, I’ll be an owner of the company, we’ll try to fix the

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Special Report

Sources of Debtor-in-Possession Financing

Company Name & Location	Amount	DIP Lender
TOYS R US, INC. Wayne, NJ	\$3,000,000,000	JPMorgan Chase & Co., Citigroup Inc., Deutsche Bank AG, Goldman Sachs Group Inc. and Barclays PLC
WALTER INVESTMENT MANAGEMENT CORP. Fort Washington, PA	\$1,900,000,000	Credit Suisse First Boston Mortgage Capital LLC, Credit Suisse AG, Cayman Islands Branch, Barclays Bank PLC
WESTINGHOUSE ELECTRIC COMPANY LLC Cranberry Township, PA	\$800,000,000	Citibank N.A., Apollo Investment Corporation, AP WEC Debt Holdings LLC, Midcap Financial Trust, Amundi Absolute Return Apollo Fund PLC, Ivy Apollo Strategic Income Fund and Ivy Apollo Multi Asset Income Fund
AVAYA INC. Santa Clara, CA	\$725,000,000	Citibank, N.A.
GANDER MOUNTAIN COMPANY St. Paul, MN	\$452,000,000	Wells Fargo Bank, National Association and Pathlight Capital LLC
PAYLESS HOLDINGS LLC Topeka, KS	\$385,000,000	Wells Fargo Bank, National Association and TPG Specialty Lending, Inc.
GYMBOREE CORPORATION San Francisco, CA	\$370,000,000	Bank of America, N.A., Pathlight Capital LLC and Credit Suisse AG, Cayman Islands Branch
APPVION, INC. Appleton, WI	\$325,300,000	Wilmington Trust and PJT Partners LP
RUE21, INC. Warrendale, PA	\$275,000,000	Bank of America, N.A. and Wilmington Savings Fund Society, FSB
TK HOLDINGS INC. Auburn Hills, MI	\$227,000,000	Sumitomo Mitsui Banking Corporation
NAVILLUS TILE, INC New York, NY	\$135,000,000	Liberty Mutual Insurance Company
M & G POLYMERS USA, LLC Apple Grove, WV	\$100,000,000	Control Empresarial de Capitales, S.A. De C.V.
WOODBRIIDGE GROUP OF COMPANIES, LLC Sherman Oaks, CA	\$100,000,000	Hankey Capital, LLC
EZRA HOLDINGS LIMITED White Plains, NY	\$90,000,000	Chiyoda Corp. and Subsea 7 S.A.
EMAS CHIYODA SUBSEA LIMITED Birmingham, UK	\$90,000,000	Chiyoda Corp. and Subsea 7 S.A.
THINK FINANCE, LLC Addison, TX	\$90,000,000	Victory Park Capital Advisors
21ST CENTURY ONCOLOGY HOLDINGS INC. Fort Myers, FL	\$75,000,000	Wilmington Savings Fund Society and Morgan Stanley
VANGUARD NATURAL RESOURCES, LLC Houston, TX	\$50,000,000	Citibank NA, JPMorgan Securities LLC and Wells Fargo Bank NA
GULFMARK OFFSHORE, INC. Houston, TX	\$35,000,000	DNB Bank ASA

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Special Report

Sources of Debtor-in-Possession Financing

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Company Name & Location	Amount	DIP Lender
ADPT DFW HOLDINGS LLC Lewisville, TX	\$22,000,000	Deerfield Partners, L.P.
CASTEX ENERGY PARTNERS, L.P. Houston, TX	\$15,000,000	Capital One Bank, Castex Energy Inc., and RBL Lenders

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Worth Reading

One Hundred Years of Land Values in Chicago

Author: Homer Hoyt

Publisher: Beard Books

Softcover: 552 pages

List Price: \$34.95

This book represents the first comprehensive study of land values in a large city over a long period of time. The author's goal was to trace cyclical fluctuations in land values in an American city, in the expectation of contributing to the policy debate on taxing real estate investments. He managed to achieve much more, however. Indeed, from the viewpoint of land values, he offers a fascinating general history of Chicago through the early 1930s. He very skillfully interweaves the city's social and economic history into its land economic history, and interprets the interrelationships among them.

The book covers the years of 1830-1933, a period of dizzying growth, during which time Chicago grew from a cluster of a dozen log huts at the site where the Chicago River meets Lake Michigan, to a booming city of 211 square miles and a population of almost 3.5 million. Over those hundred years, ground value grew from a few thousand dollars to more than \$5 billion. And what a century it was, a roller coaster of the railroad boom, the

Civil War, the Great Chicago Fire, the first skyscrapers, the first World's Fair, World War I, and the Great Depression.

The reader is immediately struck by the sheer size of the research project the author designed and undertook. He examined thousands of actual real estates sales and compared them with the appraisals and opinions of real estate dealers. He researched and had drawn 103 maps showing land values of specific sections of the city in various years; the evolution of the railroad; the growth of public transportations (from horse-car lines and street-car lines to elevated lines); sewer construction; the distribution of buildings of various heights; population densities; and residential areas by predominant ethnic group, among others. There are 103 data tables as well, including the various buildings in different years; construction of infrastructure; number and types of registered vehicles; employment and wages; mortgage rates and amounts; property sales and rents; and various comparisons with cities of similar size.

The author defines a real estate cycle

as "the composite effect of the cyclical movements of a series of forces that are to a certain degree independent and yet which communicate impulses to each other in a time sequence, so that when the initial or primary factor appears it tends to set the others in motion in a definite order." He found that in Chicago during the period studied, these forces, in the order in which they appeared, were popular growth; rent levels and operating costs of existing buildings and new construction; land values; and subdivision activity. He divides these forces into 20 "events," all the way from the first, "gross rents begin to rise rapidly"; through to the sixth, "volume of building is stimulated by easy credit"; the eleventh, "lavish expenditure for public improvements"; the seventeenth, "banks reverse their boom policy on real estate," leading to stagnation and foreclosures; the nineteenth, "the wreckage is cleared away"; and finally, "ready for another boom."

One Hundred Years of Land Values in Chicago is a source of invaluable data and analysis on the subject of urban land economics, and is equally fascinating from the standpoint of American history. The author notes that "with all its kaleidoscopic neighborhood and its babble of tongues... with all its rough edges and its bluntness, Chicago is a city with a unique and magnetic personality." And well worth reading about. ✕

This book may be ordered by calling 888-563-4573 or by visiting www.BeardBooks.com or through your favorite online or local bookseller.

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particularly offshore oil drilling and service companies, which have been hurt by a shift away from costlier deepwater projects.

Were there any other trends in 2017?

Light: Another important trend seen in 2017 was the changing dynamic of the private-equity market. There were three key factors that emerged: Valuations and purchase multiples continued to climb; we saw record levels of fundraising; and exit timelines continue to stretch well beyond

the historic five-year mark.

What cases were significant in 2017?

Feder: The Second Circuit's recent decision in *Momentive*, which created a diametric split with the Third Circuit on make-whole payments under certain types of indentures, but handed secured creditors a major victory by rejecting the *Till* standard in Chapter 11 cramdown cases and requiring that secured creditors in such cases receive a market rate of interest. The Second Circuit also issued a major decision in *Marblegate*, declining to uphold a broad interpretation of the Trust Indenture Act that could have

limited companies' ability to effectuate out-of-court restructurings.

Venditto: The Supreme Court's decision last Spring in *Czyzewski v. Jevic Holding Corporation* is the most notable since it imposes limits on structured dismissals.

Is the environment of cheap credit significant?

Venditto: The lower cost of money has helped some sectors, but that benefit is not enough to help industries, such as retail and energy, facing challenges to their fundamental businesses.

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Receipt, *from page 5*

agent on behalf of a buyer constitutes constructive receipt," the Third Circuit's said that common carriers don't qualify as agents. As a result, the Court held that there was no support for the idea that a buyer constructively receives goods when they are delivered to a common carrier—even if title and risk of loss pass at that time. "[R]egardless of FOB status, the Court found that "under the UCC and Chapter 11, receipt does not occur until after the seller's ability to stop delivery ends—namely, upon the buyer's physical possession."

Just days after the Third Circuit's *World Imports* decision, a court applied the holding with in *In re SRC Liquidation, LLC*. Relying on the Third Circuit case,

a Delaware bankruptcy court held that goods delivered to a common carrier for shipment to a debtor's customer during the 20 days before the debtor's bankruptcy filing are not entitled to § 503(b)(9) claim status. A distinguishing element in that case was the fact that vendor delivered the goods to the debtor's common carrier for direct shipment to the debtor's customer. The bankruptcy court held that because the debtor never physically possessed the goods and the common carrier didn't qualify as an agent of the debtor, the vendor wasn't entitled to a § 503(b)(9) claim.

Courts can construe the meaning of "received by the debtor" by reading relevant provisions of the U.C.C. and § 503(b)(9) as "a harmonious whole," Chief Bankruptcy Judge for the District

of Delaware Brendan Linehan Shannon wrote in his opinion. "Despite the different remedies provided under sections 546(c) and 503(b)(9), the word 'received' in both provisions should and does hold the same meaning," the court wrote. "When two words are similar and concern related issues, they may be treated as 'functional equivalent[s]' and interpreted identically," Judge Shannon wrote.

Commentators note that this developing line of cases offers both benefits and burdens to a distressed customer's supply chain. "While the *SRC* holding arguably deals a devastating blow to direct ship vendors, the Third Circuit ruling in *World Imports* will help suppliers obtain an administrative priority claim under § 503(b)(9) of the Bankruptcy Code by

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Lenders, *from page 5*

business, we'll try to make it worth more money, and that way whatever increased value there is, I don't have to give it to some unsecured creditor. I'll pocket it for myself."

A good example is the teen clothing shop rue21. Had it liquidated, many creditors would have seen almost the entire value of their investment wiped out. Instead, the company exited bankruptcy preserving much of their store footprints and employee headcount.

That is why lenders today are much more willing to become owners, especially hedge funds and private equity firms. "In the old days, when the lenders threatened to beat you up, you'd say, 'Be careful; you may get what you want, and may go on the chain of title for the assets,' because nobody wants to go on the chain of title," says Rosen. "Today, lenders are very happy to become owners. It doesn't scare them in the least."

Mandarino, who has supported retailers through debt-to-equity conversions, says they provide more options to reach a

successful reorganization, so he views them favorably. "There have been several recent instances where we've looked at the different options available today and found new unique angles that have given a company a better outcome that they would have had in the past," he notes, though he adds that to be successful, a retailer need to have a viable business plan and strategy to survive to avoid so-called "Chapter 22" repeat bankruptcy filings. "There are some great success stories about retailers transforming their models as part of their go forward strategy," he says. ▣

Special Report

Outstanding Restructuring Lawyers – 2017

Lawyer & Firm

Outstanding Achievements

MATTHEW BARR

Weil Gotshal & Manges LLP
New York, NY
matt.barr@weil.com

Key role on both debtor- and creditor-side in many of the year's most significant restructurings. Lead debtors' counsel in American Gilsonite, Angelica Corp. and China Fishery Group bankruptcies. Led representation of UCC in SunEdison's \$16B chapter 11 – the largest bankruptcy of 2016. Advised sponsor Bain Capital in billion-dollar Gymboree reorganization and majority investor Guggenheim Partners in BCBG Max Azria's chapter 11, and ad hoc groups of lenders in Performance Sports Group and Seventy Seven Energy's chapter 11 cases.

RICHARD CHESLEY

DLA Piper
Chicago, IL
richard.chesley@dlapiper.com

Representing Exelon Corp. in restructuring about \$675 million in existing debt; Appvion, Inc. in its chapter 11 case; and a stalking horse bidder in Vitamin World. Represented Rabobank, Standard Chartered Bank and DBS in their exposures to the Pacific Andes Group of companies including China Fishery Group, one of the world's largest producers of fish oil and fishmeal. Worked with Houlihan Lokey Capital, Inc. to successfully recover its US\$5 million transaction fee in Relativity Fashion LLC's chapter 11 case. Abengoa SA's Chapter 15 was also confirmed in 2017.

RICHARD J. COOPER

Cleary Gottlieb Steen & Hamilton LLP
New York, NY
rcooper@cgsh.com

Key advisor to the Commonwealth of Puerto Rico on its precedent-setting \$72B municipal restructuring, the largest in U.S. history. One of the principal architects of the insolvency provisions of PROMESA, and helped develop Puerto Rico's first fiscal plan presented to the Financial Oversight and Management Board. Representing Banco Inbursa, the largest creditor and sole DIP lender to M&G Chemicals, which filed for Chapter 11 with approximately \$2B in debt. Representing ad hoc group of bondholders in connection with the restructuring of Oi S.A., the largest-ever LatAm cross-border restructuring; and ICA, Mexico's largest construction company, in its \$3.5B pre-packaged restructuring plan.

GEORGE DAVIS

O'Melveny & Myers LLP
New York, NY
gdavis@omm.com

Advised clients on many high-profile restructuring situations, including: pre-packaged chapter 11 of Homer City Generation (represented ad hoc group of senior secured noteholders); chapter 11 of Stone Energy (represented the reserve based loan (RBL) administrative agent); out-of-court restructuring of Coso Geothermal (represented an ad hoc group of certificate holders); ongoing restructuring of Takata (representing General Motors); chapter 11 of Castex Energy (representing the RBL administrative agent); and chapter 11 of paper maker Appvion (representing a large secured creditor).

DAVID M. FELDMAN

Gibson, Dunn & Crutcher LLP
New York, NY
dfeldman@gibsondunn.com

Representations include debtor SH 130 Concession (the owner and operator of the tollway connecting Austin to San Antonio) in its successful Chapter 11 case in the Western District of Texas, resulting in the restructuring of more than \$1.5 billion in debt - one of the largest restructurings consummated in the country this year; AT&T as chair of the Official Committee of Unsecured Creditors of Avaya Inc., the U.S.-based multinational telecommunications company; Credit Suisse as first lien agent in connection with the successful prepackaged bankruptcy of Answers.com; an Ad Hoc Bondholder Group in the Corporación GEO Mexican insolvency proceeding, known as a "concurso mercantil," named Restructuring of the Year at the IFLR Americas Awards 2016; and the Official Committee of Unsecured Creditors of RCS Capital in the company's successful chapter 11 reorganization. Previously represented the controlling shareholders and acquirers of Overseas Shipping Group in OSG's Chapter 11, which was named Restructuring of the Year by IFLR and Corporate Turnaround of the Year at the Turnaround Atlas Awards.

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Special Report

Outstanding Restructuring Lawyers – 2017

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Lawyer & Firm

Outstanding Achievements

ANDREW K. GLENN
Kasowitz Benson Torres LLP
New York, NY
aglenn@kasowitz.com

Defending Ad Hoc Committee of General Motors Term Loan Lenders under the \$1.5 billion Loan in an action commenced by the Creditors' Committee to recover money repaid to lenders from sale of Company to U.S. Treasury; trial in June 2017 and mediation pending. Representing Ad Hoc Group of SunEdison Second Lien Lenders in suit against SunEdison's directors and officers in connection with the offering and solicitation of the second lien credit facility; Official Committee of Unsecured Creditors of Essar Steel Minnesota (plan confirmed June 2017); Equity Committee in Hercules Offshore chapter 11 case, securing plan providing equity with a guaranteed recovery of \$15 million and reduction of first lien lenders' claims by \$32.5 million; ad hoc group of Energy Future Holdings legacy noteholders in blocking a \$2 billion loan and a restructuring support agreement; ad hoc committee in the multi-day trial involving the confirmation of the "T-side" plan of reorganization; ongoing; and Pasig, an investor in an Alphonse "Buddy" Fletcher Jr.-controlled Cayman Islands mutual fund Soundview Elite in successfully resisting management's efforts to retain control of the debtors, filing a motion to appoint a chapter 11 trustee and objections to relief sought by the debtors' management that would divert estate assets away from creditor (liquidation confirmed Aug. 2017).

GARY HOLTZER
Weil Gotshal & Manges LLP
New York, NY
gary.holtzer@weil.com

Lead counsel to Westinghouse Electric Company – the largest bankruptcy of the year – that involves approximately \$10B of debt and will recast the nuclear energy sector. Spearheaded CHC Group chapter 11 that involved over 80 legal entities in 25 countries and more than \$1.5B in funded debt obligations. Led billion-dollar chapter 11 reorganizations of Halcón Resources, Endeavour International, Memorial Production and Paragon Offshore, as well as GulfMark's reorganization, the \$189M 363 sale of Azure Midstream and out-of-court restructuring of The Brock Group.

ERIC IVESTER
Skadden, Arps, Slate, Meagher & Flom LLP
New York, NY
eric.iverster@skadden.com

Represents SunEdison in its successful restructuring; Leucadia National Corporation, a lender to and owner of FXCM Group, LLC in the prepackage bankruptcy of its parent, Global Brokerage, Inc., fka FXCM Inc.; Aljazeera America as it completed the out-of-court wind-down of its US broadcast media operations; a large power generation project in various negotiations with its lender and in discussions with its various stakeholders; Exide Technologies, one of the largest industrial and automotive battery producers, in several matters arising out of its successful chapter 11 restructuring in Delaware including disputes relating to Exide's former lead recycling facility in Vernon, California.

CHRISTOPHER K. KIPLOK
Hughes Hubbard & Reed LLP
New York, NY
chris.kiplok@hugheshubbard.com

Debtor counsel to Republic Airways in its successful \$3.6 billion Chapter 11 restructuring. Bank counsel to DNB Bank, a major Norwegian lender, in the \$737 million Chapter 11 of GulfMark, including as creditor, DIP lender and exit financier. Bank counsel to a \$6.5 billion lending syndicate in connection with an out-of-court workout to a major energy company. Debtor counsel to Ultrapetrol, a Bahamian shipper, in an extremely efficient 53-day long pre-packaged Chapter 11 bankruptcy with more than \$500 million in liabilities. Trustee counsel to Lehman Brothers Inc. in bankruptcy court and appellate victories that will allow for the closure of the Estate. Outside general counsel to the \$1 billion Eagle-Picher Industries bankruptcy trust.

DOUG MANNAL
Kramer Levin Naftalis & Frankel LLP
New York, NY
dmannal@kramerlevin.com

Led the representation of creditors' committees in two of the energy sector's most significant Chapter 11 cases. In September, chosen to lead the representation of the creditors' committee of Seadrill Limited. Earlier this year, helped facilitate the successful reorganization of the global oil field services company CHC Group, developing a bankruptcy strategy that allowed the company to consummate an operational restructuring of its fleet and a financial restructuring of its \$2 billion dollars in debt, emerging from chapter 11 as a reorganized company with significant liquidity. Helped broker a settlement between the debtors and secured and unsecured creditors of Arch Coal Inc., which paved the way for Arch to confirm its chapter 11 plan in October 2016.

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Special Report

Outstanding Restructuring Lawyers – 2017

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Lawyer & Firm	Outstanding Achievements
<p>CHRISTOPHER MARCUS Kirkland & Ellis LLP New York, NY christopher.marcus@kirkland.com</p>	<p>Representing 21st Century Oncology Holdings, Inc., the largest global provider of integrated cancer care services, to effectuate a series of transactions contemplated by a Restructuring Support Agreement supported by over 90% of the Company’s funded debt holders that will reduce the Company’s net debt by more than \$500 million; BCBG Max Azria Global Holdings, LLC, that operated more than 550 stores spread across all fifty states, Canada, Europe, and Japan; Sabine Oil & Gas, resisting multiple motions for derivative standing and prosecuting a chapter 11 plan to confirmation; SandRidge Energy, Inc., confirming a Chapter 11 plan in 117 days that equitized and canceled about \$4.1 billion of funded debt and \$525 million of preferred stock; and the ad hoc committee of second lien lenders to (and new owners of) Breitburn Energy Partners LP, playing a leading role in the development of chapter 11 plan supported by all creditor groups.</p>
<p>LORENZO MARINUZZI Morrison & Foerster LLP New York, NY LMarinuzzi@mofo.com</p>	<p>Leads the MoFo team representing the official committee of unsecured creditors for telecommunications company Avaya, Inc., Armstrong Energy, Inc., Century Oncology Holding, Inc., Peabody Energy Corporation. Represented Maxus Energy Corporation and four affiliated debtors in their contentious oil and gas-related chapter 11 cases. Represents the Navajo Nation in connection with its general restructuring matters, including those affecting the Navajo Nation Oil and Gas Company.</p>
<p>NATALIE D. RAMSEY Montgomery McCracken Walker & Rhoads LLP Philadelphia, PA nramsey@mmwr.com</p>	<p>Currently representing the “E-side” Official Committee of Unsecured Creditors of Energy Future Holdings, one of the largest and complex bankruptcy cases in recent history. Serves as co-counsel to the Official Committee of Equity Security Holders of Performance Sports Group Inc. in its Chapter 11 case. In addition, was lead counsel for O.W. Bunker Holding North America Inc., O.W. Bunker North America Inc. and O.W. Bunker USA Inc. in their chapter 11 bankruptcy proceedings, and was recently tapped to represent the Asbestos Claimants’ Committee in Bestwall LLC’s chapter 11 case,</p>
<p>MARK SHINDERMAN Milbank, Tweed, Hadley & McCloy LLP Los Angeles, CA mshinderman@milbank.com</p>	<p>Led Milbank’s efforts on behalf of creditors in Ocean Rig; Sierra Hamilton; Sprint Industrial; Shelf Drilling; an old line consumer company; and Charlotte Russe. Lead bankruptcy lawyer in the John Q. Hammons hotels bankruptcy cases on behalf of the estates’ largest creditor and potential buyer, and continued Relativity, Select Staffing, and Vertellus (representing an ad hoc lender group) engagements. Contributed expertise to project finance client matters involving SunEdison, Essar and others; real estate matters; and a cryptocurrency matter. Contributing author of the “Dealing with Secured Lenders” chapter appearing in <i>Reorganizing Failing Businesses</i>, Vol. 1, 3d Ed., covering various forms of secured loans and providing insight into the perspective of secured lenders in a workout.</p>
<p>KEITH H. WOFFORD Ropes & Gray LLP New York, NY keith.wofford@ropesgray.com</p>	<p>Counsel to Elliot Management Corporation in the case of EFIH, successfully defeating Berkshire Hathaway’s bid for EFIH’s regulated utility, Oncor, in favor of a higher bid by Sempra Energy and overturning a \$275 million break-up fee that would have been payable to NextEra Energy; debtors’ counsel to AeroGroup International, Inc., and Gawker Media, LLC; counsel to OCC and ad hoc committees in GenOn Energy, Inc., Linn Energy, LLC, and Global A&T Electronics, Ltd. and Magnum Hunter Resources Corporation; counsel to indenture trustee in Abeinsa Holding Inc., Nuverra Environmental Solutions, Inc., MPM Silicones, LLC (in the successful 2nd Circuit appeal of the bankruptcy court’s controversial cramdown opinion), Vanguard Natural Resources, LLC, ADPT DFW Holdings LLC, CGG Holdings (U.S.) Inc., True Religion Apparel, Inc., and Energy XXI Ltd.</p>

Year In Review, *from page 8*

What was your greatest challenge in 2017?

Califano: Dealing with the accelerated pace of the restructuring process.

Feder: Representing indenture trustees and protecting the rights of minority noteholders in connection with successful restructurings in the complex cases of Vanguard Natural Resources and Ocean Rig.

Venditto: The movement to pre-negotiating and structuring case has limited the influence of creditors and stakeholders that were not inside the tent for the pre-filing process. Helping them protect their interests is a challenge: If they do not participate at the outset and bring their concerns before the court, they will be chasing the train as it leaves

the station.

What was your greatest success in 2017?

Califano: Being able to restructure several large skilled nursing facility operators out of court without the need for filing Chapter 11.

Feder: Judge Glenn's decision in the *Ocean Rig* Chapter 15 case (in which Kelley Drye represented an indenture trustee for certain noteholders) upholding the debtors' decision to relocate from the Marshall Islands (which has no insolvency scheme) to the Cayman Islands shortly prior to commencing a Cayman Islands insolvency proceeding, and recognizing that proceeding as a "foreign main proceeding" will make it easier for more non-U.S. companies to utilize Chapter 15 in cross-border cases.

Share: In 2017, I focused on combining two large outsourced food and commissary services companies that delivered over \$60 million dollars in synergies to my client. Private equity and large acquisitive companies are focused on increased consolidation, which is preparing them to survive and potentially thrive during the next downturn.

Venditto: Personally, it occurred on June 21, when *Global Restructuring Review* recognized our work in the Winsway Chapter 15 case as the Most Important Recognition Decision of 2016. The award recognized our work in obtaining recognition from the U.S. Bankruptcy Court in the Southern District of New York of parallel schemes of arrangement in Hong Kong and the British Virgin Islands. ✎

Receipt, *from page 8*

holding that "goods received" means that a debtor or its agent must have actual physical possession, and not constructive possession, of goods," Pachulski, Stang, Ziehl & Jones noted in a client alert regarding the decisions.

Moreover, the *World Imports* opinion emphasizes the crucial importance of careful recordkeeping regarding vendors' shipments. "Keeping a thorough record of these dates could be particularly beneficial for intercontinental sellers and suppliers, where there may be a longer period of time between delivery to a common carrier and receipt by a buyer," notes Payton Bradford of Burr & Forman. "In any case, good record-keeping of

the shipping dates, the nature of the delivery agreements, and the dates a buyer receives goods can help sellers and suppliers determine their options should a buyer file a bankruptcy petition before the seller or supplier has been paid for goods shipped and received."

Despite the harmful impact of

"The World Imports opinion emphasizes the crucial importance of careful recordkeeping regarding vendors' shipments. "

the *SRC* decision on direct ship vendors, the rulings may make many vendors more willing to ship goods to customers that are viewed as

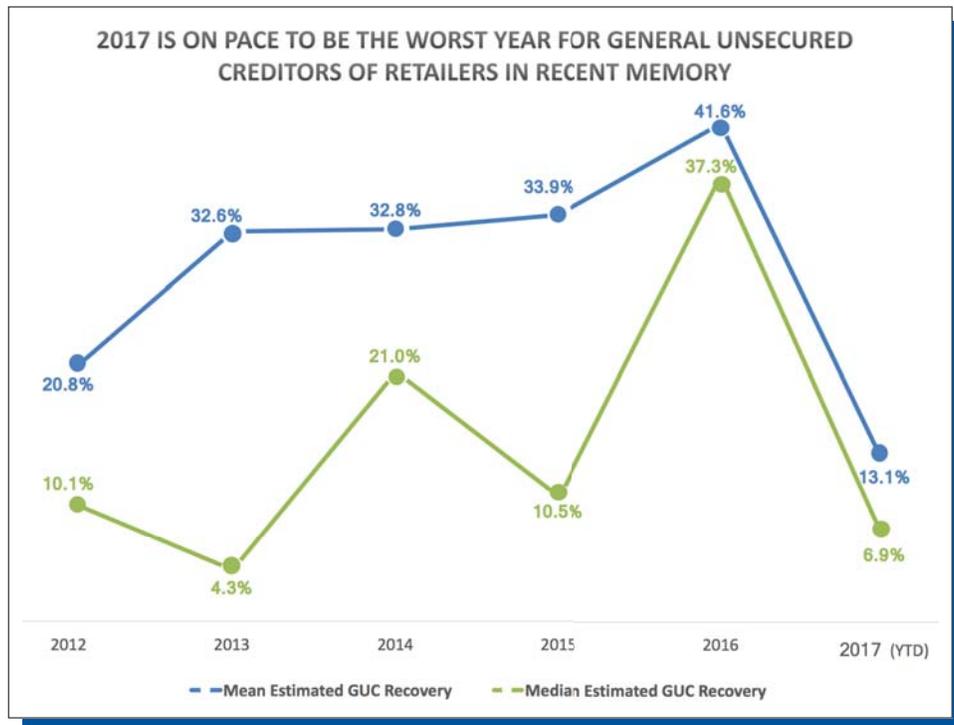
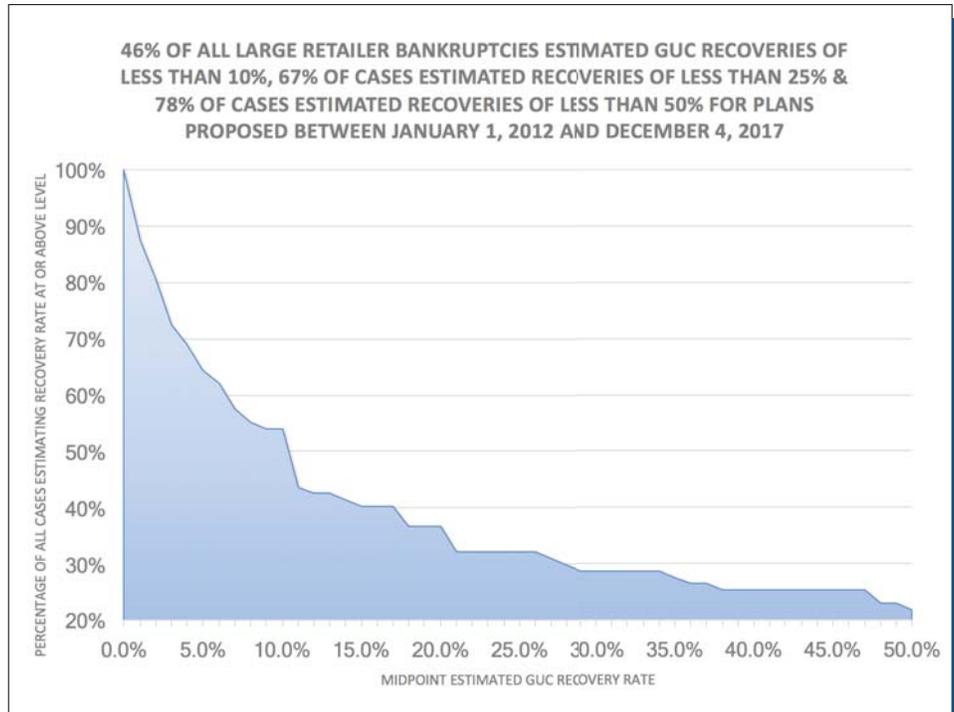
being on the brink of bankruptcy. "This ruling may benefit commerce because a seller of goods may be more inclined to permit the shipment of its goods to a distressed customer knowing that it will be entitled to an administrative claim if the customer files for bankruptcy in a court within the Third Circuit's jurisdiction (i.e., Pennsylvania, New Jersey, Delaware, and the Virgin Islands)," according to Pachulski. "Additionally, from the perspective of the distressed customer, it may find it easier to procure goods because sellers of goods may be willing to rely on the *World Imports* holding that would increase the likelihood of the seller getting paid for its 503(b)(9) claim should the customer file for bankruptcy." ✎

Special Report

Retailer GUC Recoveries: January 1, 2012 – December 4, 2017

The following charts summarize key findings regarding recoveries by general unsecured creditors in bankruptcy cases filed by large retailers, grocery stores and restaurant chains. The data regarding creditor recoveries was generated from an analysis of estimates provided by debtors in disclosure statements filed between January 1, 2012 and December 4, 2017. Some of the cases covered in our study were filed as early as 2001, but most were also filed in the 2012-2017 timeframe. In collecting the data for this study, only the last-filed disclosure statement was used for cases in which multiple versions of the disclosure statement were filed. Additionally, disclosure statements which did not provide an estimate of the percentage recovery for general unsecured creditors were excluded in charting recovery estimates. No attempt was made to independently estimate recoveries in such cases. The following charts represent only the plan proponents' estimates of recoveries which may differ from actual recoveries received by creditors in such cases.

To view a list of the bankruptcy cases examined in preparing this data, please visit www.chapter11dockets.com/about/cases.



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A Bit of Historical Perspective

by Deborah Hicks Midanek

We in the world of restructuring are accustomed to living on the edge – grab what you can today, figure it out tomorrow and keep going. Though the bankruptcy courts offer a forum for public scrutiny and negotiation among the parties in interest, there are darker parts of our world that rarely see the light of day. We have seen bankruptcy counsel and turnaround manager in cahoots to scare the company into chapter 11; we have seen outsized fees levied by fund investors for even the smallest accommodation.

We all hope, though, that what goes around comes around and such abuses are not systematic. And rarely perpetrated by banking institutions, which as holders of depositors' money enjoy a privileged position of public trust even after the appalling disclosures of the last 10 years. Behold, then, the allegations regarding a once highly respected bank and its loftily named Global Restructuring Group, or GRG.

Though the Financial Conduct Authority (FCA) has said it is not in the public interest to publish its full report into the treatment of customers of Royal Bank of Scotland, investigators allegedly found “inappropriate action” to have been taken with respect to a whopping 92% of “viable firms” they dealt with. These abuses included improperly increasing interest rates and imposing unnecessary fees on 16,000 of its clients between 2005 and its closure in 2013. RBS has been accused of pushing some companies into bankruptcy or administration so it could acquire their assets cheaply.

Though the full report has not been published, it appears that many third parties, including the British Broadcasting Corporation or BBC, have acquired copies. The leaked report found that struggling companies had a small chance of re-emerging, with only one in 10 returning intact to the main RBS bank. While it is not easy to benchmark such a figure, a more damning statistic cited showed that almost 70% of firms in turnaround were tied to complex loans organized by GRG which were often too expensive to leave.

An FCA spokesman said many of the activities carried out by GRG were largely unregulated and its powers were therefore limited. An RBS spokesman said the bank, now 73% government owned, had taken FCA-approved measures to rectify the failings including a new complaints procedure and the automatic refund of complex fees paid by customers.

The bank claims the report used a broad definition of inappropriate treatment but still found GRG actions had a very limited impact on customers. RBS is facing scores of legal actions by former customers some campaigners claim that compensation payments could be as much as £2bn.

We can likely argue that such patterns can be found in any loan portfolio that has weathered the storms, and of course we need to question how a regulator can determine retrospectively which firms were viable and therefore were improperly damaged. Yet anecdotal reports concur that during the time period in question, RBS was on a rampage, taking advantage of those least able to afford to argue with them, and pillaging their own customer base. So, dear readers, which position do we take? Are market forces simply cleaning house, getting rid of the weakest to make way for new growth? Or has RBS in this behavior unforgivably betrayed the public and its clients' trust? ✎

Deborah Midanek is President of Solon Group, Inc. and an independent corporate director.

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In the Next Issue...

- *Who's Who in Appvion Inc. and Bestwall LLC*
- *Special Report: Largest Bankruptcy Filings – 2017*
- *Special Report: Successful Restructurings – 2017*

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