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“Virtual” Decision Aids Settlement LyondellBasell Litigation Evaluation Saves Millions

by Julie Schaeffer

Using the litigation evaluation from an independent party has fast-tracked LyondellBasell Industries' emergence from Chapter 11 protection and likely saved millions of dollars in attorney's fees, says Francis G. Conrad, a partner at Bederson & Company LLP and former U.S. bankruptcy judge who served as that independent party.

In late 2007, Basell AF and Lyondell Chemical Company were two separate entities. But then billionaire investor Len Blavatnik and his New York-based company, Access Industries, led a leveraged buyout that created LyondellBasell Industries, the world's third-largest independent chemical company. At the time, the company – which had 15,000 employees worldwide at 60 manufacturing sites in 19 countries – reported annual

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Large Bankruptcies Fall Sharply First Quarter Numbers Lowest in Two Years

by David Buzzell

The first quarter bankruptcy statistics are in and they show a marked drop in filings compared to the same period a year ago. Large corporate bankruptcies, defined as those where the debtor reported assets of \$100 million or more at filing, fell from 74 during the first quarter of 2009 to 34 for the same period this year (see Exhibit 1 on page 4). The 34 large bankruptcy filings during January, February, and March were even less than the 36 reported for the first quarter of 2008, and the lowest quarterly total since 2007. The National Bureau of Economic Research marks December 2007 as the beginning date of a recession that most economists say has now ended.

One of the more interesting developments is that no company with assets of more than

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Balancing Act Zone of Insolvency Complicates Directors' Duties

by Julie Schaeffer

With more and more companies operating in the zone of insolvency, the fiduciary duties of those companies' directors is a topic worth exploring, especially when there are preferred stockholders, says Russell Shapiro, a partner with Chicago law firm Levenfeld Pearlstein LLC.

Generally speaking, directors have two primary fiduciary duties: care and loyalty. The first, says Shapiro, requires that directors act with the care an ordinarily prudent person in a like position would exercise under the circumstances, and make informed decisions that demonstrate a careful consideration of potential benefits and risks; the second requires directors to put the interests of the company above their own personal interests.

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revenues of nearly \$43 billion.

The auspicious beginning would not last, however. LyondellBasell took on billions of dollars of debt obligations in the merger, placing it in a precarious position. Then the 2008 global financial crisis hit, and in January 2009, just 13 months after the merger, LyondellBasell Industries ran out of cash and found it couldn't handle its heavy debt load amid a drop in demand for its products.

In an attempt to restructure its debts, the company and a number of its entities, including U.S.-based Lyondell Chemical Co., voluntarily filed for Chapter 11 protection in the United States Bankruptcy Court for the Southern District of New York.

The following year brought an acrimonious dispute between LyondellBasell Industries and a number of its creditors.

In July 2009, the company's unsecured creditors' committee filed a lawsuit seeking to recover \$22 billion from the banks, advisers, and executives who arranged the 2007 leveraged buyout. The creditors claimed that Lyondell Chemical Co.'s Chapter 11 filing in New York was "the entirely foreseeable and direct consequence of the merger having left [the LyondellBasell companies] with unreasonably small capital for the continuation of their businesses." The creditors sought a jury trial that would prove as many as 21 different claims against the 74 defendants (which included Access and Blavatnik and a number of investment banks, as well as many of Lyondell's key managers and board of directors) for fraudulent transfer, breach of contract, breach of fiduciary duties, and mismanagement.

Later, Wilmington Trust, the indentured trustee for LyondellBasell's senior bondholders, also filed suit, claiming the banks and advisers who put together the 2007 merger were prohibited under Basell's bondholder agreements, which strictly limited how the company could take on new debt. "The LBO debt, which was over \$20 billion and increased the aggregate debt of Basell by over \$18 billion... provided no real benefit to either the purchasing or 'bought out' company," the suit alleged.

That's where Conrad entered the picture. "I was hired to evaluate the legal position of an adversary proceeding

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\$1 billion failed during the first quarter of 2010, the first time that has happened since 2004. In contrast, 16 companies with assets of more than \$1 billion filed during the first quarter of 2009.

The largest company to file this year is Mesa Air Group, headquartered in Phoenix, Arizona. Mesa, a regional air carrier with a fleet of 130 aircraft, reported assets of \$975 million when it filed for bankruptcy on January 5. The company is being represented by Pachulski Stang Ziehl & Jones.

Of the 34 Chapter 11 filings that fell in the \$100 million to \$1 billion range, many were by companies in the information industry. The dust has yet to settle in this sector as evidenced by the recent filings of Penton Business Media Holdings (assets of \$500 million+), Haight Cross Communications (assets of \$286 million), Regent Communications (assets of \$198 million), and three more companies with assets of \$100 million (Affiliated Media, Morris Publishing Group, and UTEX Communications).

Manufacturers continue to also struggle, although their bankruptcy numbers are down considerably from previous quarters. The largest manufacturer, and the second largest company, to file this year is Zerium Technologies, which makes textile products. Zerium, represented by Cadwalader Wickersham & Taft, filed on March 30, reporting assets of \$693 million. Other manufacturers of note that filed in the first quarter include Grant Forest Products, a producer of board used in residential construction; Electrical Components International, maker of wires for electrical appliances; Natural Products Group, a maker of organic shampoos and soaps; Neenah Enterprises, a manufacturer of iron castings; and International Aluminum, which produces aluminum and vinyl components for residential and commercial buildings.

Mesa Air Group has not been the only company in the transportation sector to fall on hard times this year. South Bay Expressway Ltd, which built and operates the South Bay Expressway, a 10-mile private toll road serving the San Diego region, filed on March 22. Las Vegas Monorail Company, which owns a 3.9-mile track linking casinos and the Las Vegas Convention Center, filed for Chapter 11 on January 13.

Large bankruptcies are also prevalent

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Under normal circumstances, directors owe fiduciary duties only to the stockholders of the company. But those duties may expand when a company enters the zone of insolvency.

"In the zone of insolvency, fiduciary duties are owed to the entire corporate enterprise, including the creditors of the company," says Shapiro. "Then in actual insolvency, the duties are owed to the company's creditors alone."

Shapiro says many lawyers might disagree with him, and for good reason: "State law governs the issues discussed and, so, the state in which the company at issue is incorporated is a key factor that must be known before definitive advice can be responsibly dispensed," he says.

As an example, Shapiro points out that in Delaware, recent case law (*American Catholic Educational Programming Foundation Inc. v. Gheewalla*) suggests that duties do not expand to include creditors until the company is actually insolvent.

Regardless of what state law applies, Shapiro recommends that a lawyer advise a board to act in much the same manner: Seek to maximize the enterprise value of the company as a whole. That, in part, is because it can be hard to determine when a company enters the zone of insolvency.

"A company is insolvent when its debts exceed the fair value of its property or when it can't pay its debts as they become due, but the company enters the zone of insolvency at some point before this, and there is little court guidance as to when," Shapiro notes. "For these reasons, too, the approach of seeking to maximize enterprise value is a prudent one."

Complicating the application of fiduciary duties in many companies is the existence of preferred stockholders and the directors appointed by them, says Shapiro.

Preferred stockholders often have a right to appoint one or more directors to a company's board. Those directors have the same fiduciary duties as do the other directors – i.e., they serve as fiduciary to all stockholders and the corporate enterprise, not just to the stockholder who appointed them. But conflicts can arise when the interests of the preferred and common stockholders differ.

Shapiro notes that the mere appointment of a person as a director by a stockholder does not result in a conflict of interest, but other connections might.

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Research Report

Who's Who in Erickson Retirement Communities, LLC

by Françoise C. Arsenault

Erickson Retirement Communities, LLC (Erickson) and its affiliates have been leaders in the senior living industry. Erickson is part of a fully integrated, privately owned development and management company that focuses on providing affordable, high quality senior living for middle income seniors. As of October 19, 2009, the company managed and had varying interests in 20 continuing care retirement communities (CCRCs), in various stages of completion or development, in 11 states. The operating CCRCs, which have approximately 23,000 residents, are large campus-style communities that offer seniors a full life-cycle of retirement services from independent living through skilled nursing care. The CCRCs are similar to small college campuses with multiple interconnected buildings, which typically include several on-site dining rooms, an on-site medical center, on and off-campus transportation services, on-site classes, fitness centers, and other amenities. The total cost to complete one CCRC is typically \$300 million to \$500 million. On completion of construction, the land and campus are both sold to an independent not-for-profit operator, which operates the new campus while Erickson continues to manage the campus.

Founded in 1983, Erickson is a wholly owned subsidiary of the Erickson Group and is the developer and manager of the CCRCs. Erickson employs more than 700 people in connection with the management of the CCRCs. As of September 30, 2009, Erickson had approximately \$2.7 billion in assets and \$3 billion in liabilities. The company is headquartered in Baltimore.

According to company officials, senior living facilities, including the facilities of Erickson, have suffered substantial declines in sales and occupancy and have faced significant obstacles in their construction and development as a result of the struggling economy, the weakened credit environment, limited access to capital, and declining real estate values. Prospective senior residents are having difficulty selling their homes and have lost significant amounts of their retirement funds in the market, making it difficult for them to move into or remain in senior

housing facilities. Because of these challenging market conditions, Erickson suffered a substantial loss of revenue and lower-than-anticipated absorption rates at certain of its campuses, and difficulty raising capital. In addition, some of the developing campuses are not cash flow positive until they mature and, as a result, require additional support from Erickson.

Erickson and 15 of its affiliates filed for Chapter 11 reorganization on October 19, 2009, in the United States Bankruptcy Court for the Northern District of Texas (Dallas). On December 17, 2009, the bankruptcy court authorized Erickson to obtain up to \$20 million in DIP financing from ERC Funding Co. LLC.

With its bankruptcy filing, Erickson announced that it was contemplating the sale of substantially all of its assets to Redwood Capital Investments LLC, a Baltimore-based investment firm owned by the staffing firm Allegis Group. The court scheduled an auction for the company on December 22, 2009, which resulted in two qualified bids. Subject to court approval, Erickson selected as the successful bidder Redwood Capital Investments, which outbid Kohlberg Kravis Roberts & Co. with an all cash bid of \$365 million.

On March 8, 2010, the court approved an amended joint Plan of Reorganization and Disclosure Statement reflecting the details of the December 22 auction, the allocation of the sales proceeds, and a modified claims treatment plan.

John C. Erickson, the founder of the company, and five top managers, including the CEO and CFO, are expected to step down once the company emerges from bankruptcy. The head of Redwood Capital Investments, LLC and majority owner of the Allegis Group, Jim Davis, is expected to direct Erickson's new management team as the Chairman and Chief Executive Officer.

The Debtor

John C. Erickson is the founder and Chairman of Erickson Retirement Communities, LLC. **Bruce R. "Rick" Grinrod, Jr.** is the Chief Executive Officer. **Mark R. Erickson** is the Chief Operating Officer. **Jeffrey A. Jacobson** is the Managing Director of Finance and the

Chief Financial Officer. **Debra B. Doyle** is Executive Vice President of Health and Operations. **Gerald Doherty** is Executive Vice President and General Counsel.

DLA Piper LLP is serving as the bankruptcy counsel to Erickson. **Vincent P. Slusher**, a partner in the firm's Dallas office, and **Thomas R. Califano, Jeremy R. Johnson, John T. Cusack,** and **Michael D. Hynes**, partners in the New York office, are directing the work.

Farrell Fritz, P.C. is acting as conflicts counsel. **Ted A. Berkowitz**, a partner with the firm, is working on the case.

Houlihan Lokey Howard & Zukin Inc. is providing Erickson with investment banking services. **Matthew R. Niemann**, a Managing Director and Head of the Real Estate Restructuring Division at Houlihan Lokey, works on the engagement.

Alvarez & Marsal Healthcare Industry, LLC is restructuring advisor to Erickson. **Guy Sansone**, a Managing Director with the firm, is serving as the Chief Restructuring Officer and **Paul Rundell**, Managing Director, is serving as the Executive Vice President of Restructuring. Also working on the engagement are **Steven Boyd**, a Senior Director, and **Tamra Aloï and David McLaughlin**, Directors.

The Official Committee of Unsecured Creditors

The Committee includes **BNY Mellon Corporate Trust Default Administration Group; W. H. Boyer; Regional Construction Resources, Inc.; Northwest Electric, Inc.; Morgan Stanley; and La Posada at Park Centre, Inc.**

Bracewell & Guiliani LLP is serving as the counsel to the Committee. **Steven M. Stricklin**, a partner in the Dallas office, directs the work. Also working on the case are **Tricia R. DeLeon**, a partner in the Dallas office.

Protiviti Inc. is the financial advisor to the Committee. **Michael L. Atkinson**, a Managing Director in the firm's Baltimore office, leads the engagement.

The Trustee

The U.S. Trustee is **William T. Neary.**

The Judge

The judge is the **Honorable Stacey G. Jernigan.** □

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that the unsecured creditors' committee had filed against the LyondellBasell Industries," he explains.

Although Conrad was hired by LyondellBasell, he says the company wasn't really his client in the traditional sense. "I was hired to be an independent neutral party," he explains. "The debtor

didn't give me its opinion of the case, and I had limited contact with debtor's attorneys. It was similar to being a judge in the sense that I had to gain an understanding of all the issues, evaluate everyone's position fairly, and render a decision."

To reach a decision, Conrad was asked to review the legal positions of all

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in the real estate sector, with five companies with assets exceeding \$100 million or more filing during the first three months: Broadway 401, New York City; Sargent Ranch, La Jolla, CA; East West Resort Development, Avon, CO; Fiddler's Creek, Naples, FL; and RQB Resort, Ponte Vedra Beach, FL. All five are developers of luxury homes and resorts.

Nonetheless, in both size and number, the 2010 filings pale in comparison to last year when Lyondell Chemical, Charter Communications, Nortel Networks, Spectrum Brands, and Smurfit-Stone Container began a remarkable year when many of the nation's largest corporations fell. Mesa Air Group would have been merely the seventeenth largest filing during the first quarter of 2009.

The Beard Group's bankruptcy data also finds an improved picture further down the line. In January through March of 2009, 251 companies with assets of more than \$10 million filed for bankruptcy. The number for the corresponding period in 2010 is 189, a drop of 25 percent. □

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This would be the case, for example, if the director would personally benefit from a transaction that would not similarly benefit other stockholders.

"In a sale context, this may mean that there are sufficient funds to pay creditors and some or all of the liquidation preference payable to the preferred stockholders, but little or nothing to the common stockholders," says Shapiro. "In this case, the directors must take care to avoid potential claims by common stockholders that the preferred stockholders were favored."

Shapiro points to a recent Delaware case (*In re Trados Shareholder Incorporated Litigation*) in which the board approved a merger where the preferred stockholders were substantially paid their liquidation preference and the

common stockholders received nothing. "The court allowed a plaintiff to continue alleging breach of fiduciary duty to the common stockholders where a majority of the directors were designees of and each of whom had a financial relationship with the venture capital sponsor of the company," says Shapiro. The result of this ruling, says Dennis J. White, senior counsel at law firm McDermott Will & Emery, means directors of private equity firms should be careful when putting a portfolio company up for sale.

To avoid potential lawsuits from common stockholders as well as creditors, Shapiro first recommends, to the extent possible, that if any director believes he or she has a conflict of interest, it should be revealed to the other directors (and to the stockholders, if the stockholders are

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Calendar

American Bankruptcy Institute

28th Annual Spring Meeting

April 29-May 2, 2010

Gaylord National Resort and

Convention Center

National Harbor, MD

Contact: www.abiworld.org

Renaissance American Management, Inc. and the Beard Group

Third Annual Southwest Healthcare

Transactions Conference

May 6, 2010

Adolphus Hotel

Dallas, TX

Contact: www.renaissanceamerican.com

Association of Insolvency & Restructuring Advisors

AIRA's 26th Annual Bankruptcy and Restructuring Conference

June 9-12, 2010

Hyatt Regency La Jolla

San Diego, CA

Contact: www.airacira.org

National Association of Bankruptcy Trustees

2010 Annual Conference

September 29-October 3, 2010

The Fairmont

San Francisco, CA

Contact: www.nabt.com

Turnaround Management Association

TMA 2010 Annual Convention

October 6-8, 2010

JW Marriott Grande Lakes

Orlando, FL

Contact: www.turnaround.org

National Conference of Bankruptcy Judges

84th Annual Conference

October 13-16

New Orleans, LA

Contact: www.acbj.org

Renaissance American Management, Inc. and the Beard Group

17th Annual Conference on

Distressed Investing

November 29, 2010

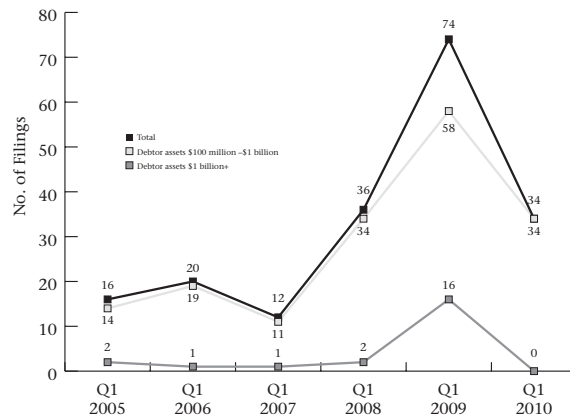
The Helmsley Park Lane Hotel

New York, NY

Contact: www.renaissanceamerican.com

□

Exhibit 1
Large Bankruptcies: 2005-2010



Special Report

Regional and Local Bankruptcy Accounting Firms

Firm	Bankruptcy Professionals	Senior Partners/ Professionals	Representative Clients
Amper, Politziner & Mattia, LLP Edison, NJ Tel. (732) 287-1000 www.amper.com	16	Allen D. Wilen Edward A. Phillips Joseph Myers M. Jay Lindenberg Thomas Buck William Pederson	Autobacs Strauss, Bayonne Med. Center, Integral Nuclear Assoc., C2 Media, Bedford Communications, St. Mary's Hospital, Command Arms Accessories, Designline Construction, Exaeris Trust, Futter Lumber, Mortgage Lenders Network, TH Properties, TSG, Scantek Medical, Hyman Companies, Keystone Surplus Metals.
Bederson & Company, LLP West Orange, NJ Tel. (973) 736-3333 www.bederson.com	20	Edward P. Bond Timothy J. King Matthew Schwartz Charles S. Lunden Charles N. Persing Sean Raquet Hon. Francis G. Conrad	Financial advisors for: LyondellBasell Industries (mediator, debtor/creditors), Marcal Paper Mills Inc. Trust (trustee), PNG (liquidating trustee), Trim Spa (trustee), DMX Creditors (liquidating trustee), Topps Meat (trustee), G1 Holdings (fiscal receiver), Omni Staffing (trustee), PT1 Communications (liquidating trustee), Solomon Dwek (trustee), Passaic Beth Israel (liquidating trustee), NJ Affordable (trustee), Barnert Hospital (trustee), Blend Restaurant (trustee), Windstar Communications (trustee), Stars & Stripes (advisors to creditors' committee).
Compton & Wendler Houston, TX Tel. (713) 351-7110 www.cw-cpa.com	6	Jeff Compton Allen Wendler	Oskya Petroleum (debtor), Imperial Sugar (debtor), McGinnis Funds (trustee), Safescript (unsecured creditors), Dunhill Resources, Inc. (trustee), Reliant Exploration (trustee), Asarco (asbestos claimants), Reichmann Petroleum (creditors' committee), Crusader Energy (trustee), Royce Homes (trustee).
Herbein + Company, Inc. Reading, PA Tel. (610) 378-1175 www.herbein.com	3	Robert M. Caster Carl D. Herbein Michael J. Rowley	Debtor, unsecured creditors, trustee, creditors' committee.
J. H. Cohn LLP Edison, NJ Tel. (732) 549-0700 www.jhcohn.com	40	Bernard A. Katz Sharon Bromberg Kevin P. Clancy Howard Konicov Chad J. Shandler Clifford A. Zucker	TOUSA, Inc. (unsecured creditors' committee), Tarragon Corporation (unsecured creditors' committee), Victory Memorial Hospital (debtor), Ciena Capital LLC (unsecured creditors' committee), R.H. Donnelley Corporation (unsecured creditors' committee), Adamar of New Jersey, Inc. (debtor), TMST, Inc. f/k/a Thornburg Mortgage, Inc. (unsecured creditors' committee).
Lain, Faulkner & Co., PC Dallas, TX Tel. (214) 720-1929 www.lainfaulkner.com	23	Dan B. Lain Dennis S. Faulkner Marla C. Reynolds Stephen H. Thomas D. Keith Enger Lori B. Lowderman Jason A. Rae Paul C. French, III Thomas J. Gingerich	SemCrude (producer's committee), Home Interiors, Inc. (Chapter 11 trustee), Combustion Engineering Asbestos Trust (accountants to trustee), S&A Restaurant Corp-Steak & Ale/Bennigans (accountants for Chapter 7 trustee), Brook Mays Music (trustee), Flying J. Inc. (consultants for secured lenders), Superior Air (OCC and post conf. trustee), Vartech (Chapter 7 trustee), Guaranty Financial Group Inc. (restructuring officer), Specialty Restaurant Group, LLC (post conf. trustee), Metromedia Steakhouses Co., LP (post conf. trustee).
LECG Devon, PA Tel. (610) 254-0700 www.lecg.com	42	Douglas J. Brickley F. Wayne Elggren Todd Neilson Christopher Barclay	Clients include distressed debtors, secured lenders and bank groups, unsecured creditors' committees, bondholders and indentured trustees, equity committees, buyers and sellers of distressed assets/businesses, and Ch 7/Ch 11 trustees and examiners. Also, serve as court appointed receivers, trustees, and examiners.
Marcum LLP New York, NY Tel. (212) 485-5500 www.marcumllp.com	10	Sam Rosenfarb	Secured lenders, real estate, healthcare, manufacturing, distribution, and services.
MarcumRachlin LLP A Division of Marcum LLP Miami, FL Tel. (305) 377-4228 www.marcumrachlin.com	20	Alan Barbee	Construction, distributors, healthcare, insurance, manufacturing and distributing, retail, and real estate.
Weiser LLP New York, NY Tel. (212) 812-7000 www.weiserllp.com	18	Stephen M. Brecher James Horgan	Air National, Cogan, FiberMark, Inacom, Pelican Pools, Student Finance Corporation, Universal Access.

Worth Reading

Corporate Debt Capacity – A Study of Corporate Debt Policy and the Determination of Corporate Debt Capacity

Author: Gordon Donaldson

Publisher: Beard Books

Hardcover: 308 pages

List Price: \$34.95

by Henry Berry

As noted in the preface, this Beard Business Classic examines “the risk element involved in the utilization of debt as a source of permanent capital for business.” The findings in this book arose from a research project funded and conducted by an organization connected with Harvard College, the original publishers of this book in the early 1960s.

The research presented here is more than a body of data. The findings do show, however, the limited thinking of most businesspersons at the time and their blind spots regarding the role of debt, especially with respect to its potential for growth and other interests of business management.

Information was collected from participating corporations and financial institutions, although the businesses are not identified. A few tables are presented, but the research is not confined to balance sheet numbers. Donaldson is more interested in the psychology of corporate leaders and their presumptions about debt than he is in current debt levels and corporate policies regarding debt. Financial institutions were also included in the study because their views toward corporate debt and the way they worked with corporations had an effect on corporate debt at the time.

As Donaldson found from the research, both corporations and financial institutions understood debt in conventional ways. Donaldson’s singular achievement was to see in the research ways in which corporations were being hampered by conventional thinking, and then propose a new way of looking at debt. For the large majority of businesses, this proved to be revolutionary. For the small number of businesses already pursuing unconventional debt practices, Donaldson’s perspective gave them credence and offered guidance going forward.

Donaldson’s findings are supported by the statements of corporate managers at the time regarding financial analysis and debt. Managers are quoted as saying “our management is essentially conservative” and “the word which describes our corporate image is ‘dignified’.” In the chapter “Management Attitudes to Non-Debt Sources,” Donaldson says that such statements are revelatory about management thinking and how it colors their approach to debt.

The author says that managers’ attitudes toward debt are often bound to conventional, inherited concepts and images of a corporation and have no relation to facts. These conventional views are perpetuated by an aversion to risk. The less debt, the less risk, according to prevailing thinking. Ironically, Donaldson notes that managers who are afraid of debt often pursue greater risks in product development, market entry, mergers, and other activities.

The changed corporate attitude about debt since the book’s 1961 publication attest to the deep influence of Donaldson’s groundbreaking perspective. Consumer debt, the growth of credit cards, and other financial phenomena also evidence changed public thinking about debt. If the pendulum has swung too far the other way, this should not be blamed on Donaldson’s work. For, in urging a new understanding of debt, Donaldson also offers ways to control of the risks that are entailed. □

Gordon Donaldson retired in 1993 after close to 20 years at the Harvard Business School. □

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

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of the involved parties as well as the numerous expert reports submitted by those parties. “I didn’t interview any of the parties, take any evidence, and have any witnesses, but the amount of data I received was close to a gigabyte,” he says.

After reviewing the data, Conrad rendered his decision orally to LyondellBasell Industries and its counsel. A day later, the company asked Conrad to recommend a settlement number, which he did.

Ultimately, the suit was settled – at an amount that Conrad says was “in close proximity to what I had recommended as a settlement.”

Although Conrad cannot discuss the specifics on the case, LyondellBasell Industries initially filed a motion asking the bankruptcy court to approve a \$300 million settlement to be distributed to holders of unsecured claims, millennium bonds, and 2015 notes at the expense of secured creditors. When the unsecured creditors’ committee rejected that number, LyondellBasell Industries increased the amount to \$450 million, with the additional \$150 million funded by a reduction in distributions to holders of the senior secured facility and bridge loan claims. On March 11, the bankruptcy court approved the \$450 million settlement, placing LyondellBasell Industries on track to emerge from Chapter 11 bankruptcy protection.

Conrad says the kind of litigation evaluation he provided in the LyondellBasell Chapter 11 is nothing new. He has provided similar services on fairly large cases four times in the past two years, and even taken part in a modified jury trial in which Conrad and two district court judges joined with a jury to render an opinion. “The trial was limited in scope, with no hearsay rules or rules of evidence, but I think it was successful,” he says. “We were able to tell the party that there was no merit to its lawsuit.”

That said, Conrad does think that litigation evaluation is increasing in popularity, perhaps because of the potential it has to save money and streamline the bankruptcy process. “Settling likely saved the adversaries in this suit millions of dollars in attorney’s fees and expedited the debtor’s emergence from Chapter 11,” says Conrad. □

Special Report

Outstanding Young Restructuring Lawyers – 2010

Lawyer	Firm	Outstanding Achievements
Ronit J. Berkovich	Weil, Gotshal & Manges New York, NY ronit.berkovich@weil.com	On Weil teams representing the debtors in historic Chapter 11 cases, including General Motors, Lehman Brothers, WorldCom/MCI, BearingPoint, and Vertis (Vertis merger with ACG was first ever “double-prepack” merger). Also worked on international restructurings, including Telewest Communications and Parmalat.
Amy Caton	Kramer Levin Naftalis & Frankel New York, NY acaton@kramerlevin.com	Represented GM’s official creditors’ committee in U.S. Treasury negotiations, official committee of unsecured creditors of Capmark, and BONY Mellon as indenture trustee in Lehman bankruptcy. Representing largest bondholder in Las Vegas Monorail bankruptcy as well as United Airlines bondholders.
Andrew Gallo	Bingham McCutchen Boston, MA andrew.gallo@bingham.com	Currently represents group of Japanese secured lenders in cross-border insolvency proceedings of Spansion Japan Ltd.; represents joint trustees in a Hong Kong Chapter 15 filing in Massachusetts; led team representing unsecured creditors’ committee in BearingPoint bankruptcy proceedings; lead litigation counsel in sale of American Home Mortgage Co.’s servicing business.
Aaron L. Hammer	Freeborn & Peters LLP Chicago, IL ahammer@freebornpeters.com	Restructuring counsel to Wiseman-Hughes Enterprises, Clark National, ThoughtWorks, and Capsonic Automotive; counsel to creditors’ committee of Arch Aluminum & Glass and Arena Football League; U.S. counsel to Bank of Montreal in cross-border restructuring of Menu Foods; bankruptcy counsel to Accenture, The Warranty Group, and Mercer in dozens of high-profile cases.
Ron E. Meisler	Skadden, Arps, Slate, Meagher & Flom Chicago, IL ron.meisler@skadden.com	One of principal partners in Delphi reorganization, a four-year process to transform operations and restructure \$22 billion in liabilities. Counsel to agent in restructuring \$100 million syndicated secured facility; lender in work out of loan default by high-profile media and entertainment company; U.K. pension trustees in Chapter 11 cases of Reader’s Digest Association and Visteon.
Anup Sathy	Kirkland & Ellis Chicago, IL anup.sathy@kirkland.com	One of the lead restructuring partners for General Growth Properties’ reorganization. Negotiated restructuring of over \$11 billion of property-level CMBS debt in eight months and supervised approximately 200 separate project-level plans of reorganization confirmed in 2009. GGP and affiliates’ filings constitute the largest Chapter 11 cases undertaken by a REIT in U.S. history.
James Savin	Akin Gump Strauss Hauer & Feld Washington, D.C. jsavin@akingump.com	Representing unsecured creditors’ committee in General Growth Properties, helping to defeat motions to dismiss bankruptcy cases of property level subsidiaries, and restructuring \$11 billion of property level secured debt. Represented unsecured creditors’ committee of Muzak, resulting in reorg. plan receiving 100% acceptance in all classes and receiving confirmation January 2010.
Damian S. Schaible	Davis Polk & Wardwell New York, NY damian.schaible@davispolk.com	Served leading role representing Delta Air Lines and Frontier Airlines in their Chapter 11 restructurings. Frequently represents agent banks in borrower restructurings and has played a key role in a number of recent high-profile restructurings, including those of the Tribune Company, the Media News Group, and C-BASS.
Robert J. Stark	Brown Rudnick Berlack Israels New York, NY rstark@brownrudnick.com	Representations include official creditors’ committees in Visteon Corporation and Motor Coach Industries; ad hoc bondholders’ committees in Spansion and Nortek Industries; secured lenders in American Safety Razor, EPV Solar, Flying J/Big West Oil, Minneapolis Star Tribune, TOUSA, and Newark Group; and indenture trustee in Tribune.
Rachel C. Strickland	Willkie Farr & Gallagher New York, NY rstrickland@willkie.com	Represented debtor in Land America Financial Group, Journal Register Company, and Ampex Corporation bankruptcies. Recently represented Genii Capital in stalking horse bid for Polaroid. Currently represents ad hoc groups contesting plan treatment in Smurfit-Stone Container and Aleris Intl. Other significant matters include complex restructurings of Teksid Aluminum and Verestar.
Michael Torkin	Shearman & Sterling New York, NY mtorkin@shearman.com	Advised the German government regarding restructuring of GM Group and Opel. Lead counsel for the ad hoc committee of noteholders in connection with the successful prepackaged Chapter 11 of Hights Cross Communications and for LBBW in connection with a restructuring of FX real estate’s 17-acre site on the Las Vegas strip.
Matt J. Williams	Gibson Dunn New York, NY mjwilliams@gibsondunn.com	Lead counsel to unsecured creditors’ committee chair and indenture trustee for \$23 billion in unsecured bonds in GM. Representing indenture trustee for approx. \$2 billion in subordinated debt in CIT Group prepackaged Chapter 11; DIP lender group and agent in connection with \$400 million convertible financing in General Growth Properties; prepetition lenders in Trident.

Gnome de Plume

The World Changed

by Christopher Beard

Last Friday, the SEC charged Goldman Sachs with fraud, a charge Goldman vigorously denies. The complaint reads like another one of those wonderfully juicy stories about towel-snapping, Gordon Gekko types talking trash while making a killing. The central character in the complaint is 31-year-old Fabrice Tourre whose parents must have had a sense of his destiny when they named him. He refers to himself as “the fabulous Fab” when emailing his colleagues about his creative construction of complex, highly leveraged, and exotic deals and his deft management of conflicting interests in a rapidly changing surreal environment. This story would have been a wonderful addition to *The Big Short*, Michael Lewis’s new book about the guerrilla investors and hedge funds who made huge sums of money betting against the housing market.

But this deal was made at the world’s foremost investment bank founded in 1869. Goldman is a major global financial institution with 32,500 employees and \$45 billion in revenue serving primarily institutional clients. It is a bank holding company regulated by the Fed, and former partners include Robert Rubin and Henry Paulson, both recent U.S. Secretaries of Treasury. Goldman Sachs advises and brokers deals for states and municipalities and works with the world’s major banks, insurance companies, and pension funds.

In the transaction Goldman admits it allowed Paulson & Co., a major hedge fund, to help assign assets to the vehicle that Paulson was going to short. Goldman then sold the long portfolio position to several European banks that lost billions on the deal. The deal helped break several banks, forcing them into the hands of the government regulators. Goldman was not forthcoming about Paulson’s involvement, and even ACA, the independent firm selecting the mortgages, was at times confused about Paulson’s role.

Is letting Paulson pick the loans illegal? I don’t know. Are these problems bad for business? Sure.

Some suggest Goldman’s institutional customers are sophisticated investors and can evaluate their own risks. Maybe. Even the managements of Citi and AIG had no idea what the risks were in the deals they were doing. And few, if any, investors are as knowledgeable as Goldman. One trader was quoted as saying “Maybe you don’t want to trade with Goldman, but you have to trade with them,” suggesting you need access to Goldman’s market knowledge.

Investment bankers have talked for years about having built Chinese walls to foreclose people within the institution from sharing information. That argument is not often made very vigorously anymore.

Can Goldman maintain its position as the world’s preeminent investment bank working with the most important financial institutions and central banks and, at the same time, sell highly toxic instruments that from time to time bring down government insured financial institutions? Can Goldman continue granting some clients special favors and indulge a cowboy culture memorialized in emails? It is becoming politically impossible. The political fallout from the bank bailouts suggests the public has little patience for finely crafted arguments when the taxpayers are stuck with huge losses.

Goldman will be an advisor and broker making transparent deals with governments and major financial institutions with the tacit support and oversight of government and regulators. There will be more regulation. Those finding the constraints burdensome will move on to smaller, more entrepreneurial firms.

There’s a growing sense that the government’s case against Goldman has a lot of holes, but that doesn’t mean the politics are wrong. □

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Future Issues:

- *Special Report: Major Trade Claim Purchasers*
- *Special Report: Top Internet Bankruptcy Resources*
- *Research Report: Who’s Who in Cooper-Standards Holdings, Inc.*

Balancing, from page 4

required to vote or consent to the transaction).

Shapiro also recommends retaining independent board counsel. “This allows the directors to focus on their duties by using counsel who are separate from counsel that may have historically represented management or a particular stockholder.”

He also recommends engaging outside experts to evaluate the options for the company, and presenting all proposals to the board with supporting materials. “The board should be given as much time as possible to consider the alternatives, and a record of this should be kept,” says Shapiro.

If time is of the essence, Shapiro says the board should consider the ability of any prospective purchaser to timely consummate a transaction. “This consideration may outweigh small differences in economics,” he says.

The board should consider appointing a committee consisting of independent directors to recommend a course of action – and if it does so, any transaction should be approved both by the committee and the full board.

Finally, whenever possible, the board should seek the unanimous approval of the common stockholders for a transaction in which the common stockholders will receive little or no consideration.

“This is a tricky area,” says Shapiro. “Directors need to assume that someone will sue them later, regardless of what action they take, and act accordingly.” □