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Chrysler Dealers to Appeal Loss in Claims Court

by *Frauline S. Abangan*

After nearly a decade of litigation, Chrysler car dealers found themselves at the losing end when the U.S. Court of Federal Claims denied their claim that the U.S. government is liable for taking their franchise agreements without just compensation in contravention of the Fifth Amendment.

In a 183-page trial opinion, Senior Judge Nancy B. Firestone noted that while the “court sympathizes with many of these owners who testified as to how the loss of their franchise agreements devastated not only their businesses but their lives,” the plaintiffs failed to prove that the United States coerced Chrysler into rejecting their franchise agreements.

But it isn't over for the Chrysler dealers who are taking their loss to the appellate

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Drivers Lose Appeal

Punitive Damages Not Assumed in GM Sale Contract

by *Christopher Patalinghug*

General Motors LLC, the entity that emerged from the ashes following General Motors Corp.'s high-profile Chapter 11 filing a decade ago, has been cleared of liability over punitive damages related to automotive accidents that occurred following the sale of the company's business.

Last month's ruling by the U.S. Court of Appeals for the Second Circuit thumbed down attempts by a group of drivers seeking punitive damages over post-sale automotive accidents involving old GM vehicles, ruling that New GM did not “contractually assume liability” for punitive damages.

General Motors Corp. or Old GM sought creditor protection at the height of

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Chrysler, *from page 1*

court, according to their lawyer Len Bellavia of Bellavia Blatt PC in an interview with Auto Dealer Today.

Taking Claims Suit

Chrysler LLC filed for bankruptcy during the Great Recession in April 2009 working under a government-negotiated prepackaged plan that called for the rejection of 789 franchise agreements, including the plaintiffs' agreements.

According to the plaintiffs, if the government had not gotten involved in the Chrysler bankruptcy, their franchise agreements would not have been rejected by Chrysler in bankruptcy but would have been assumed by the owner of New Chrysler.

The taking claims addressed in the Federal Claims Court decision relate to three separate lawsuits—Colonial Chevrolet Co., Alley's of Kingsport, Inc. and Union Dodge, Inc. with Case Nos. 10-647, 11-100 and 12-900, respectively. The plaintiffs of these lawsuits owned franchise agreements with either Old Chrysler or Old General Motors that were rejected in the Chrysler and GM bankruptcies.

Nearly 300 dealers joined the lawsuits looking for compensation totaling as much as \$850 million.

About 500 dealers chose not to participate, according to Automotive News.

The Colonial Chevrolet case reached the Federal Circuit's interlocutory review. The Circuit held that the plaintiffs had alleged sufficient facts to support potential Fifth Amendment taking claims based on a theory of coercion. If the plaintiffs could establish that Chrysler's decision to enter bankruptcy under government-negotiated terms was not voluntary, a potential taking may be found, according to the Federal Circuit.

Nearly 300 dealers joined the lawsuits looking for compensation totaling as much as \$850 million.

The Federal Circuit, however, held that the plaintiffs failed to allege sufficient facts to show that their franchise agreements would have had economic value in a "but for world" where the government had not provided financial assistance to Chrysler or GM. To prove a taking, the Circuit said, the plaintiffs would need to establish that their franchise agreements would have had value in a hypothetical "but for world" where the government had not provided financial assistance to Chrysler or GM.

As the Federal Circuit suggested, the plaintiffs in all three cases filed amended complaints in September 2014 in which they posited that their franchise agreements would have had value under several "but for world" scenarios in which the government did not provide financial assistance to Chrysler or GM.

The government moved to dismiss the amended complaints.

On September 9, 2015, the Claims Court granted in part and denied in part the government's motion, holding that certain of plaintiffs' "but for world" scenarios were consistent with the Federal Circuit's decision in *A&D Auto Sales, Inc. v. United States*, 748 F.3d 1142 (Fed. Cir. 2014). The court also severed the GM plaintiffs from the Chrysler plaintiffs and put the GM plaintiffs' claims on a separate discovery time table.

In December 2015, the court consolidated the three lawsuits for the purposes of case management, discovery, and for trial on the merits of the Chrysler plaintiffs' taking claims. A motion for class certification was denied in April 2016.

For purposes of discovery and trial, nine representative plaintiffs were chosen and divided into two groups: the Alley's group with seven plaintiffs including Taylor

Chrysler, *from page 2*

& Sons, Inc., Cedric Theel, Inc., Whitey's Inc., RFJS Company, Jim Marsh American Corp., Livonia Chrysler Jeep, Inc., Barry Dodge, Inc., and the Colonial group with two plaintiffs including Guetterman Motors, Inc. and Mike Finnin Motors, Inc. The two groups of plaintiffs are represented by different attorneys.

Trial was held in Washington, D.C. between April 8, 2019 and May 8, 2019. The goal was to determine principally whether there was government action through coercion and whether plaintiffs' franchise agreements would have had economic value in a "but for world" without government assistance. Post-trial arguments were held on June 19 and June 20, 2019. During trial, the court heard testimony from 36 witnesses and received 542 exhibits into evidence.

Judge Firestone noted that at trial the representative plaintiffs did not focus their coercion evidence on Chrysler being forced to accept the government's negotiated bankruptcy terms (including a reduction in Chrysler franchises) because Chrysler needed the government's financial assistance. Instead, she noted that the plaintiffs presented opinion testimony to the effect that Chrysler did not

need the government's financial assistance.

Federal Claims Court Decision

After considering all of the fact and expert evidence, Judge Firestone finds that the plaintiffs failed to establish by a preponderance of the evidence that the United States by its actions coerced Chrysler into filing for bankruptcy under the government's negotiated bankruptcy terms or into rejecting any of the plaintiffs' Chrysler franchise agreements in the Chrysler bankruptcy.

During trial, the court heard testimony from 36 witnesses and received 542 exhibits into evidence.

Judge Firestone pointed out that the evidence established that (1) the government did not force Chrysler to accept its bankruptcy terms; (2) the government was willing to give \$750 million to Chrysler if Chrysler wished to proceed to bankruptcy alone; (3) the government through its actions did not interfere with potential acquirers from coming forward to purchase Chrysler in bankruptcy; (4) none of the potential acquirers the plaintiffs' identified were interested or capable of purchasing Chrysler in April 2009; (5) Chrysler

accepted the government's prepackaged bankruptcy plan based on Chrysler's best business judgment after consideration of its options; (6) had the government not provided financial assistance to Chrysler, Chrysler would have been forced into liquidation under Chapter 7 of the Bankruptcy Code and, in that circumstance, all of plaintiffs' franchise agreements would have been rejected by the bankruptcy trustee; and (7) Chrysler's decision to accept the government's prepackaged bankruptcy terms was a voluntary decision and not coerced.

The Federal Claims Court finds that the testimony of Chrysler's executives established that the government never threatened Chrysler's management in order to secure acceptance of the government's prepackaged bankruptcy plan.

One of the testimonies highlighted in the decision was that of Steven Rattner, who testified for both the plaintiffs and the United States at trial. Appointed by Timothy Geithner, President Obama's Secretary of Treasury, at the end of February 2009, Rattner headed a newly formed Auto Team Task Force at the Department of Treasury.

According to Rattner, the Auto Team gave serious consideration to allowing Chrysler to liquidate

Chrysler, *from page 3*

in bankruptcy without government involvement but came to understand that Chrysler needed to survive in some form so that its suppliers would also survive.

If Chrysler was no longer making cars and trucks, Rattner said the Auto Team thought the whole industry could shut down, at least for a bit, in a Chrysler liquidation. If Chrysler was to continue to make cars and trucks during bankruptcy, Rattner explained that Chrysler needed the federal government's assistance. Rattner also made clear in his testimony that the Auto Team never targeted specific dealers for rejection.

Robert Nardelli, who was the CEO of Chrysler from late 2007 until early 2009, testified that Chrysler provided a Viability Plan to Congress in December 2008 which estimated that in order to wind-down Chrysler and provide its dealers with support and floor plan financing Chrysler would need between \$17 to \$20 billion. But Chrysler couldn't get financing from its first lien lenders. So when the Auto Team presented Chrysler with the prepackaged bankruptcy plan, Chrysler's board felt it was the best course of action. According to Nardelli, every member of the board used "good

business judgment" when voting in favor of bankruptcy.

The Federal Claims Court also finds that plaintiffs failed to prove their franchise agreements would have had value in a "but for world" without government assistance because the evidence established that Chrysler would have faced immediate liquidation in a Chapter 7 bankruptcy without government assistance. In a Chapter 7 bankruptcy scenario, all of Chrysler's franchise agreements would have been rejected by the bankruptcy trustee to preserve the assets of the bankruptcy estate and that plaintiffs' franchise agreements would have had no economic value in that circumstance. Thus, Judge Firestone finds that plaintiffs failed to prove that any property of value was "taken" from them.

Economic Coercion

In an email to Automotive News, Bellavia explained that the dealers have always understood that the case would not end at this stage, regardless of which side prevailed at trial, and would work its way up the appellate ladder, possibly all the way to the U.S. Supreme Court.

Bellavia told Auto Dealer Today, "Even if we won, I would have advised my clients not to

take a victory lap. We all knew the appellate court will decide the unique legal issues in this case."

The decision, Bellavia stressed, did not mention the provision in the government-drafted loan documents that mandated the closure of a certain number of dealerships. Bellavia contends that this provision amounts to coercion by the government. He noted that this is an uncommon claim in Takings Clause cases and that the court erred in misunderstanding their "coercion" argument.

"Coercion in the takings context is not a common matter of proof. 'Coercion' connotes this notion of almost a physical force. And that's not what we were arguing. We weren't saying the government twisted Chrysler's arm to file for bankruptcy and terminate dealers," Bellavia told Auto Dealer Today. "We claimed the coercion as a condition of the bailout. It was economic coercion. If Chrysler wanted the bailout, they had to accede to the government's directive."

"It was never plaintiffs' argument that the government forced it to file bankruptcy, but rather that the loan agreement drafted by the government mandated that the Chrysler dealership network be reduced. The court failed to address this key claim," Bellavia told Automotive News. □

Research Report

Who's Who in Purdue Pharma's Bankruptcy Cases

by Carlo Fernandez

Privately-held Purdue Pharma L.P. traces its roots to 1952, when three doctors—brothers Arthur, Mortimer and Raymond Sackler—founded the company after taking over a small New York drug manufacturer. Purdue Pharma grew to a pharmaceutical giant after it began selling OxyContin, a long-lasting, narcotic pain reliever. OxyContin has reportedly generated some \$35 billion in revenue for Purdue as of 2017.

Opioid makers in the U.S. are facing pressure from a crackdown on the addictive drug in the wake of the opioid crisis and as state attorneys general file lawsuits against manufacturers. More than 2,000 states, counties, municipalities and Native American governments have sued Purdue Pharma and other pharmaceutical companies for their role in the opioid crisis in the U.S.

Facing more than 2,600 lawsuits, Purdue Pharma sought Chapter 11 bankruptcy protection after reaching terms of a \$10 billion deal with certain of the litigants.

On Sept. 15 and Sept. 16, 2019, Purdue Pharma and 23 affiliates each filed a voluntary petition for relief under Chapter 11 of the United States Bankruptcy Code in the U.S. Bankruptcy Court for the Southern District of New York. The cases are jointly administered under Case No.

19-23649.

As part of the deal, Purdue agreed to dissolve and transfer assets to a new company, which will continue selling OxyContin, with the sales revenue going to claimants. Purdue will donate drugs for addiction treatment and overdose as well. The settlement does not involve an admission of wrongdoing.

The proposed “settlement framework” specifically provides that the Sacklers will relinquish all their equity interests in Purdue and transfer all of Purdue’s assets to a trust for the benefit of claimants and the American public. In addition to 100% of Purdue, the Sackler families will contribute a minimum of \$3 billion over seven years, plus an additional \$1.5 billion contingent on the sale of their global opioid business, Mundipharma.

Parties that agreed to the framework for a comprehensive settlement are comprised of:

- Attorneys general for 24 states: Alabama, Alaska, Arizona (which later backed out), Arkansas, Florida, Georgia, Indiana, Kansas, Louisiana, Michigan, Mississippi, Missouri, Montana, Nebraska, New Mexico, North Dakota, Ohio, South Carolina, South Dakota, Tennessee, Texas, Utah, West Virginia, and Wyoming;
- Officials from five U.S. territories,

namely, American Samoa, Guam, Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands; and

- The court-appointed Plaintiffs’ Executive Committee and Co-Lead Counsel in the federal multi-district litigation pending in Ohio, which comprises attorneys at law firms that collectively represent over 1,000 counties and cities, and Native American Tribes.

Oklahoma and Kentucky separately have already settled with Purdue Pharma.

Not everyone who’s suing Purdue and other opioid manufacturers and distributors for their role in the overdose crisis is on board with the settlement. The attorneys general of the non-settling states and other hold-out claimants are demanding that the company and the Sacklers pay more than what they have offered, and intend to pursue the company and its owners in court.

Purdue has not submitted a Chapter 11 plan nor presented a definitive settlement to the bankruptcy court for scrutiny or approval.

Purdue has commenced in bankruptcy court an adversary proceeding seeking to preliminarily enjoin more than 2,600 lawsuits for 270 days.

The Debtors disclosed consolidated

Research Report

Who's Who in Purdue Pharma's Bankruptcy Cases

Continued from page 5

assets of \$12.18 billion against total liabilities of \$1.45 billion as of Oct. 31, 2019.

DEBTORS

Davis Polk & Wardwell LLP, led by Restructuring Group partners **Marshall S. Huebner**, **Timothy Graulich**, and **Eli J. Vonnegut**, and Litigation Department partner **Benjamin S. Kaminetzky**, is serving as restructuring counsel to Purdue Pharma.

AlixPartners LLP is serving as financial advisor to the Debtors. **Lisa Donahue** is the managing director responsible for the overall engagement.

PJT Partners LP is Purdue's investment banker. **Timothy Coleman**, a partner in and the global chairman of the Restructuring and Special Situations Group at PJT, is one of the lead restructuring advisors involved in the chapter 11 cases.

Dechert LLP is in charge of national coordination of nearly 2,600 civil actions, including cases filed by the Attorneys General of almost every state and territory, pending in various state and federal courts across the United States and its territories. **Hayden Coleman**, a partner of the firm, leads the engagement.

Skadden, Arps, Slate, Meagher & Flom LLP is representing Purdue in connection with civil and criminal investigations initiated by state attorneys general and state agencies, the Department of Justice, and certain other United States agencies, as well as 51 cases filed in Texas state courts, most of which have been consolidated into a Texas state multi-district litigation. **Patrick Fitzgerald**, a partner in Skadden's Litigation and Government Enforcement and White Collar Crime practices, and **Jennifer Bragg**, a partner in the Litigation, Government Enforcement and White Collar Crime, and Health Care and Life Sciences practices, lead the firm's representation of the Debtors in government investigation, and litigation matters. **Noelle Reed**, a partner in the Litigation and Government Enforcement and White Collar Crime practices, and who is based in Skadden's Houston Office, leads the representation of the Debtors in the cases filed in Texas state courts.

King & Spalding LLP, led by partner **Jeffrey S. Bucholtz**, is representing the Debtors in matters relating to opioid claims and investigations.

Wilmer Cutler Pickering Hale and Dorr LLP is advising Purdue

in connection with certain inquiries by Congressional committees into opioid product sales and marketing practices. **Reginald Brown**, a partner at WilmerHale, leads the engagement.

Jones Day is representing the Debtors in several patent litigation matters. **John J. Normile** is the partner with primary responsibility for the matter.

Arnold & Porter Kaye Scholer LLP has been providing Purdue advice in connection with intellectual property licensing and disputes for the past 15 years. **Rory Greiss**, a partner at Arnold & Porter, leads the engagement.

Ernst & Young LLP is Purdue's auditor. **Devon M. Brady** is the audit partner responsible for the provision of E&Y's audit services. Brady, senior manager **Jessica Seenarraine** and manager **Justin Furtado** will work closely with management in performing all required audit services.

Prime Clerk LLC is the claims agent and administrative advisor.

CREDITORS' COMMITTEE

On Sept. 26, 2019, the U.S. Trustee for Region 2 appointed an official committee of unsecured creditors, comprised of (1) healthcare coverage provider **Blue Cross**

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Who's Who in Purdue Pharma's Bankruptcy Cases

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and **Blue Shield Association**, (2) trade creditors **CVS Caremark Part D Services L.L.C.** and **CaremarkPCS Health, L.L.C.**, (3) opioid addiction recovery advocate and former White House staffer **Ryan Hampton**, (4) **Cheryl Juare**, who lost her 23-year old son to an opioid overdose in 2011, (5) transdermal patches supplier **LTS Lohmann Therapy Systems Corporation**, (6) **Pension Benefit Guaranty Corporation**, which has unliquidated claims arising from unfunded benefit liabilities and premiums, (7) **Walter Lee Salmons**, who is seeking certification of a class action to provide medical monitoring for children born with neonatal abstinence syndrome, (8) **Kara Trainor**, who filed product liability and nuisance claims against Purdue over her son's NAS caused by her use of prescription opioids, and (9) **West Boca Medical Center**, which filed a complaint for RICO violations and misleading advertising, which case was selected as the bellwether for hospital cases in the MDL.

On Oct. 21, 2019, the Creditors' Committee granted the request of a multi-state group comprising 1,222 entities, including 1,172 cities, counties and other governmental entities, seven Native American

tribal nations, six hospital, two districts, 34 medical groups, two funds, and one veterans' class across 36 states, representing the interests of 60 million individuals to serve on the Committee in an ex officio capacity. The Multi-State Group has designated Cameron County, Texas to act as an ex officio member of the Committee.

Akin Gump Strauss Hauer & Feld LLP is serving as lead counsel to the Committee. Attorneys that have primary responsibility for providing services to the Committee are partners **Ira S. Dizengoff**, **Arik Preis**, **Mitchell P. Hurley**, **Allison Miller**, and **Sara L. Brauner**; and associates **Edan Lisovicz**, **James Salwen**, and **Brooks Barker**.

Bayard, P.A., led by directors **Justin R. Alberto** and **Erin R. Fay**, and associates **Daniel N. Brogan**, **Gregory J. Flasser** and **Sophie E. Macon**, is serving as the efficiency counsel to the Committee.

Province, Inc., is the Committee's financial advisor. **Michael Atkinson**, a principal with the firm, leads the engagement.

Jefferies LLC is the investment banker to the Committee. **Leon Szlezinger**, a managing director and joint global head of Restructuring and Recapitalization at Jefferies, heads the engagement.

Kurtzman Carson Consultants LLC is the information agent to the Committee. **Evan Gershbein**, a senior vice president of Corporate Restructuring Services with KCC, leads the engagement.

EQUITY HOLDERS

Milbank LLP, led by partners **Gerard Uzzi** and **Eric K. Stodola**, and **Joseph Hage Aaronson LLC**, led by attorney **Gregory P. Joseph**, are representing the Raymond Sackler family, comprised of Dr. Richard Sackler, Jonathan Sackler, David Sackler, and Beverly Sackler.

Bracewell LLP, led by managing partner **Daniel S. Connolly** and partner **Robert G. Burns**, is also representing the Raymond Sackler Family.

Debevoise & Plimpton LLP, led by partners **Jeffrey J. Rosen**, **Maura Kathleen Monaghan**, and **M. Natasha Labovitz**, is counsel to **Beacon Company**, the entity through which certain members of the Sackler family hold a beneficial interest in Purdue Pharma.

GOVERNMENTAL CLAIMANTS

Kramer Levin Naftalis & Frankel LLP, led by bankruptcy and restructuring co-chair **Kenneth H. Eckstein** and partner **Rachael**

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Who's Who in Purdue Pharma's Bankruptcy Cases

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Ringer; Brown Rudnick LLP, led by partners **David J. Molton** and **Steven D. Pohl**; **Gilbert LLP**, led by partners **Scott D. Gilbert** and **Craig Litherland**; and **Otterbourg P.C.**, led by attorney **Melanie L. Cyganowski**, and of counsel **Jennifer S. Feeney**, are representing the ad hoc committee of governmental and other contingent litigation claimants. The committee includes the attorneys general for the states of Florida and New Mexico and 8 other states, as well as the court-appointed Plaintiffs' Executive Committee (the "PEC") in the multi-district litigation captioned *In re National Prescription Opiate Litigation*, Case No. 17-md-02804, MDL No. 2804 (N.D. Ohio). The members of the Ad Hoc Committee negotiated and support a settlement structure with the Debtors and their equity shareholders, on behalf of a larger group of supporting governmental and other contingent litigation claimants.

Consovoy McCarthy PLLC, led by partners **William S. Consovoy** and **J. Michael Connolly**, is counsel to the State of Arizona, which was initially part of the \$12 billion opioid settlement but later backed out, raising the number of states opposing the deal to 25.

Pillsbury Winthrop Shaw Pittman LLP, led by partner **Andrew M. Troop**, is representing the Non-Consenting States, comprised of California, Colorado, Connecticut, Delaware, the District of Columbia, Hawaii, Idaho, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, Washington, and Wisconsin.

Caplin & Drysdale, Chartered, led by members **Kevin C. Maclay**, **James P. Wehner**, **Jeffrey A. Liesemer**, and **Todd E. Phillips**, is counsel to the Multi-State Governmental Entities Group. The group has opposed the settlement with the Sacklers.

In the Debtors' adversary proceeding seeking a preliminary injunction against lawsuits, **Scott+Scott Attorneys at Law LLP**, led by New York attorney **Beth A. Kaswan**, is counsel to the Consortium of Some Massachusetts Municipalities, comprised of 20 cities and towns, including the City of Cambridge.

Loeb & Loeb LLP, led by partner **Vadim J. Rubinstein**, and **Eglet Adams**, led by Las Vegas trial lawyers **Robert M. Adams**, **Artemus W.**

Ham, and **Erica D. Entsminger**, are representing the Nevada counties and municipalities, which include the cities of Reno and Las Vegas.

Godfrey & Kahn, S.C., led by shareholders **Katherine Stadler** and **Brady C. Williamson**, and associate **Erin A. West**, is representing the Arkansas and Tennessee Municipalities.

HOSPITALS

Schulte Roth & Zabel LLP, led by partner **Kristine Manoukian** and special counsel **James T. Bentley**, is serving as counsel to the Ad Hoc Group of Hospitals, which currently represents 10% of the hospitals in the United States that collectively assert in excess of \$303 billion of claims against the Debtors. On Nov. 30, 2017, certain members of the Ad Hoc Group of Hospitals, as putative class representatives on behalf of themselves and all hospitals who have treated patients for conditions related to the use of opiates, filed a class action suit against Purdue and other opioid manufacturers.

The law firms of **Cuneo Gilbert & LaDuca, LLP**, led by founding partner **Jonathan W. Cuneo**; **Barrett Law Group, P.A.**, led by founding partner **Don Barrett**; and

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Who's Who in Purdue Pharma's Bankruptcy Cases

Continued from page 8

Teitelbaum Law Group, LLC, led by founder **Jay Teitelbaum**, are representing **Community Health Systems, Tenet Healthcare Corp.** and its affiliates and subsidiaries, and **Infirmity Health System, Inc.** and its affiliates and subsidiaries along with approximately 384 acute-care hospitals in 18 states. The claims asserted or to be asserted on behalf of the Hospital Plaintiffs nationwide are attributable to the Debtors' illegal scheme to market and distribute opioids exceed \$400 billion, plus punitive damages and treble damages in some states.

INDIVIDUAL VICTIMS

ASK LLP, led by managing partner **Edward E. Neiger** and partner **Jennifer A. Christian**, is representing the Ad Hoc Group of Individual Victims, representative of the more than 1,000 individual victims of Purdue, including over 250 victims with wrongful death claims. Members of the group include **Lindsey Arrington**, founder of Hope Soldiers, an Everett, Washington-based non-profit that helps individuals and families affected by the OxyContin epidemic.

Tarter Krinsky & Drogin LLP, led by Bankruptcy and Corporate

Restructuring Practice co-chair **Scott S. Markowitz**, partner **Rocco A. Cavaliere**, and counsel **Michael Z. Brownstein**, is representing the Ad Hoc Committee of NAS Babies, which represents guardians who are responsible for the babies diagnosed at birth with NAS due solely to their birth mother's use during pregnancy of opioids manufactured by Purdue among other entities. The legal representatives of the NAS Babies Ad Hoc Committee and their associates are responsible for filing 87 actions on behalf of NAS Babies, including class actions covering 34 individual states and a national class.

Stevens & Lee, P.C., led by Bankruptcy and Financial Restructuring Department co-chair **Nicholas F. Kajon** and shareholder **Constantine D. Pourakis**; and **Morgan & Morgan, P.A.**, led by attorneys **James Young** and **Juan R. Martinez**, are representing privately insured parties who are plaintiffs and proposed class representatives in their individual and representative capacities in suits brought against Debtor-Defendant Purdue Pharma in actions in 25 states, all of which have been and remain stayed in connection with the MDL.

NEGOTIATION CLASS

Simmons Hanly Conroy shareholder **Jayne Conroy** and **Seeger Weiss LLP** partner **Christopher A. Seeger** are co-lead counsel and **Branstetter, Stranch & Jennings, PLLC** partner **Gerard Stranch, Renne Public Law Group** founding partner **Louise Renne**, City of Chicago's corporation counsel **Mark Flessner**, and city of New York's corporation counsel **Zachary Carter** are counsel for a proposed negotiation class that would serve as a potential model to settle cases brought over the opioid crisis. Forty nine counties and cities, including the County of Albany, New York, the City of Atlanta, Georgia; the Bergen County, New Jersey, serve as the Negotiation Class representatives. In September 2019, U.S. District Judge Dan A. Polster, who's presiding over the multidistrict opioid litigation (MDL) centered in Cleveland, Ohio, approved the first-ever Negotiation Class in U.S. history that is aimed at reaching settlements with the opioid defendants quickly.

JUDGE

The **Hon. Robert Drain** is the case judge. □

General Motors, *from page 1*

the U.S. automotive industry crisis of 2008-2009 despite receiving billions of dollars of bailout money under the U.S. government's then Troubled Asset Relief Program. Old GM filed on June 1, 2009, in the U.S. Bankruptcy Court for the Southern District of New York after failing to meet a government-imposed deadline to submit a viable long-term plan.

Immediately after the bankruptcy filing, Old GM moved to sell substantially all of its assets at an auction, "free and clear" of any associated liabilities, under 11 U.S.C. § 363(f). The assets were eventually sold to an entity that later became New GM, which was the lone bidder. The terms of the sale are governed by a contract under which New GM assumed a narrow set of Old GM's liabilities while all other liabilities remained with the bankrupt entity.

New GM was formed by the U.S. government, which held a 60.8% stake in the entity; the federal government of Canada and provincial government of Ontario with an 11.7% stake; the United and Canadian Auto Workers unions' VEBA fund, a retiree trust fund, with 17.5%; and General Motors' unsecured bondholders with a 10% stake. The U.S. and Canadian governments have since unloaded their stake in the company.

In response to some objections to the deal, the sale contract was revised for New GM's assumed liabilities to include claims arising out of post-Sale car accidents involving Old GM vehicles. New GM agreed to assume claims including those by persons who did not transact business with Old

GM, such as individuals who never owned Old GM vehicles but collided with one, and those who bought Old GM cars used after the sale.

The bankruptcy court entered an order on July 5, 2009, approving the sale terms, as revised. Five days later, the sale closed. Old GM, renamed Motors Liquidation Company, went on to obtain confirmation of a plan of liquidation that became effective in March 2011.

Between February 2014 and October 2014, New GM recalled certain vehicles manufactured by its predecessor over safety issues, including recalls to repair ignition switches, prompting numerous lawsuits against the company. The ignition switch defect could cause engine stalls and keep airbags from deploying, and has been linked to 124 deaths, according to Reuters. The company recorded charges of roughly \$400 million for ignition switch related legal matters in the year ended December 31, 2018.

In response to the lawsuits, New GM asked the bankruptcy court to enforce the "free and clear" provision of the 2009 sale order, arguing that the order already extinguished all liability arising out of Old GM's assets other than those New GM agreed to assume.

In November 2015, the bankruptcy court resolved some questions bearing on which claims could proceed against New GM and concluded that under the sale agreement, New GM could not be liable for punitive damages imposed by reason of Old GM's conduct. The November 2015 ruling was never appealed.

A group of plaintiffs in *Eason v.*

General Motors LLC, Case No. 15A-1940-7 (State Court of Cobb County, Ga.), argued that they were not bound by the bankruptcy court's November 2015 decision on the punitive damages issue because they were not yet party to the Chapter 11 proceedings. The group is represented by multiple law firms including Butler Wooten & Peak LLP, Denney & Barrett, P.C., Hilliard Martinez Gonzales L.L.P., and Turner & Associates, P.A.

In a July 2017 decision, the bankruptcy court said its November 2015 decision is the law of the case and that New GM cannot be held liable for punitive damages on a contractual basis. The bankruptcy court held that, since Old GM was deeply insolvent at the time of the sale, the structure of the Bankruptcy Code's claim priority scheme would insulate it from having to pay punitive damages. The bankruptcy court concluded that New GM could not be held liable as a successor corporation for claims that its predecessor would never have paid.

The district court upheld the July 2017 decision. The *Eason* plaintiffs elevated the matter to the Second Circuit.

Both the district court and the bankruptcy court did not address whether the scope of the Sale Order could preclude punitive damages claims. Instead, they concluded that because Old GM was insolvent, the structure of the Bankruptcy Code's priority scheme precluded punitive damages claims against New GM, the buyer.

Circuit Judge Dennis Jacobs said, "We need not decide whether the

General Motors, *from page 10*

Bankruptcy Code's priority scheme precludes liability for punitive damages in the case of an insolvent debtor such as Old GM. Here, punitive damages are not an Assumed Liability in the Sale Agreement, and the Sale Order's free and clear provision bars punitive damages claims under a theory of successor liability. These conclusions are sufficient for us to rule that Appellants may not seek punitive damages against New GM based on Old GM's conduct."

New GM argued on appeal that the doctrine of res judicata bars the *Eason* plaintiffs from challenging the bankruptcy court's decisions. New GM asserted that even if the Plaintiffs did not participate in the briefing leading to the November 2015 decision, they were a part of the larger bankruptcy litigation at that time and are thereby bound by their failure to appeal that ruling.

The Second Circuit disagreed with New GM, noting that the group did not join the bankruptcy proceedings until sometime after June 2016.

The *Eason* plaintiffs' arguments include that:

- New GM assumed "all Liabilities," including "all liabilities and obligations of every kind and description whatsoever," and thereby assumed claims for punitive damages;
- because the sale agreement does not expressly carve out punitive damages, New GM must have contractually assumed them as liabilities; and

- even if Old GM's liabilities for punitive damages were not contractually assumed, New GM must pay them under the theory of successor liability.

According to the Second Circuit, New GM's assumption of "all Liabilities" is limited to those that are "for" death and injuries and those that "arise directly out of" death and injuries. Punitive damages are not paid "for" death and injuries. Rather, they are paid to punish "egregious, reprehensible behavior," Judge Jacobs said, pointing to *Virgilio v. City of New York*, 407 F.3d 105, 116 (2d Cir. 2005).

"Claims for punitive damages do not 'arise directly out of' death and injuries," according to Judge Jacobs. "If reprehensible conduct—such as careless automobile design—led to an accident that caused an injury, a claim for punitive damages to punish that conduct does not arise directly out of the injury. Arguably, the claim might be said to arise out of the injury indirectly. Most accurately, the claim for punitive damages does not arise out of the injury at all."

The *Eason* plaintiffs, pointing to a 2016 decision by the Second Circuit, also argued that the sale order cannot bar their punitive damages claims because they had no relationship with Old GM at the time of the sale: They were not identifiable when the sale order was entered.

In 2016, the Second Circuit held that the 2009 sale order could not be enforced to bar claims for successor liability against New GM asserted by either plaintiffs who purchased

used vehicles after the sale or against purchasers who asserted claims relating to the ignition switch defect, including pre-sale personal injury claims and economic-loss claims. At that time, the Second Circuit considered whether a bankruptcy court may approve a sale "free and clear" of claims if those claims arose from pre-petition conduct that had not resulted in "detectable injury" at the time of the bankruptcy sale, but that might lead to a "tortious" injury after the sale.

According to Judge Jacobs, the 2016 decision has no bearing on punitive damages: a punitive damages claim is not a tort claim; it does not compensate for a "tortious" injury; and there is no "detectable injury." Moreover, he continued, any alleged egregious act committed by Old GM that might justify punitive damages was over and done by the time of the sale order. Therefore, those claims are subject to the sale order's successor liability bar.

"The default rule is that unless the Sale Agreement states that New GM assumed a Liability, the Liability remained with Old GM," Judge Jacobs said.

The *Eason* plaintiffs were represented by Gory W. Fox and William P. Weintraub of Goodwin Procter LLP on appeal.

New GM was represented by Richard C. Godfrey, Andrew B. Bloomer, Erin E. Murphy and C. Harker Rhodes IV of Kirkland & Ellis LLP; and Arthur J. Steinberg, David M. Fine and Scott I. Davidson of King & Spalding LLP. ☐

Research Report

Who's Who in Jack Cooper's Bankruptcy Cases

by Carlo Fernandez

Based in Kennesaw, Georgia, Jack Cooper Ventures, Inc., is a specialty transportation provider and one of the largest over-the-road finished vehicle logistics companies in North America.

The Company provides premium asset-heavy and asset-light based solutions to the global new and previously-owned vehicle markets, specializing in finished vehicle transportation and other logistics services for major automotive original equipment manufacturers and for fleet ownership companies, remarketers, dealers and auctions.

Jack Cooper operates a fleet of over 1,600 active rigs and a network of 39 terminals across the United States and Canada to haul vehicles. In 2018, it transported over 2.5 million finished vehicles and generated operating revenue of \$540.7 million. Jack Cooper also generated \$55.9 million of revenue in 2018 from asset-light services, including vehicle inspections and technical services.

Jack Cooper Ventures and 18 affiliates and subsidiaries sought Chapter 11 protection (Bankr. N.D. Ga. Lead Case No. 19-62393) in Atlanta, Georgia, on Aug. 6, 2019, to implement a comprehensive restructuring that would reduce

debt by more than \$300 million and preserve jobs for nearly 2,000 union workers.

Jack Cooper reported \$195.5 million in assets against \$582.6 million in liabilities as of Nov. 2, 2019. As of the Petition Date, the Debtors have \$575.4 million in funded debt, consisting:

- \$49.8 million outstanding under a first-priority revolving credit facility from Wells Fargo Capital Finance, LLC, as administrative agent, and lenders;
- \$188.7 million outstanding under a first lien term loan facility from Cerberus Business Finance Agency, LLC, as agent, and lenders;
- \$45.5 million outstanding under a 1.5 lien term loan due 2024, from lenders and Wilmington Trust, National Association, as agent; and
- \$291.4 million outstanding under a second-lien term loan due 2024 from lenders, and Wilmington Trust, as agent.

“In recent years, the Debtors have faced declining revenues and loss of market share amidst a changing landscape for the carhaul industry nationwide. Moreover, as one of only two unionized carhaul providers in the United States, the Debtors are burdened with substantial labor costs,

including pension obligations and work rules that limit the Debtors' ability to respond to customer requirements, making it difficult for them to compete with non-unionized competitors. These challenges have caused the Debtors to face rapidly declining liquidity,” Greg R. May, CFO of the Debtors, explains.

In connection with the restructuring, the Company and the Teamsters National Automobile Transporters Industry Negotiating Committee (“TNATINC”) have negotiated modifications to the collective bargaining agreement (“CBA”) that will be presented to the bargaining unit members for ratification.

In addition, the Company's largest lenders have agreed to cancel their debt as part of a transaction to purchase all or substantially all of the Company's assets. The transaction will result in a significantly deleveraged company with new shareholders, who have committed to invest new capital in the restructured Company that will enable it to execute on its business plan. The Company's lenders also have agreed to provide essential debtor-in-possession financing to the Company that will allow it to maintain normal operations and pay employees and suppliers in the ordinary course

Research Report

Who's Who in Jack Cooper's Bankruptcy Cases

Continued from page 12

of business.

JC Buyer Company, Inc., an entity formed by Solus Alternative Asset Management LP, signed a deal to purchase substantially all of the Debtors' assets via a credit bid.

Solus, a junior lender, has agreed to advance up to \$15 million in the form of a term loan to be provided in addition to the debtor-in-possession financing from Wells Fargo, which shall be in the form of a "rollover" DIP on terms materially consistent with the prepetition revolving credit facility.

As part of the sale, the first lien term loan facility with outstanding amount of \$188.65 million will be modified and assumed by the purchaser in the form of an exit term loan facility.

The Oct. 4, 2019 auction was cancelled as no rival offer was received by the deadline.

The sale of substantially all of the Debtors' assets to stalking horse bidder JC Buyer was approved by the Court on October 11, 2019 and closed on Nov. 4, 2019. Debtor Jack Cooper Ventures, Inc., changed its name to Legacy JCV, Inc., following the sale.

The assets acquired by JC Buyer included any and all causes of action belonging to the Debtors and their estates, including avoidance actions.

On the Closing Date, JC Buyer released and waived the avoidance actions and other causes of action that may exist against various third parties. As a result, there are no estate claims to investigate and/or prosecute, and the Debtors have no remaining material assets.

As no meaningful assets remain in the Debtors' estates for the Debtors to monetize or distribute to creditors, the Debtors sought a dismissal of the cases. On Dec. 9, 2019, the judge dismissed the Debtors' cases.

As contemplated by the Stalking Horse APA, the Debtors and Buyer agreed to a budget solely for wind-down and other post-closing expenses as set forth therein in an aggregate amount of \$250,000. The Creditors Committee is entitled to \$35,000 for wind-down fees and expenses under the wind-down budget.

DEBTORS

Paul, Weiss, Rifkind, Wharton & Garrison LLP is serving as lead restructuring counsel to Jack Cooper. Partners **Kelley A. Cornis** and **Brian S. Hermann**, and associate **John T. Weber** are the attorneys involved in the case.

King & Spalding LLP is the bankruptcy co-counsel and corporate

counsel. Partner **Sarah R. Borders**, and associates **Leia Clement Shermohammed** and **Britney Baker** are the attorneys involved in the case.

Houlihan Lokey Capital, Inc., is Jack Cooper Ventures' investment banker. **Adam Dunayer**, a managing director of Houlihan, leads the engagement. In addition to Dunayer, the principal professionals rendering services to the Debtors are **Justin Zammit**, senior vice president; **Blake Donovan**, associate; and **Morris Herman**, financial analyst.

AlixPartners LLP is the Debtors' financial advisor. **David Orlofsky**, a managing director, leads the engagement.

Ogletree, Deakins, Nash, Smoak & Stewart, P.C., is the Debtors' special labor relations counsel. **John R. Woodrum**, a shareholder of Ogletree Deakins, leads the engagement.

Osler, Hoskin & Harcourt LLP is the Debtors' Canadian restructuring counsel.

On the closing date of the sale, the existing officers and all but one director (Gerry Czarnecki) resigned from the Debtors. **Compass Advisory Partners, LLC**, has been tapped by the Debtors to provide administrative oversight and coordination of the

Research Report

Who's Who in Jack Cooper's Bankruptcy Cases

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Debtors' wind-down activities. **John W. Teitz**, a managing director at Compass, has been tapped to act as the authorized officer of the Debtors as of the closing date.

Prime Clerk LLC is the claims agent.

LENDERS

Buchalter, P.C., led by shareholder **Robert J. Davidson**; and **Burr & Forman LLP**, led by Atlanta office managing partner **Erich N. Durlacher**, are representing the Debtors' prepetition secured revolving lenders, led by **Wells Fargo Capital Finance, LLC**, in its capacity as ABL Agent and Revolver Administrative Agent.

Schulte Roth & Zabel LLP, led by partners **Eliot L. Relles** and **Adam C. Harris**; and **Kilpatrick Townsend & Stockton LLP**, led by partners **Todd C. Meyers** and **Colin M. Bernardino**, are serving as counsel to **Cerberus Business Finance Agency, LLC**, the first lien term loan lender and agent.

Kirkland & Ellis LLP, led by partners **Marc Kieselstein**, **Alexandra Schwarzman** and

Jonathan S. Henes; and **Bryan Cave Leighton Paisner LLP**, led by **Mark I. Duedall**, are representing **Solus Alternative Asset Management LP**, the lender under the 1.5 lien term loan facility and second lien term loan facility.

Kirkland & Ellis is also representing the purchaser, **JC Buyer Company**, a newly formed entity formed by or on behalf of an investment vehicle affiliated with Solus.

Alston & Bird LLP, led by partner **David A. Wender**, is counsel to **Wilmington Trust, N.A.**, which is the DIP Term Administrative Agent, Prepetition 1.5 Lien Agent and Prepetition Second Lien Agent.

CREDITORS' COMMITTEE

On Aug. 19, 2019, the United States Trustee for Region 21 appointed an official committee of unsecured creditors, comprised of: (1) **Central States, Southeast and Southwest Areas Pension Fund**, (2) **Teamsters National Automobile Transporters Industry Negotiating Committee (TNATINC)**, (3) **U.S. Bank National Association**, solely in its capacity as the indenture trustee of the 9.25%

senior notes due 2020 of Jack Cooper Holdings Corp., (4) **Selland Auto Transport, Inc.**, and (5) **Harrison Shaw**.

Sidley Austin LLP is serving as the Committee's lead counsel in the Chapter 11 cases. Restructuring partners **Matthew A. Clemente** and **Michael G. Burke** lead the engagement.

Scroggins & Williamson, P.C., is serving as local counsel to the Committee. Shareholder and president **Robert Williamson** and shareholder **Ashley R. Ray** are the attorneys involved in the case.

FTI Consulting, Inc., is the Committee's financial advisor. **Conor P. Tully**, a senior managing director at FTI, heads the engagement.

Miller Thomson LLP is special Canadian counsel to the Committee. **Stephane Hebert**, a partner in the firm, heads the engagement.

JUDGE

The **Hon. Paul W. Bonapfel** is the case judge. ☐

Special Report

Sources of Debtor-in-Possession Financing

Company Name & Location	Amount	Lenders
PG&E CORPORATION San Francisco	\$5,500,000,000	JPMorgan Chase Bank, N.A.; Bank of America, N.A.; Barclays Bank PLC and Citigroup Global
DITECH HOLDING CORPORATION Fort Washington, Pa.	\$1,900,000,000	Barclays Bank PLC and Nomura Corporate Funding Americas, LLC
WEATHERFORD INTERNATIONAL, PLC Houston	\$1,500,000,000	Citibank, N.A.
WINDSTREAM HOLDINGS, INC. Little Rock, Ariz.	\$1,000,000,000	Citigroup Global Markets Inc.
HALCON RESOURCES CORPORATION Houston	\$600,000,000	Wilmington Trust, National Association
SPECIALTY RETAIL SHOPS HOLDING CORP. Green Bay, Wis.	\$497,000,000	Wells Fargo Bank, National Association
SOUTHERN FOODS GROUP, LLC AKA DEAN FOODS Dallas	\$475,000,000	Rabobank
MURRAY ENERGY HOLDINGS CO. St. Clairsville, Ohio	\$440,000,000	GLAS USA LLC and GLAS Trust Americas LLC
GYMBOREE GROUP, INC. San Francisco	\$378,450,000	Bank of America, N.A. and Pathlight Capital LLC
LEGACY RESERVES, INC. Midland, Texas	\$350,000,000	Wells Fargo Bank, National Association
FOREVER 21, INC. Los Angeles	\$350,000,000	JPMorgan Chase Bank, N.A.
EP ENERGY CORPORATION Houston	\$315,000,000	JPMorgan Chase Bank, N.A.

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Sources of Debtor-in-Possession Financing

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Company Name & Location	Amount	Lenders
SOUTHCROSS ENERGY PARTNERS, LP Dallas	\$255,000,000	Wilmington Trust, National Association
MONITRONICS INTERNATIONAL, INC. Farmers Branch, Texas	\$245,000,000	KKR Credit Advisors (US) LLC
BLACKHAWK MINING, LLC Lexington, Ky.	\$240,000,000	Knighthead Capital Management, LLC
BARNEYS NEW YORK, INC. Central Valley, N.Y.	\$217,000,000	B. Riley Financial and Brigade Capital Management
SANCHEZ ENERGY CORPORATION Houston	\$175,000,000	Wilmington Savings Fund Society, FSB
CTI FOODS, LLC Saginaw, Texas	\$155,000,000	Barclays Bank PLC and Wells Fargo Bank, National Association
VANGUARD NATURAL RESOURCES, LLC Houston	\$130,000,000	Citibank, N.A.
PES HOLDINGS, LLC Philadelphia	\$120,000,000	Halcyon Capital Management LP and Credit Suisse Asset Management, LLC
HOLLANDER SLEEP PRODUCTS, LLC New York	\$118,000,000	Wells Fargo Bank, National Association
DELUXE ENTERTAINMENT SERVICES GROUP, INC. Burbank, Calif.	\$115,000,000	Credit Suisse Loan Funding LLC
EDGEMARC ENERGY HOLDINGS, LLC Cannonsburg, Pa.	\$108,000,000	KeyBank National Association

Special Report

Sources of Debtor-in-Possession Financing

Continued from page 16

Company Name & Location	Amount	Lenders
SUNGARD AVAILABILITY SERVICES CAPITAL, INC. Wayne, Pa.	\$100,000,000	Cortland Capital Market Services LLC
SHERIDAN HOLDING COMPANY II, LLC Houston	\$100,000,000	Bank of America N.A.
MTE HOLDINGS, LLC Midland, Texas	\$100,000,000	Great American Capital
MDC ENERGY, LLC Indianapolis	\$100,000,000	Great American Capital
FTD COMPANIES, INC. Downers Grove, Ill.	\$94,500,000	Bank of America, N.A.
ARSENAL RESOURCES DEVELOPMENT, LLC Wexford, Pa.	\$90,000,000	Citibank, N.A.
DURA AUTOMOTIVE SYSTEMS, LLC Auburn Hills, Mich.	\$84,000,000	Bardin Hill Investment Partners LP
BRISTOW GROUP, INC. Houston	\$75,000,000	U.S. Bank National Association
CENTER CITY HEALTHCARE, LLC Philadelphia	\$65,000,000	MidCap Financial Trust
ACETO CORPORATION Port Washington, N.Y.	\$60,000,000	Wells Fargo Bank, National Association
FUSION CONNECT, INC. New York	\$59,500,000	Wilmington Trust, National Association
LIFECARE HOLDINGS, LLC Plano, Texas	\$57,700,000	White Oak Healthcare Finance, LLC

Special Report

Sources of Debtor-in-Possession Financing

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Company Name & Location	Amount	Lenders
GCX LIMITED Aurora, Colo.	\$54,500,000	Wilmington Trust, National Association
CHARLOTTE RUSSE HOLDING, INC. San Diego	\$50,000,000	Bank of America, N.A.
TRIDENT HOLDING COMPANY, LLC Sparks, Md.	\$50,000,000	Silver Point Capital
JOERNS WOUNDCO HOLDINGS, INC. Charlotte, N.C.	\$40,000,000	Prepetition Lenders
ASTRIA HEALTH Sunnyside, Wash.	\$36,000,000	JMB Financial Advisors
CLOUD PEAK ENERGY, INC. Gillette, Wyo.	\$35,000,000	Ankura Trust Company, LLC
STEARNS HOLDINGS, LLC Lewisville, Texas	\$35,000,000	Blackstone Capital Partners VI NQ/NF L.P. and Blackstone Family Investment Partnership VI-NQ - ESC L.P.
EMERGE ENERGY SERVICES, LP Fort Worth, Texas	\$35,000,000	HPS Investment Partners LLC
FRED'S, INC. Memphis, Tenn.	\$35,000,000	Regions Bank and Bank of America N.A.
PERNIX SLEEP, INC. Morristown, N.J.	\$34,100,000	Highbridge Capital Management
WHITE STAR PETROLEUM HOLDINGS, LLC Oklahoma City	\$28,500,000	MUFG Union Bank N.A.

Special Report

Sources of Debtor-in-Possession Financing

Continued from page 18

Company Name & Location	Amount	Lenders
PAYLESS HOLDINGS, LLC Topeka, Kan.	\$25,000,000	Wilmington Savings Fund Society, FSB
ACHAOGEN, INC. South San Francisco	\$25,000,000	Silicon Valley Bank
AEGERION PHARMACEUTICALS, INC. Cambridge, Mass.	\$20,000,000	Highbridge Capital Management and Athyrium Capital Management
APPROACH RESOURCES, INC. Fort Worth, Texas	\$16,500,000	JPMorgan Chase Bank, N.A.
IPIC-GOLD CLASS ENTERTAINMENT, LLC Boca Raton, Fla.	\$16,000,000	Teachers' Retirement System of Alabama and the Employees' Retirement System of Alabama
JACK COOPER VENTURES, INC Kennesaw, Ga.	\$15,000,000	Solus Alternative Asset Management LP
ORCHIDS PAPER PRODUCTS COMPANY Brentwood, Tenn.	\$11,000,000	Orchids Investment LLC
NORPAC FOODS, INC Salem, Ore.	\$10,000,000	CoBank
NEW COTAI HOLDINGS, LLC Greenwich, Conn.	\$6,250,000	Silver Point Capital
BLACKJEWEL, LLC Milton, W.Va.	\$5,000,000	Riverstone Credit Partners – Direct, L.P.

Worth Reading

Unique Value:

The Secret of All Great Business Strategies

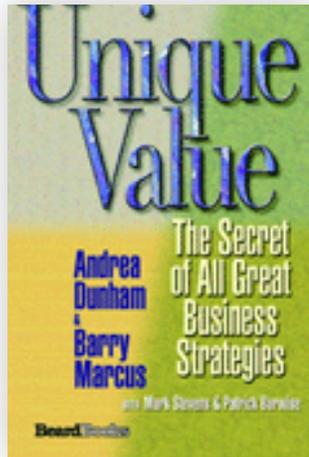
Authors: Andrea Dunham and Barry Marcus, with Mark Stevens and Patrick Barwise

Publisher: Beard Books

Softcover: 303 pages

List Price: \$34.95

[Order This Book Online Now »](#)



“Never stop leveraging what you do uniquely well,” the authors advise. Every good manager knows how to leverage business strengths. The challenge is identifying a corporation’s unique value, which, in most cases, is an interrelated set of strengths. This 1993 reprint instructs the reader on the process and method for determining unique value: how to recognize it, how to inculcate it into the corporate culture, and how to keep it in focus and preserve it during changing business conditions.

Employing charts and diagrams, Dunham and Marcus illustrate their trademarked Unique Value = ROI Model. ROI—return on investment—is a familiar measure of business productivity. However, it is not ordinarily linked to something called “unique value.” The authors make a compelling argument that the two are related. In fact, a case can be made that nearly every business achieves its ROI from its unique value.

With Dunham and Marcus offering this new perspective on ROI, one quickly realizes that unique value (and ROI) is a function of marketing, customer relations, strategic planning, and other less tangible factors. The

reader draws the conclusion that ROI is as much a result of image or market presence as it is financial planning and management.

The Unique Value Model is best seen as a pyramid with the “informing concept” of unique value at its peak. The pyramid has four bases: Consumer/Customer, Business Systems and Skills, Product/Technology, and Competition. These are the four major interrelated factors of any business organization. The authors posit that each of these factors must be analyzed, structured, and fully understood for the Unique Value = ROI Model to be informative and effective.

Unique value is ultimately concerned with decision-making and operations. This is what Marcus and Dunham mean by their advice to “never stop leveraging what you do uniquely well.” The authors demonstrate how corporate leaders can apply their knowledge of unique value to shape employee behavior and interactions with customers and clients, plan marketing campaigns, decide upon the content and style of advertising, follow closely what certain competitors are doing, look for

profitable acquisitions, and adroitly manage all the other activities upon which the success of the corporation depends. Mid- and lower-level employees may not even know there is a core concept of unique value, but they will embody it when it is practiced by executives and managers.

IBM, Frito-Lay, Seagram’s, Yamaha, and Holiday Inn are some of the many companies used as examples of how unique value can be applied to ROI. Aspects of the model are already widely practiced by many successful corporations. After reading this book, it’s hard to imagine how a corporation can be successful without heeding the principles of unique value. The challenges posed by today’s business environment are greater than ever. Competition is fierce, both at home and from abroad; consumer demands are fickle; and government policy pervades everything from taxes to the environment to health care. Corporations that can clearly articulate and unerringly implement their unique value have an advantage over their competitors.

About The Authors

Andrea Dunham and Barry Marcus were partners in founding Dunham & Marcus. Marcus is co-founder and CEO of Unique Value International, a consulting firm in the areas of marketing and brand development. □

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Special Report

Outstanding Restructuring Lawyers - 2019

Professional

Recent Representative Engagements

MATT BARR

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New York

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Leads \$4.9B chapter 11 of EP Energy, the largest U.S. energy bankruptcy since 2016. Spearheaded syncreon's groundbreaking \$1.1B cross-border restructuring effectuated through English schemes of arrangement and parallel recognition proceedings in the U.S. and Canada. Led prepack for CTI Foods that eliminated more than \$400M of debt and secured \$110M in new financing. Led Fieldwood Energy's innovative \$1.6B restructuring that used chapter 11 to make a major acquisition. Creditor-side achievements include advising ad hoc group in Cobalt International Energy; ad hoc group in Uniti; Bain Capital and Thomas H. Lee Partners as major holders of equity and debt in \$16B iHeartMedia chapter 11 case; secured lenders in Emerge Energy's \$339M chapter 11 case; secured lenders in Bumble Bee's chapter 11; and ad hoc group of lenders in out-of-court restructuring of Sable Permian Resources.

RONIT BERKOVICH

Weil, Gotshal & Manges LLP

New York

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Representing Insys Therapeutics in high-profile Chapter 11 case involving massive opioid-related litigation, investigations and complex asset sales; EP Energy in its \$4.9B chapter 11 restructuring, the largest U.S. energy bankruptcy since 2016; and Johnson & Johnson in chapter 11 of its talc supplier Imerys. Guided Catalina Marketing in prepackaged chapter 11 case that shed more than \$1.5B of debt; CTI Foods in prepackaged chapter 11 case that eliminated more than \$400M of debt; and Tweddle Group in out-of-court restructuring that transferred full equity to lenders.

GEORGE DAVIS

Latham & Watkins LLP

New York

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Guided Hexion in restructuring \$4B debt load, emerging in July with \$2.3B of capital raised and trade creditors unimpaired; Savers Inc., the biggest for-profit thrift-store chain in the US, in an out-of-court restructuring of \$1B debt; and American Energy-Permian Basin in a successful out-of-court exchange involving \$2.2B in note debt and other debt obligations. Representing Weatherford International in Chapter 11 restructuring of \$8.6B+ debt; and Imerys, a Johnson & Johnson talc supplier, in U.S. and Canada restructuring proceedings. Advising Alta Mesa Resources over a myriad of complicated governance, intercompany, and structuring issues. Extensive experience representing creditors and investors, including Apollo, Franklin Templeton, General Motors, Bank of America, PSEG, AIG, Avenue Capital, Solus Capital, Oaktree, Centerbridge, and TCW.

Special Report

Outstanding Restructuring Lawyers - 2019

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Professional

Recent Representative Engagements

JAYME GOLDSTEIN

Stroock & Stroock & Lavan LLP
New York
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Represents ad hoc group of lenders on Ultra Petroleum's \$975M secured term loans (Total matter value: \$2B); an ad hoc group of holders of Harland Clarke's \$800M of secured notes due 2022 (Total matter value: \$3B); and the Unsecured Creditors' Committee of Aceto Corp. (Total matter value: \$550M). Advised ad hoc group of Term Loan B lenders representing over 80% of the secured lenders to Empire Generating (Total matter value: \$500M); and ad hoc group of Second Lien Lenders in Animal Supply's out-of-court restructuring (Total matter value: \$425M). Closed an amendment and restatement of the First Lien Credit Facility of fast food chain Checkers (Total matter value: \$365M). Advised ad hoc groups or significant lenders or equityholders on: Ferrellgas (ad hoc group of OpCo unsecured noteholders; \$1.5B), American Renal (ad hoc group of first lien term lenders; \$475M), China Medical Technologies (ad hoc group of unsecured noteholders/liquidation funders; \$460M), Panda Temple (ad hoc group of first lien term lenders; \$425M), Permian Production Partners (ad hoc group of first lien term lenders; \$300M), Interactive Health (ad hoc group of second lien term lenders; \$100M), VIP Cinema (ad hoc group of second lien term lenders; \$85M), Vantage Mobility (ad hoc group of second lien term lenders; \$75M) and Regional Health Properties (ad hoc group of senior secured lenders; \$45M).

SCOTT J. GREENBERG

Gibson Dunn & Crutcher LLP
New York
sgreenberg@gibsondunn.com

Represented group of term lenders and certain DIP lenders of Monitronics International; the Term Loan Lender Group in David's Bridal's prepackaged chapter 11; the First Lien Group to Catalina Marketing; the Term Lender Group in Crossmark Inc.'s successful out-of-court restructuring; a group of Term Loan Lenders to Sungard AS; an ad hoc group of lenders of syncreon Group B.V.; and the TLLs in connection with Savers LLC's successful out-of-court restructuring. Advising an ad hoc group in connection with Akorn, Inc.'s current restructuring efforts; an ad hoc group of first lien term loan lenders to NPC International on potential restructuring options; an ad hoc group of secured term loan lenders to 4L Technologies. (d/b/a Clover Technologies Group) in connection with a \$648M secured term loan; ad hoc group of secured first lien term lenders to Skillsoft Corp. over a \$1.3B first lien term loan due April 2021; an ad hoc group of secured term loan lenders to Mallinckrodt plc's \$1.8B secured term loan; and ad hoc group of first lien lenders on One Call Corporation's efforts to restructure over \$2B of debt.

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Outstanding Restructuring Lawyers - 2019

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Professional

Recent Representative Engagements

KRISTOPHER M. HANSEN
Stroock & Stroock & Lavan LLP
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Representing EP Energy's Unsecured Creditors Committee; JPMorgan Chase Bank, as administrative agent and lead arranger of \$5.5B in DIP credit facilities provided to PG&E—the largest new-money DIP financing transaction in history; Axar Capital Management, a large holder of prepetition term loans of Payless Holdings; and the ad hoc group of term lenders, first lien noteholders and second lien noteholders of J.C. Penney, which has \$4B in aggregate institutional debt obligations. Advised an ad hoc group holding over 65% of senior unsecured notes due 2020 issued by Monitronics International, negotiating a deal on which the Ad Hoc Group and another ad hoc group of first lien term lenders would support a consensual restructuring pursuant to a partial prepackaged plan that allowed the Company to exit bankruptcy in August 2019; and an ad hoc group comprising the vast majority of Deluxe Entertainment Services Group's secured lenders who also serve as DIP lenders, guiding the Group in negotiations to take ownership of Deluxe from its current equity sponsor, MacAndrews & Forbes Media Group, in exchange for slashing nearly \$1B in debt, while also structuring and negotiating multiple rounds of rescue financing for the Company prior to the bankruptcy filing.

JONATHAN HENES
Kirkland & Ellis LLP
New York
jonathan.henes@kirkland.com

Guided FullBeauty Brands, which had \$1.27B in funded debt at the time of filing, in obtaining confirmation of prepack plan in less than 24 hours and staying in Chapter 11 for less than 90 hours. Then represented Sungard AS Capital—which had \$1.26B in funded debt at Chapter 11 petition date and deleveraged by over \$900M upon emergence—in winning plan confirmation in less than 19 hours while staying in Chapter 11 for less than 48 hours. Also guided One Call Corp. in a successful out-of-court recapitalization that reduced debt through a consensual equitization of nearly \$1B of junior debt, slashed annual interest expense by ~\$90M, and eliminated all near-term maturities; Deluxe Entertainment Services Group in a prepackaged Chapter 11; and Cenveo Inc. in a prearranged bankruptcy underpinned by a restructuring support deal with noteholders representing over 50% of first lien debt, and related agreements with certain of prepetition secured creditors to provide up to \$290M DIP financing.

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Outstanding Restructuring Lawyers - 2019

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Professional

Recent Representative Engagements

MARSHALL HUEBNER

Davis Polk & Wardwell LLP

New York

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Lead counsel to Purdue Pharma in connection with its chapter 11 restructuring and 2,800+ governmental lawsuits regarding OxyContin, seeking hundreds of billions of damages; Southcross Energy Partners in connection with its chapter 11 restructuring, including \$255M DIP financing; Pernix Therapeutics in chapter 11 proceedings, DIP financing and sale of assets; Neovia Logistics in a recapitalization, which includes \$200M second-lien term loan investment, and preferred equity investment of up to \$165M; pre-petition and DIP lenders in connection with Nine West's chapter 11 restructuring and DIP financing; and Citibank N.A. in connection with its rollover letter of credit facility as part of ESL Investment's acquisition of Sears. Routinely advises purchasers, companies and boards of directors in many non-public distressed matters and provides risk management and bankruptcy advice on derivatives products and other complex transactions to clients such as Bank of America, Citibank, Goldman Sachs, J.P. Morgan and Morgan Stanley.

AUSTIN JOWERS

King & Spalding LLP

Atlanta

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Advised Goldman Sachs Specialty Lending Group and affiliate Special Situations Investing Group as senior term loan lender (\$85M) and DIP term loan lender (\$30M) for Gymboree Group. Represented Capital One and an ad hoc group of term loan lenders (Barings Finance LLC, Benefit Street, Golub, Main Street and Wells Fargo) which held 80% of Joerns' \$300M first lien credit facility. Assisted Barings Finance and affiliates—prepetition term loan agent and lender under Hollander Sleep Products' prepetition \$170M term loan credit facility, and agent and lender under both a \$28M DIP term loan facility and a \$58M exit term loan facility (which includes \$30M of new money)—on the bankruptcy matter and in reaching a restructuring support agreement with other prepetition lenders, Hollander and equity sponsor Sentinel Capital. Guided an affiliate of P/E firm Starwood Energy Group Global in completing a \$144M leveraged buyout of FirstEnergy Solutions Corp.'s assets constituting the West Lorain Power Plant located in Lorain, Ohio, following a competitive Sec. 363 auction.

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Outstanding Restructuring Lawyers - 2019

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Professional

Recent Representative Engagements

SAMUEL MAIZEL

Dentons

Los Angeles

samuel.maizel@dentons.com

Leads the representation of Verity Health System of California and 16 related entities, including 6 significant operating hospitals, in the second largest hospital bankruptcy case in American history, involving more than \$1.4B debt. Also counseled numerous healthcare organizations through complex bankruptcy proceedings, including prominent local businesses like Air Force Village West dba Altavita, and Gardens Regional Medical Center & Hospital.

NANCY A. MITCHELL

O'Melveny & Myers LLP

New York

nmitchell@omm.com

Leads the firm's representation of California Governor Gavin Newsom in the PG&E chapter 11 cases and was instrumental in drafting complex legislation that addresses wildfire litigants' claims in California. Spearheads representation of Puerto Rico's electric company (PREPA) in its pending bankruptcy proceeding and in the firm's representation of Puerto Rico's water utility (PRASA).

ABID QURESHI

Akin Gump Strauss Hauer & Feld

LLP

New York

aqureshi@akingump.com

Guided FirstEnergy Solutions in its \$5B debt restructuring, ultimately winning plan confirmation in October. Representing ad hoc committee of senior unsecured noteholders in PG&E's \$30B+ cases, successfully litigated to terminate exclusivity, allowing the ad hoc group and tort claimants' committee to submit a competing plan. Advised the unsecured creditors' committee in Sears' \$5B restructuring, successfully negotiating a liquidating plan confirmed in October that establishes a trust to pursue claims against former CEO Ed Lampert, his ESL hedge fund and other parties. Represented Payless in \$470M case (confirmed October 2019); an informal committee of certain unaffiliated senior unsecured noteholders of Weatherford International plc in its \$8.34B cases (confirmed September 2019); the unsecured creditors' committee in Aegean Marine's \$855M cases (effective April 2019); the ad hoc group of first lien noteholders in Hexion's \$3.8B case (emerged July 2019); an ad hoc group of noteholders and the indenture trustee for the notes in New Cotai Holdings' ongoing bankruptcy case; Lantern Entertainment in \$289M acquisition of The Weinstein Company's assets (settled July 2018); an ad hoc group of second lien bondholders in Rex Energy's \$930M cases (confirmed October 2018).

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Professional

Recent Representative Engagements

JOHN RAPISARDI

O'Melveny & Myers LLP

New York

jrapisardi@omm.com

Continues to lead team representing Government of Puerto Rico and the agency of the Government of Puerto Rico ("AAFAF") responsible for restructuring of over \$100B in funded debt and pension liabilities, advising the Government through two significant crises: the devastation and aftermath of Hurricane Maria in September 2017, and the political crisis this past July that led to the appointment of a new governor. Representing AAFAF with respect to governmental entities in need of financial restructuring, including several in-court (Title III) cases and out-of-court (Title VI) situations. These entities include: The Commonwealth of Puerto Rico, the Puerto Rico Highway and Transportation Authority, Puerto Rico Electric Power Authority, Puerto Rico Aqueduct and Sewer Authority, Government Development Bank of Puerto Rico ("GDB"), Employees Retirement System, Puerto Rico Sales Tax Financing Corporation ("COFINA"), Puerto Rico Public Building Authority, University of Puerto Rico, Puerto Rico Infrastructure Finance Authority and Puerto Rico Industrial Development Company. COFINA obtained confirmation of a plan of adjustment that restructured over US\$17B of outstanding debt and avoided costly and protracted litigation; GDB consummated a deal under the creditor collective action procedures of Title VI of PROMESA restructuring ~\$5B of debt. Advising and strategizing with the Government and its financial advisors in all aspects of a joint plan of adjustment for the Commonwealth that was filed in late September.

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Professional

Recent Representative Engagements

ROBERT J. STARK

Brown Rudnick LLP

New York

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Representing the unsecured creditors' committees in Philadelphia Energy Solutions; in Legacy Reserves, challenging the Debtor's asset valuation; in EdgeMarc Energy, which filed after a catastrophic pipeline explosion; in Alta Mesa Resources, which filed with more than \$1B in debt, amid serious allegations of fraud and corporate malfeasance; in Aralez Pharmaceuticals which resulted in a settlement of 50% cash payment to all unsecured creditors; and in Rex Energy, handling the investigation and potential prosecution of claims against the first lien lenders, securing an extremely favorable settlement for the clients. Advising an ad hoc committee of Term Loan Lenders in Vanguard Natural Resources; the liquidation trustee in Performance Sports Group; the Term Loan Agent and Majority Lenders of Pier 1 Imports; Minority Term Loan Lenders of J. Crew (Eaton Vance and Highland Capital) in litigation challenging J. Crew's infamous "step-down" transaction that released intellectual property as collateral for a \$1.2B term loan; the Ad Hoc Committee of Bondholders of Amyris in an involuntary bankruptcy petition and subsequent negotiations; and the Ad Hoc Committee of Equity Holders of RAIT Financial, opposing the Debtors' exit strategy. Secured a favorable result for the Unsecured Creditors' Committee in EXCO Resources' case.

STEPHEN ZIDE

Kramer Levin Naftalis & Frankel

LLP

New York

szide@kramerlevin.com

Notable transactions completed in the past year include: MZ Funding LLC (\$280M); Ad Hoc Group of first lien lenders and bondholders in Westmoreland Coal Co. (Approx. \$780M in secured debt); Payless DIP Financing (\$25M); and Official Committee of Unsecured Creditors in Toys "R" Us Inc., et al. (\$5B+ of debt). Clients include official and creditor and equity committees, secured lenders, bondholders, investors, and debtors spanning a number of industries, including automotive, shipping, RMBS, retail, manufacturing, mining, and gaming.

Gnome de Plume

Dean Garrett on Avoiding 1929

by Deborah Hicks Midanek

Wharton School Dean [Geoffrey Garrett](#) offered an interesting opinion in Knowledge@Wharton on the similarities between 2019 and 1929. While worried, he suggests that armed with realistic optimism, we can navigate—and help to reverse—some daunting geo-economic and geo-political trends.

He identifies three intersecting trends to combat:

- After four decades of increasing engagement between China and the United States, the world's two leading powers seem determined to decouple their economies—making a superpower war more likely.
- While past technological revolutions have improved the quality of both life and work, AI threatens to destroy more jobs than it creates—undermining the foundations of a good life based on a good job.
- While tempting to dismiss the recent rise of anti-establishment politics as an aberration, the roots of populism run much deeper—weakening the foundations of democracy and increasing the chances of international conflict.

How is 2019 like 1929? Ninety years ago, economic inequality was at an all-time high in America and Europe. The seeds of authoritarian nationalism were sprouting in Asia, Europe and Latin America. World War I had destabilized the old global order without creating a new one. The 1929 stock market crash was followed by the depression, fascism and World War II—arguably the worst 15 years in history.

Today, while a market correction and recession seem likely sometime, a crash on the scale of 1929 appears remote. This gives us time—time to do all we can to reverse the ominous trends, time to make sure the 2020s are not a replay of the 1930s.

While we must require more of our political leaders—to be more open about challenges and more creative about potential solutions—bottom-up actions by the many can change the world as much or more than can even the most effective leaders.

Dean Garrett's suggestions:

China-U.S. Relations

He suggests that 'decoupling' the world's two leading economies would destabilize the global economy and increase prices for consumers all over the world. With flashpoints like Hong Kong, the South China Sea and Taiwan, tying the hands of each side by binding their economies together is the best way to ensure stability.

It is easy today to deride American engagement as having failed to change China. But it has had the massive benefit of reducing the likelihood of superpower conflict. Reversing course now would inevitably make conflict more likely.

The Future of Work

Economists are correct that new technologies are increasing efficiency and safety while making products better rather than cheaper. Any job that can

Gnome de Plume

Dean Garrett on Avoiding 1929

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be automated (routine jobs that require rapid, error-free repetition) will inevitably be automated. But non-routine jobs—not only high-tech jobs for coders and engineers but also personal services jobs like nurses and teachers—are in high and rising demand, and aren't vulnerable to automation.

We need to prepare more people for non-routine work; not only more education for more people, but education better targeted to the skills non-routine work requires, both hard (and technical) and soft (and social). In addition to non-routine jobs, work that requires empathy and emotional intelligence will be tougher to automate.

Populism

“Leadership” is the clichéd antidote to the nativist, nationalist, anti-immigration, and anti-globalization sentiment prominent today. But [providing this leadership is hard](#), because it means replacing emotive slogans with plain speaking and proposals that are rooted to deep realities.

Leaders must defend technology and globalization by explaining how they really work, and how the world over has benefited from them. With all the focus on job creation we tend to forget everyone is a consumer, and consumers would lose big time from reversing these megatrends—and not just because of tariffs. For example, having iPhones “made in America” (rather than assembled in China from components made all around the world) would probably increase their cost somewhere between 50% and 100%. Does anyone

really want that?

We must then not only empathize with those dislocated by technology and globalization but devise ways of extending the benefits to them. Here, education looms large. Issues of access and affordability are important, and so is changing the focus of education to align skills with the new work demands.

And, adding the author's own comments, we in the restructuring world must prepare to add value in a world full of systemic change and not only major job loss but serious job change. What will we need to be able to do in an economy where estimates suggest 85% of public company market value is intangible? ▣

Deborah Hicks Midanek

*President of Solon Group, Inc. and author of **The Governance Revolution: What Every Board Member Needs to Know, Now!***

Contact: DHMidanek@SolonGroup.com,

In The Next Issue...

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- Who's Who in Dean Foods Company
- Special Report: Largest Bankruptcy Filings – 2019
- Special Report: Successful Restructurings – 2019

About This Publication:

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