

An Interview With Jack Butler, Recipient of Harvey R. Miller Award for Outstanding Service to the Restructuring Industry

# turnarounds & workouts

News for People Tracking Distressed Businesses

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## Butler To Receive Miller Award

### Four Decades of Experience Culminate in Merchant Bank

by Dave Buzzell

Jack Butler is the 2016 recipient of the Harvey R. Miller Award for Outstanding Service to the Restructuring Industry. The award will be presented at the 23rd Annual Distressed Investing Conference on November 28 in New York City. A pioneer of corporate restructuring, who helped build an industry that flourishes today, Butler is very much in the mold of the man for whom the award is named.

“Success in life and business is often made up by big ideas,” says Butler. “Harvey was the guy who had the big idea that bankruptcy should be used to effect distressed M&A transactions. He was ahead of everybody else.”

“Harvey was a talented and fierce competitor,” Butler continues. “We were typically on the opposite sides of deals and often publicly at odds with one another, but Harvey did a number of things for me both professionally and personally that were extraordinarily

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## Jevic

### The Most Important Chapter 11 Decision in Years?

by Julie Schaeffer

The U.S. Supreme Court will hear the case of *Czyzewski v. Jevic Holding Corp.* during its current term, and the outcome could have “as significant an impact on Chapter 11 bankruptcy practice as any case that the Court has decided in decades,” according to Ben Feder, special counsel at Kelley Drye & Warren.

In May of 2008, Jevic Transportation, a New Jersey trucking company, filed for Chapter 11 in Delaware following a failed leveraged buyout (LBO).

At the time, Jevic owed approximately \$53 million to its first-priority secured creditors – certain entities affiliated with CIT Group and Sun Capital Partners – and more than \$20

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## Revisiting the Safe Harbor

### Second Circuit Differs from Seventh

by Julie Schaeffer

The Bankruptcy Code’s safe harbor, which provides a defense to fraudulent transfer claims, depends on where a bankruptcy case is filed, as conflicting decisions in the Seventh and Second Circuit illustrate.

Last month, we discussed the Seventh Circuit ruling, which held that section 546(e) of the U.S. Bankruptcy Code does not protect transfers that are simply conducted through financial institutions. The decision, which revived a long-standing circuit split on the issue, had important implications for various counterparties in securities transactions, most notably selling stockholders in leveraged buyouts (LBOs) where a bankruptcy trustee later claims

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generous. And so to receive this award is very special to me.”

Over a forty-year career that has culminated with a new business venture, Butler has received wide acclaim for his charitable and professional contributions. He is a recipient of The Ellis Island Medal of Honor, and he and his husband John were recently recognized by the Anti-Defamation League with its Freedom Award. In the late 1980s, Butler was a founder and one of the first chairs of the Turnaround Management Association and he spent six years as a director of the American Bankruptcy Institute in its nascent days. In short, he shaped the corporate restructuring industry that exists today.

Butler’s four-decade journey had an inauspicious beginning. After receiving his AB from Princeton University and his law degree from the University of Michigan, he joined Honigman Miller in Detroit. What Butler brought to the table wasn’t what Honigman was looking for in a young associate, so after 18 months at the firm, he moved on to another Detroit firm, Butzel, Keidan, Simon, Myers & Graham. There, Butler began to spread his wings, and as has been the case his entire career, there were entrepreneurial underpinnings to his development.

It was the early 1980s and Butler was among the first to realize that changes in the Bankruptcy Code enacted a few years earlier offered a new opportunity to rehabilitate businesses. As he explains, “Fundamental changes in the fabric of bankruptcy, both in terms of enabling advisors to be paid market compensation and keeping the original directors and officers involved in managing their companies, created a whole new world of distressed M&A in corporate restructuring. I wanted to get in on the ground floor.”

So, Butler approached his partners at Butzel and told them he wanted to go to Chicago and bring some clients home. Butzel was agreeable and allowed the third-year associate to travel off to find new relationships. One of them was with Heller Financial, which ended up being the source of over 125 transactions over the next few years – deals from around the world and which brought Butler in contact with many of the mega law firms that served as co-counsel to his deals.

Butler’s business horizons expanded

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million to its tax and general unsecured creditors.

But Jevic didn’t try to reorganize; it ceased operations immediately prior to its bankruptcy filing and terminated almost all of its driver employees.

During the bankruptcy, two relevant lawsuits were filed. First, the terminated drivers filed a class action suit for unpaid wages. They alleged violations of the federal and state Worker Adjustment and Retraining Notification (WARN) Act, which requires most employers with 100 or more employees to provide a 60 calendar-day notice of closings and layoffs.

Second, the unsecured creditors’ committee filed a fraudulent conveyance action against CIT and Sun Capital in connection with Sun Capital’s LBO of Jevic prior to its bankruptcy filing. The LBO was financed by a group of lenders led by CIT.

Three years later, all assets had been sold, with the proceeds distributed to the secured creditors. All that remained of the bankruptcy estate was \$1.7 million in cash subject to the secured lenders’ lien and the fraudulent conveyance claims against CIT and Sun.

“The case was effectively at an impasse,” says Feder. “A plan could not be confirmed because there were insufficient funds to pay all of the expenses of administration of the Chapter 11 case, such as the fees of professionals for Jevic and the creditors’ committee.”

Given that the only other options under the Bankruptcy Code were conversion to a liquidation under Chapter 7 or a dismissal of the case under Section 349 – both of which would have left professional fees unpaid and no recovery to creditors other than CIT and Sun – Jevic, CIT, Sun, and the creditors’ committee reached a settlement agreement.

“Such ‘structured dismissals’ have become increasingly common over the past several years,” says Feder. “As a proliferation of secured financing has resulted in more cases lacking sufficient unencumbered assets to finance an exit from Chapter 11 through plans of reorganization or liquidation, structured dismissals have been utilized by creative practitioners to wind down what would otherwise be irresolvable morasses.”

Under the parties’ agreement, CIT and

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the buyout rendered the company insolvent and thus the transaction amounted to a fraudulent transfer.

The Second Circuit came up with a different result in its decision in *In re Tribune Co. Fraudulent Conveyance Litig.*, which stemmed from Tribune Media Company’s LBO.

“The Seventh and Second Circuits read the same statutory language,” says Michael J. Venditto, a partner at Reed Smith. “One court thought it was clear and the other found it ambiguous. Then, they each looked at the purpose of the statute and came away with different understandings of what Congress intended to accomplish – a textbook example of irreconcilable decisions.”

In 2007, Tribune, confronted with financial problems, was acquired by an investor through an LBO. As part of the LBO, Tribune transferred \$8 billion to a securities clearing agency. The clearing agency then cashed out Tribune’s shareholders, who returned their shares to Tribune.

In 2008, Tribune filed for bankruptcy. During its reorganization, the official creditors’ committee was authorized to sue shareholders for allegedly receiving actual fraudulent conveyances, and filed claims in federal bankruptcy court against the cashed-out shareholders, asserting that the transfer of funds to them constituted fraudulent conveyances. The creditors’ committee wanted the court to avoid payments the shareholders received during the company’s 2007 LBO. That suit was prosecuted after plan confirmation by a creditors’ trust.

Notably, the creditors’ trust asserted that the transfers to shareholders were *actual* fraudulent conveyances, not *constructive* fraudulent conveyances under state law.

As background, there are two types of fraudulent transfers in bankruptcy law. The first, actual fraud, involves the intent to defraud creditors. The other, constructive fraud, involves a transfer made in exchange for grossly inadequate consideration.

The creditors’ trust did not assert claims for constructive fraudulent conveyance because Bankruptcy Code Section 546(e) bars a “trustee” from bringing such claims.

Fast forward a few years to 2011. Then, individual unsecured creditors of Tribune filed state-law constructive fraudulent conveyance (SLCFC) claims against

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# Research Report

## Who's Who in Linn Energy, LLC

by Dave Buzzell

Headquartered in Houston, Texas, Linn Energy, LLC and its affiliates (Linn), which include Linn Energy Holdings, Berry Petroleum Company, and LinnCo, are independent oil and natural gas companies. The company was founded in 2003 by Michael C. Linn, who still serves on the Linn Energy and LinnCo boards.

Since 2003, Linn has grown from a small operator of natural gas wells into one of the largest independent oil and gas companies in the United States today. The company grew rapidly through more than 60 acquisitions and other transactions with a total value of approximately \$17 billion. In December 2013, Linn Energy acquired Berry Petroleum in a stock-for-stock transaction valued at approximately \$4.6 billion.

As of year-end 2015, Linn operated approximately 27,000 gross productive wells in California, Colorado, Illinois, Kansas, Louisiana, Michigan, New Mexico, North Dakota, Oklahoma, Texas, Utah, and Wyoming.

Also, as of year-end 2015, Linn had approximately 4.5 trillion cubic feet equivalent of proven reserves, of which approximately 26 percent were oil, 59 percent were natural gas, and 15 percent were natural gas liquids.

Linn also owns and operates pipelines, processing facilities, and steam generators to support their production activities.

Linn Energy's workforce, which is not unionized, includes approximately 1,650 employees.

In their respective annual reports on Form 10-K, filed in March 2016, Linn Energy and Berry Petroleum submitted explanatory paragraphs from their auditors regarding substantial doubt about their ability to continue as going concerns, resulting in defaults under their first lien credit agreements, subject to 30-day grace periods. Facing the expiration of a May 11, 2016 extension of going-concern default waivers under first lien credit facilities and the expiration of a grace period on May 15, 2016, with respect to approximately \$31 million of coupon payments on Linn Energy unsecured notes, Linn filed for

Chapter 11 on May 11, 2016 in the United States Bankruptcy Court for the Southern District of Texas.

The company blamed its financial woes on continually low commodity prices that have been the downfall of dozens of other major oil and gas companies before it.

The debtors reported approximately \$7.695 billion of funded debt outstanding as of the petition date, comprised of approximately \$5.962 billion of funded debt, including approximately \$1.939 billion under a first lien credit facility, \$1 billion in second lien notes, and \$3.023 billion in unsecured notes; and roughly \$1.733 billion of funded debt at Berry Petroleum, including approximately \$899 million under a first lien credit facility and \$834 million in unsecured notes.

The debtors are pursuing a comprehensive restructuring deleveraging of their approximately \$7.7 billion capital structure, and have reached agreement on a consensual restructuring with the holders of more than 66 percent by principal amount of debt outstanding under their two separate credit facilities.

On October 7, 2016, a fourth amendment to the settlement agreement was reached with issuers, guarantors, the trustee, the collateral trustee, and settling holders that extends the alternative settlement agreement order date to May 1, 2017, and additionally gives the trustee, collateral trustee, and settling holders the right to assert certain claims and defenses if the motion to approve the alternative settlement agreement order is not filed by March 1, 2017.

The debtors have also entered into a restructuring support agreement with certain holders of 12% senior secured second lien notes due December 2020 and certain holders of the company's unsecured notes.

### The Debtor

**Mark E. Ellis** is chairman, president, and chief executive officer of Linn Energy. **Arden L. Walker, Jr.**, is chief operating officer. **Darren R. Schluter** is vice president and controller. **David B. Rottino** is executive vice president and

chief financial officer.

**Kirkland & Ellis LLP** and **Kirkland & Ellis International LLP** is serving as bankruptcy counsel. **Paul M. Basta**, **Stephen E. Hessler**, and **Brian S. Lennon**, partners in the firm's New York office and **James H.M. Sprayregen** and **Joseph M. Graham**, partners in the firm's Chicago office, head the engagement.

**Jackson Walker LLP** is serving as local and conflicts co-counsel. Partners **Patricia B. Tomasco** and **Matthew D. Cavanaugh** lead the engagement.

**AlixPartners** is serving as restructuring advisor, with **James A. Mesterharm**, managing director, leading the engagement. Others working on the case are **Michael Hartley** and **Barry Folse**, both managing directors.

**Lazard Freres & Co. LLC** is financial advisor and investment banker. **Andrew Yearley**, managing director, heads the engagement.

**PricewaterhouseCoopers LLP** is the tax consultant, led by **Kasey Dunn**, a partner in the firm.

**KPMG LLP** is serving as auditor and accounting advisor. **Mark L. Zajac**, partner, leads the engagement.

### Official Committee of Unsecured Creditors

Members are **Wilmington Trust Company**, **The Bank of New York Mellon Trust Company, N.A.**, **Sempra Rockies Marketing, LLC**, **Global One Transport, Inc.**, and **PCS Ferguson**.

The committee is represented by **Mark I. Bane** and **Keith H. Wofford**, partners at **Ropes & Gray LLP**.

**Gardere Wynne Sewell LLP** has been tapped as Texas oil and gas counsel, with **John P. Melko**, chair of the firm's financial restructuring and reorganization practice, leading the engagement.

**Moelis & Company LLC** is the committee's investment banker, led by **Robert J. Flachs**, managing director.

### Trustee

The trustee is **Judy A. Robbins**.

### Judge

The judge is the **Honorable David R. Jones**. □

**Butler**, *from page 2*

further when, as it so happened, a mile and a half from his house, a guy in his twenties like Butler had started an accounting business called Jay Alix and Associates. Butler and Alix started doing smaller deals together, which eventually led to larger and higher profile opportunities.

Skadden Arps took note of Butler's work and asked him to join the firm at the end of 1989. "Long before I got there," Butler recalls, "Skadden had a world-class M&A practice and an admired bankruptcy litigation platform. When I arrived, my focus was on doing deal-side, distressed M&A transactions." The bankruptcy department grew into the global corporate restructuring practice that remains today.

Butler's 25-year stint at Skadden found him in the middle of many of the largest corporate restructuring engagements in the world. Asked to name a few that were particularly notable, Butler says one of the first was Kmart, which began when he spotted an opportunity one morning in 1993. "I was reading in the Wall Street Journal about a financing that Kmart had in place that granted a "put" to bondholders in the event the company lost its investment grade status. I said to myself, Kmart has just created the environment to drive it down to non-investment grade because there are huge incentives for some market participants for that to happen. The company is going to need restructuring help."

Butler continues, "Kmart did lose its investment grade rating, and its future was put in peril by that defaulted bond issuance. The company had been a client of Skadden in other matters so, through those partners, we reached out to the company. We were hired and ended up executing a \$3.4 billion noninvestment grade syndicated transaction to refinance their entire capital structure—the largest transaction of its kind at that time."

The restructuring was innovative. Kmart agreed to a lien on its inventory, becoming the first major retailer to do so. Ultimately, the company recovered and returned to investment grade status. Ten years later, with the country gripped in the throes of the post-September 11 financial crisis, Butler was called upon again to rescue Kmart. The company was restructured and sold to ESL Holdings. Creditors who held on to their reorganization plan distributions received a return of more than 100 cents on the dollar.

Butler points to his work in the airline industry as another of his memorable career experiences. He has assisted more

than a dozen airlines over the years in different capacities, with one of his earliest engagements being to help United Airlines acquire routes from Eastern and PanAm to form the international route system that United has today. After 9-11, Butler helped the management team at US Airways restructure their company, and he represented the prepetition unsecured creditors in Delta Airlines in preparing the airline for its restructuring. Butler was also one of the principal architects in the US Airways/American Airlines merger that ended up generating in the neighborhood of \$18 billion worth of value for creditors and stakeholders.

In the automotive world, Butler devoted five years of his life serving as lead outside advisor for Delphi Corporation, the largest auto parts supplier in the world, helping restructure a company on the ropes into an enterprise worth more than \$20 billion today.

Looking back on his body of work, Butler says, "I think the most significant contribution thus far in my career was in the automotive business, helping to solve that industry's problems. If that mission had failed, I think the collateral consequences to the country would have been terrible. But we were successful and saved millions of jobs while probably avoiding another Great Depression."

Butler has played a hand in the salvation of many other companies – among them Xerox, Rite Aid, and Sprint – that were restructured and sent on their way to again prosper. On a Thanksgiving weekend in 2001, he was one of the lawyers called in connection with Enron's fall from grace. Butler says another challenging transaction was preserving Comdisco's businesses, one of the largest equipment lessors in the country. Comdisco ran into a financial downturn in the late 1990s and lost access to the commercial paper market—a catastrophic event for a leasing company. Businesses were sold off, and in the end all the creditors were paid in full and the equity holders received significant distributions on their investments culminating in final distributions made earlier this year.

When most people would be content to rest on their laurels, a few years ago, at the age of 57 and in the midst of raising four teenagers with his husband John, Butler decided that he had "a lot of runway ahead of me in terms of what I want to do, both professionally and personally."

Butler concluded that he wanted to move from an advisory role to becoming a principal

# Calendar

**Beard Group**

23rd Annual Conference on  
Distressed Investing  
November 28, 2016  
Park Lane Hotel  
New York, NY  
Contact: (240) 629-3300

**New York Institute of Credit and Association of Insolvency and Restructuring Advisors**

12th Annual NYIC/AIRA Joint  
Bankruptcy & Restructuring Event  
January 17, 2017  
Arno's Ristorante  
New York, NY  
Contact: [www.instituteofcredit.org](http://www.instituteofcredit.org)

**American Bankruptcy Institute**

22nd Annual Rocky Mountain  
Bankruptcy Conference  
January 26 – 27, 2017  
Four Seasons Hotel Denver  
Denver, CO  
Contact: [www.abiworld.org](http://www.abiworld.org)

**American Bankruptcy Institute**

VALCON 2017  
March 1 – 3, 2017  
Four Seasons Hotel Las Vegas  
Las Vegas, NV  
Contact: [www.abiworld.org](http://www.abiworld.org)

**National Association of Bankruptcy Trustees**

2017 Spring Seminar  
March 1 – 5, 2017  
The Gran Melia Resort  
Rio Grande, Puerto Rico  
Contact: [www.nabt.com](http://www.nabt.com)

**INSOL International**

Tenth World Quadrennial Congress  
March 19 – 22, 2017  
International Convention Centre  
Sydney, Australia  
Contact: [www.insol.org](http://www.insol.org)

**Turnaround Management Association**

TMA MidAmerica Regional  
Conference  
April 5-7, 2017  
MGM  
Detroit, MI  
Contact: [www.turnaround.org](http://www.turnaround.org)

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# Special Report

## Nation's Largest Claims Administrators

| Firm  | Senior Professionals   | Recent Cases   |  |
|---|--|--|--|
| <b>BMC Group</b><br>New York, Los Angeles, London<br><a href="http://www.bmcgroup.com">www.bmcgroup.com</a>   | Sean Allen<br>Tinamarie Feil<br>Varouj Bakhshian                                     | Myrtle (MJ) John<br>Terri Marshall   | Colorado 2002B, ABC Dentistry, Altomare Auto Group, John Q Hammons Fall 2006, Vanguard Healthcare, Goodrich Petroleum Corporation, Florham Park Surgery Center, Venoco, Inc., Fox Ortega Enterprises, Inc. dba Premiercru, Restaurants Acquisition I, RAAM Global Energy Corporation, Black Elk Energy Offshore Operations.  |
| <b>Donlin Recano</b><br>New York, NY<br><a href="http://www.donlinrecano.com">www.donlinrecano.com</a>  | Alexander Leventhal<br>Andrew Logan<br>Nellwyn Voorhies-Kantak                       | Jung Son<br>Mitch Ryan   | Buffets, CJ Holding Co., Emerald Oil, Fansteel, Foodservicewarehouse, Forest Park Medical Center, Freedom Communications, III Exploration II, Juniper GTL, Magnetation, Newbury Common Associates, Relativity Fashion, Roadhouse Holding, Solutions Liquidation.   |
| <b>Epiq Systems</b><br>New York, NY<br><a href="http://www.epiqsystems.com">www.epiqsystems.com</a>   | Brad Scott<br>Deirdre McGuinness<br>Noah Ornstein<br>Myriam Schmall<br>Jane Sullivan | Bradley Tuttle<br>Bob Saraceni<br>Jennifer Mercer<br>Kelly Desgrosseilliers<br>Ken Davis | American Gilsonite, Atlas Resources, Basic Energy, Constellation Enterprises, CS Mining, Dex Media, Energy XXI, Essar Steel Minnesota, Extreme Plastics Plus, Garden Fresh Restaurants, Halcon Resources, Key Energy, Last Call Guarantor, Mid-States Supply, Nuo Therapeutics, Penn Virginia, Premium Transportation, South Cross Holdings, Ultra Petroleum, Warren Resources.  |
| <b>Garden City Group</b><br>Lake Success, NY<br><a href="http://www.gardencitygroup.com">www.gardencitygroup.com</a>  | Angela Ferrante  | Brian Burke  | American Apparel, American Airlines, Motors Liquidation Company, et al. (f/k/a General Motors Corp., et al.), Edison Mission Energy, MF Global, General Maritime Corporation, Patriot Coal Corporation.  |
| <b>KCC</b><br>El Segundo, CA<br><a href="http://www.kccllc.com">www.kccllc.com</a>  | Albert Kass<br>Deirdre McGuinness<br>Robert Jordan                                   | Francine Gordon-Durrer<br>Eric Kerwood<br>Saima Meyer                                    | IMX Acquisition, Filip Technologies, Connect Transport, TPP Acquisition, Gulf Chemical & Metallurgical, Linc USA, Chaparral Energy, CHC Group, Midstates Petroleum, NephroGenex, AOG Entertainment, Peabody Energy, Sanjel (USA), Blue Earth, American Hospice Management Holdings, Paragon Offshore, Hancock Fabrics, Ryckman Creek Resources, SFX Entertainment, Primorsk International Shipping, UCC of Arch Coal, Sherwin Alumina.                     |
| <b>Prime Clerk</b><br>New York, NY<br><a href="http://www.primeclerk.com">www.primeclerk.com</a>  | Howard A. Blaustein<br>Michael J. Frishberg<br>Shai Y. Waisman                       | Chris R. Schepper<br>Benjamin P.D. Schrag  | DirecttBuy Holdings, Shoreline Energy, American Apparel, Global Geophysical Services, Light Tower Rentals, International Shipholding, Hercules Offshore, Seventy Seven Finance, Gawker Media, Maxus Energy, Triangle USA Petroleum, Aeropostale, Linn Energy, Breitburn Energy Partners, SandRidge Energy, SunEdison, Noranda Aluminum, Outer Harbor Terminal, Republic Airways Holdings, Arch Coal, Verso Corporation, RCS Capital.                       |
| <b>Rust Consulting Omni Bankruptcy</b><br>Los Angeles, New York<br><a href="http://www.omnimgt.com">www.omnimgt.com</a>   | Brian Osborne<br>Paul Deutch<br>Katie Nownes   | Eric Schwarz<br>Cabernet Burns   | ITT Education Services, Corinthian Colleges, Hastings Entertainment, Total Hockey, Intervention Energy, Garlock Sealing Technologies, Quirky, Jumio, Syncardia, Affirmative Insurance Holdings, City Sports, Please Touch Museum, Response Genetics, Coyne International, Fisker Automotive, Glacial Energy, Phoenix Payment Systems, Kid Brands, Elephant Bar, First Mariner Bank, Restora Healthcare, Intellittravel, American Suzuki Motor Corporation. |
| <b>UpShot Services</b><br>Denver, New York, Washington DC,<br>Seattle, Minneapolis, Chicago<br><a href="http://www.upshotservices.com">www.upshotservices.com</a> | Travis Vandell<br>Robert Klamser<br>Jennifer Keough<br>Neil Zola                     | David Issac<br>Michael Hill<br>Randall Reese<br>Brelle Rohwer                            | ValuePart Incorporated, Verengo, nJoy, BFN Operations, dba Zelenka Farms, RMS Titanic, QRS Recycling of Georgia, ATK Oilfield Transportation, Whistler Energy II, Palmaz Scientific, Argent Energy (Canada) Holdings, Wave Systems Corp., Tonzof, Team Express Distributing, Atna Resources, GMI USA Management, S&S Steel Services.   |

# Worth Reading

## The Rise and Fall of the Conglomerate Kings

**Author:** Robert Sobel

**Publisher:** Beard Books

**Softcover:** 240 pages

**List Price:** \$34.95

The marvelous thing about capitalism is that you, too, can be a Master of the Universe. If you are a certain age, you will recall that is the name commandeered by the Wall Street bond traders in their glory days of the 1980s. Being one is a lot like surfing: you have to catch the crest of the wave just right or you get slammed into the drink, and even then the ride never lasts forever. There are no endless summers in the market.

This book is the behind-the-scenes story of the financial wizards and bare-knuckled businessmen who created the conglomerates, the glamorous multi-form companies that marked the high noon of post-World War II American capitalism. Covering the period from the end of the war to 1983, Sobel explains why and how the conglomerate movement originated, how it mushroomed, and what caused its startling and rapid decline. A business historian, the author chronicles the rise and fall of the first Masters of the Universe in the United States and describes how the era gave rise to a cadre of imaginative, bold, and often ruthless entrepreneurs who took advantage of a buoyant stock market to create giant enterprises, often through the exchange of overvalued paper for real assets. He covers the likes of Royal Little (Textron), Tex Thornton (Litton Industries), James Ling (Ling-Temco-Vought), Charles Bludhorn (Gulf & Western), and Harold Geneen (ITT). This is a good read to put historic booms and busts in perspective.

While these men had vastly different personalities and processes, they had a few things in common: ambition, the ability to seize opportunities that others were too risk averse to take, willing bankers, and the expansive markets of the 1960s. There is something about an expansive market that attracts and creates Masters of the Universe. The Greeks called it hubris.

The author tells a good joke to illustrate the successes and failures of the period. It seems the young son of a conglomerateur brings home a stray mongrel dog. His father asks, "How much do you think he's worth?" To which the boy replies, "At least \$30,000." The father gently tries to explain the market for mongrel dogs, but the boy is undeterred and the next afternoon proudly announces that he has sold the dog for \$50,000. The father is proud but flabbergasted. "You mean you found some fool with that much money who paid you that much for that dog?" "Not exactly," the son replies. "I traded him for two \$25,000 cats."

While it lasted, the conglomerate struggles were a great slugfest to watch: the heads of giant corporations battling each other for control of other corporations, and all of it free from the rubric of "synergy." Nobody could pretend there was any synergy between U.S. Steel and Marathon Oil. This was raw capitalist power at work.

Because so few people study history, history repeats itself, endlessly, like waves coming to shore. The stagflation of the 1970s devalued the stock of conglomerates and made it useless as currency to keep the schemes afloat. The wave crashed, but waiting on the horizon was another wave – the LBO Masters of the 1980s – and behind that dot.com Masters of the 1990s and the MBS Masters of the 2000s. □

*Robert Sobel died in 1999. He was a prolific chronicler of American business life, writing or editing more than 50 books and hundreds of articles and corporate profiles.*

This book may be ordered by calling 888-563-4573 or by visiting [www.beardbooks.com](http://www.beardbooks.com).

## Butler, from page 4

in the deal world. He credits the leadership opportunities he was given at Skadden and the close relationships he developed with Steve Miller and Rodney O'Neal at Delphi and with the senior teams at American and US Airways and other corporations with fueling his desire for a career move.

In 2014, he joined Hilco and its CEO Jeff Hecktman, whom he had known and worked with for more than two decades. Ultimately, though, Butler decided he wanted to go into business on his own, so he formed merchant bank Birch Lake Holdings earlier this year.

"Birch Lake is the culmination of my almost four decades of deal experience," says Butler, who is the firm's CEO. "It's the marriage of intellectual capital and financial capital. We try to come up with big ideas that will make a difference, and we bring capital to the table to help implement those ideas. We differ from a lot of other people in the deal space because we have a long track record of creating and structuring innovative value accretive transactions."

Birch Lake is in its early days, but Butler says it has an aggressive business plan and entered the market more broadly in October. "There will be more news in the coming months about our businesses, our people, and our platform."

In a larger sense, the associate who went off to Chicago in the early 1980s to find deals for his law firm has returned home again. Butler's merchant bank reflects his roots and upbringing. His father was "a serial entrepreneur," in the words of Butler. "He was a stock boy at 18. Four years later, he bought the store on a leveraged basis, using other people's money."

The junior Butler is cut from the same cloth. "I'm not sure people start merchant banks when they're 60 unless it's in their DNA," he laughs while also reflecting on a deep track record generating tens of billions of incremental value and a career focused on emphasizing relationships.

The name "Birch Lake" is a take on the name of an island located in the Straits of Mackinac between the Michigan peninsulas where his parents once maintained a childhood vacation home. "Birches are one of the most resilient trees around, one of the first species to repopulate after a forest fire. Considering my past and my family, and my future and what we plan to achieve at Birch Lake, it's a fitting name." □

# Special Report

## Outstanding Turnaround Firms – 2016

| Firm   | Senior Professionals  | Outstanding Achievements   |  |
|--|---|--|--|
| <b>AlixPartners</b><br>New York, NY<br>www.alixpartners.com  | John Castellano<br>Esben Christensen<br>Lisa Donahue<br>Randall Eisenberg<br>Alan Holtz                         | David Johnston<br>James Mesterharm<br>Rick Peters<br>Becky Roof<br>Larry Young                 | Advisor and/or interim manager to Aspect Software, C&J Energy Services, Caesars Entertainment, Energy and Exploration Partners, Linn Energy, Molycorp, Noranda Aluminum, Paragon Offshore, Post Rock Energy, PREPA, Primorsk Intl. Shipping, Ryckman Creek Resources, and others.                                      |
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| <b>Deloitte Financial Advisory Services and Deloitte Transactions and Business Analytics, Corporate Restructuring Group</b><br>New York, NY<br>www.deloitte.com/us/crg | Kirk Blair<br>Michael J. Epstein<br>John Little   | Sean Cunningham<br>Bob Frezza  | Served as chief restructuring officer and provided restructuring services to Park Medical Center at Frisco, served as CRO and interim vice president of finance for CCNG Energy Partners, and acted as financial advisor for Shale Support Holdings.   |
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## Jevic, from page 2

Sun agreed, in exchange for release of the litigation, to allow the \$1.7 million in cash plus another \$2 million they contributed to be used to pay administrative expenses and provide a small distribution for general unsecured creditors.

The settlement did not include the drivers, however, even though they had an uncontested WARN Act claim against Jevic, and their claims for unpaid wages against the Jevic estate were entitled to priority treatment ahead of general unsecured creditors' claims.

Despite that, the bankruptcy court approved the settlement and the structured dismissal on the grounds that there was "no realistic prospect" of a recovery to any parties but CIT and Sun. The drivers appealed to the district court and then to the Third Circuit, both of which affirmed.

The Supreme Court granted certiorari to determine if a structured dismissal in a Chapter 11 case can incorporate a settlement that diverges from the Bankruptcy Code's priority scheme, which holds that creditors with claims that would be entitled to seniority in the event of a liquidation must be paid

before creditors with more junior claims. The issue in *Czyzewski v. Jevic Holding Corp.* was that, under the structured dismissal, unsecured creditors would receive payment while drivers with higher priority claims would be paid nothing.

"A ruling in favor of structured dismissals would serve to channel cases away from Chapter 11 plans and toward consensual settlements," says Douglas S. Mintz, a partner at Orrick. "This could reduce administrative costs and facilitate quicker bankruptcy resolutions. However, this could also lead to settlements that run counter to the expected results under the absolute priority rule."

But, Feder says the court may also look at whether a structured dismissal is even permissible to resolve a Chapter 11 case. If the court does so, it will be delving into a topic that has divided bankruptcy practitioners for years. "It's a debate between lawyers and judges who take a pragmatic view of the Bankruptcy Code, versus those who adhere strongly to the 'plain meaning' rule of statutory interpretation," says Feder.

Practitioners who take a pragmatic view of the Bankruptcy Code believe it was designed to be flexible, so parties

can develop solutions that don't fit into the statute's strict parameters.

Practitioners who adhere strongly to the "plain meaning" rule of statutory interpretation do not believe judges can approve solutions, such as a structured dismissals, that go beyond those specifically provided for in the statute.

The drivers in *Czyzewski* fall into the second camp. They believe that because there is no express authority for structured dismissals under the Bankruptcy Code, the deal must fail.

Feder believes the Supreme Court leans strongly toward the "plain meaning" rule of statutory interpretation in bankruptcy cases (as evidenced by its decision in *Baker Botts v. Asarco*), and could reverse the Third Circuit. And if the Court invalidates structured dismissals given that the Bankruptcy Code provides no specific authority for them, it "could markedly alter the Chapter 11 landscape."

*Czyzewski* is represented by Danielle Spinelli and Craig Goldblatt of Wilmer Cutler Pickering Hale and Dorr LLP. Jevic is represented by Christopher Landau of Kirkland & Ellis LLP. They were not available for comment. □

## Revisiting, from page 2

the Tribune shareholders in hundreds of lawsuits in more than 20 courts; they were ultimately consolidated in the U.S. District Court for the Southern District of New York.

The shareholders against whom the claims were brought sought to dismiss the claims on several grounds, including that: (a) the automatic stay deprived the creditors of standing to avoid the same transactions that the estate representatives were simultaneously seeking to avoid, and (b) the individual creditors' claims were preempted by section 546(e) of the bankruptcy code.

In 2013, the district court dismissed the individual creditors' actions. Judge Richard Sullivan agreed with the shareholders that the individual creditors lacked standing to target the same payments as the creditors' trust. However, he rejected the shareholders' arguments that the individual creditors' actions were preempted by the safe harbor in section 546(e), holding that the statute bars a "trustee" from bringing such

claims, but not individual creditors.

The individual creditors appealed the district court's dismissal for lack of standing to the Second Circuit, and the shareholders appealed the district court's rejection of their argument that their SLCFC claims were preempted by the section 546(e) safe harbor.

The Second Circuit affirmed the dismissal of the individual creditors' SLCFC claims, but on different grounds from the circuit court.

The Second Circuit disagreed with the district court's conclusion that the individual creditors lacked standing because of the automatic stay. It held that the bankruptcy court had modified the automatic stay to allow the individual creditors' litigation.

That said, the Second Circuit disagreed with the district court's holding regarding section 546(e). Because the text of the statute is ambiguous as to whether claims brought by someone other than an estate representative (such as a trustee) are prevented, the Second Circuit looked at the legislative history of section 546(e). In doing so, it determined that the

congressional purpose of the statute was to promote speed and finality in securities transactions.

"On its very face, the idea of preventing a trustee from unwinding the specified transactions while allowing creditors to do so, but only later, is a policy in a fruitless search of a logical rationale," wrote the court.

Ultimately, then, Second Circuit decided that Tribune's individual creditors couldn't claw back the \$8 billion shareholders received in the LBO ahead of the company's bankruptcy, holding that the Bankruptcy Code prohibits such actions because they would saddle the market with uncertainty.

"If left to stand, the decision may lead to the end of recent creditor attempts to circumvent Section 546 in this manner, in addition to having broader implications on the scope of preemption stemming from the Bankruptcy Code," says Donald S. Bernstein, who heads Davis Polk's insolvency and restructuring practice.

Venditto also notes that, "in its decision, the Second Circuit found that 'Section

*continued on page 10*

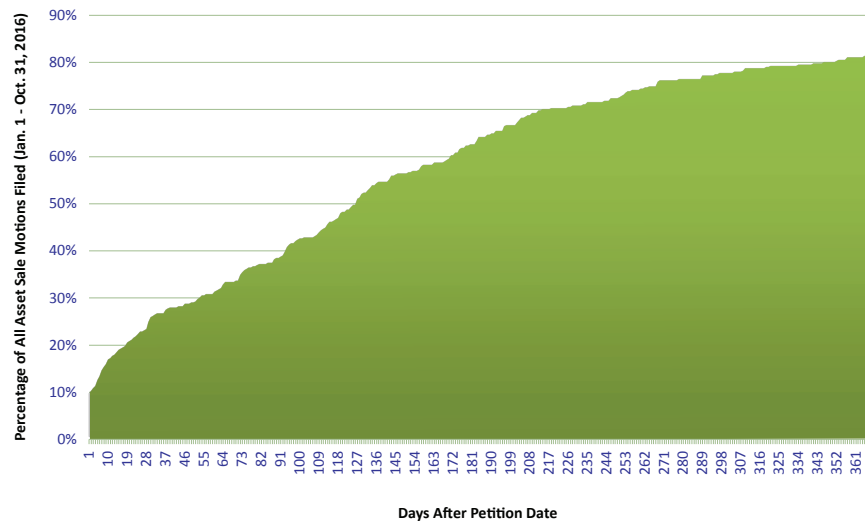


# Special Report

## Asset Sales

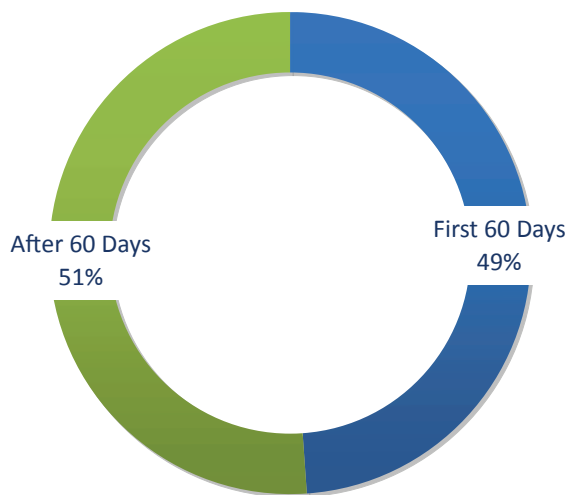
Chapter11Dockets.com recorded and analyzed over 150,000 new docket entries made in over 2,300 large Chapter 11 bankruptcy cases during the first ten months of 2016. The following tables and charts summarize key information regarding the asset sales that were proposed or received bankruptcy court approval nationwide from January 1, 2016 to October 31, 2016 in the cases tracked by Chapter11Dockets.com. To view a list of the bankruptcy cases examined in preparing this data, please visit <https://www.chapter11dockets.com/about/cases>.

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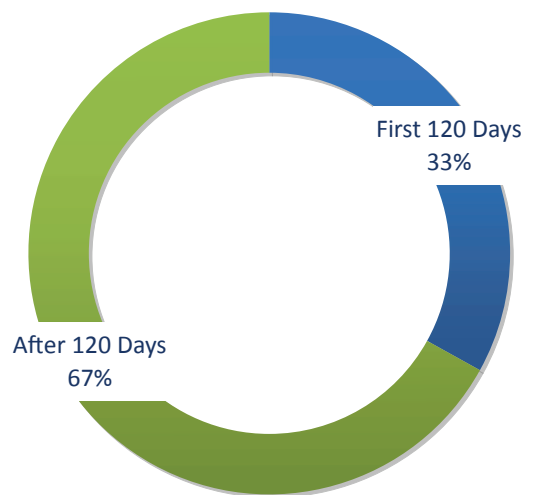


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## Gnome de Plume

### Power Rules

by Andy Rahl

*The 48 Rules of Power* is a 1998 book by Robert Greene that provides several insights into how Donald Trump won the election. I found a number of his rules to be extremely helpful in my bankruptcy practice and, after having studied and practiced them, I can't say I was entirely surprised by Trump's win – disappointed, yes, but not completely surprised.

To begin with, Trump had been exploiting two power rules brilliantly for many years that he played out with genius during the campaign: Court Attention At All Cost (#6) and Create Compelling Spectacles (#37). Trump was a spectacular example of the adage that it doesn't matter what they say about you as long as they get your name right. He was a genius in using attention and spectacle to make virtues out of his biggest flaws for many voters, including lying, womanizing, xenophobia, fanning class resentments, and so on.

Another rule that Trump exploited to the hilt: When Asking for Help, Appeal to People's Self Interest, Never To Their Mercy or Gratitude (#13). Look at how many interest groups he played to by following this rule: the right-to-life crowd, who brought a lot of evangelicals along with them, libertarians, climate change deniers, and the largest group of all, the deplorables. Hillary played right into that one by using "deplorables" as a code word for "white trash." By the way, rule #19 is: Know Who You're Dealing With – Do Not Offend the Wrong Person.

Perhaps Hillary's biggest mistake was her failure to follow one of the most important rules of all: So Much Depends on Your Reputation – Guard It With Your Life (#5). Her passivity in defending her reputation was fatal. Her three big reputational threats in this campaign were Benghazi, the Clinton Foundation, and the emails. She was fortunate with Benghazi in that her enemies created a spectacle for her with a public congressional hearing that played to her strength. She outshone her attackers and the issue faded.

But, when someone writes an entire book accusing you of corruption and it gets traction, you can't ignore it. The Clintons should have had someone write a favorable book about the foundation that explained away the corruption charge. That should have been very doable – to my knowledge, no one has credibly suggested that the Clintons were skimming money from the foundation; it was all about how Hillary was using her position to enhance their speaking careers – as if they wouldn't have had great speaking careers anyway. And yet many voters were convinced that she was thoroughly corrupt.

Then there was the email scandal. People bemoan the low level of financial literacy in the U.S., but by comparison IT literacy is nonexistent. The basic IT truth is that there is no such thing as a secure email because the Internet was not designed to be secure

in the first place. The NSA can access anyone's email anywhere any time and so can the Russians and others. Anything that is a real secret never makes it into an email except by accident; there are other much more secure ways to convey secret information.

Without getting into the technical side (start with Will Ackerly of Virtu for that), there are a number of things the Democrats should have answered with. First, of all the emails that the FBI searched, only about 40 were classified and all but a fraction of those were classified after the fact. How could the Secretary of State have had only 40 classified emails in four years? The answer obviously is that they don't use email for truly secret stuff. Another marker on this was the flap last year that the U.S. was reading Merkel and Netanyahu's emails. Notice how quickly that died down? That's because Bibi and Angela knew very well all along that we could read their emails; it just wasn't politically palatable for them to appear to condone it. We'll see what happens; there are many other power rules that will come into play while Trump is president that he may not understand so well. □

*Editor's Note: As we went to press, Mr. Rahl had just been appointed Secretary of Viniculture for his vast expertise in sour grapes.*

### Revisiting, from page 8

546(e)'s language clearly covers payments, such as those at issue here, by commercial firms to financial intermediaries to purchase shares from the firm's shareholders."

As noted earlier, that's in contrast to the Seventh Circuit's ruling, which held that section 546(e) of the U.S. Bankruptcy Code does not protect transfers that are simply conducted through financial institutions.

"Quite simply, the courts in these circuits will apply the law in different ways and for the time being the outcome of avoidance litigation could easily depend on where the litigation is venued," says Venditto. "That could change if the U.S. Supreme Court grants certiorari and settles the conflict among the circuits." □

### In the Next Issue...

- *Special Report: Sources of DIP Financing*
- *Special Report: Outstanding Restructuring Lawyers – 2016*
- *Research Report: Who's Who in Roadhouse Holding Inc.*

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