What's Hot in the Turnaround and Restructuring Industry?

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Even though default rates and corporate Chapter 11 filings remain at historic lows, a number of industries have been experiencing financial distress, including oil and gas, retail, higher education, and food processing. Hot topics affecting restructurings in all industries include potential limits on credit bidding, gifting, and other mechanisms to circumvent the priority scheme established under the U.S. Bankruptcy Code and the Section 546(e) safe harbor. Therefore, we have assembled a distinguished panel of authors to discuss these three hot topics and these four hot industries.

Paul D. Leake of Jones Day analyzes the fallout from the much-criticized *Fisker Automotive* decision, which limited the amount of a secured creditor's credit bid in a Section 363 sale to the discounted price the credit bidder had paid to acquire the secured debt. A careful analysis of *Fisker Automotive* and its progeny led Leake to conclude that the risks of limits being imposed on credit bidding solely as a result of bid chilling have been overstated.

Kelly Beaudin Stapleton of Alvarez & Marsal evaluates gifting and other mechanisms used to circumvent the priority scheme established under the Bankruptcy Code. The gifting exception to the absolute priority rule operates under the tenet that the gift being made is property of the secured creditor, not property of the debtor's estate. Gifting thus can sometimes enable junior classes to receive a distribution even though intervening classes that enjoy higher priority are wiped out. Stapleton analogizes gifting to the recent 3rd Circuit decision in *Jevic Holding*, which upheld a structured dismissal in which a class of priority wage claims was completely bypassed, but money still trickled down to junior creditors.

Mark N. Parry of Moses & Singer examines the ever-expanding scope of the safe harbor contained in Section 546(e) of the Bankruptcy Code, which was implemented to protect the commodities and securities markets from disruption or displacement from a major bankruptcy affecting those industries. However, as Parry explains, courts have applied this safe harbor in ways that bear no apparent relationship to the purpose stated in the legislative history and that threaten to defeat the avoidance powers in situations having no connection to the securities or commodities markets. Ponzi schemes and preemption are among the most hotly contested issues in safe harbor litigation.

Rob Vanderbeek and David Prager of Goldin Associates explore the wreckage in the oil and gas industry, including the manifold causes of current distress and how these dramatic changes impact different segments of the industry as well as providers of capital to the industry. These factors give rise to a new equilibrium that will continue to alter the investment landscape in the oil and gas industry. The low-price environment will offer opportunities for discerning investors, but the potential risks and rewards of any investments must be considered carefully.

Margaret Bogenrief, a turnaround consultant with ACM Partners, reviews why 2015 has proven to be such a disastrous year for the retail industry, after which she walks us through the market dynamics, key metrics, and management issues that are often involved in the retail crisis management process. Looking ahead to 2016, Bogenrief expects a significant increase in distress in the manufacturing, transportation, and rental sectors that feed into retailer operations.

The recent Chapter 11 filing of Corinthian Colleges has thrust the financial distress being experienced in the higher education industry into the spotlight. My partner Joe Huston from Stevens & Lee's Wilmington office investigates the causes and effects of distress in the industry and discusses a number of potential solutions, including whether a bankruptcy filing can be an appropriate tool.

Everyone needs to eat, regardless of the economic climate, making demand for food very inelastic. However, shifting consumer tastes (including healthier food choices and changing demographics) create winners and losers within the industry. Matt LoCascio of Heritage Equity Partners considers how these and other factors cause some players in the food processing industry to experience financial distress while others take advantage of changing market conditions and thrive.