


# Weekly News & Comment

VOLUME 40, ISSUE 26

April 8, 2003



## Top bankruptcy firms rely on more than mega-cases to gain esteem

### Director's attorney's fees are equitably subordinated

Insiders, whose "machinations" impact creditors' rights, be forewarned. Your claim may be equitably subordinated. Although the pursuit of one's legal rights may not be grounds for subordination, protracted and unjustified litigation tactics that harm the estate by causing it to incur attorney's fees may justify equitable subordination.

**Circuit Judge Richard L. Nygaard**, dismissing the appeal of a debtor's insider and fiduciary, held that the "American Rule" should not be applied to the equitable subordination of administrative expenses and professional fees. The full text of *Citicorp Venture Capital Ltd. v. Committee of Creditors*

(See **FEES** on page A6)

What traits set bankruptcy's best and brightest firms apart from the rest of the pack?

**Bloomberg Markets** selected their top five firms by looking at the 25 largest bankruptcies of 2001 and 2002 by asset size and tallying up the fees charged by their lead law firms. Clients like **Enron**, **Global Crossing** and **WorldCom** predictably catapulted **Weil Gotshal & Manges** to the top of Bloomberg's list (see story, page 4).

But everyone knows it takes more than big bills to attract mega-cases in the first place. So, what are the traits that make great firms great?

We went straight to the people who know best. And the bankruptcy attorneys we spoke with said, yes, attracting big cases and collecting large fees is a sign that you have a highly esteemed bankruptcy firm, but it's really the attorneys and their ability to build relationships, negotiate, and provide the highest client service that lifts firms to the top.

Not surprisingly, Weil Gotshal ended up on the attorney's lists too. Its own Web site touts "The Business Finance and Restructuring Department has been involved in virtually every major Chapter 11 reorganization case

(See **TOP** on page A4)

### Assistant U.S. Trustee joins Pennsylvania bench

As of March 3, 2003, **Judge Mary D. France** joined the bankruptcy bench in the **Middle District, Pennsylvania**. Judge France was appointed to fill the vacancy created when the Honorable **Robert J. Woodside** passed away last year. Prior to her appointment, Judge France served a 10-year term as the Assistant U.S. Trustee, Middle District, Pennsylvania.

In 2002, Judge France received the U.S. Trustee's highest honor, (See **JUDGE** on page A8)

## In This Issue . . .

Senate waits for bankruptcy bill battle .....	A2
McCook Metals bankruptcy prompts trustee investigation .....	A2
SONICblue files Chapter 11 with 363 plan in hand .....	A2
No extension for Kmart, judge decides .....	A2
Enron examiner: Fair fees for a hard day's work? .....	A3
Superpriority claims lose their luster after conversion .....	A7
Former Barnes & Noble V.P. joins Clear Thinking Group .....	A8
Berger Singerman attorney selected to Bankruptcy Law Institute .....	A8
Eastern District of Missouri welcomes Surratt-States to bench .....	A8
ACB welcomes fourteenth class of bankruptcy's best and brightest ....	A9
<b>CASE HIGHLIGHTS</b>	
Avoidance and recovery are independent remedies .....	A12
Trustee's release bars subsequent suit .....	A12
Chapter 11 plan could not save luxury home .....	A14
Subtenant recoups cost of improvements .....	A14
Court calculates insufficiency on test date .....	A15
Bifurcated lien revested in creditor when case dismissed .....	A17

## Enron examiner: Fair fees for a hard day's work?

The **Enron** chatter has shifted recently from the internal examination, to the fees of the highly esteemed examiner himself, **Neal Batson**, an Atlanta partner with **Alston & Bird LLP**. The *Houston Chronicle* reported that Batson and his associates have submitted bills for January totaling \$8.1 million, and predicting at that pace, his charges could reach upward of \$100 million — charges that would top the \$60 million **Kenneth Starr** charged to investigate **President Clinton**.

### Where has all the money gone?

Batson has prepared two reports, including the most recent 2,000-page report that uncovered the role banking institutions played in boosting Enron's bottom line. But at \$4,050 a page, some are seeking harder evidence of money well spent. The hope remains that Batson uncovers enough money for creditors that his fees account for a tiny sum in comparison to funds uncovered by the investigation.

While experts we spoke with concede that a bill of this size is likely to raise eyebrows in astonishment, that shock is tempered by a sense that Batson's job with Enron is immense, messy, and an absolute necessity to many inside and outside the bankruptcy realm.

**Robert J. Feinstein**, managing shareholder of **Pachulski, Stang, Ziehl, Young, Jones & Weintraub PC's** New York office, said "Given the enormity of the task, and the scope of the fraud, it's not surprising to see substantial fees of this sort. There are a lot of people who want to see Enron fully vetted, **Congress**, the public, past employees. Really, nothing can be left unexamined in this case, there's too many people with an interest."

Others say that taken in context of the case, and in context with rising fees, this initial shock can be eased. "More than \$8 million in a month seems incomprehensible, but the billings of **Weil Gotshal & Manges**, debtor's lead counsel, which billed \$67 million in the 15 months since Enron filed for bankruptcy and continues to bill almost \$4 million a month, are equally astonishing," said **Matthew J. Shier** of the **Pinnacle Law Group LLP** in San Francisco.

But the enormity of the task means little to creditors who seek more than just answers in the Enron case. **Ray R. Graves**, former U.S. Bankruptcy Judge and current principal at **BBK Ltd.**, said any analysis into the fees will have to consider what funds Batson has uncovered in the process and what he is likely to uncover in the future before you can say whether the fees are reasonable. "If he bills \$8 million dollars and comes up with a \$3 million dollar lawsuit, no, his fees certainly aren't worth it. But if he bills \$8 million and comes up with three credible lawsuits for huge sums of money, well then, it's worth their while."

### Examiner's fees examined

"The ostensible purpose of the work of the various professionals whose employment has been approved by the bankruptcy court is to recover billions of dollars for creditors. Creditors should not expect a recovery if they are not willing to pay for the investigation — they have to choose either to fund the professionals' efforts or give up the potential recoveries. They have to make the call," Shier said.

Regardless, attorneys agree that the bill will not go through the fee committee without notice. Graves said, "There aren't many people who would approve of a \$9 million bill, unless the report solved all their problems." But, he explains that there are two schools of thought on paying fees. One says the fee determined by the lodestar approach should be fully paid. The other says full payment depends on how much money's in the pot.

"I don't know which school of thought they are applying here," said Graves, "but if it's the second, at this point, the bill certainly won't be paid in full."

To make that determination, Graves said, much of the responsibility falls to the judge. "There is a basis in law that says that judges must act *sua sponte*, in regard to fees. But in this case, that might mean that the judge must go through and read the stuff, without any opposing objections to consider."

### Full investigations smooth the road to unpretentious negotiations

There are other value-added functions that Batson is performing that must also be taken into consideration, Feinstein said. "When they were considering who to appoint as the independent examiner, they were looking for someone who was going to do a good job — of course, but they were also looking for someone who was going to suggest to the wrongdoers 'oh boy, we're going to get found out.' They were looking for a heavy hitter, and they got one. Batson is a leader in the bankruptcy bar, and on all accounts, a great choice."

Hard-hitting examiners can often turn cases around more quickly, Feinstein said. The parties at the table who are suspected of fraud aren't going to negotiate like wrongdoers until they suspect that the examiner is onto them. And Batson definitely brings that to the case, he said. Uncovering their participation in Enron's demise, Feinstein said, "will serve as a predicate to negotiate controversies for the parties. These people will have to face up to the findings of the examiner and therefore be more willing to negotiate in good faith. That in itself is value added." And when these negotiations are stripped of false airs, usually the result is shorter cases, he said. ■