

2010: The Year of Stagnation, Plus Sideshow

Contributing Editor:

Scott Brown¹

Lewis and Roca LLP; Phoenix
sbrown@lrlaw.com

My 5-year-old son recently visited me at my office for lunch. He does not understand what a lawyer is, let alone a bankruptcy lawyer, but he knows that I am at work a lot. He was duly impressed by my office and all of the cool things about it, especially my view of the train tracks. (Note to all struggling realtors: Train track views are in.)

After a few minutes, I was ready to leave my office and take him to lunch, but he was hesitant. He said, “Show me your work.” I said, “What do you mean? You are at my work.” He said, “I want to see you work.”



Scott Brown

My mind began to race as I thought of ways to show my son how I work. After all, I am his hero. I sat down at my computer and put my fingers on the keyboard, making up and down movements. “This is

what I do with the computer.” He was not impressed. I picked up the phone and held it to my ear. “I talk to a lot of people on the phone.” Silence. “See those tall stacks of paper? I read them very carefully.” He slowly turned his head and looked out the window at the train tracks below. Just like that I descended to the level of Homer Simpson in his eyes.

How do you explain to a child so young what a bankruptcy lawyer does—and sound impressive at the same time? “Sometimes I help people keep things they buy with credit—it’s like pretend money, but usually I help people take away those things. Sometimes, but rarely, I help people keep their jobs by making a sick company healthy again, which makes me like a doctor for businesses, but without a cool stethoscope. Um... look! A train! Choo-choo!”

Impressing older children is not any easier. Believe me—I tried with my 13-year-old son. “You know how I told you not to be irresponsible with your money? Well, it’s people like that who pay our mortgage.” I tried to reconnect with him by showing up at his Scout

About the Authors

Scott Brown is a partner with Lewis and Roca in Phoenix. He serves as education director of ABI’s Bankruptcy Litigation Committee. Eric Van Horn is a bankruptcy and litigation associate with Rochelle McCullough, LLP in Dallas. He also co-teaches financial crisis and restructuring law at the McCombs School of Business and the School of Law at The University of Texas at Austin.

Camp last summer to volunteer for a few days. I was the Pathfinding merit-badge counselor, a “centennial” merit badge that requires scouts—this is not a joke—to identify the nearest telegraph office on a map. We talked about how cell phone stores have replaced telegraph offices and, much to their surprise (but not mine), it was not hard to find the “nearest” office. About 200 yards away was another lawyer-father who also came to camp to volunteer his time, but instead he was glued

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to his laptop with a satellite phone hook-up. He even had a printer. I joked about earning the “Billing” merit badge, but my son must have seen the envy in my eyes because he did not join in the courtesy laugh from the other scouts.

If only our children could understand how important we are and why they never saw us last year, or the year before, after Lehman filed. This year? Stagnation—and Scout Camp. I recently saw a list of the 10 largest filings ever. Year 2009 scored some good ones: General Motors, CIT, Chrysler and Thornburg Mortgage (don’t believe me on this last one—look it up²).

Not a single case that filed in 2010 made it onto the Top 10 list—so far.³ Sure, there have been a few big ones, Blockbuster being the most recent, but prepacks hardly capture the imagination of the bankruptcy profession—or our pocketbooks. The 2010 vacuum has, of necessity, created the year of “awards,” as we reminisce about the good old

days.⁴ Just look up any bankruptcy professional’s web bio. It will read something like this:

- Graduated 1984, *cum laude*
- Author: “The Fascinating Realm of Bankruptcy Court Jurisdiction,” 1985
- Speaker: “Hot Topics—Bankruptcy Jurisdiction—1986-87”
- Awards: Best Lawyer in the Universe, 2009

I, personally, am fascinated by the “40 under 40” awards—mostly because I’m still eligible and will be for a few more years. Shai Waisman of Weil, Gotshal & Manges, the recipient of such an award, was quoted in 2009: “You have no idea how many times I’ve watched the sun rise over Central Park from this office. If you’re a bankruptcy lawyer, right now is game time.”⁵ That, in a nutshell, probably explains why I will never be on that short list.

Those of an older age may think that it is unfair that there are no “50 over 50” or “60 over 60” awards, but in fact, there are. Those awards are usually named after

some famous bankruptcy lawyer or, more often, a bankruptcy judge. There are two qualifications for those awards: (1) admit you are over 40 and (2) wake up at 4 a.m. daily to watch the sunrise from your office.

None of this, of course, helps fix 2010. It would be nice if debtors stopped selling everything. I understand that the cramdown rules do not make for easy sailing for debtors—in fact, I’m a semi-expert on cramdown as you may recall from previous columns—but 363 sales? When I started practicing a lengthy 10 years ago, our profession was still debating the ethics of 363 sales in lieu of plan confirmations. Now, 363 sales dominate almost every case, and what’s worse, they stunt the growth of the really good ones. Anyone else in favor of eliminating § 363(f) from the Bankruptcy Code?

⁴ My wife tires of me talking about the “good old days” because, as she puts it, they usually preceded the time I met her. That is a fair observation, but it is not my fault my hair and good looks have not cooperated with me since high school.

⁵ See <http://mycrains.crainsnewyork.com/40under40/profiles/2009/10161>. His experience is not unique to that firm. See Dealmaker of the Week: Michael Weisser of Weil, Gotshal & Manges at <http://amlawdaily.typepad.com/amlawdaily/2010/06/dealmakerweisser.html> (“During the final few weeks of negotiations on the two deals, Weisser alternated between pulling all-nighters and getting home to his wife and three children as late as 5 a.m.”).

² See http://money.cnn.com/galleries/2009/fortune/0905/gallery.largest_bankruptcies.fortune/10.html.

³ As of late October.

¹ With helpful input and Wiki cites from Eric Van Horn.

I admit there have been a few cool cases this year. I will only mention one here—mostly because I do not want to disprove my point. In the *Texas Rangers* case, the lenders pushed back against the debtor’s “prepack” and forced a high-drama, all-night auction between Mark Cuban and Nolan Ryan that resulted in a final bid worth \$127 million more in cash than the “prepack” sale, and removed a “sweetheart” deal involving parking lots and a centerfield office for (now former) team owner Tom Hicks.⁶

The high drama of all-night auctioning is nothing compared to the *TWAs* and *Dow Corning*s of yesteryear.⁷ One helpful suggestion is to stop “amending and pretending” so that the corporate debt “wall of maturity” stops crumbling or moving farther into the future,⁸ but the root of the problem is even deeper than that. Not even our non-bankruptcy acquaintances can smile. The words “Pencils up!” and “Pencils down!” echo across the law firms of our country. What happened to “sending a message” and litigating as a matter of “principle”?

It is not in my nature to find fault or complain, but a stagnant economy is not good for anyone. Unfortunately, GCs today are under more pressure than ever to keep costs down and settle. The only type of risk they care about is “no risk.” Someone needs to explain to corporate America that risk is what keeps lawyers busy, and busy lawyers are the key to a bullish economy.⁹

This year has not been a total loss. Consumer bankruptcy attorneys are busier than ever with record-high filings.¹⁰ Maybe it is time for the rest of us

to finally figure out what the means test really means.

As for me, I’m going to learn how to drive trains.

The Sideshow: Preview of the 2010 WLC

Contributing Editor:

*Eric M. Van Horn*¹

Rochelle McCullough LLP; Dallas

evanhorn@romclawyers.com

Loyal readers, and maybe accidental ones too, might remember that Chapter 8 Humor previewed last year’s Winter Leadership Conference (WLC) and made a lot of bold predictions about panel presentations and the conference’s entertainment. Since we did not receive any feedback on that column, we can only presume that it was *exactly* what readers wanted. So, without further ado, here is a preview of this year’s WLC.



Eric M. Van Horn

This year’s conference is in Scottsdale, Ariz., which is literally Scott Brown’s backyard. This will guarantee that at least one half of Chapter 8 Humor’s dynamic duo will be there.

I might be there if someone responds to my Craigslist ad seeking to carpool to Phoenix and talk about “awesome bankruptcy stuff” for 18 hours. I can’t believe I have not already found a ride.

Be sure to catch the Great Debates, especially “Structured Dismissals Should Be Allowed in Chapter 11 Cases.” It will be a “can’t miss” debate for landlord attorneys who enjoy telling their clients that the debtor who stopped

paying their rent during a 363 sale is now dismissing their case and there is no hope of recovery on the administrative claim.

Expect maximum attendance at the presentation entitled “Commercial Real Estate: The Next Tsunami Approaches,” where the audience will be mixed with hopeful bankruptcy professionals looking optimistically toward a busy few years, and those, like Scott, who are disheartened because of the stagnation. Expect to hear some audience member jeer “we’ve heard this before” and “we might as well have a panel about the coming wave of chapter 9 cases.” That will be Scott.

Far and away the best committee panel will be “Bankruptcy Litigation/International (joint): Litigation Issues in Cross-Border Cases.” Scott will debut himself as the education director of ABI’s Bankruptcy Litigation Committee from the back row of the room. Meanwhile, panelists will debate, among other topics, the proper venue for the bankruptcy cases of members of the EU, such as France and Great Britain, if their austerity measures prove not to be enough. We predict a bad “chunneling injunction” pun.

Last, but not least, attendees will laugh at comedian Frank Caliendo’s impression of George W. Bush and what he believes the former president’s response was to learning about the financial meltdown and the role collateralized debt obligations played: “I thought Seedy O’s was the new breakfast cereal I tried during my second term that was like Cheerios but earthier. There is no way my cereal was responsible for the collapse of the financial markets.” Then, the Indubies will rock the night away and provide a new take on the Prince classic “1999” by encouraging attendees to “party like its 2009.” ■

⁶ Full disclosure: Eric’s firm, Rochelle McCullough LLP, represented the first-lien agent bank.

⁷ TWA has been in and out of bankruptcy three times. See http://en.wikipedia.org/wiki/Trans_World_Airlines. Dow Corning managed to park itself in bankruptcy for an impressive nine years. See www.highbeam.com/doc/1P2-1528469.html.

⁸ Chelsea Emery, “Corporate Debt ‘Wall of Maturity’ Crumbling: Study,” Reuters, Aug. 24, 2010, www.reuters.com/article/idUSTRE67N5MN20100824.

⁹ Everything I need to know about economics, I learned in law school.

¹⁰ You’ll have to Google this fact yourself: www.google.com.

¹ With almost no helpful input from Scott Brown. Seriously, http://utdirect.utexas.edu/lore/clap.WBX?ccyys=20109&class_unique_number=28675.

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