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A new cast takes the stage in Washington

After the Republican sweep in the November elections, the political calculus changed on a variety of questions central to the deal economy. Here's what to expect on issues ranging from merger reviews to net neutrality and too-big-to-fail

By Bill McConnell and Ronald Orol

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Announced: Jan. 21

Target: Eurasia Drilling Co. Ltd.
Acquirer: Schlumberger Ltd.
Deal value: $1.7 billion
Announced: Jan. 20

Target: Symphony Teleca Corp.
Acquirer:
Harman International Industries Inc.
Deal value: $780 million
Announced: Jan. 22

Target: Probe Mines Ltd.
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TOP STORY

A new cast takes the stage in Washington

Who to watch and what to expect on issues from merger reviews to net neutrality and too-big-to-fail

BY BILL MCCONNELL AND RONALD OROL IN WASHINGTON

Both chambers of Congress are now controlled by the Republicans, thanks to the November elections. Coupled with a retirement of a key House member, the partisan switch in the Senate has altered the leadership of Capitol Hill committees that are critical to dealmakers and will redo the calculus for issues that should be at the top of their agenda. Here's a look at the people and issues to watch as the year unfolds.

SEN. MIKE LEE. After spending the past four years as the ranking Republican on the Senate Judiciary Committee's Antitrust Subcommittee, Utah Republican and Tea Party favorite Mike Lee takes over chairmanship of the antitrust panel. During his tenure as ranking Republican, Lee cultivated a bipartisan, collegial reputation that contrasts markedly with the firebrand he's been outside the subcommittee.

Utah's junior senator is one of the most combative conservatives in the Senate. He has even drawn the ire of fellow Republicans—most recently for joining with Texan Ted Cruz in December's attempt to sink a deal on a spending bill that then-incoming Majority Leader Mitch McConnell negotiated to end last year's session. They pressed the fight as a way to combat President Barack Obama's executive action to defer deportations of many illegal immigrants. Instead, the Cruz-Lee move backfired by keeping Congress at work over a December weekend and inadvertently allowing Democrats extra time to confirm a batch of pending nominations that Republicans would just as soon have seen expire at the congressional term ended.

Fellow Utah Republicans derided what they see as an amateurish procedural mistake. Billionaire industrialist Jon Huntsman Sr. and father of former Utah Gov. Jon Huntsman Jr. called Lee, a former aide to the younger Huntsman, "an embarrassment to the state of Utah," in an interview with D.C. trade publication Politico.


AP

SEN. MIKE LEE

SEN. RICHARD SHELBY

Sen. Orrin Hatch, Utah's senior senator and once the ranking Republican on the antitrust subcommittee, dismissed Cruz and Lee's bid to upend the spending bill. "You should have an end goal in sight if you're going to do these types of things, and I don't see an end goal other than irritating a lot of people," Hatch told reporters after the December miscue.

But Lee was unapologetic. During a Dec. 16 floor speech he said, "It is incumbent on every member of this body—no matter what their politics or what immigration policies they would prefer to enact—to oppose that usurpation of legislative power and to defend the rule of law."

In contrast, since becoming the ranking Republican on the antitrust panel in 2011, Lee has continued the larger Judiciary Committee's tradition of bipartisanship and joined former subcommittee chairwoman Amy Klobuchar, D-Minn., in letters to regulators urging them to look at the potentially harmful effects of several recent mergers, including US Airways Group Inc.'s 2013 acquisition of American Airlines to form **American Airlines Group** (AAL) and the pending attempts by **Comcast Corp.** (CMCSA) to acquire **Time Warner Cable Inc.** (TWC) and **AT&T Inc.** (T) to purchase **DirecTV Group** (DTV).

"Mike Lee is well-suited for the role," said Seth Bloom, a former aide to retired Sen. Herb Kohl, D-Wis., who once chaired the antitrust subcommittee. Bloom, of **Bloom Strategic Counsel**, predicts Lee will continue the cooperative atmosphere on the subcommittee regardless of how strident he might be on other issues. "Lee has a strong intellect and cares about development of antitrust doctrine. On the antitrust subcommittee he has tried to reach out to Democrats, and I'm confident he'll maintain the bipartisan tradition now that he's chairman."

SEN. RICHARD SHELBY. The Alabama Republican returns to the chairmanship of the Senate Banking Committee. Shelby has been a member of the panel for 28 years, chairing it the last time the GOP controlled the Senate. He has the policy chops needed

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to transform controversial bills into laws. Shelby said that his priorities include repealing parts of the Dodd-Frank Act, the financial reform law enacted under Democratic leadership in the wake of the 2008 financial crisis. "I was opposed to Dodd-Frank. It has a lot of problems and we'll be addressing some of those, hopefully."

Look for delicate compromises rather than big sweeping moves. For instance, rather than seeking to repeal the Financial Stability Oversight Council, as many Republicans would prefer, Shelby is likely to try reducing the number of big banks and other institutions that the FSOC can designate for further restrictions. He has said he would do that by raising the designation threshold to $100 billion in assets from $50 billion. The move could receive broad bipartisan support because the six largest U.S. banks would still find themselves covered by the FSOC while regional midsized banks that played little role in the crisis would fall outside its purview.

In that change Shelby has some cover from Federal Reserve Board Gov. Daniel Tarullo, who has suggested that the amount could be raised.

The controversial Consumer Financial Protection Bureau, which writes rules for mortgages and other credit products, is also a possible Shelby target. Watch for any major moves, hotly opposed by Democrats, to emerge from the Senate Appropriations Committee where Shelby is the second-highest ranking Republican. Under Dodd-Frank, it is funded via automatic transfers from the Federal Reserve.

Mark Calabria, director of financial regulation studies at the Cato Institute, suggests that Shelby could include a provision in a must-pass appropriations bill that would finance the CFPB through Congress, a move that would cut the amount of funds at its disposal.

Even if Shelby's Dodd-Frank reform efforts aren't successful, the statute will receive a lot more scrutiny from the committee now that the banking panel is controlled by Republicans hostile to the law. Regulators may choose to delay and second-guess their rule-writing efforts as a result.

Shelby also has deep concerns about the central bank and is likely to hold hearings looking at the effectiveness of its supervision of big banks. "I've always had some problems philosophically with the Fed as the central bank and also as a bank supervisor," he said. Hearings on the Fed's performance as a regulator are expected to be supported by both parties and would likely put pressure on the Fed to hike big bank capital buffers, a move resulting in new limits on share buybacks and dividends.

A Shelby-led banking panel may consider tweaking or repealing a system Dodd-Frank created as an alternative to bankruptcy for large institutions. Repealing the mechanism, which is known as the Orderly Liquidation Authority, is unlikely to pass muster with Obama and will draw a veto. As a result, Shelby may work with the Senate Judiciary Committee under the leadership of Chuck Grassley, R-Iowa, to back a bipartisan House bill seeking to provide a viable alternative to the OLA process in traditional bankruptcy. "It would be a hard needle to thread but he can thread it," Calabria said. "Democrats are not going to sign onto anything that makes it appear that you are getting rid of Dodd-Frank."

Other priorities for Shelby and the Banking Committee are likely to include reforming government-seized housing finance giants Fannie Mae and Freddie Mac and adopting a followup statute to the bipartisan 2012 JOBS Act as part of an effort to encourage initial public offerings and private capital formation.

Reforming Fannie and Freddie is unlikely in 2015 but Hester Peirce, who worked for Shelby following the 2008 crisis, said it is probable that so-called JOBS Act 2.0 legislation emerges from the banking panel. "So many people are concerned about the state of the economy and this will help businesses raise capital," said Peirce, now a senior research fellow at the Mercatus Center at George Mason University. She also serves on the Investor Advisory Committee, which advises the Securities and Exchange Commission.

REP. TOM MARINO. A Pennsylvania Republican, Marino has the helm of the House Judiciary Committee's antitrust subcommittee, succeeding retired Alabama Republican Spencer Bachus.

REP. TOM MARINO

The Judiciary panel's Subcommittee on Regulatory Reform, Commercial and Antitrust Law oversees the two primary merger regulators, the Federal Trade Commission and the Department of Justice. Marino hasn't said much so far on merger enforcement, but judging by his signature piece of legislation, the Responsibly and Professionally Invigorating Development Act, he will add his support to an expected drive by the GOP-controlled Congress to streamline merger oversight and eliminate perceived discrepancies between DOJ and FTC enforcement that some antitrust lawyers say add uncertainty to the merger approval process. He's also likely to support an effort to rein in patent assertion entities, the financial outfits that buy patents solely to enforce intellectual property rights. Critics often refer to PAEs as patent trolls for tying up tech companies in legal battles despite sometimes having only a tenuous claim to the technology in question.

The RAPID Act, as Marino's signature bill is known, aims to streamline the permit approval process for energy, infrastructure, and other construction projects and would establish an 18-month maximum deadline for an environmental assessment and a 36-month maximum deadline for an environmental impact statement. The leg-

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islation also sets a 180-day statute of limitations for lawsuits challenging permitting decisions.

The House passed the RAPID Act in March with bipartisan support but it went nowhere in the Senate. With the GOP in control of both chambers Marino's initiative likely will get another go.

"As the new chairman of the Subcommittee on Regulatory Reform, Commercial and Antitrust ... my colleagues and I will be able to put forth significant, job-creating reforms like my RAPID Act," he said in a statement. "Aside from the RAPID Act and other important bills to decrease the regulatory burdens on American industry and small businesses, both the House and Senate have a clear mandate to get things done despite the prospect of presidential vetoes," Marino said.

That combative tone indicates he'll help revive another Republican initiative from the last Congress—a bill that would have put the FTC on par with the DOJ when seeking a preliminary injunction to delay consummation of a merger and also would have eliminated the FTC's authority to conduct in-house adjudication procedures against a merger instead of asking a federal judge to block the deal. There has long been some belief in the antitrust bar that federal law gave the FTC important advantages over other government bodies in securing preliminary injunctions, including over the DOJ, its sister merger enforcement agency. The FTC has played down the practical impact of the differing standards but officials from the agency have defended its unique standard nonetheless.

In an interview, Marino stressed that he's no anti-regulation zealot. "We do need regulation to make sure we have clean water, that we are not polluting the land and can have clean air.

"But lately, particularly with this administration, we have been going off the deep end," he said, citing an effort by the Environmental Protection Agency to regulate farm land through the Navigable Waters Act. "In almost two decades of living between five farms, I have yet to see a row boat go by.

"We are going to say to the agencies, 'Enough is enough. You sit in an Ivory Tower and write these rules but I wonder how many have been to a farm.' We have to tighten up the regulatory process and eliminate or reform many of the regulations that exist now."

Marino served as a Lycoming County district attorney from 1992 to 2002, and was then selected as the U.S. Attorney for the Middle District of Pennsylvania. In 2010, he challenged incumbent Democratic Rep. Chris Carney for the seat in Pennsylvania's 10th District. After winning a three-candidate Republican primary, he went on to defeat Carney 55%-45% in the general election.

According to PoliticsPA, Marino is among the most conservative members of the Pennsylvania delegation, with a 70% rating on Americans for Prosperity's scorecard and a 63% rating by Club for Growth. Those rating place him third and fifth, respectively, in each group's ranking of the Pennsylvania contingent. Marino got national attention last summer when he ended up in a confrontation on the House floor with Minority Leader Nancy Pelosi, D-Calif., whom he blamed for not dealing with the immigration problem at the beginning of the Obama administration, when the Democrats controlled both houses of Congress in addition to the White House.

SEN. ELIZABETH WARREN

SEN. ELIZABETH WARREN. Despite the Republican sweep last fall, the Massachusetts Democrat continues her meteoric rise to prominence inside and outside the Beltway. Recently named strategic policy adviser to the Democratic Policy and Communications Committee, she is formally a member of the Senate Democratic leadership and is expected to use that perch to bolster her already high-profile efforts in Congress to break up the biggest U.S. banks. She became a political player during the financial crisis as an academic, becoming one of the most aggressive critics of Washington's acquiescence to Wall Street. She's often mentioned as a dark horse candidate for the Democratic presidential nomination in 2016.

Some prognosticators have asserted that Warren's ascension to leadership would shift her focus this year away from the too-big-to-fail debate. That's wishful thinking. Warren's first high-profile battle since landing the new gig involved seeking to strip a controversial provision to reduce derivatives capital buffers from a government funding bill. She lost that fight but mobilized supporters to stage a protest outside **Citigroup Inc.**'s (C) New York offices. Further evidence that Warren will maintain her push to break up big banks followed when she excoriated the Federal Reserve Board in late December for delaying the effective date for a Volcker Rule provision requiring big banks to divest their hedge funds, real estate units and buyout shops.

More recently, Warren demonstrated her drive to blunt Wall Street's power in Washington by driving the Obama administration's nominee for a key Treasury Department slot to withdraw his name from consideration. The nominee, Antonio Weiss, ultimately accepted a behind-the-scenes position.

Jaret Seiberg, an analyst at **Guggenheim Partners** in Washington, said that if Warren doesn't run for president she can continue to act as a power broker between Congress and regulators over new restrictions on big banks. Warren can be expected to put the Fed's review of "living wills" for big banks under a microscope this year. These so-called resolution plans are put together by large institutions to map out how

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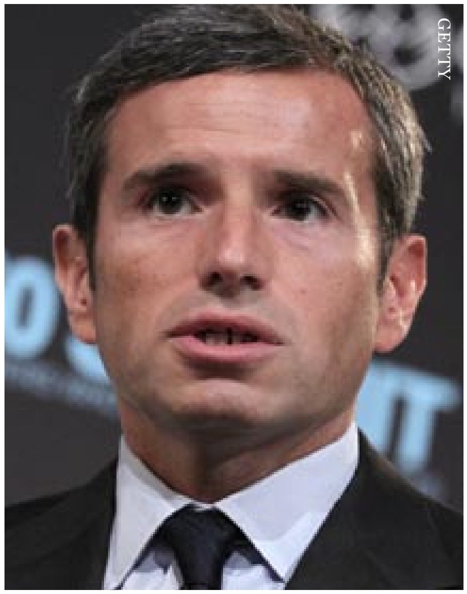
they would dismantle themselves without spreading havoc on the economy if they were to fail. If the Fed decides that the plans are credible and Warren disagrees, she will make the experience as painful as possible for the central bank and large financial institutions.

The Fed may also make banks include a new tougher global capital surcharge in their central bank stress tests. If they do, much of the credit (or blame) will go to Warren and her supporters on Capitol Hill. In December, Warren spoke out about Citigroup on the Senate floor. She didn't pull any punches: "There's a lot of talk coming from Citigroup about how the Dodd-Frank Act isn't perfect. So let me say this to anyone who is listening at Citi: I agree with you. Dodd-Frank isn't perfect. It should have broken you into pieces."

ANTONIO WEISS. After being nominated for the No. 3 slot at the U.S. Treasury, Weiss withdrew from consideration amid a welter of criticism. The affair continues to divide the Democratic Party.

Weiss, however, is still going to be a new player in Washington—he is joining the Treasury Department as a counselor to Secretary Jacob Lew. That position does not require Senate confirmation, a major difference from the Under Secretary of Domestic Finance position the Obama administration had previously sought for him.

The problem for Weiss was his two-decade career on Wall Street including his most recent position as the head of investment banking for **Lazard**. There he acted as an adviser on such high-profile international transactions as **Burger King Worldwide Inc.**'s merger with Tim Hortons Inc., a so-called inversion deal resulting in a Canadian home address for the combined company. Critics, including Warren; Sens. Sherrod Brown, D-Ohio; Jeanne Shaheen, D-N.H.; and a variety of progressive groups, pushed to have Weiss removed from consideration. They argued that he is one in a long line of Wall Street insiders who have done more to help companies like Burger King when they take a job in Washington. Lew has rejected that assessment, insisting that Weiss has "devoted a great deal of



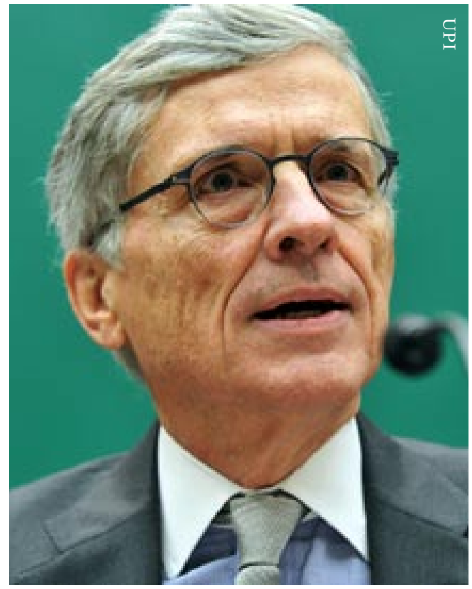
ADVISER ANTONIO WEISS

his personal time to work on tax proposals that promote economic growth and shared prosperity."

Dennis Kelleher, chief of consumer advocacy group Better Markets, said that despite not landing the undersecretary job, Weiss will be extremely influential as an adviser to Lew. The only real difference is that he won't be on the frontline of policymaking and delivering the Treasury's message to constituents. "You can't understate the influence and access of someone who is counselor to the secretary of Treasury," Kelleher said. "But it is very different from being undersecretary. As a counselor he cannot take action that binds the U.S. government to anything. He can provide advice and he can have input across the range of topics and items but he can't take substantive actions." One bank lobbyist suggested that Weiss will have fewer formal powers as an informal adviser but he will be able to privately tell Lew "what he really thinks" about tax policy and other deal-related matters.

NET NEUTRALITY. Federal Communications Commission Chairman Tom Wheeler has shrewdly maneuvered congressional Republicans into accepting stronger open Internet rules.

By signaling that he and his fellow FCC Democrats would use the agency's authority to move Internet trafficking rules under the same tough common carrier regime



FCC CHAIRMAN TOM WHEELER

used to regulate telephone service, Wheeler has set off a firestorm among Republicans, who have opposed FCC regulation of Internet trafficking generally and vehemently oppose any move that would apply the commission's strictest regulatory classification to the Internet.

In May, the FCC proposed net neutrality rules that would prohibit Internet providers from discriminating against competitors' and third-parties' Internet content and proposed to do so under common carrier rules authorized under Title II of the Communications Act. The switch to Title II regulation has been pushed by proponents of net neutrality rules because two previous incarnations of FCC net neutrality rules have been struck down in federal court.

The twisted legal history of the FCC's efforts to prevent Internet service providers from favoring their own Web content over other producers' content began in 2010 when the commission chose not to classify Internet service as a common carrier and instead based its rules on its authority to promote the deployment of broadband services under Section 706 of the Telecommunications Act of 1996.

When the inevitable legal challenges reached federal appeals court, the judges found the rules were too close to Title II-style regulation and ordered the FCC to

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rewrite them without going beyond the Section 706 authority or to reclassify the Internet as a common carrier service.

Although Wheeler said last spring that the FCC was only asking for public comment on the pros and cons of Section 706 and Title II classification, in subsequent months there is near universal expectation that he will push Title II when the commission votes on the final version of the rules at its Feb. 26 meeting. The commission's vote is expected to be split along party lines.

"I fear we may be heading into rough waters," Rep. Greg Walden, R-Ore., chairman of the House Commerce Committee's Communications and Technology Subcommittee, told Wheeler soon after the FCC started contemplating the change to Title II Regulation.

But as the FCC, backed by Obama, has neared the net neutrality vote, desperate Republicans are scrambling to come up with an alternative. Both the House and Senate Commerce Committee held hearings on net neutrality plans Jan. 21, and GOP lawmakers are drafting legislation that apparently will be tougher than the FCC's 2010 rules. Senate Commerce Committee Chairman John Thune, R-S.D., is taking the lead on the drafting, which will be based on 11 principles, such as banning blocking of third-party content by ISPs, slowing of unaffiliated content, transparent rules for network management and a prohibition on paid prioritization. The GOP legislation is likely to draw intense opposition from its most conservative quarters and probably would be vetoed by the president. "The GOP opposes tighter net neutrality rules but what can they do?" asked one source following the issue. "They certainly will raise a big fuss, but I don't know what else they can do." Whether a GOP alternative even passes Congress is almost irrelevant at this point. Wheeler's efforts have prompted senior leaders to concede that a big stink over tighter net neutrality rules will probably backfire and that they need a Plan B to show voters they aren't siding with the big Internet providers.

FTC REFORM. The House Antitrust Subcommittee can be expected to resurrect legislation the panel approved last year that would rein in the Federal Trade Commission's perceived advantages compared to the Department of Justice when seeking to prevent a merger from closing while the government wages a legal challenge to permanently block the deal in court.

REP. BLAKE FARENTHOLD

Many antitrust lawyers have debated whether federal law truly gives the FTC important advantages over other government bodies in securing preliminary injunctions but since 2008 there have been several merger cases in which the FTC was actually able to capitalize on the perceived differences in its preliminary injunction standard.

Alarmed by the legal victories, the House Judiciary Committee in September passed legislation that would put the agency on par with the DOJ when seeking to delay consummation of a merger and would eliminate its authority to keep challenges within the agency.

The legislation, sponsored by Rep. Blake Farenthold, R-Texas, is formally titled the Smarter Merger and Acquisition Reviews through Equal Rules Act. Farenthold is the new vice chairman of the House Judiciary's antitrust subcommittee and his bill is certain to have traction on that panel in the new session.

Farenthold's bill would implement the merger-related recommendations of the Antitrust Modernization Commission, a congressionally chartered panel that examined the state of antitrust law and urged a series of changes in 2007.

The discrepancy between the merger challenge powers has evolved with antitrust law. The DOJ has been allowed to bring merger challenges in federal court under the Clayton Act, which was passed in 1914. The FTC also employs the Clayton Act but its enabling statute, the FTC Act, which also was passed in 1914, gives it unique powers as an independent administrative agency. The FTC's preliminary injunction advantages were further entrenched in 1973 when Congress amended the FTC Act to create the FTC's administrative trial mechanism.

Requests for preliminary injunctions while a merger trial is under way, either by the FTC or the DOJ, can only be granted by a federal district court, but the wording of the FTC Act stipulates that the standard for granting an FTC preliminary injunction request is whether the agency can show that stopping a deal "would be in the public interest." On the other hand, the DOJ, under the Clayton Act, must show that letting a merger be consummated immediately would cause "irreparable harm."

Critics of the FTC Act say the difference, combined with the threat of a lengthy fight before an agency administrative judge to decide if the deal is permanently stopped, gives the commission an easier standard for halting a deal. In pushing his bill last fall, Farenthold told his fellow lawmakers that "it's unfair for some parties to be subject to administrative litigation while other parties avoid this prospective simply because the coin toss" puts them before one agency rather than the other. "The SMARTER Act is a common sense, good government, straight forward measure that implements reforms advanced by members of the AMC," he said.

Allen Grunes, a founding partner at Washington's **Konkurrenz Group** and former senior staffer at the Department of Justice, said now that Republicans hold a majority in both chambers, FTC merger reform has a possibility to move forward. "From a business perspective there's no good justification for having two different standards," he said. "The discrepancies in the agencies' authorizing language needs to get cleaned up." ■

Six tips for surviving a proxy fight

How a company can make it through an encounter with even the most fearsome activist

BY RONALD OROL

Nearly two dozen companies are going into 2015 proxy season as targets of activist fund managers threatening to install dissident directors. Boards at companies like chemical giant **DuPont**(DD), Pennsylvania regional bank **Metro Bancorp Inc.** (METR), and student housing owner and manager **Campus Crest Communities Inc.** (CCG), have already received notices that activists have slates ready to go, while financial services data provider **MSCI Inc.** (MSCI), industrials manufacturer **OM Group Inc.** (OMG) and construction company **Manitowoc Co.** (MTW) are scrambling to figure out what they can do about an activist investor before they start down the proxy fight path.

Once a proxy fight is launched it may already be too late for a targeted company to regain the backing of its institutional investor base. Successful activist insurgents won't engage in a full-blown battle unless they know they can count on discontent among shareholders. Still, with careful preparation and quick responses an executive can survive an encounter with even the most fearsome activist. If you're watching a battle unfold, you can figure out whether the CEO has a chance to make it through the fight—just pay attention to whether he or she is following this playbook.

Go easy on capital distributions to shareholders. A targeted company's typical first move is to expand its capital allocation program in the form of share buybacks, dividends or some combination of both. **Zoetis Inc.** (ZTS) launched a $500 million share buyback program after Bill Ackman's **Pershing Square Capital Management LP** and another fund acquired 10% and launched a campaign at the animal health company. After **ValueAct Capital Partners LP** asked in August to be included on MSCI's board—and was rebuffed—the investment analytics company in September issued plans to initiate a quarterly cash dividend and "significantly" increase its share repurchases, as part of a program that is expected to return $1 billion to shareholders by the end of 2016.

The goal of this approach is likely more about pacifying disgruntled passive institutional investors. But in many situations a capital allocation plan alone may only serve to bolster an activist's pitch.

"What you might think will be appeasement may not even be the tip of the iceberg for the activist," said Bruce Goldfarb, president and CEO of proxy solicitor **Okapi Partners LLC**. "For an activist that has done a great deal of research into the business and proposed operational change, the company can't expect to do a stock buyback and expect the activist to go away." At MSCI, for example, ValueAct turned its mostly private campaign into a public insurgency with a Jan. 6 letter expressing "great frustration" with the company. Those efforts were followed up by another fund, **Naya Management LLC**, urging strategic alternatives.

However, Richard Grossman, a partner at **Skadden, Arps, Slate, Meagher & Flom LLP**, suggested that boosting stock buybacks or issuing special dividends can be one of the most effective responses to an activist. "Capital allocation is one of the issues that activists focus on," Grossman said. "If there are other issues a capital allocation program is not going to appease the activist, but it can support the stock, and a strong stock price is always a good defense."

Find the right independent directors–early on. A tactic often employed by companies during a heated proxy fight is to bring on their own independent director candidates with relevant industry, banking or other expertise. The goal is for the activist and institutional investors to support the management's newly refreshed board, taking the wind out of the sails of an activist-backed slate. However, because the company needs to be ready to go with its new candidates, its

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board nomination committee had better be working on finding them well before the activist strikes. Better yet, the board should always be looking for candidates who will bring the right combination of independence and expertise to the table.

Take what happened when **Darden Restaurants Inc.** (DRI) tried that tactic in the face of **Starboard Value LP**'s campaign last year for control of the restaurant chain manager. A month before the activist succeeded at getting its full 12-person slate elected—the entire board—Darden had offered up four independent director nominees as part of a settlement proposal, an effort Okapi's Goldfarb characterized as "last minute." "It can be to the advantage of a company to identify new board members but those company-identified directors can't be brought in at the 11th hour," Goldfarb said. "They need to be considered through a thoughtful process, not a knee-jerk reaction to an activist."

Skadden's Grossman agreed that corporate nomination committees should always be thinking about succession and have potential independent director candidates available should an activist strike. "Many settlements often take place when the company and activist agree to add a few mutually agreeable directors. It helps if the company already has some expert candidates in mind," he said.

Don't game the system when attacked—it will backfire. Companies shouldn't take steps to try to make it ridiculously hard for an activist to launch a proxy fight or even to call a special shareholder meeting. Those kinds of approaches often create more support for the activist among the institutional community. Goldfarb noted that Botox maker Allergan Inc. (AGN), faced with a hostile bid and activist campaign by Pershing Square, created an egregiously difficult mechanism for investors to call a special shareholder meeting. "The investor community was not impressed," he said. "The results of trying to out-maneuver your investors generally are unproductive." Allergan eventually relented and adjusted its unusual special meeting bylaws. It ultimately sold itself to **Actavis plc** (ACT) in a defensive $66 billion deal before any special meeting could take place.

In another situation, telecom testing solutions provider **JDS Uniphase Corp.** (JDSU) adjusted its bylaws in a way that—in the words of **Institutional Shareholders Services Inc.**—"frustrated the ability of shareholders to submit director nominations." The effort resulted in a rebuke from ISS and a large vote of no-confidence in a "just vote no" campaign employed by the dissident, Thomas Sandell. On Jan. 13, Sandell indicated he wasn't backing down by sending a letter to JDS urging it to change its bylaws in the next two weeks.

Talk to the analysts. The analyst community is another key constituency the company should engage with effectively when faced with an activist campaign. In some cases, according to one adviser, analysts generate their M&A-focused reports after receiving suggestions from an activist.

"There are research analysts who love talking to activists because they give them new perspectives, something to write about. Sometimes research analysts have agreed with the thought all along," Goldfarb said. "Once in a full-blown campaign, talking to analysts is essential to a smart proactive strategy."

Think like an activist. Insurgents generally take the temperature of fellow shareholders before deciding to mount a campaign. But the company should be in there first, consistently putting its strategy before shareholders, and, more important, listening to shareholders. "The corporation has to constantly communicate with their shareholder base—the day-to-day work of knowing who your investors are and making sure they understand your business is really important," Goldfarb said.

It isn't a bad idea to hold a fire drill to see how management and the board would respond to an investor challenge. "I've had plenty of meetings with clients who want to understand their shareholder base and vulnerabilities," Goldfarb said.

Grossman suggested that corporations should do periodic vulnerability assessments as to whether they have any of the characteristics that could attract an activist investor, such as underperforming units, high-levels of surplus cash or potentially valuable real estate. "The best defense is a good offense, and compa-

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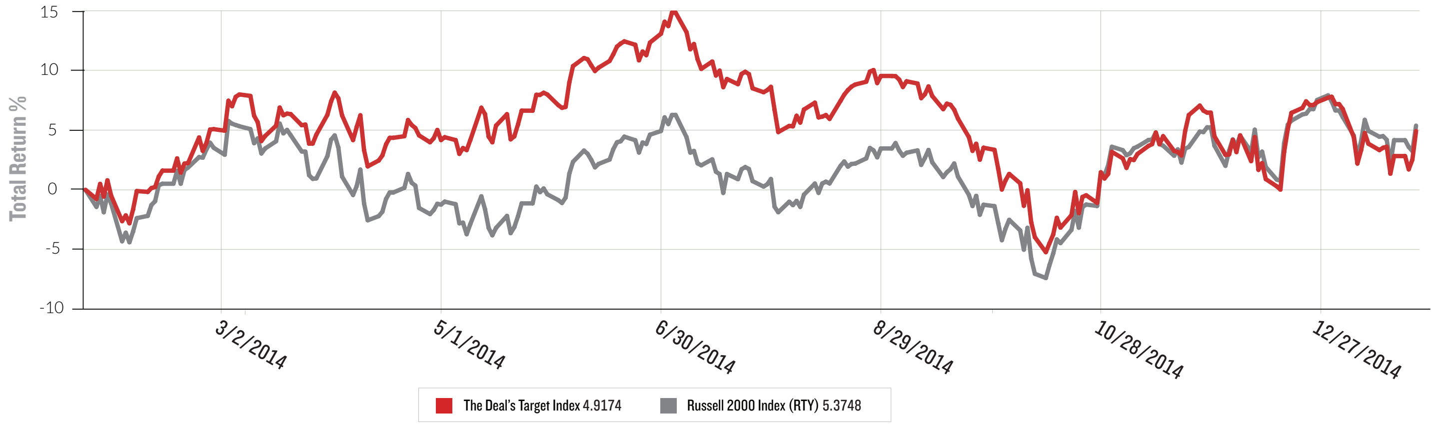
Hedging the activists

Performance of The Deal's potential targets against the Russell 2000, measured by total return



Source: Bloomberg

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nies should always be evaluating ways to strengthen their businesses," he said.

Grossman added that if the assessment turns up potential problems, the key is to privately hire an investment bank to conduct an analysis. "The goal is for the company to be able to tell the activist and other institutions that the board and management have already recently undergone a review process," he said.

As part of a regular self-assessment program, companies should watch ISS and **Glass Lewis & Co.** governance reports to make sure any errors or dated material are removed. The problem is that once an activist appears, defenses like poison pills will worsen their governance rating, which investors embroiled in a campaign like to point to when arguing their case to institutional investors. Still, doing things like eliminating related-party-transactions between the CEO and the corporation can go a long way toward improving governance ratings and deflecting a successful activist campaign.

Hire some extra experts. Another key tactic for a company faced with an activist campaign is to consider retaining an emergency communications firm. Grossman said that it is money well spent, in part, because the firms help identify and correct factual inaccuracies that might impact an institutional investor's voting pattern.

"Not only will a communications firm monitor what is going on in the mainstream media and blogosphere, but they will relay company information to the press," he said.

And it's off to proxy season. ■

Hercules labors more than most

Offshore oil and gas driller **Hercules Offshore Inc.** (HERO) stands out in a struggling industry, but not in a good way. Among companies that have been underperforming—crushed by the weight of falling commodity prices—Hercules has been underperforming worse and for a longer time. This lack of strength lands the company on our list of the top 10 most likely activist targets.

Much of Hercules' troubles can be traced to its old fleet—the average age of the rigs is 30 years, giving the company a distinct disadvantage among competitors that have invested heavily in high-specification rigs that can go into the tougher environments. That capability is necessary as oil becomes harder to extract.

So what could an activist investor accomplish? One industry observer said the assets' render them unattractive to potential buyers, so a sale seems unlikely.

Still, Moody's noted that Hercules has a contract with Maersk Oil North Sea UK Ltd., a subsidiary of **A.P. Moller-Maersk A/S**, for a new jackup rig, which will be the company's entry to the U.K.'s North Sea. Industry watchers also said they expect the company will get traction with three other riges, which could be of value to the right strategic or infrastructure fund.

Oil sector experts acknowledged that Hercules executives are highly regarded, but with the company's lack of return on invested capital, and a total return for the past two years below that of competitors, it wouldn't be surprising if an activist felt that a change might do some good.

Elsewhere, after a tough holiday season, **Bed Bath & Beyond Inc.** (BBBY) missed consensus estimates on fiscal third-quarter 2014 revenue and comparable growth and lowered its full-year revenue and growth estimates on Jan. 8, causing a 7% drop in its stock price. Footwear seller **Genesco Inc.** (GCO) said sales were up, but lower gross margins and lower than expected noncomparable sales meant that the company kept its projection for full-year EPS in the $4.75 to $4.85 range; it's stock price is down 4.8% since the year's start.

Both companies have been flagged as possible targets and continue to bear watching. ■—Paula Schaap

ACTIVISM

The watch list

Companies that might soon rank among the top 10 likely targets

BY THE DEAL STAFF

American Eagle Outfitters Inc. (AEO)—On Jan. 8, the retailer said comparable sales decreased 2% for the nine weeks ended Jan. 3, though it also expected fourth-quarter results to show EPS growth of 19% to 26%. It said December sales were positive with fewer promotions leading to better margins.

Ascena Retail Group Inc. (ASNA)—On Jan. 12, the women's specialty retail operator said it was reducing its full-year earnings per share guidance because of lower than planned sales and greater promotional activity at Justice.

Bed Bath & Beyond Inc. (BBBY)—On Jan. 8, the household goods retailer missed consensus estimates on fiscal third-quarter 2014 revenue and comparable growth and lowered its full-year revenue and growth estimates.

Blucora Inc. (BCOR)—Owner of TaxAct, Web search group InfoSpace, and computer and electronics online retailer Monoprice. dropped more than 10% on Nov. 6, after it topped earnings per share estimates but missed revenue targets.

Bravo Brio Restaurant Group Inc. (BBRG)—The Midwest restaurant chain, which is trading at multiples that could make it attractive to PE firms, recently announced a modified "Dutch auction" tender offer for up to $50 million of its shares.

Brown Shoe Co. (BWS)—A footwear and retail conglomerate that could be split between its wholesale brands and its Famous Footwear.

Cablevision Systems Corp. (CVC)—Consolidation is in the air in the cable industry; Cablevision has attractive systems in the New York metro area. Cablevision topped EPS targets on Nov. 6, but posted declines in video and broadband subscribers.

Checkpoint Systems Inc. (CKP)—Things haven't changed much at the RFID products provider since an activist hedge fund sold its stake in 2011. On Nov. 3, the company reported quarterly revenue was down 8.2% year-over-year.

Children's Place Inc. (PLCE)—**Spring-Owl Asset Management LLC**, a relatively new arrival on the activist scene, more than doubled its stake in the company as of third-quarter 2014, according to its portfolio filings.

Coach Inc. (COH)—Luxury accessory maker's shares are down almost 40% year-to-date, and it reported disappointing sales in the third quarter. Though it made a deal to buy footwear maker Stuart Weitzman for $530 million, the acquisition has been criticized as potentially distracting to its turnaround.

Con-way Inc. (CNW)—Trucking company is in the middle of a turnaround, but a spin off or sale of its Menlo Logistics division could unlock value.

Contango Oil & Gas Co. (MCF)—The oil and gas explorer on Nov. 12 said that net income for the quarter ended Sept. 30 was $3.7 million, or $0.19 per basic and diluted share, compared to net income of $19.7 million, or $1.30 per basic and diluted share, for the same period last year.

Cornerstone OnDemand Inc. (CSOD)—Long-short investment fund **Wasatch Advisors Inc.** disclosed Dec. 10 that it has taken a passive 10.3% stake in the cloud software developer.

Cubic Corp. (CUB)—The company is buying networking gear maker **Dtech Labs Inc.** for $115 million; as a governor contractor running out of business, in theory this deal should help with that, over time.

Cyberonics Inc. (CYBX)—Though shares of the medtech company that makes implants to treat epilepsy got a bump from its Nov. 20 earnings report that beat expectations for EPS, Herb Greenberg at TheStreet.com's Reality Check isn't persuaded. He had already said that Cyberonics was running into issues because of new treatments that have evolved, including greater use of medical marijuana by epileptics.

DSW Inc. (DSW)—Though a bit pricey for private equity, the shoe retailer could attract activists who are looking to persuade the company to sell. On Nov. 26, DSW reported quarterly earnings—EPS beat expectations, though net income had dropped from the year before.

Five Star Quality Care Inc. (FVE)—On Dec. 17, senior living communities operator files its 10Q for the past three quarters and noted, "The process of restating certain previously issued financial statements and completing delayed filings has been burdensome to our management and increased our expenses."

Genesco Inc. (GCO)—As an apparel and footwear retailer and wholesaler, Genesco could benefit from a split-up. On Dec. 5, Genesco said its CFO was retiring at the end of the fiscal year. It also reported earnings that were weaker than expected and lowered its full-year guidance.

Health Net Inc. (HNT)—On Aug. 19, the managed care company created and filled a new position, executive vice president, chief financial and operating officer, and interim treasurer, effective Sept. 2.

ICF International Inc. (ICFI)—Hedge funds are already in the government and industry advisory company. This one

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ACTIVISM

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makes sense as a potential M&A target or for activists, but what's not clear is the timing.

Infoblox Inc. (BLOX)—**UBS** analyst Amitabh Passi called Infoblox one of the "most interesting targets within our coverage universe," in a January report. "While the stock has recently recovered from its lows, the potential for further upside is less clear."

Informatica Corp. (INFA)—**Wedbush Securities Inc.** analyst Steve Koenig wrote in a Jan. 5 report about the enterprise software maker, which noted signs of weakness among financial services and industrial customers, that "contradict the key part of our INFA thesis—namely, that the company could repair its execution by 4Q14 after two poor quarters—and they suggest something deeper is going on than subpar sales efforts."

Jacobs Engineering Group Inc. (JEC)—Engineering and construction company has been bogged down by contract delays, disappointing Wall Street. Jacobs could be pushed to sell off some of its divisions, perhaps its large energy sector practice. On Nov. 18, Jacobs reported earnings; it was a miss on revenue, but a beat on EPS.

Jarden Corp. (JAH)—Consumer products conglomerate is back on the watch list after an industry observer told The Deal it was considering spinoffs or sales of its disparate businesses.

Kirkland's Inc. (KIRK)—Home decor and arts and crafts purveyor could find itself an activist target, but sources tell The Deal that management is open to a buyout.

Kroger Co. (KR)—The market loves the grocery chain that consistently beats expectations and is well managed. On Dec. 4, the company outstripped analyst expectations, posting a 21% rise in third-quarter profits.

Lumos Networks Corp. (LMOS)—Value investor **Corbyn Investment Management Inc.** disclosed a passive 8.3% stake in the telecom on Jan. 8.

ManTech International Inc. (MANT)—Government IT provider's third-quarter revenue came in at $447 million versus its $484 million estimate and guided to full-year lower (again).

NetApp Inc. (NTAP)—Data storage company is facing secular issues as enterprise clients hold off on whether to upgrade or wait for the industry to sort out the issue of cloud versus flash drive.

Orthofix International NV (OFIX)—On Sept. 30, hedge fund and sometime activist **Camber Capital Management LLC** revealed a 6.5% passive stake in the Mexico City-based spinal and orthopedic medtech company.

Owens & Minor Inc. (OMI)—On Oct. 27, the medial supplies distributor reported third-quarter operating earnings were down to $35.4 million from $49.2 million the year before; adjusted earnings per share fell to $0.42 from $0.47 in the year-ago period.

Pier 1 Imports Inc. (PIR)—The home furnishings seller could find itself being eyed by hedge funds due to the company's attractive valuation and balance sheet.

Roundy's Inc. (RNDY)—Private equity firm **Willis Stein & Partners** still holds a 15% stake in the Milwaukee-based supermarket chain since taking it public in 2012, though on Aug. 18, the firm's founder, John Willis, resigned from the board, effective at the end of the year, according to a regulatory filing.

ScanSource Inc. (SCSC)—Scanning technology company reported fiscal first-quarter sales of over $790 million on Oct. 30, topping expectations of $750 million.

Stage Stores Inc. (SSI)—**Point72 Asset Management LP**, the rebrand of Steve Cohen's SAC Capital, filed a 13G on Sept. 26, revealing a 5.1% passive stake in Stage Stores.

Stanley Black & Decker Inc. (SWK)—The toolmaker said in an Oct. 6 regulatory filing that it was going to focus on improving the margins in its security business and that it also intended to return about $1.5 billion to $1.7 billion of capital to shareholders through 2015 by extending its pause in M&A activity, continuing its dividend growth and repurchasing up to $1 billion in stock.

Textron Inc. (TXT)—Would be a big play, but this company has been a popular rumor as an activist target. Mini-conglomerate model with no strong connection between businesses that some have complained suffer from conglomerate discount.

Urban Outfitters Inc. (URBN)—On Jan. 8, apparel retailer said holiday sales for the two months ended Dec. 31 were up 10% over the same period last year.

US Cellular Corp. (USM)—US Cellular parent, **Telephone and Data Systems Inc.** has sold wireless towers and other operations and looks increasingly small in a consolidating industry.

Viad Corp. (VVI)—On Dec. 5, Viad chairman, president and CEO Paul Dykstra resigned from the company to be replaced by Steven Moster, formerly of Global Experience Specialists.

Western Union Co. (WU)—Herb Greenberg at TheStreet.com's Reality Check recently put Western Union on his watch list because of what he viewed as rising competition for remittances pressuring margins, but more importantly, management has been resetting its prices to try to get out in front of competition and not being entirely up front about how it would affect overall growth.

YRC Worldwide Inc. (YRCW)—Trucking company has a labor deal in place that should lead to some relief from lenders.

Zagg Inc. (ZAGG)—The maker of accessories for mobile and gaming devices could become an activist target as its stock price has declined in line with its revenue and Ebitda. ■

THE CROSSHAIRS

TOP 10 POTENTIAL ACTIVIST TARGETS

THIS WEEK	LAST WEEK

1 | 1 Hercules Offshore Inc. [HERO]

Even before oil prices started to slide, the offshore drilling rig provider was having its problems. Most of its rigs are old, which, while fine for shallow water Gulf of Mexico drilling, aren't the high specification, harsh environment rigs competitors have built in recent years. The company's stock has declined 86% over the past year; Hercules now has a market capitalization of about $125 million. But it has a contract to build a new rig in the U.K.'s North Sea and a couple of other rigs that could get it through until energy prices stabilize. The question is, will an investor decide that the company should start to consider sale opportunities sooner, rather than later.

P/E	ROIC	D/C	I %	MC	60DMA	UPI
NA	NA	59.70	3.23	$124.5M	$1.27	404%

2 | 2 Key Energy Services Inc. [KEG]

Simmons & Co. International said Dec. 3 that continued operational problems along with the stock performing significantly worse than its peers increasingly raise the prospects of potential suitors looking at the oil services company for consolidation purposes. On Dec. 16, Wunderlich analyst Jason Wangler cut his rating on Key from hold to sell, as the "greatly reduced" activity outlook for next year will probably hit it "very hard" both operationally and financially.

P/E	ROIC	D/C	I %	MC	60DMA	UPI
NA	NA	38.02	3.27	$219.5M	$2.10	379%

3 | 3 Approach Resources Inc. [AREX]

Jeffrey Bronchick's Cove Street Capital LLC — which claims it takes a "suggestivist" approach to management — said in a regulatory filing Sept. 24 it had built up a 5.38% passive stake in the independent oil and gas explorer. Approach cut its capital expenditure program for next year by 55%, the second Permian Basin player to do so recently.

P/E	ROIC	D/C	I %	MC	60DMA	UPI
7.3	NA	26.03	10.22	$217.6M	$8.25	372%

4 | 5 Denbury Resources Inc. [DNR]

Simmons & Co. International said Dec. 31 it believes the oil and gas company might consider a carbon dioxide pipeline divestiture, which could help fortify its balance sheet. On Jan. 6 bond research firm GimmeCredit LLC changed its rating on Denbury to underperform, saying that while its liquidity appears adequate to weather the downturn in oil prices and possibly take advantage of potential acquisition opportunities, it looks like its free cash flow this year is heading lower and the outlook for 2016 is looking "very uncertain."

P/E	ROIC	D/C	I %	MC	60DMA	UPI
6.6	5.55	38.34	2.36	$2.4B	$9.17	312%

5 | - Dawson Geophysical Co. [DWSN]

Some think Dawson would be better off as part of one of the big three oil services giants. On Oct. 9, Dawson struck a deal to merge with peer TGC Industries Inc. in a stock-for-stock transaction. On Nov. 12, Dawson reported revenues of $62.6 million for the quarter ended Sept. 30, compared to $69.7 million year-over-year, and a net loss of $3.9 million or $0.49 EPS, compared to a net loss of $2.8 million or $0.35 EPS.

P/E	ROIC	D/C	I %	MC	60DMA	UPI
NA	NA	5.53	5.40	$92.8M	$13.70	274%

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60DMA: 60-day moving average **UPS:** Underperformance Index: (Percentage by which the company underperformed its peers) **ROIC:** Return on invested capital
P/E: Forward Price/Earnings ratio **D/C:** Debt to capital ratio **MC:** Market capitalization **I%:** Percentage of insider shares outstanding

THE CROSSHAIRS

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THIS WEEK	LAST WEEK	
6	5	**Atwood Oceanics Inc. [ATW]**

On Dec. 16 Moody's Investors Service changed Atwood's rating outlook to stable from positive, reflecting its view that Atwood's deleveraging from 3.2 times debt to Ebitda will take longer because of the expected weakness in offshore drilling markets through 2016 and the delayed cash flow from two uncontracted ultra-deepwater drillships under construction that will arrive six months later than previously expected. Simmons & Co. International put Atwood on its "recommended shopping list" of oil services companies hit hard by lower oil prices that would benefit from a recovery.

P/E	ROIC	D/C	I %	MC	60DMA	UPI
4.5	9.63	40.70	0.79	$1.8B	$33.08	247%

THIS WEEK	LAST WEEK	
7	-	**Gulf Island Fabrication Inc. [GIFI]**

Fabricator of offshore drilling and production platforms on Oct. 24 reported third quarter sales of $118 million, 8.5% lower than in the third quarter over last quarter and 30% lower over the same quarter last year, primarily due to substantial revenue for three large deep water projects recognized during the third quarter 2013.

P/E	ROIC	D/C	I %	MC	60DMA	UPI
12.3	4.46	0	2.50	$243.7M	$20.05	187%

THIS WEEK	LAST WEEK	
8	6	**Demand Media Inc. [DMD]**

Internet media company has been hurt by changes to Google's algorithm, especially at its flagship website eHow, leading the company to project that revenues would continue to decline this year. Shares plummeted on Nov. 10, as the company topped third quarter expectations but forecast a drop in sales and Ebitda for "the next several quarters."

P/E	ROIC	D/C	I %	MC	60DMA	UPI
NA	NA	16.25	6.81	$86.9M	$6.04	173%

THIS WEEK	LAST WEEK	
9	7	**Weatherford International plc [WFT]**

With competitor Baker Hughes Inc. tieing up with Halliburton Co. in a $34.6 billion deal, the oil services company may come back on radar screens as a takeover target, analysts say. Weatherford could also sell assets — Oppenheimer analyst James Schumm said Dec. 3 that the company could sell as much as $500 million in assets like its production testing and wellheads unit. Such a sale would bolster Weatherford's cash reserves and put it in the position to acquire assets being divested from the Halliburton-Baker Hughes deal.

P/E	ROIC	D/C	I %	MC	60DMA	UPI
9.81	NA	51.55	1.1	$7.7B	$13.56	161%

THIS WEEK	LAST WEEK	
10	8	**Titan International Inc. [TWI]**

For its third quarter reported on Nov. 4, the company took a loss of $4.3 million or $0.14 per diluted share compared to net income of $3.2 million or $0.10 per diluted share year-over-year. It also took an inventory write-down and guided lower on its full year adjusted Ebitda figures. On Nov. 19, amended bylaws came into effect — most appear to be housekeeping updates, but some are more protective of the company, especially a change to the vote needed to remove directors, from a simple majority to a super-majority. Activist Starboard Value LP revealed it had added the stock to its portfolio in the third quarter with a 0.93% stake.

P/E	ROIC	D/C	I %	MC	60DMA	UPI
NA	NA	41.78	4.16	$530.2M	$10.27	137%

60DMA: 60-day moving average **UPS:** Underperformance Index: (Percentage by which the company underperformed its peers) **ROIC:** Return on invested capital **P/E:** Forward Price/Earnings ratio **D/C:** Debt to capital ratio **MC:** Market capitalization **I%:** Percentage of insider shares outstanding

BANKRUPTCY

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Full measure

BY KELSEY BUTLER

With the new year came a new home for one Washington attorney group.

A trio of bankruptcy attorneys—H. Jason Gold, Valerie P. Morrison and Dylan G. Trache—landed at **Nelson Mullins Riley & Scarborough LLP** on Jan. 1. Their previous firm, **Wiley Rein LLP**, on Nov. 6 announced it was parting ways with its bankruptcy practice, which included eight attorneys.

"This very difficult decision to spin off the bankruptcy practice follows an in-depth analysis of the current and future needs of the firm's clients and is aligned with the firm's new strategic plan that we launched at our recent annual partner retreat," managing partner Peter Shields said in a statement on Nov. 6. "We all value the bankruptcy team, and we hope to work collaboratively with them in the future."

The news certainly has raised eyebrows in the restructuring community, leaving some wondering if a slowdown in bankruptcies could mean similar spinoffs for other groups. (For the latest state of the playing field, see The Deal's bankruptcy league tables on the adjoining pages.)

Though Jeffrey L. Jonas, a bankruptcy and corporate restructuring partner at **Brown Rudnick LLP**, said he couldn't comment on this particular situation, he said when it comes to bankruptcy, "I don't think it's a one-off situation."

He added that in the space, "things have been slow and continue to be slow, and that's a function of a bunch of economic factors."

Mark Powers, a partner at Massachusetts law firm **Bowditch & Dewey LLP**, said cyclical and secular components are contributing to the downturn in bankruptcy work. "The cyclical [aspect] is pretty apparent to most of us," Powers said. "The economy is stronger, and interest rates are low. Corporations have access to liquidity, debt levels are down, and even oil prices are down. There's that aspect to it, and that's not going to last forever."

In addition, Powers noted a "systemic or secular angle" to the drop-off in cases—and that it is due to the sometimes-astronomical costs of bankruptcy.

Powers called Chapter 11 a "really expensive process" due to the procedural nature of the system.

He said that as a result, distressed companies and their creditors are looking to other ways to deal with a restructuring. "Banks and other lenders are using vehicles to deal with borrowers who default or companies that are in financial distress," he said.

Those can include state law remedies such as a foreclosure or secured-party sales of personal property. A company may also elect to do an assignment for the benefit of creditors, which does not have the often-burdensome hearing requirements that a bankruptcy does. Indeed, young women's apparel retailer **Body**

LAW FIRMS, VOLUME ($BILL.)

	Law firm	No. of active cases	Avg. liabilities	Liabilities
1	Saul Ewing LLP	87	$12.6	$1,091.9
2	Akin Gump Strauss Hauer & Feld LLP	86	12.5	1,073.1
3	Vedder Price PC	52	20.4	1,061.0
4	Duane Morris LLP	138	6.9	951.3
5	Morgan, Lewis & Bockius LLP	75	12.4	931.5
6	King & Spalding LLP	47	19.5	914.4
7	Debevoise & Plimpton LLP	14	65.1	911.1
8	Latham & Watkins LLP	60	15.1	908.7
9	Goulston & Storrs PC	47	19.3	907.7
10	DLA Piper	90	10.0	900.5
11	Orrick, Herrington & Sutcliffe LLP	42	20.8	874.5
12	Cleary Gottlieb Steen & Hamilton LLP	14	62.4	873.4
13	Ropes & Gray LLP	17	50.0	849.7
14	Chadbourne & Parke LLP	28	29.5	826.2
15	Skadden, Arps, Slate, Meagher & Flom LLP	63	12.9	810.0

LAWYERS, VOLUME ($BILL.)

	Lawyer	Law firm	No. of active cases	Avg. liabilities	Liabilities
1	Schein, Michael	Vedder Price PC	27	$37.8	$1,021.2
2	Rosner, Douglas	Goulston & Storrs PC	30	29.7	892.1
3	Hahn, Richard	Debevoise & Plimpton LLP	8	110.2	881.5
4	Davidson, Scott	King & Spalding LLP	9	95.8	862.1
5	Golden, Daniel	Akin Gump Strauss Hauer & Feld LLP	14	59.6	834.9
6	Gilhuly, Peter	Latham & Watkins LLP	22	37.8	831.8
7	Steinberg, Arthur	King & Spalding LLP	10	79.4	794.4
8	Wofford, Keith	Ropes & Gray LLP	3	263.5	790.5
9	Nixon, Timothy	Godfrey & Kahn SC	4	196.5	785.9
10	Williamson, Brady	Godfrey & Kahn SC	2	392.9	785.8
11	Lipke, Douglas	Vedder Price PC	41	18.2	746.6
12	Lauria, Thomas	White & Case LLP	17	43.5	739.5
13	LeMay, David	Chadbourne & Parke LLP	9	81.4	732.2
14	Mayer, Thomas	Kramer Levin Naftalis & Frankel LLP	8	89.8	718.6
15	Seife, Howard	Chadbourne & Parke LLP	14	50.7	709.5

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BANKRUPTCY

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Central Corp. (BODY) chose such a course on Jan. 9.

"These alternatives have been used increasingly over the last 10 to 15 years simply because the cost of Chapter 11 is very high," he said. "Obviously, it depends on the size and nature of the collateral and the relationships with the creditors. The cost of Chapter 11 has been a challenge for smaller- to midsize businesses."

Kenneth Rosen, who leads **Lowenstein Sandler LLP**'s bankruptcy, financial reorganization and creditors' rights department, echoed these sentiments.

"Chapter 11 is very expensive, and to a large degree, the price of doing a Chapter 11 is too expensive for a lot of small companies," he noted. Rosen said he was seeing an increase in Article 9 transactions, where a troubled company's assets are surrendered to the bank and sold to another party.

SOME INDUSTRY EXPERTS said the Chapter 11 challenges, coupled with a shrinking number of filings, certainly could lead to smaller practices.

"I think firms are always shifting and looking at the next very busy, exciting practice," Jonas said. "I haven't seen [other] firms saying wholesale that they want to be out of the bankruptcy practice, but there may be some downsizing. We've managed to keep busy as a group, and hopefully that will continue."

Rosen said, "A lot of law firms may downsize the size of their departments if they see that business is slow."

He added, "I do not believe that the major law firms [in the space] will jettison their bankruptcy departments—they will simply downsize."

Powers concluded, "I don't see the bankruptcy practice as a growth practice necessarily ... although, I do think that [presently], we seem to be at a time where the practice is at its lowest."

Gold, meanwhile, said his group is "settled in and hard at work" after a seamless transition to Nelson Mullins.

The former leader of the Wiley Rein group added that the trio is actively working on dozens of cases, most notably serving as Chapter 7 trustee for former Washington electrical contractor **Truland Group Inc.**

For his part, in an e-mailed statement, Wiley Rein's Shields said: "We are very pleased to hear that Jason, Valerie and Dylan have joined Nelson Mullins. We have enjoyed a great relationship with them, both as partners and friends, and look forward to working with them in the future."

There will be plenty of work, Gold said.

"There's been a decline in bankruptcy work nationwide in the past two or three years," he said. "I absolutely sense that it is turning because the economy is improving—and that sounds counterintuitive. But banks will lend a little more, underwriting standards will be loosened, and people will be investing more." With those gambles, some will be successes, and some will be failures, Gold said.

"We're not heading into a recession," he said, "but the natural business cycle is turning, and there are more business failures, so we are getting busier." ■

INVESTMENT BANKS, VOLUME ($BILL.)

	Bank	No. of active cases	Avg. liabilities	Liabilities
1	Blackstone Group LP	36	$22.5	$810.2
2	Miller Buckfire & Co. LLC	4	175.7	702.9
3	Jefferies LLC	14	7.1	98.8
4	Centerview Partners LLC	2	32.5	65.0
5	Peter J. Solomon Co.	2	25.2	50.4
6	Evercore Partners Inc.	1	49.7	49.7
	Millstein & Co.	1	49.7	49.7
7	Moelis & Co. LLC	15	2.4	36.4
8	Solic Capital Advisors LLC	11	2.8	31.1
9	Houlihan Lokey Inc.	15	1.6	24.5
10	UBS	2	11.3	22.6

CRISIS MANAGEMENT FIRMS, VOLUME ($BILL.)

	Firm	No. of active cases	Avg. liabilities	Liabilities
1	FTI Consulting Inc.	98	$10.0	$979.5
2	Goldin Associates LLC	11	65.3	718.2
3	Capstone Advisory Group LLC	19	8.5	162.2
4	Alvarez & Marsal LLC	29	2.9	83.1
5	Gavin/Solmonese LLC	24	2.6	61.5
6	Protiviti Inc.	17	1.9	32.0
7	AlixPartners LLP	18	1.6	29.1
8	Conway MacKenzie Inc.	20	0.8	15.2
9	Huron Consulting Group Inc.	8	1.1	8.9
10	McKinsey Recovery & Transformation Services U.S. LLC	1	5.1	5.1

NONINVESTMENT BANKS, VOLUME ($BILL.)

	Firm *	No. of active cases	Avg. liabilities	Liabilities
1	Epiq Bankruptcy Solutions LLC	80	$10.9	$874.7
2	BMC Group Inc.	64	11.4	732.6
3	Kurtzman Carson Consultants LLC	114	2.1	235.7
4	KPMG	9	8.5	76.9
5	Sard Verbinnen & Co.	2	32.5	65.0
6	Garden City Group Inc.	23	2.2	51.4
7	Perry Street Communications	1	49.7	49.7
8	Ernst & Young	17	2.0	33.8
9	EisnerAmper LLP	25	0.7	16.3
10	Donlin, Recano & Co.	12	1.3	15.6

Ernst & Young includes Ernst & Young Inc. and Ernst & Young LLP; KPMG includes KPMG Corporate Recovery, KPMG Inc. and KPMG LLP.

BANKRUPTCY

Baker Botts takes its quest to the top

BY KIRK O'NEIL

Facing onerous bankruptcy fees and costs women's apparel retailer **Body Central Corp.** on Jan. 9 decided to liquidate under the assignment for the benefit of creditors process supervised by a Florida state court. In early December, the **American Bankruptcy Institute**'s Commission to Study the Reform of Chapter 11 concluded that, among other things, the current process is too expensive.

Against this backdrop **Baker Botts LLP** will go before the Supreme Court sometime this year to challenge a 5th Circuit Court of Appeals ruling that disallowed the $5 million that the Houston law firm wants to charge **Asarco LLP** for the hours it worked to defend the fees it levied on the Tucson, Ariz., energy firm during its bankruptcy proceedings from 2005 to 2009.

"It would not be fair for objectors to put debtor counsel through thousands of dollars' worth of meritless objections to their fee applications and not allow counsel to recover those costs," said Baker Botts' Aaron Streett, who will handle his firm's appeal before the justices.

Streett said he expects the Supreme Court to schedule a hearing on that appeal in the last week of February or first week of March.

Bankruptcy professionals following the appeal believe the 5th Circuit's ruling could have a chilling effect on fees.

Adam Lewis, an attorney at **Morrison & Foerster LLP**, said rejecting compensation for defending fee applications invites the debtor to pummel its counsel over the bills. "It induces a firm to settle for less than they're entitled to," he said. "It invites a careless attack."

Others see more nuance. "If you're asking for $5 million for defending your fee application, you need to remember, does it benefit the [bankruptcy] estate?" said William Brandt, the CEO of turnaround advisers **Development Specialists Inc.** "It's hard to come up with an argument that $5 million for defending a fee would be a benefit to the estate. It's never going to be an issue of whether or not it's the amount or reasonableness of it."

The Supreme Court on Oct. 2 accepted Baker Botts' writ of certiorari to hear its case against Asarco to decide whether Section 330(a) of the Bankruptcy Code grants bankruptcy judges discretion to award compensation for the defense of a fee application.

Baker Botts filed its opening brief with the Supreme Court on Dec. 3 and Asarco has six weeks to respond .

SIX WEEKS in the Asarco case feels like a speck in time. The company filed for Chapter 11 in the U.S. Bankruptcy Court for the Southern District of Texas in Corpus Christi on Aug. 9, 2005, after it had run out of cash and faced $10 billion in asbestos, environmental and toxic-tort liability, according to court papers.

The Department of Justice called it the largest environmental bankruptcy in U.S. history and dismissed its chances of reorganization as "slim." Because of dealings by its parent, **Americas Mining Corp.**, in transferring ownership of affiliate Southern Copper Corp., there was a significant possibility that Asarco would be forced to liquidate and creditors were expected to get pennies on the dollar in recovery, according to court papers.

Baker Botts signed on to represent the debtor in 2008 and 2009, obtaining full payment of all claims totaling $3.56 billion and refunding about $70 million to Asarco at the conclusion of the Chapter 11 case on Dec. 9, 2009. The law firm also successfully defended a fraudulent transfer action against Americas Mining to recover controlling interest in Southern Copper Corp., which resulted in a judgment against the parent company valued at $7 billion to $10 billion.

The judgment compelled Americas Mining to fully fund Asarco's reorganization plan, while receiving a release and regaining control of the reorganized Asarco. All told, for its trouble, Baker Botts billed for $113 million in attorneys' fees and $6 million in expenses.

Because of its exceptional work in winning the judgment against Americas Mining, Baker Botts sought a $22 million performance enhancement, in addition to the $113 million in fees, which had been previously approved by Asarco.

On the effective date of Asarco's reorganization plan on Dec. 9, 2009, Americas Mining, which had lost the multibillion-dollar fraudulent transfer judgment against Baker Botts, took control of the reorganized debtor. It was then that Asarco then "launched an all-out assault" on Baker Botts' fee application, not only objecting to the enhancement but all previously approved and paid fees, according to Baker Botts' petition to the Supreme Court.

Asarco attacked everything involved in the fees, demanding immense discovery requiring 2,350 boxes of court documents that totaled nearly six million pages and 189 gigabytes of electronic data, or about 325,000 documents in all. The bankruptcy court rejected all of Asarco's objections without merit after a six-day fee trial.

Baker Botts incurred $5.2 million defending its fees and an additional $2.8 million pursuing its enhancement fee. Judge Richard Schmidt of the Corpus Christi court on Sept. 27, 2012, awarded Baker Botts an enhancement of $4.1 million, $5 million for defending its fee application and $202,230 in expenses incurred by the law firm.

Asarco appealed the bankruptcy court decision to the U.S. District Court for the Southern District of Texas in Brownsville, which affirmed the enhancement and the award for defending fees. But it didn't award fees for defending the fee enhancement.

Asarco's law firm, **Bracewell & Giuliani LLP**, appealed the district court ruling to the 5th Circuit Court of Appeals in New Orleans. Bracewell & Giuliani challenged the fee enhancement and whether the bankruptcy court may ever award fees under Section 330(a) to bankruptcy attorneys or professionals for successfully defending their fees.

The 5th Circuit on April 30 affirmed the $4.1 million fee enhancement, but reversed the award for compensation for defend-

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BANKRUPTCY

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ing fees. The 5th Circuit held that Section 330(a) doesn't authorize compensation for the costs counsel or professionals bear to defend their fee applications, according to court papers.

IN RULING AGAINST compensation for defense of fee applications, the 5th Circuit invoked a so-called American Rule, which is a presumption that parties to litigation bear their own attorneys' fees.

"We think the 5th Circuit got it right," said Bracewell & Giuliani's Jeff Oldham, who's heading the legal team representing Asarco. "The American Rule definition calls for parties to bear their own expenses. Congress did not change that in Section 330 in the Bankruptcy Code.

"We're not saying fees can never be awarded," Oldham continued. "The 5th Circuit allows exceptions to the American Rule in the case of a frivolous or bad faith objection. There are safeguards in effect so you won't have a negative effect on the bankruptcy system.

"I can't say you can never get fees. To the extent the courts award compensation for fee applications under the Bankruptcy Code, these aren't authorized by Congress," he noted.

But Baker Botts' Streett points out that other courts have ruled differently. The 9th Circuit, for example, has long held that professionals could be compensated for time devoted to preparation and presentation of fee applications dating back to the Nucorp Energy Inc. bankruptcy case in 1985. It has subsequently updated its opinion on the matter in 1991, 2002, 2004 and 2007.

"Not only has the 9th Circuit allowed compensation, almost every court that has considered the issue has allowed compensation for fee defense," Streett explained. "One of the goals Congress had when it overhauled the Bankruptcy Code in 1994 was for bankruptcy lawyers to be fully compensated."

Streett said his team was surprised by the 5th Circuit's decision, since they believe almost all the courts agree with them.

"Our point is that it is an issue that is decided in the bankruptcy courts," Streett noted. "We assert that there is no prohibition of compensation for defending fee applications. It's another part of case work that bankruptcy lawyers do and the bankruptcy courts have the discretion and should be allowed to award costs."

Attorneys have routinely obtained approval from bankruptcy courts to recover compensation for defending fee applications for work they've completed in bankruptcy cases, Streett said.

Compensation for defending fees, which has been attacked by debtors or other parties in bankruptcy cases, has also been upheld on appeal in federal district courts.

"We did think the statute was clear and the rest of the other courts have gone our way on it," Streett said. "In the 5th Circuit, it's a completely open question. We're certainly confident we had the better argument. We're glad the Supreme Court agreed to hear it."

Development Specialists' Brandt certainly is mindful of the current zeitgeist when it comes to bankruptcy costs. "I would imagine there a difference between a $10,000 or $15,000 bill and a $5 million bill for defending your fees," he noted. "And you should be able to defend your fee application, but is it a benefit?" ■

INVESTMENT BANKS, VOLUME ($BILL.)

	Bank	No. of active cases	Avg. liabilities	Liabilities
1	Blackstone Group LP	36	$22.5	$810.2
2	Miller Buckfire & Co. LLC	4	175.7	702.9
3	Jefferies LLC	14	7.1	98.8
4	Centerview Partners LLC	2	32.5	65.0
5	Peter J. Solomon Co.	2	25.2	50.4
6	Evercore Partners Inc.	1	49.7	49.7
	Millstein & Co.	1	49.7	49.7
7	Moelis & Co. LLC	15	2.4	36.4
8	Solic Capital Advisors LLC	11	2.8	31.1
9	Houlihan Lokey Inc.	15	1.6	24.5
10	UBS	2	11.3	22.6

CRISIS MANAGEMENT FIRMS, VOLUME ($BILL.)

	Firm	No. of active cases	Avg. liabilities	Liabilities
1	FTI Consulting Inc.	98	$10.0	$979.5
2	Goldin Associates LLC	11	65.3	718.2
3	Capstone Advisory Group LLC	19	8.5	162.2
4	Alvarez & Marsal LLC	29	2.9	83.1
5	Gavin/Solmonese LLC	24	2.6	61.5
6	Protiviti Inc.	17	1.9	32.0
7	AlixPartners LLP	18	1.6	29.1
8	Conway MacKenzie Inc.	20	0.8	15.2
9	Huron Consulting Group Inc.	8	1.1	8.9
10	McKinsey Recovery & Transformation Services U.S. LLC	1	5.1	5.1

NONINVESTMENT BANKS, VOLUME ($BILL.)

	Firm *	No. of active cases	Avg. liabilities	Liabilities
1	Epiq Bankruptcy Solutions LLC	80	$10.9	$874.7
2	BMC Group Inc.	64	11.4	732.6
3	Kurtzman Carson Consultants LLC	114	2.1	235.7
4	KPMG	9	8.5	76.9
5	Sard Verbinnen & Co.	2	32.5	65.0
6	Garden City Group Inc.	23	2.2	51.4
7	Perry Street Communications	1	49.7	49.7
8	Ernst & Young	17	2.0	33.8
9	EisnerAmper LLP	25	0.7	16.3
10	Donlin, Recano & Co.	12	1.3	15.6

Ernst & Young includes Ernst & Young Inc. and Ernst & Young LLP; KPMG includes KPMG Corporate Recovery, KPMG Inc. and KPMG LLP.

BANKRUPTCY LEAGUE TABLES

LAW FIRMS, NUMBER

	Law firm	No. of active cases
1	Duane Morris LLP	229
2	Young Conaway Stargatt & Taylor LLP	171
3	Richards, Layton & Finger PA	166
4	Ballard Spahr LLP	142
5	DLA Piper	127
6	Pachulski Stang Ziehl & Jones LLP	115
	Saul Ewing LLP	115
7	Dentons	101
8	Cooley LLP	100
9	Akin Gump Strauss Hauer & Feld LLP	99
10	Morgan, Lewis & Bockius LLP	97
11	McCarter & English LLP	91
12	Latham & Watkins LLP	88
13	Lowenstein Sandler LLP	83
14	Katten Muchin Rosenman LLP	80
15	Skadden, Arps, Slate, Meagher & Flom LLP	77
	Vedder Price PC	77
16	Blank Rome LLP	73
	Reed Smith LLP	73
17	King & Spalding LLP	70
18	Cole, Schotz, Meisel, Forman & Leonard PA	63
19	Goulston & Storrs PC	62
	Orrick, Herrington & Sutcliffe LLP	62
20	Greenberg Traurig LLP	60
21	Kirkland & Ellis LLP	59
22	Weil, Gotshal & Manges LLP	56
23	DelBello, Donnellan, Weingarten, Wise & Wiederkehr LLP	55
24	Berger Singerman LLP	47
25	Holland & Knight LLP	46
	Kelley Drye & Warren LLP	46
26	Levene, Neale, Bender, Yoo & Brill LLP	44
	Sidley Austin LLP	44
27	Dechert LLP	42
	White & Case LLP	42
28	Jackson Walker LLP	41
29	Brown Rudnick LLP	39
	Kutner Brinen Garber PC	39
	Schulte Roth & Zabel LLP	39
30	Jones Day	38
	Stichter, Riedel, Blain & Prosser PA	38

Includes all debtor, creditor and other assignments within active bankruptcy cases in the U.S. and Canada. All cases active as of Dec. 31, 2014.

LAWYERS, NUMBER

	Lawyer	Law firm	No. of active assignments
1	Branch, Dustin	Katten Muchin Rosenman LLP	468
2	Pollack, David	Ballard Spahr LLP	329
3	Huben, Brian	Katten Muchin Rosenman LLP	275
4	Carr, James	Kelley Drye & Warren LLP	108
5	Minuti, Mark	Saul Ewing LLP	82
6	Collins, Mark	Richards, Layton & Finger PA	79
7	Herman, Neil	Morgan, Lewis & Bockius LLP	58
8	Nestor, Michael	Young Conaway Stargatt & Taylor LLP	57
9	Mayer, Katharine	McCarter & English LLP	48
10	Bellavia, Leonard	Bellavia Blatt Andron & Crossett PC	47
11	Brady, Robert	Young Conaway Stargatt & Taylor LLP	46
12	Jones, Laura	Pachulski Stang Ziehl & Jones LLP	44
13	Lipke, Douglas	Vedder Price PC	41
	Taylor, William	McCarter & English LLP	41
14	Gottlieb, Lawrence	Cooley LLP	40
15	Heath, Paul	Richards, Layton & Finger PA	36
	Miller, Brett	Morrison & Foerster LLP	36
	Rosen, Kenneth	Lowenstein Sandler LLP	36
16	Ford, Buddy	Buddy D. Ford PA	35
	Holden, Frederick	Orrick, Herrington & Sutcliffe LLP	35
	Pasternak, Jonathan	DelBello, Donnellan, Weingarten, Wise & Wiederkehr LLP	35
	Rosner, Douglas	Goulston & Storrs PC	35
17	Hershcopf, Cathy	Cooley LLP	34
18	DeFranceschi, Daniel	Richards, Layton & Finger PA	33
	Schein, Michael	Vedder Price PC	33
19	Indyke, Jay	Cooley LLP	32
20	Gilhuly, Peter	Latham & Watkins LLP	29
	Knight, John	Richards, Layton & Finger PA	29
	Kutner, Lee	Kutner Brinen Garber PC	29
	Simkulak, Wendy	Duane Morris LLP	29
21	Merchant, Michael	Richards, Layton & Finger PA	28
	Oliner, Ron	Duane Morris LLP	28
22	Cleary, M. Blake	Young Conaway Stargatt & Taylor LLP	26
23	Cairns, Timothy	Pachulski Stang Ziehl & Jones LLP	25
24	Brown, Stuart	DLA Piper	24
	Haber, Eric	Cooley LLP	24
	Morgan, Pauline	Young Conaway Stargatt & Taylor LLP	24
	Singerman, Paul	Berger Singerman LLP	24
25	Hampton, Jeffrey	Saul Ewing LLP	23
	Kotler, Lawrence	Duane Morris LLP	23
	Liepins, Eric	Law Offices of Eric A. Liepins PC	23
	Rogers, Barbara	Rogers & Anderson PLLC	23

Includes all debtor, creditor and other assignments within active bankruptcy cases in the U.S. and Canada. All cases active as of Dec. 31, 2014.

BANKRUPTCY LEAGUE TABLES

INVESTMENT BANKS, NUMBER

	Bank	No. of active cases
1	Blackstone Group LP	40
2	Carl Marks Securities LLC	18
3	Houlihan Lokey Inc.	17
4	Moelis & Co. LLC	16
5	Jefferies LLC	15
6	Rothschild	13
	Solic Capital Advisors LLC	13
7	Lazard Ltd.	12
8	Mesirow Financial Holdings Inc.	9
9	Duff & Phelps Securities LLC	8
	Gordian Group LLC	8
	Perella Weinberg Partners LP	8

CRISIS MANAGEMENT FIRMS, NUMBER

	Firm	No. of active cases
1	FTI Consulting Inc.	111
2	GlassRatner Advisory & Capital Group LLC	79
3	Gavin/Solmonese LLC	36
4	Alvarez & Marsal LLC	30
5	Duff & Phelps Canada Restructuring Inc.	23
6	Conway MacKenzie Inc.	22
	Development Specialists Inc.	22
	Protiviti Inc.	22
7	Capstone Advisory Group LLC	21
8	AlixPartners LLP	20
9	Executive Sounding Board Associates LLC	14
10	Goldin Associates LLC	13

NONINVESTMENT BANKS, NUMBER

	Firm *	No. of active cases
1	Kurtzman Carson Consultants LLC	123
2	EisnerAmper LLP	97
3	Epiq Bankruptcy Solutions LLC	93
4	BMC Group Inc.	74
5	Garden City Group Inc.	31
6	PricewaterhouseCoopers	29
7	Prime Clerk LLC	28
8	Ernst & Young	23
9	Deloitte	20
	Logan & Co.	20
10	Rust Consulting/Omni Bankruptcy	18

*Deloitte includes Deloitte & Touche Inc., Deloitte & Touche LLP, Deloitte Financial Advisory Services LLP, Deloitte Tax LLP and Deloitte Touche Tohmatsu Ltd.; PricewaterhouseCoopers EC Inc., PricewaterhouseCoopers Inc. and PricewaterhouseCoopers LLP; Ernst & Young includes Ernst & Young Inc. and Ernst & Young LLP.

INVESTMENT BANKERS, NUMBER

	Banker	Bank	No. of active assignments
1	Genereux, Michael	Blackstone Group LP	12
2	Luria, Neil	Solic Capital Advisors LLC	11
3	Wu, Christopher	Carl Marks Securities LLC	10
4	Coleman, Timothy	Blackstone Group LP	8
5	Kaufman, Peter	Gordian Group LLC	7
	Klein, Richard	Jefferies LLC	7
	Rubin, Matthew	Solic Capital Advisors LLC	7
	Zelin, Steven	Blackstone Group LP	7
6	Casas, Edward	Solic Capital Advisors LLC	6
7	Cullen, Brian	Duff & Phelps Securities LLC	5
	Scherer, Joshua	Perella Weinberg Partners LP	5
	Szlezinger, Leon	Jefferies LLC	5

CRISIS MANAGERS, NUMBER

	Professional	Firm	No. of active assignments
1	Gavin, Edward	Gavin/Solmonese LLC	29
2	Simms, Steve	FTI Consulting Inc.	20
	Smith, Margaret	GlassRatner Advisory & Capital Group LLC	20
3	Glass, Ronald	GlassRatner Advisory & Capital Group LLC	19
4	Kofman, Robert	Duff & Phelps Canada Restructuring Inc.	18
5	Greenspan, Ronald	FTI Consulting Inc.	16
6	Eisenband, Michael	FTI Consulting Inc.	15
7	Star, Samuel	FTI Consulting Inc.	14
8	Weitz, Wayne	Gavin/Solmonese LLC	13
9	Madden, John	Emerald Capital Advisors	12
	Tully, Conor	FTI Consulting Inc.	12
10	Fox, Carol	GlassRatner Advisory & Capital Group LLC	11

NONINVESTMENT BANKERS, NUMBER

	Professional	Firm	No. of active assignments
1	Kass, Albert	Kurtzman Carson Consultants LLC	133
2	Mendizabal, Lorenzo	Epiq Bankruptcy Solutions LLC	86
3	Feil, Tinamarie	BMC Group Inc.	64
4	Ringer, David	EisnerAmper LLP	29
5	Waisman, Shai	Prime Clerk LLC	24
6	Wilen, Allen	EisnerAmper LLP	23
7	Calascibetta, Anthony	EisnerAmper LLP	17
	Logan, Kathleen	Logan & Co.	17
8	Phillips, Edward	EisnerAmper LLP	14
9	Lindenberg, Jay	EisnerAmper LLP	12
	Vandell, Travis	Upshot Services LLC	12
10	Gottlieb, Emily	Garden City Group Inc.	11

SAFE HARBOR

New York judges blame Delaware for 'merger tax'

One jurist writes that precedents from the First State have resulted in a 'tsunami of litigation'

BY DAVID MARCUS

Delaware judges have complained about aspects of M&A-related fiduciary duty litigation for many years. They have gone after individual lawyers in the plaintiffs' bar and occasionally on the defense side and bemoaned the dynamics that made such litigation ubiquitous. They have written academic papers on the subject and discussed it at conferences.

Two members of the New York judiciary recently joined the conversation by declining to approve proposed settlements of M&A litigation. In a case arising from the sale of Texas Industries Inc. to **Martin Marietta Materials Inc.** (MLM), Judge Shirley Werner Kornreich of the New York Supreme Court harshly censured Richard Brualdi, the lawyer for the stockholder plaintiffs City Trading Fund, for his conduct in the case. Her colleague Melvin Schweitzer went even further in rejecting a preferred settlement of a lawsuit arising from **Verizon Communications Inc.**'s (VZ) $130 billion purchase of a 45% stake in Verizon Wireless from **Vodafone Group plc** (VOD). In a 15-page opinion, the judge challenged the rationale for such litigation. (The New York Supreme Court is a trial-level court.)

Kornreich acknowledged in her 37-page decision issued Jan. 7 that "the ubiquity and multiplicity of lawsuits, colloquially known as a 'merger tax,' has caused many to view such lawsuits with a certain degree of skepticism." Nonetheless, she wrote at the end of her opinion that merger taxes may be "an inevitable cost of doing business" and stressed that small stockholders should be able to challenge mergers.

The case before her, though, was egregious. She found that CTF was not a business, but rather an E*Trade brokerage account belonging to CTF principal Lawrence Bass and another individual. CTF owned 10 shares of Martin Marietta, which were worth about $1,200 in April. "Notwithstanding the current climate of merger litigation," she wrote, "this case still stands out. It stands out for its downright frivolity, and it stands out due to the **Brualdi Law Firm**'s use of CTF-like E*Trade accounts to file lawsuits, but it particularly stands out because this lawsuit has two atypical features: the acquiring company was sued instead of the selling company, and only for disclosure; and the lawsuit is based on the definitive proxy, as opposed to the preliminary proxy."

MARTIN MARIETTA announced on Jan. 28 that it had agreed to pay $2.7 billion in stock for Texas Industries in a deal that required approval from both sets of stockholders. The buyer filed a preliminary proxy on March 3 and its definitive proxy on May 30, the same day Brualdi filed his suit and a month to the day before the Martin Marietta stockholder vote on the deal.

As Kornreich noted, plaintiffs' lawyers generally file such suits upon the appearance of the preliminary proxy. She had a simple theory about why Brualdi waited: "The court believes the timing of the lawsuit was all about settlement pressure." The plaintiffs' bar goes after target companies on the grounds that their directors have violated their fiduciary duties by agreeing to sell. Even though most cases settle for additional disclosure, stockholder plaintiffs start by claiming that a deal came too cheap and asking for monetary damages. In Martin Marietta, Brualdi sued only for additional disclosure.

The judge scheduled a June 20 hearing on Brualdi's motion for a preliminary injunction on the Martin Marietta vote, but the parties settled the litigation hours before the hearing, with the company agreeing to make additional supplemental disclosures and pay Brualdi $500,000. Kornreich was "disturbed" and asked the defendants for supplemental briefs on "the important public policy issues at stake." Martin Marietta used **Cravath, Swaine & Moore LLP** on both the deal and the litigation, while Texas Industries tapped **Wachtell, Lipton, Rosen & Katz**. The request put the defendants in a difficult spot, since they had to describe the gamesmanship involved in M&A-related fiduciary duty litigation without disparaging their own settlement.

Kornreich's displeasure with Brualdi was clear in a Nov. 20 hearing, and in her opinion she found the additional disclosures were "grossly immaterial" and savaged the "modus operandi" of Brualdi and Bass. "They purchase nominal amounts of shares in public companies," she wrote. "Then when one of those companies announces a merger, the partnership engages the Brualdi firm to file a merger tax lawsuit. Since 2010, the Brualdi Law Firm has filed at least 13 lawsuits in this court in the name of different partnerships." Brualdi and CTF are "shrewd investors in litigation," Kornreich wrote, which made them inappropriate as representatives for the rest of Martin Marietta's stockholders.

She noted that Brualdi had employed the same strategy in the Delaware Court of Chancery. In a 2007 case arising from the sale

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SAFE HARBOR

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of SS&C Technologies Inc., then-Vice Chancellor Stephen Lamb rejected a proposed settlement in a case where Brualdi represented the stockholder plaintiffs. Lamb ended up imposing sanctions on Brualdi, which essentially drove the firm from litigating in Delaware. At the very least, Brualdi suffered significant reputational damage in New York from Martin Marietta.

The Martin Marietta decision was about the censuring of an overly aggressive lawyer; in Verizon, Schweitzer, who retired as an active judge on Dec. 31 after turning 70 last year, questioned the logic of shareholder litigation rather than the behavior of a single lawyer. Like Kornreich, Schweitzer faced a class action suit brought against an acquiring company. In the case before him, stockholders of Verizon Communications challenged the company's $130 billion cash and stock purchase of a 45% stake in Verizon Wireless from Vodafone, which was announced in September 2013.

JUDGE SHIRLEY WERNER KORNREICH

JUDGE MELVIN SCHWEITZER

Verizon agreed to settle the case on Dec. 6, 2013, by making additional disclosures and promising to get a fairness opinion from an independent financial adviser if it sold or spun off assets of Verizon Wireless with a book value of $1.4.4 billion or more within three years.

Schweitzer held a hearing on the proposed settlement on Dec. 2, 2014. Two objectors to the settlement spoke, as did Sean Griffith, a professor at Fordham University School of Law and author of a recent law review article critiquing the current state of M&A-related stockholder litigation.

The judge found that the additional disclosures Verizon agreed to make were of little value to stockholders. Schweitzer intimated that the obsessive focus the disclosure of valuation metrics in such cases is misplaced. "Who could possibly be concerned with whether the transaction was valued by the parties alone or only after consultation with their financial advisors," he wrote. "What truly matters is the agreed-upon price which was determined at the end of the day by the parties, as were all the other terms of the transaction."

Schweitzer also questioned the value of Verizon's agreement to get a fairness opinion on future Verizon Wireless deals. "Historically," he wrote, "boards of directors and officers of public companies were ambivalent with respect to the need for an investment banker's fairness opinion as a condition to closing a merger." That changed with the Delaware Supreme Court's 1985 decision in Smith v. Van Gorkum, in which the court found that target company directors had violated their fiduciary duty of care in part because they did not get a fairness opinion on the sale of the company. After the ruling, target boards got fairness opinions as a matter of course.

THAT PRACTICE has not become standard when companies divest assets, and, Schweitzer wrote, "An objector's submission notes that only six of 18 asset divestitures valued at over $10 billion in the last 10 years are reported to have been opined upon by an investment banker." That aspect of the proposed settlement, Schweitzer wrote, "locks in an additional layer of cost without any assurance that real value will be obtained for the expenditure."

In the final paragraphs of his decision, Schweitzer wrote that "the tsunami of litigation and attendant suspect disclosure-only settlements associated with public acquisitions today" have their "root cause in the judicial precedents of the last 25 years dealing with corporate governance in connection with merger." This case law comes, of course, from Delaware, and though it was initially meant to protect stockholders, it "has been turned on its head to diminish shareholder value by divesting [shareholders] of valuable rights via the broad release that plaintiffs have fashioned at the demand of concerned defendants and their counsel and imposing additional gratuitous costs, i.e. attorneys' fees, on the corporation."

The settlement exercise is pointless kabuki with no relationship to the disclosure requirements imposed by federal law, Schweitzer wrote. "The remarkable parade of the most experienced, highly regarded corporate merger lawyers who ostensibly are failing to draft merger disclosure documents which do not require enhancement or correction strikes the court as implausible. Corporate lawyers drafting complex disclosure documents in connection with the sale of securities in public capital markets experience no such problem. They do not need litigation lawyers to teach them how to correctly draft disclosure documents. Why do merger lawyers?"

The answer, Schweitzer suggested, lies in large part with the Delaware courts, which created the jurisprudence that created the possibility of aggressive M&A-related fiduciary duty litigation and then interpreted those cases in a way that encouraged its growth. Delaware in recent years has been aggressive about asserting that such cases should be brought in its courts because judges in other states are apt to get Delaware law wrong. In what may be an act of understated jujitsu, Schweitzer implied that Delaware is itself the problem. ■

RULES OF THE ROAD

Buyout firms pulled into Europe's anti-cartel campaign

Competition authorities are increasingly scrutinizing owners of wayward portfolio companies

BY RENEE CORDES

Europe is on an anti-cartel crusade, and that spells more trouble for private equity owners of companies busted by antitrust watchdogs.

That's what competition experts on both sides of the Atlantic are saying after surprise Dutch fines against investors in a flour-cartel participant, and as **Goldman Sachs & Co.** (GS) contests a European Commission penalty against a former portfolio company of Goldman Sachs Capital Partners.

"I think because all the competition authorities in Europe are so keen to stamp out cartels, this is one of the lines of attack," said Amanda Howlett, a Manchester, England-based EU and competition partner with **Shoosmiths LLP**. "The wider they spread the net in terms of liability, the more they can hope to have the effect of getting rid of the anti-competitive behavior."

FORMER EU COMPETITION CHIEF ALMUNÍA

She and others were caught off guard when the Authority for Consumers and Markets, the Dutch competition regulator, on Dec. 30 announced its first-ever fines against investment firms: up to €1.5 million for **Bencis Capital Partners** and up to €450,000 each for **CVC Capital Partners Europe Ltd.** and CVC European Equity Ltd. for exerting "decisive influence" over former portfolio holding **Meneba Beheer BV**. During the appeal, the regulator was instructed to go back and see what influence was exerted by the parent holding company and its shareholders at the time of the illegal conduct.

Although the end-of-year fines got little press, they are being studied by the antitrust bar for their implications. A spokesman for the ACM said recently that Bencis has filed an appeal, while CVC has let the deadline slip with no appeal.

But the case that really caught everyone's attention is the EC's €37.3 million penalty, now on appeal, against Goldman Sachs for exercising "decisive influence" over former portfolio company **Prysmian Group**. It was among 11 subsea power cable makers fined in April for operating a decade-long cartel across Europe, Japan and Korea. Prysmian received the highest fine—€104.6 million—while **ABB Ltd.** was let off the hook for notifying authorities about the illegal activity.

"I would like to highlight the responsibility of groups of companies, up to the highest level of the corporate structure, to make sure that they fully comply with competition rules," then-EU Competition Chief Joaquín Almunia said at the time. "This responsibility is the same for investment companies, who should take a careful look at the compliance culture of the companies they invest in."

Goldman has appealed the decision to the EU's General Court in Luxembourg.

REGARDLESS OF THE outcome, competition lawyers say the case casts a spotlight on a growing area of antitrust risk for private equity worldwide.

"If there ever had been a lack of awareness about this area of investment risk, [recognition] is definitely there now," cautioned **King & Wood Mallesons LLP** partner Simon Holmes, who heads the firm's EU, competition and regulatory practice from London.

Matthias Haentjens, the Hazelhoff Professor of Financial Law at Leiden University in the Netherlands, said that treating shareholders as separate legal entities from the companies they own is an old corporate-law dogma now being applied in the competition arena. But he doesn't foresee a new era where every shareholder will always run the risk of decisions like the recent ACM ruling in the Netherlands. "It would really depend on the specifics of each case," he said.

To a large extent, the growing onus on financial investors has grown out of Europe's increasingly tough stance on cartels.

For years, the European Commission has been the world's strictest anti-cartel sheriff, levying €1.69 billion ($2.5 billion) in fines last year alone led by a €953 million fine against five companies involved in an automotive-bearings cartel. A sixth was let off the hook for blowing the whistle on the illegal activity. The fine was the EC's fourth-largest since its first cartel decision in 1969. Though last year's total fell short of the previous year's €1.9 billion, it's still the highest in the world, exceeding $1.6 billion in Brazil and $861.4 million in the United States, according to **Allen & Overy LLP**'s latest annual global cartel enforcement report.

"The EU is a big market, and among the most aggressive when it comes to punitive fines," noted Washington-based partner John Terzaken, who heads the firm's cartel defense practice in the United States. "Europe doesn't have criminal sanctions like in the U.S. and other jurisdictions, so the way it encourages compliance is through severe fines. The structure also allows the European Commission to act as both prosecutor and judge, which probably makes it easier to be more aggressive in terms of penalties."

New EU Competition Commissioner Margrethe Vestager has pledged to carry on the anti-cartel work of her predecessor, using her first two months in office to take on a suspected trucks cartel

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MOVERS & SHAKERS

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Sycamore Partners recently tapped **Lew Frankfort**, former chairman and CEO of **Coach Inc.**, as an executive-in-residence. Frankfort joined Coach in 1979 and was chairman and CEO from November 1995 through December 2013. He then served as executive chairman until his retirement in November.

Delaware Investments, an arm of **Macquarie Group**, brought in **Scott Kearney** to head its institutional sales group as a senior vice president. He is based in Philadelphia. Kearney joins from **F-Squared Investments**, where he was head of institutional sales since 2013. Before that, Kearney worked at **Turner Investments** since 1995, most recently as senior managing director, leading the firm's institutional sales teams.

Delaware Investments also added **Keith Birkhaeuser** to the institutional sales group as vice president of institutional sales, responsible for supporting institutional sales and consultant relations efforts in the Northeastern U.S. Previously, he worked at **UBS Investment Bank** for 14 years as executive director, institutional equity sales. Prior to that he was vice president of institutional equity sales at **Tucker Anthony**. Birkhaeuser is based in the Greater Boston area and reports to Kearney.

Esposito Securities LLC named **Chris Malehorn** as vice president of investment banking for the firm's new financial institutions group. Most recently, he was vice president at New York-based hedge fund **New Ground Capital**, specializing in banking and financial sector investments.

Before New Ground, Malehorn was vice president of investment banking at **Stifel, Nicolaus & Co.**, serving as a lead member of the firm's financial institutions group. "A significant amount of banks are facing relentless regulatory, financial and macroeconomic pressures. This is an opportune time for transactions in the space, specifically in the area of M&A," he said.

Menlo Park, Calif., life science investment firm **Sofinnova Ventures** named **Daniel G. Welch** as an executive partner.

Most recently, Welch was chairman, CEO and president of InterMune Inc. Beginning in 2003, Welch led a company turnaround, refocusing its development efforts. During his tenure, InterMune secured registration of Esbriet, the first medicine approved for idiopathic pulmonary fibrosis in Europe and the U.S. Welch built the InterMune development and commercial teams that delivered the approval of Esbriet. In October, **Roche Holding AG** acquired InterMune for $8.3 billion, a 60% premium to the pre-deal price.

Welch started his career at Adria Laboratories and held senior positions at American Critical Care (acquired by **DuPont** for $425 million in 1986). Welch then joined Sanofi-Synthelabo, ultimately serving as executive vice president and chief operating officer, and was responsible for all U.S. operations, including the launch of Plavix. He joined **Elan Corp.** in 2000, where he was president, biopharmaceuticals and diagnostics, running the largest business unit for Elan. Welch then led Triangle Pharmaceuticals as chairman and CEO. During his tenure, the company completed and submitted the new drug application for the company's lead compound Emtriva, one of the components in **Gilead Science Inc.**'s fixed-dose combination HIV regimens. Triangle was acquired by Gilead for $464 million in 2002.

Welch serves on the board of directors of Hyperion Therapeutics, a current Sofinnova portfolio company, and **Seattle Genetics**, where Sofinnova was a founding investor.

Sofinnova recently completed fundraising for its ninth healthcare pool, reaching its hard cap of $500 million in investor commitments.■

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and a five-firm envelopes cartel fined more than €19.4 million.

Terzaken noted that EU member states are becoming just as aggressive, with Germany penalizing beer, sugar and sausage cartels last year and levying nearly €1 billion in record fines, and France fining 11 makers of household and personal hygiene products €951.2 million for price-rigging.

Experts will be watching the Goldman case closely for further clarity on "decisive influence" and to what extent financial investors can be held responsible for the conduct of the companies they own, even when the stake is under 100%.

But Goldman faces an uphill battle convincing judges that it acted as a purely financial investor given the existing case law.

In May, the EU Court of Justice dismissed the appeal of Slovak investment firm **Garantovaná** that had been fined along with a former portfolio company implicated in a 2009 commission decision against a calcium-carbide cartel. Garantovaná had argued that as a pure financial investor, it should not have been held liable for the behavior of the portfolio company, though judges disagreed on the basis that the investor had exerted influence at board level.

In two additional rulings last year stemming from the same calcium-carbide case, the General Court conceded that there are circumstances where a financial investor is involved only for the money while keeping its hands off management or control. However, judges found that there was no evidence in either case to prove that had happened, and held that the investors were jointly liable for a chunk of the fine imposed on Germany's **SKW Stahl-Metallurgie**.

Similar to those cases, the court will assess whether Goldman had the ability to either unilaterally decide strategic decisions or to block them. "As always in these situations it comes down to what actually happened in practice, how did corporate governance function in its particular company?" noted one expert. ■

FEEDBACK

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