

## Viewpoint

One of a series of opinion columns by bankruptcy professionals

### Big Brother And The Big Three: How Will Professionals Fare?

By Scott Y. Stuart

As the sand in the hourglass runs short on time for the Big Three U.S. auto makers, America prepares for the potential of some of the most sensational bankruptcy cases ever to be filed. With what seems to be looking more inevitable on the horizon, the role government will play in all aspects of these potential cases is front of mind, particularly for case professionals who may find themselves subject to a higher level of scrutiny than ever before.

In the uncharted waters of direct government intervention into the Chapter 11 process, where do professionals stand? This is a tough question for a sector long criticized on the fee front but never having to directly answer to Big Brother as it will likely have to do in the context of a major automotive filing. One need only look to recent statements and news reports coming out of both governmental agencies and professional circles to know this is true.

Recently, the Special Inspector General charged with overseeing the TARP program had some scathing criticisms of the program's implementation and oversight. Specifically, Inspector General Neil Barofsky indicated that taxpayers are increasingly exposed to losses and the government may even be exposing itself to fraud because of the "unprecedented scope" of the bailout program. Statements like this, as the government gets more involved in private sector businesses cannot bode well for case professionals and the fees amassed in a complex Chapter 11 case. The test of this theory is yet to come, however.

Consider that it is the government that will likely be a central player in the auto maker bankruptcies should they file. Consider that a debtor-in-possession loan in these cases is likely to be, at least in part, funded with taxpayer dollars. And consider that case professionals, of which there will be many, will in effect be getting their fees from this same pool of funds. Does this not raise the bar on accountability and transparency, particularly in light of recent criticism of bankruptcy administration fees in cases like Lehman Brothers?

A recent *New York Times* article, "Lawyers Set to Profit on Lehman," raises some of the issues which may come to light in an automotive bankruptcy. As indicated in the article, in that case, the most recent fee request is a record for the biggest quarterly fee request ever made in

a Chapter 11 case. The article also highlights the amounts expended for meals, research and local transportation charges. Legitimate as these charges may be, do the rules change when taxpayer dollars are used to fund a case?

Despite the questions raised, the major difference between a Lehman case and an automotive filing is that, in the context of a Big Three Chapter 11 filing, the continued operations of the company will likely be largely funded through public money. Thus, the dynamics of how professional and other fees will be viewed and evaluated may radically change.

As stated in the *New York Times* article, "Some bankruptcy experts say fee requests highlight a fundamental flaw in the process by which advisers get paid, because there are limited ways to verify a firm's charges." True as this may be, where does this leave retained professionals and others in a case funded by public money? And perhaps more importantly, how will these affect future cases, from the selection of professionals to how they will get paid? If verification of charges is a question raised in the context of a wholly private industry case, how will government scrutiny in a taxpayer funded case respond to such concerns? With the public's eye closely watching these developing situations, the practical and political ramifications could be tremendous.

The Heritage Foundation, studying the effects of bankruptcy filings by the Big Three auto makers, estimates job losses in the 450,000 range should these filings occur. (Other models as cited in the same memo put potential job loss in the millions worldwide.) Another report, issued by SimplicityTactics, a Michigan-based crisis management firm, highlights how auto maker bankruptcies could spawn government oversight throughout the entirety of the process as well as the creation of new laws, precedent and/or agencies to manage implementation of these situations. One would think that this will apply to those who are on the front lines, and most visible to the American public will be the case professionals.

The point here is simple. These potential cases are going to have an immeasurable impact on the American economy. The government will be a central player in these cases, something unprecedented in the long history of the U.S. bankruptcy process. This is no longer just a complex private corporate complex Chapter 11

[continued on page 13](#)

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[continued from page 12](#)

case. It is likely to be one or more cases of a partially nationalized American corporation working its way through Chapter 11.

The questions these cases will set precedents for are many. Should the government be permitted to determine what case professionals are appropriate? Should the government have the ability to limit hourly rates or cause some cap on fees? Are entities such as claims and noticing agents, serving in a semi-public capacity, now subject to a different standard of selection and fee review. And finally, can or should the government have the ability to limit the number of professionals and other parties who are arguably necessary to administer these types of cases?

These questions are not easy ones, bringing to the forefront a level of scrutiny on case professionals never

before experienced. Efficiencies will be tested and re-defined. Transparency and accountability, terms often used by President Barack Obama, will have a meaning greater than ever before. And at the end of the day, how a Chapter 11 case is administered may be forever changed. These are tough questions indeed. Are case professionals and other parties in interest ready for the challenge Big Brother is about to present?

Opinions expressed are those of the author, not of Dow Jones & Company, Inc.



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## Firm Retention Summary General Growth Properties Inc.

This is a summary of a request from General Growth Properties Inc. to hire Weil, Gotshal & Manges LLP as attorneys, filed April 16 with the U.S. Bankruptcy Court in Manhattan.

COMPANY: General Growth Properties Inc.

FIRM TO BE HIRED: Weil, Gotshal & Manges LLP

PRINCIPAL ASSIGNED TO THE CASE: Gary T. Holtzer

DUTIES: The firm will provide the following services:

Weil Gotshal & Manges will advise the debtors on:

- obtaining "first day" relief from the court, including financing, cash collateral usage, adequate protection issues and cash management;

- negotiating with holders of existing corporate level debt and equity, including holders of the Rouse Bonds, TRUPS, the GGP LP notes and the 2008 facility;
- various project level restructuring matters; and
- their plan of reorganization, including confirmation matters and related litigation affecting all debtors and the specified debtors.

HOURLY COMPENSATION: Members of the firm will be compensated at the following hourly rates:

Members and counsel	\$675-\$950
Associates	\$355-\$640
Paraprofessionals	\$155-\$290

BONUS POTENTIAL: Not applicable.

CASE BACKGROUND: General Growth Properties, a shopping-mall operator, filed for Chapter 11 bankruptcy protection on April 16.