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## HERRICK, FEINSTEIN'S BANKRUPTCY GROUP LEADERS

ANDREW C. GOLD, PAUL A. RUBIN, JOSHUA J. ANGEL, EDMUND M. EMRICH,  
STEPHEN M. RATHKOPF, GARY EISENBERG, AND STEPHEN B. SELBST



Andrew C. Gold, Edmund M. Emrich, Joshua J. Angel, Paul A. Rubin,  
Stephen M. Rathkopf, Gary Eisenberg, and Stephen B. Selbst

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That’s how we live our  
professional and personal lives”***

# Creativity Is The Key To Success

## Herrick, Feinstein's Bankruptcy Group

There was little left of Winstar Communications. It had substantial legal claims against Lucent Technologies, but turning those claims into hard cash would be an uphill battle, and Winstar's war chest had run dry.

Winstar's bankruptcy trustee and DIP lenders believed that Lucent was a big part of the reason Winstar was forced into bankruptcy in the first place. But Winstar had already burned through millions of dollars in legal fees in a single year of litigation against Lucent, and the lenders had sustained substantial losses on their post-petition DIP loan. In all, the Winstar trustee and DIP lenders had little cash or appetite to wage an expensive, protracted legal battle with a large, publicly traded company like Lucent, represented by a well regarded "white shoe" law firm. It was time to fold or bet big.

Or bet smart. Unwilling to throw good money after bad, the trustee and DIP lenders found a law firm that would assess the chance of success and share the risk in getting there. They brought in 175-lawyer Herrick, Feinstein on a look-see arrangement: for \$50,000—pocket change compared to what had already been spent and what was still at stake—the firm agreed to review the pleadings, motions and summaries of pre-trial discovery conducted to date and advise the trustee on what to do. After its analysis was completed, Herrick recommended dropping virtually all the existing litigation claims and substituting three new claims, one of which was novel: the assertion that Lucent, a public company, was an insider of Winstar. The voidable preference period for insiders is 12 months instead of the usual three, which meant Lucent, if it were an insider, had to return a \$200 million payment made to it by Winstar beyond the three-month period. Herrick then agreed, for another \$50,000, to amend the complaint with its new claims and defend the anticipated motion to dismiss. When Herrick prevailed on that motion, the trustee and DIP lenders congratulated Herrick but asked the firm to cap its fee through trial in exchange for a 6% contingent fee on any money the estate recovered.

This January, after seven years of litigation, including wins at trial—a 3 ½-month event with 37 witnesses and 1,400 exhibits—and on appeal, the Third Circuit Court of Appeals affirmed the Bankruptcy and District Courts and awarded Winstar a \$340 million judgment. The trustee settled with Lucent for \$320 million. *The American Bankruptcy Institute*

*Journal*, in the featured article of its April 2009 issue, said the case "open[s] an entirely new and extensive arena in bankruptcy—preference litigation that may cause profound changes in both preference-risk assessment and creditor behavior."

"It came down to creativity, as to both the claims and the fee arrangement," says Stephen M. Rathkopf, chairman of the Restructuring and Bankruptcy Department at Manhattan-based Herrick, Feinstein and lead trial and appellate attorney for Winstar. "We identified a claim that required us to advance a novel legal theory that had never before been upheld at the federal appellate level. Without a creative fee arrangement, if we had insisted on a pure hourly billing, this case never would have seen the light of day," Rathkopf says. "But that's how we think, how we are wired and how we live our professional and personal lives."

Herrick's bankruptcy attorneys are indeed a creative lot, both in their professional and private lives. The key practitioners include an actor, a published photographer, an author of a book on pro sports, two connoisseurs of fine wine, an avid motorcyclist, a collector of museum quality movie and TV memorabilia from the 1930s–1960s, and one who describes himself as the "world's oldest Alpine skier and a devoted tennis player who never wins."

That would be Joshua Angel, a true dean of the bankruptcy bar, who wins often enough in bankruptcy to make up for his shortcomings on the tennis court. Angel's old firm, Angel & Frankel, was one of the few go-to bankruptcy boutiques in New York City for companies that needed debtor-side help. Like most of the old warriors of debtor-side bankruptcy practice, Angel came to realize that the practice was getting more complex and required affiliation with a larger firm that could offer clients a broader range of expertise.

"All the debtor-side boutiques saw that the practice was getting more complicated, with so many more layers of issues," Angel says. "In the old days, you could send the non-bankruptcy portions out to other firms, but it's so much more efficient and effective to have it done under one roof." Angel and his debtor-side practice at Herrick, Feinstein (Chapter 11 cases such as "Jeweler to the Stars" Fred Leighton and 200-store retailer Ultra Diamonds) balance the rest of the department, which works occasionally on debtor cases but focuses on creditors.



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Rathkopf, the collectibles aficionado, is also an experienced businessman, having served as a Senior Vice President at Frontline Capital Group, where he helped acquire several companies, including billion-dollar HG Global Workplaces, and sat as a director on their boards. His business savvy is well regarded. Recently, an activist hedge fund shareholder asked him to serve as a director of public company PW Eagle, which he helped guide to a sale for 35 percent more than its value when he was appointed a director one year earlier. “The point is that you can’t be just a book-smart lawyer; you need to be a strategic thinker with common sense and a tolerance for risk,” he says.

Over the years, Rathkopf has helped a client acquire a troubled public REIT by merger and take it private by a series of tax protection agreements with different tiers of unit owners; restructured a mezzanine loan by a foreign insurance company to an investment fund, providing for the recapitalization of fund platforms via initial public offerings and the sale of fund assets; helped a global financial institution mitigate potential losses in multi-billion dollar HELOC, HELOAN and CDO transactions; and restructured numerous companies in the automobile after-market, telecom, executive office suite, debt collection, electronics, paper, plastics, dot-com, investment fund, and real estate industries. He serves financial institutions, private equity funds and major real estate companies.

Andrew Gold, meanwhile, splits his time navigating the twists and turns of his complex bankruptcy practice and those of the 11-mile, 311-turn stretch of road known as The Tail of the Dragon in eastern Tennessee. “It’s a cult venue for bikers, who come from all over the country to try their hand at the Great Smoky Mountains,” says Gold, who assisted Rathkopf in the Winstar appeal.

Some highlights of Gold’s professional career include representing a lender holding a mortgage on a 63-building apartment complex in Brooklyn where Barbra Streisand once lived—the first New York case that held that lenders are entitled to receive yield maintenance payments in addition to repayment of principal with default rate interest; obtaining the first New Jersey decision that held that in a bankruptcy

case, a debt buyer’s claim is the face amount of the loan plus interest, not the amount the investor paid for the debt—a significant difference for buyers of distressed debt; defeating—after an eight-day trial—a borrower’s cram-down confirmation plan objected to by its lenders; and representing financial institutions and special servicers in Chapter 11 proceedings regarding major office, commercial, residential and retail properties.

It is not much of a stretch to say that Stephen Selbst’s training as an actor helped prepare him to be a bankruptcy lawyer. Selbst has acted in plays, films, television and commercials. The same creative juices and flexibility that drive him as a thespian drive him as a practitioner who has practiced bankruptcy law from every conceivable angle. He was co-counsel to the US Parmalat companies, a renowned bankruptcy case in which he successfully settled more than \$1 billion in claims. He also represented the bondholders committee in the Macy’s Chapter 11 filing, and the creditors committees in cases involving Days Inns of America, Black Box, Insilco and Carolina Steel. He represented equity committees in the Eastern Airlines, Caldor and Merry-Go-Round Stores cases. “Being an actor has certainly made me a better lawyer, although being a lawyer may not have helped my acting. But maybe I can get a role on *Law & Order*,” he quips.

Gary Eisenberg is one of two Herrick bankruptcy lawyers who has written a non-legal book. His popular *The Games That Rate* attempts to identify the greatest games played in major professional team sports. The analysis is based on a cleverly crafted set of criteria, recounts more than 100 of the greatest games ever, and encourages readers to participate by debating the perennial issue facing sports aficionados. His clients are primarily loan servicers and lenders, and his professional successes include: foreclosing, over the vigorous objection of the borrower, on a major Midwestern hotel whose debt had previously been restructured; obtaining confirmation of a lender’s consensual plan of reorganization and preventing confirmation of a debtor’s plan, by successfully using provisions in loan documents and acquiring controlling claims; and securing appointment of a trustee for a nursing facility whose principals attempted to extract more financing from





the lender despite being in default.

“Those were in-the-trenches battles,” Eisenberg recalls. “They were based on statutory and case law, of course, but they really turned on litigation and negotiation skills, as well as a clear understanding of the clients’ business needs and objectives.”

In his spare time, Edmund Emrich is a photographer who finds and captures unique and surreal elements in the environment that most people miss. His book of photos, *Eyes Open: Seeing Is Believing*, is testimony to his ability to capture images that elude and captivate. He brings the same advantage to his legal work, which includes having represented Manville Corporation in a successful reorganization of the first-ever mass tort bankruptcy case, which Congress later adopted as the model for all future asbestos bankruptcy cases. He also represented LTV Corporation in its first Chapter 11 reorganization, among the largest ever at that time, and The Caldor Corporation, a chain of 265 department stores.

Paul Rubin, a self-described sports fanatic, has the pleasure of doing legal work for the very teams he roots for. He has advised several New York-area professional franchises on financing their stadiums. “It’s a rush to sit in a stadium watching one of my favorite teams, and know that I helped get that stadium financed and ultimately built,” Rubin says.

He helps secured lenders take back major New York City properties from debtors in Chapter 11 reorganizations, and has also defeated the various lender liability claims that arise in bankruptcy and foreclosure litigation. In Georgia, Rubin helped defeat the attempted quick confirmation of a bankruptcy plan for an Enron spin-off, devising a strategy that convinced a bankruptcy court to authorize the pursuit of claims against Enron despite the opposition of all others in the case. Ultimately, Enron was forced to settle and surrender millions of dollars of value to Rubin’s clients and other shareholders.

The successful resolution of Winstar is Herrick’s most recent significant triumph and one of the greatest emblems of the firm’s use of creativity to prevail in business pursuits and

bankruptcy litigation. At the core of the multi-layered dispute was whether Lucent had used its size, strength, role as vendor-financier of Winstar’s purchases, and threats to revoke a line of credit to influence Winstar’s behaviors, including purchasing decisions. In most instances where a creditor might be found to be an insider of a debtor, it is because of common ownership or a subsidiary relationship. Here, Herrick asked the courts to find that Lucent had, by its conduct, made itself an insider of its customer-borrower, thus extending the period for return of preferential payments it received to a full year, from the usual three months.

Within weeks of the Third Circuit’s decision, a global lender and two manufacturers turned to Herrick for guidance on the insider issue. The lender was concerned about being labeled an insider in a loan workout in which it was seeking to enforce its rights by demanding additional collateral and new terms. One of the manufacturers was worried about having placed a director on the board of a customer, because of the risk of a finding of non-arm’s-length dealing. The other sought guidance for its future conduct.

“Now we’re in the role of advisor, but if these matters progress, we could easily be back yet again in the role of litigator and advocate,” Rathkopf says. “Of course we know the law, but crafting creative, imaginative solutions to our clients’ problems is where we really distinguish ourselves,” he adds. “That’s what helped us get Winstar from a likely dead end to trial and eventually to a significant victory. It’s this creativity—in our work and sometimes how we bill for it—that leads companies to turn to us.”

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