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Avoiding the Dreaded B-Word: Alternatives to Bankruptcy

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Alternatives to Bankruptcy:
Key Considerations for Directors and Officers

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Introduction

President John F. Kennedy once said that victory has a thousand fathers, but defeat is an orphan. Similarly, solving the problems of a financially distressed business can be a lonely proposition for an officer, director and a small business owner. Many critical decisions are made as a company slides toward insolvency, including what avenue to pursue as a part of a restructuring or liquidation. This article explores alternatives to bankruptcy and the impact of these alternatives on officers, directors and business owners charting a course for an insolvent company.

Background

Small businesses are often run by one owner who serves as the sole officer and sole director. Large corporations take actions through officers, as authorized by their Board of Directors. All such individuals have a variety of fiduciary duties in the corporate relationship, including the duties of care, loyalty, good faith, disclosure, impartiality, and obedience. For an insolvent business, officers and

directors are generally required to exercise due care and consider the interests of all constituencies, including creditors.[1]

Owners, directors and officers of companies in financial distress face a menu of restructuring when facing insolvency. These options have varying impacts upon their control of the business. For a company filing bankruptcy, the menu is straightforward. A chapter 7 filing will result in the appointment of an independent bankruptcy trustee to manage the company's affairs and liquidation in place of management.[2] In a chapter 11, the officers and directors generally remain in control of the business, as a debtor-in-possession.[3] A trustee in chapter 7 and a debtor-in-possession in chapter 11 (and its management) have fiduciary duties to all creditors. Accordingly, the chapter 7 filing results in a total loss of control for management, while control is generally retained in a chapter 11, subject to court supervision.

For a company exploring alternatives to bankruptcy, the impact upon directors and officers is less clear.

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[1] *See generally,* Kathy Bazoian Phelps and Prof. Jack F. Williams, *The Depths of Deepening Insolvency*, American Bankruptcy Institute, 2013; *Credit Lyonnais Bank Nederland, N.V. v. Pathe Commc'ns Corp.*, 17 Del. J. Corp. L. 1099, 1157 (Del. Ch. 1991); *Brown v. Hicks, Muse & Co. (In re Healthco Int'l Inc.),* 200 B.R. 288, 300 (Bankr. D. Mass 1997)
[2] 11 U.S.C. §§ 701-702
[3] 11 U.S.C. § 1107

Out-of-Court Workout

An out-of-court workout takes various forms, but the common thread consists of a restructuring of debt, sale of assets, or other disposition outside of a formal court process. Management stays in control of the business, although it may employ a chief restructuring officer to assist with the workout. The Bankruptcy Code is often used as a guide – and a potential hammer -- for how a debtor should act and how creditors should be treated. Many workouts attempt to achieve the effect of a bankruptcy without the professional fees and administrative costs associated with a chapter 11.

An out-of-court workout typically involves a debtor and creditor entering a forbearance agreement restructuring agreement or similar document that binds the parties by contract. In secured lender workouts, a forbearance agreement often provides the debtor with one last shot to address a loan default before judicial action is commenced.

A workout is most successful when a debtor has to negotiate a resolution with a secured lender and is able to manage unsecured creditors and vendors outside of the workout. The more unpaid and frustrated creditors that there are, the more difficult it is to achieve a restructuring outside of court. A distressed business may not rely on any of the traditional bankruptcy tools used to assist with

the restructuring like the automatic stay. Further, a debtor cannot rely on a bankruptcy discharge, a rejection of leases or other tools to achieve a restructuring over the objection of dissenting creditors.

The out-of-court workout has the potential to achieve management's restructuring goals while permitting it to retain control over operations and avoiding the costs and public stigma associated with a bankruptcy filing. The company can display a 'business as usual' face to the general public. The workout also avoids scrutiny of insider transactions by a creditors' committee, trustee or other fiduciary.

However, there are potential pitfalls for management to address with an out-of-court workout. Often, a workout will simply focus on a secured lender while ignoring unsecured creditors. This raises fiduciary issues, especially for a small business owner (e.g., is the owner just focused on resolving a personal guarantee owed to a lender?). Recalcitrant creditors may block restructuring efforts without fear of a bankruptcy court cramdown or adverse decision. A failed workout often ends up in a bankruptcy or other judicial proceeding, thereby making it seem like the workout was a waste of time.

Receivership

A receiver may be appointed in state or federal courts over a distressed business or its assets. Often, the receiver is appointed upon the filing of a complaint against a borrower and a motion to appoint a receiver by a secured lender, based upon certain factors set forth by statute.

Generally, the receiver controls all property of the receivership estate, and is authorized to act in accordance with the court order appointing a receiver. The order appointing receiver is critically important because it establishes the ground rules for the receivership, governs the assets to be administered and sets forth the receiver's rights and duties.

While there are common provisions in most receivership orders, the rights, powers, and duties of a receiver vary from case to case. In particular, the scope of a receiver's authority in managing assets or a company differs greatly. Some receiverships grant a receiver full authority over a company's management and business affairs. However, in certain receiverships commenced by secured lenders, a receiver is vested with limited authority to manage and dispose of the assets subject to a secured creditor's liens. This means the receiver does not necessarily have authority to make decisions or take corporate actions. For example, many

orders appointing receivers expressly state that a receiver has no duty to file tax returns or take other action on behalf of a company.

A debtor and its management face three choices when a complaint and motion to receiver is filed by a plaintiff (which is often a secured lender): (1) they could file objections to the motion and let the court decide whether a receiver should be appointed; (2) they can throw in the towel and ignore the motion, at which point a receiver will likely be appointed; or (3) they can attempt to negotiate with a plaintiff over the terms of a consensual order appointing receiver. A secured creditor seeking the appointment of a receiver may be willing to negotiate with a debtor in order to achieve entry of a consensual order appointing receiver. Management should simply not ignore a proposed order appointing receiver, but rather engage in discussions with the moving party over the terms of the order, or raise any concerns or objections with the court.

Assignment for Benefit of Creditors

An assignment for the benefit of creditors ("ABC") is a creature of state law that is defined by state statute. In an ABC, assets of a debtor are transferred to an individual, as assignee, who takes control of the assets. The parties execute a common law contract for the assignee's services. One primary advantage of an ABC is that the selection of the assignee is controlled by the company. However,

once the assignment is made and the contract is executed by the company and the assignee, debtor's management loses the ability to control decision making over assigned assets.[4]

Often, the ABC has less of a public stigma. Bankruptcy filings are generally more publicized and tracked by a much wider audience nationwide. The process is typically faster and requires less paperwork.

There are some disadvantages of ABCs. Creditors may attempt to file an involuntary bankruptcy and obtain an independent bankruptcy trustee, thereby undoing or overriding the work of an ABC. There is no automatic stay of any litigation. Also, ABCs may be challenging for business with creditors in several states, as ABC is a creature of state law and may not be binding on the creditors. In many states, an ABC is not able to achieve a sale of assets free and clear of liens.

[4] *See* Charles R. Dougherty, *Alternatives to Bankruptcy Liquidations and Reorganizations*, page 4, Am. Bankr. Inst. (July 12, 2012)

Article 9 Foreclosure

An Article 9 sale is an out-of-court process under the Uniform Commercial Code. The Article 9 sale allows a secured creditor, after a default, to sell or otherwise dispose of any or all collateral following a commercially reasonable process. The purchaser receives the debtor's interest in collateral free and clear of the lender's lien, which is discharged, as well as all junior liens.[5] Typically, a process can be completed within approximately 30 days, and is far less costly and paper-intensive than a bankruptcy.

An Article 9 sale does not work in all circumstances. Unexpired leases and contracts cannot be assumed and assigned without consent from the counterparty. Further, the Article 9 sale often dispossesses a debtor from its primary asset without notice to unsecured creditors.

From a business owner's perspective, the Article 9 sale may be attractive in certain scenarios where the main creditor is a secured lender, and a foreclosure of the assets would dispose of all assets in a short period of time. Nevertheless, an owner is still required to perform various winddown tasks.

[5] Uniform Commercial Code, §§ 9-610, 9-617

Key Factors for Officers and Directors to Consider

An officer, director and closely held business owner should analyze certain factors in determining the best restructuring or liquidation option for a business:

Control: The level of control that management seeks to retain is a key factor in determining the preferred restructuring process. Most officers and directors would prefer to retain total control and complete a restructuring outside of court, but that is not always possible. In a non-bankruptcy judicial process, management should have a clear understanding of (i) whether it is surrendering total control to a receiver or fiduciary, and (ii) the duties it will retain moving forward. In a receivership, many owners and managers make the mistake of assuming that a receiver takes control over *all* assets, operations and corporate decision making. In many instances, however, a receiver only takes control over defined receivership assets (e.g., collateral subject to secured liens), and explicit matters are excluded from a receiver's duties. Officers and directors will likely retain the duty to complete and file final tax returns or address the termination of a pension plan, among other duties. Management should ensure that the order appointing receiver clearly spells out the duties and responsibilities of a receiver, and understand that any duties not assigned will remain on management's plate.

Exercise of Fiduciary Duties: Embarking on one restructuring path over another is a critical decision that may be scrutinized after the fact. As an example, a debtor that consents to an Article 9 sale, and a surrender of all assets, without evidence of the value of the underlying assets may be questioned by general unsecured creditors who remain unpaid after the sale. Management must also keep in mind that it retains certain duties after the commencement of the restructuring proceeding, and that all duties aren't necessarily abrogated to a receiver, assignee or other fiduciary.

Notice to Creditors/Unsecured Claims: One of the benefits of bankruptcy is that all creditors and interested parties receive notice of the bankruptcy filing, motions and other filings that impact them, as required by the Bankruptcy Code and Bankruptcy Rules. In situations where there is a large body of creditors, management should work to ensure that all creditors will receive notice of a non-bankruptcy judicial proceeding. Management should also strive to ensure that there is a claims process to the extent that there are proceeds available to pay unsecured creditors after payment of secured claims and administrative expenses.

Funding of Liquidation: Many restructurings involve a sale or disposition of assets where a secured creditor funds the restructuring process in order to receive proceeds from the sale or disposition of the assets. Many debtors make the mistake of failing to ensure that there is sufficient funding from the secured

creditor or the receivership/ABC estate to fund necessary expenses to wind down the business, like the preparation and filing of final tax returns.

In many distressed situations, a secured lender has declared a default and takes certain action without having a meaningful dialogue with a debtor and its management. In such cases, you may not choose the restructuring path; it may be chosen for you. Nevertheless, management that has a better understanding of the different restructuring paths will be more fully equipped to ask the right questions, negotiate for certain terms with the secured lender and fiduciary, and raise objections if necessary.

Personal Counsel: Owners of closely held businesses should consider retaining personal counsel to represent their interests in any restructuring. Often, an owner has interests separate from the company. For example, owners may have personally purchased real property and leased it to the business, or they may have personally guaranteed debt. When times are good, owners often use the same attorney to represent both the business and the owner. It is important for an owner to understand that a receiver or fiduciary will typically use its own counsel and not be looking for the owner's best interest in connection with a restructuring or liquidation of assets.

Wind Downs and Liquidations Without an Insolvency Proceeding

By

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Winding down a company without an insolvency or bankruptcy proceeding involves key disciplines centered on negotiating and resolving difficult creditor concerns and most importantly should include:

1. Formal wind down plan
2. Open and direct communication with creditors
3. Absolute transparency to the process
4. Clear economic incentive for creditors to support the plan

The goal is to perform the wind down with minimal disruption and economic pain to all stakeholders including customers, vendors, owners and lenders. If the process is managed according to a formal wind down plan using transparency and consistent communications, then the avoidance of an involuntary bankruptcy filing is possible.

A formal wind down plan should include:

- Weekly wind down cash flow budget
- Committed order/shipment plan and confirmed revenue from customers during the wind down period
- Waterfall projection of claims paid from recoveries in priority order (using bankruptcy priority) with a high and low recovery estimate
- Communication plan with all stakeholders and where applicable, a company organized formation of an informal creditor committee

The primary benefit to winding down a business outside of a legal proceeding is reduced costs and increased speed, which almost always translates into a greater net recovery for creditors. Bankruptcy and receivership proceedings involve many layers of professionals representing debtors, creditors and lenders. Fees, court costs and other administrative burdens can often exceed the benefits of an insolvency proceeding for a wind down and, therefore, handling a wind down outside of court is typically the most cost beneficial path to maximize recovery. Winding down a business outside a proceeding is also faster. The company can immediately initiate a liquidation process and avoid burdensome bankruptcy reporting and the time consuming nature of the bankruptcy process which typically involves a motion, notice, objection, hearing and ultimately approval for most major decisions. Stakeholders also typically receive a larger economic recovery in a shorter amount of time.

<u>Wind Down of a Company</u>

Once a decision is made to wind down a company, the owner(s) must first consider the adverse effect on customers. The general rule is that if you don't damage your customer's operations that you will maximize the collection of accounts receivables and the sell-through of existing inventory to those same customers. Operations refer to a customer's ability to provide products or services to their own customers without interruption or forcing your customer to incur extraordinary costs. In essence, the out-of-court process allows you maximize the value of your most liquid asset, working capital, quickly. Often you can even

charge your customers a pricing premium or surcharge to allow these customers adequate time to re-source and avoid any disruption risk to their supply chain. Customers will fight this but you often have the leverage to extract this economic concession from customers because they are not ready to re-source immediately.

Contracts, blanket orders and in-process production need to be fulfilled or transitioned and thus resolved for each major customer. An immediate break in supply or operational shut down may cause customers to initiate legal action or worse, immediately cease payment on accounts receivables. The company should proactively communicate and negotiate with all major customers and prepare them for the wind down of the operations. Negotiations should center on bullet proof guarantee of collections of accounts receivables, build out of inventory where new invoice payment risk is eliminated for the company and the customers are required not only pay for their own purchases but also assist in funding the wind down via surcharges. Continued production and fulfillment which benefits the customers but which causes the company to lose money makes no sense for the company and its creditors. Customer concessions should be aggressively pursued since the company has no need to worry about an ongoing relationship with its customers. Potential customer concessions include customer purchase of raw material, immediate payment of all new invoices and all open accounts receivable, wind down surcharges to cover wind down losses, agreed liability releases, cancellation of long term agreements and sale of needed production equipment and manufacturing process intellectual property (IP). Expect customers to bargain for enough products to ensure a smooth re-sourcing to a new supplier, a timely return of all tooling and the transfer of all IP needed to manufacture their products.

Open and Direct Communication with Creditors

The creditor communication process should be proactive and open so that all parties hear the same message, all the salient facts and are presented with the associated economic considerations. Creditors include secured lenders, trade creditors, landlords, leaseholders and employees. After deals are developed and complete, or least nearly complete, with major customers, the company should approach and start negotiations with unsecured creditors and leaseholders. Typically, a secured lender is brought into the plan to wind down the company early and is generally supportive of an out-of-court attempt subject to the company's adherence to a reasonable weekly budget, much like a DIP budget in a Chapter 11. Lenders usually hold the most leverage over the company, so lender negotiations should center on what the company can do to maximize recovery for the lenders as soon as possible.

Larger companies often have secured lending groups as well as leaseholders of equipment and real property. All lenders need to be treated in the same manner and receive communication of the formal wind down plan. Real property lease holders should be given as close to possible to the same benefits to establish their unsecured claims as they would receive in a bankruptcy proceeding. The company should negotiate termination provisions of all contracts upfront and notify the leaseholders of its intentions to cooperatively turn back property and equipment after the wind down is complete with payment made timely for use of the asset during the wind down period. The company should also assist with transition, sale or disposal of all assets for leaseholders to the extent that the company is not required to expend money or allocate significant resources to do so.

The next step is to handle employee matters and communication with trade creditors. Employee and trade creditor notification should be done simultaneously. Once employees are notified of the wind

down, trade creditors will find out shortly thereafter. Accordingly, the company should plan for a direct communication of the formal wind plan to the trade creditors and the employees simultaneously.

Written communication is the preferred method to the process. The communication message should not scare creditors. Rather, it should lay out the facts and benefits of the formal wind down plan. The written communication should include a brief history of how the company arrived at this point and the restructuring efforts that were made over time. It should clearly state the alternatives that were evaluated and that the out of court wind down is the most cost effective and value maximizing solution for all stakeholders including the trade creditors. The primary purpose of the written communication is to buy time for the company to work through the beginning of the wind down process and to initiate a transparent process. Once the written communication is sent out, the company has a short period of time to get the trade creditor body to go along with the out-of-court process. You are not actually looking for the trade creditors to "agree" with the out-of-court wind down, the wind down plan and the wind down budget. You are actually looking for the trade creditors to passively acquiesce to the process and most importantly to not obstruct the process. The two biggest obstruction risks are an involuntary bankruptcy filing and trade creditor demands to receive significant pay downs on old debt and not accepting simple COD on new purchases.

Trade Creditors

Trade creditors are vital in the success of the formal wind plan because the company will undoubtedly need to purchase new products and services while avoiding an involuntary filing by its trade creditors and new trade creditor collection lawsuits. There are most likely past due invoices and trade creditors demanding past due payments can cause a disruption in fulfillment of products that will impact the timing and costs of the wind down process.

Trade creditors should be told that they will all be treated equally and that the company intends to treat the unsecured creditors as they would be treated in a Chapter 11, meaning that all new purchases will be paid for COD but that there will be no pay down of any old creditor balances. However, there will be an amount set aside weekly that will be put in escrow to pay all the unsecured creditors a guaranteed dividend. Our experience is that a 10 cent dividend is often a fair and realistic target in many cases. It's critical to promise the trade creditors a fair and open wind down process managed by an objective outsider. Additionally, our experience is that it is actually helpful to organize the creditors into an informal committee and pay for their counsel and financial advisor to provide creditors with further assurance that the wind down process will be managed fairly and that the creditors will have funds set aside in an escrow held by their committee counsel. Organizing the creditors into a committee at first may seem like an unnecessary risk. But in reality, it somewhat centralizes the trade creditor negotiations into one committee as opposed to multiple one-off trade creditor negotiations. Additionally, the committee and its counsel can be very helpful in convincing dissenting creditors to cooperate as the fellow creditors are viewed as much more non-biased than the wind down managers, even one who is an objective outsider.

Of course some creditors will suggest that the company should be in a Chapter 11. Our stock answer to that suggestion is as follows. "Let me understand this, you're telling me that you would prefer to bypass a fair and straight forward out-of-court wind down process where you get a guaranteed and fast dividend in favor of a litigious and lengthy Chapter 11 legal proceeding where you find out in two or three years that you as creditors will get nothing?"

Ongoing communication should be done in a regular and formalized manner using the informal committee and their counsel as a conduit to the entire creditor group. As part of the formal wind down plan, the company should first reconcile all trade accounts, verify amounts past due, and schedule all required outstanding pending purchase orders. If trade creditors are hostile because they don't trust that the wind down will be fair or they are simply very angry at the company and its management, there is a real risk that creditors will petition the company into an involuntary bankruptcy. This is the primary risk of attempting an out-of-court wind down. However, our view is that if you end up in an involuntary bankruptcy, you are no worse off than if you filed a voluntary Chapter 11. In most cases, there is simply nothing to lose by taking a run at an out-of-court wind down. Although certain wind downs need to be done in a Chapter 11 to protect Directors and Officers from personal liability (e.g. WARN claim that cannot be paid). Accordingly, steps and offers made to trade creditors should include:

- Confirmation of past due balance but no payment on these balances
- Company organized formation of a committee represented by trade creditors
- Offer to pay for committee professional representation
- Establish a formal and frequent communication plan
- Allow the committee to review and comment on the formal wind down plan
- Demonstrate the formal wind down plan buy-in by customers and secured lenders
- Demonstrate the cost benefit to the creditors of avoiding an insolvency proceeding
- Agree to COD on all new invoices once the wind down process starts
- Assign a dedicated employee to be the point person for all trade creditor communication and make sure you responses are helpful and timely
- Maintain total open book and transparency to stakeholders and especially committee professionals

Trade creditors that are represented by a committee and given a communication line into the company and transparency into the progress of the wind down are more likely to buy into the formal wind down plan. There is still a risk that small balance trade creditors who are outside of the committee's reach could file an involuntary bankruptcy petition against the company during the wind down process. This risk should be evaluated and special consideration may be called for including paying off some smaller creditor balances, negotiating one-off directly with certain creditors and requesting the committee to expand membership to include problem trade creditors.

The one question trade vendors will ask the company is "When will I get paid for my past due invoices?" The company must be very careful with its response. The correct response should be, "distribution will occur based on the committee's guidance and positive results of the wind down process". Quoting expected returns or distribution amounts must be done very carefully and creditor expectations must be conservatively managed.

Employees

For sizable companies, notifying employees of the wind down must comply with the federal WARN Act as well as any potentially more restrictive individual state laws. WARN requires notification to affected employees and government authorities 60 days prior to employee separation or payment of 60 days wages and benefits in lieu of notice. WARN applies to a plant closing or a mass layoff where 100 or more employees are affected in one geographic area. Similar to the trade creditor process, a formal

communication plan for employees whether the WARN Act is triggered or not should be followed. The employee formal communication plan for a wind down should explain:

- Termination timing and payment of wages for time worked
- Vacation pay
- WARN pay and severance, if any
- Health insurance plan continuance and COBRA availability, if any
- 401k plan
- Plan to transition year end reporting including pension/401k reporting, W2's and 1099's, IRS form 5500, 941 and 940 filings, 401K termination, and Part 4041 pension standard termination

Because the wind down will be conducted outside of an insolvency proceeding, the company can and should have a Key Employee Retention Plan (KERP) to facilitate cooperation and reduce early exit of key employees who are absolutely critical to perform the wind down cost effectively. Bonus plans should be paid at the very end and on the condition of fulfillment of duties relating to the wind down plan, however, bonus payments should be escrowed weekly to protect the employees from an unexpected event such as an involuntary filing cheating the employees out of accrued bonus money.

Implementing the Formal Wind Down Plan

After communication of and negotiation of the formal wind down plan is complete with all stakeholders, the company can fully implement the plan. These negotiations with all stakeholders will typically occur over two to four weeks maximum. Because timing and cost control are critical to completing the plan, a detailed weekly budget and variance analysis must be maintained. This budget is used to communicate progress to all stakeholders and ensure critical benchmarks are attained.

The first few weeks of the wind down are the most volatile period in the process. Customers, vendors and lenders are watching very closing for any disruption in the formal wind down plan and to verify that the wind down is really being managed fairly and in a transparent manner with the actual financials tracking reasonably close to the budget. Essentially everyone is verifying that they are getting what they bargained for. Accordingly, any potential problems or material changes to the plan and budget must be immediately communicated to all stakeholders. Once the company gets past the initial phase of the wind down and establishes a regular communication process, the remainder of the wind down process becomes more straight forward with the execution of the wind plan and reporting on its status to all stakeholders. The further along the company is in its wind down process, the less likely the creditors are to pursue an involuntary bankruptcy proceeding.

Absolute Transparency of the Process

Through the entire process, including negotiations with customers, formulating a formal wind down plan, communication of and negotiating the plan with trade creditors, the company should be completely open and transparent. Establishing the creditor committee is only one part of transparency process. Reporting of financials and issues, committee access to the facilities and financial records, communication with management and consistent updates help round out transparency. This may include immediately communicating changes in the formal wind down plan and material problems affecting the wind down. Immediately communicating problems or changes makes creditors feel included in the process and creditors may even help with or potentially even take ownership of corrective actions as a result. The fastest way to provoke an adverse creditor action is to make the creditors feel left out of the process.

Transparency does not mean making commitments on how much funds creditors will receive through the process. The company should resist the temptation of stating monetary returns even if it furthers the negotiation of settlement with the creditors. Creditors will push for how much and when payments on past due accounts will be paid. The company should provide a very broad range of estimated returns based on the successful execution of formal wind down plan objectives and long term cash flow forecasts of the plan.

Creating an Economic Incentive for Unsecured Creditors to go Along with the Plan

In the beginning of the wind down process, the benefit of lower professional and administrative costs associated with a legal insolvency proceeding was touted as one of the primary benefits of the formal wind down plan. This benefit is intended to be shared with all creditors with the unsecured creditors receiving a set-aside placed into an escrow account which will result in a guaranteed dividend. Additional incentives going further must be communicated to maintain commitment of the creditors. Incentives could include benefits in addition to a cash dividend:

- Facilitation of customers and suppliers to a re-sourcing supplier

- Immediate payment or COD terms
- Company assistance with timely surrender or sale of leased assets
- Safe keeping and continual maintenance of leased assets
- Undisputed bailment and other securitization attachments
- Resolution of EPA and safety concerns of collateral
- Employee transition and assistance
- Confirmation of claims and funds owed

Offering these incentives as well as other incentives can be a great benefit to creditors in terms of reduced legal fees and time consumed as these tasks can be very costly to certain creditors in a contentious bankruptcy and insolvency proceeding. Another incentive would be the possibility of a quick sale of the business even though you publicly announced a wind down. Sometimes customers so strongly desire that a business stays open that they assist a company in a wind down in finding a going concern buyer. Despite the potential to sell the company even after a wind down has been publicly announced, our experience is that you do not stop the wind down until such time that a buyer steps forward and agrees to a term sheet, puts up a cash deposit, agrees to a fast time line and funding of the business is secured to offset any continuing losses. In our experience, pushing forward with a wind down in the face of a potential buyer (at least when the potential buyer claims to be for real), forces the buyer to step forward with a deal and cash fast or else the business wind down will be concluded. A publicly announced wind down smokes out real buyers very quickly.

Repayment and Final Negotiations with Creditors

Once the wind down is complete, the company, with help from the committee, will then move towards settlement of claims. The committee will have at least the set aside escrow to distribute and depending on the success of the wind down, there may be funds in excess of the secured creditor debt and a small estate clean up reserve to complete the final wind down of the company's estate. The company must plan for additional professional fess relating to closing down, final tax returns and termination of all benefit plans. Books and records should be retained for three years in prepaid storage and employee records should be destroyed.

Claim payments should be spread out over a short timeframe and the company and committee should clearly document all amounts paid, remaining funds and continue communication throughout the entire process. There may be assets that take years to liquidate such as real estate, trusts, bonds, minority investments, workman's compensation reserves and annuities. The company must perform a cost-benefit analysis regarding keeping personnel or consultants to administer the remaining estate or to turn over the estate to a liquidating trustee. Either way, the company must complete the entire process and not abandon the remaining assets. Abandonment of the assets prior to completion of the wind down could cause an insolvency proceeding or chapter 7 bankruptcy that would offset or eliminate all benefits obtained through the wind down process.

Conclusion

Winding down a business outside of a legal proceeding can be faster, cheaper and result in better creditor recoveries if done through a formal wind down plan. The process should be transparent to all stakeholders and open communication throughout the process is critical to completing the plan. Costs are significantly lower than a bankruptcy or receivership and the plan can be completed in less time.

Creditors must be incentivized to consent to this process through both monetary and non-monetary means. The use of company-organized creditor committees and objective third-party consultants to manage the process will provide creditors with enhanced comfort that the formal wind down process will be equitable and in everyone's best economic interests.

Faculty

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Jason W. Bank is a member of Kerr, Russell and Weber, PLC in Detroit and chairs the firm's Bankruptcy and Restructuring Practice Group. He practices in the areas of commercial bankruptcy, out-of-court workouts, corporate restructurings and creditors' rights. Mr. Bank has successfully guided numerous businesses through out-of-court restructurings, chapter 11 reorganizations and other judicial proceedings. He has negotiated resolutions of complex financial issues and debtor/creditor disputes, and achieved consensual restructurings while avoiding bankruptcy or litigation. Mr. Bank is a certified mediator and vice chair of the Mediation Panel for the U.S. Bankruptcy Court for the Eastern District of Michigan. He also is the former president of the Detroit Chapter of the Turnaround Management Association and served as adjunct professor of law at Michigan State University College of Law. Mr. Bank received his A.B. from the University of Michigan and his J.D. from Wayne State University Law School.

Jason J. DeJonker is a partner and co-global practice group leader of Finance Transactions at Bryan Cave Leighton Paisner LLP in Chicago. His experience includes lender and borrower-side loan workouts, representations of debtors and secured creditors in chapter 11 bankruptcy cases (including DIP and exit finance), and the plan-confirmations, commercial foreclosures, and complex collection and judgment collection matters. Out of the courtroom, he routinely counsels clients on structuring distressed transactions (including traditional M&A and commercial real estate transactions involving all asset types), provides advice to corporate management and boards of directors on fiduciary duty issues, and helps private-equity and traditional lender clients in structuring commercial real

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Kathleen Parker is director of business development at HYPERAMS, LLC in Wood Dale, Ill., and joined the firm in 2012. Since that time, she has held several titles and was responsible for the implementation of HYPERAMS's auction operations and processes. Ms. Parker's current duties include establishing and maintaining relationships with machinery and equipment and inventory appraisal clients, including financial institutions and asset-based lenders, in the Midwest and Southeast territories. She is also an integral member of the Auction Services team and provides auction operations support. Ms. Parker is invested in professional development and is an active member of several industry organizations, including the Turnaround Management Association (TMA) Midwest Chapter and the Secured Finance Network (SFNET). She is a Repperts Auction School graduate and currently holds an auction license in the state of Illinois.