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Emergency Chapter 11 Filings: What to Do When the \$#!+ Hits the Fan!

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Emergency Chapter 11 Filings: What to Do When the \$#!+ Hits the Fan

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Agenda

- 1. Defining “Emergency” Chapter 11**
- 2. Common Causes for an Emergency Chapter 11 Filing**
- 3. Triage and First Steps**
- 4. Building Support for an Exit Strategy**
- 5. Implementation and Exit**

Defining “Emergency” Chapter 11

Defining “Emergency” Chapter 11

What is an emergency chapter 11 case?

- A chapter 11 filing that does not have the benefit of a negotiated exit or restructuring strategy that has the support of lenders or other key stakeholders
- An emergency chapter 11 case may lack:
 - Funding or cash on hand;
 - Stakeholder support;
 - A restructuring strategy; and/or
 - An exit plan
- An emergency chapter 11 typically gives rise to unique business and legal issues that must be addressed, particularly in the beginning of the case

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Common Causes for an Emergency Chapter 11 Filing

Common Causes for an Emergency Chapter 11 Filing

- **Unexpected outcomes with litigation**
 - Large verdicts or judgments rendered in favor of the other party in a proceeding
 - Injunctive relief creates a liquidity constraint for the debtor
 - Attachments, liens, or levies rendered on the debtor constricting the debtor's access to liquidity
- **Lender actions**
 - Board flip
 - Cash sweep
 - Acceleration and demand of outstanding loans, increased default interest rate, and termination of commitment to make further loans
 - Foreclosure proceedings
- **Receiverships**

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Common Causes for an Emergency Chapter 11 Filing

- **Unexpected or “self-inflicted” liquidity events**
 - Financing or sale that does not close
 - Management lacked foresight for significant payments due or coming due
 - Force majeure
- **Mismanagement**
 - Includes failure of management to create and execute an effective contingency plan
- **Macroeconomic events (i.e. COVID)**
- **Financial distress of major customers / vendors / suppliers**
- **Evictions**

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Triage and First Steps

Triage and First Steps

- **Access cash to fund the case**
 - Cash collateral
 - DIP financing
- **Canvass assets and liabilities**
- **Understand parties in interest & manage conflict**
- **File first day motions**
 - File petition & first day declaration
 - Identify motions which are higher priority if access to cash permits
 - File substantive motions: cash collateral, DIP, taxes, utilities, critical vendors, wages, customer programs
 - File procedural motions: claims agent, joint administration, extension of time to file SOFAs

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Triage and First Steps

- **Create and implement appropriate messaging to key stakeholders / customers / employees**
- **Ensure the automatic stay is in place or extended**
 - Automatic stay goes into effect immediately
 - Stay notices should be delivered in jurisdictions where there may be pending litigation
 - First day order may be sought confirming application of the stay, including outside the US
 - *Post-Purdue*
 - While not directly related to third-party releases, several courts have addressed the issue of whether the decision in *Purdue* impacts a court's ability to temporarily enjoin actions against non-debtors during the pendency of a bankruptcy case
- **The automatic stay may be lifted for cause, but bankruptcy courts routinely allow debtors at least some breathing room early in the case to develop a restructuring strategy**

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Triage and First Steps

- **Retake control of assets and stabilize business**
 - Section 542 of the Code empowers a debtor to obtain property of the estate in possession, custody, or control of third parties
 - Require receiver to return debtor property
 - Challenges:
 - Limitations to recover estate property in light of *City of Chicago v. Fulton*
 - Board flips do not violate automatic stay in *In re CII Parent, Inc.*
- **Reduce administrative expenses that may impair restructuring**
 - Analyze and reject leases and contracts that are unduly burdensome
 - 90- and 120-day time periods under 365(d)(4) to assume non-residential leases
 - WARN Notices / RIFs
- **KEIPs/KERPs for key employees**

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Building Support for an Exit Strategy

Building Support for an Exit Strategy

- **Develop business plan / restructuring strategy**
 - Goal is to maximize value for all stakeholders
 - Case specific with a strategy that:
 - Calibrates based on case budget
 - Conforms to present circumstances
 - Includes tactful strategy over estate resources, particularly if case will involve litigation
- **Understand fiduciary duties**
- **Strategize process:**
 - Sale process: going concern liquidation that may end in a liquidating plan
 - Plan process: plan of reorganization or liquidation
 - Structured dismissal

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Building Support for an Exit Strategy

- **Consider liquidity constraints, and any limitations imposed on secured lenders imposed as a condition to new financing or obtaining access to cash collateral**
- **Lock-in support**
 - Build settlements into the DIP / cash collateral order
 - 9019 Settlements
 - Restructuring Support Agreement (“RSAs”)
 - *NII* Decision
 - *Indianapolis Downs*: improper solicitation that chills the negotiation process
 - Sub-rosa plan concerns

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Implementation and Exit

Implementation and Exit

- **Timing**
 - Exclusivity period
 - DIP or cash collateral milestones
- **Confirmability**
 - Feasibility of the business strategy
 - Best interests of the creditor test
 - Absolute priority rule
 - Good faith
 - Voting thresholds from creditors
- **Conversion or structured dismissal**

Faculty

Hon. Thomas M. Horan is U.S. Bankruptcy Judge for the District of Delaware in Wilmington, appointed in 2023. He previously practiced law in Wilmington for 18 years, focusing on financial restructuring and bankruptcy litigation. Most recently, Judge Horan had been a member of the Bankruptcy, Insolvency and Restructuring group at Cozen O'Connor, a national firm headquartered in Philadelphia with a Wilmington office. He joined Cozen in a group-wide 2020 defection from Fox Rothschild, for which he had worked since its own 2018 merger with Wilmington-based Shaw Fishman Glantz & Towbin. Judge Horan's national practice included representing debtors and official unsecured creditor committees in complex chapter 11 proceedings, and he represented secured creditors and other parties in litigation. He also frequently provided opinion letters on commercial transactions and represented parties before the state's Court of Chancery and Superior Court. Last year, Judge Horan was named to *Lawdragon's* list of the Top 500 U.S. bankruptcy and restructuring lawyers. He also serves on ABI's Board of Directors. Judge Horan received his B.A. in 1989 and his M.A. in 1992 from Fordham University, and his J.D. *cum laude* from St. John's University School of Law in 2002, where he was executive notes and comments editor for the *ABI Law Review*.

Mary E. Naumann is a member of Jackson Kelly PLLC's Lexington, Ky., office. In her 24 years at Jackson Kelly, she has focused on bankruptcy law, specializing in commercial restructuring, creditors' rights, purchases of assets in bankruptcy, and defending against preference actions and claims against fiduciaries — including officers, board members and shareholders — arising from their actions before and during bankruptcy. Ms. Naumann has represented clients in bankruptcy courts across the country, most recently representing chapter 11 debtors in the *In re Piney Woods Resources, et al.* proceedings in the Northern District of Alabama, the *In re Lighthouse Resources Inc., et al.*, proceedings in the District of Delaware and the *Inmet Mining, LLC* proceeding in the Eastern District of Kentucky, and she served as co-counsel for the pre- and post-petition lender in *In re Hopedale Mining LLC, et al. (Rhino Energy, LLC)* proceedings in the Southern District of Ohio. She has been named *The Best Lawyers in America* as Lexington Bankruptcy and Creditor/Debtor Rights/Insolvency and Reorganization Law "Lawyer of the Year," and she has been noted for Bankruptcy and Creditor/Debtor Rights/Insolvency and Reorganization Law. She is a member of ABI and the International Women's Insolvency & Restructuring Confederation. Ms. Naumann received her B.A. *cum laude* and Phi Beta Kappa in history in 1995 from Centre College, and her J.D. *magna cum laude* in 1999 from Washington and Lee University School of Law, where she was admitted to the Order of the Coif.

Michael S. Neumeister is a partner with Cooley LLP in Los Angeles. He represents debtors, lenders and equityholders in complex in-court and out-of-court restructurings, and he advises buyers in significant bankruptcy sales. Mr. Neumeister's representation of the lenders and purchaser of substantially all assets of VICE Media was named the 2024 Distressed M&A Deal of the Year (\$250MM to \$500MM) at the M&A Advisor's 18th Annual Turnaround Awards. His practice encompasses litigation of bankruptcy and distressed-debt issues in bankruptcy court, state court and appellate courts, and he has a wide array of experience representing clients in bankruptcy and restructuring matters in many different industries, including real estate and hospitality. Mr. Neumeister has been recognized in *The Best Lawyers in America* for Bankruptcy and Creditor/Debtor Rights/Insolvency and Reorganization Law, and he has been named a "Rising Star" in the field of Bankruptcy & Creditor/Debtor

Rights in *Super Lawyers* since 2013. Mr. Neumeister frequently lectures on restructuring topics. His most recent article, “Sale toggles in Chapter 11 plan processes,” was published in the November 2021 edition of *Financier Worldwide*. Mr. Neumeister received his B.A. in 2006 from the University of California, San Diego and his J.D. in 2010 from the University of Southern California.

Brian L. Shaw is a member of Cozen O’Connor in Chicago, where he focuses his practice on financial restructuring, bankruptcy, and other in- and out-of-court distressed solutions, along with attendant litigation, representing debtors, creditors and other parties-in-interest in proceedings throughout the country. Over the past three decades, he has guided chapter 11 debtors, chapter 7 and 11 trustees, creditors’ and noteholders’ committees, assignees, landlords, liquidating trustees, labor organizations, preference and fraudulent conveyance defendants, receivers, and secured and unsecured creditors through all aspects of bankruptcy, insolvency and restructuring. A Fellow of the American College of Bankruptcy, Mr. Shaw has served as ABI’s president, chairman and vice president of membership, and previously chaired the Chicago Bar Association’s Bankruptcy and Reorganization Section. He has received accolades from *Chambers USA*, *Super Lawyers* (Top 100 in Illinois for 2020), *The Best Lawyers in America*, *Lawdragon* (Top 500 Bankruptcy Lawyers) and *Marquis Who’s Who in America*, and he is AV-rated by Martindale-Hubbell. Mr. Shaw chaired ABI’s inaugural Professional Development Program and regularly serves on the faculty of ABI’s Litigation Skills Symposium. He is admitted to practice in the State of Illinois, as well as the U.S. District Courts for the Northern District of Illinois, Central District of Illinois, Eastern District of Wisconsin, Western District of Michigan and Northern District of Indiana, the U.S. Courts of Appeals for the Third, Seventh and Eighth Circuits, and the U.S. Supreme Court. He is also admitted to the Federal Trial Bar for the Northern District of Illinois. Mr. Shaw received his B.A. from Tufts University and his J.D. *magna cum laude* from the University of Illinois College of Law.