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TACTICS, NOT THEATRICS

How to orchestrate a successful out-of-court restructuring.

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THERE IS A MOMENT IN EVERY transition from corporate health to corporate distress—sometimes lengthy, other times fleeting—when failure can be averted. When a board of directors and management reacts to changing circumstances is often the single greatest contributor to success: Act early and the company has options, act late and the company may not be able to avoid the sometimes crushing burden of bankruptcy.

Recognizing that something must be done is only the first step in a long process, however. Navigating the journey back to health requires a game plan. In that spirit, the authors offer these steps to help inform the thought process around the highly specialized tasks of corporate restructuring, preserving value and saving jobs.

First, call in the battery. Place an expert restructuring financial consultant and an expert restructuring/bankruptcy lawyer at the helm. Before looking at a single document, your advisers should have a thorough conversation with management to gain an understanding of what the company views as the key problems they face and the key interests of the company. Competing tranches of debt; competing shareholders; competing product lines; the oft-told tale of marketing versus engineering—all of these factors contribute to the issues at hand, and your advisers must understand these factors, and how they interrelate, before considering any significant approach to a restructuring process.

Next, your advisers should understand what the significant pressure points are for the company. What is causing the present stress? Are notes coming due that can't be paid? Are loans maturing or being called? Is the company about to default on its bonds? Understand the nature of the counterparties to any restructuring and what their objectives will be from the outset. Perform basic due diligence on counterparties. Knowing, for example, that the company's secured lender is exiting the company's industry should affect how you approach any type of negotiation with that lender. Once the company's pressure points are clearly understood, the company must prioritize these issues in order of criticality.

YOUR ADVISERS SHOULD THEN establish a process to engage the counterparties in appropriate discussions around the issue of restructuring the debt. These discussions should begin with a standstill agreement that pro-

vides breathing room for all sides to consider the restructuring. The term of the agreement should be long enough to allow for thorough analysis and discussion on both sides. When crafting a standstill agreement, important issues to keep in mind are:

- A standstill agreement is just that; it's not the time for any party to seek to improve their position through opportunistic leverage.
- The company should expect to pay the professional fees of the counterparties—this is a typical cost of getting the standstill agreement and the counterparties' willingness to undertake a restructuring process.
- The company may have to continue to pay interest on a current basis during the restructuring process. This may be a cost of getting the counterparty to the table.

Relatively simple things, like interest payments, may have exponential beneficial effects on counterparties. For traditionally regulated lenders, for example, receiving current interest payments, even if a principal payment must be deferred, may be the difference between keeping a loan as "performing" on their balance sheet or having to declare it as underperforming and taking a reserve against it. Avoiding these regulatory headaches can be a powerful incentive to get the counterparty to the negotiating table.

Before the first meeting between the company and its counterparties, there is much to be done. The company and its advisers must thoroughly investigate the company's underlying financial situation, and this is when information should be exchanged between the company and counterparties. The financials must be clear, consistent, correct and verifiable. One of the authors has a client that just restated a 13-week cash flow by what will amount to 25 percent of its yearly income. That is absolutely going to be a conversation stopper with their lenders. The company should do a full valuation: Showing a lender that hasty action could have devastating consequences can be a powerful motivator. Conversely, if the valuation shows the counterparty sitting pretty, it may alleviate doubt as to the viability of a restructuring.

You want the meeting long enough so that everyone knows that **SOMETHING CAN BE ACCOMPLISHED** that day.

KNOW WHERE THE COMPANY needs to come out in a restructuring. The company needs to understand exactly what it needs to accomplish in any restructuring and what that looks like, both operationally and in terms of cash flow, and this knowledge should inform all discussions. And be prepared to open the kimono to all counterparties. Transparency is the key to credibility in a restructuring process, and credibility is the key to success of the restructuring process. Be mindful that, in an out-of-court restructuring, there is no judge to impose the company's will. Everything is voluntary, so the credibility of the company and its advisers is what will get a deal done, whereas the lack of credibility will kill any chance of an out-of-court restructuring.

And finally, the negotiation. When orchestrating in-person meetings with counterparties, the company should host the meeting(s) unless another party insists and their request is reasonable. The company should insist that high-level decision makers with authority attend all parties. Professionals-only meetings generally go nowhere. You should plan for a meeting lasting no less than a half-day; ideally, schedule for a whole day.

Be hospitable. Shorter meetings rarely accomplish anything other than grandstanding and chest thumping. You want the meeting long enough such that everyone in attendance knows that something can be accomplished that day. The company should be prepared to dominate the first part of every meeting with a presentation by its chief executive officer, and its advisers, that radiates honesty, transparency and sincerity in seeking a consensual resolution.

The interim goal of this kind of meeting should be to begin to discuss the terms of a restructuring (and even finalize them, if possible). Points of agreement should be memorialized as soon as possible after they are agreed upon. Ultimately, depending upon how many meetings are required, an important objective is to reach a consensual term sheet executed by all parties as soon as possible.

How long will this take? It depends on how complex the situation is. A single loan with a single lender group may take 30–60 days. For multiple tranches of debt, it could easily take 120–180 days or more. But here's the thing—while there is no set time frame during which a specific deal should happen, the longer the process goes on, the less likely it is that the company will achieve a voluntary restructuring. Keep in mind, then, that it is the company that should be keeping the parties focused and continually working to move the ball down the field and advance the process.

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