Zack A. Clement, PLLC

FINANCIAL RESTRUCTURE FOR BUSINESSES AND GOVERNMENTS

Overview of a Financial Reorganization, Using Chapter 11 if Necessary

Summary

This paper describes the bankruptcy process for financial and legal officers who are responsible for a company that is having financial difficulty. It prepares them to have a meaningful discussion with a restructure lawyer about how to: (i) preserve the company's going concern value and restructure its finances, and (ii) hire financial and legal professionals to carry out that restructure.

Section I describes a template for company officers to organize what they already know about their company's debt structure, asset values and cash flows.

Sections II through IV describe basic approaches to reorganizing a company's finances, types of reorganization plans, trying to reorganize out of court, and sometimes choosing to use Chapter 11.

Sections VI-XI describe how Chapter 11 works, including the automatic stay of collection actions, financing the debtor-in-possession during a case, selling assets and rejecting contracts during the case, what can be done to secured and unsecured creditors in a plan of reorganization at the end of a case, and how exit financing can be obtained in connection with a plan. This Chapter 11 process is available to help a debtor refinance and force unreasonable holdouts to accept a fair and equitable treatment in a restructure plan.

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I. Using a Template to Summarizing Restructure Facts *and* Preliminary Assessment of a Debt Restructure

Company legal and financial officers can use a *Template* that I supply to summarize the company's (i) debt structure, (ii) asset values, (iii) cash flows and (iv) enterprise value into a *Restructure Outline* that can be used to do a *Preliminary Assessment of a Debt Restructure*.

By doing its own estimates of **Total Debt**, **Total Asset Value** and **Enterprise Value** management can understand what general kind of debt restructure plan can be pursued, and lead the company's restructure. Management can use this information to interview lawyers, financial advisors and investment bankers to decide who will best carry out a debt restructure for their company.

A. Debt Structure and Estimated Total Debt

Officers know their company's debt structure but it is helpful to use the *Template* to organize that information into a formatted *Restructure Outline*, categorizing claims into classes according to the priority of payment; and listing covenants, cross defaults and upcoming events of default. This will assist in doing a preliminary estimate of **Total Debt**.

B. Estimated Total Asset Value

Company officers will have general estimates of the sale value of the company's assets. It is helpful to summarize those estimates in a formatted outline (i) for assets already subject to lien and (ii) for those not currently subject to lien that are available to raise cash either by giving a lien on them or selling them. This will assist in doing a preliminary management estimate of **Total Asset Value.**

C. Cash Flow Projections

Company officers can do both short and long term cash flows, permitting a preliminary assessment of: (a) short term survival, (b) whether a working capital loan is needed, and (c) whether there is sufficient enterprise value to give value to shareholders in a restructure.

1. **Short Term Cash Flows** (by week for the next 13 weeks done on an actual cash in/ cash out basis; this is the time period commonly at issue in a "first day" hearing in a chapter 11 case concerning either (i) cash collateral use or (ii) a debtor in possession loan ("DIP Loan"))

2. **Long Term Cash Flows** (by month for the next 3 years on a GAAP basis, a common "planning period" for valuation projections)

3. This prepares management to interview restructure professionals who regularly do such projections in this kind of setting.

D. Preliminary Management Estimate of Enterprise Value

Company officers can do their own preliminary estimate of **Enterprise Value** using the cash flow projections that they have done. The basic valuation methods are straight forward, but applying them involves art, judgement and expertise. Management's preliminary estimate of Enterprise Value will be superseded by expert valuations, but gives an early feel on major issues.

E. Management can learn important things based on its preliminary estimates of **Total Debt**, **Total Asset Value** and **Enterprise Value**.

1. Does **Total Debt** exceed **Total Asset Value** so that creditors would not be paid in full if the company's assets were sold. This is relevant to whether the value offered in a going concern plan is in the "best interests of creditors" meaning more than creditors would receive in liquidation.

2. If **Total Debt** exceeds **Total Asset Value** then the company is balance sheet insolvent and transfers of company assets will need to be scrutinized for whether they bring fair value to avoid making fraudulent conveyances.

3. Unless **Enterprise Value** exceeds **Total Debt**, the absolute priority rule will prohibit giving value to shareholders in a plan of reorganization.

F. By doing its own cash flow projections, management can begin to lead the debt restructure process.

1. Management's cash flow projections can be used to start analyzing survival issues.

2. Short term cash flows can be analyzed to see if temporary savings can be made to survive until debt is restructured.

3. Management can start analyzing how to increase cash flows by rejecting unnecessary or uneconomic contracts.

4. Debtor in possession loans ("DIP Loans") early in a chapter 11 case often give the lender substantial control and end up heavily influencing the course of the case. If management has done projections, it can collaborate more effectively in decisions about whether the company actually needs a DIP loan for working capital during the case.

G. By doing its own preliminary enterprise valuation management involves itself in a major issue about whether there is value available for shareholders.

1. Managers might feel ill at ease making estimates of the value of assets and cash flows, and might wish to defer to experts to make them. But preliminary management estimates will be supplanted by subsequent independent expert opinion.

2. Meanwhile, if management has a preliminary estimate of enterprise value, it will have a feel for which claims and equity interests are in or out of the money, and what could be done to change that.

3. It is important for management to have a general view on these subjects when hiring experts whose methods and judgments will be significant in analyzing and opining about value and strategy**.**

II. Basic things that Can be done to reorganize a company's finances

Financial reorganization is not mysterious. There are about 12 basic approaches.

A. Eliminate money losing lines of business or subsidiaries.

B. Operate more efficiently to stop losing money/make more money.

C. Sell assets to raise money to pay down old debt or for operating capital.

D. Borrow more money to pay down old debt or for operating capital, possibly by putting a lien on unencumbered assets.

E. Raise new equity financing to pay down old debt or for operating capital.

F. Stretch out secured debt.

G. Stretch out unsecured debt.

H. Convert unsecured debt to equity.

I. Other innovative ideas.

J. Armed with an overview of the company's debt structure, asset values, cash flows, and enterprise values, you can develop a **Reorganization Plan** for your company that proposes to do some or all of these things.

III. Types of Reorganization Plans.

A. General Fiduciary Duties concerning Plans.

1. The officers and board of directors of a company going through reorganization have a fiduciary duty to preserve and enhance its going concern value and to allocate that value fairly among creditors and equity security holders according to legal priorities.

2. Often a special restructuring committee of independent board members is established to work with restructuring legal and financial advisors to evaluate options and recommend decisions to the broader board. The

committee should discover and analyze all options available to reorganize a business.

B. Basic Types of Plans.

If a company's officers and directors choose to reorganize through a chapter 11 case, they will eventually have to decide which basic kind of a Plan of Reorganization to propose.

1. A stand alone Plan, changing the terms of secured debt and converting some or all unsecured debt to equity, with no new investment at consummation of the Plan, premised on adequate existing capital to run the company's business after its debt has been restructured, and sufficient enterprise value to pay unsecured creditors more than in liquidation, possibly enough to pay them in full thus leaving some value for old equity (a "**Stand Alone Plan**").

2. A stand alone Plan, changing the terms of secured debt and converting some unsecured debt to equity, with a new investment made at consummation by a third party (or by old shareholders or old lenders) that essentially buys the majority new equity in the reorganized company (a "**Stand Alone New Investment Plan**"). Such a Plan is premised on the company needing new capital to run its business even after its debt has been restructured.

3. A Plan to sell the assets of the company as a going concern free and clear of liens, with liens to attach to proceeds and proceeds to be allocated to creditors (and possibly equity) according to the priority of their claims and interests (a "**Sale Plan**").

a. Such a Plan ends the company's existence, but preserves the company's going concern value and many of the jobs the company had been supporting.

b. Purchasers often offer incentives to managers to encourage a Sale Plan. Managers must be careful to discharge their fiduciary duties.

4. A plan to merge the debtor with other companies to create a larger company better able to compete in the relevant market;

C. **More Detailed Description of Basic Types of Plan.**

1. **Stand Alone Plan**

a. Change secured claim terms;

b. Change unsecured claim term and/or convert unsecured debt to equity;

c. Sometimes there is not enough value to support any return to old equity, but a Stand Alone Plan still preserves the company's going concern value and the jobs it supports.

d. Sometimes there is enough enterprise value to leave some value for old equity.

e. **Crucial Question:**. Will the reorganized company have adequate post-reorganization capital to continue operations after debt obligations have been restructured?

2. **Stand Alone New Investment Plan.**

a. Change secured claim terms;

b. Change unsecured claim terms and/or convert unsecured debt to equity;

c. Depending on values, old equity might be extinguished in such a plan;

d. A new investment provides adequate post-reorganization capital and requires that substantial post-reorganization equity be given to the new investor.

e. **Crucial Question:** Can a new investor be found willing to put money into the reorganized company's business plan?

3. **Sale Plan.**

a. Secured claims receive cash proceeds of sale or sometimes credit bid to take ownership of the collateral;

b. Unsecured claims might receive some residual sale proceeds;

c. Old equity likely extinguished;

d. Management might be incentivized by a grant of equity from the purchaser;

e. Going concern value and substantial employment continue on.

f. **Crucial Question:** Can a purchaser be found?

4. **Merger Plan.**

a. Merger of the debtor company with other companies to create a larger company better able to compete in the relevant market;

b. Treatment of claims otherwise similar to a Stand-Alone Plan;

c. The merger might create a stronger story about the feasibility of the Plan and be more attractive to exit financiers.

d. **Crucial Question:** Can a merger partner be found?

5. **Other imaginative Plans.**

IV. Hiring Financial and Legal Experts to develop a Reorganization Plan and implement it.

A. Hiring Financial Experts

1. Financial advisors regularly do things that are helpful in the restructure process.

a. For example, short term cash flows that are important to survival are best done on a cash basis, rather than accrual. Financial advisors regularly do cash basis short term cash flow projections.

b. Additionally, financial advisors generally do a model of full three statement business plan projections for short and long term.

i. Such a model provides a basis to determine (a) the need, size, and timing of interim financing; and (b) enterprise valuation.

ii. Such a model permits analysis of business changes and other factors that can drive value higher; and how a Chapter 11 case could change value through business improvements and rejection of unnecessary or uneconomic contracts and leases.

iii. Such a model is useful to assess potential restructuring proposals.

c. Investment bankers regularly structure transactions and find people to finance them

d. If management has done its own cash flow projections and preliminary evaluations, it will be able to interview financial advisors and investment bankers more effectively.

i. Knowing what methods and assumptions it used, management will be able to ask financial advisors about theirs that will have tremendous influence on the restructure.

ii. If management has used its projection work to start examining business improvements that would improve cash

flow, it will be able to interview financial advisors about how they would deal with this.

B. Hiring restructure lawyers

1. Some lawyers regularly represent debtor companies in restructuring.

2. They like and believe in the work, can help formulate a Reorganization Plan, help implement it, and make judgements along the way about what risks are worth taking by trying an issue or making compromise deal.

3. If management has organized its facts, understands the restructure process and the general kind of approaches that can be pursued, it will be able to interview restructure lawyers more effectively.

C. Formulating a Restructure Plan

After hiring legal and financial experts, management can work with them to formulate a Reorganization Plan and implement it

V. How to implement a Reorganization Plan.

A. The best way for a company to implement a **Reorganization Plan** is to do the things that are within its control (such as operational improvements) and to seek agreements on the Reorganization Plan from as many other parties as possible.

B. If there are hold outs who will not go along with a reasonable Reorganization Plan, then turn it into a Chapter 11 Plan of Reorganization and seek prompt confirmation of it under the Bankruptcy Code.

C. Bear in mind, some transactions will be difficult to do outside a judicial process because of concern that the out of court restructure will not succeed and a later bankruptcy case will scrutinize the transaction as a fraudulent conveyance.

VI. So why do companies file Chapter 11 cases anyway?

A. The **"common wisdom"** is that companies file a Chapter 11 case to take advantage of (i) the automatic stay during the case to avoid paying pre-petition debts on a current basis and (ii) the aggressive things that can be done at the end of the case to restructure secured and unsecured debt through a plan of reorganization.

1. As described below, the Bankruptcy Code gives (i) relief to current cash needs during the case and (ii) the power to forcibly change existing debt structure at the end of the case.

2. During a Chapter 11 Case, the debtor obtains cash relief because:

a. It makes no current payment of pre-petition unsecured debt;

b. It makes no current payment of pre-petition secured debt, as long as the secured claim is "adequately protected";

c. It makes only current payment for post-petition accruals on contracts; and

d. It can reject unfavorable contracts, creating an unsecured rejection damage claim that can be dealt with in a Plan at the end of the case.

3. In a Plan at the end of a Chapter 11 Case, the Debtor has the power to:

a. Forcibly change the terms of existing secured loans (by extending their maturity, changing the amount of periodic payments, and changing the rate of interest); and

b. Forcibly convert unsecured debt to equity.

4. These forcible changes are done based on proof of valuation and feasibility.

a. This proof is made to the Bankruptcy Court through expert witness testimony and cross examination.

b. The Bankruptcy Court makes findings of fact based on this expert testimony that are often difficult to overturn on appeal, especially when the mootness concept is applied.

B. The primary reasons for a chapter 11 filing are, however, often different from this **"common wisdom."**

1. Major companies avoid bankruptcy as long as possible to protect their shareholders' interests rather than dive in to go on offense to change the terms of their debt by court order.

2. They avoid Chapter 11 by doing the things that they can do unilaterally (improving the efficiency of operations, selling assets) and making as many consensual agreements as possible as outlined in their proposed Reorganization Plan.

3. **They file Chapter 11 because illiquidity/insolvency can be an intensely difficult, ambiguous environment with multiple conflicting demands and duties and, after a while in restructure negotiations, it often becomes safer and more comfortable to have a Bankruptcy Code to follow and a Bankruptcy Court to approve major business judgments.**

4. **They file Chapter 11 primarily because they have liquidity/solvency problems leading to a need to refinance that they cannot solve adequately outside of bankruptcy and the Bankruptcy Code provides the power to force certain forms of finance during the case through (i)**

cash collateral use and (ii) DIP loans, (iii) a sale free and clear of liens; and (vi) exit financing at the end of the case after debt has been restructured.

5. The following describes generally how Chapter 11 gives these powers.

VII. How a Chapter 11 Case works: the Automatic Stay of payments during a Chapter 11 case and treatment of secured claims and executory contracts during the case.

A. The automatic stay of section 362 of the Bankruptcy Code generally prohibits collection actions on claims that arose pre-petition.

B. Adequate protection with respect to pre-petition secured claims.

1. If its collateral is worth more than the debt secured (*i.e.*, over-secured), then this "equity cushion" may provide adequate protection to block a secured creditor's motion to lift stay to be permitted to foreclose on its collateral.

2. If its collateral is worth less than the debt secured (*i.e.*, under-secured), then the secured creditor can assert a right to adequate protection of the value of the collateral during the case, seeking compensation for:

a. market value decline post-petition;

b. value decline resulting from post-petition use;

c. an under-secured creditor is <u>not</u> entitled to compensation for lost opportunity cost during the case.

3. Forms of adequate protection (§ 361).

a. Debtor's payment of insurance, taxes and maintenance;

b. The grant of additional collateral;

c. Cash payments;

d. "Indubitable equivalence" (*i.e.*, other).

4. A Debtor can make a charge against collateral for the expense of maintaining it (§ 502(c)).

C. Pre-petition executory contracts or leases of non-residential real estate (contracts on which material performance by both parties is still due) (§ 365).

1. Time to assume or reject executory contracts or leases.

a. Non-residential real property, the debtor/lessee must decide whether to assume the lease within 120 days (§ 365(d)(4)).

b. For other leases and executory contracts, the debtor can wait until confirmation of a Plan of reorganization at the end of the case to decide whether to assume or reject (§ 365(d)(2)).

c. These time periods can be extended or shortened for "cause" (§ 365(d)(2),(4). The period within which to assume or reject a commercial real estate lease can only be extended once for cause on request of the debtor, and thereafter only with the consent of the lessor (§ 365(d)(4)(B).

2. Prior to assumption or rejection, the Debtor should pay "use and occupancy" payments for the fair market value of the benefit it receives post-petition under the lease or contract.

a. Presumptively "use and occupancy" is equal to the contract rate.

3. If a pre-petition contract is rejected, never having previously been assumed, then the rejection damage claim is a pre-petition general unsecured claim (§ 365(g)(1)).

4. If a pre-petition contract is assumed (§ 365(b)(1):

a. Defaults must be cured;

b. Debtor must prove adequate assurance of future performance;

c. Debtor must adhere to contract terms unchanged;

d. Contract payments must be made when due;

e. Moreover, the later rejection (or breach) of a previously assumed contract generates an administrative priority claim which must be paid in full in cash no later than the effective date of the Debtor's Plan (§ 365(g)(2)).

5. Generally, executory contracts can be rejected if the Debtor applies its business judgment and decides it would benefit from rejecting the contract.

6. Section 1113 and 1114 were enacted to make it very difficult to reject a labor or employee benefits contract.

a. They require meeting a standard much harder to prove than mere business judgment.

D. **Generally, liabilities incurred post-petition in the ordinary course of business can and should be paid in the ordinary course during a Chapter 11 case, without approval from the bankruptcy court presiding over the case (the "Court").**

1. Post-petition non-ordinary course payments must be approved by the Court.

VIII. Financing operations during a Chapter 11 case.

A. Unencumbered property can be used, sold or leased in the ordinary course (§ 363(c)).

1. This includes unencumbered cash.

B. Use of Cash Collateral (§ 363(c)(2)).

1. Cash collateral can only be used if (a) the secured creditor consents or (b) the Debtor obtains court approval to use it based on a finding of adequate protection.

2. Section 552 cuts off a floating lien on receivables on the petition date so generally the proceeds of pre-petition earned receivables are cash collateral, but the proceeds of post-petition earned receivables are not cash collateral (i.e. not subject to a pre-petition floating lien on receivables).

   a. Section 552 does not cut off a lien on post-petition earned (i) rents from real estate or (ii) proceeds from sale of oil and gas production.

   b. These are both proceeds of pre-petition collateral.

3. Generally, adequate protection for use of cash collateral can be:

   a. that the equity cushion from the value of all the creditor's collateral is large enough to cover loss of any cash collateral that will be used;

   b. a replacement lien on post-petition earned receivables (previously unencumbered because of Section 552); and/or

   c. a replacement lien on other previously unencumbered property.

C. Debtor-in-possession loan (§ 364).

A Debtor may obtain:

1. Unsecured credit in the ordinary course of its business, without a Court order (§ 364(a)).

2. Unsecured credit outside the ordinary course, pursuant to Court order (§ 364(b)).

3. Secured credit with either (a) a lien on unencumbered property or (b) a junior lien on already encumbered property, pursuant to Court order (§ 364(c)).

4. Secured credit with a senior (or equal) lien on already encumbered property, pursuant to Court order, as long as the previously existing lien is found to be adequately protected (§ 364(d)).

   a. This usually requires a finding that the value of the collateral substantially exceeds the amount of the pre-existing secured claim, but other forms of proof are possible.

   b. This could theoretically include proof that the value of collateral will be increased.

5. Lenders are given protection for liens granted and for money advanced in good faith pursuant to a Bankruptcy Court order, notwithstanding any reversal of the order on appeal (this is the "Mootness Concept"), unless the approval order is stayed pending appeal (probably requiring a bond) (§ 364(e)).

D. Sale of assets outside the ordinary course (§ 363(b)).

1. A Debtor may sell assets outside the ordinary course during its case pursuant to Court order under § 363(b).

2. Such a sale can be free and clear of any liens on the property sold, with any liens to attach to the proceeds of sale.

   a. The lien holder should be permitted to credit bid at such a sale (§363(k)).

3. A sale to a good faith purchaser is not affected by a subsequent reversal of the sale order on appeal (the Mootness Concept again), unless the sale is stayed pending appeal (probably requiring a bond) (§ 363(m)).

E. Assumption and assignment to a third party of valuable contracts or leases (§ 365(f)).

1. All defaults under the contract or lease must be cured.

2. Assignee must be able to give adequate assurance of future performance.

3. Subject to certain exceptions, a contract or lease may be assumed and assigned notwithstanding contract provisions prohibiting assignment (§ 365(f)(1)).

   a. Personal service contracts cannot be assigned without consent from the non-debtor party (§ 365(c)).

b. There are issues about whether certain intellectual property licenses are personal services contracts thus whether they can be (i) assumed by the Debtor or (ii) assigned to a third party.

IX. Treatment of claims in a Plan of Reorganization.

A. General Plan Confirmation Rules (§ 1129(a)(1)).

1. Liquidation Test (called the "Best Interests of Creditors Test") (§ 1129(a)(7)). **Will every creditor in a class receive not less than it would receive in Chapter 7 liquidation?**

   a. As a rule of thumb, enterprise value should be equal to or greater than asset liquidation value or there is no reason to reorganize.

   b. Liquidation values are low asset values, obtained in forced sale conditions, not as good as those assumed for a fair market value sale of assets.

2. **Plan must be feasible** (§ 1129(a)(11).

3. **Each class must either vote for the Plan** (by 1/2 in number voting and 2/3 of amount voting) **or the Plan must be "fair and equitable" to that class.**

   a. Proving that a class is being treated "fairly and equitably" is called colloquially the use of the "cramdown power."

   b. See below for descriptions of fair and equitable treatments for secured and unsecured claims.

4. There must be at least **one impaired class that votes to accept the Plan.**

B. Classes should be fairly created (§ 1122).

1. Claims within a class should be similar.

2. Presumptively, there should be only one class for each type of claim (such as general unsecured claims).

   a. Should not "gerrymander" classes to manufacture an accepting class.

   b. However, can create separate classes of the same type of claim if there is a sound business justification for it.

      (i) For example, trade claims have a different expectation of prompt payment than public unsecured bond claims or

unsecured deficiency claims on bank loans, even though they are all essentially unsecured claims.

(ii) For another example, employment contract claims have a different expectation than public unsecured bond claims or unsecured deficiency claims on bank loans.

(iii) These justifications are often subject to vigorous challenge and it is difficult to know with certainty in advance whether a reason for a separate classification will hold up.

C. Fair and Equitable Treatment of Different Kinds of Classes (§ 1129(b)).

1. Administrative and Priority Claims.

a. Must be paid **cash** on effective date of the Plan.

b. Certain tax claims can be paid in cash over 5 years (§ 1129(a)(9)(c).

2. Secured Claims can be treated fairly and equitably in one of the following three ways § 129(b)(2)(a)).

a. **Retain Lien/Cash payments** (§ 1129(b)(2)(A)(i)):

(i) Creditor retains lien on collateral

(a) However, Section 1129(b)(2)(A) does not say that the creditor is entitled to keep its loan agreement covenants that trigger defaults on the lien; and

(ii) Creditor receives "deferred cash payments totaling at least the allowed amount of such [secured] claim, of a value, as of the effective date of the plan, of at least the value" of the collateral. This language presents issues about:

(a) What is the value of the collateral that caps the amount of the secured claim?

(b) How long can the payments be stretched out (is the proposed stretch out feasible)?

(c) What is the proper interest rate to use to discount the proposed cash payments to present value (i) for this company, (ii) in this industry, (iii) for this length of stretch out?

b. **Sale of collateral,** with the secured creditor entitled to credit bid, and with any cash sale proceeds to be subjected to the lien of to the

secured creditor up to the amount of its claim (§ 1129(b)(2)(a)(ii)); or

c. **Indubitable Equivalence** (§ 1129(b)(2)(a)(iii):

(i) Abandon collateral to secured creditor, or

(ii) Treatment similar to "a" immediately above, or

(iii) Other concepts arguably meeting this broad statutory term.

3. **Unsecured Claim and the Absolute Priority Rule.**

a. Unsecured claims can be paid "value" (*i.e.*, cash, notes, common stock in the reorganized company or other value) (§ 1129(b)(2)(B)).

b. If value paid to unsecured claims is less than 100¢ on the dollar, no junior class (*i.e.*, subordinated debt or equity interests) can receive any value (this is the "Absolute Priority Rule")(§ 1129(b)(2)(B)(ii)).

c. Unsecured claims cannot be paid value greater than 100¢ on the dollar (this would not be fair and equitable to, and would discriminate with respect to, junior classes such as subordinated debt or equity).

4. **Equity interests.**

a. Can receive value only if all senior creditor classes have been given value equal to 100¢ on dollar (§ 1129(b)(2)(B)).

b. Are entitled to object if secured or unsecured claims receive more than 100¢ on the dollar.

5. New Value Exception to the Absolute Priority Rule.

a. Old equity can "buy" the stock of the reorganized debtor as it emerges from bankruptcy pursuant to a Plan based on new value invested upon consummation of the Plan.

(i) The new value must be substantial and necessary.

(ii) The value acquired in return must be reasonably equivalent to the new value invested.

(iii) If the Debtor's Plan is filed during its exclusive period to file a plan and provides its old equity holders the right to buy equity in the reorganized Debtor through a new value contribution, then (a) other parties should be permitted to bid

for the right to put in this new value, or (b) the exclusive period to file a Plan should be terminated.

X. Sale of substantially all assets.

A. A Debtor can propose to sell substantially all of its assets during a Chapter 11 case pursuant to Section 363(b) or under a Plan pursuant to §§ 1123 and 1129.

1. The Courts have usually required a higher level of proof of necessity if the Debtor proposes to sell substantially all of its assets in a § 363 sale during the case.

2. If substantially all of the debtor's assets are sold during the case pursuant to Section 363, then the cash proceeds of the sale are commonly paid to holders of liens on the sold assets in order of their priority under the Bankruptcy Code.

B. Some Courts have suggested that a Debtor should only be permitted to sell substantially all of its assets pursuant to a plan of reorganization confirmed under Sections 1123(a)(5) and 1129 and <u>not</u> during the case under § 363.

1. A Plan proposing a sale can be confirmed almost as fast as a Section 363 sale can be approved, especially if a substantial sale process including a data room, competing bidders and an auction is to be used in the § 363 sale.

C. Whether done pursuant to § 363 or §§ 1123/1129, a sale is an alternative to a standalone reorganization that, while ending the company's existence, preserves the company's going concern value and many of its jobs.

XI. The Debtor's Exclusive Period to File a Plan of Reorganization.

A. A debtor has 120 days after filing its Chapter 11 petition during which it is the only party that can file a Plan of reorganization (§ 1121(b)).

B. Extensions of this exclusive period can be obtained "for cause shown," but it is by no means certain that such extensions will be granted (§ 1121(d)).

C. The Court can terminate exclusivity for cause shown by other parties-in-interest (*i.e.*, creditors and equity interest holders) who want to file a competing plan (§ 1121(d)).

1. The best way for a Debtor to keep exclusivity is to move forward promptly with filing and seeking confirmation of its own Plan.

2. If you don't lead with a plan, you risk losing exclusivity.

D. The Court cannot extend exclusivity past 18 months (§ 1121(d)(2)).

XII. Certain creditor remedies

A. A secured creditor can seek adequate protection (§ 363(e)) or lifting of the automatic stay to permit foreclosure (§ 362(d)).

B. A party to an executory contract can request that the Debtor make a faster decision to assume or reject its contract (§ 365) and possibly receive adequate protection during any continued time given to the Debtor (§ 363(e)).

C. Any party-in-interest can move to terminate exclusivity for cause shown in order to file a competing plan (§ 1121(d)).

D. Any party-in-interest can request either the appointment of a Trustee or dismissal of the Chapter 11 case.

1. Under § 1104, appointment of a trustee can be ordered:

a. For "fraud, dishonesty, incompetence or gross mismanagement;" or

b. Because "such appointment is in the interests of creditors, any equity security holders and other interests of the estate."

2. Under § 1112, conversion to Chapter 7 or dismissal of the case can be ordered for cause, including:

a. Continuing loss or diminution of the estate and absence of a reasonable likelihood of rehabilitation;

b. Inability to effectuate a plan;

c. Unreasonable delay by the debtor that is prejudicial to creditors;

d. Failure to propose a plan under § 1121 within any time frame ordered by the Court;

e. Denial of confirmation of every proposed plan and denial of a request made for additional time for filing another plan;

f. Revocation of an order of confirmation under § 1144 and denial of confirmation of another plan or a modified plan under §1129;

g. Inability to effectuate substantial consummation of a confirmed plan; and

h. Material default by the debtor with respect to a confirmed plan.

I would be pleased to discuss any of these things.

Zack Clement

Zack A. Clement PLLC
3753 Drummond St.
Houston, Texas 77025
832 274 7629
zack.clement@icloud.com
www.zackclement.com

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