

Zack A. Clement, PLLC

FINANCIAL RESTRUCTURE FOR BUSINESSES AND GOVERNMENTS

Preliminary Assessment of a Prompt, Efficient Debt Restructure

In a *Preliminary Assessment*, company officers can learn what can be accomplished in a debt restructure and how. They can learn an *approach* that will help them interview and hire excellent legal and financial professionals to work with them to lead a restructure.

Approach to Lead Debt Restructure

Company officers can learn the following *approach* through a *Preliminary Assessment*:

- Organize what they already know about their debt obligations, asset values and cash flows.
- Understand general fiduciary duties during restructure.
- Understand what it means to develop a restructure plan that is in the *best interests of creditors, fair and equitable, and feasible*.
- Interview and work with excellent professionals to develop a fair plan.
- Sell that plan to as many creditor groups as possible in negotiations.
- If necessary, force it on unreasonable holdouts in a Chapter 11 case completed in about 90 days.
- Keep the case moving promptly and keep control of it by being willing to try issues about *adequate protection* and *fair and equitable* treatment.

Restructure Duties and Principles

This *approach* helps officers and directors carry out their fiduciary duties to (i) try to make their company more valuable and (ii) allocate that value fairly among creditors and shareholders. It justifies giving them release and exculpation at the end of the restructure.

The Delaware Chancery court has made clear that officers and directors of a financially stressed company can do their duty by continuing to take reasonable business risk to make their company more valuable for the benefit of shareholders and creditors. *Quadrant Structured Prods. Co. v. Vertin*, 102 A.3d 155 (Del. Ch. 2014).

The U.S. Supreme Court has made clear that enterprise valuation of a debtor in a reorganization case, that will determine whether there is enough value for old shareholders to retain an interest under the *fair and equitable* standard, should consider post-bankruptcy projections after the debtor is “freed from the heavy hand of past errors, miscalculations or disaster” and may have a

new business plan based on new capital investments. *Protective Committee for Indep. Stockholders of TMT Trailer Ferry v. Anderson*, 390 U.S. 414 (1968). In this precedent that has stood up over 50 years, the Supreme Court has thus invited evidence that projects expected improved business performance after a company is reorganized through Chapter 11.

This *approach* follows the Supreme Court's view in *Katchen v. Landy*, 382 U.S. 323 (1966) that a "chief purpose of the bankruptcy laws is 'to secure a prompt and effectual administration and settlement of the estate of all bankrupts within a limited period... [through] summary disposition without regard to usual modes of trial attended by some necessary delay.'"

This *approach* justifies release and exculpation for company fiduciaries who have confirmed a plan found to be proposed in *good faith*, in the *best interests of creditors*, *fair and equitable*, and *feasible*. See *In re Highland Cap. Mgmt.*, 48 F.4th 419 (5th Cir. 2022).

This *approach* aims to complete a Chapter 11 case promptly and efficiently in less than 120 days. A similar approach works for governments.

Things to discuss in a Preliminary Assessment

A *Preliminary Assessment* begins with company officers using a *Template* to organize into a *Restructure Outline* what they already know about their company's (i) debt structure, (ii) asset values, and (iii) cash flows. I can help them do this, then we can use it as a basis for a *Preliminary Assessment*.

We can discuss fiduciary duties during a restructure, and core restructure principles such as (i) *adequate protection*, (ii) *best interests of creditors*, (iii) *fair and equitable*, and (iv) *feasible*.

We can use the *Restructure Outline* of the company's debt, asset values and cash flows to discuss the general ways the company's debt could be restructured, ideally through negotiations out of court, or through a prompt efficient Chapter 11 case if necessary.

We can discuss the importance of hiring financial advisors who have experience (i) improving business performance and projections as encouraged by the Supreme Court in *TMT Trailer Ferry* and (ii) analyzing short term cash flows to determine whether additional capital is needed to support operations during a less than 120 day Chapter 11 case.

We can discuss the importance of hiring lawyers who (i) have experience with courts that have handled cases promptly and efficiently, and (ii) have tried cases about core financial issues such as *adequate protection* and *fair and equitable*. For example, the Southern District of Texas has *Complex Case Procedures* that facilitate prompt, efficient handling of debt restructure, including scheduling prompt hearings on core financial issues; other Texas courts are considering such guidelines. These *Procedures* make it possible to carry out the *Ten Steps to Prompt Efficient Debt Restructure* that we will discuss during a *Preliminary Assessment*.

Finally, we can discuss the importance of hiring lawyers who understand what kind of release and exculpation is possible under *Highland Capital*.

Help Getting Started

I can help business leaders who are beginning to realize that they need to restructure their company's debt, but are not yet ready to spend substantial resources to hire professionals. By going through a *Preliminary Assessment*, they will be prepared to interview and hire excellent professionals who will help them lead their debt restructure.

I would be happy to talk about this.

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Attachments

Quadrant Structured Prods. Co. v. Vertin, 102 A.3d 155 (Del. Ch. 2014)

Protective Committee for Indep. Stockholders of TMT Trailer Ferry v. Anderson, 390 U.S. 414 (1968)

Katchen v. Landy, 382 U.S. 323 (1966)

The Heart of SDTX Complex Case Procedures

In re Highland Cap. Mgmt., 48 F.4th 419 (5th Cir. 2022)