What's Next? The Top Issues of 2013 and Beyond

About the Author

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This article originally appeared in *NACD Directorship* on September 26, 2012.

How has the bankruptcy and restructuring landscape changed in the wake of the global financial crisis?

Europe is still very much in the midst of a financial crisis and the effects are multifaceted. Notably, we have seen an increase in the number of cross-border insolvency cases, which is a trend we fully expect to continue. In particular, there has been a rise in cases filed under Chapter 15 of the Bankruptcy Code, which provides a framework for multinational companies to have foreign insolvency proceedings recognized in the U.S. The laws governing these cases are still being developed, and courts are struggling with how much weight to give foreign insolvency laws when they conflict with U.S. law.

We have also witnessed growth in the number of foreign companies looking to file under Chapter 11 of the Bankruptcy Code. The rules on eligibility for a foreign company to file bankruptcy here are lenient, and our bankruptcy laws are biased towards rehabilitating a troubled company to preserve its "going concern" value — as opposed to most foreign insolvency regimes, where the focus is on liquidating a troubled company's assets quickly and distributing the proceeds to creditors.

How can directors best serve a company during bankruptcy or restructuring?

A board will want practical outside advice early in the process on how to fulfill its fiduciary duties, and how those duties may change when the company is insolvent or approaches insolvency. The board will want to maintain a proper supervisory role and not exercise undue influence over day-to-day operations. Prior to filing bankruptcy, the board and its advisors should also assess the adequacy of the D&O insurance policies. Also, directors should be alerted to the discrete areas where they could potentially be liable personally for the bankrupt company's debts. Every case is different, but these pitfalls can include personal liability for "responsible persons" when a company fails to pay wages or segregate certain taxes, or for knowingly permitting the company to incur debts beyond its ability to pay.

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Once a company files bankruptcy, the board should appreciate that the decision-making process becomes much more transparent. In general, the company can operate as usual but will need prior court approval for "non-ordinary course" transactions such as sales, financings and the like. A question

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that frequently gets asked is whether a director should resign once the company files bankruptcy — there are exceptions but in most cases, the answer is "no," the director is better off staying on the board and guiding the company to conclusion of the bankruptcy process.

What can a company do to position itself for post-bankruptcy operations?

The company should determine its exit strategy before it files bankruptcy wherever possible, and view the process as an opportunity to fix both financial and operational problems. Get as much negotiated in advance of filing as possible. There has been an increase in the number of "prepackaged" or "pre-negotiated" cases in recent years and we see that trend continuing. Filing with an exit plan already negotiated enables the company to shorten the time it spends in bankruptcy, maintain control over the process and reduce restructuring costs.

Another piece of practical advice is for the company to get the right managers and financial advisors in place, and develop a plan to "right-size" the employees, before it files bankruptcy. The benefits of getting this done before filing can include greater flexibility in developing an incentive bonus plan for the company and avoiding potential liability for premature layoffs.

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Lastly, the board needs to stay focused on the business plan during the bankruptcy. While external factors may have contributed to the need to file, larger underlying problems with the business model or the balance sheet likely drove the decision. Those issues need to be resolved for the company to emerge as a viable business and, while bankruptcy can be a powerful tool, it is not a panacea for the problems that led the company to file bankruptcy in the first place.

Best Communications Practices:

1. Boards must ensure that exit strategies and future growth are the hallmarks of communications during bankruptcy, beginning with the initial announcement. When companies control the "new day" narrative, internally and externally, they keep stakeholders focused on future success, not past mistakes.

2. Every ruling, decision, and development in the restructuring process is an opportunity to communicate the new day message. Adversaries will use these milestones to disseminate their own messages. Don't let them operate in a vacuum.

3. Boards must understand the power of social and digital media to disclose. Teams need to be ready to respond publicly from the very moment a company begins to seriously consider restructuring—in other words, go on the offense so you don't have to play defense.