Merrill DataSite and The M&A Advisor Present

THE ROAD TO RECOVERY

SECTION I

CREATING VALUE FROM DISTRESSED COMPANIES

VALUABLE GUIDANCE FROM THE MOST
ACTIVE MIDDLE MARKET M&A PRACTITIONERS

BEST PRACTICES
OF THE BEST
DEALMAKERS

FIRST EDITION: PART 3 - SECTION I

Introduction

Drawing on the experience and expertise of the "best in class" dealmakers, The M&A Advisor, together with the leading provider of virtual deal management services, Merrill DataSite®, publishes the quintessential dealmakers guide series - **"The Best Practices of The Best M&A Dealmakers".**

Profiling the proven strategies and unique experiences of the leading M&A practitioners, **"The Best Practices of The Best M&A Dealmakers"** series is distributed in regular installments for M&A industry professionals in both print and interactive electronic media. Previously published features and chapters are also available in the online library of Merrill Datasite and The M&A Advisor.

We are pleased to present the third installment in the series: **The Road to Recovery:** This insightful chapter, featuring a **Special Report on Conflicts of Interest**, was composed through candid interviews and thorough research, providing meaningful insight to practitioners already active in or considering the restructuring and reorganization of distressed companies.

Dealing with companies in distress is a weighty and complex business that leaves very little room for error, whether from the distressed company's perspective or that of a potential investor. This chapter of the Best Practices of the Best Dealmakers Guide will be presented in two parts: **Section 1 Creating Value From Distressed Companies**, which follows, focuses on best practices from a distressed company's, or seller's, point of view; and **Section 2 - Mastering The Art of Distressed Investing**, which will be the next installment, discusses best practices for buyers of distressed companies or its assets.

The Road to Recovery: Creating Value from Distressed Companies

"We were introduced to the owner of a plastics manufacturing company in crisis. His company had suffered financial losses for three years and his lender had asked him to take his business elsewhere because of the company's worsening performance and weak internal control systems. He was facing a mounting list of operational issues and ultimately, liquidation if he couldn't turn things around. We stepped in to help. First, we secured an extension of the existing lender's forbearance agreement, and helped the owner to identify immediate changes he could make to improve his business. Then we prepared a financing request package that replicates the underwriting process lenders use internally, and identified how the credit risks could be effectively mitigated.

We approached several lenders within our network who specialize in financing this type of company and situation, and quickly generated eight proposals. The owner was stunned! His accounting firm had approached and been turned down by dozens of banks, including a few who submitted proposals to us. We reviewed all the proposals with the owner, assisted him in selecting and interviewing "finalist" lenders, and negotiated on his behalf to secure very attractive financing terms on his new loans. That was over five years ago, and since then the owner has continued making the improvements we recommended, further strengthening the business. With a new lender in place and a plan for improvement, the company made it back from the brink and is thriving today."

Meagan Hardcastle, Director, Turnaround and Corporate Finance Practice, O'Keefe & Associates.

For many companies in crisis, the critical point of distress may seem to be pretty cut and dried: the company lacks the cash to pay its obligations. However, the underlying circumstances that drive a company to this point are anything but simple, and bringing it back from the brink is rarely easy. Moreover, navigating a turnaround is a complex journey that does not guarantee success.

The majority of respected surveys put the success rate of turnarounds in these situations at between 20% and 35%, depending on the definition of under-performance and success. [1]

Success is possible, however, if the board of directors knows how to position the company's assets well and make the right moves at the right time to achieve the best possible outcomes for the company. The following pages provide practical advice for those at the helm of a distressed company.

1 John Maver, "Turnaround Tips That Work,"

"You once dealt with the banks as one of the primary constituencies. Now you're also dealing with sophisticated parties with much more of a trading mentality," ~ Melissa Kibler Knoll

Distressed Companies Beware: The Players Have Changed

In the face of a liquidity crisis, many companies try to solve the problem by raising capital through a financial transaction, whether inside or outside of bankruptcy court. However, today's boards face a dynamically changing business environment. Access to capital continues to be elusive for companies, especially those in the middle market. Bankruptcy and restructuring strategies have become more complex. The entry of hedge funds, private equity and other private investors has required debtors to learn how to deal with a much broader set of stakeholders.

As noted by Melissa Kibler Knoll, Senior Managing Director of Mesirow Financial Consulting, "You once dealt with the banks as one of the primary constituencies. Now you're also dealing with sophisticated parties with much more of a trading mentality," she said, "One of the things that has changed is that the transferability of all these positions has been enhanced tremendously. On one day, you may be negotiating with your bank group and bondholders, and on the next day there may be a different group of people at the table."

Not only are distressed companies dealing with more diverse stakeholders, they are also often dealing with much larger groups, as noted by Jack Butler, a leading attorney primarily involved in the corporate restructuring and corporate governance practices at Skadden, Arps, Slate, Meagher & Flom, LLP. "Just ten years ago, when Xerox Corporation renegotiated $7 billion of senior debt as part of its successful restructuring, the company executed the refinancing primarily with major banks as its debt holders. Today, there might be dozens, if not hundreds, of investors that would be holding that debt, many of which would likely have differing intercreditor views about how the restructuring should proceed," he said. "And some of the holders might well have purchased credit default swaps or made other investments that would have resulted in their opposing the company's restructuring in search of higher returns following a default or bankruptcy filing."

Additionally, in Butler's view, the definition of a turnaround has taken on new meaning. "The term turnaround implies that a company in distress will work with its stakeholders to turn itself around and restructure as the same company with an organic solution. That's happening very seldom these days," he said. "Instead, claims against the company trade away from natural stakeholders, such as suppliers, to distress investors that are more likely to push for a change of control transaction, such as a sale of the company, as opposed to an internal reorganization."

"Unfortunately, we've seen many companies wait too long to seek advice and by the time they do, it's too late. At that point, no matter how much we want to help them, there is little we can do to preserve value." ~ Geoff Raicht

Butler defines a turnaround as a business enterprise that is facing mandatory change, because its current mode of operation will lead to failure. "What occurs in turnaround situations transcends the simple notion that a company recognizes that it has a material problem and fixes it. Most often, companies that undergo significant restructurings of their operations or balance sheets, or both, also undergo a change of control," he said, "That usually means that there will be changes in the composition of the board of directors and the management team that were guiding the company; in many instances, the restructuring also involves a divestiture of some or all of the operating business enterprise to a third party with the remaining shell left to address the claims of stakeholders left behind."

Unfortunately, most boards of directors have little to no experience dealing with this level of financial and operational triage. In the face of such serious stakes, one of the most important moves the board can make to prevent value from being completely eroded is to seek expert advice as soon as problems are suspected.

Controlling the Time to Market: Whatever You Do, Don't Delay!

Delay can be disastrous, according to Geoff Raicht, partner in the Bankruptcy & Restructuring Group at global law firm Proskauer, "No one wants to admit they're in trouble; it's hard to do," he said, "Unfortunately, we've seen many companies wait too long to seek advice and by the time they do, it's too late. At that point, no matter how much we want to help them, there is little we can do to preserve value."

Board members and the management team dealing with a company in decline can easily become paralyzed by the situation or choose to take a "wait and see" approach. This is a trap to be avoided, according to Chris Picone, President of Buccino & Associates, a turnaround firm that has been involved in more than 1,000 turnarounds. He advises, "Be proactive; don't wait for deadlines and compromises to be forced upon you. Outcomes can be dramatically different depending upon when/how the company addresses its problems." According to Picone, a turnaround expert who has also served as a Chief Restructuring Officer (CRO) for a number of distressed companies, "The boards that are proactive usually have a wider array of available alternatives," he said, "They are better able to negotiate with creditors, lenders and potential buyers from a stronger position, while they still have some leverage left."

> "Focus on a long-term plan. (Do) not just put a band aid on it and kick the can down the road." ~ Kathryn Coleman

It sounds like logical, straightforward advice, but many companies wait until they have breached loan covenants, missed loan payments or have run out of cash and are unable to pay vendors or make payroll before beginning to address turnaround issues. Once that happens, choices become very limited and the company's value erodes quickly. In addition, any leverage that the company may have had in dealing with its creditors and lenders is gone and a crisis exists. At that point, the company's secured lenders are generally in the driver's seat.

The wiser approach is for the board of directors to resist the temptation to operate "as usual" and seek qualified turnaround advice as soon as they suspect there's an issue. According to Picone, "If we can get in there at the beginning before the crisis stage, we have a much higher likelihood of being able to turn that company around and doing it in a much less painful and more cost-effective manner."

Kathryn Coleman, a partner at law firm Hughes, Hubbard & Reed with 25 years of experience representing companies restructuring their financial affairs, also advises distressed companies to make the first move rather than wait for the lenders to do so. "Let's say you're a company that has a maturity coming up in 18 months. If you need an amendment now, pay attention to what the lenders are asking for now," she said, "The first amendment is the one that I'd pay the most attention to, when you still have some leverage, because now is when they are going to come in and ask for changes that may seem innocuous but could cause trouble later. If there are two or three or more additional amendments, every single one of them is going to make things worse and worse. And you get this creeping document that, by the time things head south, you have no rights left."

Taking this approach is wise, according to Coleman, "because there is no maturity or payment default and the company has the ability to do something without the creditor being able to take action," she said. "This is when to really focus on a long-term plan, not just put a band aid on it and kick the can down the road."

Earlier is definitely better in Jack Butler's opinion as well. "One of the things that professionals like me do is try to create optionality for our clients, so they don't have to simply liquidate or sell or do 'XYZ,' but have a chessboard of strategic options they can pursue to move the restructuring forward to a successful outcome," "Most company presidents would probably disagree but the seeds of financial distress show up as much as three years before the company actually gets into a crisis situation." ~ Christopher Picone

he said, "The earlier you are in the process, the more options there are. The irony is that many directors and officers believe that they are capable of handling companies in early and even mid-stage decline without any outside help. They may not even recognize that they are having problems and, if they do, sometimes shun assistance from turnaround professionals fearing that any external acknowledgment of the company's problems will create a self-fulfilling path to bankruptcy reorganization or even liquidation."

The bottom line is that most boards of directors of a distressed company lack the experience, time or resources to execute a financial and operational turnaround of its company. The sooner the board acknowledges that it needs help, the faster it can begin developing an action plan and likely execute an out-of-court restructuring that maximizes enterprise value for all of the company's stakeholders, including shareholders.

Early Warning Indicators: Looking Sooner for Signs of Distress

What "red flags" should a board of directors or management team be on the lookout for as they monitor company performance? For Picone, the signals can be found much earlier than most boards of directors and management teams would think. "We believe that a company that has missed its projections for two quarters needs to get some help," he said, "Most company presidents would probably disagree with that but our academic research and over thirty years of turnaround experience tells us that the seeds of financial distress actually show up as much as three years before the company actually gets into a crisis situation."

Picone also noted several other red flags that management should pay attention to:

- Late payments to vendors
- Rise in defective products and warranty claims
- Missing delivery dates
- High employee turnover
- High employee absenteeism

Taken individually, events such as these may be considered as troubling, yet almost routine problems associated with operating a business. But considered in sum,

> "People overestimate the amount by which a relationship history will overcome economic reality. It doesn't." ~ Kathryn Coleman

they can serve to alert management to deeper issues, if they are heeded, before crisis looms. As noted by Henry S. Miller, Co-founder and former Chairman of Miller Buckfire & Company. "There are instances where the onset of distress is both sudden and catastrophic (Lehman Brothers, for example), but more often there are numerous signs pointing to pending trouble (GM comes to mind).[2]

Establishing a Successful Team

I. Analyze Existing Business and Partners

When the board identifies that the company is in trouble, experts also recommend that they take a step back to determine if their internal and external advisors have the right expertise to address the situation. Often, a board's first instinct will be to rely on their existing financial and legal advisors for advice. However, in most cases, these advisors are not the experts the company needs.

It is also wise for the board to take a step back and avoid making assumptions about the company's existing relationships with its financial partners. "The number one thing we see is that distressed companies assume they have better relationships with their creditors than they actually do," said Kathryn Coleman, "I cannot tell you how many times I have heard a company say 'We have a great relationship with our bank,' and then a week later the bank suddenly says, 'We are declaring a default.' It happens all the time. People overestimate the amount by which a relationship history will overcome economic reality. It doesn't."

To prevent missteps, the board of directors should engage the services of financial and legal professionals who have specific expertise in restructuring, bankruptcy and/or a potential M&A event involving distressed assets. Forging ahead with advisors who lack this experience can be a serious risk, according to Jay Greyson, Managing Director and Principal of investment bank Vetus Partners.

"As an investment banker, there is often a concern when you're embarking on a sell side process of having lawyers (and other advisors) who don't have the necessary M&A experience to maneuver through a "normal" transaction process," Greyson

2 Henry S. Miller, "How to Spot the Warning Signs and Stay on Top of Corporate Distress," Navigating Today's Environment: The Directors' and Officers' Guide to Restructuring, Globe White Page, Ltd., London, 2010.

said, "Now, add a distressed situation on top of that with the need to typically deal with commercial banks, alternative lenders, equity holders, courts, unsecured creditors and various other committees and interested parties. If the advisors don't have the relevant experience and expertise, I would say that has the potential to become a dangerous situation."

II. Establish a Dedicated Internal Turnaround Team

Experts also recommend that, if possible, the company create an internal team of employees whose focus is to deal with the distressed situation, removing them from the responsibility of day-to-day operations. This enables the company to respond quickly to provide the distressed advisor team with all of the information as it helps the company through the reorganization process. It also helps to keep the rest of the company focused on running the business, one of the most important undertakings the company must manage while working through the distress issues. Nonetheless, it's an undertaking that advisors are continually mindful of with their clients. Without that, there will be no value to protect.

Another best practice is to organize the internal team to work closely with external advisors. The two teams should keep each other appraised of activities, privately discuss options and agree upon the message that all will convey to outside parties. This is important because stakeholders will often assess the situation by talking to people in certain parts of the company as well as the members and advisors on restructuring team. It is much more persuasive if each parties' message adds up to a consistent story and commitment to a specific direction.

III. Determine Which Outside Advisors You Need

The board should consider augmenting their team with the following:

- **Turnaround specialist or chief restructuring officer.** The distressed board should proactively seek out the services of a turnaround specialist rather than waiting for its bank or other lenders to recommend their own advisor. This approach can be instrumental in helping the company identify hidden value, address operational issues, and identify debt resolution strategies that will most benefit the company and its stakeholders. It also sends a positive signal to the company's lenders about its commitment to building a viable recovery plan.

- **Investment bank with pertinent experience.** The board should interview several investment banks with directly related experience in working with distressed companies. Additionally, beyond considering the bank's credentials, the company should also scrutinize the credentials of the lead professional on the team, as this individual will play a pivotal role in marshaling all of the required resources and balancing the timing and negotiations between the company, its various creditors and other stakeholders.

• **Legal counsel.** The board should, at a minimum, augment their general counsel with supplemental legal counsel experienced in advising distressed companies. M&A experience is also important if the company is considering selling or buying assets as part of its turnaround strategy.

• **Accounting expertise.** Again, this should be a firm with directly related experience in helping companies of a similar operational profile, in similar financial circumstances.

If having a turnaround team staffed with the right expertise is critical, hiring specialists who can exhibit the right commitment level is even more crucial. According to Peter Kaufman, president and co-founder of the Gordian Group, an investment bank that specializes in advising distressed companies, the single most important thing a board of directors can do is find advisors who are unquestionably allied to the company's best interests. "Distressed companies have very little time and very little room for error," he said, "It is critical that the board identify advisors who will serve as passionate, dedicated advocates to helping the company maximize its value and achieve whatever it has defined as success."

It's a sentiment shared by other senior advisors and corporate executives such as Skip Prichard, president & CEO of Ingram Content Group, Inc. "In turnarounds, find people who are engaged in them," Prichard said, "I found that I absolutely loved it; I loved the crisis, the energy, the ability to make a bit of a difference. In addition to finding management who can inspire, find people who just love that because that's what will drive them. You don't want someone who is just interested in making the dollar, but someone who is interested in making the dollar and really transforming that company for the long term."

Identifying Problems and Solutions

Often, by the time the company realizes it is in crisis, liquidity problems and deadlines are rapidly encroaching or have been missed. Gaining a realistic picture of cash flow and liquidity is critical, but this is often difficult for a troubled company. If this is the case, a turnaround specialist can help the company get an accurate picture of cash flow and liquidity in a relative short period of time. Even if a company's reporting mechanisms are weak, turnaround specialists can usually

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go in and quickly build a picture of the company's cash situation and operational challenges.

Also at this point, it is critical that the turnaround team move quickly to assess the company's options and develop an action plan. Melissa Kibler Knoll of Mesirow Financial Consulting recommends doing a core analysis that encompasses the full range of possibilities so the company can come to the table and bring the parties together to find a viable restructuring strategy. "That strategy might just involve restructuring some debt; it may be selling to or merging with a financial investor or a strategic investor; it might involve liquidating. But you need to have gone through these processes to really have the information necessary to make the best decisions."

She added, "An overlay to all of this is to understand value under each of these different circumstances, because that determines where the fulcrum security[3] is, who really has the strongest voices at the negotiating table, and even what the liquidation value is. Many times, one of the most powerful negotiating tools is helping people understand what the results of failure would be, to enhance their understanding of the value brought to the parties by having the company remain a viable going concern in an improved state versus liquidation."

Evaluating Turnaround Strategies

The restructuring plan is the cornerstone in a distressed company's turnaround. The development of a restructuring plan must focus on achieving three primary goals: 1) implementation of operational changes to reduce cash burn and/or improve profitability; 2) the raising of immediate additional liquidity to fund the required changes; and 3) the defining of a timeline for when the process will be appropriately reflected in the company's financial performance.[4]

3 Fulcrum security, also known as fulcrum debt, is the security most likely to convert to (or receive) equity in a reorganized company after it emerges from Chapter 11 of the Bankruptcy Code. Some investors purchase this security as part of a strategy to take ownership of the company. While in the past, the fulcrum security was unsecured debt, today it is increasingly secured debt. For example, lenders may provide DIP financing as part of a loan-to-own strategy, based on an analysis that the debt represented by the DIP financing may ultimately result in a controlling ownership position in the company. Source: http://uslf.practicallaw.com/8-383-9148

4 Duffield Meyercord, "Preserving and Recovering Value in Illiquid Times," Navigating Today's Environment: The Directors' and Officers' Guide to Restructuring. Globe White Page, Ltd., London, 2010.

> "You need to put the full continuum of options on the table, not just the options you think are feasible and desirable" ~ Jack Butler

Moreover, the restructuring plan must be based on thorough consideration of all possible options. It is important that the board and the management team take an objective look to identify all of the opportunities available to maximize value and objectively consider them all. Experts emphasize the importance of putting all of the options on the table, for several reasons. Sometimes, the best options are eliminated from consideration before the team has legitimately evaluated them, leaving lesser ideal options to be considered. Objectivity in presenting all options is essential, according to Jack Butler of Skadden Arps, "You need to put the full continuum of options on the table, not just the options you think are feasible and desirable," he said, "Then you can look at each and assess its feasibility, whether it maximizes value for all stakeholders, and carefully consider risks, benefits and complexity of execution of each option."

This practice helps all members of the team make more fully informed decisions. It also affords the company's board members and officers with some level of protection that they exercised loyalty and care when executing their fiduciary duties. "From a corporate governance perspective, boards and officers can best protect themselves by creating a business record that, when evaluated down the line in a critical retrospective review, demonstrates that directors and management were informed, and carefully considered the full range of options," said Butler, "It is much more difficult to successfully attack the decisions of a fully informed, deliberate board that thought through all of the options."

Summary

Certainly a distressed company's board of directors and management faces a daunting task in leading the turnaround. To further complicate the situation, the board and the management team must also keep the day-to-day business operating in order to protect the company's value. Underlying this is the real risk that the turnaround may not succeed. But the good news is that companies can and do make it back from the brink by acting early and heeding the advice of experts who have firsthand experience in creating a realistic, pragmatic turnaround plan.

But it takes the right kind of experience. To some companies, the costs associated with engaging specialists, well before a liquidity crisis is obvious may seem prohibitive. But in many cases, the alternative – waiting until the company has little choice but to file for bankruptcy or liquidate the company – is far worse. By taking an early approach to identify the potential red flags of distress, seeking the advice of experts, and being proactive in resolving the crisis, the company is in the best possible position to maximize its value.

A Special Report on Conflicts of Interest

Avoiding Potential Detours on the Road to Recovery: The Very Real Impact of Conflicts of Interest

In an ideal world, we all want to see a distressed company get back on the path to success. The question is, what does "success" mean, especially to the mixed constituency of stakeholders who are acutely aware that the company's value is in steady decline? The board of directors may be focused on protecting its equity holders; management may want to save the company in a way that saves their jobs. Banks may want to divest their portion of the debt, while new investors may be interested in securing a control position in the company. Creditors want to be made whole on the money they are owed.

Given these inherent "conflicts of interest," how do you balance the wants, needs and desires of all these parties, while maintaining a fair and equitable economic value? In addition, is success defined solely by minimizing economic loss or are there other considerations that need to be taken into account? These questions can be answered only if you handle these conflicts of interest.

The Seeds of Conflict

Not surprisingly, conflicts of interest may come into play as these parties lobby for their preferred outcome. Business conflicts of interest exist in the "gray area," in instances where a financial or legal advisor finds themselves dealing with several different constituents – their distressed client (the debtor) and the advisors' other clients such as management, employees, customers, the board of directors, and, even more worrisome, the supplier, bank or other creditors. In these scenarios, the advisors may be dealing with very real business conflicts, but are not legally obligated to disclose this to their client. If this sounds like a red herring, it's not. According to many experts, this is a very real issue that a board of directors needs to be aware of and prepared to manage.

For example, a distressed company may rely on its existing bank for guidance in dealing with its financial problems. However, that investment bank may not be the company's best advocate, according to Peter Kaufman of the Gordian Group. "Most investment banks work 'both sides of the street.' Frequently this means advising borrowers on occasion and bondholder groups on a regular basis," he said, "In many cases, the existing investment banker will have placed, as agent or underwriter, the company's debt and equity securities with many of its investor clients or it may advise the borrower's creditors on other matters. As well, it may sell and trade securities with a borrower's creditors on a regular basis. If any of these are the case, is the investment bank motivated to protect itself and its ongoing brokerage advisory trading clients rather than advance – to the detriment of its ongoing client base – the interests of the distressed company, a one-time client with a potentially dim future?"

It's an issue a board of directors should consider carefully as it determines who to engage as a financial advisor to lead them through distress. The issue is, as Kathryn Coleman of Hughes, Hubbard & Reed puts it, "Have we hired someone who always has their eye on the next deal? Is my investment banker going to be sufficiently aggressive in representing me in this deal and not worry about, 'is the creditor going to hire me next time? If I am perceived as being too much of an advocate here, am I going to encounter problems?'"

Henry S. Owsley on "Conflicts of Interest"

The investment banker who tries to serve both sides of the street will find it difficult to navigate in this arena without encountering overlap. The conflicts of interest arise, according to Henry S. Owsley, Co-Founder and Chairman of the Gordian Group, largely due to the repeat nature of the opportunistic investors that tend to get involved in distress situations. "Many of the same players appear again and again in the capital structure," he said, "If you are a company-side advisor in a certain situation but you also represent those creditors frequently as well, then you put yourselves in a situation whereby you may not act as a disinterested person would in advising that company."

Avoiding The Inevitable

The process for addressing potential conflicts of interest when seeking legal advice is more straightforward, as a law firm is legally bound to disclose any potential conflicts of interest to its client and potentially to the court before taking on a legal matter. However, law firms also encounter what is not technically considered a legal conflict of interest, but more accurately termed a business conflict of interest. "There is a distinction between a legal conflict and a business conflict. It may be that your firm will absolutely be approved by the court," said Geoff Raicht of Proskauer, "But from a firms' perspective, working with this client may anger another of your clients so much so that as a business matter you won't want to take on the engagement."

> "You can't think about conflicts in a pre-bankruptcy context without also thinking of them in a post-bankruptcy context"

Some conflicts of interest issues are addressed by the legal system, others are not. Some business professions such as the legal and accounting industries have implemented an industry-wide practice of checking for potential conflicts of interest before they even consider advising a particular client. For others, such as turnaround specialists and financial advisors, the matter is not so clearly mandated. The most reputable turnaround specialists have established their own organic conflicts "policy" and make it a requirement of doing business.

When considering areas that may indicate potential conflicts of interest, it is crucial to look at long-term scenarios and outcomes. If not, the board may find itself having to change advisors – midstream – and go through the costly and time-consuming process of choosing another. This is a risk that most advisors would prefer to avoid as well.

For example, according to Geoff Raicht, "You can't think about conflicts in a pre-bankruptcy context without also thinking of them in a post-bankruptcy context," he said, "If you play by one set of rules on the idea that, 'We won't be in a formal court process, so we won't worry about the disinterestedness issue for now.' But fast-forward three or four months and guess what, you have to file for bankruptcy. What happens if at that point you find out, 'Oops, the firm can't pass the disinterestedness requirement and now I can't take you in.' That has got to be one of the most difficult conversations with a client you could ever possibly have. Because now you can't be there for them at a moment when they need you most."

If a company files for bankruptcy, the court system will provide some avenues for conflict of interest resolution. However, if the distressed company is working outside of the realm of the bankruptcy court, that safety net is removed. In these cases, the distressed company itself must put a process in place to ensure that it has sufficiently vetted all of its advisors to identify and eliminate any advisors for whom a conflict may arise.

The Best Defense: Choosing Loyal Advisors

The distressed company's best defense is to hire advisors who are both conflict-free and unequivocal in their loyalty to serving the company's best interests. Ideally, the

> "For a company in a precarious position, this is not the time to be floundering and seeking new advisors."

board should interview not one, but several candidates before choosing a firm to advise them. This process should uncover each advisory firm's strengths, experience, track record and conflicts of interest.

Only a few investment banks and other financial advisors have taken a decidedly firm stance in representing one side or the other. For example, Gordian Group has made the decision to represent the debtor side of the equation. In the early 1990s, the firm ceased representation of bondholders. "By taking this position, we are in the best position to serve our clients in a zealous, unconflicted manner," said Kaufman.

Black and White? or Grey?

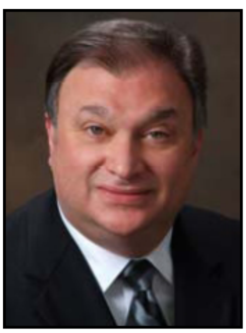
A conflict of interest that may have gone unnoticed in an out-of-court restructuring process can have a serious negative impact on the company and the advisors if it becomes an issue when the company eventually files for bankruptcy. At that time, the bankruptcy court, at the prompting of an interested party, may identify and force resolution of blatant conflicts of interest. Advisors may be "bounced," placing the company in the difficult position of starting over with new advisors. For a company in a precarious position, this is not the time to be floundering and seeking new advisors.

But ultimately, for a distressed company, the bigger issue may be the case in which a conflicted advisor is not working to maximize the value of the company. These divided loyalties can result in an undesirable outcome for the distressed company. Whatever path a distressed company may take, one thing that all the experts agree on is that the resolution of conflicts of interest is neither black nor white. It is unquestionably grey.

Hear how the experts weigh in on this timely topic. **Click here** to view "Best Practices of the Best Dealmakers: If There Ain't No Conflicts, We Got No Interests," a panel presentation at the **2012 M&A Advisor Distressed Investing Summit.**

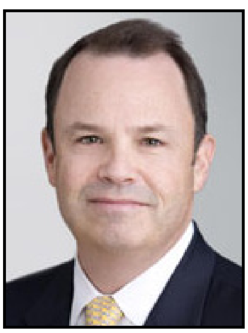
Contributor Biographies

Meagan Hardcastle is an award-winning turnaround and corporate finance specialist with a background in commercial banking. She assists middle market companies with performance improvement, crisis management, bank workouts, financial restructuring, business valuations, commercial litigation support, financial due diligence, and other related services. She also serves on the Board of Directors of the Detroit Chapter of the Turnaround Management Association. Meagan is a Certified Turnaround Professional (CTP), a Certified Fraud Examiner (CFE), is Accredited in Business Valuation (AVA), and holds an MBA from the University of Chicago. She has been the recipient of several professional awards from M&A Advisor, Crain's Business Detroit, and D-Business Magazine, and was named M&A Advisor's 2011 Turnaround Professional of the Year.



Christopher L. Picone is President and General Counsel of Buccino & Associates, Inc., a legal, financial and operational professional services firm. Picone has significant experience in all phases of financial restructurings, operations, turnaround situations, bankruptcy, litigation support matters, real estate development, construction and asset management. His legal and business career encompasses over 30 years, serving in various executive management positions in the real estate and general contracting industries. Picone began his career with a Chicago law firm where he focused his legal practice in the areas of Real Estate, Federal Income Tax and Corporate Transactions. Following a decade of private law practice, Mr. Picone moved to the corporate sector serving as President, Chief Operating Officer and General Counsel for several large Chicago based real estate and general contracting firms. Among his other recent roles, Picone was the Chief Restructuring Officer in the Sea Launch Company Chapter 11 proceeding. He also served as Financial Advisor to TVI Corporation in its Chapter 11 proceeding. Picone has served as COO/General Counsel of one of the nation's largest privately held real estate brokerage firms where he also managed the restructuring and refinancing of the company's $500 million real estate portfolio. He has served as President of a Chicago based general contracting firm specializing in retail and office construction. Picone earned his Juris Doctor (with Distinction) from the John Marshall Law School, Chicago, Illinois and also holds an LLM (Taxation) from DePaul University of Chicago. Picone earned his Bachelor in Business Administration from Loyola University of Chicago and is a member of the Turnaround Management Association ("TMA"), The American Bankruptcy Institute ("ABI") and the International Council of Shopping Centers ("ICSC").

Mr. John Wm. (Jack) Butler is a Partner at Skadden, Arps, Slate, Meagher & Flom LLP. During Jack Butler's time at University of Michigan's law school, the bankruptcy code of 1978 was passed, fortuitously providing him with the opportunity to learn the revolutionizing discipline of reorganization of distressed business. After a decade spent gaining legal experience at two Michigan law firms, he joined Skadden in 1990 as a partner and developed, what is today, one of the world's most respected restructuring practices. Since then, Butler has been identified as one of the finest dealmakers by leading notable transactions such as the restructuring process of Delphi Corporation in 2010. Today, he is consistently recognized as a "leading lawyer" as he continues his focus on corporate restructuring and reorganization. In addition to his notable business accomplishments, Butler is also respected for his generous contributions to the Chicago area.



Geoffrey Raicht is a Partner at Proskauer LLP. He serves in the Bankruptcy & Restructuring Group in the New York office. His practice focuses on debtors' and creditors' rights in large, complex Chapter 11 cases, representing debtors, creditors, official creditors committees and lenders, as well as issuers and backstop purchasers of rights offerings implemented in Chapter 11 proceedings, investment managers of hedge funds and structured investment vehicles, and asset purchasers in section 363 sales and receiverships. Recent and significant bankruptcy cases in which he has represented clients include: BankUnited, Lisbon Valley Mining, Advanta Corp., Chesapeake Corp., Circuit City, Eclipse Aviation, General Growth Properties, General Motors, RadLAX and River Road. Geoffrey has been recognized by Legal 500 as one of the leading lawyers in his field. He served as a Law Clerk to the Honorable Jeffrey H. Gallet, United States Bankruptcy Judge for the Southern District of New York, from 1997 to 1999. He received his J.D. in 1997 from the CUNY School of Law, earned both his M.P.A. in 1992 from New York University and his B.A. in 1990 from New York University.

Henry F. Owsley is a Co-Founder and Chief Executive Officer of the Gordian Group. Since co-founding Gordian Group in 1988, he has led many of the firm's financing, advisory and merger transactions, as well as expert witness engagements. Mr. Owsley has also co-authored the leading book in his field, Distressed Investment Banking: To the Abyss and Back. Prior to co-founding Gordian Group, Mr. Owsley was at Goldman Sachs, where he founded the firm's Workout Group. While at Goldman Sachs, he was also a founding member of its Technology Group. Mr. Owsley received a B.S. in Engineering, summa cum laude, from Princeton University and a M.S. from the Sloan School of Management, Massachusetts Institute of Technology. His honors included Phi Beta Kappa, Tau Beta Pi and Sigma Xi.

Kathryn A. (Katie) Coleman is a Partner at Hughes, Hubbard & Reed's New York office, and is a Member of the Corporate Reorganization Group. Ms. Coleman has over 25 years' experience representing companies restructuring their financial affairs, both in and out of court. Ms. Coleman has advised clients on, and litigated at the trial and appellate levels, the significant legal issues inherent in modern restructuring and financial practice, including contested plan confirmation, prepackaged plans, credit bidding, exclusivity, use of cash, debtor-in-possession financing, valuation, adequate protection of security interests, and cash collateral usage. Ms. Coleman frequently speaks on bankruptcy law and distressed investing, participating in programs sponsored by Practising Law Institute, the American Bankruptcy Institute, California Continuing Education of the Bar, the American Bar Association, the Pacific Bankruptcy Law Institute, the Western Mountains Bankruptcy Law Institute, and the Norton Bankruptcy Litigation Institute. Ms. Coleman graduated magna cum laude from Pomona College. She earned her J.D. from U.C. Berkeley's Boalt Hall School of Law.

Peter F. Kaufman is President of the Gordian Group and heads the firm's Restructuring and Distressed M&A practice. Mr. Kaufman has been at Gordian Group since 1990. Prior to joining the firm, he was the founding Co-chairman of the Committee on Investment Banking of the American Bankruptcy Institute (ABI). With Henry Owsley, Gordian Group's Chief Executive Officer, he is the co-author of the definitive work in the field, Distressed Investment Banking: To the Abyss and Back. He is national TV's go-to authority for restructuring and bankruptcy views. Prior to joining Gordian Group, Mr. Kaufman was a founding member of First Boston Corporation's Distressed Securities Group. As an investment banker and attorney, he has more than 25 years experience solving complex financial challenges. Mr. Kaufman received a B.A. with honors in History and Art History from Yale College. He also received a J.D. from the University of Virginia School of Law, where he graduated in the top quarter of his class.

Paul Steven Singerman is a Co-Chair of Berger Singerman LLP. Mr. Singerman concentrates his practice in troubled loan workouts, insolvency matters and commercial transactions. He is active throughout the United States in large and complex restructuring, insolvency and bankruptcy cases. Although best known for his representation of debtors in complex restructuring cases, he is also experienced in representing creditors' committees, lenders, large unsecured creditors, asset purchasers in 363 sales and trustees. A significant portion of his work has involved companies with international operations or European or Asian parties-in-interest. Mr. Singerman is a fellow in The American College of Bankruptcy and The American Bar Foundation. He is a member of the Spellman-Hoeveler American Inn of Court, The American Law Institute, American Bankruptcy Institute and Commercial Law League of America. He received a J.D., with honors, form the University of Florida Frederic G. Levin College of Law and B.A., with highest honors, from the University of Florida.

Jay Greyson co-founded and serves as a Managing Director & Principal in the investment bank of Vetus Partners, the winner of seven M&A industry Awards in 2009 (The M&A Advisor's 8th Annual M&A Awards) including the coveted Boutique investment Banking Firm of the Year. Personally, he was named Dealmaker of the Year, the highest individual honor in investment banking. Jay is also a Co-founder & Partner in Supply Chain Equity Partners ("SCEP"), the world's only committed capital Private Equity firm focused exclusively on making investments in the Distribution & Logistics industry. A highly experienced corporate finance and advisory professional Mr. Greyson has a strong background in analyzing, structuring, negotiating and executing complex financial and capital raising transactions, both domestically and internationally. He focuses on sourcing and leading the execution of private and public company sell-side Mergers & Acquisitions, corporate carve-outs and divestitures, management buyouts, buy-side programs, distressed and bankruptcy process sales, and international transactions. Uniquely, Jay combines his finance background with over a decade of extensive experience in the manufacturing, marketing and distribution of industrial products and services. Collectively, Jay has over 25 years of combined investment banking, private equity and business experience during which he completed numerous M&A transactions, including a significant number of cross border deals.

Melissa Kibler Knoll is Senior Managing Director in Mesirow Financial Consulting's Chicago office. She has over 20 years of experience providing financial ad visory and litigation services in workouts, bankruptcies, receiverships and other forums. Ms. Knoll has led engagement teams in numerous high-profile cases, such as Chrysler, Enron, Kmart, Bethlehem Steel and Singer, as well as various confidential and other matters in a broad range of industries. Ms. Knoll was previously a partner in KPMG's Corporate Recovery practice after starting her career at Price Waterhouse. She holds the CPA, CIRA, CTP and CFF designations. She is a President of the American Bankruptcy Institute and is a Fellow of the American College of Bankruptcy. Ms. Knoll earned her BBA in accounting summa cum laude from Texas A&M University and her MBA, graduating first in her class, from Southern Methodist University. She was named the 2003 CIRA Gold Medal Winner and one of Crain's Chicago Business 2004 "40 Under 40".

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