2021 ACBA Bankruptcy Symposium

Title:	Receiverships and Insolvency Alternatives: Process Selection as a Strategic Decision
Synopsis:	This panel explores the strategic process of analyzing bankruptcy and insolvency alternatives from various stakeholder perspectives, including, the debtor, personal guarantor, secured lender and an independent fiduciary (i.e. chief restructuring officer, receiver, assignee). The panel intends to discuss the nature of the various options available to an insolvent debtor and the various considerations that go into selecting the process that will, hopefully, enjoy the optimal recovery for stakeholders in an efficient manner
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Program Participant Bios

Organizer	**WILLIAM PRICE, CLARK HILL** William C. Price assists clients in matters involving workout, bankruptcy, insolvency, and commercial litigation. He also provides counsel to clients seeking to acquire assets in distressed situations. In both transactional and litigation settings, Bill partners with clients to formulate and implement strategies to achieve results identified at the outset and periodically revisited throughout his representations. By marrying a practical and academic approach to each client's needs, he takes an active role with each client to deliver results that are in line with the client's expectations—both economically and within the client's desired timeframe. Typical matters involve workout, bankruptcy, insolvency, and commercial litigation. Additionally, Bill provides general counsel to private equity clients, usually with an investment thesis involving distressed acquisitions or debt funds. Bill is a member of the firm's Banking & Financial Services Practice Group, where he serves as the team leader for the Workout subgroup. To remain sharp on issues that affect his clientele in the commercial environment, Bill teaches the course Secured Transactions (Article 9 of the Uniform Commercial Code) at the University of Pittsburgh School of Law.
Organizer	**SARAH WENRICH, ASSOCIATE, BERNSTEIN BURKLEY** Before joining Bernstein-Burkley, Sarah served as an extern for the Honorable Kevin R. Huennekens of the United States Bankruptcy Court for the Eastern District of Virginia. In this capacity, she gained significant exposure to complex bankruptcy cases and issues, and had the opportunity to assist in drafting and editing opinions. Within her first year of practice, Sarah drafted two Chapter 11 bankruptcy plans for commercial debtors, one of which has been confirmed and is effective, and the other awaiting a confirmation hearing. While attending the University of Richmond School of Law, Sarah was selected to be a student associate for the in-house Intellectual property and Transactional Law Clinic. In this position, she provided pro bono legal services to small businesses, entrepreneurs, and nonprofits under the supervision of a licensed attorney and assisted her clients with a variety of legal issues.

Moderator	**JARED ROACH, PARTNER, REED SMITH LLP** Following a one-year clerkship with Judge Gregory L. Taddonio with the U.S. Bankruptcy Court for the Western District of Pennsylvania, Jared rejoined the firm in 2015 in the firm's Financial Industry Group, practicing in the area of Commercial Restructuring & Bankruptcy. He represents indenture trustees, corporate debtors, secured lenders, and creditors' committees. His experience includes representing lenders in out-of-court workouts and in workouts involving a receiver, and representing indenture trustees in bankruptcy restructurings and liquidations. Jared has also represented multiple debtors in their in-court restructurings under the bankruptcy code.
Panelist	**KATHRYN L. HARRISON, ASSOCIATE ATTORNEY** **CAMPBELL & LEVINE LLC** Katie joined Campbell & Levine in 2010. Her practice is focused on the representation of debtors, creditors and trustees in Chapter 7 and Chapter 11 cases. Katie representing both businesses and individuals in all matters related to insolvency and restructuring. She also has experience representing clients in a variety of bankruptcy an insolvency liquidation matters, including fraudulent transfer and preference actions. Katie also represents closely held businesses, including start-up companies, in general business matters. Before joining Campbell & Levine, Katie was a law clerk to the Honorable Maurice B. Cohill, Jr., in the United States District Court for the Western District of Pennsylvania. Katie is a frequent lecturer on bankruptcy maters.
Panelist	**MICHAEL KRUSZEWSKI, QUINN LAW FIRM** Attorney Kruszewski is a member of the firm's Bankruptcy and Creditors' Rights Practice Group. His practice involves the representation of corporate debtors, secured creditors and unsecured creditor committees in business reorganization proceedings. His practice also includes commercial loan work-outs, bankruptcy-related and commercial litigation, and general collection matters. He has also been approved as a mediator for the United States Bankruptcy Court for the Western District of Pennsylvania. Attorney Kruszewski has been named as a Rising Star in the Pennsylvania Super Lawyers magazine in each year of publication from 2008-2016. He is also an active member of both the Erie County Bar Association and American Bankruptcy Institute, he is a volunteer for the McDowell Softball Boosters, and he is the past president of the Autism Society-Northwestern Pennsylvania.

Panelist	**SEAN PARKHURST, HURON CONSULTING GROUP** Sean has served as an advisor to company management as well as secured creditors, performing business and liquidity assessments in order to negotiate credit amendments and forbearance agreements. Sean's background includes serving as Interim CFO, leading cash management due diligence investigation, liquidation analysis, liquidity management, vendor and fleet management, as well as pre-Chapter 11 bankruptcy avoidance actions. His experience covers a variety of industries including: Aerospace, Automotive, Energy and Utilities, Food Distribution, and Construction. Prior to joining Huron, Sean spent 15 years in Washington, D.C. working in for-profit education, technology, hospitality management, and most recently in advocacy and regulatory space for the EOP Group. Sean received his Bachelor of Science, International Business, from Central Michigan University and his Master of Business Administration, from George Mason University, School of Management.
Panelist	**ROGER POORMAN, METZ LEWIS BRODMAN MUST & O'KEEFE** Recognized as a "Rising Star" in the field of creditors' rights by Pennsylvania Super Lawyers, Roger has an extensive track record of success in all of the following matters: • Representation of secured and unsecured creditors in all aspects of Chapter 7, 11, and 13 bankruptcy proceedings • Confession of judgment proceedings • Mortgage foreclosure proceedings • Replevin actions • Receivership proceedings • Article 9 sales, foreclosure sales, auctions, and other collateral liquidations • Execution and enforcement of judgments • Lien priority litigation • Commercial litigation • Collection proceedings • Landlord/tenant issues • Impact of cannabis legalization on financial institutions • Forbearance, deed in lieu of foreclosure, and similar transactions Earlier in his career, Roger gained extensive experience representing

	borrowers, debtors, debtors-in-possession, and trustees, giving him a rare insight into "all sides" of the bankruptcy, insolvency, and workout arenas. Roger prides himself on his tenacious representation and ability to devise and deploy innovative, cost-effective solutions to complex, time sensitive problems. In his free time, Roger enjoys participating in and watching sporting events, particularly football, golf, shotgun sports and boxing, and on most Saturdays in the Fall, can be seen and/or heard cheering on the Pitt Panthers with family and friends.

Materials

The Common Situation

The debtor reaches a point it can no longer service its debt obligations and is "done". An enterprise of some size is now faced with a low likelihood of satisfying all of its debts and to begin considering its strategic alternatives, including whether to "cleanse" the assets and transfer the assets to a third party. The debtor entity has financial obligations to various stakeholders – a senior secured lender, taxes (possibly past in addition to future), contingent liabilities, trade creditors, employees, possibly real estate and equipment lessors and shareholders. In many, if not most, instances, some individual or individuals in ownership have executed guarantees in favor of the secured lender. When a debtor defaults on their loan and a secured lender has issued a default notice, the parties can negotiate forbearance to avoid an unnecessarily disruptive process that could harm "value" and now the stakeholders need evaluate their strategic alternatives, "run a process", in order to evaluate which alternative will optimize the value of the debtor's assets. A market needs to be created to determine who will buy the assets for a fair value, the debtor may explore alternatives including a reorganization, there are State and Federal options to administer the process and the stakeholders all have their own perspective on which process will most likely provide the best "outcome". A strategic alternative process will evaluate the current market conditions and provide insights into the optionality afforded the debtor and the senior secured lender as well as other stakeholders. This panel seeks to explore what options exist for a debtor, lender, or other stakeholder and what are the best practices for evaluating the options.

Hypothetical

To provide a framework for the discussion, please consider the following scenario. Acme, LLC is a Pennsylvania company located in Allegheny County. John and Mary Smith own Acme. Acme is a traditional small business manufacturer of parts in the container industry. Acme has a $5 million senior secured loan with The Bank secured by substantially all of Acme's assets. Acme has approximately $2 million in trade debt. The Smiths have guaranteed all of the debt to The Bank. Acme owns real estate with plant property and equipment worth approximately $2 million at liquidation values (forced liquidation values (FLV)) and possibly $2.5 million as a "going concern" (orderly liquidation values (OLV)) based on recent appraisals. Due to a change in the industry, Acme's business is not able to satisfy the debt to The Bank in full. The Smiths have owned the business for 35 years and are close to retirement age. The Smiths are financially comfortable; however, paying the full deficiency would be a meaningful financial impact. The Bank has issued a default notice to Acme and the Smiths. The parties enter into a forbearance agreement. It's time to run a process. It is time for the Owners to evaluate their strategic alternatives including:

- In – Court Alternatives
    - Chapter 11 Bankruptcy
    - Chapter 7 Bankruptcy
    - 363 Sale / Article 9 Sale
    - State or Federal Receiverships

- Out of Court Alternatives
    - Sell the business to a strategic buyer
    - Refinance the outstanding debt
    - Orderly liquidation process / Wind down

The Processes

For organizations located in Allegheny County, Pennsylvania, there are several procedural mechanisms available to debtors and enforcing secured lenders. These options are bankruptcy, receivership, foreclosure, an Article 9 private or public sale, an assignment for the benefit of creditors, an out of court "workout" or a direct asset purchase agreement sale with consensual termination of security interests. These processes arise from separate bodies of law and have nuanced differences for stakeholders. A summary of these differences are below:

Process	Federal or State	Primary Benefits	Special Considerations
Chapter 11	Federal	Power of Federal proceeding/stay. Lien/security interest cleanse. Fully defined process. Transfer tax waiver if assets sold pursuant to confirmed plan (not available for typical § 363 sale). Opportunity to explore going concern sale, reorganization or liquidation sale. Low successor liability concerns.	Statutory U.S. Trustee fees, debtor plan exclusivity, creditors' committees. Governance typically retained by debtor.
Chapter 7	Federal	Power of Federal proceeding/stay. Lien/security interest cleanse. Administers unsecured claims process. Predictable statutory fees.	Operations cease. Generally, removes opportunity for going concern sale or reorganization. Unknown on fiduciary selection.
Receivership	Federal	Power of Federal proceeding. Lien/security interest cleanse. Low successor liability concerns. Lack of statutory fees. Influence on fiduciary selection.	Process largely controlled by form of order. Chapter 11 and 7 are massively more utilized as a Federal proceeding for asset transfer, so lack of predictability. Governance

			transferred to third party.
Receivership	State	Process can easily be connected to a foreclosure proceeding. Organized process for claims/noticing. No governmental fees or statutory committees. Flexible process. Fiduciary selection usually predictable. Depending on Court, may have ability to sell assets free and clear.	Process largely controlled by form of order. Secured lender often has significant influence/control. Governance transferred to third party. Oftentimes, have to address proceedings in other states by enforcing creditors.
Article 9 Sale	State	Fast for asset transfers.	No claims process. Excludes real estate. Buyers may desire "bankruptcy sale" for comfort and concerns about potential successor liability. Generally requires additional process after transfer of the personal property.
Assignment for the Benefit of Creditors	State	Flexible process. Easy to include real estate and personal property. Influence on fiduciary selection. Claims process. Lack of statutory committees and fees.	Process is rarely used, so unpredictable. Buyers often require educational process to gain comfort with process and protections flowing from sale.
Out of Court	State	Flexible and inexpensive. Assumes cooperation and consensual process.	No lien cleanse by force of law – requires lien/security interest releases. Claims process by contract, as opposed to judicially or statutorily defined with potential lingering issues. Buyers often require other options above to ensure clarity on lien/security interest cleanse and

			reduction of successor liability risks.

Governance/Fiduciary

One of the primary issues to address during an insolvency situation requiring an asset transfer is the party or parties in control of the debtor by operation of corporate governance, statute or court order: The owner, board, officers of the debtor naturally desire control, as the existing caretakers of the assets, knowledge of the business and financial interests in the outcome (whether in the form of reduced guaranty exposure, distribution on claims or interests or desire to "turn the company around"). The senior secured lender often requires more direct information about the debtor's operations, the sale process and the likelihood of recovery on its collateral, while balancing against potential liability for lender liability, allegations of commercially unreasonable enforcement, etc. The marketplace and judicial proceedings have created several roles fulfilled by parties that enter the situation immediately prior to or subsequent to the debtor's default. These roles are summarized below:

Role	**Creation Process**	**Primary Benefits**	**Special Considerations**
Chief Restructuring Officer	Corporate resolution, contract/engagement letter or both and serves as an officer of the company. Typically done as a part of a Chapter 11 proceeding.	Flexibility to obtain broad rights or refined rights to oversee the debtor's restructuring and sale process. "Fresh eyes" with insolvency experience and financial/operational insights. Reduce tensions by providing independent verification of information/process.	Debtor and its existing officers/directors/owners may become adversarial with loss of control. Cost is a factor. Details of appointment retention are critical. Tensions can arise on fiduciary obligations, attorney-client privilege and reporting information to secured creditor.
Receiver	Court Appointment	Strong ability to act due to court appointment and specifically delineated authority in Order.	Debtor loses governance and operational control. Tensions may cause damage to sale process. Cost is a factor.
Assignee	Petition	Strong ability to act due to statutory authority and court orders.	Rare process in Pennsylvania may result in negative sale process implications.
Financial Consultant	Contract – Debtor or Secured Lender	Reduced tensions. Advisory role. "Fresh	Lack of authority may result in inability to address

		eyes" with insolvency experience and financial/operational insights. Reduce tensions by providing non-biased analysis and recommendations.	root issue.

Inserting a third party into one of the above roles (or others, like a liquidating trustee following a chapter 11 bankruptcy plan confirmation) is one of the key pieces to the puzzle to optimize value. Decisions made by the debtor, insiders and secured lenders on selecting/appointing a third party fiduciary or consultant will oftentimes be the first step in starting the strategic alternative analysis which will ultimately end in electing a process from the options discussed above (i.e. bankruptcy, receivership, assignment for the benefit of creditors, etc.).

The Debtor/Guarantor

The debtor and guarantor of the secured debt have obvious interests – try to get the company to turn around, satisfy claims, obtain releases, and gain freedom from the situation. During the course of addressing the secured lender's rights through default, forbearance and enforcement/sale, the debtor and any guarantor will be faced with several decisions and documents that can greatly influence the ultimate outcome. Below is a list of some of the considerations for a debtor and guarantor during a likely sale scenario:

Party	Issue	Primary Benefits	Special Considerations
Debtor	Appoint a third-party fiduciary, like a chief restructuring officer	Gain "lender confidence" and patience. Obtain potentially useful insights on restructuring process.	Potentially lose governance control. Costs can sometimes be significant. Challenges with removing the third-party fiduciary after appointment.
Guarantor	Appoint a third-party fiduciary, like a chief restructuring officer	Similar to debtor's perspective.	Similar to debtor's perspective.
Debtor	Consent to sale process	Reduces tension. Recognizes priority scheme. Often results in more organized and successful process.	Forecloses opportunity for turnaround/reorganization, and depending on the sale process chosen, results in loss of control by Debtor over sale of its assets.
Guarantor	Consent to sale process	Similar to debtor's perspective. This is	Similar to debtor's perspective.

		often the vehicle whereby the guarantor negotiates concessions on guaranty obligations.	

Secured Lender's Perspective

As discussed throughout the above, a senior secured lender possesses significant influence in the process whenever a debtor becomes unable to continue as a going concern and a prompt sale is necessary. Secured lenders, in such a scenario, are the primary, if only, direct financial beneficiary of the process. As such, selection of the process (whether bankruptcy, receivership, etc.) is usually an important event for the secured lender. While there are numerous issues at play for a secured lender in such a scenario, below is a list of items secured lenders take into account when a debtor is no longer able to satisfy the senior secured debt and a sale is the most likely outcome and a process selection is necessary.

Issue	**Typical Event**	**Primary Benefits**	**Special Considerations**
Appoint third-party fiduciary	Forbearance or commencement of judicial proceeding.	Provide independent verification of financial information and process status. Third party may be perceived as more "serious" about effectuating sale than existing management.	Costs can be significant. Heavy reliance on business judgment of third-party fiduciary.
Release Guarantor	Execution of cooperation documentation (i.e. forbearance agreement providing sale process).	Ease of process and predictability. Collection ability may be low, in any event.	Mechanics of release are critical (review "bad boy" clauses). Offer release up front or only after completion of sale?
Sale Platform – bankruptcy, receivership, Article 9, etc.	During judicial proceeding. Article 9 process.	See process discussion above for benefits of different processes.	Lender should have keen awareness of buyers' desires on process selection – i.e. desire for bankruptcy order, speed of Article 9 sale, etc. In Article 9, requirement of commercial reasonableness and impact on ability to recover deficiency.

Conclusion

There is no "one size fits all" process that is optimal compared to the other options. Debtors, guarantors, secured lenders will have to analyze each situation as it presents itself to the parties to select the process and insert the parties necessary to carry out the process. Each party should be mindful of the other parties' goals and interests to find the path to optimizing the value of the assets and delivering the best result possible under the circumstances for the primary players.