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RESTRUCTURING SUPPORT AGREEMENTS: AN IN-COURT SOLUTION WITH OUT-OF-COURT BENEFITS

Restructuring Support Agreements (“RSAs”) are pre- or post-petition agreements among key constituents that require their signatories to support a chapter 11 plan with certain agreed-to terms. The authors give an overview of such agreements, a historical perspective vis-à-vis the Chandler Act, and the benefits and criticisms regarding such agreements. They conclude that RSAs provide debtors with the typical benefits of chapter 11 while reducing the time and expense of traditional chapter 11 cases.

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Companies confronting financial challenges often find themselves faced with a host of important decisions to make in evaluating strategies to best protect value and ongoing operations. Frequently, chief among these decisions is whether a chapter 11 bankruptcy filing or other form of restructuring would be advantageous for the company. While bankruptcy can confer substantial benefits upon distressed companies, such as an automatic stay that prevents creditors from pursuing claims against the company, an opportunity to shed burdensome contracts and leases, and an ability to sell assets free and clear of liens, claims, and other encumbrances, it can also come with significant costs and challenges. These include increased professional fees, an enlarged restructuring time frame, and a significant interruption to business operations. Boards often struggle to balance these benefits and costs in determining whether an in-court or out-of-court restructuring is more beneficial.

In addition to these two paths, a third path (or at least a variation of the path to a chapter 11 filing) may provide an opportunity to obtain some of the benefits of

a chapter 11 filing without all the attendant costs. This increasingly popular third option is the “prearranged” or “prenegotiated” bankruptcy case, through which debtors engage in substantial negotiations with certain key stakeholders prior to a bankruptcy filing in order to reach an agreement on the restructuring of those stakeholders’ claims ahead of the chapter 11 filing.¹ The agreed-to terms are documented in what’s known as a restructuring support agreement, or “RSA.”

This article provides an overview of RSAs as a means of securing the benefits afforded to chapter 11 debtors under the Bankruptcy Code while reducing the time and costs associated with traditional chapter 11 cases. The article also explores some of the concerns related to RSAs that have come to the fore in recent years, as well as the limitations of those concerns.

¹ “Prepackaged” bankruptcies, or “prepacks,” go a step further than cases that are merely renegotiated. In prepacks, debtors complete solicitation and obtain the requisite votes for approval of a plan prior to the chapter 11 filing.

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