

THE REVIEW OF
**BANKING & FINANCIAL
SERVICES**
A PERIODIC REVIEW OF SPECIAL LEGAL DEVELOPMENTS
AFFECTING LENDING AND OTHER FINANCIAL INSTITUTIONS

Vol. 39 No. 3 March 2023

DISTRESSED BUSINESS' ALTERNATIVES TO BANKRUPTCY

In this article the authors give an overview of various non-bankruptcy alternatives for distressed companies. These include: assignments for the benefit of creditors, UCC Article 9 sales, receiverships, and other out-of-court workout options. Their discussion covers the pros and cons of each strategy.

By Gary P. Segal, Deborah D. Williamson, and Paulina Garga-Chmiel *

Distressed businesses that are facing severe financial difficulties often think that bankruptcy, whether a Chapter 11 reorganization or Chapter 7 liquidation, is the only way to solve their problems. While bankruptcy is certainly an option, it may not be the only or even the best path to restructuring, financial stability, or otherwise orderly closing of the business operations. Bankruptcy can be costly, time-consuming, and, in some instances, result in more harm to stakeholders on both sides of the creditor-debtor relationship. There are numerous non-bankruptcy alternatives for distressed businesses and, while each will come with pros and cons, those alternatives can provide advantages to various stakeholders over a traditional bankruptcy filing. Bankruptcy practitioners and other professionals need to understand these alternatives and be able to evaluate and then advise whether one of them would better suit the needs of their client.

A number of factors should influence what route a struggling business should take: the ultimate goals of the business management, identity of creditors and their willingness to cooperate, existence and types of assets, and any guarantor's or equity holder's liability exposure, to name a few. When considering the alternatives to bankruptcy, practitioners should evaluate the following

alternatives: (1) Receivership, (2) Assignment for the Benefit of Creditors, (3) UCC Article 9 Sale, (4) Compromise with Creditors and Out-of-Court Workout, and (5) Wind-Down of Business Operations.¹ The pros and cons of these alternatives are discussed in this article.

RECEIVERSHIP

A receivership is an alternative to bankruptcy, which features court oversight of the operation or liquidation of a distressed business and its assets. A receiver is an officer of the court² whose powers flow from either a state specific statute, common law, applicable rules of civil procedure, the order appointing the receiver, and

*GARY P. SEGAL is a member and PAULINA GARGA-CHMIEL is senior counsel at Dykema Gossett PLLC's Chicago office. DEBORAH D. WILLIAMSON is a member at the same firm's San Antonio office. Their e-mail addresses are gsegal@dykema.com, pgarga@dykema.com, and dwilliamson@dykema.com.

¹ There are potentially dozens of possible alternatives to bankruptcy that go by different names and are appropriate for specific factual scenarios. These are more common alternatives that may be referred to by different names by different practitioners.

² *S.E.C. v. Elliott*, 953 F.2d 1560, 1577 (11th Cir. 1992).

INSIDE THIS ISSUE

- **EXCULPATION PROVISIONS IN CHAPTER 11: RECENT DEVELOPMENTS AND PRACTICE TIPS, Page 35**