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Faster, Shorter, Smarter, Better: Strategies for a New Era Of Bankruptcy

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Notwithstanding the myriad developments in corporate finance and restructuring over the last 20 years, bankruptcy remains an important, and often necessary, tool to help distressed companies reorganize debt obligations, streamline operations, and emerge as leaner, more profitable enterprises. To keep up with changing times, the practice of bankruptcy law also continues to evolve, as restructuring professionals and judges focus on making the process more accessible and cost effective.

Among other trends, practitioners are increasingly using pre-packaged and pre-negotiated cases, drafting clearer and more concise pleadings, employing smarter deposit management practices, and harnessing improved technology—strategies for a new era of bankruptcy.

Faster Cases

One often-cited trend in Chapter 11 practice is the growing popularity of "pre-negotiated" or "pre-arranged" cases, which refer to bankruptcy cases where the debtor has already reached agreement on the terms of a Chapter 11 plan with one or more creditor groups prior to commencement.

Recent studies show that pre-packaged and pre-negotiated cases now make up the growing majority of Chapter 11 filings. The benefits of accelerated cases are clear: Negotiating plan terms with creditors prior to filing for Chapter 11 minimizes the duration of

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a case, decreases the likelihood of expensive and protracted post-petition litigation, creates leverage over dissenting creditors, and allows a debtor to enter Chapter 11 with a positive message for customers, vendors, employees and contract counterparties. Indeed, increased use of pre-negotiated cases has played a significant role in shrinking the average duration of Chapter 11 cases by large, public companies from approximately 800 days in 2008 to just 328 in 2018, according to UCLA-Lopucki Bankruptcy Research.

Quick bankruptcy filings can take a number of different forms depending on whether voting on the Chapter 11 plan occurs before or after filing of the Chapter 11 petition, but some of the most remarkable feats have been accomplished in pre-packaged cases. As a refresher, in a "pre-packaged" filing, votes on the Chapter 11 plan are solicited from all "impaired" classes of claims before the filing in compliance with applicable securities laws and any local jurisdiction's specific guidelines governing prepetition solicitation. All other classes of claims are either unimpaired and deemed to accept the plan, or receive no distribution and deemed to reject the plan.

This expedited bankruptcy process—highlighted by a combined hearing to approve the disclosure statement and Chapter 11 plan—generally takes between 30 to 60 days. However, in recent months, professionals have confirmed pre-packaged plans in less than *one* day. The Chapter 11 cases commenced by FullBeauty Brands on Feb. 3, 2019 in the Southern District of New York were confirmed in 24 hours, only to be outdone by the cases of Sungard and its affiliates commenced on May 1, 2019 in the same district that were confirmed in a mere 20 hours.

Shorter Pleadings and Hearings

Courts and judges across the country increasingly encourage more concise pleadings written in plain English to avoid repetition and verbosity, and, of course, to save the time and costs of bankruptcy litigation and adjudication. Lengthy papers will always be unavoidable in certain complex matters, but there are situations in which professionals can save ink, whether it be shorter post-petition financing/cash collateral orders or streamlined disclosure statements.

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Make no mistake: Brevity is a skill and it can be difficult to write less while saying more. Indeed, as the quote often attributed to Mark Twain notes: "I didn't have time to write a short letter, so I wrote you a long one instead." Nonetheless, shorter pleadings will be a continuing trend, led by thoughtful practitioners and court-mandated form pleadings.

Similarly, cost-conscious practitioners (and judges) are making more use of telephonic hearings to save on professionals' travel costs, while also employing certificates of no objection and certificates of counsel to alleviate the need for hearings entirely, where objections either have not been filed or have been resolved.

Smarter Deposit Management

Deposit management is often overlooked, but it can be an important strategy to add value to bankruptcy estates. Most practitioners know that an estate's funds must be held by a financial institution authorized by the U.S. Trustee's Office and must comply with the deposit and investment requirements of §345 of the Bankruptcy Code, unless waived for cause. However, even when these rules are satisfied, managing deposits smartly requires consideration of a wide range of variables, including prevailing

interest rates, deposit terms, FDIC insurance, required collateral, and a bank's internal protocols.

Given these intricacies, bankruptcy estates and their attorneys are uncovering new value and efficiencies by enlisting the support of professionals with the necessary expertise and experience in managing their client's deposit management goals to maximize the return on deposits, especially in the context of liquidation and litigation trusts.

Better Technology

Legal technology has improved dramatically over the past 20 years. Gone are the days of original, paper filings at the clerk's office. Today, online case management through CM/ECF drastically reduces administrative time and costs. First implemented in 2001, CM/ECF is now used by some 700,000 attorneys across the country to access over 41 million cases and 500 million documents.

Bankruptcy courts are embracing technology. Electronic balloting is becoming more common in some jurisdictions, which improves both the speed and efficacy of voting. Moreover, the Federal Rules of Bankruptcy Procedure as well as local rules adopted in numerous courts expressly permit email service of filings with the notice party's consent. Given the prevalence of email accounts, notice by email may be, in fact, a more reliable way to ensure actual receipt for purposes of due process.

Moreover, claims agent technology platforms create more efficiencies than ever before within bankruptcy administration. Features once considered advanced, such as online dockets, claims registers and custom reporting, are now standard. Instead, innovative claims agents provide features such as customizable filing notifications, HIPAA-compliant noticing databases, secure online dashboards for debtors to access real-time reporting, automated calendar notifications of key milestones, as well as live chat and interactive, frequently-asked questions designed to maximize the information flow to stakeholders while minimizing the impact on the estate.

Looking ahead, data analysis will undoubtedly play a larger role in the practice of corporate restructuring as software and online platforms grow the capabilities to aggregate, evaluate, and apply data collected from bankruptcy filings to further streamline and improve the bankruptcy process.

Conclusion

As the next restructuring cycle approaches, savvy practitioners can employ these strategies, among others, to adapt to the ever-changing landscape of corporate restructuring with hopes that a more sophisticated and technologic era will strengthen the power of bankruptcy as a tool that benefits all stakeholders.