

Navigating the Chapter 11 process

FULL ATTENTION MUST BE GIVEN TO THE ENTIRE PROCESS TO ACHIEVE THE BEST RESULTS

ISKENDER "ALEX" H. CATTO, GREENBERG TRAUIG LLP, NEW YORK CITY

PREPARING FOR a Chapter 11 filing can be, and often is, an exhausting experience for a senior executive. Your full-time job of running a company will be supplemented with the full-time obligations of working with your bankruptcy counsel and financial advisors in the pre-filing preparations and working through the many big-picture issues that must be resolved, planned, and/or put in place in order to have the best opportunity for a successful restructuring.

Your pre-filing activities, including the seemingly endless negotiations and discussions with equity-holders, existing lenders, lienholders, and bondholders, and trying to secure debtor-in-possession financing, while at the same time trying to figure out potential exit strategies, will necessarily shift a good portion of your focus away from day-to-day operations and towards bankruptcy preparation.

This shift in focus is not a bad thing. It is critical. Your legal and financial advisors need you and your attention to these big picture items. It is a necessary part of the process. Without resolution of these major issues, your company's chance of a successful restructuring is severely limited. You will find that you are no longer just running a company, but you are also running a process on which the ultimate fate of your company, and the livelihood of your company's employees, may rest.

Enough pressure? Maybe. But there is more. Once you have these big picture items in place, and you are ready to file for Chapter 11, you will still have a company that needs to continue to operate in bankruptcy, while a good portion of your time and energy will be dedicated to the bankruptcy process. Continuing operations is the focus of this article.

All too often, there is a disruption in operations once a Chapter 11 petition is filed. A Chapter 11 bankruptcy filing can



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be a traumatic event for any company. Some of that trauma, and the associated anxiety, can be mitigated by some additional pre-filing preparation, and some post-filing attention.

Here are three things to remember when planning a chapter 11 filing for your company.

The Trading Order. Do not assume that your customers, suppliers, and other trading partners know anything about Chapter 11. Even if they themselves have been through it, and there are Chapter 11 filings going on all around you, assume that your counterparties know nothing about bankruptcy. The truth is that even some of the most sophisticated companies are afraid to do business with a company in bankruptcy. Some cut off relations as matter of policy. And, if and when they do decide to do business with a debtor, it is often only after they have gone out and hired outside counsel to investigate whether it is safe to do business with that company.

For many counterparties, the expense of hiring lawyers may be something that delays their decision. Sometimes, a conversation between your bankruptcy counsel and theirs may speed up the process. Other times, their bankruptcy counsel may unnecessarily obstruct continued business. In order to minimize the risk or length of disruption, discuss with your bankruptcy counsel whether a "trading motion" and resulting "trading order" is something that should be considered for your business.

A trading motion asks the bankruptcy court to issue an order authorizing your company to buy, sell, store, etc., whatever it is that your company does. It authorizes your company to pay for things in the ordinary course of business, enter into new agreements, and do the things your company would ordinarily do. It should include those things that a counterparty needs to see in order to get comfortable.

Many of these things for which you are seeking bankruptcy court authority may be those that your company will already be allowed to do by operation of law. Some, like the ability to post collateral, or margin, are things for which bankruptcy court authority is required. However, including all of these items, whether explicit authority is required or not, in one order issued by the bankruptcy court, makes it much easier to get your pre-filing counterparties, and new counterparties, to do business with your company.

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The less work a counterparty has to do to get comfortable, the less disruption it brings to your business. A trading order is, in essence, part required authorization, and part "comfort order." It can be an invaluable tool for an energy company in bankruptcy.

Supply and off-take assurances. Whether your business includes buying commodities, selling commodities, or both, you may be at risk of substantial disruption to your business the day you file for bankruptcy. Even if your company has existing contracts in place with suppliers and/or off-takers, those contracts may provide your counterparties with enforceable contract termination rights. Part of the pre-filing planning by your bankruptcy counsel should include reviewing your contracts to see which of them are "safe-harbor" contracts, exempt from the automatic stay, that might be at risk of counterparty termination. Therefore, the pre-filing planning should include preparing for the loss of suppliers and/or off-take customers on Day One.

If your company has several suppliers or off-takers, the first step is to identify which, if any, have the capacity to step in and supply/take additional volumes for a short term in place of those that may drop off. Keep the list short. The next step is to identify who in your company has the highest level relationship within those few counterparties. Lastly, shortly before filing, a "can we count on you if?" discussion with those few critical counterparties may need to take place. While these discussions are not binding, you will get a better sense of who you can count on when your company files for bankruptcy. The planned trading order referenced above might also come in handy in these discussions.

People leave. This article began with a discussion of the additional pressure and stress put on senior executives who are running the bankruptcy process for the company. The unfortunate fact is that the stress of a Chapter 11 is felt company-wide. Senior executives are often caught by surprise when some of their most dependable go-to people announce their departure. Get ready. People leave.

While some of the senior and mid-level executives are immersed in issues relating to the bankruptcy proceeding, others are left to manage operations, many of which may, even temporarily, be severely reduced or even halted. Too often, the correct and proper focus of senior executives on the bankruptcy proceedings and case also includes an unintentional but substantial reduction in communication with the rest of the company. The combination of the absence (both figurative and sometimes literal) of senior executives, lack of information, and uncertainty of continued operations, can cause cracks in even the toughest armor.

A lack of an active role in the bankruptcy process or information about progress or direction, can turn to fear as people think about their families, mortgages, tuition, car payments, etc. It is little wonder, and certainly not to blame, that some people seek an abrupt exit. The most unfortunate part is that many of these exits, and losses of talent to the company, were not only unnecessary, but could possibly have been avoided.

Part of the preparation should include a communication plan with employees, regardless of company size. Of course, the information shared, and timing, will vary based on employee level. Providing the appropriate timely information, and maintaining communication with employees may prevent those departures that are basically uninformed decisions.

A good communication plan, however, is not a panacea. It is a proper and useful tool. Even with proper information, be prepared as some may still leave. For some, the uncertainty associated with bankruptcy will just be too much to bear. Others may go to competitors who see this as the opportune time to lure and poach your best talent.

It is not all bad news. Just as you may be disappointed by those few surprising departures, you may be equally lifted by those who step up. You may find that there are those in your organization, sometimes the people you least expect, who will rise to the occasion. They willingly take on additional responsibilities, operate outside their previous limited roles, and execute with precision. You may discover stars in your organization that were just waiting for an opportunity to show what they are really capable of doing. They will come through in the company's darkest hour. They will be part of your business when it emerges from Chapter 11.

These are just three additional things to consider as you work with your bankruptcy counsel and advisors in preparing for Chapter 11. The success of your planned reorganization will not turn on any one of them. But any one of them might just make the process a little smoother. There are many other tools that might be appropriate for your company's Chapter 11 case.

The most important thing you can do is to make sure your bankruptcy counsel understands your business and how it operates in as much detail as humanly possible. Walk them through the business, types of transactions, and the transaction process. Only then can they properly determine which additional tools you might need, and ensure your company is well-positioned to smoothly navigate the Chapter 11 process. **OGFJ**

ABOUT THE AUTHOR

Iskender "Alex" H. Catto, a shareholder in Greenberg Traurig's New York office, is chair of the firm's Power Industry Projects and Restructuring Group. He advises energy-sector clients on restructurings and complex corporate matters, including asset acquisitions, project development, and mergers. He also represents clients on state and federal regulatory matters, financings, and commodity, renewable energy, financial, and derivative hedging transactions.

