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Restructuring Alternatives for High Yield Bonds

Evaluating and Using Exchange Offers and Prepacks to Avoid Bond Default

A Live 90-Minute Audio Conference with Interactive Q&A

Today's panel features:

Paul E. Harner, Partner, Paul Hastings **Janofsky & Walker**, Chicago

Scott R. Saks, Partner, Paul Hastings **Janofsky & Walker**, New York

William F. Schwitter, Partner, Paul Hastings **Janofsky & Walker**, New York

Wednesday, July 29, 2009

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Restructuring Alternatives For High Yield Bonds

July 29, 2009

RESTRUCTURING ALTERNATIVES FOR HIGH YIELD BONDS

Evaluating and Using Exchange Offers and Prepacks

William F. Schwitter, Scott R. Saks and Paul H. Harner

Introduction

Restructuring Alternatives

PaulHastings

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• <u>Can be accomplished quickly</u>
• <u>Restructure debt</u>
• <u>Avoid chapter 11 case and negative bankruptcy impact and stigma on business</u>
• <u>Avoid administrative expenses and management distractions associated with chapter 11 case</u>
• <u>Management remains in complete control of business</u>
• <u>Can avoid impacting certain debt, including credit agreement</u>
• <u>Generally less dilution of equity</u></td><td><u>A. General Advantages</u>
• <u>Restructure debt</u>
• <u>Eliminate holdouts and avoid most uncertainties that may arise in chapter 11 case</u>
• <u>Avoid protracted chapter 11 case and most, if not all, of bankruptcy impact on business</u>
• <u>Avoid administrative expenses and management distractions associated with protracted chapter 11 case</u>
• <u>Signals global solution to marketplace</u>
• <u>Management remains in complete control of business</u>
• <u>Probably less dilution of equity</u></td><td>A. <u>General Advantages</u>
• Restructure debt
• Eliminate holdouts
• Potentially avoid many uncertainties that may arise in "free fall" chapter 11 case
• Potentially avoid protracted chapter 11 case, including expenses and management distractions
• Receive benefits of automatic stay
• Avoid interest on unsecured and undersecured debt (unless 100% payout to unsecured creditors)</td><td>A. <u>General Advantages</u>
• Restructure debt in consensus promoting forum and provide opportunity to resolve operational or management problems
• Eliminate holdouts
• Clean up other long-term problems (e.g., burdensome contracts and leases, environmental claims and other unliquidated claims)
• Receive benefits of automatic stay
• Sell assets or assign contracts or leases despite restrictions
• Obtain financing that may not be available outside of bankruptcy
• Avoid interest on unsecured and undersecured debt (unless 100% payout to unsecured creditors)</td></tr>
<tr><td><u>B. General Disadvantages</u>
• <u>"Holdouts" can leverage process</u>
• <u>Difficult to establish hard and fast timeline</u>
• <u>Benefits limited to restructuring outstanding funded debt</u>
• <u>Do not realize benefits of chapter 11; for example:</u>
– <u>More substantial deleveraging</u>
– <u>Elimination of burdensome contracts and leases; leverage to renegotiate these agreements</u>
– <u>Ability to conduct "free and clear" bankruptcy sales and maximize the benefits of going-out-of business sales</u>
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• <u>As with out-of-court restructuring, pre-filing workout can drag out and benefits are limited to restructuring of funded debt</u>
• <u>Potential bankruptcy impact on business</u>
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• <u>Impact on equity</u>
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• Probably some bankruptcy impact on business
• Potentially greater impact on management
• Impact on equity
• Greater risk of valuation fights and no certainty regarding plan confirmation or timeframe
• Fishbowl syndrome
• Burdensome reporting requirements
• Expense
• Uncertainty of outcome and risk of losing control
• Typically used to address long-term debt issues or other discrete issues; difficult to negotiate a resolution with numerous individual creditors or unorganized constituencies</td><td>B. <u>General Disadvantages</u>
• Impact on business
• Impact on management
• Impact on equity
• Uncertain timeframe
• Fishbowl syndrome
• Burdensome reporting requirements
• Substantial expense
• Uncertainty of outcome and risk of losing control</td></tr>
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Out-Of-Court Restructurings

Exchange Offers

What Is An Exchange Offer

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- An exchange offer is an offer by an issuer to repurchase its debt securities from existing holders in exchange for new debt, equity or cash, or a combination thereof

- An exchange offer is a sale of securities and therefore must be registered under the Securities Act of 1933 unless there is an available exemption from such registration requirements

- An exchange offer is also a tender offer and must comply with the tender offer rules
  - All exchange offers are subject to Regulation 14E
  - Exchange offers for convertible debt and other equity securities such as preferred securities are also subject to Rule 13e-4 (and possibly Rule 13e-3)

How Does An Exchange Offer Help An Issuer?

- Issuing equity in exchange for debt will deleverage an issuer and reduce the issuer's cash interest expense
- Issuing debt in exchange for debt can also have a similar effect when the outstanding debt is distressed and trading at a discount so an issuer can retire the outstanding principal amount of debt for less than its face value
  - Example: $1,000 principal amount of debt is trading at $200
  - Issuer offers to pay debt holders $300 of new debt in exchange for each $1,000 principal amount of debt that is trading at $200
  - Result, the issuer reduces outstanding debt by $700
- Issuer may also be able to improve its cash position by offering new debt with longer maturities and terms that reduce its short term cash interest payment requirements
  - PIK interest or PIK toggle
  - Lower interest in near term in exchange for higher interest in later years
  - Longer maturities

Why Would A Debt Holder Agree To This?

- Risk of lower recovery in bankruptcy due to inherent uncertainty in a court proceeding, higher administrative expenses and business disruption and other risk associated with bankruptcy

- If a debt holder purchased the debt in the secondary market when it was trading at distressed levels, the debt holder can lock-in an instant profit
  - Example: distressed debt investor purchases debt that is trading at 20% of par in the secondary market
  - Issuer offers to pay each debt holder $300 of new debt in exchange for every $1,000 principal amount of debt tendered
  - Result, distressed debt investor makes $100 for every $1,000 principal amount of debt it purchased for only $200 in the secondary market and tenders into the exchange offer

- Debt holder may receive an equity kicker in the exchange offer in the form of warrants

The Holdouts

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- Unlike a restructuring in bankruptcy, an exchange offer is completely voluntary
  - Holders who do not participate retain their existing debt securities and may be in an improved position to receive full repayment at a shorter maturity than the restructured debt by not exchanging
- Tendering holders are reluctant to tender if other non-tendering holders don't share the pain and would ultimately benefit by not tendering, resulting in a transfer of value from tendering holders to non-tendering holders
- Similarly, unless a significantly high amount of debt holders tender in the exchange offer, the exchange offer may not result in the amount of deleveraging that the issuer requires
- For this reason, most exchange offers are conditioned on the participation of a minimum percentage of debt holders
  - Usually at least 90% and often 95% or higher

The Holdouts (cont)

Paul Hastings

- So called, holdouts, are one of the biggest obstacles to consummating a successful out-of-court exchange offer
- Due to the potential for holdouts, depending on the composition and willingness of bondholders, the leverage of the parties and the capital structure of the issuer, an out-of-court restructuring may not be feasible and the issuer may be forced to consider pursuing a prepackaged or prearranged bankruptcy
- Alternatively, an issuer may seek to pursue a dual track solicitation for an out-of-court restructuring and a prepackaged bankruptcy in order to mitigate the risk that the higher participation threshold required for an out-of-court restructuring is not achieved, but the lower participation threshold required for a prepackaged bankruptcy can be achieved
- In order to seek to minimize holdouts, issuers utilize a stick and carrot approach

Covenant Strips

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- Obtain exit consents to strip substantially all restrictive covenants and other protective provisions and events of default contained in the indenture governing the notes

- As a result, non-tendering holders are left with debt that does not contain most of the original protections

- The TIA and most indentures provide that cannot change economic terms without 100% consent
  - Maturity
  - Reduction in principal or interest
  - Change in form of payment

- Potential Pitfall: A "payment for consents" covenant in existing indenture could limit ability to strip covenants depending on offer structure

Other Structural Elements To Improve Likelihood of Success

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- Offer greater consideration for early tenders in order to incentivize tenders and create tension and fear among debt holders
  - Exchange offer is structured to provide that irrevocable tenders in first ten business days receive greater consideration
    - There are limits to how coercive the incentive may be structured
    - Most practitioners believe that making the higher incentive period shorter than 10 business days is problematic
  - This incentive structure only works for straight debt tenders subject to only the minimal tender offer rules contained in Regulation 14E
- Offer increased seniority – structural if possible
- Offer increased security – if permissible under existing indenture
- Offer increased guarantors – if permissible under existing indenture

Other Structural Elements To Improve Likelihood of Success (cont)

Paul Hastings

- Commence exchange offer with a side by side solicitation for a prepackaged bankruptcy with lower consideration
  - o Because a prepackaged bankruptcy requires only 66 2/3% participation, if the issuer can "lock-up" sufficient bondholders to ensure that the prepackaged bankruptcy will succeed, this can create tension and encourage bondholders to tender in order to avoid receiving the lower consideration in the prepack
- Lock-up Agreements: In order to provide certainty to the success of an exchange offer, or at least increase the likelihood of success, issuers ordinarily seek to lock-up a significantly high percentage of large debt holders prior to launching an exchange offer
- In the lock-up agreement, the debt holders will agree to tender into and support the exchange offer, not transfer their securities unless the transferee agrees to the terms of the agreement and, in certain cases, agree to support a prepack bankruptcy
  - o In the case of a solicitation for a side by side prepack and out-of-court exchange offer, issuers usually seek to lock-up at least 66 2/3% of debt holders prior to launch in order to provide certainty of success

The Securities Act Of 1933

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- There are three types of exchange offers
  - Registered exchange offers
  - Section 3(a)(9) exempt exchange offers
  - Private exchange offers

Registered Exchange Offers

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- Exchange offers are registered with the SEC on Form S-4
- Exchange offers have significant disadvantages, particularly in this environment
  - Significant risk of delay due to potential SEC review
  - Due to "gun jumping" and "integration" risks, there is increased uncertainty prior to launch and increased risk of negative publicity upon filing
  - Holdout risk
  - More costly than an unregistered deal
  - Section 11 securities law liability
- Advantages include:
  - New securities are not "restricted"
  - Ability to pay for solicitations and utilize bankers
  - All bondholders are able to participate
  - Can use different issuers to potentially provide structural seniority

Section 3(a)(9) Exchange Offers

- Contains an exemption from registration under the securities act for “. . . any security exchanged by the issuer with its existing security holders exclusively where no commission or other remuneration is paid or given directly or indirectly for soliciting such exchange”

- There are three primary elements of the Section 3(a)(9) exemption
  - The “no paid solicitation” requirement
  - The “same issuer” requirement
  - The “exclusivity by exchange” requirement

Solicitations

Paul Hastings

- Although it "*IS*" permissible to solicit tenders, "*PAID*" solicitations are not permitted

- This is the largest impediment to utilizing Section 3(a)(9)
  - For this reason, Section 3(a)(9) exchange offers are often not utilized when an exchange offer is for a single series of debt with an investment bank acting as a dealer / manager
  - Section 3(a)(9) exchange offers are more suited to larger more comprehensive debt restructurings where a restructuring financial advisor has been engaged

What Is A "Paid Solicitation?"

Paul Hastings

- The determination of whether a "paid solicitation" has occurred is inherently fact specific
- An issuer's employees generally have significant latitude in communicating with, and soliciting, the issuer's debt holders so long as they are not paid separately for the solicitation
- It is preferable that those employees conducting the solicitation be key employees and senior management with significant responsibilities at the issuer other than the solicitation
- No special bonus or commission should be paid for such activities

Financial Advisors And Other Agents

Paul Hastings

- There is increased risk that such persons' activities will be deemed to be a "paid solicitation" due to the fact that they are being separately engaged for purposes of such exchange

- Financial advisors and other agents *MAY*:
  - Provide advice to the issuer with respect to virtually all aspects of developing and executing a Section 3(a)(9) exchange
  - Provide administrative or ministerial services designed to convey the information in the exchange offer documentation

- Financial advisors and other agents may also render a "fairness opinion"
  - However, if they do render such an opinion it is imperative that their activities be further curtailed and that they do not have any contact with debt holders or their advisors or agents

Financial Advisors And Other Agents (cont)

Paul Hastings

- Financial advisors and other agents *MAY NOT*:
  - Make any recommendation to any holder of debt securities or their advisors or other representatives regarding the acceptance or rejection of such offer
  - Convey management's views or recommendations even if those views are contained in the exchange offer documentation
    - In such cases, the financial advisor should direct the debt holder to communicate directly with the company
  - Receive any fee based on the success of the exchange offer
    - The engagement letter with all financial advisors needs to be carefully scrutinized if there is any chance that a Section 3(a)(9) exchange offer will be pursued
    - There are fixed fee structures that can be utilized as a fall back if such contingency exists and most financial advisors have them in their forms

The "Same Issuer" Requirement

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- The "same issuer" requirement can limit the ability to use the Section 3(a)(9) exemption in situations where new structurally senior securities are being issued in the exchange
- The SEC has taken no-action positions that the "same issuer" requirement is satisfied in the case where a parent guarantees the existing securities of a subsidiary prior to the exchange offer even if the purpose of the guarantee is to satisfy the "same issuer" requirement

The "Exclusivity By Exchange" Requirement

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- Section 3(a)(9) provides an exemption for "any security exchanged by the issuer with its existing security holders exclusively"
- Rule 149 permits security holders to pay such cash to the issuer, along with the target securities, in a Section 3(a)(9) exchange offer "as may be necessary to effect an equitable adjustment, in respect of dividends or interest paid or payable on the securities involved in the exchange"
  - The SEC has also confirmed the availability of the Section 3(a)(9) exemption in exchange offers where the terms of the exchange offer include a waiver of interest or dividends
- Rule 150 permits an issuer to make direct or indirect payments to its security holders in connection with a Section 3(a)(9) exchange when such payments are part of the terms of the exchange
  - Unlike Rule 149, Rule 150 does not contain any requirement that such consideration effect an equitable adjustment

Advantages And Disadvantages Of A Section 3(a)(9) Exchange Offer

Paul Hastings

- Advantages of a Section 3(a)(9) exchange offer include:
  - Can be accomplished relatively quickly with no SEC review
  - Less expensive than a registered exchange offer
  - Exemption not limited to “Accredited Investors,” “QIBs” and non-U.S. investors
  - New securities have same “restricted” status under Rule 144 as old securities and participants in exchange offer may “tack” their holding periods
    - Because of the shortening of the Rule 144 holding periods, this means that it is likely that the new securities will be “unrestricted” if tendered securities were held for six months by non-affiliates and the issuer is a reporting company
  - Section 11 liability does not apply (although 10b-5 liability exists)

- Disadvantages of a Section 3(a)(9) exchange offer include:
  - Prohibition on payment for “solicitations” and limits on activities and use of bankers and financial advisors
  - Holdout risk
  - Requirement that new securities be issued by the same issuer as the target securities

Private Exchange Offers

Paul Hastings

- Section 4(2) and Regulation D promulgated there under provide an exemption from the registration requirements of the Securities Act of 1933 for securities issued in “transactions by an issuer not involving any public offering”
- Private exchange offers are limited to “Accredited Investors,” “QIBs” and non-U.S. investors pursuant to Regulation S
- In order to police the participants in a private exchange offer, it is necessary for the exchange agent to send out an eligibility letter to “pre-clear” participants entitled to receive the exchange offer documentation and participate in the exchange offer

Private Exchange Offers (cont)

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- In any private exchange offer utilizing a covenant strip, it is important to consider the covenants contained in the target securities
  - Many high yield indentures contain a covenant limiting the payment of consents unless such consent payment is offered to all holders of the securities
  - Unless every holder of the target securities is able to certify in the eligibility letter that it is entitled to receive the exchange offer documentation, this provision will limit the ability of an issuer to include a covenant strip in a private exchange offer

Advantages Of A Private Exchange Offer

- Advantages of a private exchange offer include:
  - Can be accomplished relatively quickly with no SEC review
  - Less expensive than a registered exchange offer
  - No prohibition on payment for “solicitations” or limitations on activities and use of bankers and financial advisors
  - No requirement that new securities be issued by the same issuer (unless desire ability to tack holding periods), resulting in increased structuring flexibility
  - Ability to tack holding period of exchanged securities pursuant to Rule 144(d)(3)(ii) if the new securities are acquired solely in exchange for other securities of the same issuer
    - Requires same issuer of old and new securities
    - Bondholders cannot pay cash for exchange
    - Because of the shortening of the Rule 144 holding periods, this means that it is likely that the new securities will be “unrestricted” if tendered securities were held for six months by non-affiliates and the issuer is a reporting company
  - Section 11 liability does not apply (although 10b-5 liability exists)

Disadvantages Of A Private Exchange Offer

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- Disadvantages of a private exchange offer include:
  - Exemption limited to “Accredited Investors,” “QIBs” and non-U.S. investors pursuant to Regulation S
  - Holdout risk
  - If desire ability to tack holding periods, the new securities must be issued by the same issuer as the target securities

Tender Offer Rules

- All exchange offers are subject to the Regulation 14E tender offer rules
  - Requires that tender offer be open for minimum of 20 business days
  - Tender offers must remain open for at least 10 business days after the date of publishing or sending notice to security holders of an increase or decrease in:
    - The percentage of the class of securities being sought
    - The consideration offered
    - The dealer's soliciting fee
  - Issuer must pay for or return the tendered securities promptly after the termination or withdrawal of the tender offer
  - The issuer must provide public notice of any extension of the length of the tender offer
  - Prohibition on purchases outside of tender offer (for convertible and other equity securities such as preferred securities)

Rule 13e-4 – Issuer Tender Offer Rules

Paul Hastings

- Rule 13e-4 applies to tender offers by issuers for their equity securities if the issuer has a class of equity securities registered pursuant to Section 12 of the Exchange Act or is required to file periodic reports pursuant to Section 15(d) of the Exchange Act
- As a result, exchange offers for convertible securities and other equity securities may need to comply with Rule 13e-4 in addition to Regulation 14E
- Rule 13e-4 was modeled after the third-party tender offer requirements of Regulation 14D and contains antifraud, filing, disclosure and dissemination requirements
- Rule 13e-4 requires issuer to file a Schedule TO with the SEC, which is subject to SEC review

Rule 13e-4 – Issuer Tender Offer Rules (cont)

PaulHastings

- Rule 13e-4 also requires:
  - The provision of withdrawal rights at any time while the tender offer is open and 40 business days after the commencement of the tender offer
  - Pro rata acceptance if the exchange offer is for less than all outstanding securities
  - The issuer must pay all holders of target securities the highest amount of "consideration" paid pursuant to the tender offer (i.e., early tender consent incentives are not permitted)
  - The exchange offer must be made to all holders of the target securities
  - Prohibition on purchases of target securities or securities of the same class for ten full business days after termination of the offer

Rule 13e-3 – Going Private Rules

- Rule 13e-3 applies to certain exchange offers for convertible securities and other equity securities

- Rule 13e-3 applies to any transaction specified in the rule that has either the purpose or reasonable likelihood of reducing the number of holders of the equity target securities below 300 or causing the equity target securities to no longer be listed on a national securities exchange nor authorized for quotation on an inter-dealer quotation system

- The transactions specified in the rule include
  - The purchase of an equity security of the issuer
  - A tender offer for an equity security of the issuer
  - A solicitation subject to Regulations 14A or 14C in connection with "a merger, consolidation, reclassification, recapitalization, reorganization or similar corporate transaction" or a sale of substantially all assets to an affiliate, or certain reverse stock splits

Rule 13e-3 – Going Private Rules (cont)

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- Rule 13e-3 contains many of the similar provisions as Rule 13e-4
- In addition, Rule 13e-3 requires the filing of a Schedule 13e-3 with the SEC, which is subject to SEC review, and likely to get greater scrutiny than a filing on Schedule TO
- Rule 13e-3 also requires the issuer to state whether it believes the transaction is fair or unfair to unaffiliated security holders and to discuss in reasonable detail the material factors upon which that belief is based
- Rule 13e-3 contains an exemption that is commonly relied upon for debt for equity exchange offers where the target securities holders are offered only an equity security either:
  - With “substantially the same rights” as the target securities or
  - That is common stock of the issuer

Other Issues

Paul Hastings

- It is important for counsel to continually monitor issuers' public and private disclosures to ensure compliance with Regulation FD and avoid 10b-5 liability
- Consider need / advisability of providing anticipatory cautionary disclosure with respect to an issuer's financial condition and intent to explore potential restructuring alternatives in SEC filings to provide increased flexibility in dealing with security holders

Other Issues (cont)

- Confidentiality Agreements: Due to Regulation FD and other negative publicity issues, it is necessary for issuers to enter into confidentiality agreements with those debt holders that the issuer intends to discuss the terms of a potential restructuring in advance of launch
    - Because a confidentiality agreement will restrict bondholders from trading until the information they have received no longer constitutes "material non-public information," bondholders executing confidentiality agreements will often require that the issuer make a market cleansing disclosure of all material information disclosed pursuant to the confidentiality agreement after a relatively short period of time, regardless of whether a deal is reached
    - For this reason, counsel should carefully monitor what is disclosed to individual bondholders throughout the process

Other Issues (cont)

- Liability: Because all exchange offers are subject to 10b-5 liability, most exchange offers are made via the use of an Exchange Offering Memorandum that describes the terms and risks of the transaction and contains similar information to that contained in a Private Placement Memorandum or Prospectus
  - In the case of a solicitation for a side by side prepack and out-of-court exchange offer, the Exchange Offering Memorandum will also include disclosure required for soliciting consents to the prepackaged plan in accordance with bankruptcy law
  - In exchange offers utilizing a Dealer-Manager, the Dealer-Manager will most often require a 10b-5 letter be issued by the issuer’s counsel and a comfort letter be issued by the issuer’s auditor on the Exchange Offering Memorandum
  - As a result of the foregoing, issuers and their counsel should exercise the same degree of attention and prudence in drafting an Exchange Offering Memorandum as they would in preparing a Private Placement Memorandum or Prospectus
- Risk of triggering a change of control default or required offer to purchase if contemplating a highly dilutive debt for equity exchange offer
  - Need to avoid formation of a deemed 13D group
  - Spoke and wheel analysis

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In-Court Restructurings

Prepackaged Bankruptcies

In-Court Restructurings
Prepackaged Bankruptcies

Paul Hastings

- In the event an issuer is required, or opts to, file a pre-packaged bankruptcy plan, there are a number of issues that need to be considered and prepared well in advance of the filing in order to minimize disruption to the issuer's business and increase the likelihood of a quick and efficient proceeding, including:
  - Management of public relations
  - Management of employee morale
  - Management of supplier relations
  - Management of investor relations

Filing Venue

- Traditional filing venues for professional Chapter 11 proceedings are the Southern District of New York and the District of Delaware; these are debtor friendly jurisdictions where judges have significant expertise in dealing with complex reorganizations

- Certain Debtors may wish to utilize “home court advantage” and file in a less traditional jurisdiction, where the Debtor’s ongoing operations are critical to the local economy

Timeline

Paul Hastings

- One primary advantage of a pre-packaged bankruptcy is that the bankruptcy often proceeds quickly, avoiding significant administrative expenses and certain reporting obligations
- Typically a Plan of Reorganization and proposed Disclosure Statement are filed simultaneously with the Chapter 11 petitions on the first day of the case
- A hearing to approve the Disclosure Statement and confirm the Plan of Reorganization may be scheduled in as little as 30 days
- If approved, the effective date of the Plan of Reorganization (i.e., the date of emergence from bankruptcy) will be approximately 10 days after confirmation of the Plan of Reorganization

Executory Contracts

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- A debtor in a Chapter 11 case has significant flexibility to deal with its "executory contracts" such as supply contracts, licenses, customer contracts, etc.
- In most jurisdictions, an executory contract is defined as a contract in which a material obligation must be performed in the future by both parties to the contract, such that the failure to perform such obligation would constitute a breach; credit agreements typically are not executory contracts
- A debtor is permitted to assume or reject its executory contracts or unexpired leases, constrained only by the dictates of the business judgment rule

Executory Contracts (cont)

Paul Hastings

- Any damages resulting from the rejection of executory contracts are unsecured prepetition claims extinguished pursuant to the terms of the Plan of Reorganization
- A debtor may also assume favorable executory contracts and unexpired leases, but must "cure" (i.e., pay) all amounts owed on the contract, whether such amounts are due and owing on a prepetition or postpetition basis
- Contracts that have been neither accepted nor rejected remain in force and the debtor must satisfy all obligations under the contract on a postpetition basis, the debtor may not pay prepetition amounts owing pursuant to the contract

Reinstatement of Credit Agreements

- Under Section 1124 of the Bankruptcy Code, a debtor may reinstate a credit agreement so long as certain statutory prerequisites are met
- Reinstatement essentially permits the credit agreement to be “passed through” the bankruptcy, leaving the reorganized company with a credit agreement on the exact same terms as the pre-bankruptcy agreement
- If reinstatement is permitted, the lenders to the credit agreement are unimpaired and thus are deemed to have consented to the Plan of Reorganization notwithstanding any potential desire to object

Reinstatement of Credit Agreements (cont)

Paul Hastings

- For a proposed reinstatement to be valid under Section 1124, the Plan of Reorganization must (i) leave unaltered the legal, equitable and contractual rights of the lenders under the credit agreement; (ii) cure any default that occurred before or after the commencement of the case (with certain exceptions discussed below); (iii) reinstate the maturity of the credit agreement; (iv) compensate the lenders for any damages as a result of reasonable reliance on contractual provisions in the credit agreement; and (v) compensate the lenders for pecuniary loss associated with failure to perform any nonmonetary obligation

- Certain defaults need not be cured by the Debtor for reinstatement to be valid, and this issue is being actively litigated in a number of pending bankruptcy proceedings; one example of a default that plainly need not be cured is a default predicated on the actual filing of bankruptcy by the Debtor – a so-called “ipso facto” clause

- This issue is jurisprudentially undeveloped, but currently in vogue because numerous debtors are finding their pre-recession credit agreements to be significantly more favorable than current market offerings

Employment and Senior Management Issues

Paul Hastings

- With respect to senior management, it is commonplace in both in and out-of-court restructurings for boards of directors to approve retention bonus or other similar programs to provide incentives for senior management to remain in place through the process
- Under the 2005 Amendments to the Bankruptcy Code, there are now significant limitations on the ability of debtors to provide traditional "stay bonuses" or other similar incentives to senior management if a Chapter 11 filing actually becomes necessary
- There nonetheless remains significant flexibility to provide appropriate incentives to management in the form of "success" bonuses or other targeted incentive programs within the confines of the new Bankruptcy Code limitations on executive compensation in Chapter 11

Management of Supplier Relationships

- Suppliers should first and foremost be reassured that all compensation for postpetition goods or services provided in the ordinary course of business will be paid as and when due under customary trade terms

- Prepetition goods and services may be paid under certain circumstances, such as, for example, goods delivered within twenty days of the petition date in the ordinary course of business

- Supplier relations can be strained by the bankruptcy process, but solid and consistent communication, especially communication focused on expectations regarding emergence from bankruptcy as soon as practicable and the relatively short duration of the Chapter 11 proceedings can overcome supplier anxiety

Paul Hastings Team

Paul Hastings Team

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Mr. Schwitter began his career representing underwriters and other financial institutions in a variety of complex transactions. In the late 1980's and early 1990s, he worked extensively with Drexel Burnham on high profile LBOs, and he now represents a number of investment banks in both debt and equity transactions. His work covers a variety of industries, including media, telecommunications, retail, gaming and heavy manufacturing.

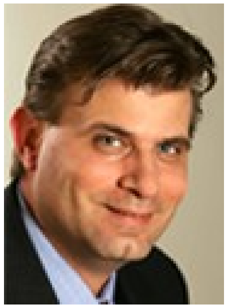
Mr. Schwitter and his team are regularly asked to represent our company-side clients in their financing endeavors, such as a recent multi-billion dollar going private transaction in the processed food industry and a significant sponsor acquisition of an international manufacturing business.

Mr. Schwitter also represents sponsors in middle market leveraged acquisitions, including a recent acquisition of a mall-based retailer with over 700 store locations.

Finally, Mr. Schwitter also combines his finance experience with corporate counseling for significant public companies, including one of the nation's largest public homebuilders.

Mr. Schwitter received his B.S.M.E. degree, *cum laude*, from Rensselaer Polytechnic Institute in 1980. He received his J.D. degree, *cum laude*, from Albany Law School of Union University in 1983, where he was a note and comment editor of the *Albany Law Review*.

Paul Hastings Team



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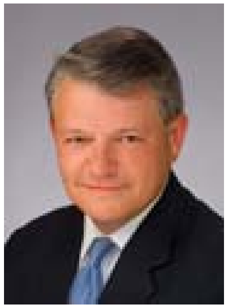
Scott Saks is a partner with Paul Hastings' New York corporate practice.

Mr. Saks has extensive securities, capital markets and corporate transactional experience representing underwriters, financial institutions and both U.S. and non-U.S. corporations in international and U.S. public and private securities offerings, including: equity, ADR, GDR and high-yield and investment-grade debt offerings; U.S. securities exchange listings and SEC registrations; acquisitions and dispositions; private equity investments; joint ventures; and general corporate matters. He has extensive experience with the compliance requirements of the U.S. securities laws, including the Sarbanes-Oxley Act of 2002, particularly as they relate to foreign private issuers. His experience extends to transactions in the U.S., France, the U.K. and the emerging markets of South Africa, Asia and Eastern Europe.

Mr. Saks received his B.S. degree, *magna cum laude*, in 1991 from Dickinson College, with a major in Economics and a concentration in Financial and Business Analysis. He received his J.D. degree, *magna cum laude*, in 1995 from St. John's University School of Law. He is the co-chair of the firm's International Securities Practice Group. Mr. Saks is also the vice chair of the American Bar Association's International Securities and Capital Markets Committee. He is a member of the New York Bar.

Paul Hastings Team



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Paul E. Harner is a corporate partner in Paul Hastings' Chicago office. He focuses his practice primarily on corporate bankruptcy, restructuring and other insolvency-related matters. He has represented debtors, committees and other parties and has played leading roles in various large national and international corporate restructurings, including the chapter 11 cases of Tower Automotive; National Century Financial Enterprises, Inc.; Kmart Corporation; USG Corporation; Laidlaw Inc.; NationsRent, Inc.; NII Holdings, Inc. (formerly known as Nextel International); Slater Steel Inc.; Imperial Home Decor Group, Inc.; Federated Department Stores, Inc. and Allied Stores Corporation; R.H. Macy & Co., Inc.; Loewen Group International, Inc.; Allegheny Health, Education and Research Foundation; Trans World Airlines, Inc.; Cardinal Industries, Inc.; Rax Restaurants, Inc.; Baldwin Builders and Baldwin Building Contractors, a California Limited Partnership; The Clothestime, Inc.; Montgomery Ward Holding Corp.; The Elder-Beerman Stores Corp.; and HomePlace Stores Inc.

In addition, Mr. Harner has extensive experience in the representation of bank groups, institutional investors, secured lenders and other parties in bankruptcy cases, out-of-court workouts (including single-asset real estate restructurings), and related litigation. He also represents multiple clients in distressed mergers, acquisitions, and other corporate transactions. In workout, litigation, and distressed acquisition matters, he has most recently represented DaimlerChrysler Corporation; Cablevision, Inc.; Citicorp Venture Capital; National City Bank; Entergy Corporation; and Nextel Communications, Inc., among others.

Mr. Harner also has substantial experience counseling clients in fraudulent conveyance, illegal dividend, preferential transfer, fiduciary duty and corporate formalities issues and has represented a number of entities in the related structuring and consummation of spin-offs, secured financings, recapitalizations, and other transactions.

Mr. Harner is a fellow of the American College of Bankruptcy and a member of the American Bankruptcy Institute (benefactor), the American Bar Association (Business Law Section), the Illinois State Bar Association, The Chicago Bar Association, and the Ohio State Bar Association. He was recently named one of the "Outstanding Bankruptcy Lawyers" in the United States by *Turnarounds & Workouts*, which had previously named him on three other occasions to its annual listing of "Outstanding Young Bankruptcy Lawyers" in the nation. He is also listed as one of the "leaders in his field" nationally in the bankruptcy and insolvency section of the 2004-2006 editions of *Chambers USA: America's Leading Business Lawyers*, is featured in *Illinois Super Lawyers*, and appears in the U.S. and international editions of *Who's Who Legal*, the *ILFR 1000* listing of the world's leading financial lawyers, and Euromoney's *Guide to the World's Leading Insolvency and Restructuring Lawyers*.

Mr. Harner received his B.A. from Duke University in 1985, and his J.D. from the same institution in 1988. At Duke, he was a member of Phi Beta Kappa and the Order of the Coif. He clerked for Judge J. Dickson Phillips, Jr., U.S. Court of Appeals, Fourth Circuit, from 1988 to 1989.

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