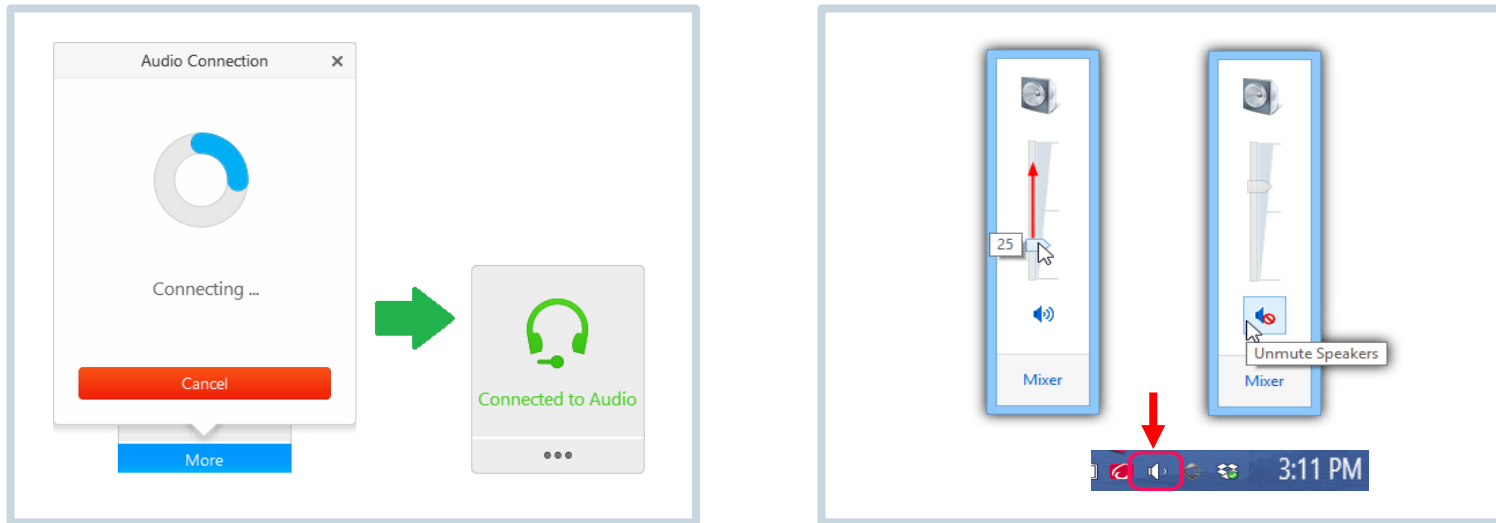


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- All registrants will receive a copy of today's presentation and a link to a replay of the discussion via email.

Restoring Stability: Distressed Organizations

Willis Towers Watson Webcast

June 30, 2020

Today's speakers



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Today's agenda



Risks for Directors and Officers of Distressed Organizations



Getting your D&O Insurance Bankruptcy-Ready



Demystifying Transactional Insurance for Distressed Organizations



Solving Multinational Problems with Global Collaboration and Local Expertise



Questions and answers

Risks For Directors and Officers of Distressed Organizations

Typical Concerns

Bankruptcy

- Chapter 7: Liquidation
 - Court designated trustee assumes control, liquidates assets for the benefit of creditors
- Chapter 11: Reorganization
 - Court allows company to continue operating as “debtor-in-possession,” development of reorganization plan
 - Can convert to a liquidation, trustee appointed
 - Pre-packaged Chapter 11 filing
- Automatic Stay

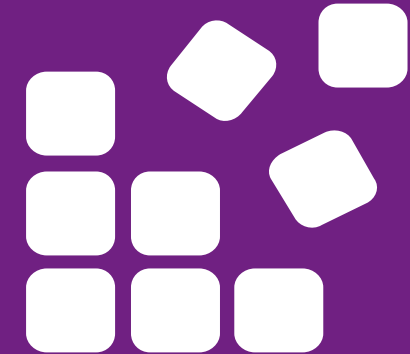
Alternatives to Bankruptcy

Director and officer duties of care

- Shareholders and the corporation
- Zone of insolvency/deepening insolvency
- Insolvency/bankruptcy

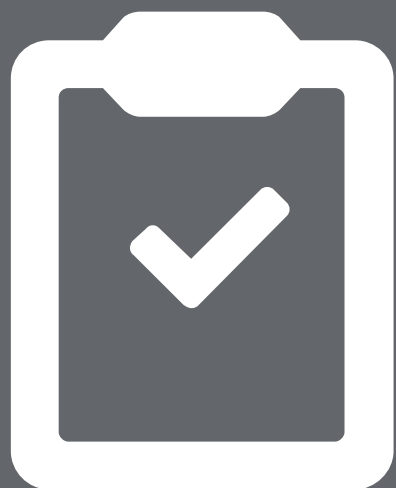
Risks For Directors and Officers of Distressed Organizations

- D&O litigation arising from insolvency/bankruptcy
 - Director and officer breach of duty
 - Trustees
 - Company as debtor-in-possession
 - Shareholders (directly or derivatively)
 - Creditors (derivatively)
 - D&O claims associated with misleading or inaccurate risk disclosures
 - Dilution/subordination of interests
 - Claims from shareholders alleging out of court workouts resulted in dilution of interests / bondholders alleging improper subordination of interests
- D&O proceeds as corporate assets



Risks For Directors and Officers of Distressed Organizations

Action Items



- ✓ Reliance on counsel re: risk mitigation, due diligence, adequate and accurate investor disclosures
- ✓ Scrutinize D&O coverage
- ✓ Evaluate adequacy of limits and scope of coverage
- ✓ Importance of bankruptcy/restructuring specialization around D&O/M&A protocols

Getting your D&O Insurance Bankruptcy-Ready

Program Design

Fundamentals

Our stories, situations matters. Out of court restructuring? In-court-prepack or pre-negotiated? “Free-fall” or “naked filing”? Are we already wrestling with suits?

1. Enough D&O coverage?
2. Right kind of D&O insurance? (A-B-C vs. Side-A-only)
3. Why is continuity so important?

Special Considerations

1. Should we buy a D-I-P policy?
2. Sharing limits with others?
3. Will restructuring require an in-court process?

65% of large case Chapter 11 proceedings are filed as prepacks or pre-negotiated cases.

That is way up from 37% for 2010-15.

For COVID-19 precipitated bankruptcies, we expect that trend to continue.

See John Yozzo and Samuel Star, “For Better or Worse, Prepackaged and Prenegotiated Filings Now Account for Most Reorganizations,” *ABI Journal*, November 2018, available at abi.org/abi-journal.

Getting your D&O Insurance Bankruptcy-Ready

Key Concepts and Terms

- ✓ Runoff (Tail) Coverage
 1. Not typically triggered by the filing itself.
 2. Runoff at filing? (Only if buying a D-I-P policy). Undermines continuity.
 3. Reorganizations—prepaid is often a must. Paid before filing.
 4. What about the Extended Reporting Period/Discovery options in most forms? Do they help here?
 5. Will runoff trigger at the right time? What if the equity holders maintain control? Trustee appointments?
- ✓ Priority of Payments - Mixed approaches offer different “Pros” and “Cons”
- ✓ Entity vs. Insured: Are all possible claiming constituencies named?
- ✓ Severability-application, exclusions *and cooperation*
- ✓ Wind-down coverage?-Needed?



Demystifying Transactional Insurance For Distressed Organizations

Representations and Warranties insurance as a deal facilitator!

Buyer Advantages

- Broader reps and warranties (within reason)
- Improves indemnification terms
 - Longer indemnity period
 - Broad loss definition
- Distinguishes bid in auction or other competitive process
- Avoids post-closing disputes with sellers
- Provides security in transactions where recourse from sellers is not available

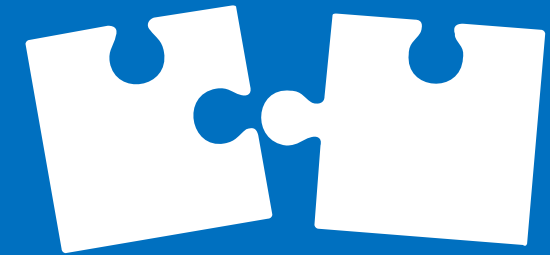
Seller Advantages

- Facilitates exits with limited or no post-closing indemnification exposure
 - No seller indemnity (public style) deals more common
- Avoids trapping funds in escrow
- Build insurance into seller offering to achieve cleaner exit
- Maximizes sale proceeds in distressed sales

Demystifying Transactional Insurance For Distressed Organizations

Specific Opportunities

- Pre-Bankruptcy Transactions
- Bankruptcy Sales--Sales conducted under Section 363 of the Bankruptcy Code
 - “Free and clear” bankruptcy release provides protection from many third-party claims, but buyer is unprotected for first-party breaches of reps. and warranties and can face potential liabilities from pre-closing exposures even with bankruptcy release
 - Unique process issues in Bankruptcy sales to be addressed, including with respect to stalking horse bidders and other potential buyers
- Successor Liability Issues – fraudulent transfer/conveyance risks, specific contingent liabilities
- Minority investments
- Tax Insurance
 - General applications
 - Cares Act



Combining a global offering with local knowledge and expertise

- **Local knowledge and expertise** is key to effective use of M&A insurance products and advice, especially on international and cross-border transactions.
- **WTW's market-leading, global and specialist team** of M&A professionals with significant corporate, legal, tax, underwriting and insurance broking backgrounds are able to **access global and domestic insurance markets** for every transaction.
- **Utilize strategic relationships:**
 - with the **insurers / underwriters**; and
 - clients' **M&A advisers** (e.g. global and local law firms),enabling us to deliver the **best achievable results quickly**.
- **Early Engagement is key:**
 - **Enhances the deliverability** of a buyer's offer **reducing execution risk and ensuring a smoother and quicker** process.
 - **Increase breath and scope of warranties** via the insurance solution, especially in a distressed scenario (synthetic or management warranty deed).
 - **Increased visibility over coverage** early in the process to address any other challenges that may arise including from the due diligence or its scope.
 - Seek beneficial **terms and leverage any competitive tension** between underwriters earlier in the process.
- **Sell side / 'Stapled' solutions:**
 - **Increased control** over the process and coverage creating a level playing field for all bidders.
 - **Increased breadth and scope of warranties** (MWD or Synthetic).
 - Identifying any gaps or issues early on **avoids price chip / increases return**

Case Study



Background



Outcome and value

- WTW acted for a US listed company on its acquisition of a global dispensing systems business, with operations and companies in Brazil, Netherlands, France, US and China.
- The involvement of the Works Council in France and employee consultations in the Netherlands required the underlying transaction documents to be structured in a three stage process: (1) Put Option; (2) Signing of Acquisition Agreement; (3) Completion of Acquisition Agreement.
- WTW negotiated a buyer-side W&I program of insurance with an overall policy limit of EUR90m obtaining a "US style" hybrid coverage position.
- Nil seller recourse for matters covered by the W&I insurance policy.

Trends in 2020 and looking to the future

- **Increased use** of M&A insurance solutions, including for distressed targets.
 - Global/cross-border and often **unfamiliar** territories.
 - Limited **recourse** available.
- **Private Equity** – opportunistic and familiarity with Transaction Solutions.
- **Corporates** are become more familiar with the strategic benefits.
- **Carve outs** – reduced residual liability and increased comfort for potential purchasers.
- **Minority stake** acquisitions.
- **Synthetic solutions** (i.e. where the seller is unable to give any warranties).
- Increased insurer appetite for **contingent and tax solutions** and client demand.
- **Increased due diligence** particularly on COVID-19.
- **Nil seller recourse** transaction structure will continue.
- **Downward pressure on pricing** (particularly tax and contingent) – driven in part by reduced deal flow due to COVID-19.
- **Increased claims** / notifications.
- **Increased competition** on coverage position and industry sectors.
- Increase in **'End of Fund life'** products / sell side wrapped policies.



Questions



Upcoming events:

July 9: Dealing with a Difficult Umbrella Market

[Register for future events and access past recordings on willistowerswatson.com](https://www.willistowerswatson.com)

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Each applicable policy of insurance must be reviewed to determine the extent, if any, of coverage for COVID-19. Coverage may vary depending on the jurisdiction and circumstances. For global client programs it is critical to consider all local operations and how policies may or may not include COVID-19 coverage. The information contained herein is not intended to constitute legal or other professional advice and should not be relied upon in lieu of consultation with your own legal and/or other professional advisors. Some of the information in this publication may be compiled by third party sources we consider to be reliable, however we do not guarantee and are not responsible for the accuracy of such information. We assume no duty in contract, tort, or otherwise in connection with this publication and expressly disclaim, to the fullest extent permitted by law, any liability in connection with this publication. Willis Towers Watson offers insurance-related services through its appropriately licensed entities in each jurisdiction in which it operates. Willis Towers Watson does not undertake to update the information included herein after the date of publication. Accordingly, readers should be aware that certain content may have changed since the date of this publication. Please reach out to the presenters or your Willis Towers Watson contact for more information.