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# AMVEST'S Corporate Advisor

For Shareholders, Senior Executives, Buyers, Investors and their Advisors

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## STRATEGIC PLANNING IN TROUBLED TIMES

### Strategic Planning for Owners And Managers

By *Charles K. Oppenheimer*

All companies are facing challenges as the country faces the most serious economic times in recent history

Take time now to sit down with your team. For large companies, this might mean your department heads and partners; for smaller companies, your bookkeeper, your salesperson and don't forget outside advisers—your accountant, lawyer, insurance and benefit agent, financial planner and possibly your banker. And don't forget your family; what affects the business affects you and your family.

#### A few things to consider:

**Employees are either part of the solution or part of the problem.** If certain employees are part of the problem, you are better off without them. Reassess your need for all the employees you have; don't keep all your employees because you're trying to be a nice guy. If you don't reduce a few, it could lead to everyone being out of a job.

As for salespeople, be sure your compensation program is fair to both the company and salespeople. Some commission structures generously compensate the salesperson, but short the company. If it isn't a win for both sides, it doesn't work.

**Use financial statements and your bank as helpful tools.** Don't produce financials to put them in a drawer, or because you must have them for the bank. If you don't understand your financials, sit down with

*(Continued on page 2)*

## How to Structure a Multiparty Transaction to Minimize Risk (1)

By *Michael D. Fielding*

### Introduction

Do you know what risks your company faces if it is part of a three-party transaction and one of the players later files bankruptcy? The simple answer is that a bankruptcy trustee may avoid and recover the assets your company received in that tri-party deal. This may occur even if more than three years has passed since the transaction was completed. But do not be dismayed because there is hope! This article discusses proactive steps you can take in structuring a multi-party transaction so as to minimize the future risk of an avoidance claim. (2)

### Constructively Fraudulent Conveyances

Section 548 of the Bankruptcy Code allows a bankruptcy trustee to avoid a transfer as constructively fraudulent where (a) the debtor did not receive reasonably equivalent value for the transaction and (b) the debtor was insolvent at the time of the transfer. The first element can be satisfied in various ways. Section 548 specifies in part that satisfaction of antecedent debt constitutes reasonably equivalent value.

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## Merger & Acquisition Outlook



I am not even going to attempt to make a prediction at this point but will offer some observations.

EBITDA multiples have come down from the highs all buyers loved. We are finding that many potential sellers don't have an interest at present valuations and many are plagued with lower sales and profits.

Private equity groups are still getting good transactions done but with a lot more equity than in the past. Many are targeting add on acquisitions for existing portfolio companies rather than new platforms.

We are seeing a minor increase in financing which we hope will increase as the government continues to put new money into the economy.

For most private companies the best direction is to concentrate on cutting costs and looking for new ways to grow. An option for some is to do a recapitalization by selling a majority to a private equity group and retaining a significant portion while continuing to run the company. This allows owners to take money off the table now and sell the remainder when the equity group exits later.

Most industry observers believe the economy will improve slightly in the third quarter. With that said, we still have challenges to overcome.

an accountant and learn how they can help you manage your business. If you're not sure your financial statements are credible, consider asking a third party — someone other than your accountant — to verify them.

Meet with your bank to ensure they are solid, and that they aren't thinking your company would be better elsewhere. Ask your bank to send account managers to your plant once in a while so they can understand your business better.

**Reduce waste and excess.** Utilize your employees to help cut costs and seek opportunities. Give them incentives to reduce waste. Enlist them to look for and suggest ways to do a project better, with fewer people and less waste.

Look at trimming down benefits or having employees pay more. Sell excess equipment and reduce inventory. Even if the used equipment market isn't great, something is better than nothing, and selling will free up space and cash. Give customers a special price on older or outdated inventory.

Use employees when you need them. If you only need them twice a week, only bring them in twice a week. Don't incur 40 hours of pay and benefits for 16 hours worth of work. I know all the excuses why not to do this, but at least they are getting some pay, still have their benefits and it's a whole lot better than no job at all.

**Consider your customers.** Not all customers add value; it can help the business to weed out those customers, leaving more time to work on projects for customers who add value and pay on time.

Determine your top customers, based on profitability, and meet with them to emphasize how much you appreciate their business and determine how you can be a better solution provider for them. Be creative and think outside the box — the idea is to add more value for these important customers.

This information was provided by Charles Oppenheimer, CEO of Amvest Financial Group, Inc. and former owner of several companies. Amvest is a national investment banking firm specializing in mergers, acquisitions, turnarounds, strategic advisory and corporate finance matters. For more information, contact Charles Oppenheimer at 888-451-9698 [coppenheimer@amvest.com](mailto:coppenheimer@amvest.com)

## Is your company in trouble?

### What are the signs?

Payables over 50 days

Receivables over 50 days

Picking up checks to make payroll

Putting off purchases because of lack of cash

Out of covenants with your bank

### What owners won't admit?

That they are in trouble

That they are in denial

That they need help

Recognizing the cause of the problem

### Common Mistakes

Believing it will get better, it won't

Loosing confidence with your lenders

Not laying off employees

Taking jobs you don't make money on

Not maintaining good financial records

Letting creditors drain your cash

Thinking you can't afford advisors, you can't afford not to, however they must be the right ones. It probably isn't your current lawyer, accountant or friend. They need to be professional, experienced and know the industry.

### When to use an outside advisor?

At the first sign of trouble

Spending more time fighting fires than managing the business

### Lessons from the grave (failed companies)

Not retaining advisors who have done turnarounds before

Experience counts, you will only get one chance

Protect personal assets

Listening to the wrong people

Waiting

### How to get back on track?

Cash is king

Freeze salaries

Take charge of purchases

### Tough decisions

Chapter 11

Laying off employees

Telling your families

Asking for pay cuts

Dealing with customers and suppliers

### Look for warning signs

### Other comments

Collect accounts receivable (they may not be good customers)

Employees are either part of the solution or the problem if the latter they go

### Cash is king, protect it

### Cash is king, protect it

### Don't ever forget it!

Thus, a payment made on a long past-due account will not be constructively fraudulent (although it may qualify as a preferential transfer under § 547 of the Bankruptcy Code if it is made within the 90-day period preceding the bankruptcy petition date). Similarly, a debtor who gives a security interest in its assets to secure a loan will be deemed to have received reasonably equivalent value if it receives the loan proceeds. The second element—solvency of the debtor—is determined on a balance sheet basis. If there is positive stockholder equity then the company is deemed solvent. Conversely, negative stockholder equity means debtor is insolvent.

Unlike preferential transfers (which typically only involve a 90-day reach back period from the bankruptcy petition date), there is a significantly greater reach back period to avoid constructively fraudulent transfers. Specifically, the Bankruptcy Code provides the trustee with a two-year reach back period from the bankruptcy petition date. Moreover, nearly all states have adopted either the Uniform Fraudulent Transfer Act or Uniform Fraudulent Conveyance Act. These uniform acts have provisions similar to the Bankruptcy Code for avoiding constructively fraudulent conveyances. Notably, these uniform acts generally allow a four-year reach back period which makes the breadth of the trustee's avoiding powers even more potent.

It is relatively easy to determine whether a transaction was constructively fraudulent in the context of a two party transaction involving just a debtor and creditor. In those situations, the trustee bears the burden of proving that the debtor did not receive reasonably equivalent value in exchange for the transfer that it made to the creditor. Hence, a creditor can proactively protect itself by taking steps to document the value a debtor received for a transaction.

### **Multi-Party Transactions & Fraudulent Conveyances**

In contrast to a two-party deal, a transaction involving three or more parties presents significantly greater difficulty in determining whether it is fraudulent or not. As a general rule, "transfers made or obligations incurred (including guarantees) solely for the benefit of third parties do not furnish reasonably equivalent value." But notwithstanding this general rule, "[i]t is

well settled that reasonably equivalent value (3) can come from one other than the recipient of the payments, a rule which has become known as the indirect benefit rule." (4)

An example of a multi-party transaction is a situation where a debtor gives a security interest in its assets to a lender who, in turn, loans money to the debtor's parent corporation. In that scenario, is the debtor's security interest a voidable fraudulent conveyance? The answer depends on what the parent corporation does with the loan proceeds. If the loan proceeds are funneled back to the debtor, then there will be no fraudulent conveyance because the debtor has received reasonably equivalent value. But if the parent company uses the assets for its own purposes, the transfer will be deemed fraudulent if the debtor does not receive any indirect reasonably equivalent value.

Whether reasonably equivalent value is given in a multi-party transaction will ultimately depend on the facts and circumstances of each case. Indeed, it can often be difficult to quantify the value the debtor received for the transfer. Intangible benefits such as goodwill, increased ability to borrow and/or expected synergies from a corporate merger can furnish reasonably equivalent value. (5) However, those intangible benefits must also be fairly concrete. (6)

Additionally, a creditor receiving funds in satisfaction of existing debt must be wary of the source of those funds. For instance, where a debtor husband uses non-marital assets to pay the debts of his wife, those monies can be avoided and recovered from the creditor because the husband will not be deemed to have received reasonably equivalent value for the payment. (7) That same rationale would hold true in the corporate context where a debtor company pays the creditors of a sister corporation and there is no corresponding transfer of value back to the debtor company.

### **How to Protect Your Company**

What should a credit manager do to protect his company against voidable fraudulent conveyances in a multi-party setting? First, he must be aware of the risks associated with transfers in a multi-party setting so that proper protective measures can be taken in structuring the deal. This article provides a good start for educating

one's self. Additionally, one can attend seminars where this topic is addressed.

Second, a credit manager should regularly obtain financial statements from the entities with whom he deals. Remember, insolvency is determined by looking at a company's balance sheet. If the company is solvent, then a constructively fraudulent conveyance action fails as a matter of law. But if the company is insolvent (i.e., if there is negative stockholder equity), then a credit manager must be vigilant to ensure that the debtor receives reasonably equivalent value every time it transacts with the creditor.

Third, clearly identify (a) what is being transferred, (b) to whom it is being transferred, and (c) what is being received in exchange for the transfer. The examples set forth above are a good illustration as to why this is important. By critically analyzing these three points a person can ascertain with much greater certainty whether a transaction is subject to avoidance in the future.

Finally, consult an experienced bankruptcy attorney. The reality of the matter is that multi-party transactions create a myriad of risks. An attorney well-versed in fraudulent conveyance law can provide critical advice so as to maximize protection against a future avoidance action.

1 This article was originally published in the June 2008 edition of *Managing Credit, Receivables & Collections* which is a publication of IOMA.

2 Neither the Supreme Court of Missouri nor the Missouri Bar reviews or approves certifying organizations or specialist designations

3 *In re R.M.L., Inc.*, 195 B.R. 602, 618 (Bankr. M.D. Pa. 1996).

4 *In re Northern Merchandise, Inc.*, 371 F.3d 1056, 1058 (9<sup>th</sup> Cir. 2004) (citations omitted).

5 See e.g., *In re Jumer's Castle Lodge, Inc.*, 338 B.R. 344, 354 (C.D. Ill. 2006).

6 *Id.*

7 *In re Bargfrede*, 117 F.3d 1078 (8<sup>th</sup> Cir. 1997).

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