

For CROs, The ‘R’ Stands for Restructuring...And Risk

By Jacqueline Palank

It’s a rewarding job to parachute into troubled companies and turn them around. It’s also incredibly risky.

Struggling businesses often ask turnaround professionals to join the ranks of their top executives in a bid to solve their financial woes, satisfy their lenders and boost their credibility with creditors and shareholders. But these outsiders who take the job of chief restructuring officer, or CRO, face a number of potential landmines as they try to navigate a company back to health.

Those landmines are on display in the case of First NLC Financial Services LLC, whose CRO was dragged into a legal battle over a deal that allegedly allowed the subprime mortgage company’s owner to walk off with its remaining valuable asset on the eve of bankruptcy.

“They’re being brought into a distressed situation,” attorney Christopher Ward, who leads Polsinelli PC’s bankruptcy practice, said of CROs. “Anyone involved in that situation is going to be looked at as a potential target for recoveries.”

CROs may come from outside the company and serve on a temporary basis, but they’re otherwise no different from their C-suite counterparts.

“The ‘O’ is the important part. It is an officer in a corporation,” said Ted Gavin, founding partner in corporate consulting firm Gavin/Solmonese LLC. “The duties of any officer in a corporation that’s insolvent or in bankruptcy carry over to the CRO.”

Those duties include acting responsibly and in the company’s best interests. And just like other executives, CROs risk becoming lawsuit targets if they don’t fulfill those duties.

One such lawsuit was filed against Thomas J. Allison, hired to be the chief restructuring officer of First NLC shortly before its 2008 bankruptcy filing.

According to the lawsuit, Mr. Allison’s first order of business was to clear the sale of First NLC’s mortgage portfolio to an affiliate of its current owner—a deal with an unorthodox marketing method that tasked the buyer with scouring the market for higher bids. The lawsuit claimed that the deal allowed the company’s owner to purchase the assets for millions of dollars less than their worth, depriving First NLC’s creditors of the chance to maximize their payout in the bankruptcy filing that followed the sale.

By allegedly failing to review the sale, the lawsuit claimed that Mr. Allison “demonstrated a conscious, knowing, willful, reckless disregard for First NLC’s best interests and was grossly negligent in numerous regards.”

The suit sought \$20 million in damages from Mr. Allison and two other executives on account of the allegations, which they denied. Through a spokesman, Mr. Allison declined to comment on the lawsuit, which settled days before a jury trial and doesn’t include any admission of wrongdoing by Mr. Allison. Insurers agreed to pay \$1.05 million on Mr. Allison’s behalf.

Attorney Scott Baena, who brought the lawsuit on behalf of the bankruptcy trustee overseeing First NLC’s liquidation, said the case shows that some clarity is needed as to what being a CRO entails.

“There’s got to be some better definition of what the responsibilities of a CRO are,” said Mr. Baena, who leads Bilzin Sumberg Baena Price & Axelrod LLP’s bankruptcy practice. “Unlike lawyers and accountants, there are no rules of admission to be a CRO. You and I could be a CRO even if you or I have no particular expertise.”

Mr. Gavin, who called the lawsuit “a shakedown,” said such litigation is always possible when everyone is fighting for a piece of a pie that by definition isn’t big enough.

But “it stings,” he said, “and people remember it.”

In the face of the real threat of litigation, CROs take steps to protect themselves. When a company asks Larry Perkins to serve as its CRO, his first step is to make sure nothing fraudulent or fishy is going on.

“That’s a key question. If it’s still going on, and you step into the chair, you’re going to be partially responsible for perpetuating that fraud,” said Mr. Perkins, founder of turnaround firm Sierra Constellation Partners LLC.

Just as CROs face the same obligations and liabilities as other executives, they also benefit from similar protections, including insurance coverage of their defense costs should any litigation arise.

“Most CROs, the first question they’re going to ask...is all your directors’ and officers’ insurance paid in full and up to date?” Mr. Ward said.

CROs also negotiate such legal protections as liability releases for anything that happened before they came on the scene as well as for their work during the bankruptcy case.

In fact, experts say CROs are safer in bankruptcy than out because courts are not only keeping an eye on the process but must also approve every move a company makes outside of its normal operations.

“Once the bankruptcy occurs, the CRO is very well-protected for all of his actions,” Mr. Ward said. “You’re getting the court’s blessing on all your decisions.”

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ATP Lenders Sweeten Offer With \$1.8M Additional Cash

By Peg Brickley

ATP Oil & Gas Corp. has overcome some opposition to the proposed sale of its deep-water drilling assets to its lenders, with a deal that provides \$1.8 million to cover the costs of wrapping up the company's bankruptcy case.

The official committee of unsecured creditors bargained for the cash to fund continued Chapter 11 efforts if the sale of the driller's most valuable assets to secured lenders led by Credit Suisse Group AG is ultimately approved.

A hearing continues before Judge Marvin Isgur in the U.S. Bankruptcy Court in Houston. Judge Isgur hasn't yet said whether he will approve the deal.

The bulk of the sale price, \$690 million, is in the form of a "credit bid," or offer to extinguish bankruptcy loans drawn down by ATP as it struggled through a difficult bankruptcy.

Hurt by the drilling moratorium that followed the 2010 Deepwater Horizon drilling disaster, ATP was plagued by a series of operational issues after filing for Chapter 11 bankruptcy protection in August 2012.

Missed business targets translated into tighter and tighter terms on bankruptcy financing. Banks marched ATP to the bankruptcy auction block, where they defeated competitors with a credit bid.

ATP says the deal with secured lenders is worth \$1.4 billion or more, when liabilities that the buyers are taking on are factored in. The alternative to the sale is liquidation, ATP says.

Judge Isgur said Friday he is "worried" about ATP's environmental liabilities, which will fall largely on regulators and on prior owners of the drill sites.

In addition to the \$1.8 million so-called "wind-down budget" for the Gulf of Mexico driller, lenders agreed to pay more than \$44 million to federal ocean energy regulators to cover the cost of decommissioning wells left behind after the proposed sale, lawyers told a bankruptcy judge Thursday.

That payment relieves ATP of the burden of being assessed as much as \$153 million, a claim that would eat up far more than the scant cash that will be in the bankruptcy coffers, assuming the sale is approved, according to evidence ATP provided during Friday's court session.

The environmental cleanup contribution and the provision of a bankroll for final bankruptcy costs are new additions to the lender takeover proposal, negotiated over weeks when ATP struggled to get the deal in front of the judge without too much opposition.

The unsecured creditor panel said lenders could not be permitted to take ATP's valuable Clipper and Telemark deepwater oil drilling operations, leaving behind nothing but abandoned wells and mounting environmental liabilities. In response to that criticism, lenders are providing about \$100 million in cash to cushion ATP's final days, said Mayer Brown LLP's Charles Kelley, attorney for the company, at Thursday's hearing in the U.S. Bankruptcy Court in Houston.

Lenders are also setting aside \$55 million in cash to pay suppliers and contractors that worked on the Clipper and Telemark projects, and they have claims that trump the rights of secured lenders. So-called mechanics and materialmen liens are high-priority claims that may be senior even to the bankruptcy loans that the Credit Suisse group is trading in for ATP's producing wells.

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Because CROs are such a well-established facet of corporate restructuring, experts say it's somewhat rare to see claims that CROs failed to meet their duties to the company, its shareholders and creditors.

It's also a job where, as Mr. Perkins said, "you're only as good as your last case." CROs rely on referrals, presenting an enormous incentive to not only achieve success but do so in a legal and ethical manner.

"If you're dealing with a quality CRO, no CRO is going to put their integrity and reputation at risk for anyone," said attorney Michael Sirota, the co-chair of Cole, Schotz, Meisel, Forman & Leonard PA's bankruptcy practice. "It's a career killer."

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