THE M&A ADVISOR

THE M&A ADVISOR SYMPOSIUM REPORT

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Featuring

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BEST PRACTICES OF THE BEST RESTRUCTURING DEALMEAKERS

At The M&A Advisor's 2014 Distressed Investing Summit in March, Mark Sirower, a Principal at Deloitte, moderated an insightful exploration of best practices in the distressed investing market.

A panel of financial advisors and key service providers in the distressed investing and restructuring space discussed how best practices in the distressed investing sector are evolving to meet changing market demands, changing case law and changing technology.

The fast-paced session addressed:

- Challenges in today's environment for distressed investing
- Industry sectors where opportunities may be hiding
- Best practices for restructuring a family-owned business in distress
- Corporate governance considerations in distressed investing
- Potential impact of the Fisker Automotive case on the distressed investing process

A glut of potential bidders, covenant-lite debt and numerous recapitalization options has created great flexibility for troubled companies and fewer opportunities for distressed investors. Competition among impatient credit bidders has caught the eye of at least one judge who imposed limits on credit bids especially when those bids impede the bankruptcy and restructuring process and opening the gates for other courts to follow. In this exclusive report, industry veterans discuss how they are positioning their clients and themselves to have the competitive edge in this challenging market.

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EXECUTIVE SUMMARY

Best practices in the distressed investing sector are evolving to meet changing market demands, changing case law and changing technology – but more change needs to happen. This was the conclusion of a panel of bankruptcy and restructuring experts exploring best practices in distressed investing. The American Bankruptcy Institute is looking into ways to change the bankruptcy code so that companies and their advisors have a real opportunity to restructure instead of liquidating under Chapter 11. In what will be a closely watched ruling, at least one court has limited credit bids to the amount paid for the claim instead of the full-value of the claim – a potential boon for debtors and their advisors.

At The M&A Advisor's 2014 Distressed Investing Summit in March, Mark Sirower, a Principal at Deloitte, moderated an insightful exploration of best practices in today's distressed investing market.

The symposium session participants included:

Mark Sirower – Principal, Deloitte (Moderator)
Lorie Beers – Sr. Managing Director, Variant Capital Advisors
Peter Kaufman – President, The Gordian Group
Deirdre McGuinness – Managing Director, Kurtzman Carson Consultants

Moderator Sirower guided the panel through a series of common steps that arise in a distressed or restructuring transaction: positioning for the transaction; value creation inside the transaction; and exiting the transaction.

Panelists discussed the reasons why the current environment for distressed investing and restructuring remains challenging and provided insight as to how to navigate through common issues that arise in these transactions. The topics discussed included:

- Challenges in today's environment for distressed investing
- Industry sectors where opportunities may be hiding
- Best practices for restructuring a family-owned business in distress
- Corporate governance considerations in distressed investing
- Potential impact of the Fisker Automotive case on the distressed investing process

Sirower kicked off the session by sharing his experience at a recent private equity conference at Columbia University, “A speaker characterized the distressed investing environment as follows: ‘cheap money; leverage; increased M&A activity and deterioration of financial discipline.’” Sirower continued, “His general sentiment was that opportunities for distressed investing exist but the degree of difficulty is high.” Sirower then posed his first question to the panel, “With so much capital chasing distressed deals right now, what do you do and say to your clients to maintain your walkaway standards? Where or how might best practices be suffering in light of all the competition chasing deals now and are you advising your clients on either side of the transaction to act differently?”

Peter Kaufman is President of The Gordian Group, a leading investment bank that focuses on financial advisory in distressed and complicated situations, “The environment last couple of years – which seems to be ongoing this year - if you are financially distressed and you can’t find new money, you are really not the best student in class.”

“Cheap money, leverage, increased M&A activity and deterioration of financial discipline.”
– Mark Sirower

He noted that many of his clients are private equity firms and his advice to those clients is if they own a distressed situation and they don’t have the best student in the class, they have to do something they really don’t want to do and that is deal with the creditors. “Most private equity firms, if they are hitting the maturity wall and they can’t find the cheap money to refinance out, they are usually still believers in their operations.” Kaufman went on to say, “You’ve had five or seven years to get it done but you just need a couple more years, it might raise an eyebrow, but they are the client, it’s what they believe, so the mission is usually to try to extend out the debt wall.”

Kaufman continued, “When our mission is to extend out the debt wall, the lack of available capital not withstanding, is to figure out how to go to creditors – we like to do it with carrots and sticks – to get the creditors to do what the private equity firm wants which is to kick out maturity wall. Every situation is different, but how we do that is to get the creditors to measure their outcome versus bankruptcy. We come to the creditors with well thought out sticks of what can be done to them in a bankruptcy setting.” Done adroitly, Kaufman noted that this method often results in the ability to do an out-of-court restructuring. Finally, Kaufman listed manufacturing and healthcare as two areas where he sees opportunity for distressed investing.

Lorie Beers, Senior Managing Director at Variant Capital Advisors, focuses on advising clients on the sellside of a transaction and has recently taken several buyside engagements for private equity as well, "The issue is putting discipline around the investing process as well as the selling process."

Beers went on, "There's so much liquidity out there it is easy to get caught up in the fervor of the situation, and people often find themselves in an overbidding situation where they are investing more than they had intended. We work with clients at the outset to set the boundaries and the curbs around where their investment is going to go and ultimately encourage them not to let the fact that there is so much money out there and so much competition for every deal make them take their eye off the ball in terms of what the investing opportunity really is." Beers provided a cautious example, "We've had a couple of private equity clients get ahead of their skis on these type of situations and have ultimately ended up in the situation that Peter [Kaufman] just described where they had to do an operational workout as well as a financial workout."

> "The issue is putting discipline around the investing process as well as the selling process."
> *– Lorie Beers*

Beers listed healthcare, food and agriculture as sectors where distressed investing is "peaking" while automotive, aerospace and defense are "cresting the curve" and offer more opportunities in the near term. When asked what factors are driving opportunities in these areas, Beers responded, "In agriculture, there has been a big shift in how consumers look at protein. There's a lot of excess capacity in these markets. So there is a need for consolidation. It's a less-attractive opportunity for many investors, so there is a shift away from that, which I believe will create more distressed opportunities in that arena."

Deirdre McGuinness is a Managing Director with Kurtzman Carson Consultants (KCC). As with the other panelists, McGuinness does not advise clients on direct distressed investing but notes, "When I was a banker, I always looked at the potential borrower as my client."

McGuinness sees best practices in restructuring as not fixed, "The notion of best practices, really dovetails with the situation that is presented in the market. Best practices in 2008 are not the same best practices in 2014." She went on, "When I was doing the AbitibiBowater exit facility, we struggled to raise $300 million – struggled! My last deal as a banker was the Hawker Beechcraft exit which was six-times oversubscribed. That is a ginormous shift in the market in the availability of financing. Any board that hasn't revamped its capital structure in the past four years should be fired. It's that profound."

She continued, "If you look at the financings that are going on in the market today, we are going right back to where we were pre-dislocation - covenant-lite and other things that lenders said they were never doing again. I haven't seen a default in I don't know how long because the banks are incentivized for a fee to give some sort of relief. It is very rare that you see a bank putting down the gauntlet and saying, 'You are in default.'"

McGuinness summarized the environment and best practices, "Whether distressed investors are chasing deals; advisors are chasing deals, money center banks are also chasing deals; the competition is savage for the fee pile. So my notion of best practices is not some stick in the sand. It's something that always evolves."

For industries that offer potential distressed investing opportunities, McGuinness points to anything that has to do with paper. "I have three kids in college and one on the way and none of them will ever buy a textbook. So anything to do with print: envelopes, yellow pages, anything to do with paper I believe is in decline. Coal is something on everyone's radar. Shipping should be on people's radar as day rates fluctuate, as percentages of fleets are left idle."

"My notion of best practices is not some stick in the sand. It's something that always evolves."
– Deirdre McGuinness

"I am amazed that we haven't seen more in healthcare," noted McGuinness, "Maybe it is a function of what is happening in the administration now, but I think that is something that is definitely coming down the pike and everyone should be prepared for another wave of healthcare."

Beers expanded on the point, "In healthcare it isn't just going to be the providers. I think we are going to see a lot in healthcare services and products as well as providers." McGuinness pointed to radiology and sonograms as areas that may come under pressure, "Physician groups have exploded as a way to chase revenue and I don't think that is sustainable." Kaufman added that his firm was working with a couple of troubled hospitals, "The whole industry is overbedded; the paradigm is shifting because of Obamacare. Where the spigot used to be turned on to an unlimited amount or more that is dramatically shifting and changing. That's great for our business. We like dislocation and change. It's not always very good for other people, but it is good for us."

McGuinness changed the focus a bit, "Madoff notwithstanding, we haven't had a good old fraud case in awhile. We know that it's out there. Criminality is human nature. We're just waiting for it to be uncovered."

Sirower concluded the macro-level discussion with a question about interest rates, "In this interest-rate environment, if rates were to tick up slightly, would this have any effect on distressed M&A transactions?" McGuinness believes there would be a significant effect, due mostly to the nature of distressed transactions, "Even a 100bp swing [could have an effect]. In restructuring we can always count on failed operations, not so competent management, declining industries. If you are a constant issuer in the capital markets, yes, you will always be able to get liquidity because you are paying the street fees and there is reciprocity there. There may be some issues, but banks can underwrite over or around those issues. However, once cost of capital starts to increase a tiny bit, it's going to have a huge effect on the companies that have to go into Chapter 11, because their banks have to roll into the facility into to fund that Chapter 11."

Kaufman commented that he found McGuinness' view a bit cynical. "The low interest rate environment is clearly fueling the easy money, and I think what has to change is either rates go up, but it's not clear what will make that happen any time soon, or the credit and refinancing markets have to have a hiccup or freeze a little bit. I don't think that anyone knows what might cause that, but exogenous forces outside this country– war, for example, could certainly bring that. But as we sit here today, the easy money continues to flow and that is certainly an invitation to later disasters, but not really to current ones.

"As we sit here today, the easy money continues to flow, and that is certainly an invitation to later disasters but not really to current ones."
– Peter Kaufman

Sirower next moved to a hypothetical case study for the panelists. "The Foremost Furniture Company was once very successful. Desmond Gruntal is the CEO. He founded the company 45 years ago in Plum Valley, North Carolina. After decades of success and great holiday parties with all of the close family members who grew up in the successful business, Foremost has had declining sales and simply can't compete on price versus cheaper imports. How do you approach a domestic business that is becoming obsolete because of global competition? It just can't compete in its current form, and it will be very difficult to make the business cost-competitive. What are some of the best practices and alternatives in saving this business?"

McGuinness outlined several constraints. "It sounds to me that this is a family-owned business, a private business, and having banked several of them, they are very difficult because they never fire anyone at anytime. So I think the first thing is to get someone in as a sounding board -- to be the scapegoat, to be the bad guy – to have the difficult discussion about what will happen if the company doesn't change. Then

look at the capital structure, see if recapitalization or refinance can be achieved and then start the 'nickel-counting.' Get the supply-chain in order, the cost-cutting, the vendors; really start honing in on centralizing and looking at efficiencies."

Variant's Lorie Beers was less optimistic, "In a business that's obsolescing, the end game is you have to sell it before it becomes completely obsolete."

Sirower added, "Their cost structure is double that of their Chinese competitors. You can fire everyone and they still can't make up the difference."

Beers responded, "There is some private equity guy that is going to buy them. There's some distressed investor who thinks they've built a better mousetrap. And so the answer is before the business is completely shot is to position it to best capture the value that is remaining."

> "In a business that's obsolescing, the end game is that you have to sell it before it becomes completely obsolete."
> *– Lorie Beers*

Kaufman contended that there wasn't enough information to come to a quick decision at Foremost Furniture, "You can't really know what to do. Forget a consultation. What you need is a Chief Restructuring Officer (CRO). That gives the family plenary authority to come up with a new business plan, to deal with the expense structure, and when the dust settles on that exercise (which needs to happen very quickly), then you can have a view on what is an appropriate capital structure. Do you get your creditors to swap debt for equity? Is there a credible business plan that the professionals and the family think is workable and that they can make money on and attract capital for? You can't really know if you have to do an emergency sale to somebody, until you've gone through that exercise and that assumes you have the liquidity to bridge to a six-week exercise for a CRO to come in and try to create a set of projections that people think have reasonable assumptions."

Kaufman continued, "What does the capital structure look like? What does an M&A look like? You try to create options and optionality. What is a self-help plan of attack that this furniture company can do? What do they need from the outside world? As Deirdre [McGuinness] said, you can talk about privately-owned family businesses and the kid's graduation and everything else is in the expenses. You need to strip that out and figure out how to retool the operations from a cold eye view of the world before you know what you've really got."

Beers added, "I agree with that, but at the end of the day, this business is not going to exist. It's like the textile business in this country. There is no room for it at the end of

the day. The two choices are: the family can run it out to the end, spend its last nickel; or they can try to capture value while value remains. I'm not suggesting you run an expedited sales process, but in the end, if there's any value to be had, that's where they will capture it."

Kaufman defended his more deliberate process, "In terms of best practices process, you want to have a self-help restructuring plan 'foil' so that you can try to keep buyers honest if they try to come in too cheaply. There's something viable and credible to do on a self-help reorganization basis."

Sirower elaborated, "This case is based on a business we worked on in pre-distress. Someone was looking to acquire it and we did a diligence and determined that they were 'toast.' That's why Lorie [Beers] hit right on the head. It's exactly what you start to see when you dig into these situations."

Beers chimed back, "I agree. Having a Plan B is important because often you get into an M&A process and it is not as robust as you would like and you need something to compete against the only buyers in the room. So having a credible Plan B is critical so that you can at least create the appearance of a robust dynamic."

"Having a Plan B is important because often you get into an M&A process and it is not as robust as you would like." *– Lorie Beers*

"Who are the buyers for this asset? It's got a well-known brand. But it's just a business that is not cost-competitive," asked Sirower.

Beers responded, "Some of the answer is in your hypothetical. Some foreign buyers are now looking for a U.S. toehold and they like branded alternatives. If there is really value in the brand, selling to someone down the supply chain may be an alternative. Selling to a foreign buyer may be an alternative. There are distressed investors who may see that as a strategy if they can fix the business and do an operational turnaround. There is a universe of both strategic and financial buyers that might be interested in this opportunity."

Sirower moved to the subject of transitions with management. "How do you tell management like CEO Desmond Gruntal, who has built and run the business for 45 years, that he and his family are no longer the right team to be running the business?"

Kaufman acknowledged that it is a difficult conversation to have and that he looks to have the market tell boards and management the story, "Ultimately, you come in and say, 'Here are the facts. Here's what you are doing operationally. Here is how we

would value that based on comparable company trading multiples, M&A comps. You are in big trouble. The way you are doing business no longer works.' And then you have to be honest with them in a palatable way. Explain to them, 'If you do XYZ, that is your best chance for: salvaging the family name; making sure the kids might still have a job; helping employees remain in the local community, etc.'"

Kaufman concluded, "You've got to give advice, but you have to deliver it in a way that people will actually consider it and hopefully take it and run with it….[if you don't] you've lost before you have the chance to give what is hopefully good and prudent advice."

McGuinness commented that in some ways, clients complicate the restructuring process, "I've seen advisors go in for a very short period of time – three months, six months - because that is all the company is willing to pay for. The advisor goes home and the company takes all of the recommendations but can't implement. They just can't pull the trigger. So they wait another six months and say, 'Wait, can you come back? We can't have these hard conversations.' And maybe that first set of advisors doesn't get rehired, but they are all saying the same story. And so to be really effective, you have to hope that the guy before you got fired and now the advice really resonates."

"To be really effective, you have to hope the guy before you got fired and now the advice really resonates."
– Deirdre McGuinness

"If it's a family-run business, these people really do care about the family. They care about the kids, the grandkids. They have pride in the product and their company and they do want to see it survive. Not just for them, but for their legacy. And so, these are hard conversations to have, but they eventually sink in," notes McGuinness.

The discussion moved on to issues of corporate governance, "When we talk about distressed investing, corporate governance is often front and center with issues like: risk-shifting in decision making from shareholders to bondholders; the many stakeholders in debt where there may be many more players than the original lenders. What advice do you give a board so that they just do the right thing?"

Kaufman commented that corporate governance was a several hour discussion. "Boards should never cede authority for their decisions to their creditors. An axiom we live by at Gordian is that we never do bondholder-side representation so that we can give a board unconflicted, aggressive, hopefully creative advice on how to get their creditors to do what they want them to do. Until you are not the board, you are the board. And so you make decisions. You have good lawyers explaining what your

fiduciary obligations are. Now the pool of folks you have fiduciary obligations to has expanded from your shareholders to include your creditors, but within that there is still a whole lot of running room that a board has to take action, develop strategic plans and go to their shareholders and creditors with various restructuring plans. There's a lot of wiggle room, a lot of gray area, if they are getting advice from reputable professionals the board can hide behind, as long as the board discusses things, have frequent meetings, make informed decisions, that's a good way for boards to stay protected."

"You don't turn over control to the loud people storming the castle because they bought a claim for $0.08 on the dollar and therefore you should do what they want you to do," espoused Kaufman.

"You don't turn over control to the loud people storming the castle because they bought a claim for $0.08 on the dollar." *– Peter Kaufman*

Beers disagreed on certain points noting, "It gets more complex when the fox gets in the henhouse. When the bondholders insist on a seat on the board as a condition to floating the bond and now they may not be acting in [the company's] best interest. The best practices solution to that is to get an outside board member and make sure that you have outside representation that is not just shareholders, debt holders and anyone else in the capital structure. Then you've got unconflicted, outside advice that can insulate the board from capital structure-based claims."

Kaufman addressed the importance of independent directors, "The most important thing is that you don't want to lose them. They come on board when things are healthy; they get some nice benefits and then a [huge problem] hits the company. Companies need to make sure that the 'care and feeding' of the independents takes place on a regular basis so they don't leave when there are problems. And you explain to them, with the help of lawyers, that if they resign before a solution is available, they are at a lot more risk than if they stay the course to see it through to a solution. If you lose the independents, the game is over."

Following on the importance of independent directors to a distressed situation, he asked the panel, "How important is the independence of an investment bank when clients are selecting an advisor?"

"It is critical," responded Beers. "You can't be beholden to a particular type of constituent if you are representing the company. There are people who represent bondholders, people who represent creditors, I think they are poor choices for

company-side work because their regular bread and butter comes from a particular constituency and they don't want to [anger] them."

McGuinness added, "If you have to avail yourselves of the protections of Chapter 11, then you have to be retained by an order of the bankruptcy court and the code has very specific criteria for retention. So if you are not disinterested, it is a dead stop."

"There are a lot of smart, clever people in this business," notes Kaufman. "What you will hear from someone who works both sides of the street when they go to the board is, 'We are really tight with these creditors. That helps you. It's going to help get a deal done.'"

In contrast, Kaufman's pitch to the board is, "I am ready willing and able to cut their heart out for your benefit because I don't solicit them for business and I don't get hired by them. People who play both sides of the street can play a siren song and certain boards fall for that."

"Out-of-court solutions are easier. You can be a little more creative, more flexible." *– Deirdre McGuinness*

Sirower moved into specific dealmaking questions. "What are the key considerations in underwriting distressed M&A transactions out-of-court and in Chapter 11 and how do those decisions change as you move from out of court to Chapter 11?"

McGuinness referenced the relative speed and flexibility of out-of-court solutions, "The out-of-court solutions are easier. You can be a little more creative, more flexible. Once you are in Chapter 11 and you are putting together a DIP facility (debtor-in-possession) or DIP-to-exit facility, the code demands that you "shop" your financing, which everyone does. By "shopping" these days, it is not exactly staple financing, but the investment bankers who are advising the company will ask for term sheets from five or six institutions, cherry pick the terms they like, marry it all together in a term sheet, disseminate it back to the banks and say, 'Which one of you is going to underwrite this facility?'"

She continued, "There are efficiencies definitely, but it comes down to underwriting strength. Money center banks make money because they deploy money and make fees. But you have to take risk; you have to underwrite the facility and take the syndication risk. A Goldman Sachs, JP Morgan, they have big pens and write big checks. If they get hung on a deal and can't syndicate it to the last penny, they are fine with that. The small regionals can't do that. They get hung for $50 million and that could crush them. It's a scale issue."

McGuinness concluded, “The goal is to ensure that it is an effective, fair, efficient process at the best lowest price point and cost of capital for the borrower. But because of the demands of the bankruptcy code, it’s tougher when you have a lot of eyes looking at you and reviewing what you are doing. However, in an out-of-court solution you have a handful of participants and it allows you to be a little more nimble.”

Sirower then asked Beers and Kaufman, “What are the Best Practices in advising clients on how to assess the risk of a distressed asset or investment versus the more traditional type of asset, particularly when it comes to thinking what kind of return you are going to get on that asset? What characteristics are you looking for that might help you distinguish a good [asset] from a bad one?” Kaufman responded, “If you are advising potential acquirer of a company, you have to start with, ‘What can I do to this business? Am I grafting it to an existing platform and how do those synergies look? Will it be standalone?’ Either way you want to have a pretty crisp view based on available information. What returns can you make in three, five or ten years? And what price are you willing to pay today?”

“In the end it has to do with the appetite of the investor and the particular sectors they know and want to be in.”
– Lorie Beers

Kaufman continued, “On the other hand, in the venture cap or technology arena, a financial model can be tossed out the window. You either love the technology or the market it is in or will be in. It doesn’t matter if you pay $8 million, $10 million or $25 million for that asset. You want to have it because you are a bull on the big picture.”

For Beers, the speed of many distressed asset transactions come with additional risks, “You have to bake in risk of distressed asset. You have less time, less due diligence and less opportunity to vet where this is going versus a regular-way M&A. So it’s important to assign the right degree of risk to your return based on all factors available. The transactions are so much faster. A regular-way M&A can take a year. A distressed transaction may happen in as little as 60-90 days. So the degree of the information and the imperfection of the information have to be taken into account.”

Asked if there were any big red flags signaling that an asset is one to avoid, Beers commented that these issues tend to be situational. “There are folks who will stay away from any healthcare-reimbursement related opportunities. They view the potential external change in legislation to be too great. At the same time, there are others who see [regulatory change] as a hotbed of opportunity. In the end it has to do with the appetite of the investor and the particular sectors they know and want to be in.”

"Are there any particular ways you position your client for winning an M&A deal?" asked Sirower. "You have to figure out how to game the system," according to Kaufman. "We were advising the buyer of a learning company – Hooked on Phonics. Their phone number was 1-800-ABCDEFG. In due diligence we found out that the company licensed the phone number from the owner/founder. We had our principal cozy up to the founder and he then licensed the phone number upon a sale to our client. So if someone else won the transaction, our client would still have the phone number. This tactic threw people against the boards for two weeks, the company was running out of money, so the auction couldn't be postponed and by the time the auction came, we were the only ones ready to proceed with the acquisition. The judge made us give up the license agreement, but by then the damage was done. We won the auction in part because we came up with something to hip-check the other bidders."

"There is nothing cookie cutter about the problems. There's nothing cookie cutter about the solutions."
– Peter Kaufman

Beers underscored the importance of dealing well with the sellers, "How you are going to deal with management is important to achieving synergies. In generational sales or family-owned businesses, the seller wants to make sure that people are taken care of. That may be the paramount importance. So it is important to understand what the seller's objectives are as you are going into the auction, and make sure you are not only gaming the system but also addressing the legitimate business concerns of the seller. This will position you better because in bankruptcy it's higher and best, not only higher. You can be the highest bidder but the qualitative aspects of the bid will come into play and you want to be sure you have addressed those aspects.

Kaufman added, "That's the fun part about this business. There is nothing cookie cutter about the problems. There's nothing cookie cutter about the solutions. I love this business because I go to war and I play games in each situation and everything's different. There's no mark-up the last deal. That's what's fun about it."

Sirower next drew on McGuinness' experience as a U.S. bankruptcy trustee to discuss the administrative burden on companies, "What do potential investors need to understand what they have to contend with and what they need to be prepared for?" Beers chimed in, "Don't ask for an adjournment of the auction!" McGuinness continued the thought, "I really leave it up to, not so much the investment bankers or the corporate bankers, but the lawyers to really advise the investor that once you go into this arena; there are parts of it that are in your control but there are large parts

of it that are out of your control. In my experience, distressed investors don't have an abundance of patience. They want everything to happen now, yesterday, and sometimes the court just cannot accommodate their schedule. So there has to be a little patience woven into the transaction. And the lawyers really have to quantify the risk that the investor may not win. And if they don't win, they still have to pay. That never goes over well."

Before the close, Sirower asked each panelist if they saw any innovation in financing or doing distressed deals or on the regulatory side that bears watching.

"I found Judge Gross' opinion in the Fisker Automotive case to be incredibly pleasing as a debtor-side guy," commented Kaufman. In the Fisker Automotive case, the buyers of the debt sought somewhat aggressive sales terms for their credit bid of $75 million on a full debt amount of $168 million. The buyers specified a very quick 24-day sale period but could not articulate to the court why the sale needed to occur so quickly. In addition, the buyers insisted on a private sale – not subject to higher and better bids as in an auction process. Finally, the debt buyers wanted their credit claim to cover all three buckets of assets in the company – assets where the buyers had an undisputed interest, assets where there was some dispute over the asset rights and unencumbered assets. In the end, the court limited the amount that the buyer could bid to the amount they paid for the assets. As Kaufman put it, "The bidders, as they always do, showed up piously and said, 'We are owed 100 cents on this asset we credit bid x amount for!' and the judge said, 'No. You can credit bid the amount you paid for the claim.' That's going to send shockwaves through the system. If it gets codified or followed, it will have a tremendous impact on how cases are run."

"The system that we are currently operating in under Chapter 11 is broken."
– Lorie Beers

Variant's Beers hopes for regulatory change, "The system that we are currently operating in under Chapter 11 is broken. I think we have moved away from the intention of the code in the way it was originally drafted. That makes it very difficult for companies to navigate outside of [solutions other than] selling the company. If there is going to be real reorganization in this country then we are going to have to make changes in the code. The ABI (American Bankruptcy Institute) has a task force mandated to look at this issue and determine what can work and what can't, but we've got to figure out how to fix it."

KCC's McGuinness forecasts a lot of change over the next three to five years in the claims administration part of restructuring and bankruptcy, "We are all technology companies within and we are all working on electronic efficiencies because noticing

and balloting by paper, by snail mail, it's not efficient and I don't think the courts or the professionals are going to have much patience for it in the long term. So we are all working on e-noticing, proof of claims, just trying to do our jobs cheaper and more efficiently." Beers commented that the M&A process is also being affected by technology, "We just launched our first web-based information memorandum. The way of doing things is improving and changing as well."

In summary, best practices in the distressed investing sector are evolving to meet changing market demands, changing case law and changing technology – but more change needs to happen. A glut of potential credit bidders, covenant-lite debt and numerous recapitalization options has created great flexibility for troubled companies and fewer opportunities for distressed investors. Competition among impatient credit bidders has caught the eye of the courts, leading to limits on credit bids especially when those bids impede the bankruptcy and restructuring process. The panel recommended that companies look for truly independent advice and beware the siren song of investment banks, which also solicit and service creditors. Most importantly, however, be creative and consider the needs of the seller. As Gordian Group's Peter Kaufman found with the Hooked on Phonics transaction, "Just a slight edge in due diligence can hip-check the competition out of the game."

To watch candid interviews with industry stalwarts on "Best Practices of The Best Restructuring Dealmakers" click on the photos below

Peter Kaufman
President
Gordian Group

Lorie Beers
Sr. Managing Director
Variant Capital Advisors

Pavle Sabic
Credit Market Development
S&P Capital IQ

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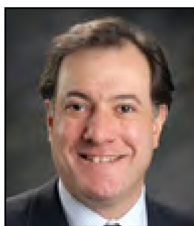
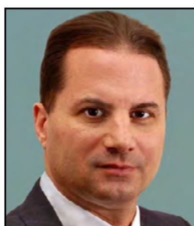


Mark Sirower is a Principal at Deloitte Consulting LLP and a leader in the M&A Strategy practice. Mark has more than 17 years of consulting experience advising clients in growth, strategy and innovation, M&A process and strategy, target screening, commercial due diligence, valuation, investor relations, pre- and post-close merger integration and on governance issues related to M&A decisions. He has been active in helping industrial goods, consumer goods, financial services and pharmaceutical companies rethink and grow their businesses profitably through M&A. He focuses on transforming clients from merely reacting to growth opportunities to having the capability to proactively determine the best opportunities and grow shareholder value. Prior to joining Deloitte, Mark was global leader of the M&A practice at a major strategy firm and also led the M&A Strategy practice at a Big Four firm. His work has spanned across projects involving market analysis, strategy development and international acquisition search for technology division of a global tier-1 auto supplier, market analysis and strategic options development for world's largest international industrial cleaning company re-entry into the U.S. market, and competitive positioning and strategic screening of life-insurance acquisition options for a Fortune 50 financial services company. Mark is author of the M&A classic, The Synergy Trap, and his research and articles on best practice in acquisition performance have been featured in major business periodicals including Forbes, BusinessWeek, Fortune, the Economist, The Wall Street Journal and Harvard Business Review. An acclaimed speaker on M&A driven growth, he is adjunct professor at NYU's Stern School and regularly presents to groups of CEOs, CFOs and boards of directors.



Peter Kaufman is the President at Gordian Group. Mr. Kaufman has been at Gordian Group since 1990. Prior to joining the firm, he was the founding Co-chairman of the Committee on Investment Banking of the American Bankruptcy Institute (ABI). With Henry Owsley, Gordian Group's Chief Executive Officer, he is the co-author of the definitive work in the field, Distressed Investment Banking: To the Abyss and Back. Additionally, Mr. Kaufman has been profiled by The Deal, where he is consistently ranked as one of the 10 leading national investment bankers in financial restructurings. He is national TV's go-to authority for restructuring and bankruptcy views. Prior to joining Gordian Group, Mr. Kaufman was a founding member of First Boston Corporation's Distressed Securities Group. As an investment banker and attorney, he has more than 25 years of experience solving complex financial challenges. Mr. Kaufman received a B.A. with honors in History and Art History from Yale College (where he won letters in varsity lacrosse). He also received a J.D. from the University of Virginia School of Law, where he graduated in the top quarter of his class.

Lorie R. Beers is a Senior Managing Director at Variant Capital Advisors where she has the leadership role for the investment banking practice and its activities including M&A, capital raising, and balance sheet restructuring services. Ms. Beers has more than a dozen years of investment banking experience and 20+ years of corporate restructuring and insolvency transaction experience. She is familiar with a wide range of industries and has driven both in-court and out-of-court restructuring successes and is credited with developing the Complex Financial Restructuring Program for the American Bankruptcy Institute (ABI). She was cited as a valuation authority by the Seventh Circuit Court of Appeals in In the Matter of River Road Hotel Partners LLC et.al. Prior to joining Variant Capital, Ms. Beers was a Managing Director and Global Co-head of Investment Banking for Seabury Group in New York where she was responsible for Seabury's middle market and aerospace investment banking practice. Prior to that, she established KPMG's Special Situations East Coast practice and spent several years practicing law in various bankruptcy departments at a number of East Coast law firms. Ms. Beers received her Juris Doctor degree from the University of Pittsburgh School of Law and a Bachelor's degree from Dickinson College.

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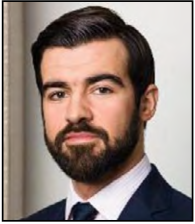

Pavle Sabic is an Application Specialist in the Product & Content division of S&P Capital IQ. In this global role, Mr. Sabic focuses on global business development - including client workflow and pre- and post-sales solutions. He joined the firm's London office in 2011, where he also covered business development in Europe, the Middle East and Africa. Prior to joining S&P Capital IQ, Mr. Sabic was a product specialist in the risk management division of State Street Investment Analytics. He began his career at Kames Capital – formerly AEGON AM – as a Fixed Income Analyst. Mr. Sabic graduated with a degree in Mathematics and Economics from Herriot-Watt University in Edinburgh and holds an MSC in Finance and Investment from the University of Edinburgh. He also has an FRM certification from the Global Association of Risk Professionals.