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Finance and Restructuring Team Publishes Article on Independent Directors as a Strategic Alternative to Bankruptcy in The Secured Lender

Members of Choate's Finance and Restructuring team, including John Ventola, Jonathan Marshall, Doug Gooding, Alexandra Thomas, and Jacob Lang, have been published in *The Secured Lender's* January/February 2026 feature story, "Appointing Independent Directors to Distressed Companies: An Alternative to Bankruptcy."

FEATURE STORY

Appointing Independent Directors to Distressed Companies: An Alternative to Bankruptcy

BY JOHN F. VENTOLA, JONATHAN D. MARSHALL, DOUGLAS R. GOODING, ALEXANDRA THOMAS, AND JACOB LANG

The most traditional avenue for a distressed company seeking to reorganize existing debts or maximize company value is through a Chapter 11 bankruptcy. However, due to its complexity, a Chapter 11 bankruptcy can be a lengthy, expensive process that is not always palatable for the distressed company's secured lenders.

In some situations, appointing an independent director or board of directors to replace the existing directors (consensually or non-consensually) is a quicker, more cost-effective turnaround approach. Independent directors can be beneficial for distressed companies because they (i) offer expertise as to maximizing value in a struggling business and (ii) insulate the company from liability related to any real or perceived conflicts of interest at the director level. For secured lenders, particularly when existing management is acting unreasonably, independent directors can offer fresh and unbiased perspective for the company, allowing for a unified path towards maximizing value. This article explores the mechanisms a secured lender can utilize when seeking to appoint independent directors, and key issues that secured lenders and independent directors alike should consider.

Mechanisms for Appointing Independent Directors

Independent directors can be appointed to take over a distressed company consensually or non-consensually.

- *Consensual path:* A distressed company will often seek to alleviate economic stressors by negotiating an amendment to its existing credit facility or entering into a forbearance agreement with its secured lenders. Secured lenders can utilize this opportunity to add a condition precedent to the effectiveness of the applicable agreement that requires appointment of independent directors (who are agreeable both to the secured lenders and to the company) by a certain date. This is the most desirable approach, as it promotes a unified path forward and is generally less risky and less costly.
- *Non-consensual path:* A typical secured financing will include an equity pledge and/or proxy right that allows secured lenders to exercise voting rights on the company's behalf upon the occurrence of an uncured event of default. When a distressed company has triggered an event of default under the existing loan facility and is not cooperating with its secured lenders, the secured lenders can choose to exercise their proxy rights to replace the existing directors with new independent directors who are better suited to act in the best interest of the company's stakeholders. This is generally considered the riskier approach, as it may result in litigation or disgruntled sponsors and company management that can undermine the new directors' efforts.

Fiduciary Duties of Independent Directors

The role of independent directors in a distressed company will vary based on the facts and circumstances of each company. Once independent directors have been appointed, however, they must comply with several fiduciary duties, including:

- *Duty to maximize value:* Directors of any company are obligated to maximize value for shareholders. However,

JOHN F. VENTOLA
Choate

JONATHAN D. MARSHALL
Choate

DOUGLAS R. GOODING
Choate

ALEXANDRA THOMAS
Choate

JACOB LANG
Choate

in the case of distressed companies that may be insolvent, directors are obligated to maximize value for all stakeholders — including both the existing equity holders and the company's secured and unsecured creditors. Independent directors must therefore pursue the

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The article explores how independent directors can strengthen distressed companies, the mechanisms secured lenders can leverage to appoint them, and the key considerations that should guide both lenders and independent directors throughout the process. The full article can be found in digital publication of *The Secured Lender*, available on The Secured Finance Network (SFNet) website.

Choate's nationally recognized Finance and Restructuring Group closes hundreds of transactions every year, for a wide array of clients, with facility sizes ranging from $25 million to in excess of $4 billion. Our restructuring attorneys focus on providing creative solutions to highly complex issues arising with financially distressed businesses, including with respect to corporate governance, security enforcement actions, asset sales, bankruptcy strategies and out-of-court restructurings. Learn more.

John F. Ventola
Department Chair, Finance & Restructuring

Jonathan D. Marshall
Partner

Douglas R. Gooding
Partner

Alexandra Thomas
Associate

Jacob Lang
Associate