EQUITABLE TRANSITIONS

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Educated and Flexible Solutions to Crises of Solvency

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Deadlock Doesn't Have to Mean Good-Bye by David R. Haberbush

All too often individuals form a business with the highest hopes and then they see those hopes dashed. They may suffer the death of a "key man;" they may realize less-than-rosy income; they may mire themselves in disagreements about the firm's management; they may be betrayed by people in key positions. Whatever the cause the result is always the same: deadlock.

The Problem: Deadlock Defined, Causes Traced

Corporate deadlock means no single person or group of persons has legal control of the business. No clear-cut majority of ownership agrees on a single course of action. The business can't make a decision.

This often occurs in a two-person partnership whose ownership has been split down the middle. It also occurs when ownership factions become so polarized that no majority can agree on what to do next. The practical result is that, to the detriment of the firm, operational control remains unchanged. The firm lurches ahead, rudderless. Often those in control prevent those not in control from gaining access to information, compensation, or profits are held hostage.

Disputes also occur when a majority owner of a firm engages in activity that disadvantages or even defrauds the interests of a minority owner. Under California law, the owner of 33% or more of the voting stock of a corporation may petition the courts to force removal of a person in control or to force Court-supervised dissolution and wind-up of the corporation. For partnerships, the withdrawal, death, self-dealing, or fraud of a partner will result in the dissolution of the partnership, unless the partnership agreement provides otherwise. Under these circumstances a partner may petition the courts to force the dissolution and wind-up of the partnership, also under the Court's supervision.

What it Costs

What are the available options? The pre-litigation option is usually the liquidation of the assets), a costly and time-consuming process. Often the business subject to the dispute becomes valueless to the individual owners due to the high cost of litigation and/or the continued employment of people who perpetrate fraud or malfeasance in the first place. Additionally, in circumstances of fraud or self-dealing by those in control, assets are dissipated and secreted away before the litigation ends.

The Solution: Receiverships Defined

There is another option, less

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What's Inside

And They Didn't Spell His Name Wrong

David Haberbush has recently published two articles on General Assignments in industry-leading publications for the legal and venture capital communities.

His application of the process to various industries shows the flexibility that a General Assignment can offer to those who seek an alternative to corporate insolvency.

"Easy as ABC" was published in the Judgment Call section of The Deal: Voice of the Deal Economy, February 9, 2004.

He also published "ABC is Alternative to BK" for the November/December 2003 issue of Big News for Smaller Firms, a journal published by the State Bar of California.

Send requests for copies of both articles to James Scarborough at jscarborough@equitabletransitions.com.

There's No Business Like New Business

Equitable Transitions recently undertook a General Assignment on behalf of U.S. Paralegals, an attorney-supervised service that previously assisted with family law, bankruptcy law, and other personal issues.

He Speaks of Cookies and Dough

Jerry Jones was one of the owners of large, commercial production bakery, Carolyn's Country Pies, experiencing financial challenges that included problems with cash flow, continuing losses, bouncing checks, and disagreements among its owners that created a stalemate. Insolvency loomed over the owners' heads. Mr. Jones' accountant told him to speak with Equitable Transitions. He's glad he did.

Equitable Transitions impressed me for three reasons. First, they demonstrated a keen understanding of the business issues affecting my particular situation. They're very good listeners. Second, they thoroughly apprised me of the alternatives to bankruptcy that lay before me. They don't push a particular agenda. Third, their priority was to fashion a solution to resolve my particular situation. There's nothing off-the-shelf about them.

All throughout the process, they were very professional, open, and communicative. In a situation like this, clear communications is vitally important. Because of their streamlined size and hands-on approach, the principals were always available and they always took my calls. How often does that happen?

Equitable Transitions solved all of the problems swiftly and economically. I couldn't have asked for anything more. They brought peace of mind and closure to a miserable situation! I would highly recommend them to any company who has financial problems. Don't wait, the sooner you call them the quicker you can sleep at night.

A Firm by Any Other Name Would Smell as Sweet

David Haberbush's law firm is now called Haberbush Feinberg, LLP. All that's changed is the name. They still restrict their practice to insolvency issues, business formations, and business transactions.

A revamped web site and inaugural newsletter will soon follow.

If He Can Make It There, He'll Make It Anywhere

I received word in mid-June that the U.S. Supreme Court would review a case in which I represented one of the parties.

The journey began three years before in a Bankruptcy case when tax claims were filed by the Internal Revenue Service against my clients.

Even before I headed East I felt my appearance before the Supreme Court was a defeat. Until then my client had prevailed at every stage. The acceptance of the Petition by the U.S. Supreme Court was, in effect, our first loss.

I quickly stopped feeling sorry for myself. I had work to do.

Even though I saw the Court in session just before Christmas, I was not prepared for what greeted me once I arrived. Only a lectern in the center of the table separated opposing attorneys. Each counsel had little table space. I was isolated from my co-counsel. And not only did we sit a mere ten feet from the Justices' bench, we met them at eye level.

The opposing counsel entered and introduced himself. He worked with the Solicitor's General Office and had argued cases before the Supreme Court on prior occasions. He wore a grey morning coat in keeping with Supreme Court tradition. I wore a charcoal business suit.

The Justices entered the Courtroom at 10:00 am sharp. The Motions for Admissions of Attorneys were made, and argument for my case began. The Government attorney spoke first. Immediately the Justices posed questions beyond the specific issues of our case. I could tell this was going to be a long day.

Now it was my turn. Before I had a chance to get out one sentence Justice Breyer asked me a question. Each time I made a point, the Justices bombarded me with questions on unrelated issues.

After a few of these questions I felt that I had been there for most of my allotted time. I glanced up at the clock above Justice Rehnquist's head and saw that I had only been arguing for ten minutes! As the questions continued, though, I became more relaxed.

"Only later did it dawn on me that I had argued a case before the Supreme Court."

A couple of times as I answered a question I would hear a Justice pose another question, but not know who asked it. Their microphones were wired to a general sound system. If I were speaking to Justice Breyer, for example, who sits on the left side of the bench, I would hear a question by Justice Souter or Justice Scalia, who are seated on the opposite side of the bench. When I heard a voice I had to scan the bench to figure out who was talking.

After twenty-five minutes, the white light on the podium lit up. Only then did I think that I was going to make it. A few minutes later I completed my argument and took my seat. I did it!

Whatever the outcome, I felt that I had held my ground, even though I could have answered several questions better. It seemed that a couple of Justices favored our side. Justice O'Connor repeatedly nodded her head as I spoke and Justice Ginsburg asked questions clearly intended to help make my argument. All this bolstered my confidence.

Only later did it dawn on me that I had argued a case before *the* Supreme Court. That not only had I stood in the same place where the 2000 election was decided, but also where such important decisions as *Roe v. Wade* and *Brown v. The Board of Education* had been argued. That the Justices called me by name.

Friends and colleagues told me it was a great honor to appear before the U.S. Supreme Court. I thought of it as more a great privilege.

A privilege I will remember for as long as I live.

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obvious because it is less well known.

Much of the costs, delays, and risks caused by litigation due to deadlock might be avoided through a Court-implemented Receivership. A Receiver is an independent individual who preserves the business's value for the benefit of parties affected by the conflict. The Receiver, as an independent and neutral third party, takes possession of all assets and assumes control of the business and its operations.

Depending on the situation, a Receiver may also use limited special powers to investigate fraud and mismanagement and then report these findings to the Court. The Receiver may also undertake investigations to determine and recommend to the Court fair allocations of the value of the business among its owners. A Receiver, under appropriate circumstances, can also obtain a stay (a halting) of creditors' actions until a resolution of the disputes is achieved. Finally, a Receiver investigates the business involved in the dispute. The Receiver will ordinarily meet with all of the ownership interests, collectively or individually or both, to discuss the claims and positions of each owner. Often this enables the deadlock to be resolved through a consensual process in much the same way as mediation.

Benefits of a Receivership

Receiverships can focus attention away from Owner disagreements back to where it belongs, to the business's overall financial health, value, and future. If resolution cannot be achieved, Receiverships provide a stable process by which the value of a business can be maximized while allowing for an ordered resolution of the claims ownership has against one another.

A Receivership may not prevent deadlock but it does present an option around it. Along the risk/return scale, what have you got to lose? Better yet, what do you have to gain?