Q&A With Pillsbury's Deryck Palmer

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Deryck Palmer
Partner
Insolvency and Restructuring
+1.212.858.1100
deryck.palmer@pillsburylaw.com

Clients describe Deryck Palmer as "an outstanding adviser," noting that he is a "very effective litigator especially when he is required to argue a difficult issue," as recognized by *US Legal 500* and *Chambers USA*.

Mr. Palmer concentrates his practice in the representation of debtors as well as creditors under Chapter 11 of the Bankruptcy Code, and has handled a wide variety of workout, corporate restructuring, and bankruptcy matters, in some of the largest and most significant matters in the country during the past three decades.

Deryck A. Palmer is a partner in Pillsbury Winthrop Shaw Pittman LLP's New York office. He concentrates his practice on the representation of debtors as well as creditors under Chapter 11 of the Bankruptcy Code, and has handled a variety of workout, corporate restructuring and bankruptcy matters. Recognized by Turnarounds and Workouts as one of the nation's top "Outstanding Bankruptcy Lawyers," Palmer is active in the American Bankruptcy Institute and the Turnaround Management Association. He is also active in the American Bar Association's Business Bankruptcy Committee and is a member of both the New York State Bar Association Committee on Bankruptcy and Committee on Courts and the Community.

For more than 10 years, Palmer served as a foreign adviser on United States bankruptcy law to the Chinese government and was instrumental in the drafting of the new PRC Enterprise Bankruptcy Law, and was a recent delegate to the UNCITRAL Working Group V (Insolvency Law) on behalf of the International Law Institute, advising on the development of an international bankruptcy code. He is a former member of the Committee on Bankruptcy and Corporate Reorganization of the Association of the Bar of the City of New York and former co-vice chairman of the American Bar Association's Healthcare Working Group. Palmer was selected as one of the lead counsels to the U.S. Treasury Department in the General Motors restructuring, and was also the lead counsel for the Detroit School System, the sixth largest school district in the country.

Q. What is the most challenging case you have worked on and what made it challenging?

A. The first case I had a significant role in as a junior associate had more than its share of challenges. A company with operating losses in a declining industry. A parent conglomerate convinced that bankruptcy would destroy the company and substantially harm its other businesses. Competitors who would snatch up customers at the first whiff of opportunity. A unionized workforce distrustful of management after years of acrimony. In other words, things were not going well for Wayne Transportation, a yellow school bus manufacturer, during the post-busing period.

Substantial reductions in labor and benefit costs were needed to save the company. The unions, represented by the UAW, took the position that there would be no such concessions.

It took months of negotiations, but finally, less than three and a half hours before the company would file for Chapter 11, the UAW agreed to significant reductions in worker benefits and salaries and thereby averted the bankruptcy. Of course, this only happened after we had given the unions copies of the fully drafted first-day pleadings, including motions to reject the collective bargaining agreements. A great lesson to learn as a junior lawyer — parties can resent each other and bear grudges, but as long as they can overcome their distrust and are not entirely irrational, they can usually agree that the pie will be bigger outside of bankruptcy.

Q: What aspects of your practice area are in need of reform and why?

A: Any restructuring starts outside of a courtroom, and the greatest value and efficiencies are likely to be realized outside of the courtroom as well. But for an "out-of-court" process to work best, the stakeholders must be on the same page about the backdrop of the "in-court" alternative. Our practice's "in-court" alternatives are determined by the Bankruptcy Code, which has been shown to be a very flexible and effective tool. However, as the nature of restructurings has changed, particularly over the past business cycle, reforms to the Bankruptcy Code to better address current issues — such as quick section 363 sales, structured dismissals and the treatment of certain derivative contracts — may help key participants realize optimal outcomes. Other areas where Bankruptcy Code reform could bring significant benefits are a better use of operational restructuring options, a return of certain case management functions to the court's discretion, and an increased acknowledgement of today's capital structures.

As increased leverage on companies becomes more common, it has also become more common to use the Bankruptcy Code as a mechanism to solve holdout or collective action problems and achieve only a financial restructuring such as a debt for equity swap. This may be the right choice in particular circumstances, but the unique opportunity in bankruptcy to undertake an operational restructuring should not be overlooked. What company couldn't benefit from rejecting particular contracts or leases, or being able to liquidate some assets free and clear? Encouraging the use of the Bankruptcy Code's operational restructuring tools to deal with legacy issues and optimize current operations may help position companies for sustained success in today's challenging business environment.

Amendments to the Bankruptcy Code such as shorter exclusivity periods or shorter periods to propose a plan or to reject real property leases have shortened the typical case length overall. But it's questionable whether these changes, which force debtors to act very quickly on certain issues, have actually resulted in better recoveries to creditors. Creditors have always had the ability to seek stay relief or to compel the debtor to assume or reject their contracts upon an appropriate showing, perhaps leaving these matters for the court's decision on a case-by-case basis would do the greatest good.

Finally, due to current financing structures, it is rare to find companies filing for bankruptcy with unencumbered assets. Many Bankruptcy Code provisions are generally predicated on the existence of unencumbered assets in addition to any encumbered assets. In the last 30 years, the increase in the use of secured debt has made this situation increasingly rare, with fewer avenues for redress for unsecured creditors, even unwilling creditors such as tort claimants. Reform of the Bankruptcy Code to acknowledge and address this change in financing practices would benefit all participants.

Q: What is an important issue or case relevant to your practice area and why?

A: Conflicts of interest are an important issue in restructuring practice. Because any restructuring involves multiple stakeholders, including equity investors, bondholders, indenture trustees, trade creditors, the distressed company itself, and management, and any of these groups may itself be composed of parties with diverse interests, the potential for conflicts is greater than what is commonly encountered in other practice areas. A proactive and systematic procedure for identifying, evaluating and disclosing these issues as appropriate, and obtaining any necessary consents, is crucial. These issues become even more important in a bankruptcy case as counsel to the debtor or to an official committee, as courts continue to develop the standards for disclosure and disinterestedness.

Q: Outside your own firm, name an attorney in your field who has impressed you and explain why.

A: Ricky Mason at Wachtell is a terrific lawyer who has consistently impressed many by his ability to deliver value for his clients by building consensus between diverse stakeholders. Ricky builds this consensus in a conciliatory manner and without being overly confrontational.

Just recently, Ricky represented the majority of the senior secured debt holders in the Hawker Beechcraft case. After negotiating an emergency financing and restructuring support agreement with the company prior to its Chapter 11 filing, they negotiated a PBGC agreement resolving significant pension liabilities and then engaged in a five-month negotiation to sell the company as a going concern. When those negotiations fell through, Ricky's clients provided the basis for a consensual plan of reorganization that provides the senior secured debt holders with approximately 90 percent of the equity of the reorganized entity, with bondholders and unsecured creditors receiving the remainder. Hawker Beechcraft is now on the cusp of emerging from Chapter 11 after just nine months — another great result by Ricky for his clients.

Q: What is a mistake you made early in your career and what did you learn from it?

A: It's important to emulate your mentors, but each lawyer needs to find his or her place in the practice. Indeed, one's approach to the practice of law should be suited to an individual's personality, temperament and ease of doing business. Early in my career, I mimicked my mentor wholesale, but soon came to realize that traits which are complementary or helpful to one person may not be particularly beneficial or constructive for someone 25 years junior, in part because of the changing times and nature of restructuring profession. That realization enabled me to accomplish more than I would otherwise have, and it's probably why I still enjoy my work even after more than 30 years in this profession.

Pillsbury Winthrop Shaw Pittman LLP