Workouts a good option: Companies in financial hardship have alternative to bankruptcy

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Phillips Murrah Directors Elizabeth K. Brown, Stephen W. Elliott, and Melvin R. McVay, Jr. present at the Oklahoma Independent Petroleum Association Annual Meeting.

OIPA board member Elizabeth Kemp Brown and her fellow attorneys from Phillips Murrah PC presented a panel at the Annual Meeting discussing workouts and bankruptcies in the oil and natural gas industry.

Phillips Murrah's Melvin McVay, Stephen Elliott and Clayton Ketter joined Brown, who is also CEO of E&P company The Gloria Corporation, on the panel.

Bankruptcies in the oil and natural gas industry more than quadrupled from 2014 to 2015, totaling almost $35 billion.

Bankruptcy is usually not the best choice for a company facing financial trouble, Ketter said.

“Before jumping into that you want to see if you can do an out-of-court workout,” he said.

Bankruptcy is the last resort for both borrowers and lenders, McVay said.

A consensual workout agreement is an agreement between parties to renegotiate the loan and stay away from bankruptcy. Workout measures can include extending the term of a loan, extending payments, or partial payments.

A workout allows the parties to have much more control, McVay said, and avoids public scrutiny and the stigma that is attached to bankruptcy.

“You file bankruptcy, and everything about your company is an open book,” McVay said. “The good, the bad and the ugly.”

He urged business owners to be proactive if the company is entering hard times.

Elliott said recent cases have seen a change to how bankruptcies have worked.

“Historically, secured creditors come in and assert their positions and everybody below them gets nothing,” he said. “That’s not what’s happening. What they’re generally doing is restructuring their debt, cutting in existing equity and leaving trade participants and trade creditors pretty much alone.

“It seems to be a realization that they can maximize value by keeping the industry participants and the relationships with them intact.”

Ketter said of the around 35 oil and natural gas bankruptcies that have been filed this year, few were filed in Oklahoma, even if the company was Oklahoma-based.

"You would think, a company that is headquartered in Oklahoma, has a lot of creditors in Oklahoma or even Texas, how is it that they can go to Delaware or the southern district of New York and file?" Ketter said. "The venue requirements under the bankruptcy code are pretty broad. They allow you to be creative in where you end up filing."

The biggest cases tend to hire national counsel, Elliott said, and they practice more frequently in Delaware and New York and Texas than they do in Oklahoma.

"I think there's also a perception that the courts in Delaware and New York may be more sophisticated," Elliott said. "I personally don't buy that. And if any of you were involved in the SEM Group case, you received decisions out of the Delaware judge that I don't think were very compatible with your view of the world. So I think home filing would probably be a lot better for some of these folks than they realize."

Brown said when dealing with a company that is having financial difficulties, reviewing existing contracts is vital.

"Make sure you have your ducks in a row," she said. "Review back over those agreements … If you've done an acquisition, you need to make sure you have your assignments in hand, and you need to make sure those assignments have been actually executed and recorded." Take steps like making sure any liens are filed, and any other documents signed and recorded, so you understand your position, she said. Brown said when providing services or products to a company with financial problems, options are to get a deposit, get a pre-payment or personal guarantee from the owner before providing additional products and services.

"It's a good idea to evaluate where you are and then try to make sure that you’ve got your I’s dotted and your T’s crossed, and you’ll be in a much better position to be paid if the company ends up going into bankruptcy,” she said.