Part II

MANAGING THE CRISIS

INTRODUCTION

One of the biggest obstacles to developing a disciplined evaluation and diagnosis in a troubled business situation is the sheer volume of crisis activities that scream out for attention. As someone lost in history once observed, "When you're up to your ass in alligators, it's hard to remember that your objective is to drain the swamp." Prioritization of issues is essential, and stabilizing the crisis must come first. In Part II, we address three topics that we believe are fundamental to the task of stabilizing the crisis:

- Pitfalls specific to operating in a financially stressed or insolvent condition that must be considered in order to avoid making the situation worse;
- Liquidity issues and cash-flow management requirements;
- Evaluation of the many and conflicting agendas that typically exist among the various stakeholders in a troubled business and must be addressed.

The crisis must be managed for there to be longer-term potential for maximizing the value of the business entity. How the value of this business pie gets split among the stakeholders is not the first concern. The first concern is *making sure there is a pie to divide*.

Chapter 5

FIRST DO NO HARM:
Legal, Operational, and Political Pitfalls

The only thing worse than a meltdown that results in a zero recovery is a meltdown that triggers incremental contingent liabilities and results in claims or litigation that extend beyond the assets of the estate. One key reason why troubled businesses (as well as investors in, and lenders to, troubled businesses) need to seek experienced legal and professional advice is that there are a variety of ways in which the actions of management, the board, the lenders or professional advisors can destroy existing protections or create new liabilities.

As the realization hits that an investment is failing, the urge is to try to hit a home run, obtain an advantage in a difficult environment or simply survive for one more day in the hope of getting luckier tomorrow. This urge can tempt parties down dangerous paths marked by often unforeseen hazards. We are not here raising the issue of fraudulent behavior, but rather of the potential to inflict harm inadvertently, either as a result of ill-considered precipitous action or the failure to understand fully the rules that apply to a business facing insolvency.

As a company struggles, fiduciary responsibilities shift and adversarial relationships develop, creating a minefield of potential claims and liabilities. Errors and missteps will be subjected to review with the clarity of hindsight and, in many cases, through a lens wielded and focused by damaged parties evaluating litigious options. It is a time for caution.

The dangers of inadvertently doing harm come in three classifications:

Legal: In our litigious society, business enterprises are subject to a variety of laws and governmental regulations that define a company's rights and obligations, as well as the rights of others. Unless great care is exercised in advance, the intricacies and pitfalls of those laws and regulations may become the basis for challenges and litigation instigated by claimants long after the events occurred.

Operational: Exposure to serious operational errors can involve taking actions that destroy value by making the situation worse, or *not* taking action and allowing a deterioration of value to the detriment of creditors or shareholders. When