



# Overview of Plan Confirmation Process; Pre-Packaged Plans and Asset Sales

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An Overview of Corporate Bankruptcy

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# What is a Plan of Reorganization?

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- ❖ Court approved contract governing relationship between the company and its creditors post Chapter 11 emergence
- ❖ Voted on and accepted by certain types and classes of creditors and approved by bankruptcy court



## Entire Goal of Chapter 11 is for DIP to Propose and Confirm a Plan of Reorganization

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- ❖ Exit strategy and viable business plan critical
  - ❖ DIP emerges as ongoing, reorganized entity; or
  - ❖ DIP conducts orderly liquidation of its assets



## Key Aspects of Plan

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- ❖ Exit financing
- ❖ Corporate Restructuring
  - ❖ Cancellation of old securities and issuance of new
  - ❖ Formation of new corporate entity, new shareholders, new board and management
- ❖ Settlements with major creditors
- ❖ Discharge, release, exculpation and indemnification



# Disclosure Statement Required

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- ❖ Like a prospectus. Requires adequate information to enable creditors and shareholders to make an informed judgment about the plan of reorganization
- ❖ Describes key events leading up to and in Chapter 11
- ❖ Plan summary
  - ❖ Classification of claims and interests
  - ❖ Overview of restructuring transactions and means of implementing the plan
  - ❖ Mechanics of distribution of cash or equivalent to holders of claims and interests
- ❖ Valuation/Financial Projections



# Timeline

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- ❖ Old school. Pre-2005 Amendments
  - ❖ 120-Day, 180-Day Exclusivity Periods Could be Extended Indefinitely
    - ❖ Extensive amount of time to formulate and negotiate plan . . . 6 months to 2, 3, 4 or more years
  - ❖ Court approves disclosure statement
  - ❖ DIP solicits acceptances of creditors with “impaired claims”/Creditors may solicit rejections



## Timeline Cont'd

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- ❖ Creditors submit ballots voting “yes” or “no” on the plan. To be confirmed must be accepted by at least one impaired class if there are impaired classes:
  - ❖ Class of claims is deemed to accept if creditors in class hold at least 2/3rds in amount and more than one half in number of claims
  - ❖ Holder of unimpaired claims deemed to accept
  - ❖ Plan can be confirmed over the objection of dissenting class through “cram down”:
    - ❖ Doesn't discriminate unfairly against that class and is fair and equitable



## Timeline Cont'd

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- ❖ Confirmation hearing:
  - ❖ Court must find that enumerated provisions of the Bankruptcy Code met, including:
    - ❖ Best interests of creditors
    - ❖ Feasibility, i.e., not likely to be followed by additional reorganization or liquidation
    - ❖ Good faith
    - ❖ Disclosure of new board and senior management; relevant incentive plans
- ❖ Court confirms plan
- ❖ Implementation of plan and emergence from Chapter 11 on Effective Date (at least 10 days after confirmation order entered)



# Emergence

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- ❖ DIP's assets vest in new reorganized entity free and clear of liens
- ❖ All pre-petition liabilities discharged except those specifically retained in plan
- ❖ Automatic stay cancelled
- ❖ Corporate restructuring effected: e.g., old shares cancelled/new securities issued
- ❖ Exit financing in place
- ❖ If public company, new entity listed on exchange



## Waterfall – Payouts Under Plan

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- ❖ DIP Lenders: normally paid in full
- ❖ Secured Claims: normally paid in full or otherwise unimpaired through reinstatement or taking title to collateral
- ❖ Administrative Claims, e.g. lawyers and financial advisors retained during the pendency of the case: normally paid in full
- ❖ Priority Tax and Other Priority Claims
- ❖ General Unsecured Claims, e.g., trade creditors
- ❖ Equity Claims: often wiped out and new shares issued



## POST 2005 BANKRUPTCY AMENDMENTS: RECENT TRENDS THAT ARE CLEAR RESPONSE TO SHORTENED EXCLUSIVITY PERIODS

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- ❖ 2005 Amendments: exclusive period for DIP to file plan is a maximum of 22 months after petition date. Exclusive period for acceptances to be obtained by DIP is a maximum of 26 months after the petition date.



# Significant Increase in Prepackaged Plans

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- ❖ Function of shortened exclusivity periods
- ❖ Function of tight credit markets: companies that would have simply re-financed two years ago need to resort to the Chapter 11 process:
  - ❖ They need to be in and out quickly
- ❖ Goal: speedy confirmation of a plan or reorganization that has already been approved by requisite numbers of creditors prior to Chapter 11 filing



## Advantages of Prepackaged Plans

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- ❖ Encourages better up-front planning and a clear exit strategy
- ❖ Minimal time and money spent in bankruptcy
- ❖ Better P.R. for company
- ❖ Ability to bind creditors with 50% in number/two thirds in amount rules, reducing “holdout” problems
- ❖ Avoid loss of control



## Disadvantages of Prepackaged Plans

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- ❖ For public companies solicitation must comply with SEC rules
- ❖ Bankruptcy Court may not approve pre-petition vote, resulting in potentially protracted process



# Statistics on Prepackaged Plans

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- ❖ 2007: just 4 pre-paks initiated
- ❖ 2008: 10 pre-paks
- ❖ 2009: 30 pre-paks, a 300% increase from 2008
- ❖ 2010: 2009 trend continuing



## Examples of Prepackaged Plans

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- ❖ Sirva (relocation company-Allied Van Lines): in and out of bankruptcy in only 100 days
- ❖ CIT Group
- ❖ Six Flags, Inc.



# Lightning Fast Section 363 Asset Sales Are the Norm

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## ❖ What are they?

- ❖ Sale of substantially all of DIP's assets in bankruptcy out of the ordinary course of business, usually at auction
  - ❖ This was extraordinary remedy in the 1980's and 1990's (See In re Lionel Corp., 722 F.2d 1063, 1070 (2d Cir. 1983), now routine)
- ❖ DIP has duty to sell assets at highest possible purchase price
- ❖ Usually a “stalking horse” bidder who is entitled to a break-up fee if deal fails



# Lightning Fast Section 363 Asset Sales Are the Norm Cont'd

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## ❖ Why Popular?

- ❖ Tight credit
- ❖ Most Chapter 11 cases in past 2 ½ years have ended in liquidation because of inability to obtain financing
- ❖ The process sanitizes distressed assets by enabling the purchaser to take free and clear of liens
  - ❖ Although successor liability can still be an issue for the purchaser
- ❖ Assets of distressed companies can be had at bargain basement prices



# Disadvantages of Section 363 Asset Sales

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- ❖ Sale happens too fast: failure of basic due diligence
  - ❖ In re Lehman is good example of nasty fallout from compressed sales timeframe (one week)
    - ❖ Speed of sale to Barclays contributed to alleged \$5 Billion loss in value to Lehman in its bankruptcy case
  - ❖ Stalking horse has sale wrapped up: unfair advantage
  - ❖ Assets that fluctuate dramatically in value, e.g. commodities

# CONCLUSION

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## ❖ Speculation on the Future of Chapter 11



# QUESTIONS

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# CONTACT INFO.

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