Plan Confirmation Overview

Today's Speakers

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Introduction

- The Plan
  - Plan of Reorganization
  - Claims Priority and Classification
  - Impaired vs. Unimpaired Claims
  - Absolute Priority
  - Cramdown / Cramup
  - Means for Plan Implementation
  - Post-petition Financing
  - Voting and Acceptance
  - Acceptance of Plan
  - Confirmation Hearing
  - Substantive Consummation and Discharge
- Confirmation Standards
- Issues and Considerations

Recap

- Contingency Planning
- Preparation Stage
- Commencement of Chapter 11 Cases
- Second Day Matters
- Exit Strategy Overview

Plan of Reorganization ("Plan" or "POR")

- A Plan is a contract between the debtor(s) and its creditors
- Prearranged Plans
  - Debtor(s) file for Chapter 11 following a negotiation and agreement with at least one impaired creditor class
  - Often characterized as a Restructuring Support Agreement ("RSA")
- Prepackaged Plans
  - Debtor(s) file for Chapter 11 only after impaired creditors vote in favor of the Plan
  - Debtor(s) can emerge from bankruptcy quicker than a Prearranged Plan

Priority of Claims and Classification of Claims / Interests (11 U.S.C. § 1122)

- A plan must separate creditors into classes.
- Generally, a plan will classify claim holders as secured creditors, unsecured creditors entitled to priority, general unsecured creditors, and equity security holders
  - Classes of claims must be "substantially similar"
  - There must be a reasonable business justification for classifying creditors together
  - Can create a "convenience" class

Acceptance of Plan

- Disclosure Statement
  - Prior to solicitation of plan, disclosure statement that contains "adequate information" must be approved
- No solicitation of votes unless court approves disclosure statement
- Once disclosure statement is approved, a debtor can solicit votes

Voting and Acceptance (11 U.S.C. § 1126)

- Impaired creditors get to vote on the plan.
- For a class to accept a plan:
  - ½ in number of voters
  - ⅔ in amount of voters
- There is a presumptions in favor of voting

Impaired vs. Unimpaired Claims

- Importance of distinction for voting
- A creditor is impaired if its legal or equitable rights are altered by the proposed treatment under the plan
- Impaired creditors get to vote on the plan
- Unimpaired creditors do not vote as their legal or equitable rights are not altered

Plan Confirmation Standards (11 U.S.C. § 1129)

- Certain criteria must be met in order for a court to confirm a Plan
  - The Plan must comply with all applicable laws
  - The Plan has been proposed in good faith
  - Plan must be feasible (i.e. not likely to be followed by a subsequent reorganization)
  - Plan must be in the best interest of creditors
  - Must have an impaired accepting class

Cramdown

- To the extent an impaired class votes to reject the plan, the plan can still be confirmed over their objection
- Plan must be shown to be "fair and equitable" and not discriminatory
  - For example, if a creditor is secured – must receive the "indubitable equivalent" of its claim
  - Fair and equitable is often fact specific to the case
  - Must comply with "absolute priority rule"
    - Creditors of a junior class cannot receive recovery until senior creditors are paid in full

Confirmation Hearing - Cramdown

- Equal classes can be given different kinds of consideration under a Plan, so long as they receive rough equivalents
  - Not all discrimination is unfair
  - Courts are divided in the standard they use to assess “unfair” discrimination among equivalent classes
  - Restrictive application: Some courts only apply the unfair discrimination standard in cases where claims and interests have been subordinated
  - Broad application: Some courts have found that unfair discrimination exists where a Plan segregated multiple similar claims or groups of claims into separate classes and provided disparate treatment for those classes

Means for Plan Implementation – Secured Creditor Cramdown

- To satisfy the condition that a plan be "fair and equitable," the Plan must provide:
  - For the secured creditor to retain the lien and for the provision for cash payments that (in the aggregate) equals the allowed secured claim and that has present value "of at least the value of such holder's interest in the estate's interest in such property;"
  - For the sale of any collateral, free and clear of liens, with the secured creditors' liens attaching to the proceeds of the sale; or
  - For the realization of "indubitable equivalent" of such claims

Means for Plan Implementation – Unsecured Creditor Cramdown

- The "Absolute Priority Rule" –
- The "fair and equitable" standard as it applies to unsecured creditors
    - The Plan must provide to each holder of an unsecured claim property with the present value of the allowed amount of its claim (i.e., "paid in full"); or, the Plan must provide that junior claims or interests "will not receive or retain under the Plan on account of such junior claim or interest any property"

Substantive Consummation and Closing the Case

- Upon the entry of a final order that confirms a plan of reorganization over a creditor's objection, an appeal becomes ripe. Indeed, a creditor may immediately appeal the confirmation order.
- The doctrine of equitable mootness "is a recognition by the appellate courts that there is a point beyond which they cannot order fundamental changes in reorganization actions." *Manges,* 29 F.3d at 1038-39. "Consequently...when there has been substantial consummation of a plan ...effective judicial relief is no longer available—even though there may still be a viable dispute between the parties on appeal." *In re GWI PSC 1 Inc., et al,* 230 F.3d 788, 800 (5th Cir. 2000)
- U.S. Trustee fees and closing the case.

Issues And Considerations That Could Derail Confirmation

- Voting
- Amassing blocking position
- Approved solicitation against acceptances
- Claims trading – buying claims likely to vote in favor
- Objections to disclosure statement
- Objections to plan
- Competing plans

Review – FA Perspective

- Many successful bankruptcy reorganizations will seek to "right size" the debtor(s) balance sheet to align the NewCo capital structure with the current business outlook
- The balance sheet change, or restructuring, is informed by management's outlook for the business and management's outlook will, in turn, help inform what the value of the business is worth
- The Plan of Reorganization memorializes the valuation of the business and the valuation is the basis for which a company or debtor will seek to negotiate with its creditor constituencies
- The topic of valuation and negotiation with creditors is typically commenced prior to a bankruptcy filing. If a prepackaged agreement cannot be achieved, a pre-arranged bankruptcy or free fall is inevitable
  - In the event that there are impaired classes that are given modest or no consideration, plan objections may be raised
    - May be used to negotiate a better outcome / recovery for constituents
  - Differences of opinion on the future business forecast / business valuation make for more difficult negotiations / plan processes
    - COVID-19 environment will create differences in opinion on future business prospects / valuation

POR Valuation Issues and Considerations

- Methodologies
  - Discounted cash flow analysis, multiples analysis, precedent transactions, etc.
- Perspectives of the Parties
  - RBL / ABL, Term Loan, Bondholders, Equity, Management
  - Secured vs. Unsecured
- Feasibility
  - Credibility of the business plan
  - Liquidity / runway
  - Equity cushion or lack thereof
- "Best Interest" Test
  - Liquidation analysis and the resulting recoveries
  - Collateral issues in a post-COVID-19 world

Exit Financing

- Sufficient exit financing is critical in bankruptcy processes
  - Considerations include the sizing of an appropriate quantum of capital
- Most parties are aligned in wanting the business to succeed post-effective date
  - Important for court and constituents to understand and feel satisfied that the "Feasibility" standard is satisfied
- Funds from exit financing generally are used to:
  - Pay creditor claims under the Plan; and
  - Refinance existing indebtedness (i.e., the DIP)
  - Fund operations post-effective date

Q&A