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Need For Speed: Utilizing Hybrid Solicitation Strategies to Shorten Ch. 11 Cases

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Like many restructurings these days, Reddy Ice, Inc. expected to enter Chapter 11 with some but not complete consensus on a comprehensive restructuring. What was different for Reddy, however, was that its timeline for emerging from bankruptcy was being driven by the restructuring case of *another* company, one of Reddy's competitors. The competitor was going through a sales process and had already set in place a deadline for parties to submit bids to acquire it. Reddy's plan of reorganization provided for a baseline set of recoveries in a traditional debt-to-equity recapitalization with a toggle that allowed for additional recoveries to creditors if Reddy was successful in acquiring the competitor. In essence, Reddy needed to complete its own Chapter 11 case and emerge so that its bid would not be viewed as contingent on the completion of a partially-approved deal with its creditors. The task Reddy faced was to develop a timeline where emergence would occur in under 50 days. As a result, Reddy Ice simply did not have the time, or the requisite support, to commence and *complete* a solicitation before filing its Chapter 11 case. Instead, on the eve of its Chapter 11 filing, and in reliance on a recent and essentially untested addition to the Bankruptcy Code, Reddy Ice launched a solicitation on its prenegotiated plan. The ''straddled'' launch allowed Reddy Ice to continue its solicitation[1] after the filing, which resulted in confirmation of a Chapter 11 plan in 36 days and Reddy Ice's emergence just 50 days after filing for Chapter 11.

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Kirkland & Ellis LLP represented Centerbridge Partners, L.P., a holder of first and second lien indebtedness and the backstop party under a rights offering conducted as part of the restructuring. Following the restructuring, Centerbridge now controls a majority of Reorganized Reddy Ice's equity.

Prepackaged vs. Prenegotiated Restructurings

The recent trend in Chapter 11 restructurings has seen a keen focus on speed, efficiency and the desire to avoid a prolonged stay in Chapter 11. This means more ''prepackaged'' and ''prenegotiated'' Chapter 11 cases, both in which significant negotiations and documentation of the restructuring occur prior to filing Chapter 11. While there are many differences between a prepackaged and a prenegotiated restructuring, when the debtor solicits acceptances on a plan of reorganization remains a central distinction between them.

In a traditional prepackaged case, solicitation is fully completed prior to filing. In addition, creditors must be afforded a reasonable amount of time to accept or reject the plan.[2] Generally, the Bankruptcy Code will not interfere with a prepetition solicitation so long as it complies with ''any applicable nonbankruptcy law, rule, or regulation governing the adequacy of disclosure in connection with such solicitation.''[3] The most common ''nonbankruptcy law'' applied by bankruptcy courts is federal and state securities law.[4]

In a traditional prenegotiated case, a company will not solicit prepetition. Instead, a company will likely en-

[1] Although Reddy Ice was unsuccessful in its bid to acquire the competitor, Reddy was able to submit a bid that was not contingent on the completion of its Chapter 11 case.

[2] *Id.* (noting that creditors must not be required to respond to the solicitation in ''an unreasonably short time.'')

[3] 11 U.S.C. § 1126(b)(1).

[4] The most common ''nonbankruptcy law'' cited by courts includes Section 3(a)(9) and Section 4(2) of the Securities Act of 1933, 15 U.S.C. §§ 77(a)-77(b).

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ter into so-called ''lock-up'' or ''plan support'' agreements with major creditors. These prepetition contracts generally provide that once a company files a plan of reorganization the creditor will support and vote in favor of a plan referenced in the support agreement. When solicitation is commenced postpetition, the Bankruptcy Code requires that the debtor deliver to all solicited parties the plan or a summary of the plan only after a court approves a disclosure statement.[5]

Because a disclosure statement must be approved by the bankruptcy court before solicitation, prenegotiated cases generally take longer than prepackaged plans. A debtor may, however, seek to have a disclosure statement conditionally approved under Section 1125(f) of the Bankruptcy Code on the first day the case so that any solicitation can commence immediately upon filing.[6] Even under the rare circumstances where a bankruptcy court conditionally approves a disclosure statement at the first day hearing, the entire process, from solicitation to confirmation, typically still takes 45-60 days.[7]

Prior to the enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act (''***BAPCPA***'') in 2005, many practitioners believed that a solicitation had to occur either entirely prepetition (in the context of a prepackaged Chapter 11) or entirely postpetition (in the context of a prearranged or traditional Chapter 11).[8] If a solicitation commenced prepetition continued postpetition, a debtor faced a risk that those votes submitted postpetition could be designated, requiring the entire solicitation process to start over.[9] And even in the prepackaged context, significant impediments to execution existed, including the prospect of an involuntary bankruptcy filing by a disgruntled creditor during the prepetition solicitation period.[10] To curtail this risk and foster more pre-filing negotiations and resolutions, Congress enacted Section 1125(g) as part of BAPCPA, which provides ''[n]otwithstanding subsection (b), an acceptance or rejection of the plan may be solicited from a holder of a claim or interest if such solicitation complies with applicable nonbankruptcy law and if such holder was solicited before the commencement of the case in a manner complying with applicable nonbankruptcy law.''[11] The alternative provided by Section 1125(g) now permits solicitation to straddle the petition date, even when a disclosure statement is not approved by a bankruptcy court until later in the case. Until recently, however, use of Section 1125(g) has generally remained untested in the seven years since its enactment.[12]

Reddy Ice

In a recent case filed in United States Bankruptcy Court for the Southern District of Texas, Dallas Division, the debtors utilized Section 1125(g) to confirm a hybrid prenegotiated plan 36 days after the filing.[13]

The debtors in *Reddy Ice* commenced their Chapter 11 cases on April 12, 2012 (the ''***Commencement Date***''). In the months leading to the Commencement Date, the debtors had engaged in negotiations with an informal committee of the debtors' first and second lien noteholders (the ''***Ad Hoc Committee***''). Those negotiations expanded to include holders of other notes and culminated in the execution of a restructuring and plan support agreement on April 11, 2012, the day before the Commencement Date (the ''***Plan Support Agreement***'').

On the evening before the Commencement Date, the debtors commenced a solicitation of their plan. And the debtors continued their solicitation after the Commencement Date, utilizing Section 1125(g)'s flexibility in an effort to shorten the duration of their Chapter 11 cases. As a result, solicitation was complete on May 9, 2012, and a combined plan confirmation/disclosure statement approval hearing was conducted on May 18, 2012.

The Court understood the circumstances around the need to expedite the cases. Despite objections raised by the United States Trustee and certain litigation plaintiffs at the first day hearing that the Bankruptcy Code does not provide for solicitation to straddle the petition date, the Court overruled such objections and expressly recognized the propriety of the straddled approach.[14] The Court stated on the record that Sections ''1125(g) and 105 combined approve . . . the straddling procedure'' and ''as a backstop,'' the Court preapproved the debtors' disclosure statement.[15] Moreover, the Court stated in its findings of fact and conclusions of law confirming the debtors' plan that ''the continued postpetition solicitation of the voting classes was proper and in compliance with Bankruptcy Code Section 1125(g).''[16]

Impact of Reddy Ice

The ability to utilize Section 1125(g) depends highly on the facts and circumstances of the particular situation. If a debtor can make the case that a shorter proceeding may result in increased recoveries for stakeholders, Section 1125(g) provides an opportunity to potentially move quickly through Chapter 11. As Reddy Ice demonstrates, the key will be building consensus with non-consenting constituents and fully educating such stakeholders on the prospects for increased recoveries that may occur under an expedited proceeding.

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[5] 11 U.S.C. § 1125(b).

[6] 11 U.S.C. § 1125(f). *See In re Linden Ponds Inc. and Hingham Campus, LLC*, Case Nos. 11-33913 & 11-33912 (Bankr. N.D. Tex. June 21, 2011).

[7] *Prepackaged Bankruptcy and Prearranged Bankruptcy Process*, 913 PLI/Comm 543 , 560 (2008).

[8] *In re Stations Holding Co., Inc.*, No. 02-10882 (MFW) (Bankr. D. Del. Sept. 25, 2002); *In re NII Holdings, Inc.*, No. 02-11505 (MFW) (Bankr. D. Del. Oct. 22, 2002).

[9] *In re NII Holdings, Inc.*, No. 02-11505 (MFW) (Bankr. D. Del. Oct. 22, 2002).

[10] *See, e.g., In re Resorts Intern., Inc.*, 199 B.R. 113 (Bankr. D. N.J. 1996) (creditors filed an involuntary case against a debtor while negotiating a prepackaged plan).

[11] 11 U.S.C. § 1125(g).

[12] *See In re CIT Group Inc.*, 09-16565 (ALG) (Bankr. S.D.N.Y. Dec. 8, 2009) (finding votes solicited prepetition and accepted postpetition were in compliance with Section 1125(g)); In re Trans Max Tech., Inc., 349 B.R. 80, 86 fn 7 (2006) (recognizing the exception to Section 1125(b) provided by Section 1125(g)).

[13] *In re Reddy Ice, Inc.*, 12-32349 (Bankr. N.D. Tex. Apr. 12, 2012)

[14] Transcript of Record at 179-82, *In re Reddy Ice, Inc.*, 12-32349 (Bankr. N.D. Tex. April 13, 2012) [Docket No. 80].

[15] *Id.* at 195.

[16] *In re Reddy Ice, Inc.*, 12-32349 (Bankr. N.D. Tex. May 22, 2012) [Docket No. 432].

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