



AMERICAN  
BANKRUPTCY  
INSTITUTE

# 2019 Mid-Level Professional Development Program

## Preparing the Debtor

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## CHAPTER 11 PREPARATION AND BEST CASE MANAGEMENT PRACTICE



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*Practical tips from professionals:  
Everything a mid-level associate should know about how to prepare a company to file chapter  
11 and the important coordination among advisors that is necessary along the way.*

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### Pre-Filing Petition Efforts

- Prior to filing depending on the capital structure, perceived value and participants in the capital structure, significant energy and effort is put into pursuing various out of court solutions.
- These transactions can include a host of transactions including exchanges (debt for debt; debt for equity, uptier); new financings (permitted debt under credit documents; accounts receivable securitizations; asset drop down / unrestricted subs); asset sales; among others.
- These transactions can be implemented through a pre-packaged bankruptcy, pre-negotiated bankruptcy or in a free-fall scenario in court. The goal of these pre-petition efforts is to explore building consensus across as many constituents as possible and to shorten the duration of a filing and the associated expense.
- When preparing a debtor for a filing, there are some core similarities across all debtors; however, the preparation can be different if a sale is being considered as part of a filing.



### Business Plan

- Work with the FA and management to develop a business plan that is used with various constituents towards effectuation a restructuring.
- The business plan is typically 3-5 years in duration and is a re-based plan that is viewed as a 50/50 plan - a balance of risk and conservatism that management is willing to underwrite.
- The business plan is used in a host of work streams:
  - Valuation: Serves as underlying projections for a valuation to be performed by the Investment Banker
  - Allocation of Value: Determines overall valuation that is then allocated down to legal entities depending on whether the plan is a sub-con or non-sub-con plan
  - Recoveries: Ultimately will determine recoveries by legal entity and by creditor class
  - Pro Forma Capital Structure: Used to size pro-forma capital structure and debt service capacity upon emergence. This will ultimately outline the level of forgiveness / concessions needed from various creditors
  - New Capital: Based on existing liquidity and business plan identify and size new capital needs
  - Management Incentive Plan: Determines MIP performance metrics



### Liquidity and DIP

- **Liquidity / DIP Budget / New Capital**
- Work with the FA to understand liquidity, DIP budget and new capital needs.
- Liquidity and DIP budget will serve as basis to run a market check on a DIP financing
- New capital needs will translate into work streams regarding capital raising and structuring
- **DIP Market Check and Comparable DIP Terms**
- Prior to seeking court approval for a DIP, it's important to run a market check to see whether there is an alternative source of capital that can be provided on better terms.
- Identify amount of and duration of DIP needed for the chapter 11 case
- Identify a universe of potential lenders that are a combination of bank lenders and non-bank lenders that underwrite DIP loans
- Offer an NDA and access to information to underwrite an investment
- Compare terms to terms being provided by existing capital structure members
- Once a DIP has been selected, look at similar sized DIP over a reasonable period of time to compare terms - determine reasonableness of DIP terms



### Liquidity and DIP

- **DIP Declaration**
- Prepare a declaration summarizing:
- Need for DIP financing
- DIP market check and reasonableness of fees
- Include additional relief including adequate protection and use of cash collateral
- Be prepared to testify to reasonableness of DIP terms



### Sale / Bid / Valuation

- **Sales Process / Bidding Procedures**
- In the event the restructuring contemplates a potential sales process in or out of court, there are additional materials that need to be prepared and anticipated either at the beginning of a filing or during the filing.
- Sales Materials: Draft sales materials including a Confidential Investment Memorandum, NDAs for participating parties, Teaser, Buyer List and Process Letter
- Sales Process: Oversee and run the entire sales process including drafting the CIM, sending out the NDA, managing the data room, diligence and receiving and comparing the bids
- Bidding Procedures: Work with counsel to draft bidding procedures in the event there is a court supervised sales process, including a 363 sales process. Bidding procedures outline the timeline, milestones and rules by which bidders will be identified as potential bidders, qualified bidders, a stalking horse or the winner of an auction. The procedures will also outline the auction framework and structure
- The Investment Banker needs to be prepared to testify to the bidding procedures
- **Valuation Analysis**
- Prepare valuation work that will be used for Plan Valuation and recovery analysis.



### Understanding Capital Structure and Cash Position

- Understanding a company's capital structure is essential to conducting a comprehensive assessment of the company's strategic restructuring alternatives.
  - Look beyond demonstratives and high-level summaries and conduct a critical analysis of the company's debt documents, including:
    - Credit agreements, indentures, debentures, notes, letters of credit, commercial paper
    - Security agreements, mortgage agreements, UCC financing statements
    - Guaranty agreements
    - Intercreditor agreements
    - Amendments and forbearance agreements
    - Other ancillary documents



## Understanding Capital Structure and Cash Position

- Answers to many of the key questions that must be answered before developing and executing a restructuring strategy are contained in the company's debt documents:
  - Estimated timing of chapter 11 filing?
  - Collateral packages and/or unencumbered assets?
  - Order of priority?
  - Borrowing capacity and potential financial sources?
  - Key players?
  - Potential deal capacity?
  - Which entities need to file?
- **Associate practice tips**
  - As early as possible, obtain execution version closing sets for each of your client's debt facilities and store clearly-labeled electronic copies of each document in a central, secure location that is easily accessible to your team.
  - Have binders or spiral-bound mini-books with key debt documents made for each member of your team.
  - If your client has not already done so, prepare corporate organizational chart with an illustrative debt overlay. Have the chart laminated and distribute copies to each member of your team.
  - Capitalize on in-house resources. If possible, seek out the expertise of colleagues when necessary or efficient (e.g., inquire as to whether a colleague in your firm's finance department can assist with preparing comprehensive debt summaries).
  - Make it a priority to become an authority on these materials so that you are able to play a more active role in developing case strategy and provide valuable contributions to discussions with your team, the client and other advisors.



## Corporate Organizational Structure & "Domino" Analysis

- Determining which entities in a corporate family should commence chapter 11 cases requires an examination of a variety of financial, operational and legal considerations, including the following:
  - Subsidiary / affiliate guarantors of debt obligations
  - Other joint and several liabilities
  - Potential cross-defaults
  - Relief from pending litigation, enforcement actions or other legal processes
  - Availability of postpetition financing
  - Intercompany transactions and integrated cash management
  - Bankruptcy "remoteness"
  - Cross-border insolvency and chapter 15 considerations
- **Associate practice tips**
  - As early as possible, obtain complete sets of corporate organizational documents and a current slate of directors and officers for each entity in your clients' [client's?] corporate family. Store clearly labeled electronic copies of each document in a central, secure location that is easily accessible to your team.
  - Don't be caught unprepared for an emergency filing! Get the petitions packages done first. At a minimum, you (or a junior associate working under your supervision) should confirm who is authorized to execute each petition and the corporate governance requirements that must be satisfied before each entity may file. Using this information, prepare a petition template and form resolutions and written consents and task a junior associate or paralegal with duplicating and revising the documents as necessary for each filing entity.
  - Denote states of incorporation / organization in your illustrative corporate organizational chart.



### Assessing Key Client-Specific Issues to Develop Case Strategy

- No two businesses or restructurings are the same, so it is important to take inventory of the key issues that affect your client's business and what impact those issues could have on the company's restructuring efforts.
- **Associate practice tips**
  - Get to know the business and greater industry early. If your client is a public company, review its latest Form 10-K or Form 10-Q. Otherwise, ask a client contact if there is an annual report that can be shared with counsel, in addition to conducting your own due diligence. Look out for issues that will affect the first-day preparation process (and beyond), including:
    - Employee matters: unionized workforce; pension and/or severance obligations; anticipated workforce reductions
    - Vendor matters: vendor network and potential trade contraction; applicable non-bankruptcy law (e.g., Perishable Agricultural Commodities Act of 1930; Packers and Stockyards Act of 1921)
    - Contract matters; rationalizing lease portfolio; assignment of IP license agreements
    - Legal matters; environmental regulation or enforcement proceedings; mass tort litigation; SEC regulation



### Venue Analysis

- Depending on the circumstances, selecting a venue could be a purely ministerial task or a decision central to a company's restructuring strategy.
- Where a company decides to commence a chapter 11 case could depend on [a] variety of factors, including:
  - Impactful differences in the law among districts
  - Relative experience and predictability of bankruptcy courts among districts
  - Convenience of the parties
  - Potential "home court" advantage where a company has strong local ties
  - Avoiding "hostile territory" and negative publicity
  - Likelihood that venue could be challenged
- **Associate practice tips**
  - Identify the top three to five issues for the company and prepare a chart comparing the applicable law in the districts in which the company may file. For a comprehensive venue analysis, include an assessment of other important venue considerations, such as required travel, the district's experience handling similarly-situated cases, etc.
  - Try to complete a venue analysis before you begin drafting first-day papers.
  - After a venue is selected, prepare a boilerplate template for first-day papers that includes venue-specific nuances, such as citations to local rules and other binding legal authority.
  - Have a spiral-bound mini-book with the local rules made for each member of your team.
  - If you are working with local counsel, develop a strong working relationship with an associate at or around your level of seniority. Local counsel's experience can be invaluable to the first-day preparation process.



### First-Day Diligence

- Establishing an organized and efficient first-day diligence process is one of the most effective ways to support your team, provide cost-effective services and facilitate your client's smooth entry into chapter 11.
- **Associate practice tips**
  - Divide up diligence gathering based on team assignments (*i.e.*, the junior associate drafting the customer programs motion also should be tasked with gathering the related diligence).
  - Identify "point persons" at the company (or advisors working for the company) responsible for providing diligence for particular subject matters (*e.g.*, someone in the company's HR department likely is best equipped to provide information for the employees motion, while someone in the finance department would better serve as the "point person" for cash management).
  - Maintain a master first-day diligence checklist. Each associate should maintain an individual, more detailed diligence checklist for each of their assigned motions.
  - Store diligence materials in a secure data room accessible to the company and its advisors.



### Other Case Management Practice Pointers

- Schedule standing calls. Have at least one "all hands" diligence call each week. As necessary the applicable associate and company "point person" also should schedule individual "break out" calls to discuss in greater detail specific diligence for a particular motion.
- Establish strong working relationships with the company's other advisors – particularly persons at or around your seniority level. Clearly communicate what data you need and by when you need it. Send samples and demonstratives from previous cases to help clarify requests.
- Store internally-prepared documents and other documents that your team will need to access often in a central internal location. As regularly as possible, save documents using a uniform file-naming convention (*e.g.*, "Project XYZ: Joint Administration Motion").
- Maintain an internal-facing work-in-process report to be circulated in advance of internal meetings and an external-facing work-in-process report to be circulated to the client and/or other advisors in advance of larger group calls.
- Circulate calendar invites to your team to remind them of key dates and deadlines.
- Maintain a master working group list and request a paralegal or an assistant to update it on a weekly basis, as needed.





### DIP Financing and Business Plan

- A DIP budget, and the resulting borrowing need, requires departures from the normal cash flow forecast, and varies by industry, constituent, and circumstances:
  - Circulate calendar invites to your team to remind them of key dates and deadlines.
    - Changes in working capital: vendor deposits, cash in advance (“CIA”), “slow paying” from customers, and credit card processor holdbacks, etc.
    - Increased D&O premium
    - Increased health benefits for self-insured debtors
    - Customer reactions: delays in new contracts, increase/ decrease in sales, etc.
    - Timing to “cure” payments: contracts and leases
    - Monetization of assets: liquidation of liabilities
  - *In addition to the operational impacts to the cash flow caused by a chapter 11, it is critical that first day relief amounts from First Day Motions are included in the DIP budget*
- In addition to preparing a DIP Budget, it is often important to have a post-emergence business plan prepared. Increasingly, constituents are focused on pre-packaged or pre-arranged bankruptcies. In order to do that, long term projections are required.



### First Day Motions and Cap Tracker

- Concurrent with the petitions, the Debtors file two types of motions to be heard by the judge at the First Day Hearing
  - Administrative Motions outline how the Debtors will operate during the case. Examples include: Joint Admin, Cash Management, DIP, Insurance, Utility, Professional Retention, and Ordinary Course Professionals.
  - Relief Motions request relief from the bankruptcy rules to allow the Debtors to operate without disruption. Examples include: Wage and Employee Benefits, Tax, Critical Trade/ 503(b)(9), Foreign Vendor, Shippers/ Lienholders/ Warehousemen/ Custom Brokers/ Bondsmen, Customer Programs, KEIP/ KERP
- The relief motions are critical to ensuring the business operates as “normally” as possible in a bankruptcy.
- Developing appropriate caps [in a cap tracker] is crucial to maximizing the value of the relief granted



### Communications

- A necessary component for a smooth bankruptcy filing is a comprehensive communications plan
  - In many cases, a communications firm is brought in to develop and implement the strategy and plan, but coordination is required across all professionals and with the company
  - Just before, and immediately after, filing, the message from the debtor to its constituencies should be a coordinated effort. A key objective is to promote a “business as usual” scenario and keep operations running smoothly.
  - A variety of methods are utilized to communicate the key messages and can include press releases, call center operations, special section on website, Q&A meetings, phone calls, letters, and emails from management. All of these items should be coordinated through a communications cascade.



### Treasury Preparation and Prefunding

- Prefunding: certain items should be prepaid prior to filing, liquidity permitting:
  - Payroll – prior to filing it’s critical to ensure that no one will be over the priority wage cap at the time of filing. This often requires running a special payroll to pay down certain individuals
  - Retention payments – in certain cases, it makes sense to pay retention payments to certain critical employees prior to filing.
  - Key vendors – there are usually certain vendors who are critical to operations that that should be paid down prior to filing
  - Case specific items – every case is different and all vendors should be reviewed in each case to determine if there are items to address



### Treasury Preparation and Prefunding

- The treasury team holds key responsibilities on the petition day
  - Ensuring no payments are initiated until the cash management order has been approved by the court
  - Notifying all banks of the filing and have accounts placed on hold
  - Direct bank(s) not to honor pre-petition checks and provide the last pre-petition check # written
  - Follow up with prepared written/ email instructions and a copy of the cash management motion
  - Upon cash management order approval:
    - Provide bank(s) a copy of the cash management order
    - Direct banks to label the account(s) as “debtor in possession”
    - Direct banks to begin honoring post-petition checks (provide them with beginning check #)



### Overview of the Claims Agent Role

- A Claims Agent is retained by the debtor to fulfill the duties that would otherwise be performed by a Clerk of the Bankruptcy Court with respect to:
  - Providing notices to creditors and other parties as required by law (serving copies of Court filings)
  - Processing claims and maintaining claims register
- In addition, Claims Agents may also be asked to handle other tasks, such as:
  - Assisting the financial advisory firm or bankers (for example, contract review for Schedule G)
  - Providing back-office support, including establishing website, call center, email inquiries
  - Acting as balloting and tabulation agent in connection with a chapter 11 plan
  - Facilitating and making distributions to creditors
  - Assisting with Schedules/ Sofas in cases with no financial advisor
- **A tale of two timelines: Lehman and Jones Energy**
- ***Lehman – still the largest and most complex case in history with over \$600 billion in assets and liabilities***
- Basic timeline: Filing was September 15, 2008; Bar Date was September 22, 2009 (one year later); Plan confirmation was on December 6, 2011; Effective Date was March of 2012: about 3½ years from filing to emergence
- Epiq retained ON the petition date.
- Huge rush to coordinate matrix and noticing parties; served notices immediately and then supplemented



## Lehman – largest case in history

- Website up as soon as possible – added detail as it became available
- Scrambled to get call center up and running within day or so, after script prepared and recorded
  - Most NY-based employees handled immediate inquiries
- Securities played significant role in LBHI case:
  - Securities issued by LBHI; and
  - Securities issued by other entities and theoretically guaranteed by LBHI
- One of the issues for a bar date process is that security holders are often confused about whether or not they have to file a proof of claim. (When in doubt, file the claim!)
- With thousands of potential securities, Epiq recommended a special step for the bar date process to make it easier for holders to make a determination.
- “Master List of Securities” posted on Epiq site
  - over 875 securities listed
  - showed securities for which indenture trustee or paying agent was filing a proof of claim
  - holder did NOT need to do so if their claim was only on account of security ownership
- Holders of other LBHI-issued securities (e.g., commercial paper or other derivatives) had to file a claim –
  - Thousands of derivative contract claims filed – generally a separate claim was filed for the underlying claim and the guarantee portion of the claim
  - Additional information required – to validate positions and claims amounts – requested in separate questionnaire
  - Epiq established a website for creditors to facilitate efficient collection of necessary information, including ability to upload supporting documentation relating to claim questionnaire
  - 14K questionnaires were completed
- Guarantee claims: Lehman Program Securities
  - Special bar date process run over the summer of 2009 with an LPS Bar Date of November 9, 2009 and over 6,000 underlying securities



## Lehman - How FA and CA worked together: Epiq’s role in comparison to A&M role

- Epiq – Prepared and maintained case website
- Epiq – Preliminary work to compare schedules and claims and to classify claims
- A&M – Prepared Schedules of Assets and Liabilities and Statement of Financial Affairs:
  - 45K scheduled claims and contracts
- Epiq – Received Claims:
  - Entered claims into the claims register
  - Prepared website for collection of supporting documentation to derivative and guarantee claims (on-line questionnaire)
  - Maintained the claims register
  - Processed transfers and other updates pursuant to court orders
- Epiq – coordinated and served all notice mailings
- A&M – Handled substantive claims review and financial elements, including:
  - Claim reconciliation
  - Modeling
  - Projections
  - Valuations
- Epiq and A&M – coordinated on records needed for the chapter 11 plan solicitation
- Epiq – acted as balloting agent with respect to the solicitation, conducted the tabulation, ran reports and certified the vote for the court
- A&M – determined distributable value to be paid to claimants
- Epiq – solicited tax forms, OFAC certifications, and wire instructions, as applicable, from claimants to receive a distribution; preliminary coordination with DTC on distributions to U.S. securities
- A&M – arranged for wires to indenture trustee for certain bond claims and to Epiq for most other payees
- Epiq – arranged for the disbursement via check or wire to claimants to all holders on the payment file
- *Seven years later, we are still making Plan distributions at least every six months: cash only*



### Jones Energy – lean and speedy

- Retained a few weeks prior to launch of prepackaged plan solicitation
- Extensive of preparation; short time in bankruptcy
- Complex case, but small in comparison to Lehman: \$1+ billion funded debt
- Basic timeline: Solicitation Launch was April 3, 2019; Filing was April 14, 2019; Voting Deadline was May 1, 2019; no bar date; no schedules; Combined DS and confirmation hearing was May 6, 2019; Effective Date was May 17, 2019 – less than seven weeks after solicitation launch – and just one month after the filing
- Very tight schedule from the outset
  - When solicitation commenced prior to filing, also provided notice to ALL constituents, even to those not entitled to vote
  - Proposed schedule did not require the shortening of any statutory notice periods
  - All required parties received 28 days' notice of the Plan objection deadline and 33 days' notice of the proposed Combined Hearing
- Voting parties consisted of notes held through DTC (Class 4 First Lien Notes; Class 5 Unsecured Notes), and Class 7 General Unsecured Claims [individual parties]
  - Extensive prep with A&M to determine Class 7 *VOTING PARTIES*
  - *Also extensive prep with A&M to determine non-voting NOTICE PARTIES*



### Jones Energy – lean & speedy

- All stockholders were also notice parties
- Relevant parties received ALL DOCUMENTATION INCLUDING RELEASE OPT-OUT FORM in advance of the filing – key to speed of case Attended First Day Hearing and Combined Hearing – affidavits of service and voting declarations on file
- Distribution process – final complexity in a rocket-speed case
  - Public securities distributions required extensive coordination with multiple parties
  - Epiq assisted with DTC eligibility of two new security CUSIPs for new common stock; new warrants
  - Ran special Partnership Equity Election process for electing noteholders:
    - Collected required information from holders and arranged for removal of underlying notes from DTC via DWAC withdrawal
    - Prepared allocation spreadsheets for electing holders and corresponding upload files showing interest allocations for review by financial advisors
  - Non-electing noteholders received new stock and (if applicable) new warrants via mandatory exchange at DTC
    - Extensive coordination with indenture trustee and DTC to ensure smooth processing
  - Old equity cancelled as of Effective Date; “worthless” letter to DTC signed by company to remove DTC positions
- Speed of case – and the concurrent elements of solicitation, case preparation, and case noticing – created significant administrative challenges to ensure that all aspects were executed flawlessly
- Any error could potentially jeopardize the Debtors entire restructuring



Q&A

