Executive Summary

This outline describes the restructure process for general counsel and financial officers whose company is having financial difficulty. It prepares them to have a meaningful preliminary discussion with a restructure lawyer about how to preserve going concern value and restructure finances through consensual deals if possible, through Chapter 11 if necessary.

Section I is a template for company financial and legal officers to fill out in first draft summarizing debt structure, cash flows and values. Sections II-IV describe basic approaches to reorganizing a company’s finances. Meaningful discussion of these options can begin with a good first draft of the Section I outline.

Sections V-X describe how the Chapter 11 works, including the automatic stay of collection actions, financing the debtor during a case, selling assets and rejecting contracts, and what can be done to secured and unsecured creditors in a plan of reorganization. This Chapter 11 process is available to force unreasonable holdouts to accept a fair and equitable restructure plan.
# TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>I. PRELIMINARY ANALYSIS OF DEBT STRUCTURE AND CASH FLOW</td>
<td>2</td>
</tr>
<tr>
<td>II. BASIC THINGS THAT CAN BE DONE TO REORGANIZE A COMPANY'S FINANCES</td>
<td>6</td>
</tr>
<tr>
<td>III. TYPES OF CHAPTER 11 PLANS OF REORGANIZATION</td>
<td>7</td>
</tr>
<tr>
<td>IV. SO WHY DO COMPANIES FILE CHAPTER 11 CASES ANYWAY?</td>
<td>9</td>
</tr>
<tr>
<td>V. THE AUTOMATIC STAY OF PAYMENTS ON CLAIMS DURING A CHAPTER 11 CASE</td>
<td>11</td>
</tr>
<tr>
<td>VI. FINANCING OPERATIONS DURING A CHAPTER 11 CASE</td>
<td>13</td>
</tr>
<tr>
<td>VII. TREATMENT OF CLAIMS IN A CHAPTER 11 PLAN OF REORGANIZATION AT THE END OF A CASE</td>
<td>14</td>
</tr>
<tr>
<td>VIII. SALE OF SUBSTANTIALLY ALL ASSETS</td>
<td>17</td>
</tr>
<tr>
<td>IX. THE DEBTOR’S EXCLUSIVE PERIOD TO FILE A PLAN OF REORGANIZATION</td>
<td>18</td>
</tr>
<tr>
<td>X. CERTAIN CREDITOR REMEDIES</td>
<td>18</td>
</tr>
</tbody>
</table>
I. Preliminary Analysis Of Debt Structure And Cash Flow

Section I is a template for a company’s financial and legal officers to fill out in first draft summarizing debt structure, cash flows and values. It provides a basis to begin discussion with restructure counsel about broad outlines for a reorganization and about what other experts should be involved.

Filling in the template below begins the analysis of the company’s debt/capital structure by categorizing claims into classes according to priority of payment, collateral, covenants, cross defaults and upcoming events of default. Corporate counsel and financial officers will likely already have an excellent working knowledge of the company’s debt structure, and public financials might contain the beginnings of this kind of outline, but it is important to write certain details of this capital structure into one formatted outline as shown in the template below.

Sections II-IV describe basic approaches to reorganizing a company’s finances. Meaningful discussion of these options can begin with restructure counsel based on a first draft of this outline prepared by the company.

This will lead to discussion of what other professionals should be hired to help, particularly with the cash flow and valuation material this outline calls for. It is often helpful to engage a financial advisor to work with the company to do financial projections, including short-term cash flow projections to be sure the company does not run out of cash and long-term cash flow projections that are a basis for valuation. It will often be helpful to engage an investment banker to develop opinions about value and analyze possible refinance and sale transactions.

A. Capital Structure/Classification of Claims

1. Secured Claims:

   a. Lender 1.
      (i) Amount of claim
      (ii) Collateral
      (iii) Estimate of collateral value
      (iv) If applicable, current borrowing base
      (v) Covenants and cross defaults
      (vi) Upcoming events of default

   b. Lender 2.
      (i) Amount of claim
(ii) Collateral

(iii) Estimate of collateral value

(iv) If applicable, current borrowing base

(v) Covenants and cross defaults

(vi) Upcoming events of default

c. Calculate projected financial metrics tied to covenant testing to determine when a potential covenant default will occur or has occurred.

2. Priority Unsecured Claims

a. Certain wage and benefit claims

b. Certain tax claims

3. Unsecured Claims

a. General Unsecured Claims

(i) Unsecured lender/bondholder claims

(ii) Unsecured deficiency claims of secured creditors
(estimated amount of their claim in excess of the value of their collateral)

(iii) Trade vendors

(iv) Contracts and leases

(a) Preliminary analysis of contracts and leases that may not be needed in a go-forward business plan and that should be rejected

(b) Damage claim if contract rejected

(c) Amount of claim for the contract if not rejected

(v) Other general unsecured claims.

(vi) [What claims for goods and materials fall within the 20-day window prior to a Chapter 11 filing, which could elevate the claim to administrative status and impact the financing needed to complete an in-court reorganization.]
b. Contingent and unliquidated unsecured claims
   (i) Pending lawsuits
   (ii) Other?
c. Subordinated unsecured claims
d. Intercompany unsecured claims (often subordinated)
e. Other unsecured claims

4. Total Debt and Estimated Trade and Other Unsecured Claims $ ________
   (to be compared to enterprise value to make a preliminary assessment of
   the position of old equity).

5. Equity Interests
   a. Preferred stock
   b. Common stock

B. Cash Flows

1. Immediate Term (next month)
2. Short Term (by month for next 4 months)
3. Intermediate Term (for the next year)
4. Long Term (by year for the next 3 years)
5. Is there an inability to pay debts as they come due insolvency in the
   immediate, short, intermediate or long term?
6. [For survival purposes, what are the company’s immediate-, short- and
   intermediate-term cash flows:
   a. With and without debt service requirements
   b. With and without other non-essential payments on leased
      equipment, real property, or other financing payments related to
      assets that may not be needed for the long-term business plan
   c. [Consider alternative payment arrangements on items such as
      insurance, taxes, other items that can be deferred or canceled, or
      payments spread out in order to generate as much liquidity as
      possible.]
7. For valuation purposes, what are the company’s intermediate and long-term EBITDA’s?

C. Values Available to Satisfy Claims and Obtain Additional Financing

1. Enterprise Value (based on the ability of the company to generate cash flow as a going concern).
   a. Multiple of Earnings Method
      (i) Projected annual EBITDA
      (ii) Times a multiple of earnings derived from comparable companies
   b. Discounted Cash Flow Method
      (i) Projected annual EBITDA with adjustments for normalized cap-ex, working capital and other cash sources or uses required in the business case.
      (ii) Discounted by an appropriate discount rate, plus a terminal value.
   c. Preliminary estimate: Is Enterprise Value larger than Total Debt so that there is value available for old equity?
   d. [What are the key drivers of value, higher or lower, and how could Chapter 11 change that, if any? (i.e. rejection of unnecessary or uneconomic contracts, leases or other business right-sizing that may not be possible or is more easily accomplished through the judicial process.)
   e. A full three-statement, business plan projection model is usually necessary at this stage to model potential restructuring proposals; determine need, size, and timing for interim or long-term financing for the business; and provide the basis for other business decisions that will be addressed during the reorganization. Company financial officers can do this, but financial advisors do it regularly.

2. Asset Values (essentially the fair market sale value of assets).
   a. Assets already subject to lien:
      (i) Receivables
      (ii) Inventory
      (iii) Equipment
(iv) Intellectual property
(v) Real Estate
(vi) Causes of action
(vii) Other

b. Assets not already subject to lien, available to give as collateral to obtain additional financing or to sell to raise cash:

(i) Receivables
(ii) Inventory
(iii) Equipment
(iv) Intellectual property
(v) Real estate
(vi) Causes of action
(vii) Other

D. “Balance Sheet Solvency”: Do asset values exceed total debt? This is relevant to preference and fraudulent conveyance claims.

II. Basic Things That Can Be Done To Reorganize A Company’s Finances

A. Eliminate money-losing lines of business or subsidiaries.
B. Operate more efficiently to stop losing money.
C. Sell assets to raise money to pay down old debt or for operating capital.
D. Borrow more money to pay down old debt or for operating capital.
E. Raise new equity financing to pay down old debt or for operating capital.
F. Stretch out secured debt.
G. Stretch out unsecured debt.
H. Convert unsecured debt to equity.
I. Other innovative ideas.
J. Armed with an overview of the company’s capital structure, cash flows, going concern values and asset values, you can develop a Reorganization Plan for your company that proposes to do some or all of these things.

K. Implementing a Reorganization Plan:

1. The best way for a company to implement a Reorganization Plan is to do the things that are within its control (such as operational improvements) and to seek agreements on the Reorganization Plan from as many other parties as possible.

2. If there are holdouts who will not go along with a reasonable Reorganization Plan, then turn it into a Chapter 11 plan of reorganization and seek prompt confirmation of it under the Bankruptcy Code.

3. Bear in mind, some transactions will be difficult to do outside a judicial process due to the concern that the potential insolvency could subject the terms of the transaction to a future challenge if the out-of-court reorganization does not address problems sufficiently and is followed subsequently by a Chapter 11 filing within two years (fraudulent transfer).

III. Types of Chapter 11 Plans of Reorganization

A. General Fiduciary Duties and Basic Types of Plans

1. The officers and board of directors of a company going through reorganization have a fiduciary duty to preserve and maximize its going concern value and to allocate that value fairly among creditors and equity security holders according to legal priorities.

2. Often a special restructuring committee of independent board members is established to work with restructuring legal and financial advisors to evaluate options and recommend decisions to the full board. The committee will ensure that a full analysis of all options to reorganize the business has been done without inappropriate influence from significant debt or equity holders.

3. If a company’s officers and directors choose to pursue those goals through a Chapter 11 case, they will eventually have to decide which of three basic kinds of a plan of reorganization (a “Plan”) to propose.

4. A Stand Alone Plan, changing the terms of secured debt and converting some or all unsecured debt to equity, with no new investment at consummation of the Plan, premised on adequate existing capital to run the company’s business after its debt has been restructured, and sufficient enterprise value to pay unsecured creditors more than in liquidation, possibly enough to pay them in full thus leaving some value for old equity (a “Stand Alone Plan”).
5. A Stand Alone Plan: changing the terms of secured debt and converting some unsecured debt to equity, with a new investment made at consummation by a third party (or by old shareholders or old lenders) that essentially buys the majority new equity in the reorganized company (a “Stand Alone New Investment Plan”). Such a plan is premised on the company needing new capital to run its business even after its debt has been restructured.

6. A plan to sell the assets of the company as a going concern free and clear of liens, with liens to attach to proceeds and proceeds to be allocated to creditors (and possibly equity) according to the priority of their claims and interests (a “Sale Plan”).

   a. Such a plan ends the company’s existence, but preserves the company’s going concern value and many of the jobs the company had been supporting.

   b. Purchasers often offer incentives to managers to encourage a Sale Plan. Managers must be careful to discharge their fiduciary duties.

B. More Detailed Description of the Basic Types of Plan

1. Stand Alone Plan

   a. Change secured claim terms;

   b. Change unsecured claim term and/or convert unsecured debt to equity;

   c. Sometimes there is not enough value to support any return to old equity, but a Stand Alone Plan still preserves the company’s going concern value and the jobs it supports.

   d. Sometimes there is enough enterprise value to leave some value for old equity.

   e. **Crucial Question:** Will the reorganized company have adequate post-reorganization capital to continue operations after debt obligations have been restructured?

2. Stand Alone New Investment Plan

   a. Change secured claim terms;

   b. Change unsecured claim terms and/or convert unsecured debt to equity;

   c. Depending on values, old equity might be extinguished in such a plan;
d. A new investment provides adequate post-reorganization capital and requires that substantial post-reorganization equity be given to the new investor.

e. **Crucial Question**: Can a new investor be found willing to put money into the reorganized company’s business plan?

3. Sale Plan

a. Secured claims receive cash proceeds of sale or sometimes credit bid to take ownership of the collateral;

b. Unsecured claims might receive some residual sale proceeds;

c. Old equity likely extinguished;

d. Management might be incentivized by a grant of equity from the purchaser;

e. Going concern value and substantial employment continue on.

f. **Crucial Question**: Can a purchaser be found?

4. Consolidation Plan

a. Merger of the debtor company with other similarly sized companies to create a larger company better able to compete in the relevant market;

b. Treatment of claims otherwise similar to a Stand-Alone Plan;

c. The merger might create a stronger story about the feasibility of the Plan and be more attractive to exit financiers.

d. **Crucial Question**: Can a merger partner be found?

5. Other Imaginative Plans

IV. So Why Do Companies File Chapter 11 Cases Anyway?

A. The “common wisdom” is that they do so (i) to take advantage of the automatic stay during the case to avoid paying pre-petition debts on a current basis and (ii) to take advantage of the aggressive things that can be done at the end of the case to restructure secured and unsecured debt through a plan of reorganization.

1. As described below, the Bankruptcy Code gives (i) relief to current cash needs during the case and (ii) the power to forcibly change existing debt structure at the end of the case.

2. During a Chapter 11 case, the debtor obtains cash relief because:
a. It makes no current payment of pre-petition unsecured debt;

b. It makes no current payment of pre-petition secured debt, as long as the secured claim is “adequately protected”;

c. It makes only current payment for post-petition accruals on contracts; and

d. It can reject unfavorable contracts, creating an unsecured rejection damage claim that can be dealt with in a plan at the end of the case.

3. In a plan at the end of a Chapter 11 case, the debtor has the power to:

a. Forcibly change the terms of existing secured loans (by extending their maturity, changing the amount of periodic payments, and changing the rate of interest); and

b. Forcibly convert unsecured debt to equity.

4. These forcible changes are done based on proof of valuation and feasibility.

a. This proof is made to the Bankruptcy Court through expert witness testimony and cross-examination.

b. The Bankruptcy Court makes findings of fact based on this expert testimony that are often difficult to overturn on appeal, especially when the mootness concept is applied.

B. The primary reasons for a Chapter 11 filing are, however, often different from this “common wisdom.”

1. Major companies avoid bankruptcy as long as possible to protect their shareholders’ interests rather than dive in to go on offense to change the terms of their debt by court order.

2. They avoid Chapter 11 by doing the things that they can do unilaterally (improving the efficiency of operations, selling assets) and making as many consensual agreements as possible to the terms of their proposed Reorganization Plan.

3. They file Chapter 11 because illiquidity/insolvency can be an intensely difficult, ambiguous environment with multiple conflicting duties and, after a while in restructure negotiations, it often becomes safer and more comfortable to have a Bankruptcy Code to follow and a Bankruptcy Court to approve major business judgments.

4. They file Chapter 11 primarily because they have liquidity/solvency problems leading to a need to refinance that they cannot solve adequately outside of
bankruptcy and the Bankruptcy Code provides the power to force certain forms of refinance through (i) DIP loans during the case, (ii) a sale free and clear of liens during the case and (iii) an exit financing at the end of the case after debt has been restructured.

V. The Automatic Stay Of Payments On Claims During A Chapter 11 Case

A. The automatic stay of Section 362 of the Bankruptcy Code generally prohibits collection actions on claims that arose pre-petition.

B. Adequate protection with respect to pre-petition secured claims

1. If its collateral is worth more than the debt secured (i.e., over-secured), then this “equity cushion” may provide adequate protection to block a secured creditor’s motion to lift stay to be permitted to foreclose on its collateral.

2. If its collateral is worth less than the debt secured (i.e., under-secured), then the secured creditor can assert a right to adequate protection of the value of the collateral during the case, seeking compensation for:

   a. Market value decline post-petition;
   b. Value decline resulting from post-petition use;
   c. An under-secured creditor is not entitled to compensation for lost opportunity cost during the case.

3. Forms of adequate protection (§ 361)

   a. Debtor’s payment of insurance, taxes and maintenance;
   b. The grant of additional collateral;
   c. Cash payments;
   d. “Indubitable equivalence” (i.e., other).

4. A debtor can make a charge against collateral for the expenses of maintaining it (§ 502(c)).

C. Pre-petition executory contracts or leases of non-residential real estate (contracts on which material performance by both parties is still due) (§ 365).

1. Time to assume or reject executory contracts or leases.

   a. Non-residential real property, the debtor/lessee must decide whether to assume the lease within 120 days (§ 365(d)(4)).
b. For other leases and executory contracts, the debtor can wait until confirmation of a plan of reorganization at the end of the case to decide whether to assume or reject (§ 365(d)(2)).

c. These time periods can be extended or shortened for “cause” (§ 365(d)(2),(4). The period within which to assume or reject a commercial real estate lease can only be extended once for cause on request of the debtor, and thereafter only with the consent of the lessor (§ 365(d)(4)(B).

2. Prior to assumption or rejection, the debtor should pay “use and occupancy” payments for the fair market value of the benefit it receives post-petition under the lease or contract.

   a. Presumptively “use and occupancy” is equal to the contract rate.

3. If a pre-petition contract is rejected, never having previously been assumed, then the rejection damage claim is a pre-petition general unsecured claim (§ 365(g)(1)).

4. If a pre-petition contract is assumed (§ 365(b)(1):

   a. Defaults must be cured;
   b. Debtor must prove adequate assurance of future performance;
   c. Debtor must adhere to contract terms unchanged;
   d. Contract payments must be made when due;
   e. Moreover, the later rejection (or breach) of a previously assumed contract generates an administrative priority claim which must be paid in full in cash no later than the effective date of the Debtor’s Plan (§ 365(g)(2)).

5. Generally, executory contracts can be rejected if the debtor applies its business judgment and decides it would benefit from rejecting the contract.

6. Sections 1113 and 1114 were enacted to make it very difficult to reject a labor or employee benefits contract.

   a. They require meeting a standard much harder to prove than mere business judgment.

D. Generally, liabilities incurred post-petition in the ordinary course of business can and should be paid in the ordinary course during a Chapter 11 case, without approval from the bankruptcy court presiding over the case (the “Court”).
1. Post-petition, non-ordinary course payments must be approved by the Court.

VI. Financing Operations During A Chapter 11 Case

A. Unencumbered property can be used, sold or leased in the ordinary course (§ 363(c)).

1. This includes unencumbered cash.

B. Use of cash collateral (§ 363(c)(2)).

1. Cash collateral can only be used if (a) the secured creditor consents or (b) the Debtor obtains Court approval to use it based on a finding of adequate protection.

2. Section 552 cuts off a floating lien on receivables on the petition date so generally the proceeds of pre-petition earned receivables are cash collateral, but the proceeds of post-petition earned receivables are not cash collateral (i.e. not subject to a pre-petition floating lien on receivables).

   a. Section 552 does not cut off a lien on post-petition earned (i) rents from real estate or (ii) proceeds from sale of oil and gas production.

   b. These are both proceeds of pre-petition collateral.

3. Generally, adequate protection for use of cash collateral can be:

   a. That the equity cushion from the value of all the creditor’s collateral is large enough to cover loss of any cash collateral that will be used;

   b. A replacement lien on post-petition earned receivables (previously unencumbered because of Section 552); and/or

   c. A replacement lien on other previously unencumbered property.

C. Debtor-in-possession loan (§ 364). A debtor may obtain:

1. Unsecured credit in the ordinary course of its business, without a Court order (§ 364(a));

2. Unsecured credit outside the ordinary course, pursuant to Court order (§ 364(b));

3. Secured credit with either (a) a lien on unencumbered property or (b) a junior lien on already encumbered property, pursuant to Court order (§ 364(c));

4. Secured credit with a senior (or equal) lien on already encumbered property, pursuant to Court order, as long as the previously existing lien is found to be adequately protected (§ 364(d)).
a. This usually requires a finding that the value of the collateral substantially exceeds the amount of the pre-existing secured claim, but other forms of proof are possible.

b. This could theoretically include proof that the value of collateral will be increased.

5. Lenders are given protection for liens granted and for money advanced in good faith pursuant to a Bankruptcy Court order, notwithstanding any reversal of the order on appeal (this is the “Mootness Concept”), unless the approval order is stayed pending appeal (probably requiring a bond) (§ 364(e)).

D. Sale of Assets Outside the Ordinary Course (§ 363(b))

1. A debtor may sell assets outside the ordinary course during its case pursuant to Court order under § 363(b).

2. Such a sale can be free and clear of any liens on the property sold, with any liens to attach to the proceeds of sale.

   a. The lien holder should be permitted to credit bid at such a sale (§363(k)).

3. A sale to a good faith purchaser is not affected by a subsequent reversal of the sale order on appeal (the Mootness Concept again), unless the sale is stayed pending appeal (probably requiring a bond) (§ 363(m)).

E. Assumption and Assignment to a Third Party of Valuable Contracts or Leases (§ 365(f)).

1. All defaults under the contract or lease must be cured.

2. Assignee must be able to give adequate assurance of future performance.

3. Subject to certain exceptions, a contract or lease may be assumed and assigned notwithstanding contract provisions prohibiting assignment (§ 365(f)(1)).

   a. Personal service contracts cannot be assigned without consent from the non-debtor party (§ 365(c)).

   b. There are issues about whether certain intellectual property licenses are personal services contracts thus whether they can be (i) assumed by the Debtor or (ii) assigned to a third party.

VII. Treatment Of Claims In A Plan Of Reorganization

A. General Plan Confirmation Rules (§ 1129(a)(1)).
1. Liquidation Test (called the “Best Interests of Creditors Test”) (§ 1129(a)(7)). Will every creditor in a class receive not less than it would receive in Chapter 7 liquidation?
   a. As a rule of thumb, enterprise value should be equal to or greater than asset liquidation value or there is no reason to reorganize.
   b. Liquidation values are low asset values, obtained in forced sale conditions, not as good as those assumed for a fair market value sale of assets.

2. Plan must be feasible (§ 1129(a)(11).

3. Each class must either vote for the plan (by 1/2 in number voting and 2/3 of amount voting) or the plan must be “fair and equitable” to that class.
   a. Proving that a class is being treated “fairly and equitably” is called colloquially the use of the “cram-down power.”
   b. See below for descriptions of fair and equitable treatments for secured and unsecured claims.

4. There must be at least one impaired class that votes to accept the plan.

B. Classes Should be Fairly Created (§ 1122)

1. Claims within a class should be similar.

2. Presumptively, there should be only one class for each type of claim (such as general unsecured claims).
   a. Should not “gerrymander” classes to manufacture an accepting class.
   b. However, can create separate classes of the same type of claim if there is a sound business justification for it.
      i. For example, trade claims have a different expectation of prompt payment than public unsecured bond claims or unsecured deficiency claims on bank loans, even though they are all essentially unsecured claims.
      ii. For another example, employment contract claims have a different expectation than public unsecured bond claims or unsecured deficiency claims on bank loans.
      iii. These justifications are often subject to vigorous challenge and it is difficult to know with certainty in advance whether a reason for a separate classification will hold up.
C. Fair and Equitable Treatment of Different Kinds of Classes (§ 1129(b))

1. Administrative and Priority Claims.
   a. Must be paid cash on effective date of the plan.
   b. Certain tax claims can be paid in cash over 5 years (§ 1129(a)(9)(c)).

2. Secured claims can be treated fairly and equitably in one of the following three ways § 129(b)(2)(a)).
   a. Retain Lien/Cash payments (§ 1129(b)(2)(A)(i)):
      i. Creditor retains lien on collateral
         1. However, Section 1129(b)(2)(A) does not say that the creditor is entitled to keep its loan agreement covenants triggering defaults on the lien; and
         2. Creditor receives “deferred cash payments totaling at least the allowed amount of such [secured] claim, of a value, as of the effective date of the plan, of at least the value” of the collateral. This language presents issues about:
            i. What is the value of the collateral that caps the amount of the secured claim?
            ii. How long can the payments be stretched out (is the proposed stretch out feasible)?
            iii. What is the proper interest rate to use to discount the proposed cash payments to present value (i) for this company, (ii) in this industry, (iii) for this length of stretch out?
   b. Sale of collateral, with the secured creditor entitled to credit bid, and with any cash sale proceeds to be subjected to the lien of to the secured creditor up to the amount of its claim (§ 1129(b)(2)(a)(ii)); or
   c. Indubitable Equivalence (§ 1129(b)(2)(a)(iii)):
      i. Abandon collateral to secured creditor, or
      ii. Treatment similar to “a” immediately above, or
      iii. Other concepts arguably meeting this broad statutory term.

a. Unsecured claims can be paid “value” \((i.e., \text{cash, notes, common stock in the reorganized company or other value})\) \((§ 1129(b)(2)(B))\).

b. If value paid to unsecured claims is less than 100¢ on the dollar, no junior class \((i.e., \text{subordinated debt or equity interests})\) can receive any value \((\text{this is the “Absolute Priority Rule”})\)\((§ 1129(b)(2)(B)(ii))\).

c. Unsecured claims cannot be paid value greater than 100¢ on the dollar \((\text{this would not be fair and equitable to and would discriminate with respect to junior classes such as subordinated debt or equity})\).

4. Equity Interests

a. Can receive value only if all senior creditor classes have been given value equal to 100¢ on dollar \((§ 1129(b)(2)(B))\).

b. Are entitled to object if secured or unsecured claims receive more than 100¢ on the dollar.

5. New Value Exception to the Absolute Priority Rule

a. Old equity can “buy” the stock of the reorganized debtor as it emerges from bankruptcy pursuant to a Plan based on new value invested upon consummation of the Plan.

i. The new value must be substantial and necessary.

ii. The value acquired in return must be reasonably equivalent to the new value invested.

iii. If the debtor’s plan is filed during its exclusive period to file a plan and provides its old equity holders the right to buy equity in the reorganized debtor through a new value contribution, then \(a\) other parties should be permitted to bid for the right to put in this new value, or \(b\) the exclusive period to file a plan should be terminated.

VIII. Sale Of Substantially All Assets

A. A debtor can propose to sell substantially all of its assets during a Chapter 11 case pursuant to Section 363(b) or under a plan pursuant to §§ 1123 and 1129.

1. The courts have usually required a higher level of proof of necessity if the debtor proposes to sell substantially all of its assets in a § 363 sale during the case.

2. If substantially all of the debtor’s assets are sold during the case pursuant to Section 363, then the cash proceeds of the sale are commonly paid to holders
of liens on the sold assets in order of their priority under the Bankruptcy Code.

B. Some courts have suggested that a debtor should only be permitted to sell substantially all of its assets pursuant to a plan of reorganization confirmed under Sections 1123(a)(5) and 1129 and not during the case under § 363.

   1. A plan proposing a sale can be confirmed almost as fast as a Section 363 sale can be approved, especially if a substantial sale process including a data room, competing bidders and an auction is to be used in the § 363 sale.

C. Whether done pursuant to § 363 or §§ 1123/1129, a sale is an alternative to a standalone reorganization that, while ending the company’s existence, preserves the company’s going concern value and many of its jobs.

IX. The Debtor’s Exclusive Period To File A Plan Of Reorganization

A. A debtor has 120 days after filing its Chapter 11 petition during which it is the only party that can file plan of reorganization (§ 1121(b)).

B. Extensions of this exclusive period can be obtained “for cause shown,” but it is by no means certain that such extensions will be granted (§ 1121(d)).

C. The Court can terminate exclusivity for cause shown by other parties-in-interest (i.e., creditors and equity interest holders) who want to file a competing plan (§ 1121(d)).

   1. The best way for a debtor to keep exclusivity is to move forward promptly with filing and seeking confirmation of its own plan.

   2. If you don't lead with a plan, you risk losing exclusivity.

D. The Court cannot extend exclusivity past 18 months (§ 1121(d)(2)).

X. Certain Creditor Remedies

A. A secured creditor can seek adequate protection (§ 363(e)) or lifting of the automatic stay to permit foreclosure (§ 362(d)).

B. A party to an executory contract can request that the debtor make a faster decision to assume or reject its contract (§ 365) and possibly receive adequate protection during any continued time given to the debtor (§ 363(e)).

C. Any party-in-interest can move to terminate exclusivity for cause shown in order to file a competing plan (§ 1121(d)).
D. Any party-in-interest can request either the appointment of a trustee or dismissal of the Chapter 11 case.

1. Under § 1104, appointment of a trustee can be ordered:
   a. For “fraud, dishonesty, incompetence or gross mismanagement;” or
   b. Because “such appointment is in the interests of creditors, any equity security holders and other interests of the estate.”

2. Under § 1112, conversion to Chapter 7 or dismissal of the case can be ordered for cause, including:
   a. Continuing loss or diminution of the estate and absence of a reasonable likelihood of rehabilitation;
   b. Inability to effectuate a plan;
   c. Unreasonable delay by the debtor that is prejudicial to creditors;
   d. Failure to propose a plan under § 1121 within any timeframe ordered by the Court;
   e. Denial of confirmation of every proposed plan and denial of a request made for additional time for filing another plan;
   f. Revocation of an order of confirmation under § 1144 and denial of confirmation of another plan or a modified plan under §1129;
   g. Inability to effectuate substantial consummation of a confirmed plan; and;
   h. Material default by the debtor with respect to a confirmed plan.