October 10, 2008

This information is intended to provide clients with information on recent legal developments and issues of significant interest. It should not be regarded as legal advice or opinion.

Our Global Financial Restructuring Team brings together an interdisciplinary team of lawyers with the combined experience needed to address and resolve the complex issues currently confronting clients. Through our extensive network of 68 offices worldwide, we provide expertise and seamless service to clients across multiple jurisdictions and practice areas including Financial Restructuring and Creditor's Rights, Purchase and Sale of Distressed Assets, Distressed Debt Trading, Derivatives, Structured Finance, Real Estate, Dispute Resolution, M&A, Post Acquisition Integration, Tax and Employment.

Our experienced lawyers have guided clients through the turbulent times over the last three decades, including the 1980s debt crisis in Latin America, the early 1990s debt crisis in the US and Europe and the 1997 Asian financial crisis.

For further information please contact the current Baker & McKenzie LLP attorney with whom you work, or either of the individuals listed below

David Heroy
North America
Corporate
Tel: +1 312 861 3731
david.f.heroy@bakernet.com

Carmen Lonstein
North America
Corporate
Tel: +1 312 861 8606
carmen.lonstein@bakernet.com

We will be running a series of webinars related to these alerts. If you would be interested in these webinars please contact GFRwebinars@bakernet.com

Opportunities for Buying Financially Distressed Businesses in the U.S. as a Result of the Credit Crisis and Deteriorating Economic Conditions

This client alert focuses on the increasingly favorable environment for purchasers of financially distressed assets in the U.S. as a result of both the current credit crisis and generally deteriorating economic conditions. The failure of numerous financial investments, originally concerning subprime loans and then other related derivative instruments, has become wide-spread, causing unprecedented levels of write downs in asset values by financial institutions. The resulting need for capital at these financial institutions has led, in turn, to tighter credit, increased costs of capital and, in some circumstances, failures of the institutions themselves. A simultaneous general slowdown in economic activity, consisting of steadily increasing unemployment, reduced consumer spending and eroding housing values, has further contributed to reduced corporate earnings and market valuations. Corporate default rates are now expected to rise dramatically as over-leveraged companies compete for limited access to capital while facing deteriorating operating results. Consequently, those companies will be forced to raise capital quickly or be sold, often under time pressure, at prices that could be very favorable to buyers. For foreign buyers, favorable currency exchange rates may provide an additional purchasing advantage.

What are Financially Distressed Assets?

There are two broad classes of financially distressed assets – securities[1] and businesses. This client alert will focus on financially distressed businesses. Financially distressed businesses will be divided into three types for purposes of this discussion – businesses that are: (1) potentially distressed; (2) distressed and in a restructuring process; and (3) in formal insolvency proceedings (chapter 11 or 7).

1 All types of distressed securities are typically traded in varying degrees and places in the U.S. capital markets. The current credit crisis has affected certain sub-markets such as those for investment grade commercial paper, auction rate preferred stock, and, of course, CDOs (collateralized debt obligations) and CLOs (collateralized loan obligations), particularly involving sub-prime borrowers. The effect of the credit crisis on those securities has been addressed in separate firm client alerts. Nevertheless, there remains an active market for the trading of distressed at all levels of the capital structure - senior secured, bonds trade debt and the like.

This may qualify as "Attorney Advertising" requiring notice in some jurisdictions. Prior results do not guarantee a similar outcome.

Assessment of Distress/Initial Due Diligence

A potential buyer of a distressed business first must determine the nature and level of distress, namely: (1) the causes for the target's distress; (2) the buyer's goals regarding the target's assets; and (3) the strategic process for implementing its acquisition strategy. At that point, tactics can be selected by which the acquisition can be accomplished efficiently.

Causes for distress can include excess leverage, industry or sector related distress, failed acquisitions or expansions, loss of key personnel or customers, excessive tort litigation or burdensome legacy liabilities. In the current financial turmoil, a major cause of distress is also likely to be a combination of excess leverage and lack of access to needed capital as stated above.

Initially, top level due diligence is at center stage when considering any distressed transaction. A buyer initially should undertake to understand the target's value, liquidity, access to capital and identify the fulcrum security - is its equity still in the money? Leverage in negotiating a discounted price may be tied directly to lack of liquidity and need for a fast closing. In addition to being followed by the typical corporate due diligence after execution of a letter of intent, an initial evaluation of distress also should include: (i) confirm the causes for the company's financial distress and identify realistic potential fixes; (ii) focus on how the debtor's operations will effect any working capital adjustment as a result of the distress; (iii) identify the critical liabilities in the context of concerns regarding taking the business without those liabilities; and (iv) analyze the existing capital structure in the context of projected needs for working capital and capital expenditures.

The Potentially Distressed Company

The first type of target business may not yet be in default or a restructuring process. Its common shareholders may still hold the "fulcrum security" that represents the true equity value of the enterprise. Yet the possibility of distress could be imminent from a variety of sources - capital requirements, deteriorating market conditions, extraordinary events such as mass tort litigation or transactional errors, etc. For potential buyers of these companies, there are certain risks not usually encountered in most M&A transactions.[2]

Though typical M&A process and concerns will continue to govern, additional due diligence will be needed first to verify that the target business is not affected by the distress to the system (guarantees, loss of access to capital, etc.). Moreover, extra weight should be placed on analysis of potential liabilities and other risk factors as a result of the potential financial distress.

2 In addition, several of the target's business units may be very healthy and profitable, the sale of which may be provoked by financial distress unrelated to the health of the particular business to be acquired. For example, the current overall financial conditions of U.S.-based insurance giant AIG, has resulted in a sales process for several of its healthy businesses held in subsidiaries insulated from AIG's distress, but being sold in a process truncated by AIG's urgent need to raise capital to repay emergency U.S. government financing. There, too, the relation to financial distress will require additional analysis in order to be assured that distress from the rest of the corporate family will not infect the particular target.

A stock purchase of the potentially distressed business itself, for example, would carry certain additional risks. Exposure to significantly larger liabilities, the inability to impose a balance sheet restructuring, and the potential loss of the entire investment in a subsequent insolvency all must be considered under those circumstances.

An asset purchase also would carry its own additional risk, especially from a subsequent insolvency of the target. One risk would be a potential attack on the transaction itself. Unpaid creditors of the seller could contend in a later insolvency proceeding that the entire transaction could be avoided as a fraudulent transfer, because it was not made for reasonably equivalent value, while leaving the seller insolvent or left with unreasonably small capital. The reachback for such a claim could extend for a period of up to four years after the closing of the transaction. This risk, however, can be minimized, if not completely eliminated, in arm's-length transactions properly documented with contemporaneous appraisals and a reasonable, market-driven sales process.

Another risk to a buyer of a potentially distressed business arises if the remaining assets of the seller are no longer sufficient to satisfy any liabilities left behind. Unpaid creditors of the seller may seek to assert their claims later against the buyer based upon state law theories of successor liability. Here, too, the transaction can be structured so as to minimize risk of liability by compliance with those successor liability laws even though they vary from state to state in the U.S. Moreover, if that risk appears too great, the bankruptcy administrative process could be used to reduce or eliminate that risk as discussed below.

A third issue presented by the post-closing insolvency of the seller is that it effectively would eliminate any indemnification recourse in the absence of escrows. The target typically will either wind-down or liquidate by the time a material breach of a representation or warranty has been discovered. The typical practical solution under these circumstances would be to establish an escrow to "hold back" a certain percentage of the purchase price to secure the seller's indemnification. A later insolvency by the seller also could, however, result in attacks on the effectiveness of the escrow itself, but escrow agreements can be drafted appropriately to minimize or eliminate those risks by making it clear that they secure indemnification, and that the escrowed funds themselves are not the property of the seller (or its later bankruptcy estate).

The Distressed Company in Restructuring

The current credit crisis is likely to produce even more sellers in actual financial distress, meaning businesses in payment default to, and perhaps ongoing negotiations with, their lenders or bondholders to restructure debt obligations. This is the second category of financially distressed business.

Standard & Poor's estimates that the three-year U.S. cumulative default rate between 2008 and 2010 among *speculative-grade nonfinancials* could rise to as high as 23.2%, which would be the worst on record since 1981. This implies that more than 350 speculative-grade rated nonfinancial firms could default between 2008 and 2010, with potentially more than 200 of these defaults happening in the second half of 2009 and in 2010. Consumer-sensitive sectors –

such as consumer products, media and entertainment, retailers and restaurants - are expected to be among the worst hit, as occurred in 1990-1992. To put the expected default rate into perspective, the corporate default rate for speculative grade bonds in the two previous U.S. recessions reached only 9.43% in 1990 and 5.4% in 2000.[3] It has been less than 1% since 2003.

When contemplating the purchase of a financially troubled business in default or restructuring, it first is important to understand the obligations of the target's board of directors. Directors owe fiduciary duties to the corporation and all of its constituents under most applicable corporate law. Those constituents are typically the common equity holders, but generally are expanded to include creditors when a company is insolvent or "in the zone of insolvency." Those directors are therefore likely to take extra measures to ensure that their decision concerning any distressed sale of the business takes the creditors' senior interests into account. Directors thus can be expected to favor a quick sale that satisfies immediate creditor interest over the long term interests of equity holders who might be wiped out by the sale. These directors are likely to protect themselves from liability by complying with the "business judgment rule" and adopting a sale process, aided by advisors to assist with marketing and sale efforts, to comply with the duty of care and safe harbors for advice by professionals.

The next concern will be the target's creditors. Should the potential purchaser deal with them? If so, when and how? A buyer typically should deal with management in the first instance for political reasons, as management directly controls the sales process. When senior or bond debt is in default, however, transactions will likely require the consent and support of the debt holders. A buyer always should consider negotiations with the debt holders under those circumstances, either as soon as an agreement is reached with management or as an alternative leverage tactic when management is not receptive. Negotiations with creditors that hold the target's fulcrum securities may be essential, as they are the most likely to take action to protect their stake in any reorganized company as effective owners of the business' equity value. Care must be taken, however, to avoid confidentiality agreements that limit contact with debt holders, and to observe legal limits regarding interference with the target's contractual relationships.

Under these circumstances, risks of the subsequent insolvency of the seller could be even greater, giving rise to all of the issues described above with respect to potentially distressed businesses. In addition, a potential purchaser of distressed companies must also weigh the need for formal insolvency proceedings, either to facilitate execution of the transaction or as a tactic to solve problems raised by particular issues such as successor liability, overriding voting provisions and other covenant in debt issues, selling assets free and clear of certain claims, obtaining exemptions from the securities laws and the like. These potential tactics and related issues are discussed immediately below.

3 Compare the "all corporate issuer" corporate default rate which peaked in the Great Depression at 9.2% in July of 1932 and at near 4.1% in July of 1991. In May of 2008, Moody's predicted this rate would reach 5.8% by the end of 2008.

The Distressed Business in Insolvency Proceedings

Acute financial distress – payment defaults, zero liquidity, need to stay litigation, etc. – typically results in the business initiating formal insolvency proceedings under the U.S. Bankruptcy Code– our third category of financially distressed businesses. There are two types of insolvency proceedings for businesses in the U.S.: (a) chapter 11, where management retains control to manage the process to devise a plan by which the administration is ended, either by reorganization or liquidation (usually the sale of the business as a going concern); and (b) chapter 7, where a trustee is appointed immediately to oversee a forced liquidation of assets and distribution of the proceeds to creditors. Most acutely distressed businesses will file first for chapter 11. Resort to chapter 7 usually only occurs if there is no possibility of a reorganization or a sale as a going concern, or it is used as a second step after the sale of the business has been consummated – and then only to liquidate remaining assets. The remainder of this client alert, therefore, will focus on the purchase of businesses in chapter 11 proceedings.

When dealing with a chapter 11 debtor, a prospective purchaser again needs to keep in mind that fiduciary duties of the target's board and management shift even more firmly. In chapter 11, there is no doubt that the debtor owes duties of care and loyalty to both creditors and shareholders, but that the creditors are always paramount. Bankruptcy courts generally decline to second-guess business decisions of debtors in possession, and the transparency of the sale process, when coupled with the requirement of court approval for any transaction and the usually active role of creditors, shareholders and other parties, creates both a zero tolerance for any appearances of impropriety or self-dealing on the part of the debtor, while generally insulating it from later scrutiny.

A prospective purchaser also needs to know the key players in a chapter 11 case:

Debtor in Possession. A company in a chapter 11 case is known as a "debtor-in-possession." This is the same pre-bankruptcy management team that continues to manage the assets and affairs of the business in the ordinary course of business, subject to obtaining court approval for any transactions deemed to be "outside the ordinary course of business," such as sales, financing transactions or the like. The team is often augmented by a Chief Restructuring Officer or CRO, usually from a professional consulting firm to manage the insolvency process.

Bankruptcy Court. A U.S. bankruptcy judge will be assigned to the case. This judge has inferior status to the U.S. Federal District Courts but will decide virtually all of the issues in the case, after notice and hearings, some of which may be evidentiary. All actions outside the debtor's "ordinary course of business" – sales, financings, etc. – are subject to bankruptcy court approval in this manner. Also, three levels of appeal are possible from the bankruptcy court's decisions: (1) the U.S. Federal District Court; (2) the U.S. Circuit Court of Appeals; and (3) the U.S. Supreme Court. In some regions there is a Bankruptcy Appellate Panel that substitutes for the first level.

U.S. Trustee. The Office of the United States Trustee, a division of the Department of Justice, is charged with administrative oversight of the bankruptcy system (the "U.S. Trustee"). A local representative of the U.S. Trustee is responsible for the appointment of statutory committees of creditors and equity holders in a chapter 11 case, can be heard on any issue in the case and is responsible for investigating any suspected bankruptcy fraud or abuse.

Creditors' Committees. The U.S. Trustee appoints an official committee of unsecured creditors in almost every chapter 11 case, consisting of members that hold the largest claims against the debtor. The creditors committee represents the class of unsecured creditors as a whole, to which it has fiduciary duties. Creditors who agree to serve generally see it as an opportunity to have a direct role in the outcome of the case through the committee's active monitoring of the debtor's business activities and negotiations on behalf of the creditors for a sale, plan or other key events during the bankruptcy case. In fact, the unsecured creditors that the creditors committee represents often hold the "fulcrum security" of an insolvent debtor, and are thus key to the outcome of the case. Moreover, all professional fees of the committee are paid by the debtor's bankruptcy estate, relieving the individual creditors of the financial burden of participation in the case. From time to time the U.S. Trustee also may appoint special committees for discrete claims of creditors, such as where there are special classes of tort claimants.

Equity Committees. When debtors have widely-held, publicly traded equity securities, the U.S. Trustee may appoint an official committee of equity security holders, typically consisting of the seven largest holders, except when insolvency appears hopeless. Those committee members then serve as fiduciaries for the equity holders in a role equivalent to the creditors committee's role as to creditors. These committees have rare, however, due to insolvency caused by overleverage.

Other Parties. In some cases, active players can include senior secured creditors, committees of bondholders, secured creditors, unions, and parties to critical contracts with the debtor. Their importance will be determined from case-to-case based on the facts unique to each chapter 11 case.

Strategies for Acquiring Distressed Assets from a Chapter 11 Debtor

Chapter 11 offers several alternatives for prospective purchasers. Simple asset purchases can be negotiated with the debtor for individual assets or operating businesses, in processes and on terms similar to regular M&A transactions. Bankruptcy plans – though involving a more lengthy process and direct creditor involvement and approval - also can be used to implement virtually every possible form of purchase transaction. Sales, recapitalizations, joint ventures, mergers and the like all can be structured in a chapter 11 plan, which can be used to facilitate execution of the transaction in numerous ways unavailable in a simple purchase, including insulation from successor liability, obtaining creditor consent that would otherwise by unavailable, curing and re-setting loan defaults and terms, and reducing taxes in a variety of ways. A brief description of different acquisition techniques follows.

A. 363 Sales

A chapter 11 debtor can sell some or all of its assets, or even its entire business, "outside the ordinary course of business" under section 363 of the Bankruptcy Code (a "363 Sale"). The 363 Sale is free and clear of claims and interests, with such claims and interests attaching to the proceeds of sale at closing. Only the debtor's management can propose a 363 Sale. Court approval is required, and the debtor need only show "good business reason" to obtain it, even where the sale will be tantamount to a liquidation with creditors left to assert their claims against the sale proceeds. The request is typically heard on twenty (20) days' notice to creditors and parties in interest in the chapter 11 case, but can be heard and granted on an expedited basis depending upon the facts of the case. For example, the sales of several of the assets of Lehman Brothers Holdings, Inc. were approved in 7 days.

In almost every instance, however, a 363 Sale involves an auction process. Courts invariably will entertain higher and better offers before approving any 363 Sale. This can often result in a live bankruptcy auction in the courtroom itself, with rules established by the court either beforehand with specificity, or as ad hoc rules announced on the hearing date itself.

A 363 Sale not only provides the best and clearest title in the fastest time frame. Buyers can obtain bidding protections such as break-up fees and expense reimbursements similar to those available outside of bankruptcy, though they require separate, court approval in advance of approval of the sale itself. These are granted routinely within parameters developed in more than 30 years of case law intended to induce buyers to bid.

Title companies generally accept court orders approving 363 Sales free and clear of liens and claims as evidence of clear title. A 363 Sale can be an effective tool for leaving "bad assets" and "bad liabilities" behind in the debtor's estate, while allowing the purchaser to acquire only the valuable assets and related necessary operational liabilities, such as those for necessary vendors and key contracts that a buyer chooses to assume. One limitation, however, is that a 363 Sale cannot be executed free of certain claims that may be asserted by future unknown claimants (e.g. future personal injury claims from products), successor liability claims, continuing environmental claims and claims held by claimants that did not receive notice of the sale. Even those claims, however, may be left behind in certain distressed asset purchases, if executed pursuant to a bankruptcy plan as discussed later.

If secured creditors assert liens against the assets to be purchased, the proposed 363 Sale price must be "greater than the aggregate value of all liens" unless the secured creditor's interest is the subject of a bona fide dispute or it consents to the sale. Courts are sharply divided, however, as to whether this means "greater than the face amount of the liens" - requiring a purchase price exceeding secured debt without secured creditor consent – or merely "greater than the value of the subject collateral," thereby effectively eliminating the requirement of lender consent because the purchase price would establish the collateral value. Purchasers thus need to know the approach preferred by the bankruptcy court hearing the case in instances where the sale price does not exceed the face amount of the secured liens on the assets to be purchased.

In addition, sales are invariably made on an "as is, where is" basis with no warranties or representations except for title. Since all of the liens and claims against the debtor attach to the proceeds of a 363 Sale, the buyer typically does not require extensive warranties or representations to be made in the asset purchase agreement. Any buyer should, however, adjust its due diligence to take this into account.

Finally, the requirement of bankruptcy court approval does not mean a lengthy process involving appeals. In fact, a court order approving a 363 Sale is almost always a final, unappealable order. Specific sections of the Bankruptcy Code protect 363 Sales from subsequent attack, whether on appeal or collaterally.

B. Sales Under Confirmed Chapter 11 Plans

A potential buyer also could choose to purchase assets from a chapter 11 debtor pursuant to a plan. While this is a more protracted process, the main advantages to a buyer in a plan over a 363 Sale include: (i) elimination of transfer taxes; (ii) the ability to effectuate a stock purchase, thereby retaining public company status (where there are public securities) and a chance at preservation of certain tax attributes, or alternatively, the ability to effectuate a going private transaction as part of the plan; (iii) the ability to obtain third party releases for key management and executives; (iv) compelling creditor consent that was otherwise unattainable outside bankruptcy; (v) utilizing the securities laws exemption in the Bankruptcy Code (there is a disclosure statement issued to voting creditors that serves as a substitute for a proxy or registration statement); and (vi) the ability to cure or modify debt in the plan, thereby reducing charges for default interest and the need for capital post-confirmation.

A typical chapter 11 case can take up to 18 months or longer, including four to eight months for plan negotiations, solicitation and approval by the bankruptcy court. Even after the negotiation and drafting of all necessary documents, there are separate court hearings to approve the disclosure statement and then the plan itself, plus a solicitation and voting period in between. The process can be truncated by negotiating the terms of a plan with the target before the filing of the chapter 11 case, including the terms of proposed sale. This is known as a "prepackaged bankruptcy" plan. Typically, a chapter 11 case with a prepackaged plan can be completed within 60 to 90 days after commencement of the case.

The U.S. Bankruptcy Code contains a complicated series of requirements that bankruptcy plans must meet for court approval. To summarize, creditors are first divided into classes. These classes that are impaired (paid less than full, generally) vote as classes. Two-thirds in amount and a majority in number of the creditors that vote in each class must vote in favor of the plan for class acceptance, and at least one impaired class must vote in this manner in favor of the plan. If any class rejects the plan, however, the plan can still be confirmed by compliance with special "cramdown" provisions of the U.S. Bankruptcy Code.

If a plan is contested by a creditor group or other party in interest, the bankruptcy court holds an evidentiary hearing tantamount to a trial to

determine whether it can be "confirmed" – the term for court approval. Once confirmed, however, bankruptcy plans also have little or no risk of later modification on approval as the appellate courts typically reject such challenges as "moot," thereby insulating a purchase transaction from later challenge or appeal, even if done pursuant to a plan.

A potential buyer of a chapter 11 debtor's business also may choose to extend financing to the debtor ("DIP Financing") as part of a sale transaction with the twin goals of enhancing overall returns and making it more difficult for competing bidders to make a competitive offer. The lucrative terms of DIP Financings - above market interest rates for a first collateral position with above market fees and costs - often make this a very attractive option for a strategic buyer.

C. Debt Purchasing Strategies

Prospective purchasers also can purchase debt obligations of the target – typically at a discount – at one or more levels of the chapter 11 debtor's capital structure. Debt purchases have in recent years, become a key adjunct to many purchase strategies involving chapter 11 debtors for the following reasons:

1) Gain Leverage by obtaining a "blocking position," in a class of claims against the chapter 11 debtor. A blocking position can be obtained by purchasing more than one-third of the dollar amount of claims in a class (or more than ½ of the claims in the class), thereby preventing acceptance by that class of a plan containing an alternative transaction per the voting process described above.

2) Cover Costs, especially if another bidder wins a bidding contest to purchase the target assets, due to the price of the debt securities having been driven up by the competitive bidding for the purchase.

3) Convert to Equity - Notwithstanding the purchase of debt at a discount from its face value, the debt purchaser is generally entitled to enforce the face amount of the debt for all purposes in a bankruptcy proceeding, including for purposes of converting the face amount of the debt into equity in the reorganized debtor as the "fulcrum security" in the case.

Purchasing debt is not without potential risk, however. Some constituents in a chapter 11 case could raise claims against the debt purchaser that arise from the pre-purchase conduct of the seller of the debt. A prudent and well-advised buyer, however, can ensure that the purchase transaction is well-documented as a true sale (instead of an assignment) and that no actions are taken to support the viability of any such claims. There are also "bad faith" voting limitations on the Bankruptcy Code, but they are rarely enforced and generally believed inapplicable to most strategic debt purchases.

D. Rights Offering

Another current strategy for buying or investing in a chapter 11 debtor is to invest in a rights offering for public securities upon emergency from bankruptcy. Rights offerings have been used as an effective means to raise capital and reduce the need for more expensive exit financing for public

companies. Typically, rights offerings are combined with the issuance of convertible debt to acquire control of the company on exit from the chapter 11 case. Successful recent examples of rights offerings include: (1) USG Corp. $1.8 billion / + $2.75 bn financing (2006); (2) J.L. French $130 million / + $255 mn financing (2006); and (3) Global Power Equip. Group $52 million /+ $20 m private placement + $90 bn financing (2008).

The rights offering mechanism is for an investor to make a financial commitment to backstop, or guaranty, the rights offering. This is an agreement to purchase any shares offered to existing creditors or shareholders of the chapter 11 debtor that they do not purchase themselves. This typically requires a combination of exit financing for the balance of projected funds needed to fund post-confirmation operations. Generally, rights offerings are exempt from registration as public securities under the Bankruptcy Code so long as the securities received are received in exchange for claim against or an interest in the debtor, or principally for such exchange and partly for cash.

E. Credit Bidding Strategies

A prospective purchaser of assets or a business from a chapter 11 debtor also could choose to purchase senior debt secured by the assets or business that is the target, again usually at a discount, in order to "credit bid" for assets at a 363 Sale. To implement this strategy even more effectively, a potential purchaser could buy the debt before the bankruptcy case is filed, and then negotiate a prepackaged plan of reorganization with the debtor that includes the conversion features, and perhaps also provisions for debtor-in-possession financing. This would enable the buyer to maintain a higher level of control over the progress of the chapter 11 case with the ability to demand repayment of the loan on a short maturity date and expedite the sale.

A critical requirement in any prepackaged plan scenario also would be to identify the key creditors whose votes are needed to confirm a plan, then to obtain the agreement of those creditors to vote in favor of and support the proposed plan. A typical agreement would provide for key creditors to vote in favor of and support the plan, subject only to court approval of a disclosure statement. It would further commit those creditors not to take any adverse action or support any competing plans pending the confirmation of the prepackaged plan. Also, a common feature in such a plan would be a "death trap" for junior classes, that those classes would receive a greater distribution if their class votes in favor of the plan as compared with a nominal or no distribution if they vote against the plan.

Baker & McKenzie International is a Swiss Verein with member law firms around the world. In accordance with the common terminology used in professional service organizations, reference to a "partner" means a person who is a partner, or equivalent, in such a law firm. Similarly, reference to an "office" means an office of any such law firm.

©2008 Baker & McKenzie
All rights reserved.