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CRAM-UP PLANS OF REORGANIZATION BECOME MORE COMMON

Cram-up plans occur when a bankruptcy court confirms a Chapter 11 plan over the objection of a class of secured claims. The author discusses leading cases involving such plans, and the various strategies debtors have used to propose and confirm them.

By Stephen B. Selbst *

A "cram-up" plan of reorganization – once as rare as the formerly endangered American bald eagle – is becoming more common in chapter 11 cases. And just as the bald eagle's numbers have increased because its environment is protected, cram-up plans have benefitted from unusual and favorable conditions in the financial environment – low interest rates coupled with strong real estate markets – that have made it easier for debtors to propose and confirm these unusual reorganization plans. There are three primary strategies driving cram-up plan implementation: (1) reinstatement of lender debt; (2) extending the maturity date of existing debt and proposing "fair and equitable treatment" to the secured debt; and (3) providing the lender with the "indubitable equivalent" of its collateral package. This article examines why cram-up plans have become attractive and how courts have ruled on cram-up plans in leading cases.

For a plan to be consensually confirmed under section 1129(a) of the Bankruptcy Code, each class of impaired claims or equity interests is required to accept the plan. Acceptance by a class of creditors or equity holders requires the affirmative vote of parties holding two-thirds in amount of the claims or interests in the class, and the approval of a majority in number of holders in that class.

Section 1129(b)(1) of the Bankruptcy Code also provides, however, that a plan of reorganization may be confirmed despite its rejection by a class or classes. Confirmation of a plan over the objection of a class of impaired creditors is called a "cram-down." For a cram-down plan's confirmation to happen, the plan must: (1) be accepted by at least one impaired class; (2) not unfairly discriminate against each impaired, rejecting class; and (3) be fair and equitable. Cram-down – versus the aforementioned and rarer "cram-up" plans – are common; typically, the class or classes being crammed down are the most junior classes, such as equity holders and/or general unsecured creditors.

By comparison, a "cram-up" occurs when a bankruptcy court confirms a Chapter 11 plan of reorganization over the objection of a class of secured claims. Most cram-up plans take one of three forms: (1) reinstatement under section 1124 of the Bankruptcy Code; (2) providing the lender with a stream of deferred payments with a present value equal to the value of its collateral, sometimes referred to as "stretch-out" plans; or (3) providing the lender with the "indubitable equivalent" of its collateral, which can also be so-called "dirt for debt" plans. In a cram-up plan of an impaired secured class of claims, the treatment of the impaired class must still meet Bankruptcy Code's "fair and equitable" standard.

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