Re: Timing of Debtor's Plan
In re Harcom
79 Bankr. 137
(Bankr. D.N.H 1987).

1987 BANKRUPTCY LAW INSTITUTES

CREDITORS' PLANS

By

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INTRODUCTION

Chapter 11 of the Bankruptcy Code gives creditors several weapons that may be used in reorganization cases. For example, secured creditors can demand adequate protection of their collateral or can seek relief from the automatic stay. 11 U.S.C. §§ 361-364. Landlords or lessors may seek to compel the debtor in possession to assume or reject an executory contract or unexpired lease. 11 U.S.C. § 365. Creditors may threaten or may actually move for the appointment of a trustee or examiner or may move to dismiss or convert the case. 11 U.S.C. §§ 1104, 1112. Creditors also have the ability to take the examination of the debtor's management under Bankruptcy Rule 2004.

To date, the least utilized creditor weapon in chapter 11 cases is the proposal of a creditors' plan of reorganization. 11 U.S.C. § 1121(c). This paper discusses when a creditors' plan can be proposed in a chapter 11 case, both as a practical matter and a legal matter. After discussing the contents of a creditors' plan, the paper focuses on disclosure, solicitation of acceptances, and confirmation with respect to the creditors' plan.

Proposing A Creditors' Plan

In order to propose a creditors' plan, the proponent must overcome practical and legal impediments. As a general legal rule, the debtor is given the exclusive right to file a plan of reorganization for the first 120 days after the order for relief in a chapter 11 case. 11 U.S.C. § 1121(b). If the debtor files a plan within the 120 day exclusivity period, the debtor preserves plan exclusivity if acceptances of impaired classes are obtained before 180 days following the order for relief. 11 U.S.C. § 1121(c)(3).

If the debtor files a plan and obtains acceptances within the exclusivity periods, the only way for creditors to be able to file a plan is to obtain the appointment of a trustee. 11 U.S.C. § 1121(c)(1). In fact, appointment of a trustee within the exclusivity periods also entitles creditors to propose a plan of reorganization in a chapter 11 case.

Frequently, the debtor seeks to obtain an extension of the exclusivity periods. Creditors are sometimes successful in opposing these requests for extension if the extension is done to force settlement of a dispute or for purposes of delay. E.g., Teachers Insurance & Community Association v. Lake In The Woods (In re Lake in the Woods), 10 Bankr. 338 (E.D. Mich. 1981). 11 U.S.C. § 1121(d). Based on a 1984 amendment to § 1121(d), at least one court has held that only one request for an extension of the exclusivity period is proper. In re Westgate General Partnership, 55 Bankr. 562 (Bankr. E.D. Pa. 1985).

A recent trend in case law indicates that the debtor's ability to obtain extensions of exclusivity will be the exception and not the rule, at least when there is important opposition to a requested extension. E.g., In re Parker Street Florist & Garden Center, Inc., 31 Bankr. 206 (Bankr. D. Mass. 1983); In re Gagel & Gagel, 24 Bankr. 674 (Bankr. S.D. Ohio 1982). But see In re Manville Forest Products Corp., 31 Bankr. 991 (S.D.N.Y. 1983). The Court of Appeals for the Fifth Circuit recently recognized the importance of permitting creditors to file plans of reorganization as part of the overall balance of debtors' and creditors' rights in chapter 11 cases. In re Timbers of Inwood Forest Associates, Ltd., 808 F.2d 363, 372 n.14 (5th Cir. 1987) (en banc) (dictum).

Where it appears that the debtor will not be able to obtain acceptances before the expiration of its exclusivity period, the court may entertain a motion by creditors to reduce the exclusivity period in order to permit creditors to promptly file a competing plan to facilitate simultaneous solicitation of acceptances. In re Barker Estates, Inc., 14 Bankr. 683 (Bankr. W.D.N.Y. 1981). If the debtor is intractable, the court may also reduce the exclusivity period. See H.R. Rep. No. 595, 95th Cong., 1st Sess. 232 (1977). See also Texas Extrusion Corp. v. Lockheed Corp. (In re Texas Extrusion Corp.), 844 F.2d 1142 (5th Cir. 1988) (exclusivity in 4th case reduced where 4th case converted to Ch 7 + reconverted to 11 to delay creditor from
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While the pendulum may be swinging in the direction of permitting competing plans, many courts remain protective of the debtor's right to file and seek confirmation of a plan of reorganization without competition. _E.g._, _In re Manville Forest Products Corp._, 31 Bankr. 991 (S.D.N.Y. 1983). In order to overcome the language of § 1121(d) with respect to extension of exclusivity periods, debtors are well advised to obtain extensions for a fixed period of time, plus such additional time as the court may allow. If the initial extension is open ended, the letter of the statute will have been met. The inspiration for the 1984 amendment to § 1121(d) was to prevent creditors from seeking to reduce the debtor's exclusivity periods retroactively after the debtor had actually complied with filing the plan and obtaining acceptances within statutory or court ordered periods.

Even if creditors obtain the right to file a plan of reorganization, several practical obstacles must be overcome before a plan of reorganization may be filed. Considerations vary depending on whether the plan is a liquidating plan providing for dismemberment of the business; a "takeover" plan providing for a change in management, change in ownership of the debtor, or change in ownership of the debtor's assets; or a plan of reorganization in which the debtor is recapitalized. If a recapitalization is envisioned, the role of management must be analyzed. In certain circumstances, management will be indispensable to operation of the business. For example, a reorganization involving performance of a rock star will not be successful without the rock star's compliance. Similarly, if the future of the business depends on the ability to create new products, it will be important to retain those members of management who have the creative abilities to permit the business to survive. On the other hand, many cases will not involve special or unique management skills. Where the business consists of marketing raw land or running an apartment house, new management may be brought in without a negative effect on the business in most cases.

Once it is determined to propose a plan, care must be taken in selecting the "proponent" of the plan. As a matter of law, a creditor may propose a plan as may a creditors' committee. 11 U.S.C. § 1121(c). It is doubtful, however, that an outside third party purchaser has standing to propose a plan. Therefore, a party desiring to acquire stock or assets of a debtor ought to find a creditors' committee or a creditor to sponsor the plan.

Selection of a proponent is important for a number of reasons. First, the proponent retains the exclusive right to modify the plan prior to confirmation. 11 U.S.C. § 1127(a). Second, the proponent's compliance with the provisions of the Bankruptcy Code will be measured as a condition to confirming the plan. 11 U.S.C. § 1129(a)(2). Third, the proponent must undertake the preparation of the disclosure statement and solicitation of acceptances which can involve a great deal of time and expense. Fourth, the identity of the proponent may influence confirmation of the plan as more fully discussed below.

## Formulation Of A Plan

Formulation of a creditors' plan is likely to be influenced by the probability of reorganization in a particular case. If there is a substantial likelihood that the debtor can propose and confirm a plan of reorganization, it is unlikely that the court will terminate plan exclusivity to permit creditors to file competing plans. On the other hand, if the debtor's prospects for proposing and confirming a plan of reorganization appear remote, the court may allow the exclusivity periods to terminate early in the case so that creditors may file their own plans.

As a practical matter, creditors may proceed with liquidating plans or takeover plans shortly after the filing of a chapter 11 case if given permission to do so. By contrast, a reorganization plan involving recapitalization of the debtor often requires a substantial period of time to elapse after the filing of the chapter 11 petition before the plan may be proposed. Until business losses have been stemmed and the business redirected, creditors are not in a position to determine the amount of debt service that can be supported by the future profits of the business. On the other hand, if the debtor is able to redirect the business, often the debtor will be able to negotiate a consensual plan of reorganization with creditors and a creditors' plan will be unnecessary.

The contents of a creditors' plan may be quite broad. The proponent has the flexibility to formulate a plan restructuring the business organization, management, debt, or equity in almost any conceivable manner. For example, the plan could provide for a merger or consolidation of the debtor with one or more business concerns. 11 U.S.C. § 1123(a)(5)(C). It is clear in the context of a creditors' plan that a proponent need not obtain the consent of the debtor's board of directors or shareholders as a precondition to consummating the merger. H.R. Rep. No. 595, 95th Cong., 1st Sess. 407 (1977) (indicating that § 1123(a)(5)(C) has the effect of overruling St. Joe Paper Co. v. Atlantic Coast Line RR, 347 U.S. 298 (1954)).

It is perfectly appropriate for creditors to propose a liquidating plan providing for partial or complete liquidation of the debtor. 11 U.S.C. § 1123(a)(5)(D) & (b)(4). The plan may provide for the distribution of any kind of consideration including, but not limited to, cash, property in kind, or securities of the debtor or a third party. The exemption from § 5 of the Securities Act of 1933 contained in § 1145 of the Bankruptcy Code may facilitate distribution of securities under a plan and a limited exemption from the Trust Indenture Act of 1939 may facilitate the issuance of certain debt securities. 11 U.S.C. § 1145(d).

The proponent of a creditors' plan must be sure that the plan contains the mandatory provisions required by § 1123(a) of the Bankruptcy Code. Tactically, the proponent must decide on a classification scheme to group classes of claims and interests for purposes of voting. The proponent should give careful consideration whether the proponent should be classified together or separately from other creditors with similar legal rights. Unless all impaired classes vote to accept the plan, confirmation may only be obtained under the fair and equitable rule of § 1129(b). Therefore, the proponent may wish to group itself with similarly situated creditors in order to favorably influence the vote of the class. The proponent should also consider whether to give junior creditors or shareholders a token amount of consideration rather than nothing. If a class is given nothing, it is deemed to have rejected the plan requiring the proponent to prove that the plan meets the fair and equitable rule with respect to the dissenting class in order to obtain confirmation. 11 U.S.C. §§ 1126(g), 1129(a)(8), 1129(b). The proponent should consider the possibility of bringing a motion under Bankruptcy Rule 3013 to determine the propriety of classification. Generally, the proponent should decide against bringing such a motion as there will be little benefit in focusing attention on classification as a separate proposition. On the other hand, a debtor opposing a creditors' plan may be well advised to seek a determination of the propriety of classification under Bankruptcy Rule 3013.

Of the remaining mandatory requirements, a few require comment in the context of a creditors' plan. First, the mandatory provisions contained in § 1123(a) are to be complied with notwithstanding "any otherwise applicable nonbankruptcy law." As set forth above, this permits creditors to propose for merger or liquidation of the debtor without the consent of the debtor's shareholders or board of directors. In addition, the plan may provide for the amendment of the debtor's charter or the issuance of securities. 11 U.S.C. § 1123(a)(5)(I)-(J). Second, a proponent should be particularly careful to provide for amendment of the debtor's corporate charter to prohibit the issuance of non-voting stock and to fairly allocate voting power among classes as required by § 1123(a)(6). Finally, selection of the officers and directors of the reorganized entity must be consistent with the interests of creditors, equity security holders, and with public policy. 11 U.S.C. § 1123(a)(7). A proponent should scrupulously avoid placing members on the debtor's board of directors who would have conflicts of interest.

The plan may also contain permissive provisions in accordance with § 1123(b) of the Bankruptcy Code. Of particular interest in the context of a creditors' plan is the power to assume, assign, or reject any executory contract or unexpired lease of the debtor. 11 U.S.C. § 1123(b)(2). Note that this section does not apply to contracts entered into by the trustee or debtor in possession during the course of the chapter 11 case. Of equal importance is the power in § 1123(b)(3) to designate a representative of the estate to pursue causes of action and resolve disputes. The proponent should give careful consideration to the appointment of a representative of the estate who can faithfully exercise fiduciary duties on behalf of the estate without a conflict of interest. Thus, a creditor or creditors' committee should be reluctant to become the representative of the estate if it would be obligated to pursue itself or its members to recover a preference or fraudulent transfer. As previously noted, the plan may provide for a complete liquidation of the debtor's business and distribution of the proceeds under a liquidating plan. 11 U.S.C. § 1123(b)(4). Finally, the plan may include any other appropriate provision not inconsistent with the provisions of the Bankruptcy Code. The proponent should consider whether to include provisions for retention of jurisdiction and resolution of disputes. Of particular importance may be the inclusion of provisions for the transition of management if the creditors' plan envisions replacement of existing management.

<u>Disclosure Statement and Solicitation of Acceptances</u>

The proponent of a creditors' plan may confront a number of practical obstacles in preparing a disclosure statement to accompany a creditors' plan. Preparation of the disclosure statement requires the accumulation of vast amounts of information depending on the kind of plan involved. A plan proposing sale of the debtor's assets may require little information regarding the debtor's history and the performance of management. On the other hand, a plan proposing to issue stock to creditors would require an analysis of the business, the ability of future management, and the prospects of future earnings. If the debtor is a public company, the 10K and 10Q reports filed with the Securities and Exchange Commission should be a valuable source of information. In most cases, however, the proponent will go through a painful process of extracting information from the debtor and its professionals.

One reason that a creditors' committee may be asked to become a proponent of a plan is the committee's access to information in the case. While any creditor may attend the § 341(a) meeting to examine the debtor or conduct a Rule 2004 examination, the creditors' committee often receives detailed information regarding the operation of the business. If the committee is friendly with the debtor during the early days of the case, it may be in a position to demand and receive a great deal of information that could be of use in formulating a creditors' plan later in the case. See 11 U.S.C. § 1103(c). The committee also has the advantage of being able to employ accountants and investment bankers to gather, analyze, and prepare information necessary for a disclosure statement with the compensation of these professionals to be at the expense of the estate. 11 U.S.C. § 1103(a) & 330(a).

Unless the court orders otherwise, the trustee or debtor in possession is obligated to "furnish information concerning the estate and the estate's administration as is requested by a party in interest." 11 U.S.C. § 704(7). See 11 U.S.C. § 1106(a)(1). If the debtor is reluctant to supply information to the proponent, the proponent may take an examination of the debtor for information concerning the business under Bankruptcy Rule 2004. The proponent may seek to compel the debtor's professionals to turn over information under section 542(e) of the Bankruptcy Code. In addition, the proponent may request the Bankruptcy Court to compel the debtor in possession to waive the corporate attorney client privilege. CFTC v. Weintraub, _____ U.S. ____, 105 S. Ct. 1986 (1985). It is unclear whether the court can compel the debtor in possession of a partnership or individual debtor to waive the attorney client privilege.

The proponent of a creditors' plan must exert a reasonable effort to provide adequate information about the plan in the disclosure statement. More often than not, any inadequacies in the disclosure statement can be remedied after they are pointed out by the debtor at the disclosure statement hearing.

In addition to the foregoing practical considerations, there are a number of legal considerations the proponent should confront in formulating the disclosure statement. The opportunity to utilize a prepetition solicitation in the context of a creditors' plan should be extremely rare. In most circumstances, creditors will not have formulated a plan of reorganization prior to the filing of a chapter 11 petition.

In order to formulate a plan, the proponent will engage in negotiations in almost every case. Negotiations with the debtor might lead to a consensual plan or might motivate the debtor to compromise with respect to its plan. Negotiations with the creditors can mould the creditors into a cohesive force if combat with the debtor becomes necessary. As a matter of law, the proponent is prohibited from soliciting acceptances (or rejections) of the plan prior to the transmission to the party being solicited of a disclosure statement approved by the court and a copy of the plan or a summary of the plan. Nevertheless, it will frequently be necessary for the proponent to negotiate with creditor or shareholder interests prior to the formulation of a plan of reorganization. As long as the proponent does not solicit the acceptance of its plan, it should be perfectly permissible for the proponent to negotiate provisions of a plan that would be acceptable to various creditor or ownership interests. In re Snyder, 51 Bankr. 432 (Bankr. D. Utah 1985).

Occasionally, as the result of negotiations, the creditor will propose a plan in which all classes are unimpaired. In this context, it may well be that a disclosure statement is not required in order to proceed to confirm the plan. Section 1125(b) of the Bankruptcy Code appears to require a disclosure statement only if solicitations of acceptances or rejections will be made. If all classes are unimpaired, they are deemed to have accepted the plan and the requirements of confirmation can be met without solicitation of acceptances or rejections. 11 U.S.C. §§ 1126(f), 1129(a)(8) & (10). See In re Rolling Green Country Club, 26 Bankr. 729, 730 (Bankr. D. Minn. 1982). The contrary argument is that the mere assertion that a class is not impaired under a plan does not make it so. Thus, acceptances and rejections should be solicited in case the court determines that a class is impaired. In re Forrest Hills Associates, Ltd., 18 Bankr. 104 (Bankr. D. Del. 1982). As a policy matter, Congress could have required a disclosure statement to be filed in every case in order to give parties information to accept or reject a plan or to prepare objections to confirmation. It appears that § 1125(b) was drafted, however, only to require a disclosure statement to be filed when the proponent desires to solicit acceptances. It should be noted, however, that if a disclosure statement is not filed, approved, and transmitted to creditors and owners, parties opposing the plan cannot solicit rejections. 11 U.S.C. § 1125(b).

It is possible that a proponent may desire to confirm a plan under the fair and equitable or "cramdown" provisions of § 1129(b) without soliciting acceptances or rejections. This theoretically could be accomplished in a creditors' plan where the proponent separately classifi impaired class (such as a secured creditor of its debt instrument) and votes to accer would satisfy the requirements of § 1129(a) proponent is not designated an "insider," and should permit the proponent to seek confirmation under § 1129(b) without soliciting the acceptance or rejection of other impaired classes. While this approach appears to be proper, in the context of a debtor's plan case law is split. Compare In re Union County Wholesale Tobacco & Candy Co., 8 Bankr. 442 (Bankr. D.N.J. 1981) with In re Rail King, Inc., 33 Bankr. 4 (Bankr. N.D. Ohio 1983). In the context of a creditors' plan, this approach has been condemned. In re Jeppson, 66 Bankr. 269 (Bankr. D. Utah 1986).

With the exception of the circumstances discussed above, the proponent of a creditors' plan will be required to file and obtain the approval of a disclosure statement to be transmitted to creditors and equity security holders prior to the solicitation of acceptances. The proponent will be well advised to exercise good faith and due diligence in preparation of the disclosure statement and solicitation of acceptances. Many lawyers prefer to get solicitation materials approved at the time of the disclosure statement hearing. Cf. In re Snyder, 51 Bankr. 432 (Bankr. D. Utah 1985). Parties soliciting acceptances or rejections in good faith are insulated from liability under the safe harbor of § 1125(e) of the Bankruptcy Code.

Once the disclosure statement has been approved, the proponent will be responsible for analyzing the ballots and proving that various impaired classes have accepted or rejected the plan. The proponent should consider using § 1126(e) to designate bad faith rejections of the plan by those who are competitors of the debtor or who would destroy the debtor's business. In re MacLeod Co., 14 Bankr. Ct. Dec. 915 (Bankr. S.D. Ohio 1986). Perhaps this provision could be used to disqualify the vote of shareholders of a closely held company who desire to see the business fail entirely rather than to permit a creditors' plan to be confirmed.

As previously noted, a class that is unimpaired is conclusively presumed to have accepted the plan and the proponent need not solicit acceptances from such class. 11 U.S.C. § 1126(f). Occasionally, however, it will be difficult to determine whether a class is unimpaired under the provisions of § 1124 of the Bankruptcy Code. For example, suppose a plan proposes to sell all of the assets of the debtor for cash with cash to be distributed to the creditors and with shareholders to be left to retain their shares in the debtor company. The proponent may contend that the rights of the shareholders are unaltered within the purview of § 1124(1) and that the shareholders' class is "unimpaired." It is doubtful that retaining 100% of the stock in a shell corporation is the same as retaining 100% of the stock in a going business. Nevertheless, the problem is difficult to distinguish from a partial sale of assets with distribution to creditors where retention of the stock intact would undoubtedly constitute unimpairment. Another difficult example concerns the issuance of additional shares of stock where the issuance of shares is authorized by the debtor's corporate charter and could have been accomplished outside of bankruptcy under state law without shareholder approval. The issuance of additional shares of stock will probably alter the shareholders' legal, equitable, or contractual rights since prior to the filing of the case they held 100% of the voting rights and after confirmation they will hold less. On the other hand, the voting rights that were held as of the time of the filing of the petition were subject to dilution by the issuance of additional shares in accordance with state law.

Confirmation

In order to be confirmed, a creditors' plan must comply with all of the routine confirmation requirements of § 1129(a). In particular, the plan and the proponent of the plan must comply with the applicable provisions of the Bankruptcy Code. 11 U.S.C. § 1129(a)(1)-(2). With respect to the proponent, this means that the proponent must not have solicited acceptances or rejections of the plan prior to the transmission of a disclosure statement approved by the court as having contained adequate information, together with a summary of the plan or the plan itself. If solicitation is improper, not only will the vote be excluded under § 1126(e), but the proponent may be found to have failed to have complied with § 1125(b) of the Bankruptcy Code.

In addition, it is important that the plan be proposed in good faith and not by any means forbidden by law. 11 U.S.C. § 1129(a)(3). If the plan is proposed with a legitimate and honest purpose to reorganize and has a reasonable chance of success, the good faith standard is satisfied. In re Sun Country Development, Inc., 764 F.2d 406 (5th Cir. 1985). If the proponent is a competitor of the debtor, it is possible that the plan might be found to have been proposed for an improper purpose and confirmation of the plan will be denied under § 1129(a)(3) of the Bankruptcy Code. On the other hand, the status of the proponent as a competitor should not disqualify the proponent from proposing a plan that is designed to rehabilitate the business where rehabilitation is appropriate or to liquidate the business where that is in the best interest of creditors. For example, it should be appropriate for a competitor to propose a plan of reorganization in the context of a "takeover" where the proponent's claim is converted to equity or where management of the debtor is changed as long as the plan is proposed in good faith and is in the best interest of creditors. See, e.g., In re Evans Products Co., 65 Bankr. 31 (Bankr. S.D. Fla.), aff'd, ___ Bankr. ___ (S.D. Fla. 1986).

In addition to the foregoing requirements, the proponent must disclose any payments to be made by the proponent, by the debtor, or by a person issuing securities or acquiring property under the plan with respect to services or expenses in connection with the case or the plan. 11 U.S.C. § 1129(a)(4). Moreover, the proponent must disclose the identity and affiliation of proposed officers and directors and the compensation of any insider that will be employed or retained by the reorganized debtor. Finally, appointment of the officers and directors must be consistent with the interests of creditors and equity security holders and with public policy. 11 U.S.C. § 1129(a)(5).

In order to confirm a plan, the proponent of the creditors' plan will be required to prove that the plan meets the best interest of creditors test of § 1129(a)(7), and the feasibility test of § 1129(a)(11), among other things. The best interest of creditors test invariably requires a liquidation analysis. The proponent should employ its own experts or rely on the opinion of the debtor to establish the liquidation value. Except in cases where the debtor is marginally solvent on a liquidation basis, the best interest of creditors test should not be difficult to satisfy.

The feasibility requirement of section 1129(a)(11) may prove to be more troublesome depending on the kind of plan proposed. If the plan is a "pot plan" where the proponent agrees to pay a fixed sum of money to an entire class of creditors, then feasibility should be limited to proving that the proponent can perform financially and that the business is financially sound. In this regard, the proponent may wish to deposit money into court to prove its financial wherewithal. See, Bankruptcy Rule 3020(a). On the other hand, if the proponent has agreed to pay a fixed percentage to creditors holding allowed claims, it may be necessary for the proponent to conduct claims estimation proceedings under section 502(c) of the Bankruptcy Code or to file objections to claims under Bankruptcy Rule 3007. If the determination of feasibility hinges on resolution of a large disputed claim and the dispute is not resolved prior to confirmation, it may be impossible to confirm the plan. In re Pizza of Hawaii, Inc., 761 F.2d 1374 (9th Cir. 1985). Essentially, the proponent must show a reasonable likelihood of the debtor's survival (unless the plan is a liquidating plan) and the plan must have a reasonable probability of success. In re Acequia, Inc., 787 F.2d 1352 (9th Cir. 1986).

In order to eliminate the interests of shareholders (or other ownership interests), the proponent must show that the plan is fair and equitable and does not discriminate unfairly with respect to shareholders. 11 U.S.C. §§ 1126(g), 1129(a)(8), (b)(1). The statutory requirement of § 1129(b)(2)(C)(ii) that no junior class participates is automatically satisfied when shareholders' interests are to be eliminated. 11 U.S.C. § 1129(b)(2)(C)(ii). Courts have nevertheless required the proponent to prove that no senior class is being compensated more than in full. E.g., In re Evans Products Co., 65 Bankr. 31 (Bankr. S.D. Fla.), aff'd, ___ Bankr. ___ (S.D. Fla. 1986). Accord H.R. Rep. No. 595, 95th Cong. 1st Sess. 417 (1977). Senior creditors who are required to give up relative priority with respect to junior creditors may receive more than the allowed amount of their claim as compensation for their loss of priority under the fair and equitable rule. 11 U.S.C. § 1129(b)(1). E.g., In re Inland Gas Corp., 211 F.2d 381, 385 (6th Cir. 1954); Standard Gas & Electric Co. v. Deep Rock Oil Corp., 117 F.2d 615, 617 (10th Cir.), cert. denied, 313 U.S. 564 (1941); In re Imperial 400 National Inc., 374 F. Supp. 949, 976-77 (D.N.J. 1974).

It is unclear whether the court must permit simultaneous solicitation of competing plans. It appears that if the debtor's exclusivity period has expired, creditors ought to be able to simultaneously propose and obtain consideration of competing plans. Accord In re Barker Estates, Inc., 14 Bankr. 683 (Bankr. W.D.N.Y. 1981). Under § 1129(c) of the Bankruptcy Code, the court is bound to consider the preference of creditors in deciding which plan to confirm. It is not always the case that creditors will prefer a creditors' plan over the debtor's plan. E.g., In re Rolling Green Country Club, 26 Bankr. 729 (Bankr. D. Minn. 1982) (where unsecured creditors' committee objected to bank's plan but withdrew objections to debtor's plan, court confirmed debtor's plan rather than bank's plan). The court will not refuse to confirm a creditors' liquidating plan where the creditor has a firm offer to purchase when the debtor's competing plan offers creditors a higher price but is based on a contingent contract. In re Holywell Corp., 54 Bankr. 41 (Bankr. S.D. Fla. 1985), aff'd sub nom Holywell Corp. v. Bank of New York, 59 Bankr. 340 (S.D. Fla. 1986).

At the confirmation hearing, the proponent should consider asking the Bankruptcy Court to waive making written Findings of Fact and Conclusions of Law as permitted under Bankruptcy Rules 7052 and 9014. See In re Evans Products Co., 65 Bankr. 31, 34 (Bankr. S.D. Fla.), aff'd, ___ Bankr. ___ (S.D. Fla. 1986). In addition, the proponent may wish to ask the Bankruptcy Court to waive the provisions of Bankruptcy Rule 7062 which may operate to delay the effectiveness of the confirmation order for a ten day period. See Bankruptcy Rules 9014, 7062, 9002(5). It is possible, however, that the ten day period is not waivable as a matter of due process so that parties desiring to appeal the order confirming the plan can seek a stay pending appeal. See Felts v. Bishop (In re Winstead), 33 Bankr. 408, 410-11 (M.D.N.C. 1983) (preserving 10 day period in context of sale). In any event, if the provisions of Rule 7062 apply, the proponent should consider making the plan effective on the second business day following the 9th day after the entry of the order confirming the plan. Some attorneys prefer to delay the effective date until the order confirming the plan is final. Delaying the effective date until the order confirming the plan is final, however, simply gives the debtor the opportunity to obtain a free stay pending appeal. If the plan becomes effective and the debtor does not obtain a stay pending appeal, consummation of the plan may render the debtor's appeal moot. _See_ _In re Roberts Farms, Inc._, 652 F.2d 793,798 (9th Cir. 1981). In some cases, however, as a practical matter, the effective date must be conditioned upon all appeals having been resolved such as where a third party financier is reluctant to invest funds necessary to consummate the plan as long as an appeal is pending.

## Conclusion

The creditors' plan is a potent weapon that is beginning to find more use in chapter 11 reorganization cases. The creditors' plan affords creditors an opportunity to capture the going concern value of a business in appropriate cases or to force a liquidation of the business where continued operation by the debtor will erode the value of the business for creditors. In the future, creditors' plans may play an important role in the context of corporate takeovers in chapter 11 reorganization cases.