

NY Guidelines Bring Clarity To Prepackaged Chapter 11 Cases

By **Robert Drain and Moshe Jacob** (January 29, 2024)

On Jan. 22, the chief judge of the U.S. Bankruptcy Court for the Southern District of New York entered General Order M-621 adopting amended procedural guidelines governing prepackaged Chapter 11 cases.

The guidelines provide a comprehensive framework for the administration of prepackaged Chapter 11 cases in the district. Among other things, they recognize and address "rapid prepackaged Chapter 11 cases," defined as cases "where the Debtor seeks confirmation of the plan to be granted between one (1) and fourteen (14) days after the petition date."

The new guidelines, albeit advisory only, provide bankruptcy practitioners guidance on practical matters pertaining to prepacks that are often addressed only indirectly or in piecemeal fashion by the U.S. Bankruptcy Code, the Federal Rules of Bankruptcy Procedure or local rules.

These guidelines will facilitate the use of prepacks as a tool that can greatly reduce the time, expense — including professional and U.S. trustee fees — and risks of a Chapter 11 case.



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Prepacks

In a traditional Chapter 11 case, votes on a Chapter 11 plan are solicited after the start of the case.

In contrast, a prepackaged case involves the prepetition negotiation and solicitation of votes on a proposed plan. Once that process is complete, and assuming the debtor obtains sufficient votes, it then files for Chapter 11 and asks the bankruptcy court to confirm the plan.

While it is not unusual for a debtor to emerge from Chapter 11 within 30 to 60 days after filing a prepack, some debtors have completed the process in substantially less time.[1] Of course, the prepack process does not begin with the petition date.

For example, after prepetition negotiations, the prepetition solicitation periods in most prepacks are longer than the period required by the bankruptcy rules generally or by the letter of the rules pertaining to prepacks. Nevertheless, they can greatly reduce the cost and risk of the Chapter 11 process by limiting the debtor's time in bankruptcy itself.

Although Congress clearly contemplated prepackaged bankruptcies — for example, in Sections 1125(g) and 1126(b) of the Bankruptcy Code, which govern the prepetition solicitation of plans and associated disclosure requirements — a truly comprehensive framework for their administration, especially one that adequately accounts for the industry trend toward rapid prepacks, has been lacking.

Historically, the Bankruptcy Court for the Southern District of New York has led in providing

guidance on prepackaged bankruptcy cases. It first promulgated formal guidelines for prepackaged cases in 1999, which it amended in 2009 and later again in 2013.

The new Southern District of New York guidelines continue to reflect the evolving nature of such cases.

The Guidelines

Most notably, the new guidelines recognize the concept of a "rapid prepackaged Chapter 11 case," and provide a road map for the conduct of such cases, including with respect to limitations, discussed below, on the types of issues to be raised and the type of notice to be provided.

The guidelines also provide that:

- In all prepackaged Chapter 11 cases, the hearings on approval of the disclosure statement and/or compliance with Sections 1125(g) and 1126(b) of the Bankruptcy Code and confirmation of the plan typically will be scheduled and held together;
- Consistent with Section 341(e) of the Bankruptcy Code, an official creditors committee typically will not be appointed; and
- The debtor is free not to set a bar date and may seek to conditionally dispense with filing otherwise required schedules and statements.

The guidelines also describe anticipated first-day motions and contain provisions on the retention and compensation of professionals.

Lastly, they provide instructions governing the content of the scheduling motion expected to be filed and considered at the start of the prepackaged case, including specialized requirements applicable only to rapid prepackaged Chapter 11 cases.

Summary of Changes

Contents of Scheduling Motion

For all prepackaged bankruptcy cases, the scheduling motion will:

- Seek plan confirmation and disclosure statement hearings to be combined whenever practicable;
- Describe the debtor's compliance with applicable notice requirements;
- Request the court under Title 28 of the U.S. Code, Section 156(c), and Bankruptcy Rule 2002(a)-(b) to deem the prepetition noticing and ballot agent to be the clerk of the court's agent for such purposes and seek retroactive approval of such notice;
- Disclose all written but as-yet-unfiled, as prepetition, objections to the debtor's disclosure, solicitation or confirmation request, and schedule a prompt conference with the court regarding any expected discovery issues;

- Disclose whether the debtor will be seeking entry of a bar date order or a due process order, discussed below; and
- Disclose whether and how the debtor intends to seek a declaration in the confirmation order regarding good faith solicitation and exemption under Bankruptcy Code Section 1125(e) or (g).

Additional requirements for rapid prepackaged Chapter 11 cases only include:

- Disclosing intention to have the case treated as a rapid prepackaged Chapter 11 case, with plan confirmation to be sought between one and 14 days after the petition date;
- Generally, only accepting classes are impaired under the plan, i.e., generally, no cramdown;
- No nonconsensual third-party releases, as would result in impairment;
- No contract or lease rejections, unless the rejection claim is unimpaired;
- Disclosing whether the debtor intends to reject, assume, or assume and assign any executory contracts or unexpired leases, and propose a timetable for a hearing;
- Describing the "cause" supporting any request to shorten any post-petition notice period under Bankruptcy Rule 9006(c) or form of disclosure to unimpaired parties;
- Providing support for the plan's feasibility and any other confirmation requirements that might implicate unimpaired parties receiving shortened notice under the scheduling motion; and
- Disclosing whether the debtor anticipates the need to leave the case open for post-confirmation matters other than the final fee applications.

Due Process Order

The new guidelines generally attempt to strike a balance between the impact of a prepackaged bankruptcy case on parties "unimpaired" under a plan under Section 1124 of the Bankruptcy Code, and thus deemed to accept it under Section 1126(f) of the code, with the need to promptly resolve remaining issues that may be critical to the case's success.

Accordingly, the guidelines enable debtors to request a due process order in the scheduling motion, a concept introduced by the Southern District of New York, which presided over the 2021 In re: Belk Inc. case.

The due process order schedules a time to raise the court's timely consideration of issues affecting parties, such as landlords, that did not receive prepetition notice in compliance with due process and the bankruptcy rules while expressly preserving such parties' rights even if the plan becomes effective before the court issues a ruling on the matter.

Takeaways

Guidance and Predictability for Prepackaged Cases

The amended guidelines offer detailed guidance for prepackaged Chapter 11 cases in the Southern District of New York.

As a result, they can be expected to enhance the level of predictability for companies considering using a prepackaged bankruptcy.

Introduction of Rapid Prepacks

The amended guidelines establish a clear framework for rapid prepackaged Chapter 11 cases, which can be a powerful tool for companies seeking to resolve their liabilities very swiftly while minimizing the financial and reputational impact on their business associated with a longer time in Chapter 11.

Road Map for Notice Requirements

The amended guidelines clarify noticing requirements in prepackaged Chapter 11 cases and provide guidance to practitioners on addressing notice considerations.

Generally, the guidelines focus practitioners on the need to understand and spell out in the scheduling motion their proposed compliance with the applicable notice requirements, including the grounds for shortening any otherwise required notice, for cause under Bankruptcy Rule 9006(c), and for seeking approval of different forms of notice for those unimpaired by the plan.

Reinforcing Southern District of New York's Position as Preferred Venue

By establishing comprehensive procedures for prepackaged cases and formally prescribing the use of rapid prepacks, the amended guidelines reinforce the Southern District of New York's position as a choice venue for achieving expedited Chapter 11 cases.

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[1] See Blue Bird Body Company (confirmed in 2006 approximately 32 hours after filing), Roust Corp. (confirmed in 2017 less than seven days after filing), Sungard Availability Servs. Cap. (confirmed in 2019 approximately 19 hours after filing), and Belk Inc. (confirmed in 2021 approximately 12 hours after filing). Such rapid prepacks are not free from academic debate. Compare Lynn M. LoPucki, Chapter 11's Descent into Lawlessness, 96 Am. Bankr. L.J. 247 (2022) and Robert K. Rasmussen & Royce Zur, The Beauty of Belk, 97 Am. Bankr. L.J. 438 (2023).