

What Is the Difference Between Pre-Packaged and Pre-Negotiated Bankruptcy Plans, and What Are Restructuring Support Agreements?

Creditor's Rights Toolkit

CONTACTS

[Heather Smillie](#) | [David M. Fournier](#) | [Kenneth A. Listwak](#) | [Evelyn J. Meltzer](#) | [Tori Lynn Remington](#)

This article explores the differences between pre-packaged and pre-negotiated plans and highlights important issues for creditors.

Unlike traditional Chapter 11 bankruptcy cases, sometimes called “free fall” cases, where a debtor files for bankruptcy and determines its path out of bankruptcy over the course of the following months, some debtors enter into bankruptcy with a plan entirely (or mostly) drafted, with an emergence strategy already completed. In these cases, debtors enter bankruptcy with pre-packaged plans or pre-negotiated plans (sometimes called pre-arranged plans) ready to file on or just after their petition date. Pre-packaged and pre-negotiated cases offer debtors and key creditor parties major advantages over free fall cases. One of the most obvious differences is the length of the case — while traditional free fall cases can remain open well over a year, some pre-packaged or pre-negotiated cases can be resolved in a matter of weeks, greatly diminishing the cost of administering the case. Pre-packaged and pre-negotiated cases also tend to have greater certainty in the outcome of the case, because both types of plans require buy-in from key creditor groups. However, there are important differences between pre-packaged plans and pre-negotiated plans, as discussed below:

KEY ISSUES

PRE-PACKAGED PLANS

In cases with pre-packaged plans, not only has the debtor already fully drafted a plan before filing for bankruptcy, but the plan has been fully solicited, voted on, and accepted by creditor classes necessary to confirm the plan. Thus, on day one of the case, the debtor has a confirmable plan filed on the docket. For this reason, cases with pre-packaged plans move extremely quickly. Creditors still have the opportunity to object to a pre-packaged plan, but will need to understand their rights under the proposed plan as soon as possible. Unsecured creditors may not have the benefit of or the need for a creditors' committee, as one may not be appointed if a plan leaves unsecured creditors unimpaired — in such cases, unsecured creditors can expect to receive payment in full and may have no need to file a proof of claim unless a claims bar date is ordered by the court.

PRE-NEGOTIATED PLANS AND RSAS

Somewhat less extreme than a pre-packaged plan, a pre-negotiated plan is a plan that the debtor has already

negotiated with certain key creditors, but the debtor has not yet begun the solicitation process when it enters bankruptcy, and creditors have not yet voted to accept the plan. To ensure that the debtors and supporting creditors move forward with the agreed-upon, pre-negotiated plan, they enter into a Restructuring Support Agreement (RSA), which the debtor will move to assume after filing the bankruptcy (this makes the RSA enforceable against the debtor in bankruptcy). An RSA strikes a balance between ensuring certainty of outcome and flexibility. Unlike a pre-packaged plan, where creditors have already voted to accept a particular plan, an RSA requires the debtor to propose a plan providing for certain agreed-upon treatment of the supporting creditors' claims and potentially other plan provisions, establishes a required timeline for plan confirmation or other key elements of a case (e.g., if there is a bankruptcy sale contemplated by the plan, then a deadline for a sale order to be entered), and requires the supporting creditors to vote in favor of the plan proposed by the debtor, so long as it meets the requirement of the RSA. Creditors who are not party to the RSA must take special care to understand how any proposed plan treats their claims — unlike pre-packaged plans, it is less likely that unsecured creditors will be treated as unimpaired. While not as fast as pre-packaged cases, pre-negotiated cases move more rapidly than a typical free fall bankruptcy.

TAKEAWAY

When dealing with either a pre-packaged or pre-negotiated plan, creditors need to move quickly to understand their rights. Experienced bankruptcy counsel can readily understand the proposed plan and develop a quick action plan to achieve the best result for the creditor in the case.

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