

5 Ways To Make Your DIP Hassle-Free

By Maria Chutchian

Law360, New York (June 05, 2014, 7:24 PM ET) -- As [Energy Future Holdings Inc.](#) has proven in recent weeks, securing bankruptcy financing can be a grueling endeavor if creditors think they're getting the short end of the stick, but experts say restructuring attorneys can overcome any resistance by following a few key steps.

Debtor-in-possession financing is typically one of the first major bridges a debtor with little liquidity must cross when it enters Chapter 11 bankruptcy. But sometimes getting creditors, secured lenders and the U.S. trustee's office on the debtor's side isn't easy, and contested evidentiary hearings on DIP financing can be costly.

EFH ultimately gained a Delaware bankruptcy judge's approval of \$4.475 billion of its \$9.9 billion DIP package Thursday, but it did so only after it and its subsidiaries were peppered with opposition from several constituencies. And while most bankruptcies aren't nearly as complex as EFH's, the road to a good DIP loan is still similar.

Here are five tips to land a hassle-free DIP package:

Be Clear That the Funds Are Necessary

Balancing the need for post-petition financing and proving to creditors and the court that the debtor can afford the costs of the loan can be a tricky task, but it's crucial if a debtor wants to keep the squabbling with creditors to a minimum.

While some companies enter bankruptcy with some cash collateral on hand that could theoretically fund operations during a Chapter 11 stint, it is typically not enough to ensure a smooth process.

"You have to convince everyone that you need it," Paul Labov of [Edwards Wildman Palmer LLP](#) said.

Talk to Prepetition Lenders

Discussing a possible loan with current lenders can be the best way to find the cheapest funding. Striking up talks with a party the debtor is already familiar with is a safe place to start in the DIP process.

Though prepetition lenders may be hesitant to loan more money to a distressed company, the benefits — most notably, the top rung on the food chain when it comes time for the debtor to pay back its debts and high interest rates — are usually enticing enough to lure a decent offer that can serve as the jumping-off point when the time comes to peruse the market.

"In the long run, hopefully you'll find that that may be the cheapest way to do it," Labov said.

Many times, these talks lead to an order wherein the prepetition lender consents to allowing the debtor to access the cash designated as collateral for the lender, if not a DIP agreement.

If possible, it's best to approach current lenders before actually filing a petition, according to Michelle Novick of [Arnstein & Lehr LLP](#). Waiting until the Chapter 11 case is already underway brings more opportunities for objections and, of course, is more expensive than negotiating outside of court.

"By agreeing to a DIP lender prior to the bankruptcy case, you take a lot of the hassles out of the picture," she said.

Show That the Debtor Shopped Around

Creditors will be sure to make their ire known if they don't think the debtor reviewed all possible options and selected the offer that provides the best terms. Moreover, no judge will sign off on

a DIP package without certainty that all possible DIP opportunities were evaluated and the best one was chosen.

"The key is, like algebra class in school, to show your work," Ted Gavin of **Gavin Solmonese LLC** said.

The U.S. trustee's office has also been known to get involved at this stage if it isn't convinced that the debtor has searched far enough to find the best financing available. The government watchdog will also speak up if it doesn't think the debtor and lender are being forthcoming about the nitty-gritty of the deal or if it finds the breakup fee exorbitant.

In many cases, the DIP loan will further encumber already-encumbered collateral. When that happens, proving that the debtor performed a diligent search for a lender is especially critical in avoiding creditor pushback and a difficult approval process.

"You have to shop the DIP around to make sure it's market-tested and you're getting the best terms for it," Labov said.

Offer Creditors Attractive Protection

Section 361 of the Bankruptcy Code says debtors can offer creditors and lenders cash payments, replacement liens or an "indubitable equivalent" of the collateral on which they already have liens as adequate protection. They'll all want the cash, of course, so it's important to make clear what is doable and what isn't.

"What you have to do is get ready for the barrage of creditors saying they're being harmed and you have to be agile and figure out how to settle them all down by providing them with adequate protection," Labov said.

Often, DIP lenders and unsecured creditors will duke it out over who is entitled to the proceeds of avoidance actions over alleged fraudulent transfers, Novick said. If it's possible to carve out those proceeds for unsecured creditors, that could be a key to resolution.

Still, "it depends on the case, it depends on the judge and it depends on the facts," she added.

Don't Forget, the Judge Matters Most

In the face of any type of objection, whether it be from creditors or the U.S. trustee, the most important thing to do is call the attorneys for the opposing parties and try to come to terms.

But while getting creditors and the U.S. trustee in the debtor's corner will undoubtedly make an attorney's life easier, in the end, the judge's opinion is all that matters. Attorneys shouldn't get waylaid by grumpy creditors. They should focus their efforts on presenting a sound argument to the court.

"It ain't rocket science," Gavin said. "Remember: You never need to convince parties that don't agree with you; you just need to convince the judge."

--Editing by Jeremy Barker and Katherine Rautenberg.