

The Canadian Institute's
9th Annual Advanced Insolvency & Restructuring Law Conference
January 23, 2009

MASTERING A DISTRESSED M&A TRANSACTION

Agenda

Panelist Introductions

Section 363 Sales Overview

Financing and M&A Market Trends

Panel Discussion

Q&A

Panelists

- Moderator:
 - David F.W. Cohen
Partner, Gowling Lafleur Henderson LLP
- Panelists:
 - Carl S. Lane
Managing Director, AlixPartners LLP
 - Aaron L. Hammer
Partner, Freeborn & Peters LLP
 - Andrew W. Chidester
Managing Director, Duff & Phelps, LLC



David F.W. Cohen
Gowling Lafleur Henderson L.L.P.

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David is a Partner in the Gowling Lafleur Henderson LLP Financial Services Industry Group David and leads its Trustees, Receiver and Monitors Client Team. He concentrates his practice in corporate and commercial law with a particular focus on the areas of bankruptcy and insolvency in both a domestic and cross-border context, and secured and unsecured financing transactions in both a domestic and cross-border context. In recent years David has acted in large lending and corporate restructuring and insolvency proceedings in the media, healthcare, retail, automotive, plastics, bottling, food and beverage, construction and other industrial sectors for secured and unsecured creditors, corporate debtors, and insolvency and turnaround professionals. As well, he has been very active in the asset based lending sector as well as cross-border financings, income trust debt financings and project financings.

Effective January 2009 David has been elected to the International Board of Directors of the Turnaround Management Association. David served for 6 years as a member of the TMA (Toronto Chapter) Board of Directors. David was the Chair of the Canadian Bar Association National Bankruptcy and Insolvency Section Executive for a two-year term ending in September 2004.

David was a visiting instructor in Bankruptcy Law at Osgoode Hall Law School for five years up to 2001. He has authored the *CCH Ontario Corporate Law Guide* chapter on Liquidation & Dissolution and has written and presented for the Canadian Bar Association on insolvency law topics, written for the *National Insolvency Review* and written for the *CCH Corporate Law Brief* on corporate law topics. He is a member of the CCH Corporate Law Advisory Board and the editorial board for Butterworth's *National Insolvency Review* newsletter.

David is also very active for the Canadian Institute, having chaired their Enforcing Creditor's Rights conference in 2001 and 2002 and co-chaired their annual insolvency super conference held in Toronto in January 2001 through to 2009. He has also spoken at and written for other conferences for the Canadian Institute and for Insight on due diligence in lending transactions, fraud in a bankruptcy and insolvency context, cross-border insolvency issues, debtor-in-possession financing and receivership alternatives, and stalking horse bids under U.S. Ch. 11 and Canadian law. David earned his law degree at Osgoode Hall Law School and was called to the Ontario Bar in 1992. He is a member of the Turnaround Management Association, Commercial Finance Association, the Association for Corporate Growth, Insol International, the American Bankruptcy Institute, and the American Bar Association.



Carl Lane
Managing Director
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Professional Highlights

Carl is a managing director in the Turnaround and Restructuring Services practice. He has over 17 years of experience as a financial consultant focusing on providing reorganization and restructuring consulting to major distressed companies, creditors, shareholders, and other interested parties. He has provided expert testimony in bankruptcy court matters and provided dispute consulting on a range of financial matters.

He has served both public and private companies in various industries, including Automotive, Construction, Energy and Mining, Financial Institutions, Food and Consumer Products, Healthcare, Insurance, Publishing, Real Estate and Hospitality, Manufacturing, Retail and Distribution and Transportation.

Client Experience

Carl has assisted management in developing restructuring initiatives and business plans to improve operations, profitability, and liquidity; performed analyses on the restructuring of capital and assisted in the disposition of assets; and prepared and assessed normalized and pro forma earnings, financial projections and business plans. Carl has assisted in planning for filing for protection under Chapter 11; advised regarding the terms and structure of Debtor-in-Possession financings, key employee retention and management incentive plans; and assisted with the development of Plans of Reorganization and Disclosure Statements; and assisted in the development of pro forma financial statements.

Representative engagements include Motor Coach Industries, ASARCO, MoneyGram International, Bally Total Fitness, Federal Mogul, Florsheim Shoes, Jacobson Stores, an aluminum casting company, a coal mining company, a regional baking company, and a national association.

Affiliations

He is a Chartered Financial Analyst, a Certified Insolvency and Restructuring Advisor, and holds a Certification in Distressed Business Valuation. He is a frequent speaker and author on the subject of corporate restructuring. Carl received a bachelor of science degree in accounting with high honors and a master of business administration degree with a concentration in finance from the University of Florida. Prior to joining AlixPartners, he was a principal at Deloitte Financial Advisory Services LLP and served as the director of corporate planning and development of an international publisher.



Aaron L. Hammer, Esq.

Leader, Bankruptcy, Reorganization
& Creditor's Rights Group
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Summary of Experience

Mr. Hammer leads the Bankruptcy, Reorganization, and Creditors' Rights Practice Group at Freeborn & Peters LLP.

With experience representing debtors, creditors' committees, financial institutions, bondholders, hedge funds, asset purchasers and landlords in all facets of domestic and cross-border insolvency matters, Mr. Hammer is an accomplished financial restructuring and bankruptcy attorney in the broadest sense. He is a trusted advisor to Fortune 500 companies on their insolvency matters and widely recognized as a leading expert in restructuring proceedings involving telecommunications assets and on chapter 15 foreign recognition proceedings. Mr. Hammer also was a member of the team that successfully represented Bank of America before the U.S. Supreme Court in *203 N. LaSalle Street Partnership*.

When not counseling clients, Mr. Hammer is an active member of the turnaround and restructuring community, and is regularly featured with other industry experts as a panelist in *Financier Worldwide's* Roundtable on trends in the U.S. bankruptcy market. He is a contributing author of "Cross-Border Debt Restructurings: Innovative Approaches for Creditors, Corporates and Sovereigns," (*Euromoney*, 2005), a leading treatise on the subject of cross-border insolvencies and workouts, and has authored dozens of other publications on bankruptcy and insolvency law. Mr. Hammer's latest article, "Understanding Chapter 15 of the United States Bankruptcy Code: Everything You Need to Know About Cross-Border Insolvency Legislation in the United States" (*Law and Business Review of the Americas*, Spring 2008), recently was cited to the U.S. Supreme Court on an issue involving multinational insolvencies.

Mr. Hammer served as an Adjunct Professor at Northwestern University School of Law for many years where he taught several advanced bankruptcy classes. He has lectured extensively on those subjects around the world, including at the University of Chicago and The Canadian Institute, and is a member of the Turnaround Management Association (2009 Steering Committee, Chicago Midwest chapter), American Bankruptcy Institute and INSOL International. Mr. Hammer also recently served as an expert in litigation involving the claims trading industry.

Bar Admissions

Illinois
United States District Court, Northern District of Illinois
United States District Court, Eastern District of Michigan
United States District Court, Eastern District of Wisconsin
United States Bankruptcy Court, Southern District of New York
United States Bankruptcy Court, District of Delaware

Education

Northwestern University School of Law, JD, *magna cum laude*
Order of the Coif
University of Michigan, BA, *with distinction*
James B. Angell Scholar



*Andrew W. Chidester
Managing Director
Duff & Phelps, LLC*

*Professional
Experience*

- Andrew Chidester is a Managing Director in the Chicago office of Duff & Phelps, LLC's Investment Banking Group. Andrew specializes in providing merger and acquisition, private placement and financial restructuring services to private and public companies.***
- Engagement highlights include:
 - Advised a distressed kitchen cabinet manufacturer and a portfolio company of a Midwest P.E. firm on its sale to another P.E. firm.
 - Advised a manufacturer of CNC Toolholders and a portfolio company of a Midwest P.E. firm, on its sale to a German strategic buyer.
 - Advised a manufacturer of heat exchangers, a portfolio company of a Midwest P.E. firm, on its sale to a New Zealand equipment manufacturer.
 - Advised a master distributor of pipes and valves on its sale to a U.S. strategic buyer.
 - Advised a manufacturer of school lockers on its financial restructuring and its Section 363 sale in bankruptcy to a P.E. firm.
 - Advised a manufactured housing company, a portfolio company of a Midwest P.E. firm, on its sale to a U.S. strategic buyer.
 - Advised a manufacturer of precision metal products, a portfolio company of a Midwest P.E. firm, on its sale to another P.E. firm.
 - Andrew's recent speaking engagements have included:
 - Panelist at the Northwestern Kellogg turnaround conference on April 23, 2008.
 - Guest speaker at a Kellogg Managing Turnarounds MBA class on June 25, 2007.
 - Prior to joining Duff & Phelps, Andrew was a Vice President at Brown Gibbons Lang, which provided investment banking services to middle-market companies.
 - Preceding his employment at Brown Gibbons Lang, Andrew was a Vice President in the Midwest Private Equity Group at Dresdner Kleinwort Wasserstein in Chicago.
 - Andrew also worked in the Corporate Finance Group of Heller Financial in Chicago, and was one of the founding members of Heller's Healthcare Finance Division.

*Education &
Certifications*

B.A., Carleton College
M.B.A., Northwestern University
M.S. - Accounting, DePaul University
Certified Public Accountant

P R O F E S S I O N A L C R E D E N T I A L S

Section 363 Sales Overview

Distressed Acquisition Alternatives in the U.S.

While there are numerous distressed acquisition alternatives, § 363 Sales have clear advantages

- Conventional Stock/Assets Purchase
- Friendly Foreclosure (Article 9 Sale)
- Assignment for the Benefit of Creditors (an “ABC”)
- Section 363 Sale
- Chapter 11 Plan of Reorganization Transaction
- Chapter 7 Trustee Liquidation Sale

Section 363 Sales

- Debtor generally permitted to operate business as it was conducted prior to the bankruptcy as “debtor-in-possession”
- Matters outside the “ordinary course of business” (such as asset sales) require prior court approval
- Although sales can be structured to occur as part of a reorganization plan, section 363 sales have become the prevailing method for disposing of debtor’s assets
- U.S. Bankruptcy Code imposes general requirements such as notice procedures and court approval, it does not prescribe the precise manner of sale
- U.S. Bankruptcy Courts prefer auctions and view auction procedures as necessary to maximizing value for the debtor’s assets
- Debtor has much discretion in setting procedures and selecting “stalking-horse” bidder
- Creditors committee looks to ensure process is transparent – that assets have been fully exposed to marketplace and bidding occurs on a level playing field

Advantages of a Section 363 Sale

- Process is extremely flexible, but not excessively long in duration (typically 30 to 90 days)
- U.S. Bankruptcy Code does not preclude sale of substantially all of the assets outside the Plan of Reorganization
- Assets are generally free and clear of liens and claims (with the exception of certain product liability and environmental claims)
- Debtor is often motivated to sell in order to generate necessary funds
- Purchaser can decide which contracts it wishes to assume, as long as defaults are cured and adequate assurance of future performance is provided
- It is difficult to overturn an approved sale

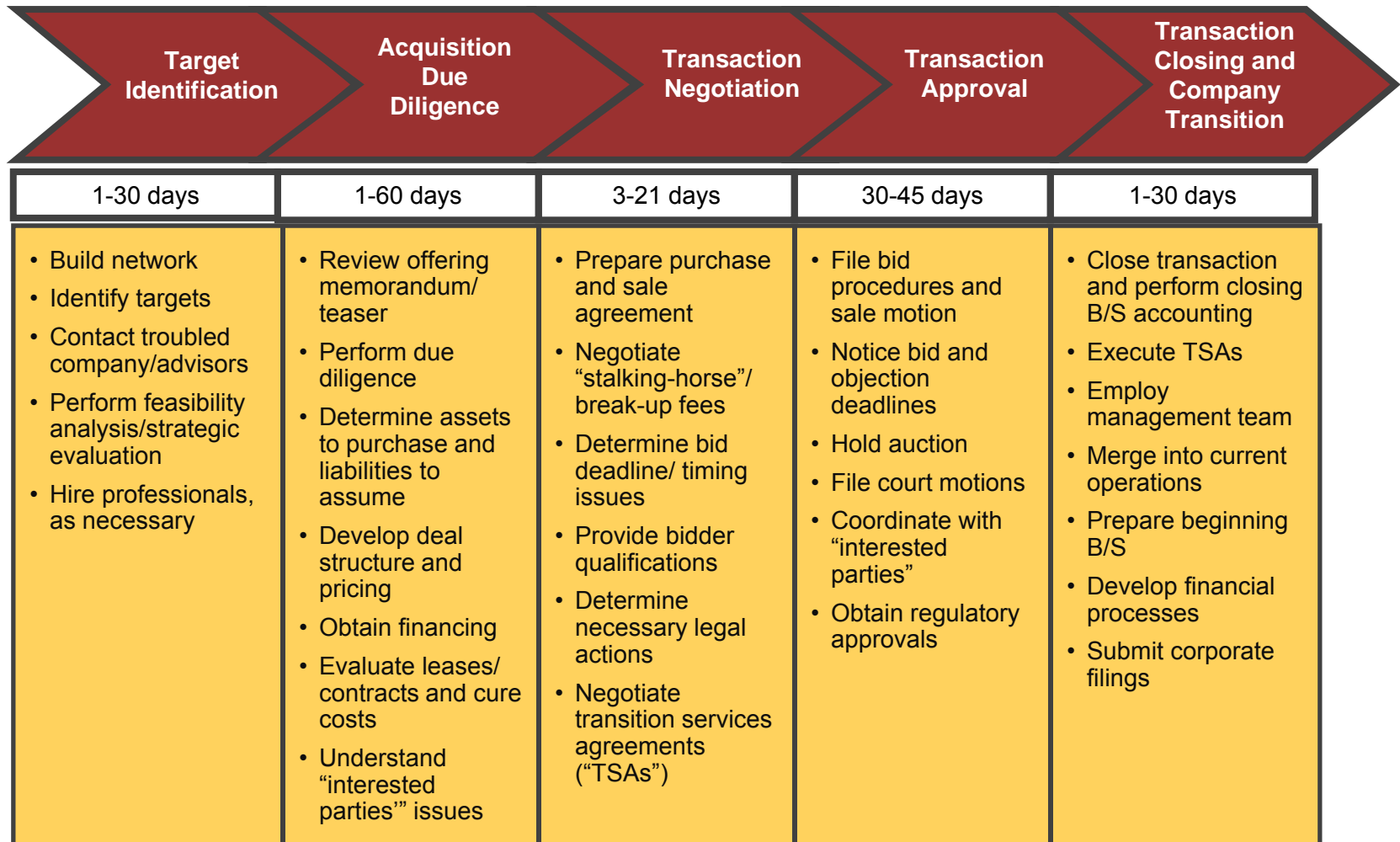
Disadvantages of a Section 363 Sale

- Auction of assets is usually required
- U.S. Bankruptcy Court approval is usually required
- U.S. Bankruptcy Court can modify procedures and time limits for bidding, auction, notice, and advertising
- Sale may be inconsistent with Plan of Reorganization process, particularly when most of the assets are sold
- Representations, warranties, and indemnifications are of little value and generally not provided
- Difficult to incorporate hold-backs or escrows as creditors require known purchase price
- Must deal with numerous constituencies
- Bidders have minimal standing, competing bidders typically have no standing before U.S. Bankruptcy Courts

Section 363 Sale Generic Process

1. Stalking Horse Bid obtained
2. Asset Purchase Agreement ("APA") negotiated and signed
3. Sections 363/365 Bid Procedures Motions filed
4. Bid Procedures approved by U.S. Bankruptcy Court
5. Notices sent
6. Competing Bids ("Qualified Bidders") tendered, possibly
7. Auction held, if Qualified Bidders
8. Hearing to Approve Sale and Assumption/Assignment of Contracts held
9. Closing

Acquisition of Troubled Companies Process (U.S.)



Key Terminology

- **APA** – If stalking horse, agreement will include negotiated bid protections such as break-up fee and bid increments – often used as form APA other bidders must mark up
- **363/365 Motion** – Will identify buyer, assets to be sold, contracts and leases to be assumed and assigned, general terms and timing of sale, should include copy of APA
- **Approval of Sale and 363/365 Order** – Critical to buyer that proper evidentiary foundation established, notices given, and findings made
- **Bid Procedures** – Negotiable – some “market” terms, but largely driven by specific deal facts – sets forth broad and flexible rules for Auction

Key Terminology (cont.)

- **Stalking Horse** – A qualified buyer who makes an offer to acquire the seller's company/assets before an auction commences
- **Break-up Fee** – A termination fee paid by the seller to the "stalking horse" bidder in the event the transaction contemplated fails to be consummated at no fault of the buyer
- **Initial Overbid** – The Minimum amount by which the "stalking horse" bid must be increased by the second bidder to be accepted by the seller

Benefits of a Stalking Horse Bidder

PURCHASER'S PERSPECTIVE

- Allows for a break-up fee to be provided
- Allows the purchaser to influence the terms of the purchase/sale agreement
- Allows the purchaser to influence the terms and conditions by which other bidders must make offers

SELLER'S PERSPECTIVE

- Provides the estate with a level of certainty that the assets will be sold at some minimum price
- Provides the debtor with a purchase/sale agreement that spells out the terms and conditions
- Should stimulate interest from other bidders

Rationale for Break-up Fees

PURCHASER'S PERSPECTIVE

- Compensates the initial bidder for its expenditures
- Compensates for risk that the purchaser's offer will be used as a "stalking horse" to induce other purchasers
- Requirement that the second bid be greater than the initial bid plus the break-up fee may be a disincentive to other bidders
- Compensates the unsuccessful bidder for the risk of losing other opportunities while the bidding process unfolds
- Compensates the potential purchaser for the risk that the company will continue to deteriorate

SELLER'S PERSPECTIVE

- Encourages the making of an initial offer when there are no competing bidders
- Discourages a bidding strategy designed to hold back competitive bids until late in the process
- Aids the seller in negotiating an initial bid that may be the potential buyer's highest bid
- Enhances the bidding process by creating momentum towards the consummation of a sale

Reasonable Break-up Fees

- Must be reasonable in comparison to purchase price (e.g., 2-3%)
- Must reasonably correlate with probable costs and expenses of the purchaser for “due diligence”
- If linked to initial overbid amount, cannot hamper or “chill” bidding
- Cannot be tainted by self-dealing or manipulation

Bid Protection Procedures

SOLICITATION

- Prohibit the debtor from indirectly soliciting further offers
- Require competing bidders to submit bids prior to the hearing to approve purchase/sale agreement
- Require terms and conditions of the competing bids to be substantially the same as those in the purchase/sale agreement
- Joint venture with other potential bidders who are interested in other assets

AUCTION

- Include deadlines for debtors to present motions to approve the bidding/auction procedures
- Require competing bidders to provide a minimum deposit
- Require all bids to be in minimum increments
- Require initial overbid to exceed the current bid by a certain percentage or dollar amount
- Include a provision to allow the purchaser to match any qualifying bid
- Include a break-up or stalking-horse fee, and take that fee into account when determining the highest bid
- Tie bid to DIP financing

Section 363 Sale – Business Considerations

- Executory contracts can be transferred notwithstanding anti-assignment clause; Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA”) disallows certain executory contracts from being transferred
- Assets are purchased “free and clear” of most liabilities
- The process may limit director and officer liability related to the sale
- The process may also limit exposure of breaches of “reps and warranties”

Section 363 Sale – Legal Considerations

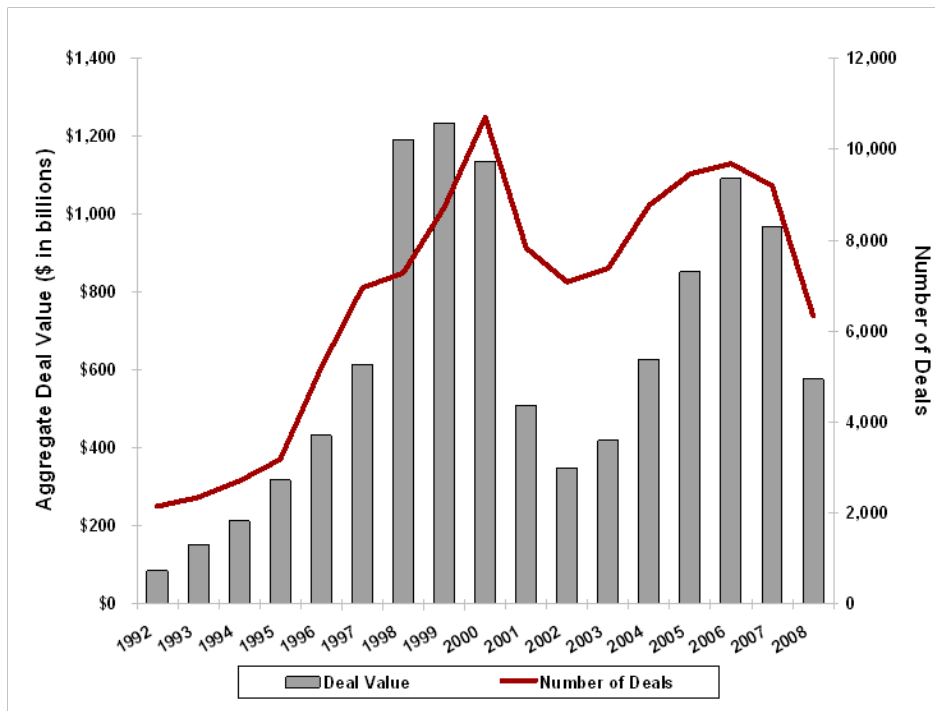
- To confirm a section 363 sale, the U.S. Bankruptcy Court must find
 - A sound business purpose
 - Accurate and reasonable notice of the sale was provided
 - The price paid is “highest and best” (i.e., fair and reasonable)
 - The sale was made in good faith
- Confirmation of a plan requires higher standard (1129(a))
- Contested sale hearings happen in U.S. Bankruptcy Courts with jilted or disgruntled bidders objecting at the sale hearing, typically on process grounds
- In July 2008, the United States Supreme Court held in *Florida Dept. of Revenue v. Piccadilly Cafeterias, Inc.*, that the section 1146(c) transfer tax exemption only applies to transfers under a confirmed plan of reorganization, not before such as in section 363 sales
- BAPCA limits key employee retention plans and time to assume/reject non-residential real estate leases
- *Clear Channel v. Knupfer*, 392 B.R. 25 (B.A.P. 9th Cir. 2008) ruling regarding “free and clear” findings in sale order can be reversed on appeal even though the sale itself was final under section 363(m)

Financing and M&A Market Trends

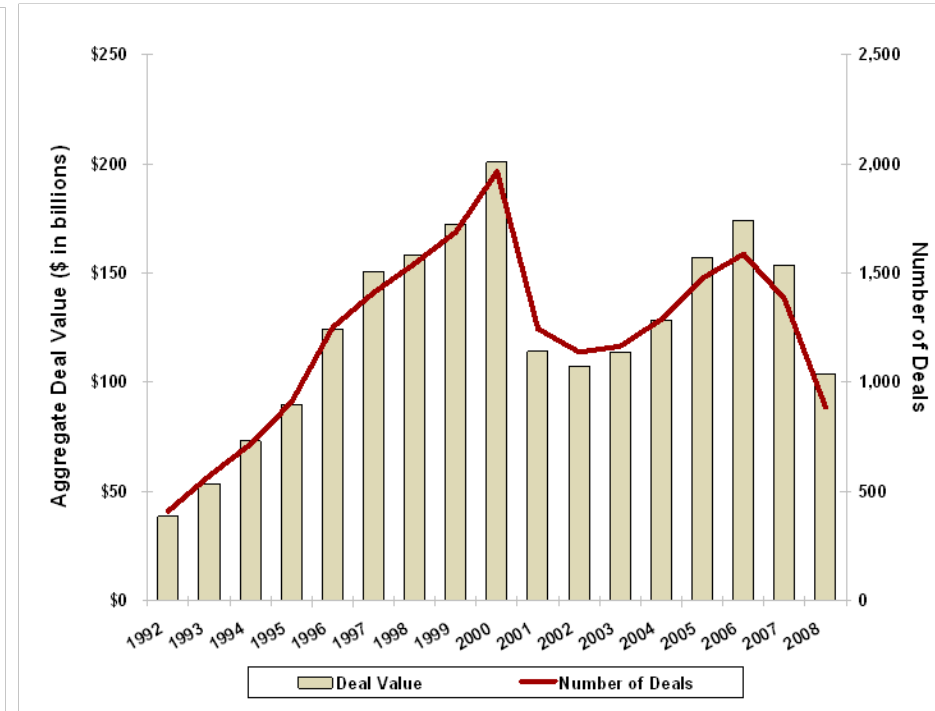
Current M&A Environment

M&A Market Environment: Aggregate U.S. Deal Volume

Overall U.S. M&A Activity



Middle Market U.S. M&A Activity^(a)



Source: Mergerstat (U.S. Announced Deals), through 12/31/2008

(a) Middle Market defined as deals with enterprise values less than \$500mm

Current M&A Environment

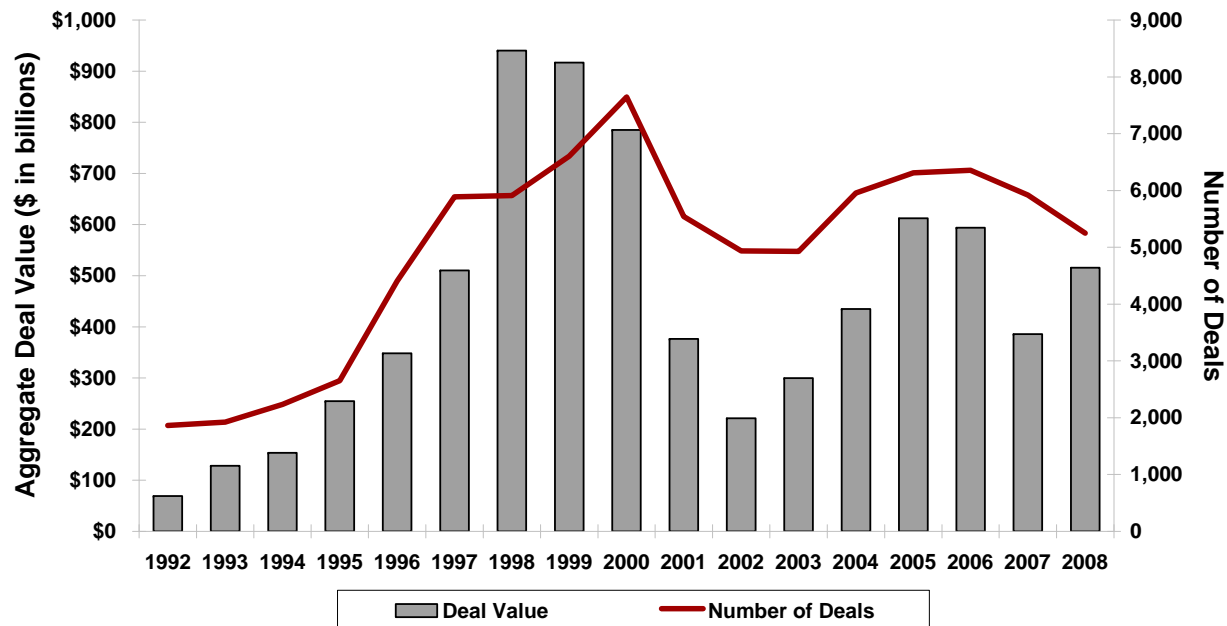
Strategic Buyer Market: Re-emergence of the Corporate Take-over

After peaking in 1998, strategic acquisitions fell precipitously, bottoming out in 2002

Since then, strong balance sheets and corporate liquidity have fueled a rebound in strategic acquisitions

- Expensive credit with more stringent terms could hinder financial sponsors' ability to out-bid strategic acquirors which could lead to more strategic acquisition activity

2008 Aggregate Deal Value and Deal Volume – Strategic Acquisitions



Source: Mergerstat (U.S. Announced Deals), as of 12/31/2008

The Debt Marketplace Today

A backlog of \$300B in leveraged loans and high yield notes will make refinancings and new issuances of speculative companies very difficult through much of 2009

- Combined with a softening economy, banks will be hesitant in issuing waivers due to decreased appetite for incremental risk and vanishing of CLO outlet
- Proliferation of 2nd lien and “stretch 1st lien” markets helped expand leverage multiples
 - 2nd lien issuances set new records
 - Have grown from \$165M in '01 to \$76.8B in 2007
 - Rapid growth means intercreditor agreements yet to be battle-tested
 - Approximately \$8B coming due through 2009

Evidence is in the secondary markets

- High yield spreads widening near historical average
- New issuances priced with OID, increased spreads and tighter covenants
- Volatility is back

Private equity firms have built massive war chests

- 2007 proved to be a record year for buyout/mezzanine funds
 - 415 PE funds raised a total of \$302B of new capital (Dow Jones), a 19% increase over 2006
 - PE funds may have more than \$500B of dry powder, which will be focused on venture, growth equity and mid-market

The Debt Marketplace Today

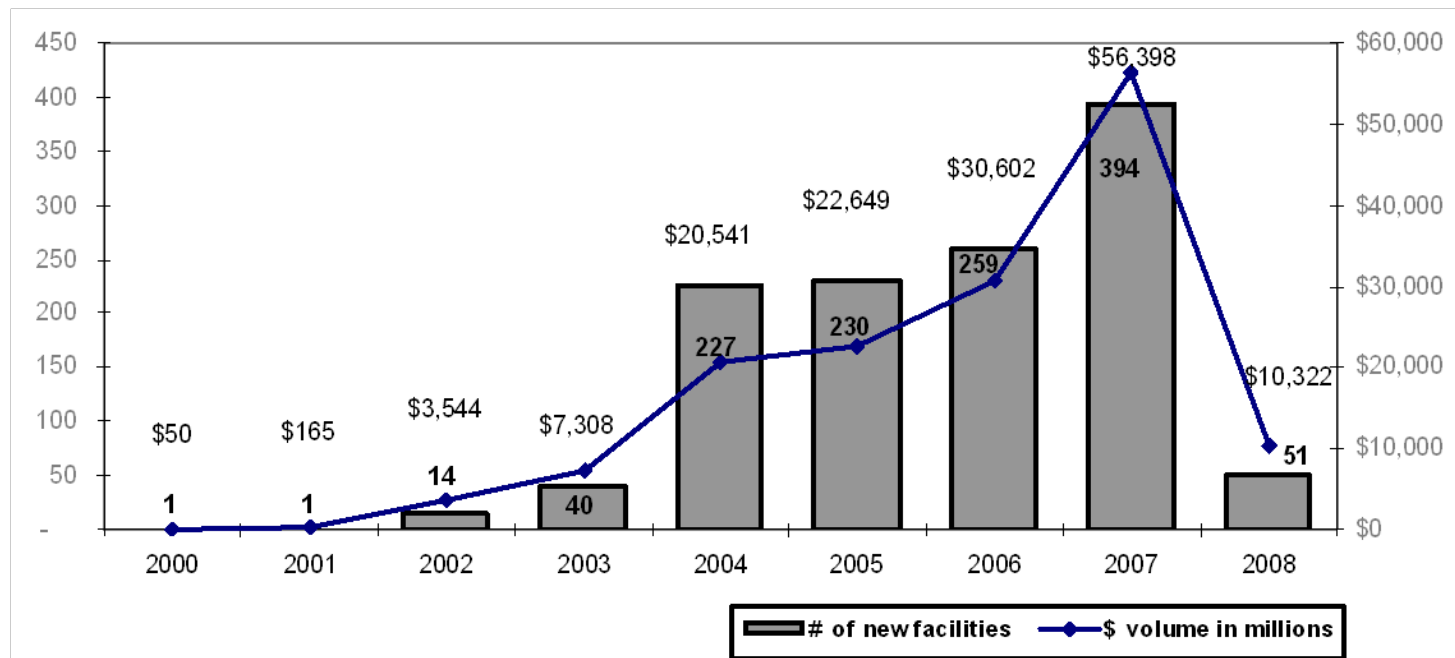
Second Lien Debt: New Issuances

Utilized by Bulls...

- 68% of issuances in 2005 used to fund LBOs and dividend recaps

...and Bears

- Provided distressed investors with added protections and companies with rescue financing



Source: Reuters Loan Pricing Corp.

Panel Discussion

FYI ONLY – DO NOT INCLUDE

Proposed Questions (Put in Order)

1. What types of processes are sellers of distressed U.S. and Canadian assets employing in the current market?
2. How have the new BAPCPA rules regarding lease assumption/rejection impacted the section 363 process?
3. Have there been any recent changes to the U.S. Bankruptcy Code or new precedent that a distressed buyer should be aware of?
4. What are the biggest differences for the buyer in buying a company outside of bankruptcy vs. inside bankruptcy?
5. Do stalking-horse processes generate more value than non-stalking horse processes?
6. How long does it typically take to complete and close a distressed M&A transaction?
7. Who are currently the most active buyers of distressed companies/assets?
8. From a turnaround managers perspective, what are the keys to a successful M&A transaction?
9. Other than the overall economy, what will be the major factors driving distressed M&A transactions in 2009?
10. From the perspective of the troubled company, what are the main factors that need to be considered in deciding whether to sell the company outside of bankruptcy or inside bankruptcy?
11. Given the need to operate the business during the sale process, what are some of the top strategies to generate liquidity?
12. How can buyers and sellers of cross-border assets utilize new chapter 15 of the U.S. Bankruptcy Code?

Topics per Flier

- Timing the market: Maximizing M&A opportunities during an economic slump
- Recognizing the latest legislative developments and how they effect a distressed M&A
- Top strategies for solving immediate liquidity challenges in turbulent industries
- Managing expectations and key stakeholder relationships effectively
- Analyzing alternative acquisition structures and strategies (in or out of a filing?)
- Obtaining and negotiating interim and permanent financing solutions (debt vs. equity: timing)
- Maintaining and maximizing the going-concern value of the business during the M&A process
- Expediting the process in today's fast-paced market: Avoiding the legal, financial, restructuring and insolvency issues that kill deals
- Understanding and overcoming pre and post integration issues for a successful M&A
- Assembling the right team of professionals: Speed matters, size matters and experience matters