

# Business Bankruptcy: How Has BAPCPA Affected Key Issues

*By Lisa J. Donahue  
Managing Director*

*ABI's BAPCPA*

*Georgetown Univ. Law Center – Washington, DC*

**AlixPartners**  
*Change the outcome.*

# Today's Agenda

- *Discuss Key Employee Retention Programs (KERP) prior to the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA)*
- *Review the KERP provisions of BAPCPA*
- *Compare the recent court rulings of Calpine Corporation and Dana Corporation*
- *Exclusivity Issues & Options*

# KERP's Prior to BAPCPA

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- *Programs were reasonably designed to achieve desired results without unduly burdening the estate*
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- *Senior executive focused – top executives were afforded disproportionate distributions versus the larger employee base*
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*503(c)3: Prohibits:*

- *Other transfers or obligations that are outside the ordinary course of business and not justified by the facts and circumstances of the case, including transfers made to, or obligation incurred for the benefit of, officer, managers, or consultants hired after the date of filing the petition*

# Calpine and Dana

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# Dana's Court Ruling

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- *This Court can not categorize the (completion bonus) of this size and form as an incentive bonus*
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*Incentive plans which may have some components that arguably have a retentive effect, don't necessarily violate 503(c)'s requirement*



# Calpine's Compensation Plan

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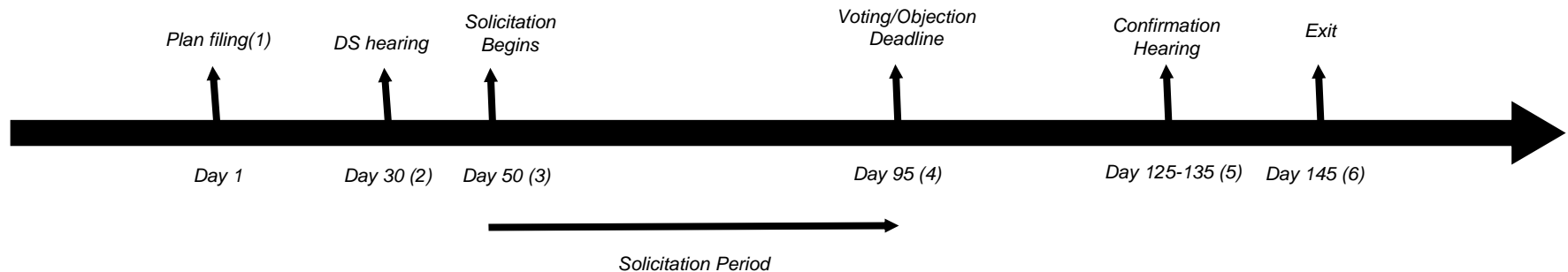
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# Restructuring and Emergence Process: Guiding Principles

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  - *emergence is preferred sooner rather than later, but not at expense of reorganized Debtor's enterprise value or creditor recoveries;*
  - *optionality has inherent value (accordingly, avoid absolutes whenever possible); and*
  - *at outset of POR process, building consensus yields better results than unilateral, adversarial approach.*
    - *Although building consensus may take longer up front, it often results in a shorter confirmation process on the back end.*

# Plan of Reorganization Illustrative Timeline

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**Note: Timeline can be contracted and expanded to suit particular needs of case. However, dramatic contraction will require complete creditor acquiescence, which is unlikely in most large Chapter 11 cases.**

**Note: Possibility exists for complex, lengthy valuation fight with various (Equity, etc.) at confirmation.**

# Path to Confirmation

- *Business plan development:*
  - *creditor due diligence; and*
  - *valuation/debt capacity discussions.*
- *Claims evaluation.*
- *Plan of reorganization:*
  - *distribution of value to stakeholders;*
  - *confirmation process; and*
  - *essential plan of reorganization components.*

# Business Plan Development: Creditor Due Diligence

- *Prior to commencing plan discussions, creditors and other stakeholders will want to understand, among other things:*
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  - *Liquidity Cushions and Break-even Points*
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- *Exclusivity ends within 18 month period*
- *Best outcome: file confirmable and consensual POR with sufficient advance stakeholder support assuming five month process*
- *Company must formulate alternative strategies if best outcome not possible.*
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## Exclusivity: Alternatives other than best outcome

- *Don't file POR; develop alternatives to maintain control*
  - *Take risk that a few parties can legitimately file plans*
    - *Committee, 2nds, project lenders are likely suspects (if applicable)*
  - *Develop inclusive, transparent process that demonstrates Debtor's control and eliminates stakeholders' need to force issues*
  - *Request court approval of various case management structures ("informal exclusivity")*
  - *Allows Debtor to surface with POR at right time*
  - *Has its own risks, particularly criticisms for delay*

# Essential Plan Components

- *Treatment and classification of claims*
- *Implementation of restructuring*
- *Liquidation analysis*
- *Valuation analysis*
- *Feasibility*



# Treatment and Classification of Claims

- *Claims tied directly to value under business plan.*
- *POR contains various classes of claims (e.g., DIP claims, secured, non-tax priority, multiple unsecured classes, subordinated classes, equity).*
- *Creditors' unique rights and settlements will determine separate classes and treatment.*
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- *Paramount concern: will intercompany claims analysis and litigation slow down exit process?*
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- *Exit financing.*
- *Corporate issues:*
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- *Tax restrictions to preserve NOLs.*
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- *claims litigation and estimation;*
- *distribution mechanics;*
- *fresh start accounting; and*
- *avoidance action evaluation.*

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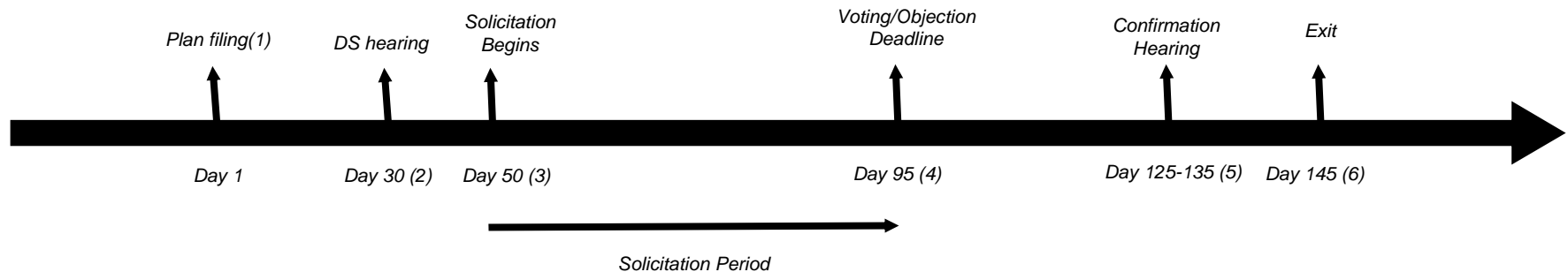


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