

Professional Perspective

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# 1-Day Prepackaged Bankruptcy

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On February 23, 2021, [Belk Inc.](#), a privately owned department store, filed for chapter 11 bankruptcy and emerged in approximately 12 hours. Belk's expeditious bankruptcy is emblematic of a growing trend towards super-fast prepackaged bankruptcy cases (1-Day Prepack)—joining the likes of [Sungard Availability Services](#) (19 hours) (Bankr. S.D.N.Y.), [FullBeauty Brands](#) (23 hours) (Bankr. S.D.N.Y.), [Sheridan Holding Company I LLC](#) (28 hours) (Bankr. S.D. Tex.), and [Mood Media Corporation](#) (30 hours) (S.D. Tex.). This article provides a general overview of a prepackaged bankruptcy, identifies the circumstances and attributes conducive to a 1-Day Prepack, and highlights certain risks and considerations that should be weighed in evaluating whether a 1-Day Prepack is appropriate for a given situation.

## What is a Prepackaged Bankruptcy?

Restructurings come in two primary varieties: out-of-court restructurings, such as credit facility amendments, exchange offers, and consensual restructurings of liabilities, and in-court restructurings. An in-court restructuring is a court supervised process that commences with the filing of a petition under chapter 11 of the Bankruptcy Code. A debtor in a chapter 11 case can emerge from bankruptcy through confirmation of a plan of reorganization or liquidation, which requires both satisfying the Bankruptcy Code's confirmation requirements and the ultimate approval of the bankruptcy court. A chapter 11 case can also be terminated by dismissal or conversion to a case under chapter 7.

In-court restructurings include traditional (free fall), prearranged, and prepackaged (Prepack) cases. A free fall, or traditional bankruptcy, generally entails a debtor filing for chapter 11 without a negotiated or agreed-upon path through, and, ultimately, out of, bankruptcy. The debtor ideally uses its time in bankruptcy to negotiate, solicit, and confirm a plan of reorganization or liquidation. A prearranged bankruptcy entails a debtor filing for chapter 11 with an agreement in place regarding the significant terms of a restructuring with certain key creditors, often reflected by a restructuring support or lock-up agreement, and using the chapter 11 in-court process to solicit votes on, and confirm, its plan.

In contrast to a traditional or prearranged bankruptcy, a Prepack is a bankruptcy filing in which a debtor fully negotiates the terms of a chapter 11 plan and solicits votes on its chapter 11 plan from those creditors entitled to vote before the actual bankruptcy filing. This is different from a free fall, where the plan is negotiated, and votes are solicited on the plan, during the bankruptcy case in accordance with the procedures set out by the Bankruptcy Code and applicable rules. Mechanically, the Bankruptcy Code allows pre-filing solicitation of votes on a bankruptcy plan, so long as it is done in accordance with applicable non-bankruptcy law—which generally requires solicitations (and required disclosures) in compliance with applicable federal securities laws. See [11 U.S.C. §§ 1125\(g\), 1126\(b\)](#).

Practically, the primary benefits of a Prepack are speed, cost, and value. A Prepack is faster, as it can be resolved in hours where a free-fall may take months or even years. A Prepack has lower cost, as the compressed in-court time allows a debtor to reduce costs, including the potential to avoid the appointment, and payment of, official committees. A Prepack also allows greater value preservation, since a Prepack minimizes operational disruptions.

Importantly, Prepacks lend themselves to financial, not operational, restructurings. This is because financial creditors can be easily and efficiently identified, negotiated with, and solicited outside of a bankruptcy proceeding in accordance with applicable securities laws. Creditors who are unimpaired under a plan are deemed to approve such plan, and creditors that receive no distribution under a plan are deemed to reject such plan. In either case, such creditors are not entitled to vote on the plan, which streamlines the approval and negotiation process. As such, Prepacks restructure financial debt, and operational related debts ride through the case unimpaired so as to avoid needing to identify, solicit, and negotiate with such creditors.

## Attributes Relevant to a 1-Day Prepack

A review of the 1-Day Prepacks, and their respective particulars, highlights three crucial considerations in evaluating the potential for a 1-Day Prepack to a given situation: compliance with notice requirements and due process, available venue, and the scope of creditor impairment and related objections. Note that, to date, no requirement has emerged requiring special circumstances to approve a 1-Day Prepack. To the contrary, Judge Drain noted that such a finding is not required. [Hr'g Tr. In re: Sungard Availability Services](#), Case No. 19-22915-RDD, 30:12-14 (May 2, 2019). However, circumstances that

threaten value destruction due to a long case, may weigh in favor on granting a 1-Day Prepack, especially if filed outside of a venue with a proven track record of granting such relief.

First, with respect to notice, Rule 2002(b) of the Federal Rules of Bankruptcy Procedure requires 28-days' notice of the time fixed for filing objections to, and the hearing to approve, disclosure statements and plans. As drafted, the rule does not specify whether the 28-day notice period must run after the filing of a bankruptcy case. In fact, it is not uncommon for the notice period in a super-fast Prepack to "straddle," which means that the notice period begins pre-filing, but concludes post-filing. Given the foregoing, a technical read of Rule 2002(b) allows a debtor to satisfy the requirement by providing notice before the commencement of a bankruptcy case—setting the stage for a 1-Day Prepack.

Accordingly, all of the 1-Day Prepacks mentioned above complied with the 28-day notice period by providing such notice before the commencement of the applicable bankruptcy case. To address due process concerns, Judge Isgur, in *Belk*, confirmed the case in approximately 12 hours, but also entered a "Due Process Preservation Order." The order provided controls over the confirmation order, extended certain deadlines, and preserved various parties' rights with respect to, among other things, raising due process objections, opting out of releases, and disputing adequate assurance of future performance with respect to assumed leases. Practically, the extension of certain objection deadlines prolongs certain litigation and transactional risks that would otherwise be eliminated with the entry of a fully implemented confirmation order. It is unknown if other courts will adopt the approach embodied in the Due Process Preservation Order with respect to 1-Day Prepacks.

Second, with respect to venue, bankruptcy cases can only be filed in districts in which a debtor is domiciled, has its principal assets, or where the debtor's affiliates have a pending case. As such, a threshold consideration for implementing a 1-Day Prepack is being able to file a potential bankruptcy case before a court that is familiar with 1-Day Prepacks and believes that Rule 2002(b) can be satisfied by providing notice prior to the bankruptcy filing. Currently, only two courts have sanctioned 1-Day Prepacks: the Southern District of New York, where all cases were in White Plains before Judge Drain, and the Southern District of Texas. It is uncertain if other courts will follow suit, so the decision to seek a 1-Day Prepack should consider favorable venues.

Third, all of the aforementioned 1-Day Prepacks had the support of 100% of their voting creditors, and provided a full recovery to all other creditors excluding interest holders. All of these Prepacks also avoided the appointment of official committees and had no formal creditor objections to confirmation.

It is important to note that a 1-Day Prepack is not a viable mechanism for a case seeking to reject burdensome leases and contracts, sell assets, or compromise litigation claims. A 1-Day Prepack may also be inappropriate for a publicly held company seeking to wipe-out publicly-held equity. None of the aforementioned 1-Day Prepacks involved publicly held equity, and it is unclear how a court would handle this type of a case in such a short timeframe.

In the context of the *Sungard* confirmation, Judge Drain of the Bankruptcy Court for the Southern District of New York indicated that a 1-Day Prepack might not be appropriate where there were creditor objections and a contested confirmation hearing. As such, the 1-Day Prepack mechanic lends itself to completely consensual restructuring situations without impaired objectors.