

FEASIBILITY - SECTION 1129(a)(11)

The Statute: Confirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan.

Purpose: The purpose of section 1129(a)(11) is to prevent confirmation of visionary schemes which promise creditors and equity security holders more under a proposed plan than the debtor can possibly attain after confirmation.

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CASE LAW INTERPRETATION

- The feasibility test requires a court to determine whether a plan is workable and has a reasonable likelihood of success.
- Feasibility does not require a guaranty of success.
- The "mere potential for failure of the plan is insufficient to disprove feasibility." *In the Matter of TCI 2 Holdings, LLC*, 428 B.R. 117, 148 (Bankr. D.N.J. 2010).
- The "key element of feasibility is whether there is a reasonable probability the provisions of the plan can be performed." *In Re G-1 Holdings Inc.*, 420 B.R. 216, 267 (D.N.J. 2009).
- A "relatively low threshold of proof" will satisfy the feasibility requirement. See *In the Matter of TCI 2 Holdings, LLC*, 428 B.R. 117, 148 (Bankr. D.N.J. 2010).

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FEASIBILITY TESTING POINTS

- Whether the debtor can satisfy the obligations that are due upon entry of the confirmation order, e.g. payment of professional claims (See 11 U.S.C. §1129(a)(9)(A)).
- Whether the debtor will have sufficient cash flow to make the periodic payments contemplated by the plan.
- Whether the debtor will have a sufficient funding source to make any balloon payments contemplated by the plan.

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ESTABLISHING FEASIBILITY

Standard:

- Fact intensive
- Case-by-case analysis
- Burden on the proponent by a preponderance of the evidence

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ESTABLISHING FEASIBILITY (CONT.)

Factors:

- Position of Creditors whose economic interests are at stake ("skin in the game")
- The debtor's historical financial and operational performance.
- The adequacy of the debtor's capital structure.
- The earning power of the debtor's business.
- Economic conditions before and during the bankruptcy.
- The capabilities of the debtor's management.
- The probability of the continuation of the same management.
- Any other related matters that determine the prospects of a sufficiently successful operation to enable performance of the provisions of the plan.

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WITNESSES

- Debtor Representative
- Expert Accountant/Financial Advisor
- Appraiser or Expert in Valuation
- Funder

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TESTIMONY (CONT.)

- A summary of the debtor’s operational results during the Chapter 11 case.
- A projection of the financial condition of the debtor on confirmation of the plan.
- Improving profitability by increasing revenue.
- Reducing expenditures.
- Capital expenditures.
- Eliminating unprofitable products or services.

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TESTIMONY

- The financial projections are reasonable.
- The debtor’s projected future revenues and other sources of cash are sufficient to satisfy its obligations under the plan.
- The debtor can operate profitably in the future.
- The debtor can meet its obligations incurred in the ordinary course of its business.
- The debtor has sufficiently qualified management to handle the operational, financial, and other issues likely to arise in the future.
- The plan presents a reasonable assurance of success.

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CASES OF INTEREST

- In the Matter of TCI 2 Holdings, LLC, 428 B.R. 117, 148 (Bankr. D.N.J. 2010)
- In Re G-1 Holdings Inc., 420 B.R. 216, 267 (D.N.J. 2009)
- In re S B Building Associates Limited Partnership, 621 B.R. 330 (Bankr. D.N.J. 2020)
- In re Greate Bay Hotel & Casino, Inc., 251 B.R. 213 (Bankr. D.N.J. 2000)
- In re Congoleum Corp., 362 B.R. 198 (Bankr. D.N.J. 2007)
- In re Indianapolis Downs, Inc., 486 B.R. 286 (Bankr. D. Del. 2013)

Balloon Payments:

- In re Eddington Thread Manufacturing Co., Inc., 181 B.R. 826 (Bankr. E.D. Pa. 1995)
- In re Briscoe Enterprises, 994 F.2d 1160 (5th Cir. 1992), cert denied, 510 U.S. 992 (1993)

SubChapter V:

- In re Pearl Resources LLC, 622 B.R. 236 (Bankr. S.D.Tex. 2020)

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