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presents

Distressed M&A: Seizing New Opportunities, Minimizing Legal Risks

Buying and Selling Troubled Businesses In and Out of Bankruptcy

A Live 90-Minute Audio Conference with Interactive Q&A

Today's panel features:

Stephen Spencer, Director, **Houlihan Lokey**, Minneapolis

Joseph Theodore Kinning, Partner, **Fulbright & Jaworski**, Minneapolis

Berry D. Spears, Partner, **Fulbright & Jaworski**, Austin, Texas

Wednesday, September 2, 2009

The conference begins at:

1 pm Eastern
12 pm Central
11 am Mountain
10 am Pacific

The audio portion of this conference will be accessible by telephone only. Please refer to the dial in instructions emailed to registrants to access the audio portion of the conference.

CLICK ON EACH FILE IN THE LEFT HAND COLUMN TO SEE INDIVIDUAL PRESENTATIONS.

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Confidential

Distressed M&A – Overview of Transactional Environment | 9.02.09

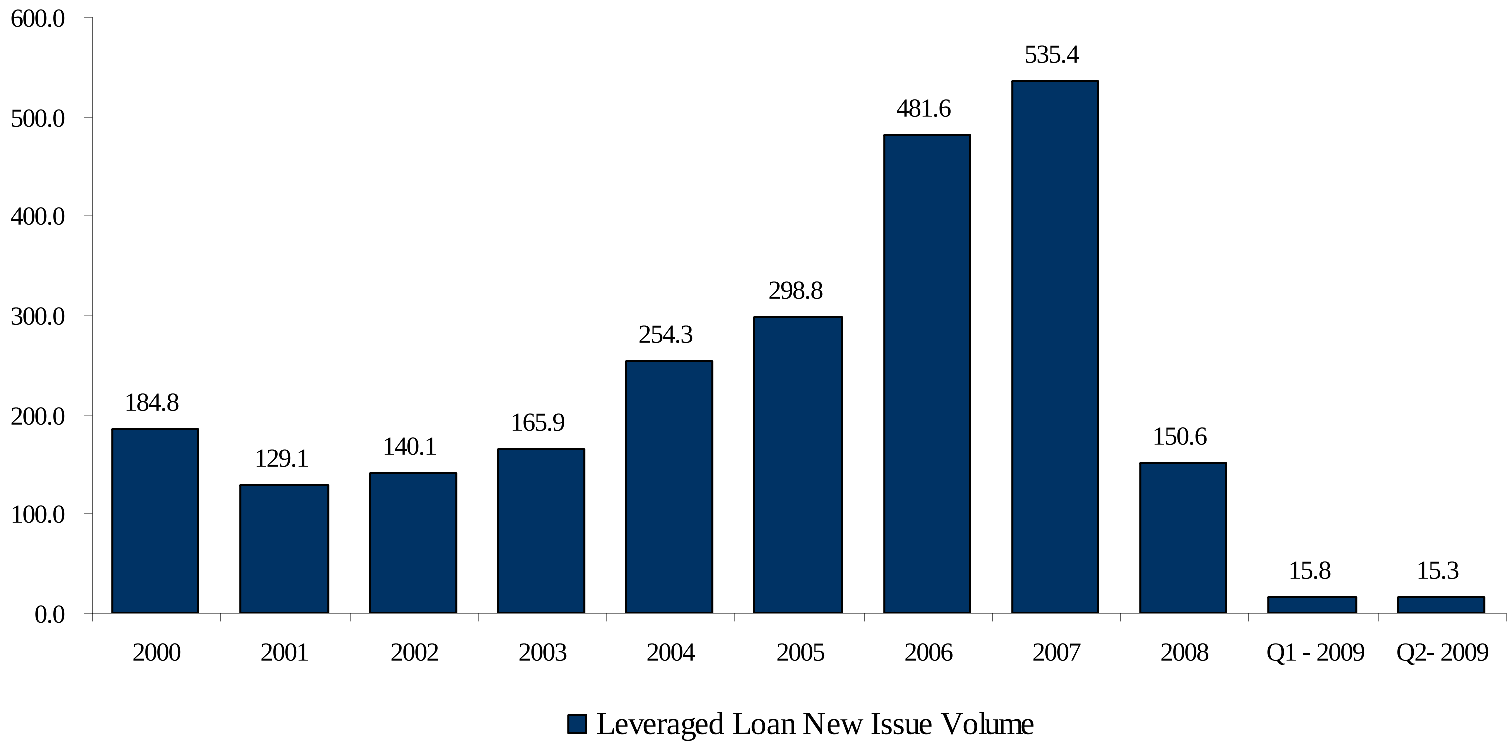
Strafford Publications Presentation

Stephen J
Spencer
Houlihan Lokey

HOULIHAN LOKEY

Overall Corporate Leverage Has Been Increasing

Leveraged Loan New Issuances ($ in billions)

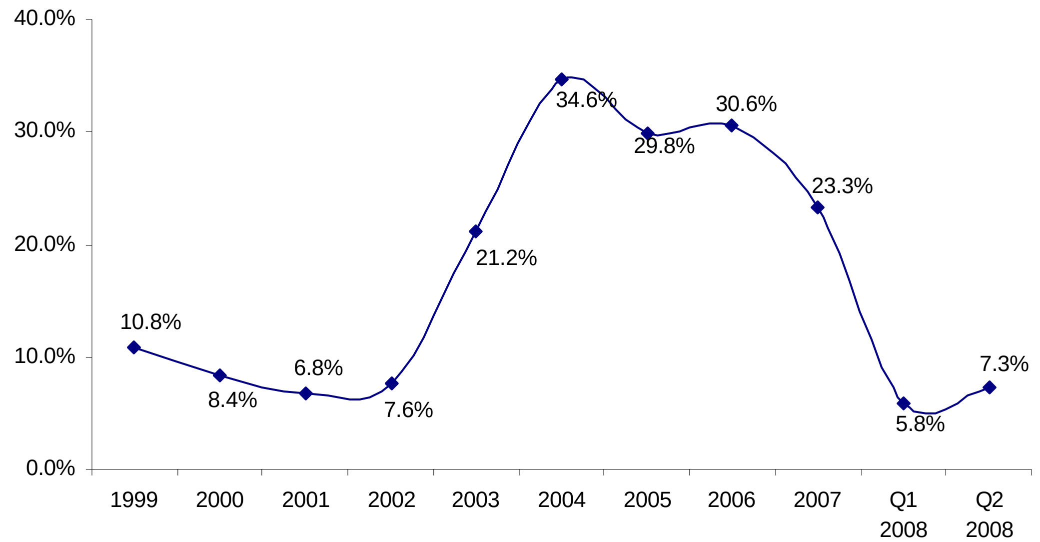


Source: Standard & Poor's LCD as of July 29, 2009
Note: Data reflects domestic issues only.

Quality of Debt Issued Has Declined…

- …And the loans have become more risky
  - From 2003 – 2007 there was a substantial increase in B+ rated issuance, traditionally a much more austere credit

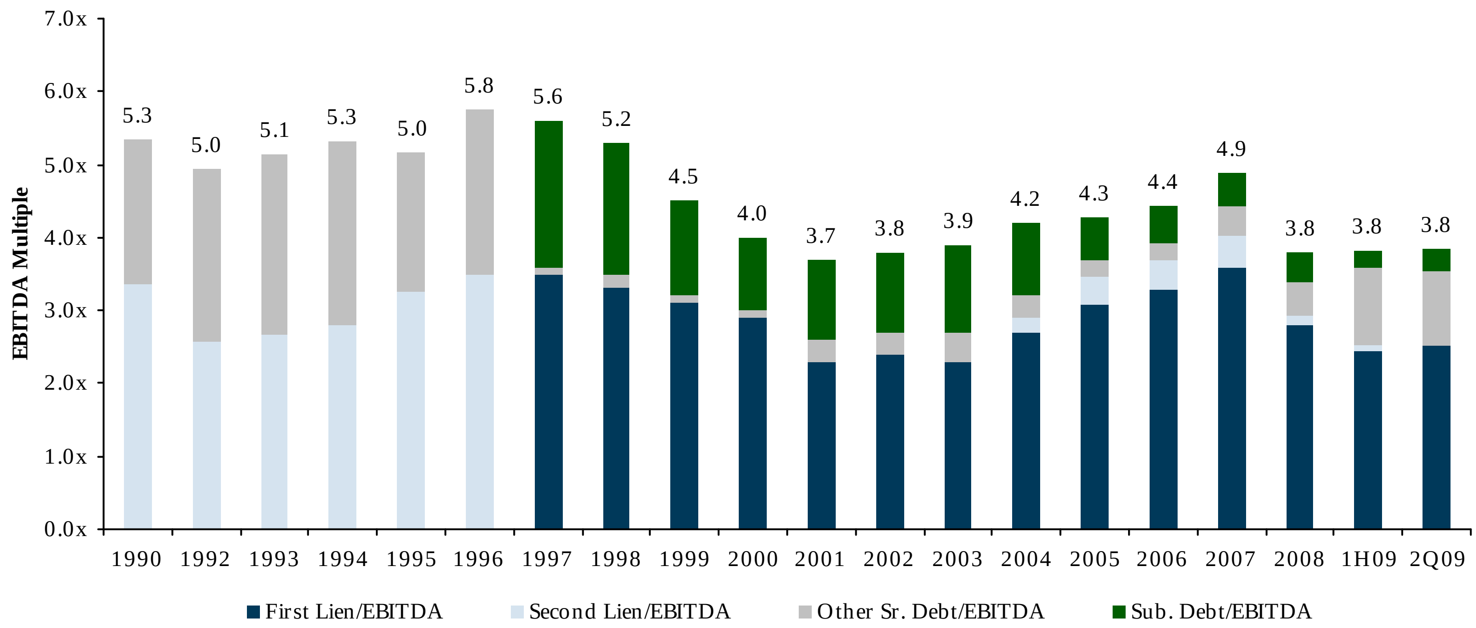
B- Rated and Below Issuances as a % of Rated Leverage Loan New Issuances



Source: Standard & Poor's LCD : July 2008.
Note: Data reflects domestic issues only.

…And This Has Been Underway For Years

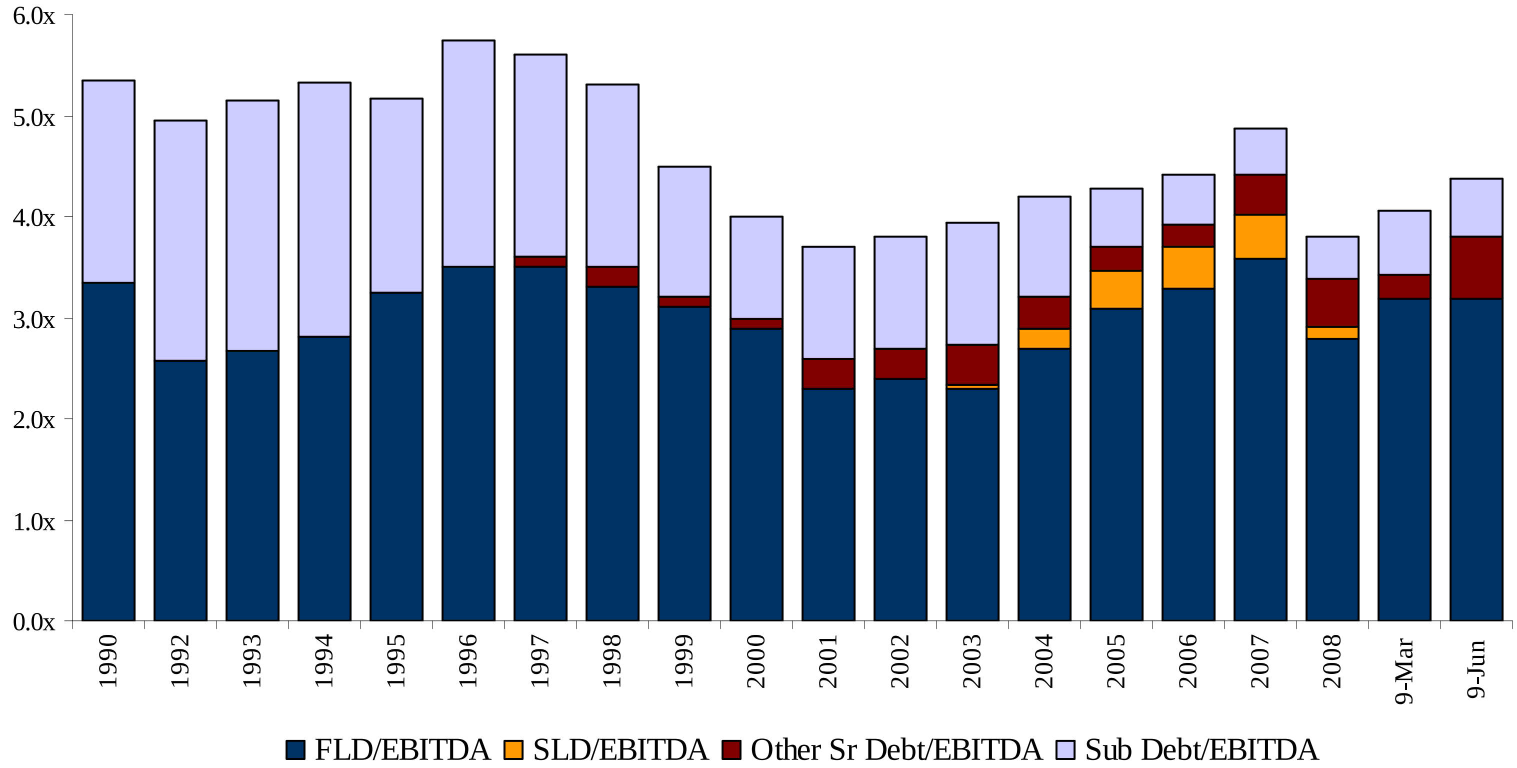
Average Debt Multiples of Highly Leveraged Loans



Source: S&P LCD.
Note: For 1990-1996, breakouts of First Lien debt & Second Lien debt were not available; therefore the lower portion of the column reflects Bank Debt/EBITDA and the top portion reflects all Non Bank Debt/EBITDA.
Criteria: Pre-1996 data is based on all debt priced at L+250 and higher; 1996 to date data is based on all debt priced at L+225 and higher; Media loans are excluded; 1991 data is excluded given too few deals to form a meaningful sample.

In Addition, Capital Structures Have Become Increasingly Complex

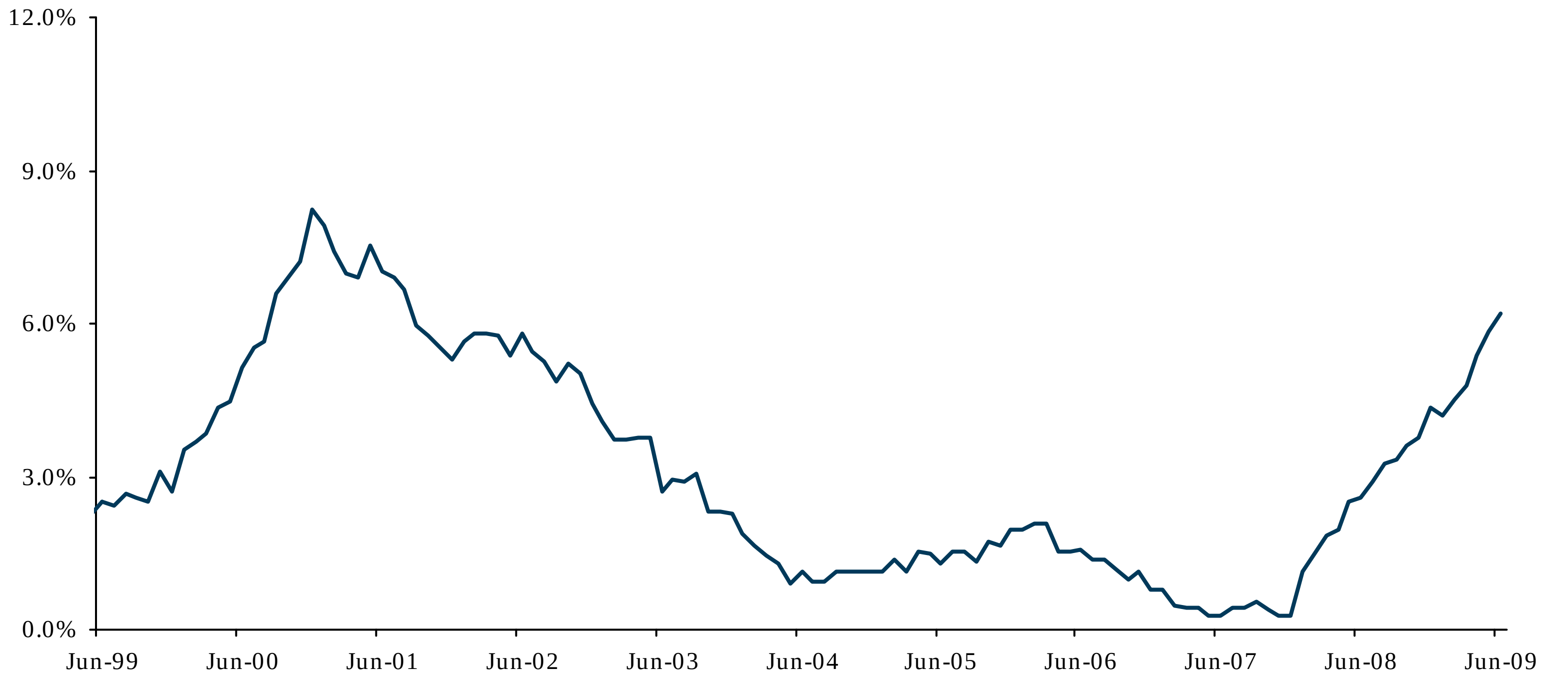
Average Debt Multiples of Newly Issued Highly Leveraged Loans



Source: Standard & Poor's LCD LoanStats Weekly, July 23, 2009
Criteria: Pre-1996: L+250 and Higher; 1996 to Date: L+225 and Higher; Media Loans Excluded; There were too few deals in 1991 to form a meaningful sample.
Notes: "FLD" denotes first-lien debt; "SLD" denotes second-lien debt; for years 1987-1996 Sub Debt/EBITDA reflects all Non Bank Debt/EBITDA.

All Of Which Is Resulting In Dramatic Increases In Defaults

LTM[(1)] Default Rate by Number of Issuers

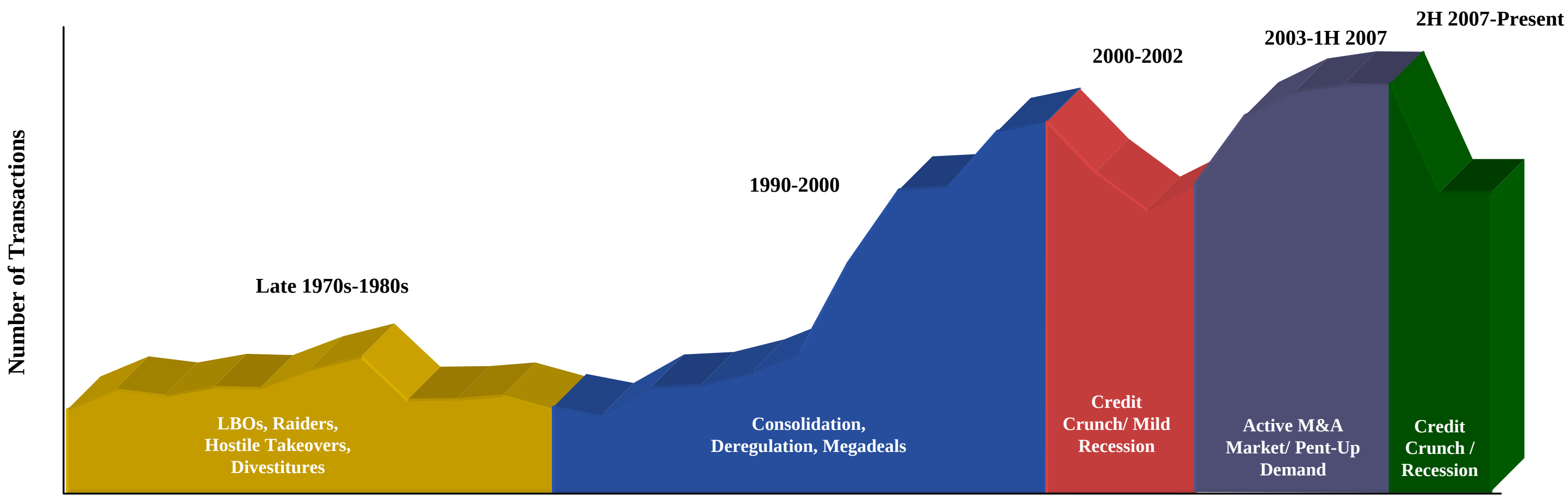


Source: S&P LCD
[1] LTM =Latest Twelve Months

While Overall M&A Transactions Are Down…

- After a downturn from 2000-2002, M&A activity steadily increased from 2003-2007
  - Through June 2007, transaction levels rebounded to near all-time historical highs
  - The onset of the credit crunch, triggered by problems in the sub-prime market, has effectively shut down financing markets since the second half of 2007, causing agreed upon transactions to be unwound and the rate of new to deals to plummet
- The outlook for the remainder of 2009 reflects an altered M&A landscape, with a different set of drivers underpinning a muted level of activity
  - M&A activity will likely consist primarily of defensive mergers, sales of non-core assets and industry restructuring plays
  - Opportunities triggered via sellers motivated by short-term liquidity needs, covenant default pressures and focus on core business

Historical Developments

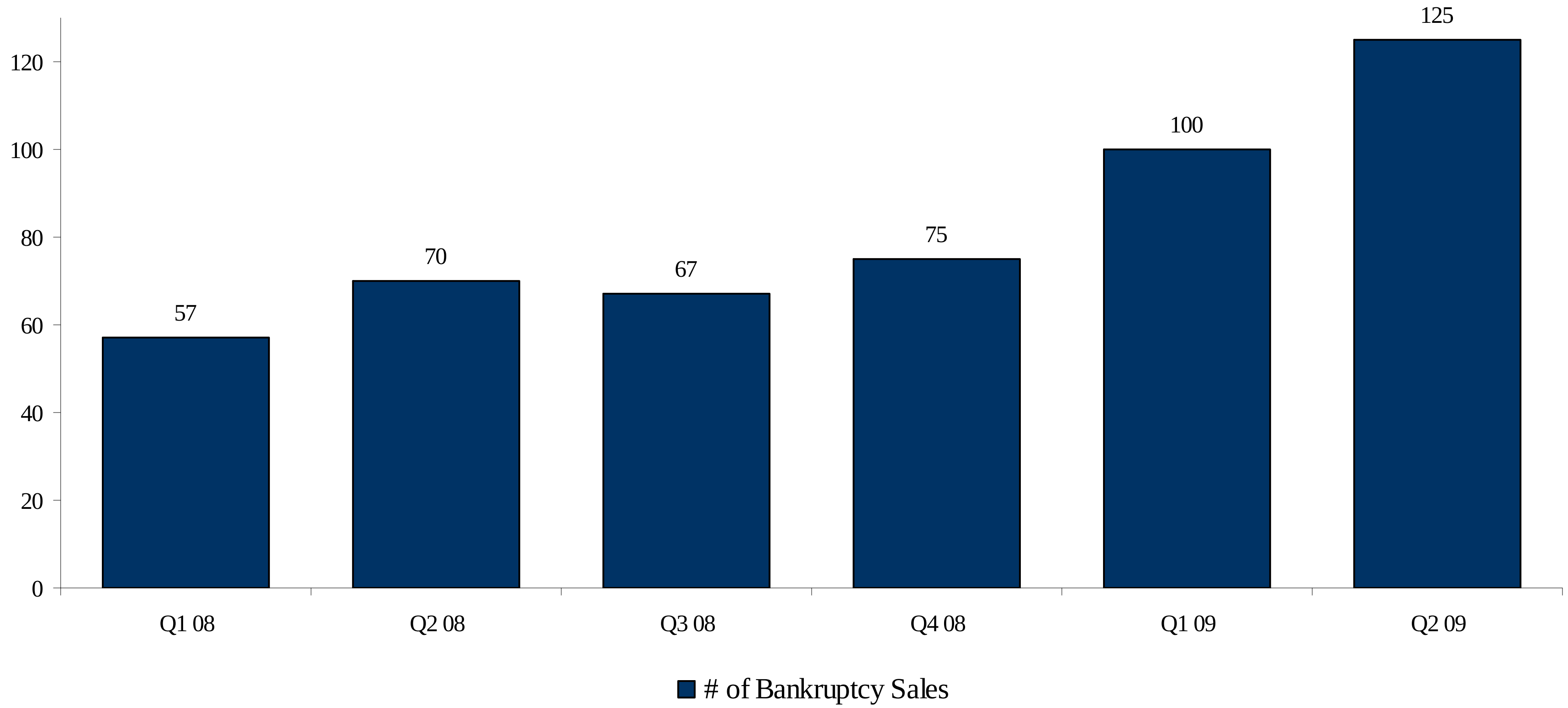


Source: Mergerstat.

…Distressed Transactions Are Up

- The number of bankruptcy sales have generally increased, with a greater number of struggling companies filing for bankruptcy

Bankruptcy Sales from 1/1/08 to 6/30/09 (# of Sales)



Source: Capital IQ
Includes all domestic targets and sellers that have filed for bankruptcy

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Distressed M&A: Buying and Selling Businesses Facing Financial Trouble

Strategies for Structuring Winning Deals

Presented by:

Joseph Kinning

September 2, 2009

FULBRIGHT & Jaworski L.L.P.
Attorneys at Law

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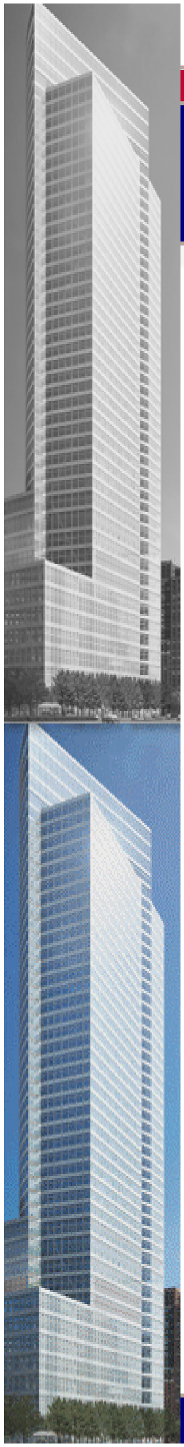
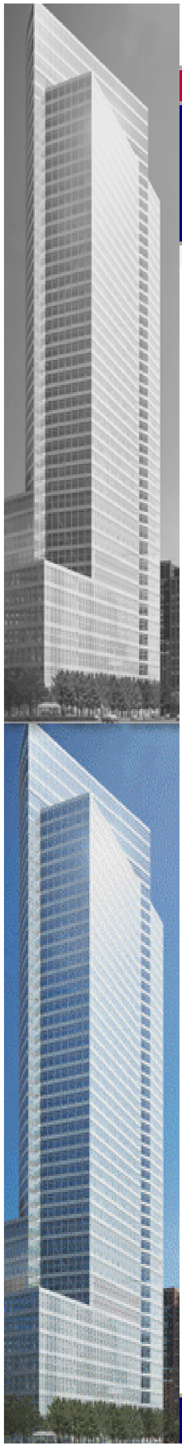
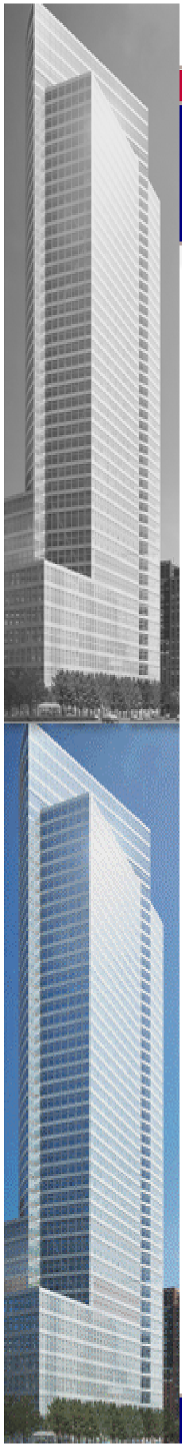


Purchasing Assets from Non-Bankrupt Companies



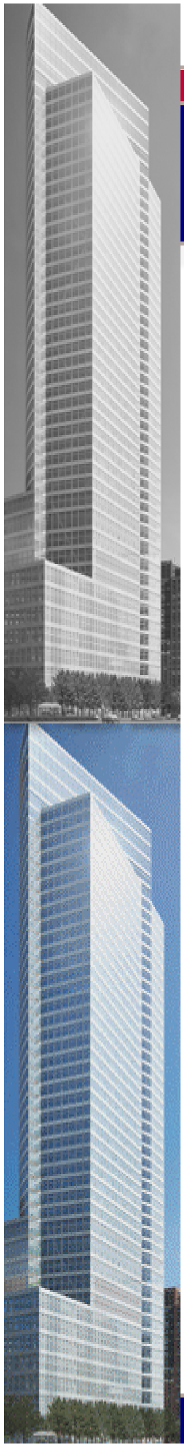
SETTING

- As the economy puts stress on operating companies many of these companies will be forced to raise cash:
  - To meet debt covenants
  - For regulated industries to satisfy regulatory requirements
  - To raise capital to support operations
  - To meet day-to-day cash requirements
  - To meet the demands of lenders
  - In addition, operating companies under earnings pressure may need to divest underperforming assets
  - Certain industries are more stressed than others
  - Recent LBOs or spin-offs may be over-leveraged



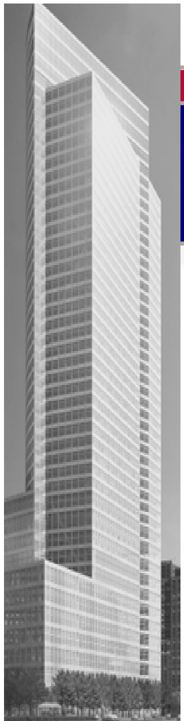
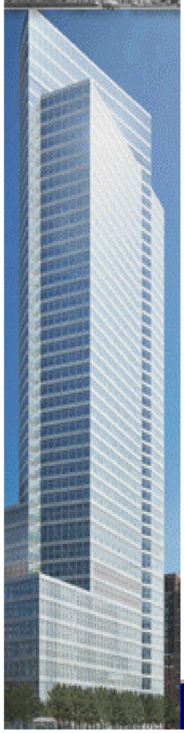
OPPORTUNITY

- Distressed assets may be selected for divestiture based on:
  - Non-strategic fit with future operating plans
  - Poor economic performance of the Asset
  - Capital requirements which cannot be met in current environment
  - Opportunities are available for Buyers who can bring focus and resources to improve the performance of these assets
- In addition, in current environment Buyers are having success proactively approaching financially distressed companies to purchase strategic assets



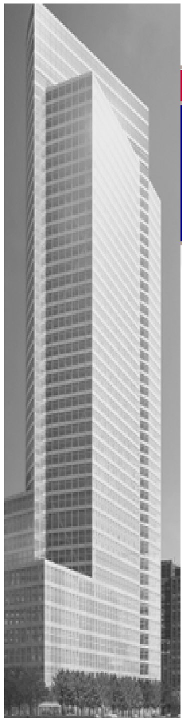
KEY ACQUISITION POINTS

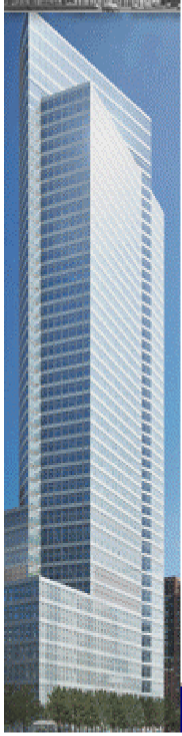
- Speed
  - Seller will favor Buyer who can close quickly
  - No financing contingency
  - Avoid regulatory approvals or convince Seller that process will go quickly
  - Accelerate Due Diligence process
  - Accelerate negotiation of Purchase Agreement
  - Consider pre-emptive bid for assets being shopped

KEY ACQUISITION POINTS

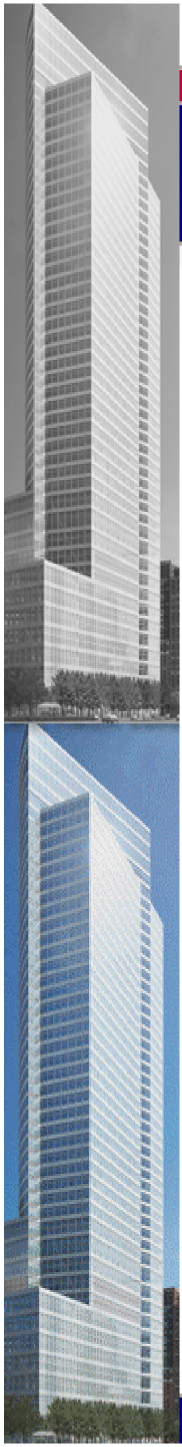
- Certainty of Close
  - Seller will favor Buyer who can provide certainty of close
  - Be prepared to obtain Buyer Board approval prior to execution of definitive agreement
  - No Due Diligence outs
  - MAC Clause to be tailored to transaction (Buyer will need to accept that asset is distressed)
  - Agree to restrictive Force Majeure Clause
  - Representation and Warranty bring-down will contain materiality qualifier



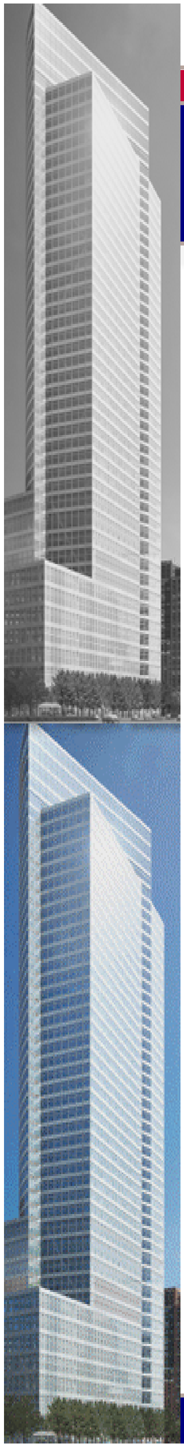


KEY ACQUISITION POINTS

- Key concerns
  - Structure as an Asset Sale to avoid assumption of unknown liabilities
  - Make sure Seller has brought all necessary constituents to the table to avoid getting re-traded on deal terms
  - Retention of key members of management
  - Fraudulent Transfer: U.S. Bankruptcy and state law allow creditors to void certain prior debtor transactions
    - Seller receives less than reasonably equivalent value AND
      - Seller was **insolvent or became insolvent after transaction** OR
      - Seller had reasonably small capital for business or transaction OR
      - Seller believed it would incur debts beyond its ability to pay

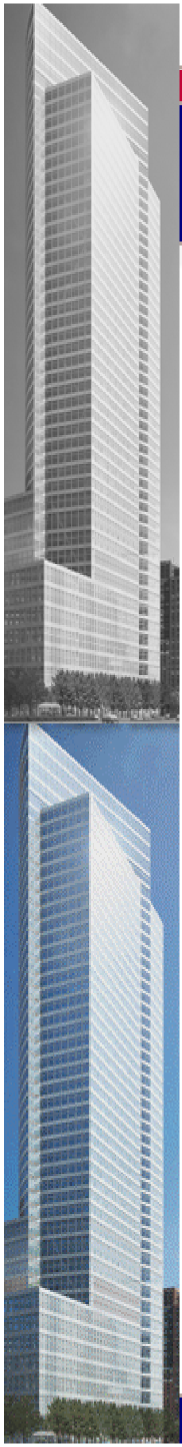


- Avoiding a Fraudulent Transfer problem
  - Post closing solvency of Seller
    - Due diligence
    - Solvency opinion
    - Solvency representation
  - Reasonable equivalent value
    - Fairness opinion
  - In some circumstances the Purchase Price should go directly to creditors through funds flow



KEY ACQUISITION POINTS

- Purchase Agreement to provide clear Bifurcation of Liabilities
  - Devote extra attention to delineation and Scheduling of Assumed Liabilities and Excluded Liabilities



KEY ACQUISITION POINTS

- Certainty of Seller Indemnity
  - Consider financial viability of Seller
  - Negotiate for a guarantor
  - Negotiate for a Letter of Credit
  - Negotiate an escrow or hold back
  - Require Seller to purchase Representation and Warranty Insurance
  - Factor into the Purchase Price
- Consider asking Seller to file for Bankruptcy protection to obtain the benefits of a 363 sale

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SECTION 363 ASSET SALES

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SECTION 363 ASSET SALES

- Simplest and quickest distressed deal strategy (Debtor sells assets [e.g., equipment, fixtures], subsidiaries or entire entity via formalized Bankruptcy Code process)
  - Evidentiary standard: Reasonable Business Judgment
  - *In re The Lionel Corporation, et al.*, 722 F.2d 1063 (2d Cir. 1983)
  - Developments post – *Lehman*, *GM* and *Chrysler*

    - 363 Sale Denied (*In re Gulf Coast Oil Corp., et al.*, 404 B.R.407 (Bankr. S.D. Tex. 2009)

- Encompasses a competitive but <u>expedited</u> sales process and established <u>bid procedures</u>:
  - Compressed due diligence
  - "Stalking Horse" process is typical
  - Controlled Public Auction/Bid Procedures Approved
  - Court Approval of Sale Required

363 ASSET SALES (continued)

Key Attributes

Stalking Horse Issues

Considerations

- Early access to management and more time to complete due diligence
- Negotiate breakup fees and overbid protections
  - Break-up fee and expense reimbursement potential have jurisdictionally sensitive parameters
- Stalking horse often dictates purchase agreement structure for competitive bidders
- Stalking horse wins 70% of the time [1]

[1] Based on a Houlihan Lokey analysis of 165 transaction sample universe.

363 ASSET SALES (continued)

Advantages →

- Structure deal to get what the Buyer wants (i.e., purchase only valuable assets)
- Can require Debtor to assume and assign (or reject) contracts
- Acquire assets "free and clear" of liabilities (including potentially leaving payables behind)
- Speed and certainty for Buyer/Seller
- Limited ability for a dissatisfied creditor class to "block" deal; objection is sole recourse; only creditors have standing to object

363 ASSET SALES (continued)

Disadvantages →

- **Guarantees a public auction**
  - **Requires the Stalking Horse/Buyer "show all your cards" publicly without complete certainty that the deal will be consummated**
- **Uncertainty with court process and securing Stalking Horse protections**
  - **Breakup fees and bid protections are not guaranteed; Court has discretion and parties may object**
- **May face credit bid from secured creditor(s)**
- **Potential material disadvantage if Buyer does not want to retain existing management (who may be significant decision makers for the Seller)**
- **Absence of some of the most powerful "tools" available as under Plan Process:**
  - **NOLs not transferable**
  - **Inability to obtain financing from "trapped" creditors**