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Underwriter Underwater: The LandAmerica Bankruptcy

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Introduction

On November 26, 2008, LandAmerica Financial Group, Inc. ("LFG") filed a voluntary petition in the Eastern District of Virginia, declaring Chapter 11 bankruptcy. Federal bankruptcy judge Kevin Huennekens closed the case on December 22, 2015.

Before filing for bankruptcy, LFG was one of the largest title insurance underwriters in the United States. In 2008, the company collapsed during the Great Recession. The financial crisis caused many other companies involved in the real estate industry to experience a similar fate. LFG's failure was due in part to its participation in 1031 exchanges: transactions made possible by the Tax Code to defer taxable gains upon the sale of investment property.

This paper outlines the fall of LFG and how, through bankruptcy proceedings, LFG completed a successful liquidation of its assets—beginning with first-day motions before Judge Huennekens and ending with a return of eighty cents on the dollar owed to unsecured creditors after complete liquidation of the company.

The Debtor's Business

LFG served as the holding company for various subsidiaries, collectively called LandAmerica.[1] At the time of its collapse, LandAmerica was the third largest title insurance underwriter in the United States.[2]

Consider this example to understand what a title insurer does.[3] Buyer wants to buy a green house. To obtain the money to buy the house, Buyer agrees to give a mortgage on the property to Lender. Before lending the money, however, Lender seeks a lender title insurance policy from Insurer—a local title insurance company. Buyer covers the cost for Lender to pay Insurer (1) to check the state of title of the property and (2) to insure against any claims against the property that it missed when completing its search.

Buyer obtains an $80,000 loan from Lender. Buyer uses that money and $20,000 in savings to pay Seller for the house. The fair market value of the house is $100,000. Lender is over secured: the value of the property is greater than the outstanding loan. So if Buyer immediately defaults and Lender forecloses, Lender will receive the first $80,000 from the sale.

On the day after the sale, Lender finds out that Insurer missed a judgment lien of $30,000 on the property when

1 Affidavit of G. William Evans, Chief Financial Officer of LandAmerica Financial Group, Inc. and Vice President of LandAmerica 1031 Exchange Services, Inc., in Support of Chapter 11 Petitions and First Day Pleadings at 3, *In re* LandAmerica Fin. Grp., Inc., No. 08-35994-KRH (Bankr. E.D. Va. filed Nov. 26, 2008), ECF No. 12 [hereinafter Affidavit of G. William Evans] [https://perma.cc/G9KE-ZUW3].

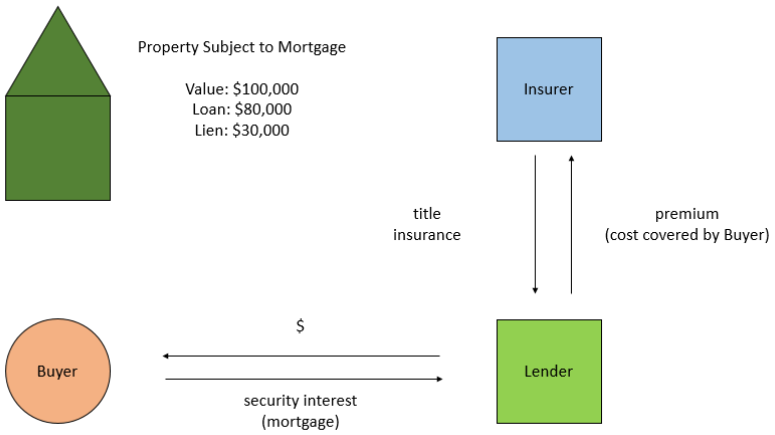
2 *Id.* at 4; *see also What Is Owner's Title Insurance?*, CONSUMER FIN. PROT. BUREAU, https://www.consumerfinance.gov/ask-cfpb/what-is-owners-title-insurance-en-164/ (last updated Aug. 7, 2017) ("Owner's title insurance provides protection to the homeowner if someone sues and says they have a claim against the home from before the homeowner purchased it.") [https://perma.cc/5CD8-DYBE].

3 We would like to thank Professor Gregory M. Stein for his assistance with these four paragraphs and Figure 1.

completing its search of the title. Lender discovers the lien because the judgment lien holder attempts to collect the $30,000 that it is owed by suing to foreclose on the house. So now, because the judgment lien is senior to the mortgage, Lender will only receive $70,000 from the sale ($100,000 fair market value minus $30,000 judgment lien).

This is why Lender bought title insurance. To remedy the situation, Insurer sends a $30,000 check to the judgment lien holder so that the judgment lien is removed from the property.

Figure 1



LandAmerica played a key role in both the residential and the commercial real estate markets.[4] With offices and agents throughout the United States, LandAmerica facilitated the purchase, sale, transfer, and financing of real estate.[5] Its customers included residential and commercial

4 Affidavit of G. William Evans, *supra* note 1, at 3.
5 *Id.*

buyers and sellers, real estate agents and brokers, developers, attorneys, mortgage brokers and lenders, and title insurance agents.[6]

Two principal title underwriting subsidiaries issued the majority of LandAmerica's policies: Commonwealth Land Title Insurance Company ("Commonwealth NE") and Lawyers Title Insurance Corporation ("Lawyers Title").[7] Combined with Commonwealth Land Title Insurance Company of New Jersey and United Capital Insurance Company, those title underwriting subsidiaries generated about 85% to 90% of LandAmerica's annual revenue.[8] Based upon the volume of home sales and other usual real estate transactions, the strength of the title insurance market is closely related to the strength of the United States economy.[9] Low interest rates and available mortgage financing help title insurers; high interest rates and limited mortgage financing hurt them.[10]

Another key subsidiary was LandAmerica 1031 Exchange Services, Inc. ("Exchange Co.").[11] It operated as a qualified intermediary under section 1031[12] of the Internal Revenue Code—assisting taxpayers who sought the benefits of that provision.[13] Exchange Co. did so by helping tax-

6 *Id.*

7 *Id.* at 4.

8 *Id.*

9 *Id.*

10 *Id.*

11 *Id.* at 5.

12 I.R.C. § 1031 (2012); *Like-Kind Exchanges Under IRC Code Section 1031*, INTERNAL REVENUE SERV. (Feb. 2008), https://www.irs.gov/newsroom/like-kind-exchanges-under-irc-code-section-1031 ("IRC Section 1031 . . . allows you to postpone paying tax on the gain [from the sale of business or investment property] if you reinvest the proceeds in similar property as part of a qualifying like-kind exchange.") [https://perma.cc/H4D6-RTKM].

13 Affidavit of G. William Evans, *supra* note 1, at 5.

payers who sold business or investment property to structure their transactions as exchanges of one property for another of like kind.[14] Taxpayers could then defer taxes on the gains from those sales.[15]

As of December 31, 2006, LFG had twenty-five direct subsidiaries.[16] They are listed below. One of the principal underwriters, Lawyers Title, was actually a subsidiary of LandAmerica OneStop, Inc.

14 *Id.*

15 *Id.*

16 LANDAMERICA FIN. GRP., INC., FORM 10-K, EX-21, SUBSIDIARIES OF THE REGISTRANT (Feb. 28, 2007).

Figure 2


LandAmerica Financial Group, Inc.
Beech Fly, LLC
Buyers Home Warranty Company
Buyers Real Estate Services
Capital Title Group, Inc.
Commonwealth Land Title Insurance Company
County Title Holding Corp.
Geodata Research Systems, Inc.
INFO1 Holding Company, Inc.
LandAmerica Property Inspection Services, Inc.
LFG Processing Corporation
LandAmerica Alliance Company
LandAmerica Assessment Corporation
LandAmerica Valuation Corporation
LandAmerica Commercial Search Services Company
LandAmerica (Europe) Sarl
LandAmerica Exchange Company
LandAmerica Services, Inc.
LandAmerica Insurance Agency, Inc.
LandAmerica OneStop, Inc.
LoanCare Servicing Center, Inc.
Orange County Bancorp
Palma, LaZar and Ulsh, LP
Residential Property Maintenance, Inc.
RQ Holdings, Inc.
Transnation Title Insurance Company

Events Leading to Chapter 11

Officially beginning in December 2007 and officially ending in June 2009,[17] the Great Recession bludgeoned the title insurance market. In 2006, residential mortgage originations in the United States exceeded $2.7 trillion; in 2008, they dropped to about $1.8 trillion.[18] Market stresses slashed LandAmerica's revenues by over 40% during that time.[19] Between 2006 and 2008, policy losses eroded profits for the company—these losses increased from 5.2% of operating revenue to 21.1%.[20] As the economy collapsed, resulting in reduced housing values and an increased number of foreclosures, LandAmerica collapsed.[21]

Exchange Co. was a key contributor to LandAmerica's failure.[22] In 2002, Exchange Co. began investing a slice of its 1031 Exchange Funds in auction rate securities ("ARSs").[23] Highly rated at the time of investment and backed by federally guaranteed student loans, these ARSs

17 Robert Rich, *The Great Recession*, FED. RESERVE BANK OF N.Y., https://www.federalreservehistory.org/essays/great_recession_of_200709 (last visited Apr. 28, 2018) [https://perma.cc/K65H-PZF7].

18 Affidavit of G. William Evans, *supra* note 1, at 8.

19 *Id.*

20 *Id.*

21 *Id.*

22 *Id.*

23 *Id.* at 8–9.

later lost luster.[24] The market for ARSs froze in 2008.[25] Before then, Exchange Co. would buy and sell the normally highly liquid ARSs to assist its customers with 1031 exchanges.[26] But the frozen ARS market disabled Exchange Co.[27] It could no longer sell the ARSs at a price near what it paid for them, much less at a profit.[28]

To understand the connection between ARSs and Exchange Co.'s business, one must consider the timeline of a 1031 exchange. A 1031 exchange must be completed by a taxpayer no later than 180 days after the sale of his or her exchanged property.[29] Imagine that you want to sell investment property in Franklin and that you want to use those proceeds, tax free, to buy investment property in Brentwood. To qualify for the 1031 tax advantage, the purchase of the property in Brentwood must occur no later than 180 days after the sale of the property in Franklin.

24 *Id.* at 9; Liz Rappaport, Randall Smith & Tom McGinty, *Auction-Rate Headaches: Issuers Search for Ways Around Soaring Costs; Prior Trouble in Market*, WALL ST. J. (Feb. 21, 2008, 12:01 AM), https://www.wsj.com/articles/SB120355364158181495?mod=searchresults&page=4&pos=9 ("Demand ha[d] collapsed because many auction-rate securities [were] insured by troubled bond insurers. Investors fear[ed] the bond insurance [was] no longer good, making the auction-rate securities riskier, even though many issuers of this debt [were] healthy institutions with strong credit ratings on their own.") [https://perma.cc/G8B3-S8FP]; *see also Bond Insurance*, WALL ST. SURVIVOR, http://www.wallstreetsurvivor.com/starter-guides/bond-insurance (last visited Apr. 28, 2018) ("Bond insurance is a kind of policy that, in the event of default, guarantees the repayment of the principal and all associated interest payments to the bondholders.").

25 Affidavit of G. William Evans, *supra* note 1, at 9; Yaron Leitner, *Why Do Markets Freeze?*, FED. RESERVE BANK OF PHILA. (2011), https://www.phil.frb.org/-/media/research-and-data/publications/business-review/2011/q2/brq211_why-do-markets-freeze.pdf ("A *market freeze* refers to a situation in which trade does not occur despite the potential gains from trade.") [https://perma.cc/CP9E-H5X9].

26 Affidavit of G. William Evans, *supra* note 1, at 9.

27 *Id.*

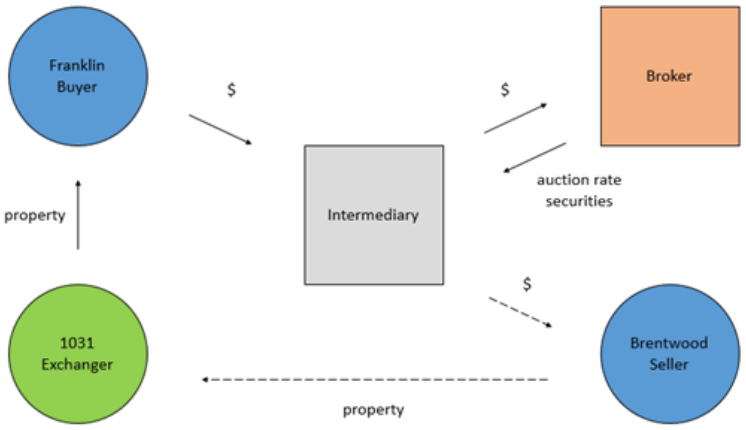
28 *Id.*

29 I.R.C. § 1031 (2012) ("[A]ny property received by the taxpayer shall be treated as property which is not like-kind property if . . . such property is received after . . . the day which is 180 days after the date on which the taxpayer transfers the property relinquished in the exchange . . . .").

So consider Exchange Co.'s position if you are one of its clients. You transferred the proceeds from the Franklin property to Exchange Co., and Exchange Co. agreed to serve as a § 1031 intermediary for your purchase of the Brentwood property. Similar to most of Exchange Co.'s other clients, you have time before you need to complete the transaction—almost half a year. During that period, Exchange Co. holds your money as it does for its other clients.

Exchange Co. could let the money sit in its account, waiting for you to close on the Brentwood property before touching the money again, or Exchange Co. could make money on that money by investing it. Exchange Co. chose to make money on the money it held. Exchange Co. invested the money and collected interest payment from those investments. Exchange Co. primarily invested that money in ARSs. In 2008, when the ARS market froze, Exchange Co. could no longer sell the ARSs to liquidate the client funds when needed. Client funds were stuck in those debt instruments, which could not be sold at a price anywhere near what Exchange Co. had paid for them.

Figure 3



Exchange Co. invested in ARSs because of their perceived appeal in the market and high rate of liquidity. Because of their high liquidity in normal times, Exchange Co. could simply sell them whenever needed to help its clients complete their 1031 exchanges. Financial institutions often marketed ARSs as cash equivalent securities with zero market risk.[30] This was a fallacy. Common usage of ARSs began in the 1980s.[31] Investors who purchased ARSs were "typically seeking a cash-like investment that [paid] a higher yield than money market mutual funds or certificates of deposit."[32] While structured as long-term debt instruments, they were effectively short term because they

30 Amod Choudhary, *Auction Rate Securities = Auction Risky Securities*, 11 DUQ. BUS. L.J. 23, 32 (2008).

31 *Auction Rate Securities*, U.S. SEC. & EXCH. COMM'N, https://www.investor.gov/introduction-investing/basics/investment-products/auction-rate-securities (last visited Apr. 28, 2018) [https://perma.cc/H6FQ-NHHB].

32 FIN. INDUS. REGULATORY AUTH., AUCTION RATE SECURITIES: WHAT HAPPENS WHEN AUCTIONS FAIL (2008), https://www.finra.org/sites/default/files/Investor-Alert-Auction-Rate-Securities-What-Happens-When-Auctions-Fail.pdf [https://perma.cc/NRC8-J4NQ].

were sold at auction several times per month.[33] ARS market liquidity was dependent on supply and demand at the ARS auctions.[34] The market for these securities was confined to the primary market as bankers and brokers refused to sell ARSs on the secondary market.[35] In the past, when the market for these securities began to fail, the financial institutions stepped in and bid on the securities they already owned to stabilize the market.[36] By bidding on their securities, these financial institutions "creat[ed] a false sense of demand in the minds of investors."[37] Brokers did not disclose to potential investors that the financial institutions themselves were bidding on the ARSs to prevent market failure.[38] Thus, the ARS market was dependent on the continued success of the nation's major financial institutions.[39] In February 2008, those auctions began to fail when supply exceeded demand.[40]

Many of the financial institutions that participated in the auction rate securities market had considerable losses resulting from the rising number of defaults on sub-prime loans in the form of mortgage-backed securities.[41] As a re-

33 Jacqueline Doherty, *The Sad Story of Auction-Rate Securities*, BARRON'S (May 26, 2008), https://www.barrons.com/articles/SB121159302439419325 ("Participants -- both mom-and-pop investors and corporations seeking yields on their cash -- assumed they could sell their securities at auction to new buyers.") [https://perma.cc/Z7X4-QEBG].

34 Sean T. Seelinger, *Auction-Rate Securities: A Fast & Furious Fall*, 13 N.C. BANKING INST. 287, 288 (2009).

35 Choudhary, *supra* note 30, at 32 ("[W]ith the threat of actual lawsuits from ARS holders, the brokers/ banks . . . refused to sell the ARS in the secondary market, thereby creating a catch-22 situation.").

36 Seelinger, *supra* note 34, at 288.

37 *Id.*

38 *Id.*

39 *Id.*

40 *Id.*

41 Choudhary, *supra* 30, at 31.

sult, the lack of funds available for these financial institutions to purchase ARSs crippled the ARS market.[42] Holders of the securities could no longer quickly get their money back in the same way that they could with, for example, a checking account.[43] Seven years later—when LFG's bankruptcy concluded—about $50 billion out of the $330 billion of ARSs outstanding from 2008 remained frozen.[44]

As Exchange Co. failed in 2008, LFG pumped money into it: advancing $65 million.[45] That money enabled Exchange Co. to honor customer claims.[46] The loan, however, failed to sustain Exchange Co.[47] LFG faced its own liquidity constraints from "stresses in the real estate markets" and increased policy losses, and Exchange Co. lacked an alternative to ARSs.[48] Exchange Co. could no longer continue in the ordinary course if it let the 1031 exchange money sit in its account—instead of investing in a highly liquid financial instrument.[49] In sum, LFG needed help.

To assist, LFG employed JP Morgan as financial advisor and investment banker, and Wachtell Lipton Rosen & Katz as mergers & acquisitions counsel.[50] Together, they considered several options.[51] These options included trans-

42 *Id.*

43 *Id.*

44 Jacqueline Doherty, *Auction-Rate Securities: Still Frozen in Time*, BARRON'S (Mar. 28, 2015), https://www.barrons.com/articles/auction-rate-securities-still-frozen-in-time-1427505026 [https://perma.cc/4D68-DGQE].

45 Affidavit of G. William Evans, *supra* note 1, at 9.

46 *Id.*

47 *Id.*

48 *Id.* at 8–9.

49 *Id.* at 9.

50 *Id.* at 10.

51 *Id.*

actions with five strategic partners along with a transaction with LFG's largest shareholder.[52] But none of the potential transactions gained traction, putting LFG in limbo.[53]

Without another viable option, the committee determined that its best option was to find a competitor to acquire LFG.[54] LFG contacted Fidelity National Financial ("Fidelity") to discuss a transaction in an attempt to salvage the company.[55] Fidelity is a "provider of title insurance and transaction services to the real estate and mortgage industries."[56] At the time, Fidelity was one of LFG's largest competitors.[57] After a few short weeks of negotiating, LFG and Fidelity reached a deal.[58] On November 7, 2008, LFG and Fidelity signed a merger agreement.[59] At the time, LFG appeared to have salvaged its company and avoided bankruptcy.

This victory was short lived. The merger was conditioned on Fidelity's approval following a due diligence period that permitted Fidelity to review LFG's records.[60] Three weeks after the parties announced their proposed merger, Fidelity announced its plan to exercise its right to

52 *Id.*

53 *Id.*

54 Affidavit of G. William Evans, *supra* note 1, at 11.

55 *Id.*; *see also About Us*, FID. NAT'L FIN., http://www.fnf.com/pages/about-us.aspx (last visited Apr. 28, 2018) ("FNF is the nation's largest title insurance company through its title insurance underwriters - Fidelity National Title, Chicago Title, Commonwealth Land Title, Alamo Title and National Title of New York - that collectively issue more title insurance policies than any other title company in the United States.") [hereinafter *About Us*] [https://perma.cc/9GKG-M9GM].

56 *About Us*, *supra* note 55.

57 Affidavit of G. William Evans, *supra* note 1, at 11.

58 *Id.*

59 *Id.*

60 *Id.*

terminate the agreement, citing its "contractual due diligence termination right."[61]

> Neither firm would comment on the failed merger agreement beyond the fact that the merger had been called off. But the terms of the deal, along with Friday's closing share prices, meant that Fidelity would have paid nearly a 70 percent premium to acquire LandAm's business; Fidelity was to exchange .993 of its shares for each LandAmerica share. . . . That LandAm would have agreed in the first place to let a direct competitor review its books and operations with an apparently unencumbered right to terminate the deal, however, likely suggests the sort of dire situation now facing the firm. "Nobody gives a free look unless they have little other choice," said one source, an M&A consultant in the mortgage industry that asked not to be named. "Fidelity had no incentive to try to find a way to work the deal, and there were probably some pretty scary ghosts that bounced up in the due diligence process. There always are."[62]

Financing Issues

Days after its merger with Fidelity fell apart, LFG filed for bankruptcy. LFG entered bankruptcy with over $650 million in liabilities.[63] Roughly two-thirds of that debt

61 Paul Jackson, *No Deal: Fidelity Calls off LandAmerica Merger*, HOUSING WIRE (Nov. 24, 2008), https://www.housingwire.com/articles/no-deal-fidelity-calls-landamerica-merger [https://perma.cc/W972-8ETY].

62 *Id.*

63 Affidavit of G. William Evans, *supra* note 1, at 6.

arose from a revolving credit facility ($100 million),[64] two series of senior unsecured notes ($150 million),[65] and convertible notes ($225 million).[66] All of these long-term debt instruments were unsecured.[67]

SunTrust Bank led the syndicate of lenders that provided the revolving credit facility.[68] LFG defaulted on several covenants under the agreement, so it had no access to funds from the credit facility when it entered bankruptcy.[69] LFG had also issued two series of senior notes to Prudential Investment and other purchasers.[70] Before filing its bankruptcy petition, LFG defaulted on these notes too.[71] Finally, LFG issued convertible senior debentures[72] in

64 *Cf.* Robert K. Rasmussen, *Secured Credit, Control Rights and Options*, 25 CARDOZO L. REV. 1935, 1938 n.13 (2004) ("For example, credit cards are a form of a revolving credit facility. The lender sets a ceiling on the cardholder's ability to borrow; as the cardholder repays monies borrowed in the past, she has access to new funds.").

65 BRIAN A. BLUM, BANKRUPTCY AND DEBTOR/CREDITOR: EXAMPLES AND EXPLANATIONS 7 (4th ed. 2006) ("A secured debt differs from an unsecured debt in one important respect . . . . [I]f the debtor fails to pay, the secured creditor may have recourse to the property to satisfy the debt.").

66 Affidavit of G. William Evans, *supra* note 1, at 6.

67 *Id.*

68 *Id.* at 7.

69 *Id.* The affidavit of CFO G. William Evans did not address the specific covenants that LFG defaulted on. *Id.* But some specific examples are provided in a 2008 SEC filing of LFG:

> The effects of the severe downturn in the housing and mortgage markets caused us to violate the financial debt covenants of our Note Purchase and Master Shelf Agreement ("Note Purchase Agreement") and our revolving credit facility ("Credit Agreement") as of September 30, 2008. In particular, we did not meet our fixed charge coverage ratio covenant of 1.20:1.0 required for the fiscal quarter ending September 30, 2008 under both the Note Purchase Agreement and Credit Agreement. In addition, our debt to total capitalization also exceeded the maximum limit of 37.5% on both facilities.

LANDAMERICA FIN. GRP., INC., FORM 10-Q, QUARTERLY REPORT PURSUANT TO SECTION 13 OR 15(D) OF THE SECURITIES EXCHANGE ACT OF 1934 73–74 (Nov. 10, 2008).

70 Affidavit of G. William Evans, *supra* note 1, at 7.

71 *Id.*

72 *What Is a Debenture?*, CORP. FIN. INST., https://corporatefinanceinstitute.com/resources/knowledge/finance/debenture-bonds/ (last visited Apr. 28, 2018) ("A deben-

2003 and again in 2004.[73] The amounts due on these debentures were unpaid when LFG declared bankruptcy.[74]

First-Day Motions

To commence the bankruptcy proceedings, LFG filed its voluntary petition in the U.S. Bankruptcy Court for the Eastern District of Virginia.[75] Along with the voluntary petition, LFG filed a series of first-day motions. Using the categories provided in *Bankruptcy in Practice*, first-day motions are filed to achieve one of three objectives: (1) facilitating the administration of the estate, (2) maintaining the day-to-day operations, and (3) honoring pre-petition obligations.[76] The following is a recount of LFG's first-day motions categorized by their objectives.

1. Facilitating the Administration of the Estate

LFG and its subsidiaries moved for joint administration of the Chapter 11 cases under Rule 1015(b) of the Federal Rules of Bankruptcy Procedure (Bankruptcy Rules).[77] LFG's goal was to avoid the additional costs and procedural

ture is a long-term debt instrument issued by corporations and governments, to secure fresh funds or capital. There is no collateral or physical assets required to back-up the debt, as the overall creditworthiness and reputation of the issuer suffice.") [https://perma.cc/57FY-EZG8].

73 Affidavit of G. William Evans, *supra* note 1, at 7.

74 *Id.*

75 Voluntary Petition Under Chapter 11 at 1, *In re* LandAmerica Fin. Grp., Inc., No. 08-35994-KRH (Bankr. E.D. Va. filed Nov. 26, 2008), ECF No. 1 [https://perma.cc/33RX-7XVR].

76 MICHAEL L. BERNSTEIN & GEORGE W. KUNEY, BANKRUPTCY IN PRACTICE 273–75 (Charles J. Tabb ed., 5th ed. 2015).

77 Motion for Order Authorizing Joint Administration Pursuant to Rule 1015 of the Federal Rules of Bankruptcy Procedure at 2, *In re* LandAmerica Fin. Grp., Inc., No. 08-35994-KRH (Bankr. E.D. Va. filed Nov. 26, 2008), ECF No. 3 [hereinafter Motion for Joint Administration] [https://perma.cc/5HF3-PER4].

problems associated with separate but related Chapter 11 cases.[78] LFG urged that joint administration would lead to a more efficient resolution of these cases.[79] In support, LFG asserted that all of the hearings and matters in the separate cases would affect all of the debtors. Thus, they argued that approval of joint administration would "reduce costs, facilitate administrative efficiency, and avoid the procedural problems otherwise attendant to the administration of separate but related chapter 11 cases."[80] LFG also noted that joint administration would not prejudice any party or any party's substantive rights in the case.[81] No creditors objected, and the court later granted the joint administration motion.[82]

Next, LFG moved to extend its deadline to file its schedules of assets and liabilities, its statement of financial affairs, and the list of its equity security holders.[83] LFG sought a sixty-day extension to file those documents—as permitted by Bankruptcy Rule 1007(c).[84] Per that rule's requirement, "[a]ny extension of time for the filing of the schedules and statements may be granted only on motion

78 *Id.* at 3; *see also* Jay M. Goffman & Grenville R. Day, *First Day Motions and Orders in Large Chapter 11 Cases (Critical Vendor, DIP Financing and Cash Management Issues)*, 2003 WL 23925660, at *6 (2003) ("If the company is filing multiple affiliated entities, a motion providing for the joint administration of all related cases under one case number is generally desirable.").

79 Motion for Joint Administration, *supra* note 77, at 3.

80 *Id.*

81 *Id.*; *see also* Goffman & Day, *supra* note 78, at *6 ("Joint administration, while not having a substantive effect on the debtors, will allow for pleadings filed in one case to apply to all related debtors.").

82 Motion for Joint Administration, *supra* note 77, at 8.

83 Motion of the Debtor for Order Pursuant to Bankruptcy Rule 1007(c) and Local Bankruptcy Rule 1007-1 Extending Time for LandAmerica Financial Group, Inc. To File Its Schedules and Statement of Financial Affairs and List of Equity Security Holders at 2, *In re* LandAmerica Fin. Grp., Inc., No. 08-35994-KRH (Bankr. E.D. Va. filed Nov. 26, 2008), ECF No. 4 [https://perma.cc/53AW-73WM].

84 *Id.*

for cause shown and on notice."[85] In support of its motion, LFG claimed cause for an extension because of its limited resources after filing for bankruptcy.[86] Specifically, LFG submitted that "substantial burdens already imposed on the Debtor's management by the commencement of this chapter 11 case, the limited number of employees available to collect the information, and the competing demands upon such employees" constituted sufficient cause to extend the filing deadline.[87] The court accepted LFG's cause argument and, with no objections to the motion, granted it to extend the required filing date.[88]

LFG also hoped to eliminate the administrative cost of submitting a formatted mailing matrix of its creditors to the court—as required by Local Bankruptcy Rule 1007-1(I).[89] Instead, LFG moved to prepare its own list of its creditors and to offer access to any party who requested it.[90] This way, the court would no longer need to send notice to all of LFG's creditors and parties in interest.[91] The court granted this motion.[92]

To facilitate an orderly entry into bankruptcy, LFG filed a motion to continue using its centralized cash management system and to maintain its existing bank accounts.[93]

85 *Id.*

86 *Id.* at 3.

87 *Id.* at 4.

88 *Id.* at 7.

89 Motion of the Debtors, Pursuant to 11 U.S.C. §§ 105(a), 342(a), and 521, Fed. R. Bankr. P. 1007 and Local Bankruptcy Rule 1007-1, for Authority To Prepare a List of Creditors in Lieu of Submitting a Formatted Mailing Matrix at 3, *In re* LandAmerica Fin. Grp., Inc., No. 08-35994-KRH (Bankr. E.D. Va. filed Nov. 26, 2008), ECF No. 6 [https://perma.cc/5XCG-M8BB].

90 *Id.*

91 *Id.*

92 *Id.* at 7.

93 Motion for Order Authorizing: (A) Continued Use of the Debtor's Centralized Cash Management System; (B) Maintenance and Continued Use of the Debtor's Existing Bank Accounts and Business Forms; (C) A Waiver of Certain Operating Guidelines

LFG ran the cash management system for all of its affiliates, including Exchange Co.[94] When it filed for bankruptcy, LFG maintained about thirty-one active bank accounts that were linked to the cash management system.[95] The court granted this motion too.[96]

In addition, LFG moved to establish notice, case management, and administrative procedures.[97] For example, it asked the court to allow electronic service of documents.[98] To save costs, courts routinely grant requests for limited notice requirements.[99] LFG hoped to use the money saved to reorganize its business.[100] The court granted this motion.[101]

Further, LFG sought an expedited hearing to consider approval of the sale of its two principal title underwriting subsidiaries: Commonwealth NE and Lawyers Title.[102] After Exchange Co. failed, LFG needed the proceeds of this sale to give Exchange Co.'s clients their money back.[103]

Relating to Bank Accounts; and (D) An Extension of Time for the Debtor To Comply with Section 345 of the Bankruptcy Code at 3, *In re* LandAmerica Fin. Grp., Inc., No. 08-35994-KRH (Bankr. E.D. Va. filed Nov. 26, 2008), ECF No. 5 [https://perma.cc/TSH6-PAKK].

94 *Id.* at 5.

95 *Id.* at 3–4.

96 *Id.* at 20.

97 Motion of the Debtors for an Order Pursuant to Bankruptcy Code Sections 102 and 105, Bankruptcy Rules 2002 and 9007, and Local Bankruptcy Rules 2002-1 and 9013-1 Establishing Certain Notice, Case Management, and Administrative Procedures at 3, *In re* LandAmerica Fin. Grp., Inc., No. 08-35994-KRH (Bankr. E.D. Va. filed Nov. 26, 2008), ECF No. 8 [https://perma.cc/3AK9-V9YJ].

98 *Id.* at 5.

99 *Id.* at 7.

100 *Id.* at 6.

101 *Id.* at 11.

102 Debtor's Motion for Order: (A) Scheduling Expedited Sale Hearing To Consider Approval of Sale of Debtor's Stock in Certain Underwriting Subsidiaries; (B) Approving Related Stock Purchase Agreement; (C) Approving Form and Manner of Notice of Sale Hearing; and (D) Granting Related Relief at 3, *In re* LandAmerica Fin. Grp., Inc., No. 08-35994-KRH (Bankr. E.D. Va. filed Nov. 26, 2008), ECF No. 11 [https://perma.cc/KND5-FJVZ].

103 *Id.* at 7.

Time was of the essence: LFG argued that customers would quickly leave the two underwriting companies if they were not confident that a buyer would promptly sweep the companies up.[104]

Finally, LFG moved for an expedited hearing on all of its first-day motions.[105] Similar to its other first-day motions, LFG filed for this relief so that it could avoid harm to its business.[106] The court granted this motion too.[107]

2. Maintaining the Day-to-Day Operations

To assist with its day-to-day operations, LFG filed a motion to keep receiving water, gas, and electricity while in bankruptcy.[108] It sought to keep operating while honoring the special protections that utility companies have under the Bankruptcy Code.[109] The court granted this motion too.[110]

104 *Id.* at 9–10.

105 Motion of the Debtors, Pursuant to 11 U.S.C. § 105 and Local Bankruptcy Rule 9031-1(M), for an Order Setting an Expedited Hearing on "First Day Pleadings" and for Related Relief at 3, *In re* LandAmerica Fin. Grp., Inc., No. 08-35994-KRH (Bankr. E.D. Va. filed Nov. 26, 2008), ECF No. 13 [https://perma.cc/JE3C-JNQE].

106 *Id.* at 4.

107 *Id.* at 9.

108 Motion of Debtor for Order Under Bankruptcy Code Sections 105(a) and 366 (I) Approving Debtor's Adequate Assurance of Payment, (II) Establishing Procedures for Resolving Requests by Utility Companies for Additional Assurance of Payment, and (III) Scheduling a Hearing with Respect to Contested Adequate Assurance of Payment Requests at 3–4, *In re* LandAmerica Fin. Grp., Inc., No. 08-35994-KRH (Bankr. E.D. Va. filed Nov. 26, 2008), ECF No. 9 [https://perma.cc/2EHC-DK22].

109 *Id.*

110 *Id.* at 16.

3. Honoring Pre-petition Obligations

LFG moved to obtain court approval to continue to honor its pre-petition obligations.[111] LFG had four goals when it filed to continue honoring its pre-petition obligations. First, it hoped to continue paying its approximately 7800 employees.[112] Second, it wanted to continue reimbursing its employees for their business expenses.[113] Third, it sought to continue providing medical insurance, vision insurance, prescription drug coverage, dental insurance, life insurance, disability insurance, paid time off, a 401(k) plan, and other benefits to its employees.[114] Fourth, it wished to continue paying its taxes as an employer.[115]

Typically, employee's wages are incurred before the petition date, but the debtor has yet to pay those wages.[116] As a result, employees often "hold considerable prepetition claims for unpaid salaries or wages."[117] The Bankruptcy Code prohibits a company from paying pre-petition debts, including salaries and wages incurred prior to the petition date, without court authorization.[118] Continuing to pay employees is critical to continuing company operations.[119] Courts typically grant these motions because a stoppage in

111 Motion for an Order: (A) Authorizing Payment of Prepetition (1) Wages, Salaries, and Other Compensation, (2) Employee Medical and Similar Benefits, (3) Reimbursable Employee Expenses, and (4) Other Miscellaneous Employee Expenses and Benefits; and (B) Granting Related Relief at 3, *In re* LandAmerica Fin. Grp., Inc., No. 08-35994-KRH (Bankr. E.D. Va. filed Nov. 26, 2008), ECF No. 10 [hereinafter Motion To Honor Pre-petition Obligations] [https://perma.cc/J8KY-N3J3].

112 *Id.* at 5–6.

113 *Id.* at 6–7.

114 *Id.* at 7–14.

115 *Id.* at 14–15.

116 Goffman & Day, *supra* note 78, at *6.

117 *Id.*

118 *Id.*

119 *Id.*

company operations can hurt the debtor's value and in turn hurt the debtor's creditors.[120]

Pursuant to section 363 of the Bankruptcy Code, a bankruptcy court may authorize a Chapter 11 debtor to honor its pre-petition debts so long as the debtor can "articulate a valid business justification" for such authorization.[121] LFG argued in its motion that it had a valid business justification because without authorization to honor its pre-petition obligations, it would be unable to continue paying its employees.[122] Specifically, LFG maintained that a failure of the court to grant this motion would "immediately and irreparably" harm the debtor and its employees.[123] In support, LFG argued that not paying the employees of its non-debtor subsidiaries would hurt the value of those subsidiaries and thus harm their creditors in the long term.[124] In the motion, LFG stated "[a]s a parent holding company, LFG's primary assets consist of its equity interests in its non-debtor subsidiaries. Thus, it is in LFG's best interest to ensure that the value of its subsidiaries is maximized and preserved."[125] There were no objections, and following a hearing,[126] the court granted the motion.[127]

120 *Id.*
121 Motion To Honor Pre-petition Obligations, *supra* note 111, at 15.
122 *Id.* at 3.
123 *Id.* at 4.
124 *Id.*
125 *Id.*
126 *Id.*
127 *Id.* at 21.

Appointment of Committee

One week after LFG filed for Chapter 11 bankruptcy protection, the U.S. Trustee appointed the Official Committee of Unsecured Creditors ("OCC").[128] The OCC consisted of four members: The Bank of New York Mellon; The Prudential Insurance Company of America; Vangent, Inc.; and Citadel Equity Fund, Ltd.[129]

The OCC quickly filed an objection to LFG's proposed sale of its two principal underwriting subsidiaries, which produced a significant portion of LFG's revenue.[130] The OCC argued that the sale was not in the best interests of LFG's estate.[131] Unsatisfied with the rush to sell the subsidiaries, the OCC wanted LFG to seek other prospective buyers to ensure that the subsidiaries were sold for the best price.[132] In sum, it hoped to force LFG to produce evidence demonstrating that the sale price was fair.[133]

Sale of Two Principal Underwriters

LFG's two principal title insurance underwriting subsidiaries—Commonwealth NE and Lawyers Title—were

128 Appointment of Unsecured Creditors Committee at 1, *In re* LandAmerica Fin. Grp., Inc., No. 08-35994-KRH (Bankr. E.D. Va. filed Nov. 26, 2008), ECF No. 72 [https://perma.cc/BP8J-TXNU].

129 *Id.*

130 Initial Objection by the Official Committee of Unsecured Creditors to the Debtors' Motion for an Order (A) Scheduling Expedited Sale Hearing To Consider Approval of Sale of Debtor's Stock in Certain Underwriting Subsidiaries; (B) Approving Related Stock Purchase Agreement; (C) Approving Form and Manner of Notice of Sale Hearing; and (D) Granting Related Relief at 2, *In re* LandAmerica Fin. Grp., Inc., No. 08-35994-KRH (Bankr. E.D. Va. filed Nov. 26, 2008), ECF No. 109 [https://perma.cc/RJS6-M5AP].

131 *Id.* at 7.

132 *Id.* at 8–9.

133 *Id.* at 11.

both domiciled in Nebraska.[134] On November 18, 2008, fewer than ten days before LFG declared bankruptcy, the Nebraska Department of Insurance informed both of the subsidiaries that they were in a "hazardous financial condition."[135] The department based its assessment on their third quarter 2008 statutory filings.[136] After Fidelity terminated its proposed merger agreement, the department filed a petition in the Court of Lancaster County, Nebraska, to put both of the subsidiaries in rehabilitation.[137] "Rehabilitation is a state of legal protection for insurance companies, usually done to protect the company's insured clients."[138]

Unlike the insolvency of a company such as LFG, "[i]nsurer insolvencies are governed by state law."[139] Insurance regulators, such as the Nebraska Department of Insurance in this case, seek to protect "policyholders, claimants, and creditors [of insurance companies] from financial loss."[140] One of the options that an insurance regulator can take to accomplish its goal is to place an insurance company in rehabilitation.[141]

> If rehabilitation is warranted, state regulators must allege and prove a specific statutory ground in order

134 *Two LandAmerica Title Insurers Sold, Placed in Rehabilitation*, LINCOLN J. STAR (Nov. 25, 2008), http://journalstar.com/business/two-landamerica-title-insurers-sold-placed-in-rehabilitation/article_d644fe79-69d6-572c-a314-9407970f37f4.html [hereinafter *Placed in Rehabilitation*] [https://perma.cc/KN9A-LH5N].

135 Affidavit of G. William Evans, *supra* note 1, at 12.

136 *Id.*

137 *Id.*

138 *Placed in Rehabilitation*, supra note 134.

139 *Troubled Companies and Receivership*, NAT'L ASS'N INS. COMM'RS, http://www.naic.org/cipr_topics/topic_troubled_companies_and_receivership.htm (last visited Apr. 28, 2018) [https://perma.cc/98TB-8BVK].

140 *Id.*

141 *Id.*

> to proceed. In rehabilitation, a plan is devised to correct the difficulties that led to the insurer being placed in receivership and return it to the marketplace. The receiver is charged with implementing the restrictions, limitations and requirements set forth in the order of rehabilitation.[142]

This is one of the options that an insurance regulator has to help a struggling company such as LFG.[143]

On November 26, 2008, the same day that it filed for bankruptcy protection, LFG announced the sale of the two underwriters to Fidelity for $298 million.[144] Fidelity agreed "to pay the $298 million in cash to [LFG] and not take on any debt."[145] In contrast, the original merger agreement between Fidelity and LFG "called for Fidelity to issue stock to [LFG] shareholders valued at $128 million, and also pay off [LFG] debt."[146] At the time, Fidelity was the largest U.S. title insurer.[147] To complete the sale, however, LFG required approval from both the U.S. Bankruptcy Court for the Eastern District of Virginia and the Nebraska Department of Insurance.[148] Less than one month after announcing the sale, LFG obtained approval from both to sell the two underwriters to Fidelity.[149]

142 *Id.*

143 *Id.*

144 *Placed in Rehabilitation*, supra note 134.

145 Mark Basch, *Fidelity, LandAmerica Back On*, FLA. TIMES-UNION (Nov. 27, 2008, 12:01 AM), http://www.jacksonville.com/2016-03-11/stub-265.

146 *Id.*

147 Joseph A. Giannone, *LandAmerica Files for Bankruptcy, Sells Businesses*, REUTERS (Nov. 26, 2008, 3:12 AM), https://www.reuters.com/article/us-landamerica/landamerica-files-for-bankruptcy-sells-businesses-idUSTRE4AP1W420081126 [https://perma.cc/49M5-2BNG].

148 *Id.*

149 Carol Hazard, *Bankruptcy Judge OKs LandAmerica Core Sale*, RICH. TIMES-DISPATCH (Dec. 17, 2008), http://www.richmond.com/business/bankruptcy-judge-oks-landamerica-core-sale/article_23701ed2-18e9-5bec-a49e-a487beff6805.html [https://perma.cc/M8C2-QCSQ].

In response to the approved deal, two of the other largest U.S. title insurers—Stewart Title Guaranty Company and Old Republic International Corporation—claimed that the sale raised concerns about anti-competitive behavior in the industry.[150] Specifically, lawyers for one of the companies, Old Republic, claimed that Fidelity "might use [its] 'near monopoly power' [after the deal] to artificially inflate prices."[151] The Federal Trade Commission agreed; it filed a complaint charging that "the acquisition reduced competition in six geographic areas."[152]

At the time, five companies, including LFG, "controlled 93 percent of the $14 billion U.S. title insurance market."[153] With only five companies controlling almost the entire market, any combination of these companies raised antitrust concerns from the FTC.[154] For over a year and a half, Fidelity negotiated with the FTC to settle the charges that its acquisition of the LFG subsidiaries was anticompetitive. Finally, in the summer of 2010, Fidelity agreed to settle the charges.[155] As part of the settlement, Fidelity agreed to "sell off several title plants and related assets in Oregon

150 Matt Carter, *Fidelity Closes in on LandAmerica Deal*, INMAN (Dec. 17, 2008), https://www.inman.com/2008/12/17/fidelity-closes-in-landamerica-deal/ [https://perma.cc/S94E-J3BE].

151 *Id.*

152 *Fidelity National Financial Settles FTC Charges that Its Acquisition of LandAmerica Subsidiaries Reduced Competition in Title Information Markets*, FED. TRADE COMM'N (July 16, 2010), https://www.ftc.gov/news-events/press-releases/2010/07/fidelity-national-financial-settles-ftc-charges-its-acquisition [https://perma.cc/DP64-6DG4].

153 Matt Carter, *Fidelity, LandAmerica Agree to Merger*, INMAN (Nov. 7, 2008), https://www.inman.com/2008/11/07/fidelity-landamerica-agree-merger/ [https://perma.cc/XT83-XJT4].

154 *Id.*

155 *Id.*

and Detroit."[156] In the end, the FTC commissioners voted 5-0 to approve the sale as modified.[157]

Exchange Company Customers

When LFG declared bankruptcy in 2008, about 450 Exchange Co. customers had 1031 transactions that were in limbo.[158] Those customers had sold their 1031 properties, and Exchange Co. held the proceeds of those sales.[159] It invested a significant portion of those funds "in investment grade securities rated A or stronger at the time of investment, including auction rate securities."[160] Then the market for those ARSs froze; Exchange Co. could no longer sell them to get the money to complete those customers' 1031 exchanges within the statutory frame.[161]

Of those approximately 450 customers, approximately 50 of them had contracted with Exchange Co. to segregate their funds—as opposed to allowing them to be commingled.[162] The segregated accounts held about $138.6 million.[163] The commingled funds, however, were the funds

156 Mark Basch, *Fidelity National Financial Settles FTC Complaint by Selling Title Plants in Oregon, Detroit*, FLA. TIMES-UNION (July 16, 2010), http://www.jacksonville.com/article/20100716/BUSINESS/801248472.

157 *Id.*

158 Affidavit of G. William Evans, *supra* note 1, at 5–6.

159 *Id.*

160 *Id.* at 8–9. Exchange Co. was not the only 1031 exchange company to invest in auction rate securities. Real Estate Exchange Services Inc. ("REES") also invested in ARSs. In 2008, REES also filed for bankruptcy following the ARS market collapse. *See also* Bradley T. Borden, Paul L.B. McKenney & David Shechtman, *Like-Kind Exchanges and Qualified Intermediaries*, 124 TAX NOTES 55, 56 (2009) ("It has been suggested that LES was far from alone in its practice of investing exchange funds in auction rate securities and that other [qualified intermediaries], like LES, kept the spread on the return produced by auction rate securities over the growth factor promised to exchangers, often without disclosing that practice to their customers.").

161 Affidavit of G. William Evans, *supra* note 1, at 9.

162 *Id.* at 6, 8.

163 *Id.* at 8.

that were invested by Exchange Co.[164] Of the money held by Exchange Co. from customers whose funds were commingled, Exchange Co. "maintained approximately $46 million backed by investments in government treasury bonds and approximately $201.7 million (par value) in auction rate securities."[165] But Exchange Co. had one major problem—it couldn't sell the assets. So the customers couldn't complete their 1031 transactions within the required 180-day period.

Tracy Ralphs was one of those customers.[166] A retired Army lieutenant colonel, he was working as a transportation engineer in 2008.[167] That year, his job moved him from Virginia to Illinois.[168] He hoped to sell his Virginia property and—with the help of Exchange Co.—to buy property in Illinois.[169] All went well when he sold his Virginia property: $81,000 was successfully wired to Exchange Co.[170] Problems began, however, when Ralphs showed up for his 11:30 AM closing on the Illinois property.[171]

> At 11:18, a clerk for the law firm that was conducting the closing walked up and handed him a piece of paper. "I don't know how to tell you this, but you don't have any money," she told him.
>
> "LandAmerica 1031 Exchange Services Inc. is no longer conducting business effective immediately," the e-mail from a LandAmerica official said.

164 *Id.*
165 *Id.*
166 Chris Adams, *Though LandAmerica Clients Lost Millions, No Bailout Granted*, MCCLATCHY (Mar. 20, 2010), http://www.mcclatchydc.com/news/nation-world/national/economy/article24577042.html [https://perma.cc/563T-8XU8].
167 *Id.*
168 *Id.*
169 *Id.*
170 *Id.*
171 *Id.*

> . . . .
>
> "I had taken my savings from a lifetime of working in the military and invested it. I made a profit. I followed the laws that Congress made."
>
> "So you're telling me the intent of Congress was to give my money to them so they could make a profit by risking my life's savings?" he said.
>
> For the privilege of losing his money, Ralphs had paid LandAmerica an $850 exchange fee.[172]

Many suffered a similar fate after trusting their money with LandAmerica—a company that once "boasted of its inclusion on Fortune magazine's 2007 list of 'America's most admired companies'" and "said that 'clients can rest assured' that LandAmerica didn't do risky things such as invest in sub-prime mortgages."[173]

Over eighty-five adversary proceedings were brought by exchange customers during the course of the bankruptcy.[174] These exchange customers sought recovery of their funds.[175] The adversary proceedings were messy because Exchange Co. used different language throughout their various agreements with customers.[176] On January 16, 2009, the court entered a protocol order.[177] This order stayed all but five of the eighty-five proceedings.[178] The five select cases "presented legal and factual issues that were common to certain of the other adversary proceedings."[179]

172 *Id.*

173 Chris Adams, *LandAmerica Touted Its Safety but Clients Lost Millions*, MCCLATCHY (Mar. 20, 2010), http://www.mcclatchydc.com/news/nation-world/national/economy/article24577048.html [https://perma.cc/V3MT-V6GJ].

174 Millard Refrigerated Servs., Inc. v. LandAmerica 1031 Exch. Servs., Inc. (*In re* LandAmerica Fin. Grp., Inc.), 412 B.R. 800, 802 (Bankr. E.D. Va. 2009).

175 *Id.*

176 *Id.*

177 *Id.* at 803.

178 *Id.*

179 *Id.*

The court ruled on the five cases in two opinions.[180] Both opinions found that the customer's exchange funds were property of the bankruptcy estate and that the funds did not constitute a trust that would exclude them from the bankruptcy estate.[181]

More than four years later, however, the liquidation trustee announced that all Exchange Co. customers had finally been paid back in full.[182] But as one commentator noted, the trustee failed to account for attorneys' fees, added taxes, and interest.[183] Not to mention the added stress during "the longest recession since World War II."[184] In sum, the approximately 450 Exchange Co. customers lost more than simply the money that was frozen in an account.

Lawsuits Against Former Bosses

In 2011, the trustee of the LFG liquidation trust filed a federal lawsuit against twenty-one former executives and directors of LandAmerica.[185] Bruce Matson, the trustee plaintiff, sought "$365 million in damages."[186] He asserted "claims for breach of fiduciary duty, corporate waste, equi-

180 *Id.*

181 *Id.*

182 Notice of Principal Satisfaction Date at 1, *In re* LandAmerica Fin. Grp., Inc., No. 08-35994-KRH (Bankr. E.D. Va. filed Nov. 26, 2008), ECF No. 5284 [https://perma.cc/YK3Y-LMAK].

183 David Wieland, *What Happens if Your Qualified Intermediary Files Bankruptcy?*, REALIZED (June 15, 2016), https://www.realized1031.com/blog/what-happens-if-your-qualified-intermediary-files-bankruptcy [https://perma.cc/E3S6-FZ6A].

184 Rich, *supra* note 17.

185 Michael Schwartz, *Former LandAmerica Bosses Slapped with $365M Suit*, RICH. BIZSENSE (July 8, 2011), https://richmondbizsense.com/2011/07/08/former-landamerica-bosses-slapped-with-365m-suit/ [https://perma.cc/2U5H-HRTK].

186 *Id.*

table subordination, and avoidance of change of control employment agreements as fraudulent conveyances."[187] A few months after the court held that Matson had standing to bring his claims,[188] the bankruptcy court approved a settlement between the parties.[189]

The twenty-one former executives and directors settled the lawsuit for $36 million.[190] Insurance companies representing the defendants made the substantial recovery possible: "[t]he settlement amount reflect[ed] about 90 percent of what was available under the insurance policies for the directors, Matson said."[191] In addition, the defendants agreed to forgo more than $3 million of severance payments that they said that they were owed from the company.[192] In sum, the trustee "said he settled the suit because he believed he recovered more for creditors than tying up the issue in court."[193]

In 2013, another major federal lawsuit was filed against former LandAmerica officers and directors.[194] This time, however, the plaintiff sued only fifteen of the former bosses.[195] By filing the lawsuit, Kerrie Borboa purported to represent "all participants [at least 1000 people] of the

187 Matson v. Alpert (*In re* LandAmerica Fin. Grp., Inc.), 470 B.R. 759, 759 (Bankr. E.D. Va. 2012).

188 *Id.*

189 Gregory J. Gilligan, *LandAmerica Officers, Directors Settle Suit; Some Creditors Get 100%*, RICH. TIMES-DISPATCH (July 25, 2012), http://www.richmond.com/business/landamerica-officers-directors-settle-suit-some-creditors-get/article_4a3c7967-bcc1-5511-bd99-aef14554946b.html [https://perma.cc/95D4-8FLU].

190 *Id.*

191 *Id.*

192 *Id.*

193 *Id.*

194 Michael Schwartz, *Lawsuit Against LandAmerica Execs Revived*, RICH. BIZSENSE (Feb. 10, 2014), https://richmondbizsense.com/2014/02/10/lawsuit-against-landamerica-execs-revived/ [https://perma.cc/K9RU-NE2A].

195 *Id.*

company's retirement plan through July 2009."[196] Borboa claimed significant damages for breach of fiduciary duty:

> At the end of 2007, the plan held about 812,000 shares of LFG stock, which at the time had a value of $28.4 million.
>
> A year later, the holdings of LFG stock had increased to more than 850,000, and their value stood at $76,500. The company terminated its retirement plan in July 2009.[197]

In 2015, the bankruptcy court approved a settlement between the parties.[198]

The fifteen former executives and directors settled the lawsuit for $5 million.[199] Similar to the previous lawsuit discussed above, insurance coverage for the former executives and directors allowed the class to receive such a substantial settlement.[200] But as part of the settlement, the defendants could get away without an admission of wrongdoing on their part.[201] In the end, lead plaintiff Borboa was awarded $5,000.[202]

Disclosure Statement and Liquidation Plan

Nearly ten months after filing for bankruptcy, on September 9, 2009, LFG filed its first Chapter 11 plan, disclosure statement, and notice of hearing for approval of the

196 *Id.*
197 *Id.*
198 Michael Schwartz, *LandAmerica Class-Action Case Settled for $5M*, RICH. BIZSENSE (July 27, 2015), https://richmondbizsense.com/2015/07/27/landamerica-settles-class-action-case-for-5m/ [https://perma.cc/Y4VJ-FA87].
199 *Id.*
200 *Id.*
201 *Id.*
202 *Id.*

disclosure statement.[203] Before LFG could solicit votes for approval or rejection of its Chapter 11 plan, Bankruptcy Code § 1125(b) required LFG to transmit a copy of the plan and a disclosure statement approved by the bankruptcy court to each holder of a claim.[204] The bankruptcy court held a hearing to review the disclosure statement before approving it. Courts review disclosure statements on a case-by-case basis,[205] and to approve a disclosure statement, the court must find that it contains adequate information.[206]

203 *See* Disclosure Statement with Respect to the Joint Chapter 11 Plan for LandAmerica Financial Group, Inc. and Its Affiliated Debtors at 1, *In re* LandAmerica Fin. Grp., Inc., No. 08-35994-KRH (Bankr. E.D. Va. filed Nov. 26, 2008), ECF No. 1991 [hereinafter Disclosure Statement] [https://perma.cc/2VHS-PJR7]; Joint Chapter 11 Plan of LandAmerica Financial Group, Inc. and Its Affiliated Debtors at 1, *In re* LandAmerica Fin. Grp., Inc., No. 08-35994-KRH (Bankr. E.D. Va. filed Nov. 26, 2008), ECF No. 1992 [hereinafter First Chapter 11 Plan] [https://perma.cc/S9EZ-4W4S]; Notice of Hearing and Objection Deadline Regarding Disclosure Statement with Respect to Joint Chapter 11 Plan of LandAmerica Financial Group, Inc. and Its Affiliated Debtors at 1, *In re* LandAmerica Fin. Grp., Inc., No. 08-35994-KRH (Bankr. E.D. Va. filed Nov. 26, 2008), ECF No. 1993 [https://perma.cc/7Y4X-TXTU].

204 11 U.S.C. § 1125(b) (2012). This section requires a party soliciting acceptances or rejections of its proposed plan to transmit "the plan or a summary of the plan, and a written disclosure statement approved, after notice and a hearing, by the court as containing adequate information" to any holder of a claim or interest in the suit. *Id.*

205 § 1125(a) ("[I]n determining whether a disclosure statement provides adequate information, the court shall consider the complexity of the case, the benefit of additional information to creditors and other parties in interest, and the cost of providing additional information . . . .").

206 *Id.* The Bankruptcy Code defines adequate information as

> information of a kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and history of the debtor and the condition of the debtor's books and records, including a discussion of the potential material Federal tax consequences of the plan to the debtor, any successor to the debtor, and a hypothetical investor typical of the holders of claims or interests in the case, that would enable such a hypothetical investor of the relevant class to make an informed judgment about the plan, but adequate information need not include such information about any other possible or proposed plan and in determining whether a disclosure statement provides adequate information, the court shall consider the complexity of the case, the benefit of additional information to creditors and other parties in interest, and the cost of providing additional information.

Id.

1. Contents of Disclosure Statement

In its disclosure statement, LFG stated that the purpose of the document was

> to set forth information: (i) regarding the history of the Debtors and their businesses; (ii) describing the Chapter 11 Cases; (iii) concerning the Plan and alternatives to the Plan; (iv) advising the holders of Claims and Interests of their rights under the Plan; and (v) assisting the holders of Claims entitled to vote on the Plan in making an informed judgment regarding whether they should vote to accept or reject the Plan.[207]

The disclosure statement started with an introduction in section I that informed creditors of important information about approval of the plan.[208] In this section, LFG recommended that each class vote in favor of the plan to obtain the best available recovery.[209] The plan next informed the creditors of the process for approval of the proposed plan, including when the court would hold a hearing on the plan, each class's voting rights, and the voting procedure.[210]

Following section I, section II included a table summarizing the classification and treatment of claims pursuant to the plan.[211] The table also identified "which Classes [were] entitled to vote on the Plan based on provisions of the Bankruptcy Code."[212]

207 Disclosure Statement, *supra* note 203, at 1.
208 *Id.*
209 *Id.* at 2. The recommendation language was the same for each class of creditors.
210 *Id.* at 3–6.
211 *Id.* at 6.
212 *Id.* at 7.

Section III described LFG's business structure and the events that led to the Chapter 11 cases.[213] Notably in the business description section, LFG described the business practices of its two principle underwriters, Commonwealth NE and Lawyers Title,[214] and its 1031 exchange company, LES.[215] In this section, LFG also described the events that led to the Chapter 11 cases.[216] First, they described the ARS market collapse and its effect on Exchange Co. and ultimately LFG.[217] Next, this section discussed the strategic alternatives that LFG tried to take, including the proposed merger with Fidelity.[218]

Section IV gave a description and history of LFG's Chapter 11 cases.[219] First in subsection 4.1, LFG discussed the continuation of the business after filing the Chapter 11 cases.[220] This discussion included a review of the first-day motions, the appointment of the creditors committee, the sale of the two principal underwriters to Fidelity, and the

213 *Id.* at 16.

214 *Id.* at 18.

215 *Id.* at 19. Note that this section included descriptions of LFG's other holdings. First, the "Regulated Underwriters" were described. These included the two principal underwriters, Commonwealth NJ, and United Capital. Second, the "Unregulated Operations" were described. These included (i) LES (Exchange Co.); (ii) LandAmerica Assessment Corporation; (iii) the underwritten title companies (LandAm Title and Southland Entities); (iv) LandAmerica Credit Services, Inc.; (v) LandAmerica Home Warranty Company, Residential Property Maintenance, Inc., LandAmerica Property Inspection Services, Inc., and Buyers Real Estate Services, Inc.; (vi) LoanCare Servicing Center, Inc. and LC Insurance Agency, Inc.; (vii) LandAmerica Valuation Corporation; (viii) Capital Title Group; (ix) LandAmerica Title Insurance Company of Mexico, S.A.; (x) LandAmerica Commercial Search Services; (xi) LandAmerica Alliance Company; (xii) LandAmerica OneStop, Inc.; (xiii) Centennial Bank; (xiv) LandAmerica International Holding Company B.V.; and (xv) LEISA of Connecticut, Inc.

216 *Id.* at 28.

217 *Id.* at 28–30.

218 *Id.* at 30–32.

219 *Id.* at 36.

220 *Id.*

continued operation of LFG's insurance programs and pension plans.[221] Subsection 4.2 described the sale of the rest of LFG's assets, including its remaining subsidiaries.[222] Subsection 4.3 described the wind down of LFG and the sale of any remaining assets that the company still held.[223] Subsection 4.4 discussed the Exchange Co. litigation.[224] These were "adversary proceedings brought by Exchange Customers asserting causes of action including breach of contract and fraud, and seeking, among other things, compensatory and punitive damages and injunctive relief."[225] Subsections 4.5 through 4.7 briefly discussed the ARS litigation, government investigation into Exchange Co., and the administration of the case.[226]

Section V discussed why LFG needed to solicit acceptances and rejections of the plan from the creditors.[227] While this section was the shortest in the disclosure statement, it contained important information. As noted in the section, pursuant to the Bankruptcy Code, "for the Bankruptcy Court to confirm the Plan as a consensual plan, the holders of impaired Claims against the Debtors in each Class of impaired Claims must accept the Plan by the requisite majorities set forth in the Bankruptcy Code."[228] Here, LFG and the creditors committee recommended

221 *Id.* at 36–54.

222 *Id.* at 54–59. This sale of remaining assets included (i) sale of LFG's stock in LVC; (ii) sale of LAC's assets; (iii) sale of LFG's stock in LoanCare; (iv) sale of LFG's stock in Home Warranty; (v) sale of LFG's stock in RealEC Technologies, Inc; (vi) sale of LandAm Credit's assets; (vii) sale of DataTrace; (viii) sale of tax and flood division of OneStop; and (ix) sale of origination, default and MSTD (Back-InTheBlack®) divisions of OneStop.

223 *Id.* at 59–60.

224 *Id.* at 61.

225 *Id.*

226 *Id.* at 66–70.

227 *Id.* at 70.

228 *Id.*

"that all holders of Claims entitled to do so, vote to accept the Plan."[229]

Section VI gave a comprehensive overview of the plan.[230] Additionally, a full copy of the plan was attached as an exhibit to the disclosure statement.[231] The main purpose of the plan overview was to inform each creditor how the plan would be implemented, what distribution they would receive, and the manner in which those distributions would be made.[232]

Section VII discussed post-effective date litigation.[233] This section included descriptions of potential litigation that LFG might initiate following confirmation of the plan that might result in increased funds for creditors.[234] This included litigation against parties involved in the "underwriting, offering, marketing or sale of ARS to LES."[235]

The next three sections discussed the process of plan approval.[236] Section VIII summarized the confirmation process and requirements.[237] Section IX discussed alternatives to confirmation, including liquidation under Chapter 7 and alternative settlement.[238]

Section XI informed creditors and other interest holders of certain risk factors that they should consider along with the plan.[239] These risks included general bankruptcy considerations, such as what would happen if the plan was not approved, how the court might rule on some objections, and

229 *Id.* at 71.
230 *Id.* at 71–92.
231 *Id.*
232 *Id.*
233 *Id.* at 93.
234 *Id.*
235 *Id.*
236 *Id.* at 94.
237 *Id.* at 100.
238 *Id.* at 101.
239 *Id.* at 103–15.

risks that come with liquidation.[240] Additionally, LFG warned that "[a]ctual recoveries may differ materially from the estimated recoveries set forth in this Disclosure Statement."[241]

Lastly, section XII summarized "significant United States federal income tax consequences of the Plan to certain holders of Claims or Interests."[242]

2. Amendments and Objections

On October 2, 2009, LFG submitted its first amended copy of the disclosure statement.[243] The amended disclosure statement contained numerous changes and additions. Those changes and additions included (i) updates to the estimated recovery of each claimant or interest holder;[244] (ii) updates to LFG's ongoing business including (a) updates to the sale of LFG's remaining subsidiaries;[245] and (b) updates to LFG's ongoing insurance programs regarding coverage amounts and notice insurance claims;[246] (iii) an updated estimate range of $195.1 million to $281.3 million for the proceeds from the sale of LFG and its remaining assets; and (iv) updates to the recovery process for Exchange Co. customers.[247]

240 *Id.* at 103–10.

241 *Id.* at 106.

242 *Id.* at 115.

243 Disclosure Statement with Respect to the Joint Chapter 11 Plan for LandAmerica Financial Group, Inc. and Its Affiliated Debtors at 1, *In re* LandAmerica Fin. Grp., Inc., No. 08-35994-KRH (Bankr. E.D. Va. filed Nov. 26, 2008), ECF No. 2110 [hereinafter Amended Disclosure Statement] [https://perma.cc/VG7F-WL2N].

244 *Id.* at 8–24.

245 *Id.* at 27–34.

246 *Id.* at 56–58.

247 *Id.* at 87–89.

There were six filed objections to the amended disclosure statement. Trustee of the W.M. Thompson, Jr. revocable trust objected on the grounds that the amended disclosure statement did not "discuss the terms of an inter-trust agreement between the [Exchange Co.] Trust and the LFG Trust which is to govern how these two trusts will cooperate."[248] Attorneys for the Matthew B. Luxenberg revocable family trust ("Luxenberg") objected to the filing deadline.[249] The attorneys argued that the deadlines did not give them enough time to review the disclosure statement or the amended disclosure statement, and to make timely objections.[250] Two days later, the attorneys of Luxenberg filed a supplemental objection to the amended disclosure statement accompanying their original objection.[251] The

248 Objection to Amended Disclosure Statement at 1, *In re* LandAmerica Fin. Grp., Inc., No. 08-35994-KRH (Bankr. E.D. Va. filed Nov. 26, 2008), ECF No. 2115 [https://perma.cc/547S-55AY]. The inter-trust agreement is found in section 1.77 and section 8.6 of LFG's Chapter 11 plan.

249 Objection to the Amended Disclosure Statement with Respect to the Joint Chapter 11 Plan for LandAmerica Financial Group, Inc. and Its Affiliated Debtors at 1, *In re* LandAmerica Fin. Grp., Inc., No. 08-35994-KRH (Bankr. E.D. Va. filed Nov. 26, 2008), ECF No. 2117 [https://perma.cc/D7DU-KRMB].

250 *Id.* at 2–3. Specifically, Luxenberg objected on the grounds that LFG filing their amended disclosure statement at 10:00 PM on Friday, October 2, 2009, with the deadline for objections to the plan ending on Monday, October 5, 2009, at 4:00 PM, did not give Luxenberg's counsel time to sufficiently review the document. *Id.*

251 Supplemental Objection of Matthew B. Luxenberg to the Amended Disclosure Statement with Respect to the Joint Chapter 11 Plan or LandAmerica Financial Group, Inc. and Its Affiliated Debtors at 1, *In re* LandAmerica Fin. Grp., Inc., No. 08-35994-KRH (Bankr. E.D. Va. filed Nov. 26, 2008), ECF No. 2160 [https://perma.cc/UF58-V7XU]. Luxenberg made the following objections: (i) the Chapter 11 Plan deviated from court-ordered mediation conducted on July 13 and 14, 2009, but the disclosure statement made no reference to the deviation despite LFG and the committees acknowledging the inconsistency; (ii) a majority of the Exchange Co. creditors would not understand the amended disclosure statement as currently drafted because of its length, reliance on legalese and overall difficulty to understand; (iii) LFG did not address any of Luxenberg's previous comments to, suggestions to, and questions about the amended disclosure statement in the document; (iv) the scope of the channeling injunction contained in the amended plan was unclear; (v) lack of "adequate information regarding the trusts to be established under the Amended Plan"; and (vi) "the Amended Disclosure Statement fail[ed] to address

Grunstead Family Limited Partnership ("Grunstead") filed an objection because it believed that the disclosure statement did not contain a complete discussion of the pending Exchange Co. litigation, which included nearly 100 adversary proceedings.[252] Angela M. Arthur, as Trustee of the Arthur Declaration of Trust, dated December 29, 1988; Leapin Eagle, LLC; Vivian R. Hays; Denise J. Wilson; Gerald R. Terry; Ann T. Robbins,; and Jane T. Evans (collectively "Objectors") objected to the adequacy of information contained in the amended disclosure statement and urged the court to reject the disclosure statement pursuant to the adequate information requirement set forth in 11 U.S.C. § 1125.[253] The creditors committee also filed an objection requesting that "the Court not approve the Disclosure Statement until all open issues with the Draft Plan and Disclosure Statement [were] resolved."[254]

certain Multi-District Litigation currently pending against SunTrust Bank and certain officers and directors." *Id.* at 1–5.

252 Grunstead Family Limited Partnership's Objection to Approval of Debtors' Amended Disclosure Statement at 1, *In re* LandAmerica Fin. Grp., Inc., No. 08-35994-KRH (Bankr. E.D. Va. filed Nov. 26, 2008), ECF No. 2121 [https://perma.cc/V897-K6CX].

253 Objection to Amended Disclosure Statement of Joint Debtors at 2, *In re* LandAmerica Fin. Grp., Inc., No. 08-35994-KRH (Bankr. E.D. Va. filed Nov. 26, 2008), ECF No. 2146 [https://perma.cc/3VMS-ZG54]. Objectors objected to the following: (i) release of exchanger claims against LFG because the release "render[ed] the plan facially defective and non-confirmable"; (ii) LFG's characterization of the permanent injunction against third-party claims as a "channeling" injunction was "false and misleading"; (iii) the disclosure statement did not adequately disclose other litigation; (iv) the plan did not properly disclose purported tolling agreements; (v) the disclosure statement was misleading in its description of purported "Waterfall" distributions; and (vi) the disclosure statement lacked disclosures of the amended plan's treatment of exculpation and injunctions. *Id.* at 7–21.

254 Response of the Official Committee of Unsecured Creditors of LandAmerica Financial Group, Inc. to the Debtors' Disclosure Statement with Respect to the Joint Chapter 11 Plan for LandAmerica Financial Group, Inc. and Its Affiliated Debtors, and *in the Alternative*, Motion of the Official Committee of Unsecured Creditors of LandAmerica Financial Group, Inc. for Entry of an Order Approving Form of Letter

On October 12, 2009, LFG submitted its second amended disclosure statement, which contained changes and additions in response to the objections filed.[255] LFG further described updated information regarding the Exchange Co. litigation, comprising of more than 100 adversary proceedings in response to the Grunstead objection.[256] LFG also attached a table outlining those pending adversary proceedings against it as an exhibit to the disclosure statement.[257] LFG added a section describing the class action litigation taking place against SunTrust Bank, Inc., in which some of LFG's and Exchange Co.'s officers were parties in response to one of the objections made in Luxenberg's supplemental objection.[258] LFG also added a section outlining how trusts could make claims against directors and officers.[259] Additionally, LFG provided more information about the tolling agreements in response to the Objectors' objection.[260] One day after filing its second amended disclosure statement, LFG filed its third and final

to Unsecured Creditors in Support of Debtors' Chapter 11 Plan at 5, *In re* LandAmerica Fin. Grp., Inc., No. 08-35994-KRH (Bankr. E.D. Va. filed Nov. 26, 2008), ECF No. 2174 [https://perma.cc/Y7UE-C335].

255 Disclosure Statement with Respect to the Joint Chapter 11 Plan of LandAmerica Financial Group, Inc. and Its Affiliated Debtors at 1**,** *In re* LandAmerica Fin. Grp., Inc., No. 08-35994-KRH (Bankr. E.D. Va. filed Nov. 26, 2008), ECF No. 2186 [hereinafter Second Amended Disclosure Statement] [https://perma.cc/T3LE-R4M3].

256 *Id.* at 71.

257 Exhibit 5 to Disclosure Statement with Respect to the Joint Chapter 11 Plan of LandAmerica Financial Group, Inc. and Its Affiliated Debtors at 2**,** *In re* LandAmerica Fin. Grp., Inc., No. 08-35994-KRH (Bankr. E.D. Va. filed Nov. 26, 2008), ECF No. 2186-5 [https://perma.cc/T5GQ-HP8S].

258 Second Amended Disclosure Statement, *supra* note 255, at 78–79.

259 *Id.* at 100.

260 *Id.* at 101.

amended disclosure statement.[261] The second amendment contained no major changes or additions.[262]

3. Approval of Disclosure Statement

On October 14, 2009, the bankruptcy court issued an omnibus order approving the disclosure statement.[263] The court found that the disclosure statement contained "adequate information" as defined by section 1125 of the Bankruptcy Code.[264] The court overruled any objections to the disclosure statement not previously resolved. Further, the court authorized LFG to commence distributing "solicitation materials" to claim and interest holders.[265] In the order, the court also established a November 10, 2009, deadline for claim and interest holders to submit a ballot to vote to accept or reject the plan.[266] Finally, the court set the date for the confirmation hearing for approval of the plan for November 18, 2009.[267]

261 Disclosure Statement with Respect to the Joint Chapter 11 Plan of LandAmerica Financial Group, Inc. and Its Affiliated Debtors at 1**,** *In re* LandAmerica Fin. Grp., Inc., No. 08-35994-KRH (Bankr. E.D. Va. filed Nov. 26, 2008), ECF No. 2207 [https://perma.cc/SGE8-T49Q].

262 *Id.* The only notable changes were updated dates regarding hearings and voting procedures, and updates to on-going litigation. *Id.*

263 Omnibus Order: (A) Approving Disclosure Statement; (B) Fixing Voting Record Date; (C) Approving Solicitation Materials and Procedures for Distribution Thereof; (D) Approving Forms of Ballots and Establishing Procedures for Voting on Debtors' Plan; (E) Scheduling Hearing and Establishing Notice and Objection Procedures in Respect of Confirmation of Debtors' Plan; and (F) Granting Related Relief at 1, *In re* LandAmerica Fin. Grp., Inc., No. 08-35994-KRH (Bankr. E.D. Va. filed Nov. 26, 2008), ECF No. 2214 [https://perma.cc/TC9C-8F4J].

264 *Id.* at 2.

265 *Id.* at 4. Solicitation materials included (i) the disclosure statement order and exhibits; (ii) a ballot with return envelope, disclosure statement, and the plan and exhibits attached; (iii) a notice of non-voting status; and (iv) a letter of support from the LES (Exchange Co.) committee or the LFG committee, as applicable. *Id.* at 4–5.

266 *Id.* at 4.

267 *Id.* at 14.

4. Liquidation Plan

Along with the disclosure statement, LFG filed the first copy of its Chapter 11 plans on September 9, 2009.[268] The first plan was seventy pages long,[269] and it contained sixteen articles.[270]

In article I, several definitions were provided.[271] For example, "*Class* means each category of Claims or Interests established under Article IV of the Plan pursuant to sections 1122 and 1123(a)(1) of the Bankruptcy Code."[272] Also, the plan defined "*Exchange Funds*" as "the net consideration from the sale of relinquished property acquired by LES pursuant to an Exchange Agreement."[273] Further, the plan defined "*General Unsecured Claim*" by describing what it is not—for example, it is not "a Secured Claim" or "an Administrative Expense Claim."[274] In addition, the plan defined "*Notice Parties*" as "(a) the U.S. Trustee, (b) the LES Trustee, (c) the LES Trust Committee, (d) the LFG Trustee, and (e) the LFG Trust Committee."[275]

268 First Chapter 11 Plan, *supra* note 203, at 1; *see also* BERNSTEIN & KUNEY, *supra* note 76, at 516 (outlining how a Chapter 11 case is resolved, from negotiation with creditors to approval of debtor's plan by the court).

269 First Chapter 11 Plan, *supra* note 203, at 70.

270 *Id.* at 2–5. The articles included (i) definitions and interpretation, (ii) resolution of certain inter-creditor and inter-debtor issues, (iii) administrative expense claims, fee claims, U.S. trustee fees and priority tax claims, (iv) classification of claims and interests, (v) treatment of claims and interests, (vi) acceptance or rejection of the plan; effect of rejection by one or more classes of claims or interests, (vii) means for implementation, (viii) the trusts, (ix) distributions, (x) procedures for resolving claims, (xi) procedures for LES (Exchange Co.) damages claims, (xii) executory contracts and unexpired leases, (xiii) conditions precedent to consummation of the plan, (xiv) effect of confirmation, (xv) retention of jurisdiction, and (xvi) miscellaneous provisions. *Id.*

271 *Id.* at 6.

272 *Id.* at 9.

273 *Id.* at 11.

274 *Id.* at 12.

275 *Id.* at 20.

In article I, the plan also explained what rules of construction apply to the document.[276] All of "the rules of construction contained in section 102 of the Bankruptcy Code shall apply to the construction of the Plan," but not "the rules of construction contained in sections 102(5) of the Bankruptcy Code."[277] That specific excluded section explains that "'or' is not exclusive."[278] Further, "[a]ll Plan Documents and appendices to the Plan [were] incorporated into the Plan by reference and [were] part of the Plan as if set forth in full [in it]."[279]

In article II, the plan explained how certain inter-creditor issues and intercompany claims would be resolved.[280] To confirm the plan, the bankruptcy court would agree that it "constitute[d] a good faith compromise and settlement of all Claims or controversies . . . pursuant to this Plan."[281] Also, the plan would relegate the holders of "prepetition Intercompany Claims" to the status of unsecured creditors.[282]

In article III, the plan divided the types of claims into four groups: (1) administrative expenses claims, (2) fee claims, (3) U.S. trustee fees, and (4) priority tax claims.[283] Using all caps, the plan encouraged holders of administrative expense claims to timely file or be forever barred.[284] The plan repeated an all caps warning for fee claims.[285]

276 *Id.* at 26.
277 *Id.*
278 11 U.S.C. § 102(5) (2012) ("In this title . . . 'after notice and a hearing,' or a similar phrase . . . 'or' is not exclusive . . . .").
279 First Chapter 11 Plan, *supra* note 203, at 27.
280 *Id.*
281 *Id.*
282 *Id.*
283 *Id.* at 28.
284 *Id.* at 29.
285 *Id.*

Also, the plan explained how outstanding U.S. trustee fees and allowed priority tax claims would be paid.[286]

In article IV, the plan designated the various classes of claims.[287] First, eight classes were associated with LES (Exchange Co.): priority non-tax claims, secured claims, escrow exchange claims, segregated exchange principal claims, note exchange collectible claims, general unsecured claims, damages claims, and equity interests.[288] Second, six classes were associated with LFG: priority non-tax claims, secured claims, general unsecured claims, exchange guarantee claims, securities law claims, and equity interests.[289] Third, four classes were associated with subsidiary debtors: priority non-tax claims, secured claims, general unsecured claims, and equity interests.[290] Then each class was further separated based on whether it was impaired or unimpaired by the plan and whether it was entitled to vote or deemed to accept.[291]

In article V, the plan described how fourteen different types of claims and interests were treated.[292] They were priority non-tax claims, secured claims, LES (Exchange Co.) escrow exchange claims, segregated exchange principal claims, note exchange collectible claims, LES (Exchange Co.) general unsecured claims, LES (Exchange Co.) damages claims, LES (Exchange Co.) equity interests, LFG general unsecured claims, LFG exchange guarantee claims, LFG securities law claims, LFG equity interests,

286 *Id.* at 30.
287 *Id.* at 31.
288 *Id.*
289 *Id.*
290 *Id.*
291 *Id.*
292 *Id.* at 33–37.

subsidiary general unsecured claims, and subsidiary equity interests.[293] For example, "legal, equitable and contractual rights of the holders of [Secured] Claims [were] unaltered by [the] Plan."[294] Also, because "Secured Claims [were] not impaired Claims," under "section 1126(f) of the Bankruptcy Code, the holders of Secured Claims [were] conclusively presumed to accept [the] Plan and [were] not entitled to vote to accept or reject the Plan."[295] Finally, holders of secured claims became holders of general unsecured claims for the unsecured portion of their claims if "the value of the Collateral securing each Secured Claim [was] less than the amount of such Secured Claim."[296] Below is a table depicting the treatment of each class under the plan.[297]

293 *Id.*
294 *Id.* at 33.
295 *Id.* at 34.
296 *Id.*
297 *Id.* at 30.

Figure 4

Class	Designation	Impairment	Entitled to Vote
LES			
Class LES 1	LES Priority Non-Tax Claims	No	No (Deemed to accept)
Class LES 2	LES Secured Claims	No	No (Deemed to accept)
Class LES 3	LES Escrow Exchange Claims	Yes	Yes
Class LES 4	Segregated Exchange Principal Claims	Yes	Yes
Class LES 5	Note Exchange Collectible Claims	Yes	Yes
Class LES 6	LES General Unsecured Claims	Yes	Yes
Class LES 7	LES Damages Claims	Yes	Yes
Class LES 8	LES Equity Interests	Yes	Yes
LFG			
Class LFG 1	LFG Priority Non-Tax Claims	No	No (Deemed to accept)
Class LFG 2	LFG Secured Claims	No	No (Deemed to accept)
Class LFG 3	LFG General Unsecured Claims	Yes	Yes
Class LFG 4	LFG Exchange Guarantee Claims	Yes	Yes
Class LFG 5	LFG Securities Law Claims	Yes	Yes
Class LFG 6	LFG Equity Interests	Yes	No (Deemed to reject)
Subsidiary Debtors			
Class SD 1	Subsidiary Priority Non-Tax Claims	No	No (Deemed to accept)
Class SD 2	Subsidiary Secured Claims	No	No (Deemed to accept)
Class SD 3	Subsidiary General Unsecured Claims	Yes	Yes
Class SD 4	Subsidiary Equity Interests	Yes	Yes

In article VI, the plan explained how it could be accepted or rejected and how a rejection by one or more classes of claims or interests would affect the plan.[298] Plan acceptance by a particular class of claims required acceptance "by at least two-third (2/3) in amount" and "more than one-

298 *Id.* at 38.

half (1/2) in number of holders."[299] Also, the "Debtors, with the prior written consent of each of the Creditors Committees, [could] request confirmation of [the] Plan . . . under section 1129(b) of the Bankruptcy Code."[300] The plan referred to this option as a "Cramdown."[301] Finally, the complete plan could not be confirmed until "confirmed as to each of the Debtors."[302]

In article VII, the plan described the means of implementation of the plan.[303] For example, "entry of the Confirmation Order . . . constitute[d] authorization for the Debtors, their Subsidiaries, the Trustees, or the Trust Committees . . . to implement all provisions of . . . the Plan."[304] Also, the plan authorized the subsidiary debtor trustees to "monetize and convert the Assets of the Subsidiary Debtors to Cash and make timely distributions to the holders of [Subsidiary Debtor] Trust Interests."[305]

In article VIII, the plan covered the newly created trusts.[306]

> On the Effective Date, each of the Trusts and their associated Sub-Trusts, including an SD Trust for each Subsidiary Debtor, shall be established as liquidating trusts for the primary purpose of monetizing and distributing the Trust Assets to holders of Trust Interests with no objective to continue or engage in the conduct of a trade or any other business, except to the extent reasonably necessary to, and

299 *Id.*
300 *Id.*
301 *Id.*
302 *Id.*
303 *Id.* at 39.
304 *Id.* at 41.
305 *Id.* at 42.
306 *Id.* at 44.

> consistent with, the liquidating purpose of the Trusts.[307]

Also, "[e]ach Trust [was] required to distribute at least annually to the applicable holders of Trust Interests."[308] Further, "upon the distribution or abandonment of all of its Trust Assets," each trust would terminate.[309]

In article IX, the plan covered distributions.[310] The distributions would be made "in complete settlement, satisfaction and discharge of such Allowed Claims or Allowed Interests."[311] Also, "[n]o fractional Trust Interests [would] be distributed."[312] Finally, the plan explained how it complied with the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended.[313]

In article X, the plan explained the procedures for resolving claims.[314] A period of "one-hundred twenty (120) days after the Effective Date" was established when objections would have to be served and filed.[315] Also, "Disputed Claims [would] not be entitled to any Plan Distributions unless and until such Claims became Allowed Claims."[316] In addition, "reasonable fees and expenses incurred . . . in connection with implementation of [the] Plan . . . [would] be paid in Cash in the ordinary course of business by the Trustees or Post-Effective Date Entities."[317]

307 *Id.*
308 *Id.* at 46.
309 *Id.* at 47.
310 *Id.* at 49.
311 *Id.* at 50.
312 *Id.* at 51.
313 *Id.* at 52.
314 *Id.*
315 *Id.*
316 *Id.* at 53.
317 *Id.* at 55.

In article XI, the plan described the procedures for LES (Exchange Co.) damages claims.[318] The plan provided a timeline for when Exchange Co. damages claims would be allowed.[319] Also, "no Plan Distribution [would] be made on account of LES Damages Claims" if "the Principal Satisfaction Date [did] not occur prior to the termination of the LES Trust."[320]

In article XII, the plan covered executory contracts and unexpired leases.[321] Generally, as of the effective date, "all executory contracts and unexpired leases to which a Debtor [was] a party [would] be deemed rejected."[322] In addition, "[a]ll contracts, agreements and leases that were entered into by LES or LFG . . . after the Petition Date [would] be deemed assigned by LES or LFG to the respective Trust on the Effective Date."[323]

In article XIII, the plan explained conditions precedent to consummation of the plan.[324] Some of the conditions precedent included "the Confirmation Order having become a Final Order," "the Trust Agreements [having] been fully executed," and no "stay or injunction (or similar prohibition) in effect."[325] Further, "the Confirmation Order [would] not be vacated if all of the conditions to consummation [were] either satisfied or duly waived."[326]

In article XIV, the plan described the effect of confirmation.[327]

318 *Id.*
319 *Id.*
320 *Id.*
321 *Id.* at 56.
322 *Id.*
323 *Id.* at 58.
324 *Id.*
325 *Id.*
326 *Id.* at 59.
327 *Id.*

> [O]n or after the Confirmation Date, the provisions of [the] Plan [would] bind any holder of a Claim against, or Interest in, the Debtors and inure to the benefit of and be binding on such holder's respective successors and assigns, whether or not the Claim or Interest of such holder is impaired under [the] Plan and whether or not such holder has accepted [the] Plan.[328]

Also, "all holders of Claims and Interests and other parties in interest [would] be enjoined from taking any actions to interfere with the implementation or consummation of [the] Plan."[329]

In article XV, the plan covered retention of jurisdiction.[330] Even after confirmation of the plan, the bankruptcy court would retain exclusive jurisdiction over the LFG case for several purposes.[331] Among them, the bankruptcy court would retain exclusive jurisdiction "[t]o ensure that distributions to holders of Allowed Claims or Allowed Interests are accomplished as provided [in the plan]," "[t]o recover all Assets of the Debtors and property of the Estates, wherever located," and "[t]o enter a final decree closing each of the Chapter 11 Cases."[332]

In article XVI, the plan described all miscellaneous provisions.[333] One provision explained that "[t]he Creditors Committees [would] be automatically dissolved upon the Effective Date."[334] Another provision stated that "[t]he Debtors reserve the right to revoke or withdraw [the] Plan

328 *Id.*
329 *Id.* at 60.
330 *Id.* at 63.
331 *Id.*
332 *Id.* at 63–64.
333 *Id.* at 65.
334 *Id.*

prior to the Effective Date."[335] Finally, the last provision in the article provided that "the Plan [would] have no force or effect unless the Bankruptcy Court [would] enter the Confirmation Order."[336]

Before obtaining creditor and court approval, LFG filed five more plans over the next couple of months—on October 2,[337] October 12,[338] October 13,[339] October 24,[340] and November 16.[341] In seventy-six pages, the final document explained how LFG would distribute funds to its creditors after liquidating its assets.[342] The final plan contained all of the articles and article subsections from the original plan, but the final plan contained four additional article subsections.[343]

First, the final plan added a subsection about tolling agreements within the article covering means for implementation.[344] It simply stated the following: "The statute

335 *Id.* at 66.

336 *Id.* at 69.

337 Joint Chapter 11 Plan of LandAmerica Financial Group, Inc. and Its Affiliated Debtors at 1, *In re* LandAmerica Fin. Grp., Inc., No. 08-35994-KRH (Bankr. E.D. Va. filed Nov. 26, 2008), ECF No. 2109 [https://perma.cc/WD4N-CKTL].

338 Joint Chapter 11 Plan of LandAmerica Financial Group, Inc. and Its Affiliated Debtors at 1, *In re* LandAmerica Fin. Grp., Inc., No. 08-35994-KRH (Bankr. E.D. Va. filed Nov. 26, 2008), ECF No. 2185 [https://perma.cc/48QC-6U7M].

339 Joint Chapter 11 Plan of LandAmerica Financial Group, Inc. and Its Affiliated Debtors at 1, *In re* LandAmerica Fin. Grp., Inc., No. 08-35994-KRH (Bankr. E.D. Va. filed Nov. 26, 2008), ECF No. 2206 [https://perma.cc/VC2R-BLMF].

340 Joint Chapter 11 Plan of LandAmerica Financial Group, Inc. and Its Affiliated Debtors at 1, *In re* LandAmerica Fin. Grp., Inc., No. 08-35994-KRH (Bankr. E.D. Va. filed Nov. 26, 2008), ECF No. 2342 [https://perma.cc/8NLU-SQ9A].

341 Joint Chapter 11 Plan of LandAmerica Financial Group, Inc. and Its Affiliated Debtors at 1, *In re* LandAmerica Fin. Grp., Inc., No. 08-35994-KRH (Bankr. E.D. Va. filed Nov. 26, 2008), ECF No. 2576 [hereinafter Final Chapter 11 Plan] [https://perma.cc/4GXM-2MTS].

342 *Id.* at 47.

343 Final Chapter 11 Plan, *supra* note 341, at 2–5; First Chapter 11 Plan, *supra* note 203, at 2–5.

344 Final Chapter 11 Plan, *supra* note 341, at 48.

of limitations for Enjoined Actions against the Tolling Parties are tolled subject to the terms and conditions of the Tolling Agreements."[345] Also, the plan defined "*Tolling Parties*" as "the LES and LFG directors and officers set forth on Schedule 1.214 of this Plan who are parties to Tolling Agreements."[346]

Second, the final plan added a subsection about LFG guaranteed cash distributions within the article covering distributions.[347] This subsection allowed "[a]ny holder of an Allowed LFG Exchange Guarantee Claim that elect[ed] to receive an LFG Guarantee Cash Distribution [to] receive such distribution from the LFG Trustee."[348]

Third, the final plan added a subsection about deemed allowed claims to the article covering procedures for resolving claims.[349] This subsection confirmed that some of the claims listed on some specific schedules were "deemed Allowed in the amounts and in such Classes as set forth on such Schedules."[350]

Fourth, the final plan added a subsection about the Securities and Exchange Commission to the article covering miscellaneous provisions.[351] This subsection confirmed that the plan would not "prohibit, impair or delay the Securities and Exchange Commission from continuing or commencing any current or future suits, actions, investigations or proceedings against the Debtors or any third parties."[352]

345 *Id.*
346 *Id.* at 29.
347 *Id.* at 56–57.
348 *Id.* at 56.
349 *Id.* at 60.
350 *Id.*
351 *Id.* at 75.
352 *Id.*

Before creditors and the court approved the final plan, the U.S. Trustee raised an objection to it.[353] In particular, the he objected to the release of liability for pre-petition officers and directors of LFG, the exculpation of people who were involved with the Chapter 11 case from negligence, and the differing treatment proposed for creditors depending on whether they voted in favor of the plan.[354] In addition to the U.S. Trustee, more than twenty creditors filed objections to the plan.[355]

But despite the objections, 97% of creditors and equity security-holders voted to approve the plan.[356] Next, the court held a hearing to consider confirmation of the plan on November 18, 2009.[357] In addition, the court later filed its order confirming the plan on November 23, 2009—missing the one-year anniversary of LFG's bankruptcy filing by only a few days.[358]

Counsel for LFG proposed that ending litigation and some of the administrative costs associated with Chapter 11 bankruptcy would help to give higher returns to LFG's

353 Objection of United States Trustee to Confirmation of Debtors' Plan of Reorganization at 1, *In re* LandAmerica Fin. Grp., Inc., No. 08-35994-KRH (Bankr. E.D. Va. filed Nov. 26, 2008), ECF No. 2554 [hereinafter U.S. Trustee Objection to the Final Chapter 11 Plan] [https://perma.cc/9YKN-HLMR]; *see also* BERNSTEIN & KUNEY, *supra* note 76, at 15–16 (explaining the duties of the U.S. Trustee); Tina Peng, *Trustee Objects to LandAmerica Ch. 11 Plan*, LAW360 (Nov. 16, 2009, 12:35 PM), https://www.law360.com/articles/134114/trustee-objects-to-landamerica-ch-11-plan [https://perma.cc/DF55-CXAK].

354 U.S. Trustee Objection to the Final Chapter 11 Plan, *supra* note 353, at 2.

355 Emily C. Dooley, *Creditors Approve LandAmerica's Bankruptcy Exit Plan*, RICH. TIMES-DISPATCH (Nov. 18, 2009), http://www.richmond.com/business/article_6696898e-b674-5e3a-afb6-48e80d6a57f3.html [https://perma.cc/D4V8-GPKX].

356 *Id.*; *see also* BERNSTEIN & KUNEY, *supra* note 76, at 516 (explaining how the plan must receive the requisite votes from the creditors and equity security-holders before the court can confirm it).

357 Order Confirming Joint Chapter 11 Plan of LandAmerica Financial Group, Inc. and Its Affiliated Debtors at 2, *In re* LandAmerica Fin. Grp., Inc., No. 08-35994-KRH (Bankr. E.D. Va. filed Nov. 26, 2008), ECF No. 2666 [https://perma.cc/ZH4M-YC3N].

358 *Id.* at 1.

creditors.[359] Before finally confirming the plan, Judge Huennekens stated the following:

> I think that it was a very, very -- I can't put enough verys in front of that -- difficult case, and I realize that, you know, not everybody is happy, but we have the happiest of results we could possibly have by being able to distribute monies as quickly as possible in this case.[360]

After confirmation, one reporter estimated that unsecured creditors would receive between two and eighty-one cents per dollar owed,[361] while another reporter estimated that they would receive thirty-seven cents per dollar owed.[362] The final amount that unsecured creditors received was eighty cents per dollar owed.[363]

359 Transcript of Hearing Before Honorable Kevin R. Huennekens United States Bankruptcy Judge at 8–9, *In re* LandAmerica Fin. Grp., Inc., No. 08-35994-KRH (Bankr. E.D. Va. filed Nov. 26, 2008), ECF No. 2701 [https://perma.cc/C89R-BPF9].

360 *Id.* at 180.

361 Emily C. Dooley, *Bankruptcy Judge Approves LandAmerica Plan*, RICH. TIMES-DISPATCH (Nov. 19, 2009), http://www.richmond.com/business/bankruptcy-judge-approves-landamerica-plan/article_7619e996-8874-523a-ad78-0e9205726d38.html [https://perma.cc/VX3K-DJLQ].

362 Christie Smyth, *LandAmerica Ch. 11 Plan Wins OK from Judge*, LAW360 (Nov. 24, 2009, 2:36 PM), https://www.law360.com/articles/135891/landamerica-ch-11-plan-wins-ok-from-judge [https://perma.cc/Z34A-DZ67].

363 Transcript of Hearing Final Report and Motion for Final Decree (The LandAmerica Financial Group, Inc., Capital Title Group, Inc., LandAmerica Assessment Corporation, LandAmerica OneStop, Inc., Southland Title Corporation and Southland Title of San Diego Liquidation Trusts' Final Reports and Motion for (A) The Discharge of Liquidation Trustees, (B) The Discharge of Dissolution Trustee and (C) Entry of Final Decrees) Before the Honorable Kevin R. Huennekens, United States Bankruptcy Judge at 4, *In re* LandAmerica Fin. Grp., Inc., No. 08-35994-KRH (Bankr. E.D. Va. filed Nov. 26, 2008), ECF No. 5755 [hereinafter Transcript of Hearing Final Report and Motion for Final Decree] [https://perma.cc/FN7C-Q5LT].

Final Order

On December 22, 2015, Judge Huennekens issued an order to close the LFG bankruptcy case.[364] The U.S. Trustee reported that "the plan anticipated a 26.2 percent distribution, and the Trust actually distributed 80 percent to those unsecured creditors."[365] He considered the resolution of the case "an enormous success for LFG creditors."[366] Nearly seven years after it began, the bankruptcy saga of LFG came to a close.

364 Final Decree at 3, *In re* LandAmerica Fin. Grp., Inc., No. 08-35994-KRH (Bankr. E.D. Va. filed Nov. 26, 2008), ECF No. 5754 [https://perma.cc/BLB9-UKBR].

365 Transcript of Hearing Final Report and Motion for Final Decree, *supra* note 363, at 4.

366 Michael Schwartz, *LandAmerica Bankruptcy Coming to a Close*, RICH. BIZSENSE (July 29, 2015), https://richmondbizsense.com/2015/07/29/landamerica-bankruptcy-coming-to-500m-close/ [https://perma.cc/WH8D-KBCB].