

SMALL BUSINESS BANKRUPTCY PROVISIONS

- A. The small business provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 continue the objective manifested in the 1994 amendments to the Bankruptcy Reform Act of 1978 to facilitate Chapter 11 reorganization of small businesses. At the same time, the statute manifests a legislative intent to impose strict deadlines and imposes substantial reporting burdens, these aspects of the statute appear to reflect a legislative scepticism as to the ability of many small businesses to reorganize.
- B. Section 10151(C) defined small business case as "a case filed under Chapter 11 of this title in which the debtor is a small business debtor."
- C. Section 51(d) states: "The term small business debtor –
- D. Thus, breaking down the elements: a small business debtor is one that (a) is a person engaged in commercial or business activities, (b) with aggregate non-contingent liquidated, secured and unsecured debt of not more than \$2,000,000.00, (c) where the U.S. Trustee has not appointed a creditors committee, or (d) if appointed has been determined by the court to not be sufficiently active and representative.

II Section 1116 imposes a series of additional duties in a small business case they are:

- (A) Append to the voluntary petition, or in an involuntary case not later than seven days after the date of the order for relief.
 - 1. Most recent balance sheet, statement of operations, cash flow statement and federal income tax return.

OR

- (B) Misstatement made under penalty of perjury that no balance sheet, statement of operations or case flow statement has been prepared and no federal income tax return has been filed.
 - 2. Attend through its senior management personnel and counsel meetings scheduled by the court or the United States Trustee including initial debtor interviews scheduling conferences and meetings of creditors.
 - 3. Timely file all schedules and statements of financial affairs, unless the court after notice and a hearing grants an extension which shall not extend such time period to a date later than 30 days after the date of the

order for relief.

4. File all post-petition financial and other reports required by the Federal Rules of Bankruptcy Procedure.
 5. Maintain customary and appropriate insurance.
 6. Timely file tax returns and other required government filings and pay all taxes entitled to administrative expense priority.
 7. Allow the U.S. Trustee or a designated representative of the United States Trustee to inspect the debtor's business premises, books and records.
- (B) Amended 1112(b)(4) which sets forth additional basis to either convert or dismiss a case, and in light of 1104(a)(3) to appoint a trustee.
- (C) 1121(e) extends the exclusive period in which only a debtor may file a plan of reorganization from 120 days in a non-small business case to 180 days.
- (D) 1121(e)(2) however, limits the time in which a plan and disclosure statement shall be filed so that it must be filed within 300 days after the order for relief.
- (E) The savings provision is found in 1121(e)(3) which states that the time period specified in (e)(1) and (e)(2) may be extended only if: a) the debtor, after notice to parties-in-interest demonstrates by a preponderance of the evidence that it is more likely than not that the court will confirm a plan within a reasonable period of time, b) a new deadline is imposed at the time the extension is granted, and c) the order extending the time is signed before the existing deadline has expired.
- (F) 1129(e) requires the court in a small business case to confirm a plan that complies with the applicable provisions not later than 45 days after the plan is filed as the time for confirmation is extended in accordance with 1121(e)(3).
- (G) The deadlines set forth in Section 1116, as opposed to the prior deadlines set forth in the Bankruptcy Rules, now have the force and effect of statute as opposed to rule, therefore it is debatable whether any such deadlines can be extended by application of Rule 9006.
- (H) While 1112 provides some small latitude for the court to extend the statutory deadlines, such latitude is only available upon a showing that there exists a "reasonable justification for the act or omission and that it will be cured within a reasonable period of time fixed by the court."
- (I) 1. New Section 308 captioned "Debtor Reporting Requirements", which imposes the obligation to file certain periodic financial and other reports. This Section is only applicable to small business debtors. These reports include: a)

report as to the debtor's profitability, b) reasonable approximations of the debtor's projected cash receipts and cash disbursements over a reasonable period, c) comparisons of actual cash receipts and disbursements with projections in prior reports, and d) a statement of whether the debtor is in compliance in all material respects with post-petition requirements imposed by this title and the Federal Rules of Bankruptcy Procedure and in compliance with the obligation to timely file tax returns and other required government filings and paying taxes and other administrative expenses when due.

2. Debtor is not in compliance with the requirements set forth in 308(B)(4)(i)(2) (bankruptcy requirements, tax returns and other governmental filings and paying taxes and other administrative expenses), a specification of what the failures are and how and at what cost the debtor intends to remedy such failures.

3. Report on such other matters as are in the best interest of the debtor and the creditor and in the public interest "in fair and efficient procedures under Chapter 11 of this Title."

(J) 1. Section 1125(a) reflects the Congressional intent to lessen the disclosure obligations of a small business debtor in connection with the preparation of its disclosure statement. Thus, it provides that "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."

2. Section 1125(f) provides varying types of flexibility to the court in evaluating a small business debtor's disclosure statement. Thus, the court may determine that the plan itself provides adequate information and that a separate disclosure statement is not necessary, the court may approve a disclosure statement submitted on standard forms approved by the court or adopted under Section 2075 of Title 28.

3. The court may conditionally approve a disclosure statement subject to final approval after notice and a hearing. Statute provides that acceptances and rejections of a plan may be soliciting based upon a conditionally approved disclosure statement. It also provides that the hearing on the disclosure statement may be combined with the hearing on confirmation of the debtor's plan.

(K) Section 433 of the BAPCPA directs the judicial conference of the United States to propose for adoption standard form disclosure statements and reorganization plans for small business debtors.

(L) Likewise Section 435 directs the judicial conference of the United States to propose official rules and forms with respect to the periodic financial reports and other information that a small business debtor must file under Section 308 of the Bankruptcy Code.