



Business Reorganization Committee

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In This Issue:

Volume 8, Number 9/ August 2009

- Combined Hearings on Approval of Disclosure Statement and Confirmation of Plan
- Bankruptcy 2009: Views from the Bench

Combined Hearings on Approval of Disclosure Statement and Confirmation of Plan

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As a result of the general prohibition under §1125(b) of the Bankruptcy Code on solicitation of votes to accept or reject a plan prior to court approval of a disclosure statement, there is usually a period of time between the hearing on approval of a disclosure statement and the hearing on confirmation of the plan.^[1] However, there are two universally recognized cases in which bankruptcy courts will combine the hearings on approval of the disclosure statement and the confirmation of plan. First, in cases involving small business debtors,^[2] the court is empowered to conditionally approve the disclosure statement, permit postpetition solicitation, and combine the two hearings on approval of the disclosure statement and confirmation of the plan.^[3] Second, in cases involving prepackaged plans, which are subject to a prepetition solicitation of votes that was in compliance with applicable nonbankruptcy law, courts routinely conduct combined hearings to approve the disclosure statement, plan and solicitation procedures shortly after a debtor files its chapter 11 petition.^[4]

Absent these situations, may a bankruptcy court combine the hearings on approval of the disclosure statement and confirmation of a plan in cases involving non-small business debtors that did not solicit votes on their plans prior to commencing bankruptcy proceedings? On its face, §105(d) of the Code appears to authorize the court to combine the two hearings in such circumstances. The purpose of §105(d) is to authorize the court to issue orders to ensure that "the case is handled expeditiously and economically."^[5] Section 105(d) authorizes a court to enter an order that "provides that the hearing on approval of the disclosure statement may be

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combined with the hearing on confirmation of the plan.”^[6] However, §105(d) provides that such an order must be consistent with other provisions of the Code and Federal Rules of Bankruptcy Procedure.^[7]

Courts have disagreed on whether the application of §105(d) to combine the hearings on approval of the disclosure statement and confirmation of a plan in non-small business cases involving postpetition solicitation of votes conflicts with §1125. Recently, in *In re Gulf Coast Oil Corp.*, 404 B.R. 407, 425 (Bankr. S.D. Tex. 2009), the court, in the context of denying the debtors’ motion for approval of an asset sale, harmonized the two Code sections stating that “section 1125(f) authorizes combined plans and disclosure statements [hearings] in small business cases and section 105(d) authorizes the court to combine them in other cases.” This statement is consistent with the long-established canon of statutory interpretation that courts must give effect, if possible, to every word and clause of a statute so no part, or section, will be inoperative or superfluous.^[8] To limit combined hearings to cases involving small business debtors or prepackaged plans under §1125 would render the portion of §105(d) that provides for combined hearings on a plan or disclosure statement superfluous.

On the other hand, a bankruptcy court has held that it is impermissible to combine hearings on approval of a disclosure statement and confirmation of a plan in a non-small business case that is not a prepackaged bankruptcy. In *In re Amster Yard Assocs.*, 214 B.R. 122, 123 (Bankr. S.D.N.Y. 1997), the secured creditor filed a disclosure statement and an *ex parte* application for preliminary approval of its disclosure statement to permit immediate solicitation, combine the disclosure statement and confirmation hearings, and grant related relief. The debtor did not qualify for small business treatment because its debts were in excess of the statutory limit and because it was a single-asset real estate entity. As an initial matter, the bankruptcy court found that entering a scheduling order providing for combined hearings under §105 in the circumstances of the case clashed with §1125’s limitations on combined hearings.^[9] Applying the provisions of §105(d) that the court cannot make an order under that section that conflicts with other sections of the Code or the Bankruptcy Rules, the bankruptcy court held that §105(d) “does not authorize [the court] to approve the disclosure statement subject to a final hearing, or under the circumstances of this case, to combine the disclosure statement and confirmation hearings.”^[10] In other words, the bankruptcy court held that an order combining the disclosure statement and confirmation hearings is “inconsistent with Section 1125 except in prepackaged cases or ‘small business’ cases.”^[11] The court also noted that the potential problems resulting from combined hearings include that plan proponents would be less willing to make modifications that could nullify votes they had already solicited and courts may be reluctant to delay confirmation based

on shortcomings that might have foreclosed approval of the disclosure statement if the hearings had not been combined.^[12]

Recognizing the differing opinions on the statutory basis for combined hearings and the potential problems noted by the court in *Amster Yard Assocs.*, an argument can be made in favor of allowing combined hearings upon a showing of cause. Cause may constitute an uncontentious case wherein the debtor and the official committee of unsecured creditors (both of whom are fiduciaries under the Bankruptcy Code) support the holding of the combined hearings. An example of such a case is *Luminent Mortgage Capital Inc., et al.*, jointly administered under Case No. 08-21389, pending in the U.S. Bankruptcy Court for the District of Maryland (*Luminent*).^[13.]

In *Luminent*, Judge Duncan W. Keir granted the unopposed request of the debtors and debtors-in-possession (DIPs), who were publicly-traded prior to the effective date of the plan, to hold combined hearings on approval of the debtors' disclosure statement and confirmation of their plan of reorganization.^[14] The plan of reorganization embodied a consensual transaction pursuant to which the debtors' largest creditor and DIP lender received a significant equity stake in the reorganized parent company in exchange for converting its claims to new equity and making a cash contribution to the unsecured creditor distribution fund. No objections were filed to approval of the disclosure statement or confirmation of the plan, and 100 percent of the creditors who voted on the plan voted to accept the plan. By holding combined hearings, the bankruptcy court enabled the debtors to avoid the tremendous administrative expenses that would have been incurred in providing notice of and holding separate hearings on the disclosure statement and the plan.

To the extent other courts follow the *Luminent* court in authorizing combined hearings, medium-sized debtors with limited resources who do not qualify small business debtors will experience a significant decrease in administrative costs, including professional fee claims, that often endanger the ability of debtors to consummate a plan and emerge from bankruptcy protection.

1. See 11 U.S.C. §1125(b). Section 1125(b) precludes solicitation of votes to accept or reject a plan until after the bankruptcy court has approved the disclosure statement for the plan after notice and a hearing, and the proponent of the plan has transmitted the plan (or a summary) and the approved disclosure statement to holders of claims and interests.

2. A small-business debtor is a debtor whose debts are less than \$2,190,000,

excluding debts owed to affiliates or insiders. See 11 U.S.C. §101(51D).

3. See 11 U.S.C. §1125(f)(3) (providing that in case involving small-business debtor, notwithstanding §1125(b), “the hearing on the disclosure statement may be combined with the hearing on confirmation of a plan”).

4. See *In re Chivor S.A. E.S.P.*, Case No. 02-13291 (BRL) 2002 Bankr. LEXIS 1811, **3-5 (Bankr. S.D.N.Y. Aug. 13, 2002).

5. 11 U.S.C. §105(d)(2).

6. 11 U.S.C. §105(d)(2)(B)(vi).

7. See 11 U.S.C. §105(d)(2).

8. See *Taunton Mun. Lighting Plant v. Enron Corp. (In re Enron Corp.)*, 354 B.R. 652, 656 (S.D.N.Y. 2006) (citations omitted).

9. See *In re Amster Yard Assocs.*, 214 B.R. at 124.

10. *Id.*

11. *Id.* at 124 (internal quotation marks and citations omitted).

12. See *id.* at 125.

13. Hunton & Williams LLP serves as co-counsel to the debtors in *Luminent*.

14. See Order Scheduling Concurrent Hearings on Approval of the Disclosure Statement and Confirmation of the Second Amended Joint Plan of Reorganization, signed May 15, 2009, ¶2.