

Mission Largely Accomplished.

I recently obtained what may have been the first confirmation of a Subchapter V Plan in the Northern District of California. *In re Public Bikes, Inc.* Case No. 20-30310. I thought that sharing my conclusions about that process might prove helpful. One of Congress' objectives had been to expedite the Chapter 11 process. My case went from filing to a "non-consensual" Plan confirmation in 44 days. A second objective had been to reduce the costs of Chapter 11. That objective was also largely met.

The Case

The Debtor sold its business pre-petition, and was principally engaged in performing and requiring performance under the asset purchase agreement. The Debtor's objective was to distribute the proceeds of sale ratably among its unsecured creditors. One creditor sought and obtained a right to attach order and an assignment of the proceeds of the asset sale (the "Attaching Creditor"). When negotiations with the Attaching Creditor failed, the Debtor commenced a Subchapter V case within 90 days of entry of the right to attach order so as to avail itself of the automatic dissolution of the attachment and assignment.

The Sheriff and the Attaching Creditor complied and returned the attached funds, but the Attaching Creditor presented objections to confirmation and voted against the Plan, causing the unsecured creditor class to reject the Plan.

Timing

The Court set the initial Status Conference contemplated by Section 1188 for 44 days after the case was filed. The Debtor filed its Plan of Reorganization and set the Confirmation Hearing to coincide with that initial Status Conference. Neither the U.S. Trustee, nor the Subchapter V Trustee nor the Court imposed any extraneous delays, so the Confirmation Hearing went forward in conjunction with the Status Conference 44 days after the case was commenced.

As noted, the negative vote of the Attaching Creditor caused the unsecured creditor class to reject the Plan. Section 1126(c). The Attaching Creditor also raised legal challenges which were unique to the case. The Court ruled against the legal challenges and, noting that confirmation without any accepting impaired creditor class was contrary to Chapter 11 as it had been practiced for more than the past 100 years, approved the Plan. Section 1191(b). Congress' objective of a quick alternative to regular Chapter 11 cases was met here.

Cost

For the past couple of decades, I have told clients that I have not seen a successful Chapter 11 case which resulted in less than \$100,000 of attorney's fees. Thinking of this case as "vanilla" and taking Congress at its word, I told my client I would attempt to limit my fees to \$25,000.

Of course, the case was not, as it turned out, vanilla and various idiosyncrasies required expenses to expand beyond what I initially hoped. That said, normalizing my experience for a hypothetical "vanilla" case, I think that aggregate attorney's fees for a successful Subchapter V case in the range of \$25,000 to \$35,000 would be a reasonable expectation.

One "wildcard" is the Subchapter V Trustee, who is to be paid on an hourly rate/lodestar basis. His fees did not materially affect the case.

Interestingly, the U.S. Trustee did: the U.S. Trustee treated the case as just like any other Chapter 11 case, so the expenses of compliance were the same as in any other Chapter 11 case, although the other expenses of Chapter 11 were much reduced. In my project billing, compliance with U.S. Trustee requirements was second only to the Plan of Reorganization as the most expensive billing matter. Perhaps the Initial Debtor Interview or the associated document production might be shortened, perhaps the Section 341 hearing might be reduced from the 2 hour Chapter 11 norm to something closer to the 15 minute Chapter 7 norm: the reduction in cost that was so important to Congress seems least evident in the administration of the Office of the U.S. Trustee.

Other Issues

Although I approached the exercise thinking he would be a fifth wheel, I could not be happier with my Subchapter V Trustee. He did not impose unnecessary expenses, he undertook terrific (albeit ultimately unsuccessful) efforts to achieve a consensual Plan confirmation by attempting to negotiate a settlement with the Attaching Creditor and throughout the process provided the calm, reasonable, non-partisan view that I think Congress intended. We ultimately proceeded with a non-consensual Plan confirmation – as a result, accepting the Trustee's on-going post-confirmation administration – because we were satisfied that he would likely provide an efficient, reasonable and cost-effective administration. We also saw it as a potentially deft “solution:” if there was a vote of “no confidence” by the creditors, it was appropriate to have an independent third party administer the case post-petition

Subchapter V permits confirmation of an entirely non-consensual plan, contrary to decades of bankruptcy practice, as my Judge noted. Although a substantial majority of the voters accepted the Plan, the amount of debt owed to the Attaching Creditor meant that the unsecured creditor class could not accept the Plan without its assent. So the Plan was confirmed non-consensually; in my case, without acceptance by *any* impaired class.

This did not cause the sky to fall. The Attaching Creditor was required to accept a ratable distribution comparable to all other unsecured creditors. No violence was done to the Commercial Code or the Bankruptcy Code or the underlying principles of bankruptcy law. Nothing was accomplished in my Subchapter V case that could not have been accomplished in a Chapter 11 case, but an ordinary Chapter 11 case would likely have required three times the expense and delay. As a business matter, it would not have been rational to incur the expense of an ordinary Chapter 11 to resolve this business's problems, but it was reasonable to incur the expenses of a Subchapter V reorganization to solve this business's problems.

My sense is that Subchapter V effectively accomplished Congress' objectives: it was quick, comparatively cheap and prevented a dissident creditor from imposing unnecessary expense or delay.