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## How To Comply With Local Ch. 11 Procedural Guidelines

Law360, New York (October 23, 2013, 12:44 PM ET) -- Certain jurisdictions have established procedural guidelines for prepackaged cases. Prior to preparing a case for filing, the website for the applicable bankruptcy court should be checked to ascertain whether guidelines exist in that jurisdiction. Even in jurisdictions that do not have guidelines, counsel should review and consider the guidelines promulgated by other courts in preparing for a Chapter 11 filing.

For example, the United States Bankruptcy Court for the Southern District of New York established rules for prepackaged Chapter 11 cases. Under the Procedural Guidelines for Prepackaged Chapter 11 Cases in the Southern District of New York, in order to qualify as a prepackaged Chapter 11 case, a case must be filed with a prepackaged scheduling motion, plan, disclosure statement (or other solicitation document), and a voting certification.

### Prepackaged Scheduling Motion

In addition to filing the plan and the disclosure statement, the company is required to file the prepackaged scheduling motion. Pursuant to the SDNY guidelines, the motion must request entry of an order scheduling the hearing (no more than 90 days following the petition date) for: (1) confirmation of the plan and (2) a determination as to whether the debtor has satisfied the requirements of either Section 1126(b)(1) or Section 1126(b)(2).

In addition, the prepackaged scheduling motion must make the following specific representations:

- That the solicitation of all required votes to accept or reject the plan was completed prior to the petition date, and that no additional solicitation is contemplated by the debtor, or that the solicitation of all required votes has been deemed adequate by the bankruptcy court;
- That the company has obtained the requisite acceptances of the plan from each class of claims or interests as to which solicitation is required; and
- That, with respect to any class of interests that has not accepted the plan, whether or not it is deemed not to have accepted the plan under Section 1126(g), the company is requesting confirmation under Section 1129(b).

Pursuant to Section 341(e) of the Bankruptcy Code, the prepackaged scheduling motion should also request a waiver of the requirement under Section 341(a) of the Bankruptcy Code that the United States trustee convene a meeting of creditors. Under the SDNY guidelines, such relief will be granted if the plan is confirmed within 40 days of the petition date and the confirmation order contains a specific waiver.

If, as of the petition date, the debtor initiated, but did not complete, solicitation of votes, the debtor may continue to accept but not solicit votes until the voting deadline, subject to the court determining the effect of such votes.

## **Retention of Professionals**

For all Chapter 11 cases, pursuant to Section 327 of the Bankruptcy Code, the debtor must file an application with the bankruptcy court to retain attorneys, accountants, financial advisors, and other professional persons. For prepackaged cases, however, there are certain limited modifications under the SDNY guidelines.

If an accountant, investment advisor, vote tabulator, solicitation agent or similar nonlegal professional was retained prepetition and is not seeking any payment in connection with the plan or the case in addition to the payments received prior to the filing of the petition, such professional is not required to file a retention application with the court.

Nonetheless, the professional may continue to provide services to the estates during the pendency of the case. With respect to accountants and financial advisors who are not retained under this exception, their post-petition work cannot be substantive in nature, which includes, for example, preparing new financial data, even if no additional post-petition compensation is sought.

## **Establishment of a Bar Date**

For cases other than prepackaged cases, a debtor typically files a motion seeking entry of an order to establish a deadline, known as the "bar date," by which all holders of claims against and interests in the debtor are required to file proof of such claim or interest.

An order establishing a bar date is not entered until the debtor has complied with Section 521(a)(1) of the Bankruptcy Code and filed its schedules of assets and liabilities with the bankruptcy court.

For a prepackaged case that leaves unsecured creditors unimpaired (i.e., such claims "ride through" unaffected by the Chapter 11 case), the debtor may not require a bar date because the debtor will pay all such claims in the ordinary course of business. No modification or impairment of such claims will be sought pursuant to the prepackaged plan.

## **Creditors Committee**

In cases in which unsecured creditors are unimpaired, often a creditors' committee is not appointed. If, however, members of a prepetition committee seek to serve on an official committee of creditors, they are required to demonstrate to the United States trustee their compliance with Federal Rule of Bankruptcy Procedure 2007(b).

Bankruptcy Rule 2007(b) requires proof that the prepetition committee was fairly chosen by demonstrating that:

(1) the committee was selected by a majority in number and amount of claims of

unsecured creditors eligible to vote at a meeting that was on seven days' written notice, of which records were kept and are available;

(2) all proxies were solicited in accordance with Federal Rule of Bankruptcy Procedure 2006 and the related forms were transmitted to the United States trustee; and

(3) the organization of the committee was in all other respects fair and proper.

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