
UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

M E M O R A N D U M

TO : Attorneys Who Represent Chapter 11 Debtors in the EDNC

FROM : A. Thomas Small

DATE : October 10, 2008

SUBJECT : New Rules and Forms (Effective December 1, 2008)

Several new Bankruptcy Rules and Official Forms that will affect chapter 11 cases become effective on December 1, 2008. These include Bankruptcy Rules 1020 (the small business designation, objections to the designation, effect of appointing a creditors' committee), 2015(a)(6) (obligation to file monthly reports in a small business chapter 11 case), 2015.3 (obligation to file a report of value, operations and profitability of each entity in which the estate holds a substantial or a controlling interest), 3016(b) and (d) (in a small business case the plan may provide adequate information and serve as a disclosure statement and the court may approve a disclosure statement and confirm a plan that conform to the new Official Forms), and 3017.1 (the court may conditionally approve a disclosure statement in a small business case), and Official Forms 22B (statement of currently monthly income for chapter 11 debtor who is an individual), 25A (small business plan of reorganization), 25B (small business disclosure statement), 25C (small business monthly operating report), and 26 (periodic report regarding entities in which the estate holds a substantial or controlling interest).

This memorandum (portions of which are taken from an upcoming Collier revision) will discuss Bankruptcy Rules 2015(a)(6) and 2015.3 and Official Forms 25C and 26.

Rule 2015(a)(6) and Official Form 25C

Rule 2015(a)(6) of the Federal Rules of Bankruptcy Procedure provides that prior to the effective date of the plan, conversion or dismissal of a chapter 11 small business case, unless the court, for cause, sets another reporting period, the debtor shall file monthly reports. The monthly report shall be submitted on Official Form 25C and be filed no later than 20 days after the last day of the month following the month covered by the report. If the order for relief is within the first 15 days of the month, the report shall be filed for the remaining portion of the month, but if the order for relief is after the 15th day of the month, the information for the remainder of the

month should be included in the next month's report. The court, pursuant to Rule 9006(b)(1) of the Federal Rules of Bankruptcy Procedure, has discretion, for cause, to enlarge the time for filing monthly reports required by Rule 2015(a)(6).

Although Rule 2015(a)(6) and Official Form 25C are effective on December 1, 2008, 11 U.S.C. § 308, which requires small business debtors to file periodic reports, is not effective until 60 days after the necessary rules and forms have been prescribed. Consequently, until January 30, 2009, there is no requirement under the Code for a small business to file a periodic report. Of course, Local Rule 4002-1(b) EDNC already requires all chapter 11 debtors to file monthly reports.

Rule 2015(a)(6) applies to all small business cases, including those that are pending prior to the effective date. The order entered by the United States Supreme Court on April 23, 2008, amending Rule 2015 provided "[that] the foregoing amendments to the Federal Rules of Bankruptcy Procedure shall take effect on December 1, 2008, and shall govern in all proceedings in bankruptcy cases thereafter commenced and, insofar as just and practicable, all proceedings then pending." As a practical matter, because all chapter 11 debtors in the EDNC have already been required to file periodic reports (although the timing and content of reports under Rule 2015(a)(6) and Official Form 25C may be different), the new requirements should not cause any problems for small business debtors.

Rule 2015.3 and Official Form 26

Rule 2015.3 requires a chapter 11 debtor in possession or trustee to file periodic reports of value, operations, and profitability of each entity, other than an entity that is publicly traded or is a debtor under title 11, in which the bankruptcy estate holds a substantial or controlling interest. The report must be filed with the court on Official Form 26, and the information must be the most recent information available to the debtor in possession or the trustee.

The first report is due not later than five days before the first date set for the meeting of creditors and subsequent reports must be filed no less frequently than every six months. The report shall be served on the bankruptcy administrator, any committee appointed under section 1102 of title 11, and any other party in interest that requested the report. The court may, after notice and a hearing, for cause, vary the terms of the reporting requirements and may enter protective orders pursuant to section 107.

The term "substantial or controlling interest" used in Rule 2015.3 is not defined, but if the estate controls or owns more than 20 percent of an entity, there is a rebuttable presumption, for purposes of Rule 2015.3, that the estate's interest in the entity is substantial or controlling. Likewise, if the estate controls or owns an interest of less than 20 percent, there is a rebuttable presumption that the estate's interest in the entity is not substantial or controlling. The focus of the presumption is on whether the ownership interest is substantial to the entity and not whether it is substantial to the estate.

The information required by Official Form 26 is extensive. Rule 2015.3 provides that the court may, for cause and after notice and a hearing, vary the reporting requirement established in Rule 2015.3(a). Given the comprehensive scope of the information required, there may be many circumstances where modification of the report may be warranted. The bankruptcy administrator and the trustee or debtor in possession should confer at the beginning of the case and agree on what is required. If no understanding is reached the issue should be brought before the court at an early date.

Rule 2015.3 applies in all chapter 11 cases, and all chapter 11 debtors in possession and chapter 11 trustees must file periodic reports of the value, operations and profitability of each entity in which the estate holds a substantial or controlling interest. Both Rule 2015.3 and Official Form 26, which together implement section 419 of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, became effective on December 1, 2008, and, in accordance with the order entered by the United States Supreme Court, Rule 2015.3 "shall govern in all proceedings in bankruptcy cases thereafter commenced and, insofar as just and practicable, all proceedings then pending."

Rule 2015.3 does not address when reports in cases pending on December 1, 2008, must be filed. Rule 2015.3 requires that the report be filed early in the case, and, presumably, in cases pending on December 1, 2008, the report should be filed as soon as reasonably possible. There may be circumstances in which a case is near completion and a report would not be helpful, but the need for filing a report and the time for filing the report is something that should be agreed upon between the bankruptcy administrator and the debtor in possession or trustee. If no understanding is reached then the need for and the timing of the report should be the subject of a status conference under section 105(d), preferably before December 1, 2008. When deciding whether a report is required under Rule 2015.3 in a chapter 11 case pending on December 1, 2008, the court must consider whether the requirement is "just and practicable."

Rule 2015.3 does not specify the effect of not filing the report required by Rule 2015.3(a). Failure to file the report could constitute "cause" under section 1112(b)(4)(F) of the Code for dismissal, conversion to chapter 7, or the appointment of a trustee for "unexcused failure to satisfy timely any filing or reporting requirement established by this title or by any rule applicable to a case under this chapter." Also, the failure to file the required report may be a factor in how a debtor in possession has conducted the case, which may affect the court's willingness to extend deadlines and may be a consideration in assessing the reorganization's viability.