**Statement Before American Bankruptcy Institute Commission**

**To Study the Reform of Chapter 11 – April 19, 2013**

My name is Dennis Dow and I am a bankruptcy judge in the Western District of Missouri in Kansas City, Missouri. I appreciate the invitation to speak at this hearing focused on issues relating to small and middle market Chapter 11 reorganization cases. I have chosen to focus on some of the specific problems encountered by debtors in small business cases, that is, debtors whose debt levels and nature of business satisfy the statutory definition of a small business. More specifically, I plan to focus on the additional burdens imposed by provisions added to Chapter 11 by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 that relate specifically to such cases and the interpretive difficulties created by the statutory language.

For some time, observers of the Chapter 11 process have commented that it does not often lead to successful outcomes for small businesses. The complexity, time and costs of the Chapter 11 process impose obstacles that small businesses often cannot overcome. The process of preparing a disclosure statement, obtaining approval of that document, soliciting creditor votes and satisfying the numerous requirements to obtain confirmation of the plan takes time and money. Adding to the costs is the requirement that the Chapter 11 debtor pay the costs of professional fees incurred by other entities in the case, such as creditor’s committees. Provisions offering accommodations for small business debtors have been in the Code for some time, but do not appear to have alleviated these problems. Some have suggested the creation of a separate subchapter in Chapter 11 for small business debtors. Why I believe that approach has some merit, it is not what I propose to discuss today.

As part of its comprehensive revision of the Bankruptcy Code in 2005, Congress enacted a number of changes relating specifically to small businesses. Rather than being concentrated in one subchapter, they are sprinkled throughout the Code. While some of these changes were designed to address the difficulties experienced by small business debtors, they have not been uniformly helpful. It is not unfair to characterize the changes as somewhat schizophrenic, some of them designed to reduce complexity and compress the timeline, arguably facilitating better outcomes for small business debtors, others adopted as a result of an apparent presumption that small business reorganization cases as a rule lack merit and require close judicial supervision. For example, the only legislative history, House Report No. 109-31, specifically says that the legislation includes “several significant provisions intended to heighten administrative scrutiny and judicial oversight of small business cases, which often are the least likely to reorganize successfully.” So, what were these changes and what effect have they had on the practice in small business cases.

To begin with, unlike under previous law, debtors no longer have the option of being treated under these provisions or not, but are automatically bound by them, with all their benefits and burdens, if they meet the statutory definition of a small business. Significant additional reporting requirements are imposed on such debtors, mandating the creation and filing of periodic reports regarding profitability, among other things. As I mentioned, some of the changes offer benefits to small business debtors. For example, small business debtors are given a 180-day exclusivity period, 60 days longer than an ordinary Chapter 11 debtor. Courts are given specific statutory authorization to compress the timeline of the confirmation process by preliminarily approving a disclosure statement upon filing and then scheduling a combined hearing on final approval of the disclosure statement and confirmation of the plan. A new provision specifies that the plan itself may function as a disclosure statement and that courts may adopt form plans to be used by such debtors.

In other respects, the process has been made less flexible. The Code now imposes an absolute 300-day deadline for the filing of a plan and disclosure statement. In addition to the plan filing deadline, the Code now also requires that a court confirm a plan complying with the requirements of § 1129(a) within 45 days of the date of its filing. While these deadlines may be extended, strict limitations are imposed on such extensions. Specifically, they may only be extended if the debtor 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, a new deadline is imposed at the time the extension is granted, and the order is signed prior to the expiration of the deadline. One court referred to the 45-day deadline and the strict limits on its extension as “a pernicious piece of legislation enacted in 2005 that lays a trap for the unwary.” In another case, the same court quoted one litigant’s characterization of these provisions: “if not conceived in ignorance, sections 1121(e) and 1129(e) would appear to be either harebrained or calculated to scuttle the reorganization efforts of the unwary.” While one need not go that far in characterizing the intent or effect of these new provisions, it is fair to say that they have created interpretive problems for the courts, practical problems for small business debtors and traps for unwary counsel.

I turn first to the requirement that the court confirm a plan within 45 days of the date of its filing. By its terms, the provision imposes a limitation on the power of the court to act and raises questions about who bears the responsibility for tracking the date by which the plan must be confirmed. Initially, the court must set a hearing on confirmation of the plan to occur within 45 days. As I mentioned before, the Code now authorizes the court to preliminary approve a disclosure statement and conduct a simultaneous final hearing on approval and on confirmation of the plan. Given the fact that the bankruptcy rules otherwise require separate 28-day notices of both the date for objections to the disclosure statement and the date for objections to the plan, the court is not only authorized to consolidate these hearings, but must do so if there is any possibility of even considering confirmation of the plan with 45 days of the date on which it was filed.

Maintaining that date and accomplishing everything that may need to be accomplished before a plan can be confirmed within such a limited period of time is in many cases difficult, in others, impossible. My experience suggests that not all debtor’s counsel are fully aware of the limitation and its implications. For example, in some cases in which I have issued an order of preliminary approval of the disclosure statement and scheduling a final hearing within the 45-day period, debtor’s counsel have made requests for continuance of the confirmation hearing which would take it beyond that date. I have had to advise them that although I may grant their request for continuance, I would then be unable to confirm the plan unless they complied with the rigorous requirements for extension of the 45-day deadline. Additional time is often necessary in the plan confirmation context to resolve objections to the plan, valuations of property or objections to claims, the nature or size of which might affect feasibility of the plan.

The published opinions contain several illustrations of situations in which the parties have proceeded to try to resolve such problems without strict compliance with the requirements for obtaining an extension of the confirmation deadline, only to have the issues raised later in the process. These objections have often been raised well after the expiration of the deadline and after numerous extensions and continuances of the confirmation hearing to which no one objected. The courts have sometimes, without using such phrases, essentially applied a concept substantial compliance with the conditions for obtaining extensions or found that opposing parties were estopped to insist on them or had waived their ability to do so. In those cases, the courts have struggled to make sense of the limitations.

It is equally unclear precisely what the court must find and how it must go about doing so. For example, must the debtor file a separate motion or just make the appropriate demonstration at some hearing before the court of which parties had notice? Does the court have to hold a mini-confirmation hearing in order to make the necessary determinations? At least one court held this not to be necessary, drawing an analogy to the requirements for approval of a compromise under Rule 9019. That same court also observed that while it is necessary that the court find that the debtor will confirm a plan within a reasonable period of time, it is not necessary that the court find that the plan which might be confirmed is the precise one presently before the court. Another court has suggested that the appropriate focus of these determinations is not necessarily on confirmability, but on the temporal element of the requirement, that is, that the debtor place a plan before the court within a reasonable period of time.

The Code does not specify the consequences for failing to confirm a plan within the 45-day period. Some courts have held that failure to confirm a plan within the 45-day period requires dismissal of the case. At least one other held that the debtor may file another plan as long as it does so within 300 days of the date of filing of the case.

The Code also fails to address the effect of the filing of an amended plan. If the debtor files a plan of reorganization and then amends it within the 45-day period, does the 45-day limit run from the filing of the original plan or the amended plan? Does it depend on the nature and extent of the amendments? The possibilities for circumvention of the time limit are obvious and undoubtedly influence the appropriate response.

As I mentioned, another change is the imposition of an absolute deadline of 300 days for the filing of a plan of reorganization in a small business case. This provision has created similar interpretive and practical problems. First of all, it is unclear whether the provision applies to parties other than the debtor. At least one court has held that it does not, relying in part on the language of the extension provision which refers to a demonstration that must be made by the debtor. Second, this provision also fails to specify the effect of an amended plan. For example, if the debtor timely files a plan before the 300-day deadline, may it obtain confirmation of an amended plan filed after the 300-day period? Some courts have suggested that the debtor may amend the plan, analogizing to the jurisprudence under Rule 15 on amended pleadings, if it has a sufficient relationship to the original plan. Third, once again, the Code fails to specify the consequences for a failure to file a plan within the 300-day period, although the consensus appears to be that if no party files a plan within the 300-day period, no relief can be afforded and the case must be dismissed, but if one entity files a plan within the 300-day period, the field may be open for others to do so.

Having said all this, what do I suggest that you consider in evaluating possible changes in the Code relating to small business cases? First, you should consider whether the requirement that the court confirm a plan within 45 days of the date on which it was filed serves any meaningful purpose. If the objective is to make sure that a plan is proposed and/or confirmed within a reasonable period of time from the date of the filing, the mere lapse of time between the date of the filing of the plan and its confirmation is not particularly relevant. Other approaches, such as an absolute limitation on the date of filing and/or confirmation would be better designed to achieve this objective. Second, you should consider whether the limitations on filing and extension of deadlines should be revised to address and resolve some of the issues arising in the caselaw.

Once again, I appreciate this opportunity to speak to the commission about these issues and I would be glad to answer any questions you may have.