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Meeting the Challenges of Today's Accelerated Case Calendars

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No national border has proven impervious to the extraordinary economic crisis in which we are now embroiled. The crisis has become a ubiquitous part of the global conversation, whether over the dinner table or posted in an online forum. Insolvency professionals who specialize in supporting plan proponents must work even harder to achieve successful chapter 11 reorganizations.

The axiom that underpins today's bankruptcies is that the longer a well known brand name is referenced in the same breath with the phrase "in bankruptcy," the longer it takes to erase that association from the minds of customers, vendors and the general public on whose good relations that reorganization will depend. Thus, in order to make the General Motors and Chrysler bankruptcies palatable, a conspicuous part of the Obama administration's pitch to the American taxpayer and the international court of public opinion is that the reorganizations of the companies would be "quick." Having made these "promises," our federal regulators and central bankers—the abettors of cheap credit—ironically now find themselves under immense public pressure to affect abbreviated in-court restructurings. Yet, for debtor service firms to admit that they lack the resources that these new abbreviated in-court restructurings now require is to fall shy of the industry's new post-credit-bubble par. Focused on their self-inflicted wounds, federal regulators and central bankers seem to forget that under BAPCPA, they have already forced debtor services firms to accede to accelerated case calendars in order to survive the most competitive bidding environment for chapter 11 consultants in recent memory.

The squeeze generated by an accelerated case calendar manifests in a number of ways, among which are the challenge of crafting a bar date, disclosure statement approval and plan solicitation schedule ambitious enough to uphold promises made to a debtor without compromising the requirements for providing adequate notice under the Federal Rules of Bankruptcy Procedure. As a consequence, a case calendar is often first calibrated to the desired confirmation date, and the dates for other key events are then determined by working backwards. At best, the Rules provide an incomplete framework for the objection deadline (after the required three days for service under Rule 9006(f) have been added). The Rules provide less guidance when the population of parties in interest includes the holders of public securities. Rule 3017(e) addresses the transmission of solicitation materials to beneficial holders of securities, but only to require that any procedures for doing so are to be heard and approved by the bankruptcy court.

In fact, Rule 3017(e) provides scant guidance on how to determine whether noticing procedures for soliciting votes from beneficial holders of securities are adequate. In contrast, §1126(b)(1) of the Bankruptcy Code provides some direction in the case of a prepackaged bankruptcy by implicitly subjecting the adequacy-of-notice test to "compliance with any applicable nonbankruptcy law, rule, or regulation." When acceptances and rejections are solicited from the holders of public securities, the Code's call to yield to the regulatory authority of the Securities and Exchange Commission

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determining the periods of time required for serving notice for what is likely to be the costliest of mailings in the administration of a chapter 11 case—the solicitation of acceptances and rejections of a chapter 11 plan. Assuming a court-approved 20-day voting period, when plan ballots are served concurrently with notice to parties interested in the deadline for filing objections to plan confirmation (as is the general practice), a plan's proponent complies with both Rule 2002(b) and Rule 3017(c) when service is effected on the earlier of 23 days prior to the voting deadline and 28 days prior to is limited to prepackaged cases. The lack of clarity, which remains outside of this very small percentage of filings, leaves the adequate-notice requirement dangling as a corner to cut.

The physical delivery of paper disclosure documents, ballots and other proxy solicitation materials to holders of publicly-held securities is complicated by a bank's general obligation to preserve the anonymity of its constituent investor customers. Most banks designate a similarly obligated distribution agent (*e.g.*, Broadridge Financial Solutions) for purposes of executing the delivery

of solicitation materials and tabulating master ballots on their behalf. One should plan on notifying Broadridge of a voting record date no later than noon on the business day that precedes it, and also expect Broadridge to use the three business days that follow it to compile a comprehensive security-holder mailing list from the individual record date lists generated by each of Broadridge's subscribing banks (these lists are not to be confused with the Security Position Reports furnished by a depository (*e.g.*, the Depository Trust Company) but which may similarly require a few days before delivery). Requesting a retroactive voting record date can be problematic for this reason.

Thereafter, the actual delivery of proxy solicitation materials to holders of publicly-held securities generally involves a two-step process: The plan proponent first ships the necessary quantities of solicitation materials to each of a depository's participating respondent banks (or their agents), who then forward individual solicitation packages to their applicable beneficial holders of record to complete the second step. This second step is regulated by Rule 14b-2 under the Securities Exchange Act of 1934, which states that upon receipt of proxy soliciting materials, a bank "shall forward such materials to each beneficial owner on whose behalf it holds securities, no later than five business days after the date it receives such material." Plan proponents will often seek the approval of solicitation procedures, which fail to provide for this five-business-days allowance. Hence, should a bank receive proxy soliciting materials from a plan proponent via overnight courier and be unable to forward these materials via first class mail until the fifth business day thereafter (as would be more likely during the peak of the proxy season), its respective beneficial holders could see a 25-day notification period for objections to confirmation shrink to 17 days and a 20-day voting period reduced to 12 days.

For example, suppose the desired deadlines for both submitting ballots and filing objections to confirmation are Aug. 31, 2009, in a case for which holders of public securities are entitled to vote. In order to allow for (1) one business day for solicitation materials to be overnighted to banks (or their agents), (2) five business days pursuant to SEC Rule 14b-2, (3) 25 calendar days pursuant to Rule 2002(b), (4) three calendar days pursuant to rule Rule 9006(f), and (5) one business day for the banks (or their agents) to overnight their completed master ballots to the voting agent, a solicitation date would have to be scheduled no later than July 23, 2009, a date that precedes the voting deadline by 39 calendar days. This period might be even longer if the solicitation calendar encompassed one or more nonbusiness day holidays.

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The types of events for which subparagraphs (a) and (b) of Rule 2002 apply are such that they may be effected without a hearing and court approval. For example, subparagraph (a)(5) of this Rule sets a minimum of 20 days to accept or reject a proposed *modification* of a plan. If filed prior to confirmation, the plan as modified becomes the plan without further court approval. The only exception is under subparagraph (b), which requires that the deadline for filing objections to plan confirmation be set no earlier than 25 days after service of notice thereof. That the Rules provide a directive for the scheduling of a deadline for objections to confirmation but leave the scheduling of a voting deadline to the court's exclusive discretion is somewhat odd, given how both are customarily fixed by the court at the time it rules on the adequacy of the disclosure statement. As Rule 3017(c) requires the court to "fix a time *within which* the holders of claims and interests may accept or reject the plan" (emphasis added) rather than fix the quantity of days' notice that must be provided respective of a voting deadline, would there be any statutory basis for the holders of bonds in "street" name to object to the validity of a plan vote if bondholders as a group received only 12 days notice of the date by which their executed ballots had to be received?

Admittedly, the coincidence of circumstances for which the bankruptcy court might find tabulation results to be invalid as a result of such a failure to provide adequate notice would be remarkable. One might argue that acceptances and rejections were solicited in bad faith in a case where a class of general unsecured claimants was comprised of both unsupportive bondholders and supportive trade vendors, and the brevity of the voting period caused the tally of timely ballots to be skewed in favor of the latter. After having moved to designate the votes of a class of wholly unsupportive public bondholders and in the face of other substantive objections filed by their indenture trustee and multiple continuations of the confirmation hearing, a debtor found itself soliciting votes a second time, but for an amended and consensual plan.

Considering how the second solicitation was padded with eight extra days and yielded a 45 percent increase in bondholder turnout, one can only guess how the willingness of the debtor to renegotiate its original plan might have been further influenced by an objection by the bondholders grounded in inadequate notice—particularly if plan acceptance was marginal. The solicitation of votes on a chapter 11 plan from the beneficial holders of publicly-traded securities is a process made even more complex by the degree to which such securities are held through one or more intermediate custodians.

It is unlikely that all of those who are eligible to vote on such a chapter 11 plan can be guaranteed even roughly equivalent periods of notice before executed ballots must be submitted. As the rules for soliciting proxies adopted by the brokerage community put the holders of public securities at a disadvantage in this respect (as compared to creditors whose claims appear on the clerk's register of claims or the debtor's schedules of liabilities), one should anticipate a higher marginal response rate among holders of public securities as the voting period is shortened.

The contemplation of procedures for the solicitation of votes on a chapter 11 plan should acknowledge this "relationship of thumb" if such procedures are to endeavor toward a voting process that is fair as well as expedient. ■

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