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In Defense Of Expedited Bankruptcies

By **Kenneth Rosen** (June 30, 2021, 4:51 PM EDT)

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Expedited Chapter 11 bankruptcies are on the rise because they save money and because key constituents such as bank lenders and bondholders recognize that the more time that a debtor spends in Chapter 11, the more likely the case is to fail.

Increasingly, debtors file Bankruptcy Code Section 363 motions to sell assets in bulk on the petition date. Furthermore, it has become common to seek confirmation of a plan of reorganization within a few weeks, if not days, of the petition date. Recently, the U.S. Bankruptcy Court for the Southern District of Texas confirmed the plan in the Belk Inc. bankruptcy on the petition date.

Expedited bankruptcies are beneficial as they address the skyrocketing costs of Chapter 11. However, some believe that these new, fast-moving bankruptcies are threats to due process.

For instance, the June 9 Law360 guest article "**Expedited Bankruptcies Are Cause For Concern**" is critical of so-called shotgun Chapter 11 cases. It says that exigent circumstances asserted are often artificial bases for granting truncated relief.

In situations where the debtor seeks prompt approval of a Section 363 sale, the article argues for the practice of a comprehensive post-petition re-marketing of the debtor's assets.

The article also asserts that traditional Chapter 11 proceedings increase accountability and that, if the process is truncated enough, those tenets of due process become meaningless to the majority of parties. Finally, it says that the general opposition of the U.S. Trustee's Office to expedited Chapter 11 proceedings is legitimate.

However, the article does not address the cause of the problem that it and the U.S. Trustee's Office assert to exist — instead it focuses on the consequences.

The problem is that Chapter 11 is expensive and prolonged cases are risky and cause greater devaluation of a debtor's assets and business. Secured lenders are wary of funding Chapter 11s for more than a limited period of time because most cases get worse with time.

Today no Chapter 11 case — even the largest ones — are too big to fail. Many cases start out looking pretty good, but end up administratively insolvent. Increasingly, Chapter 11s are dismissed because there is nothing left for unsecured creditors. Or the effective date of a plan of reorganization is inordinately delayed because administrative claims cannot be funded without seeking disgorgement of preference payments — which doubles down on the harm to vendors.

Therefore, key parties in interest, such as banks and bondholders, want the bulk of the restructuring done prepetition, and they want a fast in and out of the bankruptcy court.

Chapter 11s can become a test of how long before the debtor and secured creditors make concessions to unsecured creditors in the form of a token recovery. Concessions are made because the cost of prolonging the case simply cannot be justified. Spending more time under the cloud of Chapter 11 is too costly and risks further devaluation of the company. Unfortunately, there is more

litigation and less deal-making now.

Bankruptcy judges grant requests for expedited relief only where the request is sufficiently fact-based. They review what occurred prefiling, which parties participated in the pre-Chapter 11 process and whether there is something to gain by slowing down the case — other than an opportunity for extortion. They also are sensitive to the costs of delay. And, they are sensitive to the interests of all constituents

Professionals involved in the case prebankruptcy are highly sensitive to compliance with due process because the last thing that they want is for the judge to tell them that they did something wrong and that the error or omission will block granting expedited relief. How embarrassing is that? So, all professionals must be overly cautious to dot their i's and cross their t's.

Even in traditional cases there is not always a satisfactory recovery for all parties with interest. Sometimes the facts are just bad. The authors of the Law360 guest article and the U.S. Trustee's Office appear to believe that repeating what occurred prepetition will facilitate a larger recovery for creditors. Sometimes, it is only repetitive.

Furthermore, they seem to distrust the bankruptcy judge making the call as to whether denying a request for expedited relief is worth it and whether due process was sufficient. As a bankruptcy professional I trust myself to make a convincing argument in opposition when appropriate. And, the judge is very capable of deciding whether to expedite a case after learning all the facts.

The traditional Chapter 11 process can be very beneficial; but certainly not always. I do not endorse shotgun cases under all circumstances. But, where there has been a thorough prebankruptcy sale process or robust plan negotiations, they are a good solution.

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