The Rush to Judgment

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"In the Beginning"--these three words begin the Greatest Story Ever Told.

The bankruptcy world does not encompass so majestic a landscape, but three other words have the same impact in bankruptcy--"First Day Orders." The thrust of this article is to examine first day orders ("FDOs") and the need for the United States Trustee Program ("United States Trustee") to participate actively in the hearings that lead up to the entry of these orders.

Whether the case is of national stature or of local concern, the use of FDOs is commonplace. Of major concern to a Chapter 11 debtor is the continued operation of its business during the bankruptcy proceeding. At no time is this concern more vital than during the first 72 hours of bankruptcy.

During this time, the debtor's normal course of conducting business changes dramatically. Prior to bankruptcy,

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[1] All views expressed in this article are those of the author and do not necessarily represent the views of, and should not be attributed to, the Office of the United States Trustee.

the debtor was familiar with its operating protocol; after the filing, however, its business affairs are placed under the scrutiny of the court and its creditors. Significantly, any business transaction that is not "in the ordinary course of business" becomes subject to court authorization, with the attendant notice requirements and opportunity to be heard.

This tension between the debtor's need to conduct its business affairs as it sees fit and the creditors' right to monitor the debtor's course of conduct highlights the impact of FDOs. In the view of debtors' counsel, entry of FDOs "facilitates the seamless entry into bankruptcy," but creditors may not have the same opinion.

As the words denote, FDOs are entered very early in the case. Often, matters that are subject to FDOs are scheduled to be heard within the first 24 hours of the bankruptcy filing. Courts sometimes defer these hearings, but the exigency of the debtor's continued viability undoubtedly will convince the court to conduct the hearing.

Because the debtor usually is the proponent of the matters under consideration at the hearing, our jurisprudence--which generally eschews ex parte hearings--requires participation by affected parties. Nonetheless, creditors often receive insufficient notice of the presentment of first day motions; in fact, creditors may not be aware of the bankruptcy filing within the first 24 hours. Accordingly, the United States Trustee is the only entity that can offer a

tempering view of the situation.

Broad Role

The United States Trustee typically lacks any pecuniary interest in the cases it monitors, but its role at the first day hearing is several-fold. The vigor of the United States Trustee's advocacy directly relates to the sufficiency of the debtor's notice of the hearing and the issues to be covered, the appearance of parties who can advocate on their own behalf, and the substantive matters to be argued before the court. The extent of the relief sought in the first day motions will also have a profound effect on the United States Trustee's aggressiveness.

Typical matters to be heard at first day hearings involve the retention of professionals, the acquisition and expenditure of working capital, and, in larger cases, the authorization of current business practices. While the foregoing list covers many of the traditional issues presented for FDOs, the debtor's immediate needs dictate what matters will be raised.

From the United States Trustee's perspective, the governing principle for relief requested at the first day hearing is "What does the debtor need for its immediate needs that will prevent irreparable harm, and what is the least cost involved in obtaining it?" Although the United States Trustee's position often conflicts with the interests of other

hearing participants, that United States Trustee protects the interests of the creditor with the most to lose upon entry of FDOs--the general unsecured creditor who lacked notice of the bankruptcy filing or the first day hearing.

Attentiveness to the debtor's immediate needs also suggests the outer bounds of relief that should be granted at the commencement of the case. Numerous motions can be filed during the first days of bankruptcy, but usually much of the desired relief can be deferred until parties with pecuniary interests at stake can effectively participate.

To further this goal, the United States Trustee argues to the court, when appropriate, that matters submitted for consideration need not be heard in expedited fashion because no cognizable prejudice will occur. Rather, the United States Trustee often urges that the matters be deferred until sufficient notice can be provided and an effort to form an unsecured creditors' committee be undertaken. Generally, in the larger cases where these matters are frequently raised, the United States Trustee will appoint a committee so the deferred matters can be timely considered.

Another matter that causes universal concern to the bar is the retention and court authorization of debtor's counsel. The United States Trustee is statutorily obligated to become involved in this area. In fact, there is no requirement to serve debtor's counsel retention applications upon any party

other than the United States Trustee. Moreover, circuit courts have jealously guarded the bankruptcy court's right to rule on the propriety of retaining debtor's counsel early in the case. The unexcused failure to obtain court authorization at the commencement of the case has resulted in denial of compensation for debtor's counsel in many instances.

While not graciously received, the United States Trustee's participation in first day hearings involving retention of debtor's counsel facilitates addressing challenges to the propriety of that retention. Waiting until later in the case to address those challenges could severely prejudice both the debtor and its counsel.

Review Function

The mechanics of securing FDOs do not lend themselves to a full airing of the issues. Often, the debtors' pleadings are not in final form until hours before the scheduled hearing. Additionally, the pleadings may be voluminous. In such instances, it is extremely rare that creditors receive sufficient information to apprise them fully of the substantive matters to be addressed at the first day hearing. Moreover, as stated previously, creditors may not even know about the bankruptcy filing. To facilitate the United States Trustee's effective participation and advocacy, draft or final pleadings must be timely provided for the United States

Trustee to review.

If the United States Trustee is given sufficient time to review the matters to be raised at the first day hearing, it can informally approach the participants to address substantive and procedural concerns. The United States Trustee will want to know the extent and sufficiency of notice of the scheduled hearing. The United States Trustee will also need information about the debtor, as the first day hearing is probably the first contact between the debtor and the United States Trustee. It is important to inform the United States Trustee about the debtor's business affairs and corporate workings, so the United States Trustee can tailor its advocacy to the individual case.

With this information, the United States Trustee can attempt to balance the participants' competing interests on the crucial first day. While it is customary for debtor's counsel to attach affidavits addressing these matters to the first day motions, that practice does not allow for dialogue among the parties. To achieve any meaningful appreciation of the debtor's needs, an exchange of information is necessary.

If the parties can reach a mutual resolution, the debtor can present an unchallenged request for relief and the court may be more willing to expedite the proceedings. If the parties cannot resolve their differences, at least the issues may be better defined, allowing the court to limit the hearing to areas of dispute. In any event, it is advisable to attempt

to define the issues that are subject to objection.

Repercussions From FDOs

It is critical to examine the impact FDOs may have during the entire bankruptcy proceeding. Debtors often submit proposed forms of order containing significant findings of fact as well as conclusions of law. Entry of such orders at the commencement of the case can have powerful repercussions. Further, the court rarely has enough time to conduct plenary hearings allowing for introduction of testimony to support the debtor's proffered findings and conclusions.

Under such circumstances, the United States Trustee urges the court not to enter the order. What may appear innocuous at the commencement of the case may have significant overtones down the line. It would be most unfortunate for the parties to bear the cost of litigating matters that directly result from overbroad FDOs. The United States Trustee therefore generally seeks to ensure that the record supports any conclusions made by the court and, where necessary, seeks to limit the scope of relief in accordance with the factual record and the debtor's needs.

In conclusion, the United States Trustee does not reject the use of FDOs, because they serve an important function in facilitating the continuing operations of the Chapter 11 debtor. We advocate, however, that the needs of the debtor

must not trammel the rights of creditors; instead, the parties' competing interests must be balanced.

Because the debtor's needs may require immediate attention, creditors may not have time to organize effectively to represent their interests at the commencement of the case. Thus, the United States Trustee must intercede to ensure that the necessary balance is maintained. Without the United States Trustee's intervention, there would be no effective advocacy to temper the needs of the debtor.

Whether perception or reality, the lack of advocacy for parties other than the debtor at first day hearings conjures up the image of a freight train without any brakeshoes. The United States Trustee's goal is not to unduly impede the debtor's ability to do business, but to level the playing field--or, in some instances, to ensure that nine innings of play are left to the other bankruptcy participants.