

**GUIDELINES FOR CHAPTER 11 CASES ASSIGNED
TO BANKRUPTCY JUDGE ROBERT E. NUGENT¹**
(November, 2001)

The following are the Chapter 11 case guidelines for cases assigned to Judge Nugent. The purpose and intent of these guidelines is to encourage the prompt and timely completion of the reorganization process, either via consensus among the parties and their counsel or by prompt balloting and determination of all outstanding factual and legal issues at trial. These guidelines are supplemental to, and by no means a replacement of, the applicable Federal Rules of Bankruptcy Procedure, Federal Rules of Civil Procedure, or the Local Bankruptcy Rules of this District. By these guidelines, the Court hopes to discourage protracted reorganization processes (except to the extent necessitated by the size or complexity of a particular case). The Court also hopes to encourage proactive docket control and judicial control of these cases to insure that they proceed on an orderly basis. Finally, the Court hopes to encourage the expectations of all its constituents, whether counsel, clients, or other parties in interest, that cases will run smoothly and on a cooperative basis. The Court also hopes to encourage counsel to report to the Court regarding areas in which unresolvable disagreements have surfaced so that the Court may resolve those issues.

I. FILING A CASE.

To the extent possible, counsel are encouraged to make a complete initial Chapter 11 filing. The Court understands that in larger cases, “face-sheet” filings including only the matrix, the petition, and the list of twenty largest creditors, may be necessary. The more complete the initial filing is, however, the more readily able the Court and parties will be to grasp the subject matter and scope of the case itself.

II. EMPLOYMENT OF PROFESSIONALS.

- A. Court Approval. Both counsel seeking employment by debtors-in-possession as well as other professionals to be hired by any party in a Chapter 11 case, must be appointed by the Court’s order pursuant to 11 U.S.C. §327.² The Court reminds counsel to carefully review the applicable law and rules (including professional conduct guidelines regarding the ability to represent a debtor, disinterestedness, and related topics) and to

¹ Judge Nugent acknowledges the Judges of the United States Bankruptcy Court for the District of Delaware, whose Local Rule 4001-2 is adopted as a part of these guidelines. The Court further acknowledges the Honorable John T. Flannagan, United States Bankruptcy Judge for the District of Kansas, whose guidelines to some extent inspired these.

² All subsequent statutory references are to the United States Bankruptcy Code, 11 U.S.C. § 101 et. seq., unless otherwise noted.

submit these applications with the petition.

B. Local Bankr. Rule 2014.1. Counsel are reminded that they must comply with the provisions of L.B.R. 2014.1 which require, *inter alia*, separate disclosures for each individual attorney who will appear before the Court in the conduct of the case, the required elements of the accompanying affidavit of declaration, as well as the requirement that all such applications be noticed to the Chapter 11 docket and served on a variety of parties. It is this Court's habit to enter orders approving employment on an interim "first day" basis, however, with the caveat that such relief is interim only and that counsel may subsequently be disqualified and denied compensation if qualification or conflict issues arise. The entry of such interim orders is entirely within the Court's discretion.

(a) Disclosure of Connections. In this connection, counsel should also carefully consider the content of their disclosure declarations prior to signing and filing same. If counsel has previously represented any party in the case, it is important that the representation be disclosed. Similarly, if counsel has previously represented some person or some entity affiliated in some respect with the debtor or the estate, that connection must also be disclosed. Understand that while disclosure of the connections does not necessarily mean that counsel will be disqualified from representation, failure to disclose such connections may well result in disqualification and denial of compensation. This is ultimately a bad result not only for counsel, but also for the client and the other parties in the case. The Court encourages counsel to apply for appointment prior to rendering any services to the debtor or to the estate to the extent such prior application is possible.

C. Nunc Pro Tunc Orders. Counsel should expect that "nunc pro tunc" retroactive appointments will be only very rarely approved and only upon a showing of extraordinary or exigent circumstances. Do not rely on the occasional availability of this relief.

III. "FIRST DAY" ORDERS AND CONCERNS

A. Emergency Hearings. Often, debtors require the entry of "first day" orders providing for the use of cash collateral pursuant to 11 U.S.C. §363, the obtaining of post-petition credit under §364, the payment of pre-petition vendors pursuant to the "doctrine of necessity", and other related matters. It is the Court's experience that these are matters which have usually been discussed extensively among counsel for the debtor, lenders and other constituencies prior to the filing of the case. To the extent possible, counsel should advise the Clerk's office when they believe agreements have been reached

concerning the entry of these orders and the likely filing of the Chapter 11 case and the motions seeking entry of these orders. The Court will grant prompt emergency hearing settings; the Court prefers, however, to have an opportunity to review the pleadings and support documents prior to those hearings, *preferably twenty-four hours in advance*. Counsel are reminded to comply with all of the requirements of the noticing rules,(See Fed. R. Bankr. P. 2002, 4001 and 9014) with respect to any financing motions or other first day order.

- B. Content of First Day Orders; Disclosure. The content of such orders should be governed by the following which is a verbatim quotation of D. Del. L.B.R. 4001-2 currently in use in the District of Delaware.

Rule 4001-2 **Cash Collateral and Financing Orders**

- (a) Motions. Except as provided herein and elsewhere in these Rules, all cash collateral and financing requests under 11 U.S.C. §§ 363 and 364 shall be heard by motion filed pursuant to Fed. R. Bankr. P. 2002, 4001 and 9014 (“Financing Motions”).
- (i) Provisions to be Highlighted. All Financing Motions must (1) recite whether the proposed form of order and/or underlying cash collateral stipulation or loan agreement contains any provision of the type indicated below, (2) identify the location of any such provision in the proposed form of order, cash collateral stipulation and/or loan agreement, and (3) the justification for the inclusion of such provision:
- (A) Provisions that grant cross-collateralization protection (other than replacement liens or other adequate protection) to the prepetition secured creditors (i.e., clauses that secure prepetition debt by post-petition assets in which the secured creditor would not otherwise have a security interest by virtue of its prepetition security agreement or applicable law).
- (B) Provisions or findings of fact that bind the estate or all parties in interest with respect to the validity, perfection or amount of the secured creditor’s prepetition lien or debt or the waiver of claims against the secured creditor without first giving parties-in-interest at least 75 days from the entry of the order and the creditors’ committee, if formed, at least 60 days from the date of its formation to investigate such matters.

- (C) Provisions that seek to waive, without notice, whatever rights the estate may have under 11 U.S.C. § 506(c).
 - (D) Provisions that grant immediately to the prepetition secured creditor liens on the debtor's claims and causes of action arising under 11 U.S.C. §§ 544, 545, 547, 548, and 549.
 - (E) Provisions that deem prepetition secured debt to be post-petition debt or that use post-petition loans from a prepetition secured creditor to pay part or all of that secured creditor's prepetition debt, other than as provided in 11 U.S.C. § 552(b).
 - (F) Provisions that provide disparate treatment for the professionals retained by a creditors' committee from that provided for the professionals retained by the debtor with respect to a professional fee carveout.
 - (G) Provisions that prime any secured lien, without the consent of that lienor.
- (ii) All Financing Motions shall also provide a summary of the essential terms of the proposed use of cash collateral and/or financing (e.g. the maximum borrowing available on a final basis, the interim borrowing limit, borrowing conditions, interest rate, maturity, events of default, use of funds limitations, and protections afforded under 11 U.S.C. §§ 363 and 364).
- (b) Interim Relief. When Financing Motions are filed with the Court on or shortly after the date of the entry of the order for relief, the Court may grant interim relief pending review by the interested parties of the proposed debtor-in-possession financing arrangements. Such interim relief is intended to avoid immediate and irreparable harm to the estate pending a final hearing. In the absence of extraordinary circumstances, the Court shall not approve interim financing orders that include any provisions previously identified in subsection (a)(i)(A) through (a)(i)(F) of this Rule.
- III. Final Orders. A final order shall be entered only after notice and a hearing pursuant to Fed. R. Bankr. P. 4001. (Balance of Delaware rule omitted).

IV. DEBTOR DUTIES AND RESPONSIBILITIES

- A. Advising Debtor Management. Debtor's counsel is responsible for insuring that debtor's management understands the degree and extent of its duties and responsibilities, both to the creditors, and to the Court. In listing these duties, a good place to start is §1107 which requires a debtor-in-possession to perform all of the functions and duties of a trustee serving in a Chapter 11 case except those provided in § 1106(a)(2), (3), (4). Section 1106(a)(1) provides that a trustee will perform the duties of trustee as specified in § 704(2), (5), (7), (8) and (9). Fed R. Bankr. P. 2015 requires a trustee or debtor-in-possession to make reports of the debtor's financial status as well as to provide the Office of the United States Trustee with a statement of disbursements made during each calendar quarter and a statement that the fees required by 28 U.S.C. § 1930(a)(6) have been paid. The Court believes that it is vital for counsel to debtors-in-possession to advise debtor's management of the nature and extent of its fiduciary duties to the Court and to the creditor body.
- B. Timely Current Reporting. The Court especially emphasizes that debtors maintain current monthly reporting obligations and also upon the debtor's timely filing of each and every tax return, whether the same was due and not filed prior to the commencement of the case or becomes due after the commencement of the case.

V. CHAPTER 11 STATUS CONFERENCES

- A. Timing. The Court will convene an initial Chapter 11 status conference within 60 days of the commencement of the case. Generally, this status conference will be conducted after the first meeting of the creditors in order to afford the Office of the United States Trustee an opportunity to designate an unsecured creditors committee.
- B. Agenda. At the first status conference, the following activities will take place:
1. Introduction of Court to the debtor and to the case;
 2. Discussion of any remaining outstanding "first wave" matters;
 3. General status of reorganization and anticipated timing of plan;
 4. Historical overview of debtor, principals, and financial relationships;
 5. Outstanding financing issues;
 6. Anticipated issues such as adversaries to be filed, valuation concerns, claim disputes, discovery matters and pending state court litigation;
 7. Status of retention of professionals;
 8. Anticipated time for:
 - a. Plan filing.

- b. Claims bar date.
 - c. Claims objections
 - d. Other matters
- C. Appearances. Debtor management may, but need not, appear at these conferences. At the conferences, all counsel should be prepared to discuss any unresolved motions or other pending contested matters and how such matters might be resolved. Counsel should bring their calendars to these conferences.

VI. CLAIMS PROCESSING AND MANAGEMENT

- A. Allowance. Voting and confirmation requirements under the Bankruptcy Code speak to “allowed” claims. Therefore, claims should be determined and allowed before voting or a valuation of whether a plan can be confirmed. This technically complies with the Code, and gives the Court and all interested parties the information necessary to adequately evaluate the plan. This Court requires that a claims bar date order be entered early in a reorganization case so that objections to claims can be dealt with before the case comes to the disclosure and confirmation stage.
- B. Claims Objections. Counsel are reminded that, pursuant to §502(a), a proof of claim is deemed allowed unless it is objected to. Under Fed. R. Bankr. P. 3001(f), a claim is presumptively valid and correct in amount.
 - 1. Fed.R.Bankr. P. 3007. Objections to claims are covered by Fed.R. Bankr. P. 3007 pursuant to which the claimant is entitled to 30 days notice of hearing if a claim is objected to. The objector has the burden of going forward on the issues of the validity and the amount of the claim. If the objector overcomes the prima facie effect given a claim by §502(a), the burden shifts to the claimant to prove its validity and amount by a preponderance of the evidence. Parties objecting to claims are discouraged from “negative noticing” of claims objections. In other words, because neither the Code nor the Rules provides for requiring the claimant to respond to the objection, objectors should appear and bear their burden of going forward on the issues of the validity in the amount of the claim.
 - 2. Hearings on Objections to Claims. Hearings on objections to claims should be set on the next motion’s docket which falls outside the thirty (30) day notice period mandated by Rule 3007. The Court recommends and prefers that all claims objections in a case be set at one time and, be contained in one objection. While the motions docket is typically not accommodating of evidentiary proceedings, the Court will utilize this first setting on the objections

to determine preliminarily whether the objections have merit and whether the claimant is disposed to proceed to defend the objection. If objections are resolved prior to the time of the docket setting, the Court will employ this setting to approve and enter such dispositions on the record.

3. Bar Date Orders. When requesting a bar date, please attach a proposed version of the order (including a proposed bar period) to the motion for bar date. In general, the Court will not approve a bar date of fewer than 60 days after entry of the order. If the bar date process is being utilized to cut off claims listed on the schedules listed as disputed, contingent or unliquidated, the bar date notice should clearly state that the holders of claims scheduled as disputed, contingent or unliquidated can lose their rights to distribution if they fail to file a proof of claim. The bar date notice should further state that any holder of a claim may inspect the schedules and statement of affairs filed by the debtor in the office of the Clerk. The bar date order should also provide that administrative expense applications for administrative expenses incurred to date be filed by the bar date. Obviously, administrative expenses incurred after the bar date may still be applied for prior to the approval of the disclosure statement. Parties are encouraged, however, to timely file administrative expense requests so that the debtor and the Court may know of the degree and extent of the increasing administrative burden in the case.

VII. PLANS AND DISCLOSURE STATEMENTS:

- A. Timing. The Court encourages debtors to file plans within 120 days of commencement of the case. While the Code does not specifically require filings on that time schedule, the Code does afford debtors protection by granting them an exclusive period in which to file plans and, if that exclusive period is met, a further exclusive period of 60 days in which to confirm their plans. §1121. The Court is of the strong belief that the sooner most debtors file their plans, the more likely their reorganizations are to succeed.³
- B. Content; Projections; Claims. Disclosure statements should be couched in ordinary English to the greatest extent possible. In addition, disclosure statements should contain both historical and prospective cash flow information. The prospective cash flow information should include a description of the assumptions employed in the generation of the projections. The disclosure statements should also contain a liquidation analysis

³ Debtors electing “small business” treatment under § 1121(e) are bound by the shortened time lines contained therein.

so that the Court and creditors may make a reasonable determination as to whether the plan as proposed will meet the Chapter 7 liquidation test. The Court prefers that the debtor provide three (3) years of historical cash flow information as well as a three (3) year projection of same. The cash flow information should be presented on a monthly, rather than simply on an annual basis. An annual cash flow summary is, however, helpful to all concerned and should be included.

1. Allowed Claims Treatment. The disclosure statement should include a list of the allowed claims by class, with the amount of each allowed claim. The disclosure statement should further include a list of all disallowed claims by claimant. The plan should include a definitional section and, in particular, the term “effective date” should be specifically defined as should the extent of the Court’s proposed reservation of jurisdiction.

VIII. CONCLUSION

The Court hopes that these guidelines will make the administration of Chapter 11 cases assigned to it easier and more efficient for counsel, debtors, creditors, and the bankruptcy system. Counsel filing Chapter 11 cases which are likely to be assigned to this Court should obtain a copy of these guidelines from the Clerk’s office. In the event counsel have questions about the application of these guidelines to particular factual scenarios, counsel are welcome to contact this Court’s courtroom deputies in Wichita for clarification.

Dated this ____ day of November, 2001.

/S/
ROBERT E. NUGENT, BANKRUPTCY JUDGE
UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS