Marquette Law Review

Volume 67
Issue 3 *Spring 1984*

Article 2

Introduction

Ralph C. Anzivino

INTRODUCTION

PROFESSOR RALPH C. ANZIVINO*

On October 1, 1979, the United States Bankruptcy Code took effect. The Bankruptcy Code basically provides four chapters offering different forms of relief - Chapter 7 (Liquidation); Chapter 9 (Adjustments of Debts of a Municipality); Chapter ll (Reorganization); and Chapter 13 (Adjustments of Debts of an Individual with Regular Income). Each chapter is designed to provide an eligible debtor with a "fresh start" in a different manner. The articles in this symposium deal primarily with the debtor in a Chapter 11 reorganization.

The passage of Chapter 11 was heralded as a monumental reform. The prior reorganization provisions available to insolvent debtors failed to meet the needs of such debtors in today's business environment. Chapter 11 offers relief to individuals, partnerships and corporations. The legislative history to Chapter 11, however, indicates that the corporation was the primary debtor Congress had in mind when drafting Chapter 11. The modern corporation is a complex and multi-faceted entity. Most corporations do not have a significant market share of the lines of business in which they compete. Therefore, success in the contemporary marketplace depends on three factors: first, the ability to attract and hold skilled management; second, the ability to obtain credit; and third, the ability to attain and maintain an image of vitality. The primary problem inherent in the prior reorganization provisions was delay. Therefore, the current Chapter 11 reorganization provisions stress both simplicity and speed for creditors and debtors.

A case may be commenced under Chapter 11 either on an involuntary or voluntary basis. The Code provides that if an involuntary petition is filed, the debtor has the right to controvert the petition and the court must decide whether a debtor is "generally paying its debts as they become due." Congress is currently considering whether a "solvent" corpo-

---

* B.S., Bowling Green University, 1969; J.D., Case Western Reserve University, 1971; Associate Professor of Law, Marquette University Law School.

ration should be permitted to file for voluntary Chapter 11 relief and thereby avail itself of the benefits of Chapter 11 to the detriment of certain creditors.

In a typical Chapter 11 case, the "debtor in possession" continues to manage the business. For a corporation, that means the same management team will continue and be responsible for reorganizing the debtor. The Code, however, provides that at anytime after the commencement of the case, the court may order the appointment of a trustee for cause, or if such appointment would be in the best interest of creditors. Messrs. Berdan and Arnold's article on *Displacing the Debtor In Possession: The Requisites For and Advantages of the Appointment of A Trustee in Chapter 11 Proceedings* considers the many facets of this issue. The Court may at a later date reverse its decision to appoint a trustee and restore the debtor in possession to management of the business. The debtor in possession-trustee must fulfill certain statutory duties such as being accountable for all of the property of the estate; examining creditors' claims; furnishing information concerning the estate to parties in interest; filing periodic reports with the court and any governmental units involved, including tax returns; investigating the acts, conduct, assets, liabilities and financial condition of the debtor, including filing a report of such investigation with the court; and as soon as practicable, filing a reorganization plan or a report explaining why the trustee cannot file a plan or recommend conversion of the reorganization case to a case under Chapter 7 or 13.

As soon as practicable after the order for relief under Chapter 11 is entered, the court is required to appoint a committee of creditors holding unsecured claims. Messrs. Blain and Erne's article entitled *Creditors' Committees under Chapter 11 of the United States Bankruptcy Code: Creation, Composition, Powers and Duties* is very instructive on this point. The committee was designed to be the primary negotiating body for the formulation of the plan of reorganization. The committee should ordinarily consist of the seven largest unsecured creditors of the debtor who are willing to serve.

Certain administrative powers are provided to the debtor in possession-trustee to assist in the conduct of the business and to provide time to formulate a plan of reorganization.

The automatic stay is one of the fundamental debtor protections provided by the Bankruptcy Code. It gives the debtor a breathing spell from his secured and unsecured creditors. During the administration of the case, the debtor in possession-trustee is permitted to use, sell or lease property of the debtor. In addition, the debtor in possession-trustee is permitted to obtain credit for the operation of the business. Since utilities will be essential to the successful operation of any business, the Code provides that no utility may alter, refuse or discontinue service to the debtor in possession-trustee on the basis that a prepetition debt is due. The utility, however, may be able to obtain a security deposit to assure that postpetition services are paid for. And finally, the debtor in possession-trustee is permitted to assume or reject executory contracts or unexpired leases of the debtor. The use of this administrative power to reject unfavorable contracts and leases, including collective bargaining agreements, provides a mechanism for the business to remove the unsuccessful portions of its operation.

The commencement of a bankruptcy case creates an estate. The bankruptcy estate consists of all of the debtor's legal or equitable interests in property. It includes all types of property, including tangible or intangible. The legislative history to the code expressly provides that causes of action are property of the estate. The debtor in possession-trustee may seek to supplement the assets in the estate by pursuing the various causes of action available. In this regard, K. Thor Lundgren's article on the *Liability of a Creditor in a Control Relationship with its Debtor* should be consulted. Additionally, the debtor in possession-trustee can increase the properties in the estate by the exercise of various avoiding powers provided for in the Code. Certain transfers which permitted a creditor or creditors to receive preferential treatment over other creditors from the debtor may be avoided by the debtor in possession-trustee. Certain fradulent transfers or fraudulently incurred obligations by the debtor may be avoided by the debtor in possession-trustee. The debtor in possession-trustee may be able to avoid certain postpetition transactions which were unauthorized or authorized under a Bankruptcy Code section that protects only the transferor. The debtor in possession-trustee may also avoid

the fixing of certain statutory liens. Liens that first became effective on the bankruptcy of the debtor or that are not perfected on the date of the petition may be avoided. In addition to the aforesaid specific avoiding powers, the debtor in possession-trustee also succeeds to the rights of unsecured creditors under state law to avoid transfers, such as bulk sales violations or fradulent conveyances. And finally, as of the commencement of the case, the debtor in possession-trustee succeeds to certain rights "hypothetically," which may permit the avoidance of a transfer of property or the incurrence of an obligation. Those rights are the rights of a lien creditor, the rights of a creditor with a writ of execution against the property of the debtor unsatisfied as of the date of the petition, and the rights of a bona fide purchaser of the real property of the debtor as of the date of the petition.

The bankruptcy code contemplates three major groups of claims—administrative claims, secured claims and unsecured claims. The trustee is normally thought to be the champion for the unsecured claims, and the administrative claimants are given statutory priority by the Code. The secured claims are, therefore, left to assert their own protection as provided by the Bankruptcy Code. In this regard, Mr. Kenneth B. Axe's article on *Penetrating the Iron Curtain: Representing Secured Creditors in Chapter 11 Reorganization Proceedings* is very helpful. Often times, the major opponents in a reorganization are the secured creditors and the debtor in possession-trustee.

Unless a trustee has been appointed, the debtor in possession has the exclusive right to file a Chapter 11 plan for 120 days after the date of the order for relief. If a trustee has been appointed, the trustee, the debtor in possession, a creditor, the creditors' committee or any other party in interest may file a plan. It is possible that more than one plan may be filed. The plan must designate classes of claims and interests and specify the treatment of such classes or interests. Claims which are substantially similar must receive the same treatment under the plan. In addition, the plan must provide for adequate means to accomplish its objective. Once the plan has been proposed and distributed to the creditors, the plan is voted upon by the creditors. However, there can be no solicitation of the creditors unless, at the time of or

before such solicitation, there is transmitted to such creditors the plan or a summary of the plan and a written disclosure statement approved by the court. A class of claims has accepted a plan when more than half in number and two-thirds in amount of the claims actually voting on the plan approve it. While it is possible that more than one plan will be filed and accepted, only one plan may be confirmed. A plan that has been accepted by every class of claims must be confirmed by the court. A plan cannot be confirmed unless at least one class of claims has accepted the plan. However, a plan may be confirmed even though one or more classes of claims fails to accept the plan. This procedure is commonly referred to as the "cram down" procedure. The court may cram down the plan of reorganization on nonapproving claims when the court feels that the plan is fair and equitable. Once the plan has been confirmed by the court, the confirmation operates as a discharge. Noncompliance with the plan operates to no longer bind the creditors, and the creditors may seek to collect the monies due and owing pursuant to normal collection procedures.

To the novice, the Bankruptcy Code is an intimidating statute in both its length and terminology. It is hoped that the above summation and the following articles will ease any initial research anxiety and provide helpful suggestions in analyzing reorganization problems.