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## Feature

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### Small Business Deadlines

#### Expiration, Extension and Consequences



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The majority of chapter 11 business reorganizations are “small business” cases, yet these cases face large hurdles in their ability to reorganize.<sup>1</sup> A number of the 2005 amendments to the Bankruptcy Code were aimed at improving the plan confirmation and performance rates of these cases.<sup>2</sup> Among these amendments were specific and shortened deadlines for plan proposal and confirmation.<sup>3</sup>

The Bankruptcy Code classifies a chapter 11 case as a “small business case” if it is filed by a “small business debtor” as defined in 11 U.S.C. § 101(51C) and (51D). The deadlines for plan proposals are found in 11 U.S.C. § 1121, which provides, in relevant part:

- (e) In a small business case —
  - (1) only the debtor may file a plan until after 180 days after the date of the order for relief, unless that period is —
    - (A) extended as provided by this subsection, after notice and a hearing; or
    - (B) the court, for cause, orders otherwise;
  - (2) the plan and a disclosure statement (if any) shall be filed not later than 300 days after the date of the order for relief.

Section 1129(e) of the Bankruptcy Code states that the court “shall confirm a plan ... that is filed in accordance with section 1121(e) no later than 45 days after the plan is filed,” unless this time is extended pursuant to § 1121(e)(3).<sup>4</sup> Taken

together, §§ 1121(e) and 1129(e) create three relevant deadlines: (1) a 180-day period from the order for relief,<sup>5</sup> in which the debtor has the exclusive right to file a plan (the “exclusivity period”); (2) a 45-day period for confirmation after filing (the “approval period”); and (3) a 300-day period from the order for relief, in which a plan and disclosure statement must be filed (the “300-day deadline”) (collectively, these are referred to as the “small business deadlines”).

Despite Congress’s efforts to streamline and clarify the processing of small business cases, treatment of the small business deadlines has varied across courts with respect to the effect of their expiration, as well as the courts’ ability to extend them. Decisions on the effect of the expiration of the 300-day deadline have been particularly inapposite. The varying views on extending the small business deadlines and the legal effect of 300-day deadline expiration are discussed in turn.

#### Substantial vs. Strict Compliance

Section 1121(e)(3) gives a court discretion to grant the extension of the deadlines where these conditions are met:

- (A) the debtor, after providing notice to parties-in-interest (including the [U.S. Trustee]), demonstrates by a preponderance of the evidence that it is more likely than not that the court will confirm a plan within a reasonable period of time;
- (B) a new deadline is imposed at the time the extension is granted; and
- (C) the order extending time is signed before the existing deadline has expired.

Pursuant to the statute’s plain language, where a debtor timely meets all of the aforementioned

<sup>1</sup> Karen M. Gebbia-Pinetti, “Small Business Reorganization and the *Sabre* Proposal,” 7 *Fordham J. Corp. & Fin. L.* 253, 253-55 (2002).

<sup>2</sup> See Thomas E. Carlson and Jennifer Frasier Hayes, “The Small Business Provisions of the 2005 Bankruptcy Amendments,” 79 *Am. Bankr. L.J.* 645, 667 (2005).

<sup>3</sup> 11 U.S.C. § 1121(e)(2) (requiring that plan be filed in a small business case within 300 days after order for relief); 11 U.S.C. § 1129(e) (providing that bankruptcy court must confirm small business plan within 45 days of its filing).

<sup>4</sup> *In re Simbaki Ltd.*, 522 B.R. 917, 920 (Bankr. S.D. Tex. 2014) (quoting 11 U.S.C. § 1129(e)).

<sup>5</sup> “The commencement of a voluntary case under a chapter of this title constitutes an order for relief under such chapter.” 11 U.S.C. § 301(b).

requirements, an extension might be granted. However, if the debtor does not timely meet the requirements, courts are split as to whether any relief is available. Some courts find the plain language of § 1121(e)(3) to be clear and require strict compliance.<sup>6</sup> Thus, if “no signed order exists prior to the expiration of the ... deadline, then no extension can be granted,” and the case is ripe for conversion or dismissal.<sup>7</sup> Under this view, no relief is available via the equitable power of the court or any other rule, including Rule 9006(b) of the Federal Rules of Bankruptcy Procedure, which permits the court, upon finding excusable neglect or inadvertence, to extend deadlines — even after their lapse.<sup>8</sup>

Other courts require only substantial compliance with the requirements of § 1121(e)(3).<sup>9</sup> To justify this more accommodating approach, courts construe the phrase “[a]fter notice and a hearing” to require that “notice as is appropriate in the particular circumstances,” which might not require the filing of a formal motion.<sup>10</sup> Moreover, these courts recognize the unique difficulties posed by technological advancements, stating that “[i]n an age of electronic docketing and [a] court[’s] use of ‘virtual’ orders for routine, uncontested matters, the reality is that the adjournments [are] in fact handled prior to the expiration of the existing deadline whether a physical order [is] ‘signed’ or not.”<sup>11</sup>

A ruling from the bench and notation on the docket constitutes substantial compliance and allows the case to proceed.<sup>12</sup> Regardless of whether a court permits substantial compliance or demands strict compliance, the most crucial element is that the extension be given before a small business deadline expires, because failure to obtain such a timely extension will likely prove to be a fatal error.

## Enforcement of the 300-Day Deadline

Section 1121(e)(3) explicitly gives the court discretion to extend the 300-day deadline where the debtor meets the three conditions, discussed supra. The controversy arises as to what effect, if any, the debtor’s failure to timely file a plan or obtain an extension has on other interested parties.

The Bankruptcy Code does not specify any consequences following the expiration of the 300-day deadline. Thus, § 1121(e)(2) is open to two possible interpretations: One reading is that this section prohibits the filing of any reorganization plan more than 300 days after the date of the order for

relief (the “drop dead” deadline),<sup>13</sup> and the other is to allow other interested parties to file a plan upon the 300-day deadline expiration.<sup>14</sup> The weight of authority, although not overwhelming, appears to rest with the first view.

## The “Drop Dead” Deadline

Under the first view, once the 300-day deadline passes and there is no plan filed by any party-in-interest, “cause” for dismissal or conversion exists pursuant to 11 U.S.C. § 1112(b)(4)(J).<sup>15</sup> These courts reason that the term “plan” found in § 1121(e)(2) encompasses all possible plans, whether proposed by a debtor or nondebtor.<sup>16</sup> This interpretation of § 1121(e)(2) represents a “plain reading” whereby “Congress could not have been clearer” that the 300-day deadline is a “drop dead” period requiring conversion or dismissal.<sup>17</sup>

This view comports with the practice prior to the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) on this issue. Before BAPCPA’s adoption, the statutory language required “all plans” to be filed within the statutorily prescribed period of 160 days after the order for relief.<sup>18</sup> In addition to pre-BAPCPA practice, courts cite Congress’s intent in creating the tightened deadlines as compared to regular chapter 11 cases in finding that the 300-day deadline represents a “drop dead” deadline for a small business case.<sup>19</sup> Specifically, these courts note legislative history explaining that small business cases were intended to be on an expedited track following a supervised procedure,<sup>20</sup> and that the deadlines are integral to the statutory scheme reflecting “[c]ongressional intent that plan filing time limits be strictly followed”<sup>21</sup> because small businesses are often “the least likely to reorganize successfully.”<sup>22</sup> Further, Collier on Bankruptcy supports this view, stating that “if no party files a plan within the specified or extended time, then no relief is available to the debtor in Chapter 11.”<sup>23</sup> Notably, the treatise cites no additional authority for this interpretation other than the statutory language itself.<sup>24</sup>

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6 See, e.g., *In re Veridia LLC*, No. 2:15-BK-20181, 2016 WL 3049655 (Bankr. S.D. W.Va. May 20, 2016).

7 *In re Caring Heart Home Health Corp. Inc.*, 380 B.R. 980, 910-11 (Bankr. S.D. Fla. 2008).

8 *Id.* at 910 (denying extension of approval period where debtor filed motion to extend approximately 23 days late). However, Fed. R. Bankr. P. 9006(b) has been invoked to extend other deadlines (e.g., amending Schedules). See Matthew J. Burne, “Amending Exemptions in a Reopened Case,” 24 No. 2 *J. Bankr. L. & Prac. NL Art.* 2 (2015).

9 *Id.*

10 *In re Miss. Sports & Recreation Inc.*, 483 B.R. 164, 167 (Bankr. W.D. Wis. 2012). See *In re Netwurx Inc.*, No. 08-26131-svk, 2009 WL 3185575, at 4 (Bankr. E.D. Wis. Sept. 25, 2009).

11 See, e.g., *In re Miss. Sports & Recreation Inc.*, 483 B.R. at 167.

12 See *id.* at 166.

13 See generally *In re Randi’s Inc.*, 474 B.R. 783 (Bankr. S.D. Ga. 2012); *In re Sutherland*, No. 10-17768-MER, 2011 WL 2078529 (Bankr. D. Colo. May 25, 2011); *In re Castle Horizon Real Estate LLC*, No. 09-05992-8-JRL, 2010 WL 3636160 (Bankr. E.D.N.C. Sept. 10, 2010); and *In re Sanchez*, 429 B.R. 393 (Bankr. D. P.R. 2010).

14 See generally *In re Riviera Drilling & Exploration Co.*, No. BR 10-11902, 2012 WL 6719591 (Bankr. D. Colo. Dec. 19, 2012); *In re Shea Ltd.*, 545 B.R. 529 (Bankr. S.D. Tex. 2016); and *In re Fla. Coastal Airlines Inc.*, 361 B.R. 286 (Bankr. S.D. Fla. 2007).

15 Section 1112(b)(4) sets forth a nonexclusive list of examples of “cause” upon which the bankruptcy court may rely in ordering conversion or dismissal, including “failure to file a disclosure statement, or to file or confirm a plan, within the time fixed by this title or by order of the court.” Dismissal or conversion for “cause” under § 1112(b)(4)(J) might be sought by a party-in-interest or ordered by the bankruptcy court itself pursuant to 11 U.S.C. § 105(a), which provides, in part, that “[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.”

16 See, e.g., *In re Randi’s Inc.*, 474 B.R. at 786.

17 *In re Veridia*, 2016 WL 3049655 at \*3.

18 See, e.g., *In re Randi’s Inc.*, 474 B.R. at 785.

19 *In re Sanchez*, 429 B.R. at 398.

20 *In re Randi’s Inc.*, 474 B.R. at 786 (citing H.R. Rep. No. 109-31, at 158 (2005), 2005 U.S.C.A.N. 88).

21 *In re Sutherland*, 2011 WL 2078529 at \*1 (internal quotations omitted).

22 *In re Sanchez*, 429 B.R. at 397.

23 *Id.* (citing *Collier on Bankruptcy* ¶ 1121.07[4] (Alan N. Resnick and Henry J. Sommers eds., 16th ed.)).

24 *Collier on Bankruptcy* ¶ 1121.07[4] (Alan N. Resnick and Henry J. Sommers eds., 16th ed.).

The harsh result of a “drop dead” 300-day deadline could be mitigated where the facts permit application of the “relation-back doctrine.”<sup>25</sup> Under this doctrine, a plan filed after the expiration of the 300-day deadline relates back to a plan previously filed within the 300-day deadline and therefore satisfies the requirements.<sup>26</sup> The applicability of this exception is narrowly tailored. Where the amended plan is very different from the first plan, as opposed to being a “cleaned-up” version of the original, it does not relate back and runs afoul of § 1121(e)(2)’s intended purpose of expediting small business cases.<sup>27</sup> Narrow application is also favored because otherwise, “all plans, no matter how different in their proposed reorganization, would relate back to a timely filed original plan,” permitting debtors to file plans well beyond the 300-day deadline.<sup>28</sup>

### The 300-Day Deadline Is for Debtors Only

The other view adopted by courts concerning expiration of the 300-day deadline holds that the expiration of this deadline applies only to the debtor with respect to filing a plan. Accordingly, another party may file a plan after the 300-day deadline lapses. Courts adopting this interpretation point to BAPCPA’s changes to § 1121.<sup>29</sup> Prior to BAPCPA, § 1121(e) read:

In a case in which the debtor is a small business and elects to be considered a small business —

- (1) only the debtor may file a plan until after 100 days after the date of the order for relief under this chapter; [and]
- (2) all plans shall be filed within 160 days after the date of the order for relief.<sup>30</sup>

Accordingly, the pre-BAPCPA statutory language required “all plans” to be filed within 160 days of the order for relief.<sup>31</sup> In amending § 1121(e), Congress changed the more general article “all” to a definite article “the.”<sup>32</sup> The use of the definite article “the” relates back to its antecedent reference in § 1121(e)(1): “a plan” filed by a debtor.<sup>33</sup> Therefore, “[i]f Congress intended [for the] new § 1121(e)(2) to apply to all plans, it certainly knew how to say so. Changing the words in § 1121(e) ... evinces a Congressional intent to restrict the application of the new 300-day deadline for the filing of reorganization plans solely to those plans filed by debtors.”<sup>34</sup>

Construing § 1121(e)(2) in this way establishes that the passage of the 300-day deadline does not automatically require dismissal or conversion of a small business case. However, this view does beg the following question: At what point would the small business case need to be dismissed or converted when the debtor failed to meet the 300-day deadline and no other party-in-interest filed a plan? Surely a small business case cannot continue in perpetuity when no reorganization plan is forthcoming.

## Conclusion

Reorganization in bankruptcy prioritizes “the dual need for expedience and efficiency in formulating and consummating a plan for reorganization without any unreasonable delay.”<sup>35</sup> Section 1121(e) codifies this principle and balances the competing interests of debtors and creditors by seeking to ensure a prompt confirmation process.<sup>36</sup> Accordingly, the limitations in § 1121(e) are central to “weed[ing] out debtors who are not likely to reorganize”<sup>37</sup> while providing the honest-but-unfortunate debtor with the time and opportunity to revitalize its business and propose a plan that maximizes the benefits to creditors.

While courts seem to uniformly acknowledge this underlying purpose, they are split with respect to enforcement of § 1121(e) in order to achieve this end. Accordingly, it is incumbent on practitioners to be acutely aware of small business deadlines to avoid either the loss of control over the reorganization plan or, worse, the dismissal or conversion of the case. **abi**

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25 *In re Castle Horizon Real Estate LLC*, 2010 WL 3636160 at \*1 (discussing relation-back doctrine).

26 *Id.*

27 *Id.* at \*2.

28 *Id.*

29 See, e.g., *In re Fla. Coastal Airlines Inc.*, 361 B.R. at 291.

30 11 U.S.C. § 1121(e) (1994).

31 *In re Fla. Coastal Airlines Inc.*, 361 B.R. at 291.

32 *Id.*

33 *Id.*

34 *Id.*

35 See Novica Petrovski, “The Bankruptcy Code, Section 1121: Exclusivity Reloaded,” 11 *ABI Law Review*, 451, 462 (Winter 2003), available at [abi.org/member-resources/law-review](http://abi.org/member-resources/law-review).

36 See *id.* at 463.

37 *In re Netwurx Inc.*, 2009 WL 3185575 at \*5 (internal quotations omitted).