

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

ENTERED

JUN 19 '00

U.S. Bankruptcy Court
Greensboro, NC

YHB

IN RE:)
)
Vendsouth, Inc.) Case No. 00-10112C-7G
)
Debtor.)
)

ORDER

This case came before the court on May 31, 2000, for hearing upon a motion by Lighthouse Financial Corp., Ryder Transportation Services and Nabisco, Inc. for appointment of a creditors' committee in this case. David F. Meschan appeared on behalf of the Movants, Walter W. Pitt, Jr. appeared on behalf of Branch Banking & Trust Company ("BB&T"), Charles M. Ivey, III appeared on behalf of the Trustee, William O. Moseley, Jr., and Robin R. Palenske appeared on behalf of the Bankruptcy Administrator. Having considered the motion, the matters of record in this case and arguments of counsel, the court finds and concludes as follows:

1. The Debtor's voluntary petition for relief under Chapter 7 was filed on January 19, 2000.

2. William O. Moseley, Jr., is the Chapter 7 Trustee in this case and, with court approval, has employed Charles M. Ivey, III as special counsel to assist the Trustee in investigating whether the Trustee has viable causes of action against corporate officers or

third parties.

3. The motion now before the court was filed on May 23, 2000, by the Movants, who are creditors of the Debtor.

4. The motion prays that the court appoint the Movants as the members of a committee of creditors in this case to assist the Trustee in the execution of his lawful duties, to represent the interests of the creditors in this case and also authorize the movants, as members of the committee, to assist the Trustee in any investigations in this case, subject to the execution of applicable confidentiality agreements. The motion was supported by the Trustee and his attorney, was not opposed by the Bankruptcy Administrator, but was opposed by BB&T, who apparently is the focus of one of the "investigations" referred to in the motion.

5. The formation of creditors' committees in Chapter 7 cases is very unusual in this District. Nevertheless, the Bankruptcy Code and Rules clearly provide for the formation of an unsecured creditors' committee in a Chapter 7 case. Section 705 of the Bankruptcy Code provides that "[a]t the meeting under section 341(a) of this title, creditors that may vote for a trustee under section 702(a) of this title may elect a committee of not fewer than three (3), nor more than eleven (11), creditors"

6. It is undisputed that no committee was formed at the § 341 meeting in this case. Because no committee was formed at the § 341 meeting, BB&T argues that it is now too late for the formation of a committee in this case. In effect, BB&T argues that the procedure set forth in § 705 is the exclusive means by which a committee may be formed in a Chapter 7 case.

7. The court does not agree that § 705 should be read as establishing the exclusive means for the formation of a committee in a Chapter 7 case. Section 705 states that creditors "may" form a committee at the § 341 meeting, but does not say that a committee may be formed only at the § 341 meeting. Moreover, recognition of a second procedure for forming an unsecured creditors' committee in a chapter 7 case is found in Rule 2006 of the Federal Rules of Bankruptcy Procedure. Subparagraph (c)(1) of Rule 2006 specifies the persons and entities who may solicit proxies in a chapter 7 case. Under Rule 2006(c)(1)(B), one such entity is "a committee elected pursuant to § 705 of the Code" However, a committee formed under § 705 is not the only type of committee that is authorized to solicit proxies in a Chapter 7 case. Rule 2006(c)(1)(C) provides that a proxy may be solicited by "a committee of creditors selected by a majority in number and amount of claims of creditors (i) whose claims are not contingent or

unliquidated,¹ (ii) who are not disqualified from voting under § 702(a) of the Code and (iii) who were present or represented at a meeting of which all creditors having claims of over \$500.00 or the hundred creditors having the largest claims had at least five (5) days notice in writing and of which meeting written minutes were kept and are available reporting the names of the creditors present or represented and voting and the amounts of their claims” The argument that § 705 provides the exclusive means for the formation of a committee in a Chapter 7 case therefore is rejected.

8. The question which remains is whether the Movants should be recognized as an “official” committee with authority to speak on behalf of creditors, as requested in their motion. Section 705 and Rule 2006(c)(1)(C) provide guidance in answering this question. Criteria which may be derived from these provisions are: (1) The committee should be formed at a meeting of creditors by the creditors; (2) The creditors entitled to participate in the selection of the committee are unsecured creditors who qualify to vote under § 702(a)¹; and (3) The selection of the committee should

¹The requirements of § 702(a) are: (a) the creditor must hold an allowable, undisputed, fixed, liquidated, unsecured claim of a kind entitled to distribution under Section 726(a)(2), 726(a)(3), 726(a)(4), 752(a), 766(h), or 766(i); (b) the creditor must not

take place either at the § 341 meeting or at a meeting of which all creditors having claims of over \$500.00 or the hundred creditors having the largest claims have at least five (5) days written notice and of which written minutes are kept reporting the names of the creditors who are present or represented and voting and the amounts of their claims. In short, the unsecured creditors in a Chapter 7 case may form a committee at a meeting called and properly noticed for the purpose of forming such a committee. The notice requirement is particularly significant because it is essential that the constituency to be represented by a committee receive reasonable notice that a committee is proposed and be afforded an opportunity to participate in the selection of the committee.

9. In the present case, the record is silent as to the manner in which the Movants were selected to serve on the proposed committee and as to the qualifications of the Movants to select and serve on a committee of unsecured creditors. Without such information, the court is unwilling to enter an order recognizing the Movants as constituting an official committee in this case that

have an interest materially adverse, other than an equity interest that is not substantial in relation to such creditor's interest as a creditor, to the interest of creditors entitled to such distribution; and (c) the creditor must not be an insider.

is to speak for and act on behalf of other creditors in this case.

In reaching this conclusion, the court does not wish to discourage the Movants from providing the Trustee and his attorney with relevant information and assisting the Trustee in investigating and pursuing legitimate claims, and otherwise carrying out his duties. Nor should this order be construed as barring or discouraging the Movants from pursuing the formation of an unsecured creditors' committee in accordance with the above guidelines for doing so.

Now, therefore, it is ORDERED that the motion for appointment of a creditors' committee which is now before the court is denied without prejudice.

This 16th day of June, 2000.

William L. Stocks

WILLIAM L. STOCKS
United States Bankruptcy Judge