BUSINESS LAW SECTION
The State Bar of California

05-BR-037

May 31, 2006

Honorable Thomas S. Zilly
Chair, Advisory Committee on Bankruptcy Rules
of the Judicial Conference of the United States
United States Courthouse
700 Stewart Street, Suite 15229
Seattle, Washington 98101

Re: Comments on Interim Bankruptcy Rules

Dear Judge Zilly:

The Insolvency Law Committee of the Business Law Section of the State Bar of California ("ILC") appreciates the opportunity to comment on the newly issued Interim Rules of Bankruptcy Procedure and Official Forms ("Interim Rules"). The ILC seeks to promote predictability, efficiency, and consistency in the administration of the federal and California laws governing insolvency and the rights and duties of creditors and debtors.

We appreciate the tremendous amount of hard work that went into promulgating these Interim Rules. Given the complexity of the task, your accomplishment is truly exceptional. In response to the request for comment by the Advisory Committee on Bankruptcy Rules ("Rules Committee"), the ILC has reviewed the rules and forms. We are pleased to report that, on the whole, the ILC found that the rules and forms provide an excellent procedural template. However, we did find occasions where we think the rules could be improved. This letter contains a discussion of our concerns with respect to the rules that we found problematic and/or in need of revision. Additionally, we have comments on three rules that are not interim rules. Those comments appear at the end our discussion of the interim rules.

Interim Rule 1019

Interim Rule 1019 creates a new time period within which to file a motion to dismiss or convert under section 707(b) of the Bankruptcy Code ("Code") upon conversion of a case from Chapter 11, 12, or 13 to a Chapter 7 proceeding. The plain language of section 707(b) permits a court to dismiss a case filed by an individual debtor "under this chapter..." It could be argued that a case converted from Chapter 11, 12 or 13 to a Chapter 7 proceeding is not filed "under" Chapter 7 of the Code. Interim Rule 1019 arguably creates a new substantive right to move to dismiss a converted case under

section 707(b) which the plain language of section 707(b) may not permit. As we see it, the basic issue is whether the Rules Committee intended for Interim Rule 1019 to create a right to seek dismissal under section 707(b) where a case originally filed under another chapter is converted to chapter 7 when the actual language of section 707(b) does not seem to permit such a right. It seems unlikely that this result was intended by the Rules Committee. We suggest that Interim Rule 1019 be revised so that it is consistent with the Code by eliminating the reference to "a motion under section 707(b) or (c)" from Interim Rule 1019(2).

Interim Rules 2002(f)(9) and (f)(10)

Interim Rules 2002(f)(9) and (f)(10) provide for noticing requirements with regard to whether the presumption of abuse arises under section 707(b) as required under sections 342(d) and 704(b). As the Committee Notes to Interim Rules 2002(f)(9) and (f)(10) indicate, "[these amendments] reflect the 2005 amendments to sections 342(d) and 704(b) of the Bankruptcy Code." Interim Rule 2002(f) does not, however, include the Chapter 7 trustee among those who must be given the notices required by sections 342(d) and 704(b). We suggest that Interim Rule 2002(f) be revised to include the Chapter 7 trustee among those who must be given such notices, as the Chapter 7 trustee is an important party in interest in this context.

Interim Rule 2002(c)

Interim Rule 2002(c) requires a trustee leasing or selling personally identifiable information under section 363(b)(1)(A) or (B) of the Code to include in the notice of the lease or sale transaction a statement as to whether the lease or sale is consistent with a policy prohibiting the transfer of the information. The problem is that the rule refers to a policy "prohibiting the transfer of the information" without specifically referring to the policy of the debtor pursuant to subdivision (b)(1) of section 363. We suggest that Interim Rule 2002(c) be revised to clarify that the term "policy" refers to the "**policy of the debtor pursuant to subdivision (b)(1) of section 363**." This change will make the rule clearer and thus enhance compliance with the new provisions of section 363.

Interim Rule 2007.2

Interim Rule 2007.2 provides for the appointment of an ombudsman in a health care business case. The appointment is mandatory unless the court finds that it is not necessary "for the protection of patients under the specific circumstances of the case." We note that Interim Rule 2007.2 refers only to "patients." However, the language of the Code in section 333(a)(1) makes a distinction between the "quality of patient care" and the "interests of the patients" as two different aspects arising from the health care business. Moreover, the legislative history refers to the "interests of the patient" as a

distinct factor. Therefore, we suggest modifying Rule 2007.2 so that it separately identifies both the "quality of patient care" and the "interests of patients." This will ensure that the rule is consistent with the Code.

Interim Rule 5003(e)

Interim Rule 5003(e) provides procedures for the Clerk of the Court to maintain a register of addresses for governmental units. We suggest that the reference in Interim Rule 5003(e) to "United States, state, territory, or local governmental unit responsible for collecting taxes" be changed to "**governmental unit responsible for collecting taxes**." We note that the term "governmental unit" is a defined term under the Code and that it already includes (or can be so construed to include) all of the entities that are currently listed separately in the present version of Interim Rule 5003(e). This change would reduce unnecessary verbiage and promote clarity in the text of the rule.

Interim Rules 6004(g)(1) and (g)(2)

Interim Rules 6004(g)(1) and (g)(2) govern the sale or lease of personally identifiable information. We have several comments with respect to this rule. Our basic concern is that the rule does not reflect the practical, legal, and administrative realities of how courts function in the context of sales of this nature and scope.

Our first suggestion is that Interim Rule 6004(g)(1) be revised to include a requirement that a motion for authority to sell or lease property (i.e., "the sale motion") under section 363(b)(1)(A) must be accompanied by admissible evidence which would support a conclusion by the court that it is not required to direct the United States Trustee to appoint a "consumer privacy ombudsman" under section 332. In the alternative, the rule could be revised to require inclusion of a statement in the title of the sale motion that it is accompanied by a separate motion requesting the court to direct the United States Trustee to appoint an ombudsman under section 332 (i.e., "the ombudsman motion"). The current draft of the rule seems to contemplate that the court can issue an order for the appointment of an ombudsman without first being asked to make a finding on the matter, or at least being asked to do so in an appropriate motion.

Second, we recommend that Interim Rule 6004(g)(1) should provide that, unless the court orders otherwise, the ombudsman motion must be filed and served not less than 45 days before the commencement of any hearing on the sale motion. We also recommend that the rule require that the ombudsman be appointed by the United States Trustee as soon as feasible, but in any event, not less than five days before the commencement of the hearing on the sale motion. We endorse the five-day time period only because it is arguably dictated by section 332(b). In our view, a longer time period, perhaps 10 days, would be preferable. The five-day time period is quite unrealistic given

the extensive duties of the ombudsman pursuant to the Code. On this point, we direct your attention to the extensive requirements contained in sections 332(b)(1)-(4) of the Code. We anticipate that compliance with those requirements will generate an enormous amount of paperwork for the ombudsman.

Third, we think that Interim Rule 6004(g)(2) should be revised to provide that the court may direct that the United States Trustee file and serve the notice of appointment of the ombudsman together with the verified statement of the person appointed on any date selected by the court which is not less than five days prior to the commencement of the hearing on the sale motion. The notice of appointment and the verified statement should be served by the United States Trustee or by the moving party under the sale motion on all creditors and other parties in interest, unless otherwise instructed by the court in the order directing the United States Trustee to appoint the ombudsman. The current draft of the rule merely requires the United States Trustee to file a notice of appointment. Given the importance of such an appointment, we believe that mere filing by the United States Trustee is insufficient. Service on all creditors and parties in interest should also be required unless otherwise ordered by the court.

Interim Rule 1007(a)(4)

Interim Rule 1007(a)(4) requires any foreign representative filing a petition for recognition to commence a case under Chapter 15 to file a list of entities with whom the debtor is engaged in litigation in the United States. The foreign representative filing the petition for recognition must also list any entities against which provisional relief is being sought as well as administrators in foreign proceedings of the debtor. We have three suggestions regarding this interim rule.

First, we suggest that the rule be amended to include not only administrators but also "receivers, trustees, or other persons or entities acting in a similar capacity." Otherwise, the rule could be interpreted as not requiring notice on the foreign equivalent of the trustee unless that trustee-equivalent is an "administrator." Under the present language of the rule, for example, the administrator in a U.K. or Australian proceeding would clearly be entitled to notice of the petition under Rule 2002(q), but the receiver in a Korean proceeding might not.

Second, we suggest that the Rules Committee should consider whether a corporate ownership statement (Rule 7007.1) should be required of the foreign debtor since the purpose of that statement is to permit judicial recusal if there is a conflict. It might be argued that the involvement of the United States court may be so limited that such a statement would not be justified. However, one can envision cases where the involvement of the U.S. court might implicate the same set of policy considerations that prompt use of corporate ownership statements in general. We do not take a strong view

on this issue at this time. We only suggest it as an issue for further study and consideration.

Third, we note that section 1515 of the Code requires that the foreign representative file an array of supporting documents at the time the Chapter 15 petition is filed. Accordingly, we think that Interim Rule 1007(a)(4) should contain the following phrase at the beginning of the rule: "**In addition to the documents required under section 1515 of the Code** . . ."

Interim Rule 2002(q)

As with Interim Rule 1007(a)(4), Interim Rule 2002(q) uses the term "administrators" generically as though it is widely used in all foreign proceedings. However, as stated above, various foreign jurisdictions use other terms for their version of a trustee. We suggest that the term "administrators" be broadened to include "receivers, trustees, or other persons or entities acting in a similar capacity."

Comments on Non-Interim Rules

Rule 5009

Section 1517(d) of the Code states that "a case [under Chapter 15] may be closed in the manner prescribed under section 350." Section 350 states that the court shall close the case when the estate is fully administered and the trustee is discharged. Rule 3022 governs obtaining a final decree in a Chapter 11 case and Rule 5009 governs closing Chapter 7, 12, and 13 cases. Neither rule establishes an appropriate standard for closing a Chapter 15 case. We suggest that Bankruptcy Rule 5009 be modified to make it clear that a Chapter 15 case shall be closed when the grounds for granting the order granting recognition no longer exist. See § 1517(d) of the Code.

Rule 7065

Rule 65 F.R. Civ. P. applies in adversary proceedings and with respect to applications for provisional relief under section 1519(e) of the Code, except that a temporary restraining order or preliminary injunction may be issued on application of a debtor, trustee, or debtor-in-possession without compliance with Rule 65(c). Under the old section 304, an ancillary case was conducted "*essentially* as an adversary proceeding under Part VII of the Federal Rules of Bankruptcy Procedure." *Collier on Bankruptcy, ¶ 304.03[3] (15th ed. rev. 2005) (emphasis added).* In turn, Bankruptcy Rule 7065 makes the injunction standard in Rule 65 applicable to adversary proceedings. Although it would seem apparent that the Rule 65 standard for a temporary restraining order or a preliminary injunction (which requires a showing of irreparable injury, loss, or damage)

would apply to a request for injunctive relief in an ancillary case, the courts disagree on whether the factors expressly enumerated under section 304 created a different or lesser standard. *See, e.g., In re MMG, LLC,* 256 B.R. 544, 550-52 (Bankr. S.D.N.Y. 2000) (collecting cases). Section 1519(e) attempts to clear this up by stating that "[t]he standards, procedures, and limitations applicable to an injunction shall apply to relief under these sections." We therefore suggest that Bankruptcy Rule 7065 be amended to clarify, and to be consistent with section 1519(e) of the Code, that Rule 65 applies to applications for provisional relief under section 1519(e) of the Code.

Rule 9006(b)(3)

Rule 9006(b)(3) deals with enlargement of time. The reference in Rule 9006(b)(3) to Bankruptcy Rule 4004(a) should be revised to include a reference to both 4004(a) and 4004(b). Bankruptcy Rule 4004(a) concerns the filing of complaints to object to discharge. We note that Bankruptcy Rule 4004(b) contains the provisions dealing with the extension of the time period set forth in Bankruptcy Rule 4004(a).

The Insolvency Law Committee of the Business Law Section of the State Bar of California

The Insolvency Law Committee seeks to promote predictability, efficiency and consistency in the administration of the federal and California laws governing insolvency and the rights and duties of creditors and debtors. The Committee evaluates and advocates changes in federal and state statutes and regulations affecting creditors and debtors; sponsors a broad variety of educational programs in cooperation with the State Bar and local bar associations; and prepares articles on current developments and practice aides to assist practitioners.

The Committee draws its members from attorneys throughout California representing a broad cross-section of the diverse disciplines and practices (corporate, commercial, consumer, large firm, small firm, governmental agency, in-house) with expertise and experience in issues of general concern in insolvency law. The Committee is comprised of 25 members, elected to three-year staggered terms. In-person meetings are held approximately every five weeks, alternating between northern California and southern California, with teleconference attendance available.

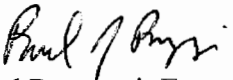
The Committee coordinates its activities with the Executive Committee of the Business Law Section, with other standing committees of the Business Law Section and other sections of the State Bar or, when appropriate, other state and local bar associations and professional organizations, on issues of related interest.

Please note that the views and positions set forth in this letter are only those of the ILC. As such, they have not been adopted by the State Bar's Board of Governors, its overall membership or the overall membership of the Business Law Section, and are not to be construed as representing the position of the State Bar of California.

Membership in the Business Law Section, and on the ILC, is voluntary and funding for activities of them, including all legislative activities, is obtained entirely from voluntary sources. There are currently more than 8,800 members of the Business Law Section.

Once again, we thank you for the opportunity to comment on the outstanding work of the Rules Committee and please feel free to contact us if you have any questions regarding our comments. Questions regarding this letter should be directed to Professor Mary Jo Wiggins. She can be reached at 619-260-2328 or at mwiggins@sandiego.edu. I can be reached at 916/329-7400, extension 22, or at ppascuzzi@ffwplaw.com.

Sincerely,



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