



CHAMBERS OF
MARVIN ISGUR
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION
515 RUSK AVENUE
HOUSTON, TEXAS 77002

05-BK-004

December 22, 2005

Mr. Peter G. McCabe
Secretary of the Committee on Rules of Practice and Procedures
Administrative Office of the United States Courts
Washington, D.C. 20544

Dear Mr. McCabe and Members of the Committee:

I am a United States Bankruptcy Judge in the Southern District of Texas. Please accept my thanks for all of the work and effort that has resulted in the proposed amendments to the Federal Rules of Bankruptcy Procedure. I have several comments for your consideration.

Most of my comments concern the application of rules that—while beneficial in large chapter 7 or chapter 11 cases—may be harmful in the administration of smaller cases and in consumer cases.

1. **Rule 4001.** The proposed amendments to Rule 4001 appear to be directed at eliminating perceived abuses in complex matters. Please consider the following:
 - A. **Rule 4001(b) as it applies to simple cash collateral orders in simple cases.** It is not uncommon to have small chapter 11 cases (and even some larger chapter 13 cases) in which a concise order authorizing the use of cash collateral may be appropriate. Often, these orders will only be 1-5 pages in length. As the Committee is aware, there are many more cases in this category than there are complex chapter 11 cases. Accordingly, I suggest that a new subsection 4001(b)(1)(B)(5) be inserted that reads as follows:

“(5) the introductory statement is not required if each of the motion and the proposed form of order are (i) less than 6 pages in length, (ii) double spaced, and (iii) in twelve point or greater type.”¹
 - B. **Rule 4001(c) as it applies to small loans in small cases.** The same comments set forth in paragraph 1(A) applies to Rule 4001(c) and motions to obtain credit.

¹ Proposed language is submitted solely for the purpose of promoting discussion of a method for evaluating whether the introductory statement would be helpful in particular cases.

C. **Rule 4001(d) as it applies to exempt property in consumer cases.** The local rules of the Southern District of Texas provide for the mandatory use of certain forms with respect to motions for relief from the stay on exempt homes and vehicles. The local rules also require a pre-filing conference on these motions. There are a series of form orders that may be submitted by agreement under current S.D. Tex. BLR 4001(d). Although these procedures are relatively new, I estimate that over 300 proposed 4001(d) orders are filed monthly in the Southern District of Texas. I also note that the service provisions in the proposed subsection "D" provides for no service at all in chapter 13 cases. The proposed amendments will have a material, adverse effect on practice in our Court. Accordingly, I request the following additions:

(1) The contents of the current proposed subsection (B) shall become "(B)(1)."

(2) The following subsections should be added:

"(B)(2) the introductory statement is not required if each of the motion and the proposed form of order are (i) less than 6 pages in length, (ii) double spaced, and (iii) in twelve point or greater type;

(B)(3) the introductory statement is not required if: (i) the debtor is an individual; (ii) the rules of the local court provide for an exception for certain cases in which the debtor is an individual; and (iii) the case in which the motion is filed qualifies for the local rule's exception."

(3) At the end of subsection "D", please add the following sentence: "In a case in which the debtor is an individual, the motion shall be served on (i) any party claiming a lien on or an interest in the subject matter of the motion, (ii) parties requesting notice, (iii) any committee elected under § 705 or appointed pursuant to § 1102 of the Code or its authorized agent, and (iv) such other entities as may be directed by the Court or by local rule."

D. **General comments about notice under all of proposed Rule 4001.** I do not understand why service of all Rule 4001 matters is so limited in cases involving entities. At a minimum, I suggest that the service provisions be expanded to include parties requesting notice and parties with a lien on or an interest in the matter that is the subject of the motion. Perhaps I misread the notice rules, but they appear not to require notice on parties requesting notice or on those directly affected by the motion. By way of example, proposed Rule 4001(c)(1)(D) appears to provide that a motion seeking to authorize an extension of credit to be secured by a senior lien

on collateral that is presently encumbered by a lien would not be required to be served on the current lien holder.

2. **Rule 6003.** I am concerned about the interplay between § 365(d)(3) and § 502 with respect to the newly proposed rule. There is a good faith interpretation of current law that a debtor must perform under leases until the leases are rejected and that a failure to perform will result in an administrative claim against the estate. I am concerned that the use of the terms “immediate and irreparable harm” may be so strong as to preclude a debtor’s rejection of a lease in order to avoid the accrual of an administrative claim against the estate. There may be abuses of which I am not aware that necessitate such a change. However, I would prefer that the Committee leave open the possibility that a lease could be rejected within 20 days on a lesser showing than “immediate and irreparable harm.” I note that the Committee references current Rule 4001(b)(2) and (c)(2). Under those rules (dealing with cash collateral use or obtaining credit), interim orders are generally issued when there is immediate and irreparable harm. I do not know how the Court can fashion equivalent interim relief with respect to a burdensome lease where the debtor is seeking to avoid the accrual of an administrative claim. For example, a debtor may have abandoned a premises pre-bankruptcy, but be obliged to make payments under § 365(d)(3). Under those circumstances, does the Committee believe that there is “immediate and irreparable harm?” If so, clarification in a comment to the notes would be helpful. If not, I suggest that the lease rejection provision be based on a lesser standard.

Overall, I find the proposed rules changes most helpful. I ask that the Committee consider the comments in this letter with respect to possible modifications. I ask that particular attention be given to the proposed changes to Rule 4001(d). Adoption of the proposed rule without change would result in a significant (and in my view, unnecessary) cost to consumer debtors in the Southern District of Texas.

Sincerely,

/s/

Marvin Isgur