

NATIONAL BANKRUPTCY CONFERENCE

*A Voluntary Organization Composed of Persons Interested in the
Improvement of the Bankruptcy Code and Its Administration*

05-BK- 007

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February 15, 2006

By Electronic Transmission

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Judicial Conference of the United States
Washington, D.C. 20544

Re: Proposed Amendments to Bankruptcy Rules

Dear Mr. McCabe:

The National Bankruptcy Conference¹ has studied the proposed amendments to the Federal Rules of Bankruptcy Procedure, which were published for comment on August 15, 2005. Although the Conference believes that on the whole, the amendments will provide needed improvements to practice and procedure in the bankruptcy court, the Conference submits these comments in the hopes of drawing the Committee's attention to areas of potential problems and further improvements in the proposed amendments.

Rules 3001(c) and (d)

The proposed amendments would modify Rule 3001(c) to require that where a claim is based upon a writing and the writing exceeds 25 pages, instead of filing the writing, the claimant must file a copy of relevant excerpts from the writing and a summary of the writing, which together "shall not exceed the total of 25 pages." Similarly, subsection (d) provides that if evidence of perfection is contained in a writing that exceeds five pages, the claimant must file a copy of any relevant excerpts and a written summary, which together "shall not exceed five pages." We understand that these proposed amendments derive from concerns expressed by the clerks' offices that lengthy writings submitted in electronic form create technical difficulties. The Conference is concerned that in a chapter 11 case, it may not be possible to comply with these page limitations, as some of the underlying writings are voluminous and cannot be adequately summarized within the page limitations. Further, while the information required to complete a proof of claim form is straightforward and easy to prepare, it will be costly and time consuming to have counsel draft these summaries. As a result, the Conference strongly recommends that Rule 3001(c) and (d) not be changed.

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¹ See the attached for a description of the National Bankruptcy Conference.

However, if the Rules Committee decides that the rule must be modified to meet the needs of the clerks' offices, then the Conference recommends that the rule be modified so that in a chapter 11 case, a court can enter an order directing that voluminous documents (as defined by the court) need not be filed and specifying how parties in interest can get copies. Should the Committee decide an amendment is needed, our proposed revisions are attached.

Rule 4001

Changes Applicable to Subsections (b), (c) and (d). The proposed amendments would require that any motion for use of cash collateral, to obtain credit and relating to relief from the automatic stay include an introductory statement, not to exceed three pages, that summarizes all material provisions of the motion, including certain specified information. For the reasons discussed in greater detail below, the Conference does not believe that three pages is a realistic or achievable limit. While use of cash collateral may be less complicated to describe than relief under subsections (c) and (d), the Conference urges the Committee to modify its proposed amendment and provide that each motion contain a brief introductory summary or table that summarizes all material provisions of the motions. We have proposed specific language in the attached draft amendment.

The Conference also suggests that the "service" provision of each subsection be modified to provide service on those parties who have requested special notice in writing from the trustee.

Motion for Use of Cash Collateral (Rule 4001(b)). In addition to the foregoing modifications, the Conference proposes a technical modification to subsection (b). We believe the word "material" should be inserted before the word "term" in subsection (b)(1)(B)(3). Again, the proposed change is in the attached draft.

Obtaining Credit (Rule 4001(c)). These amendments are similar to the proposed amendments to subsection (b); however, the list of provisions that must be described in the motion itself is somewhat longer and the amendments add a new provision, (1)(C), which authorizes the court to grant relief under Rule 9024 "if it determines that the introductory statement did not adequately disclose a material element of the agreement." In addition to some minor technical changes that are identified in the attached draft amendments, the Conference strongly urges the Committee to delete the reference to Bankruptcy Rule 9024, both here and in subsection (d), for several reasons.

First, relief under Rule 9024 is available if a party can make the requisite showing under the Rule. The reference to Rule 9024 in Rule 4001 probably adds nothing; a party must still meet the requirements of the Rule in order to get relief. However, the reference might unintentionally suggest an alternative, perhaps lower standard for relief based on the specific provisions of Rule 4001. Second, including a reference to Rule 9024 in Rule 4001 suggests that relief under Rule 9024 may not be available for orders entered under other Bankruptcy Rules because they do not specifically reference it. Third, materiality is in the eyes of the beholder, and an after-the-fact decision that a material term was omitted (particularly if

done unintentionally) should not warrant action under Rule 9024. Fourth, it is unclear what relief can be obtained under Rule 9024. The Rule provides that “the court may relieve a party or a party’s legal representative from an . . . order” for various reasons, including “misrepresentation.” For example, one can imagine a situation where a specific event of default was not disclosed in the summary. Later, a creditor files a motion under Rule 9024 seeking to set aside the provision. Can the moving party obtain an order relieving another party, namely the debtor-in-possession or trustee, from application of the provisions, and can it do so for a period of up to one year from the date the order was entered? Can it get broader relief and overturn the order in its entirety? Additionally, while the Conference has some sympathy for actions taken by the court at the initial hearing, when there is little time to review the entire motion and accompanying agreement, it has less sympathy when the court enters an order after a final hearing because the parties and the court will have had sufficient time to review the motion in its entirety and the pertinent terms of the attached agreement before the final hearing, which must be at least 15 days later. Clearly, the failure to include a term in the summary should not form the basis for relief under Rule 9024 if the borrowing order is entered after the final hearing. Finally, how would relief under 9024 reconcile with mootness on appeal under section 364(e) of the Bankruptcy Code? On balance, the Conference questions the soundness of including a special provision that purports to apply Rule 9024.

The Conference also suggests several modifications to subsection (c)(1)(B) in the attached draft amendments. One clarifies that the required disclosures specified in (1)(B) apply to both the provisions included in the summary and the new provisions specified in the proposed amendment. We also suggest that the moving party not have to disclose the reasons for each provision, but that the moving party must disclose the extent to which any provision may affect the estate if interim relief is granted, but a final order is never entered. These provisions may be the most important to consider before entering interim relief. The Conference also suggests inclusion of another provision in the list under subsection (c)(1)(B) and another addition to (c)(1)(B)(3). These are all set out in the attachment.

Agreement Relating to Relief From the Automatic Stay, etc. (Rule 4001(d)). The Conference proposes parallel modifications to subsection (d). They are contained in the attached draft amendments.

Rule 6003

The proposed amendments to Rule 6003 would prohibit a court from granting certain specified relief within 20 days after the date of the filing of the petition. No orders could be entered within the 20-day period on an application under Rule 2014, a motion to use, sell, lease or otherwise incur an obligation regarding property of the estate, including a motion to pay all or a portion of a fee petition claim (but not a motion under Rule 4001), or a motion to assume, assign or reject an executory contract or unexpired lease under section 365. The Conference proposes a modification to subsection (c) to permit a court to authorize rejection of an executory contract or unexpired lease during the 20-day period because it could save the estate substantial costs. Again, we refer you to the attached drafts.

Mr. Peter McCabe
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Rule 6006

The proposed amendments to Rule 6006 would preclude the trustee from seeking authority to assume or assign multiple executory contracts or unexpired leases in one motion, except under limited circumstances. The Conference believes that the proposed amendments should be modified to permit the trustee to file an omnibus motion to assume multiple leases with different parties because the showing of adequate assurances will be common to all parties to the leases.

Please feel free to contact me at (212) 735-2800, the Conference Chair Donald S. Bernstein at (212) 450-4092, or Robert White, Esq., the Chair of the Chapter 11 Committee of the Conference at (310) 246-8485, should you have any additional questions regarding this matter.

Very truly yours,

/s/ Richard Levin

Richard Levin
Vice-Chair

Attachment

cc: Prof. Jeffrey Morris

**PROPOSED AMENDMENTS TO THE
FEDERAL RULES OF BANKRUPTCY PROCEDURE**

Rule 3001. Proof of Claim

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(c) CLAIM BASED ON A WRITING. When a claim, or an interest in property of the debtor securing the claim, is based on a writing, a copy of the writing shall be filed with the proof of claim; provided however, that in a case under chapter 11 of this title, and for good cause shown, the court may enter an order directing that voluminous writings not be filed with the proof of claim and requiring that, on the request of a party in interest, the claimant shall promptly serve on that party a copy of the writing. If the writing has been lost or destroyed, a statement of the circumstances of the loss or destruction shall be filed with the proof of claim. If the writing exceeds 25 pages, the claimant shall instead file a copy of relevant excerpts of the writing and a summary of the writing which together shall not exceed a total of 25 pages. If the claimant has not filed a copy of the complete writing, on request of a party in interest, the claimant shall promptly serve on that party a copy of the complete writing.

(d) EVIDENCE OF PERFECTION OF SECURITY INTEREST. If a security interest in property of the debtor is claimed, the proof of claim shall be accompanied by evidence that the security interest has been perfected. If the evidence of perfection is a writing, the claimant shall file a copy of the writing with the proof of claim; provided however, that in a case under chapter 11 of this title, and for good cause shown, the court may enter an order directing that voluminous writings not be filed with the proof of claim and requiring that, on the request of a party in interest, the claimant shall promptly serve on that party a copy of the writing. If the writing exceeds five pages, the claimant shall instead file a copy of relevant excerpts of the writing and a summary of the evidence of perfection, which together shall not exceed a total of five pages. If the claimant has not filed a copy of the complete writing, on request of a party in interest, the claimant shall promptly serve on that party a copy of the complete writing.

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Rule 4001. Relief from Automatic Stay; Prohibiting or Conditioning the Use, Sale, or Lease of Property; Use of Cash Collateral; Obtaining Credit; Agreements

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(b) USE OF CASH COLLATERAL.

(1) *Motion; Service.*

(A) Motion. A motion for authority to use cash collateral shall be made in accordance with Rule 9014 and shall be accompanied by a proposed form of order.

(B) Contents. The motion shall include ~~and~~ a brief introductory statement, not to exceed three pages, summarizing or table that lists or summarizes all material provisions of the motion, including:

(1) the name of each entity with an interest in the cash collateral;

(2) the purposes for the use of the cash collateral;

(3) the material terms, including duration, of the use of the cash collateral; and

(4) any liens, cash payments, or other adequate protection that will be provided to each entity with an interest in the cash collateral or, if no additional adequate protection is proposed, an explanation of why each entity's interest is adequately protected.

(C) Service. The motion shall be served on any entity with an interest in the cash collateral, any party that has requested in writing to the trustee or debtor in possession notice of pleadings filed in the case, any committee elected under § 705 or appointed under § 1102 of the Code or its authorized agent, or, if the case is a chapter 9 municipality case or a chapter 11 reorganization case and no committee of unsecured creditors has been appointed under § 1102, the creditors included on the list filed under Rule 1007(d), and any other entity that the court may direct.

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(c) OBTAINING CREDIT.

(1) *Motion; Service.*

(A) Motion. A motion for authority to obtain credit shall be made in accordance with Rule 9014 and shall be accompanied by a copy of the credit agreement and a proposed form of order.

(B) Contents. The motion shall include ~~an~~ a brief introductory statement, ~~not to exceed three pages, summarizing or table that lists or summarizes~~ all material provisions of the proposed credit agreement, including interest rate, maturity, events of default, liens, borrowing limits, and borrowing conditions. If the proposed credit agreement or proposed order includes any of the following provisions, the introductory statement or table also shall briefly list or summarize each provision, and the body of the motion shall describe the nature and extent of each such provision, and identify the specific location of the provision in each of the proposed form of order, agreement, or other document, and disclose the extent to which such provision may affect the estate if interim approval is granted, but final relief is denied, as provided under Rule 4001(c)(2):

(1) the granting of priority or a lien on property of the estate under § 364(c) or (d);

(2) the providing of adequate protection or priority with respect to a claim that arose before the commencement of the case, including the granting of a lien on property of the estate to secure the claim, or the use of property of the estate or credit obtained under § 364 to make cash payments on account of the claim;

(3) a determination with respect to the validity, enforceability, avoidability, priority, or amount of a claim that arose before the commencement of the case, or of any lien securing the claim;

(4) a waiver or modification of the provisions of the Code or applicable rules relating to the automatic stay;

(5) a waiver or modification of any entity's ~~authority~~right to file a plan, to seek an extension of time in which the debtor has the exclusive right to file a plan, ~~or the right to~~ request the use of cash collateral under § 363(c), or to request authority to obtain credit under § 364;

(6) the establishment of deadlines for filing a plan of reorganization, for obtaining approval of a disclosure statement, for setting a hearing on confirmation, or for obtaining entry of a confirmation order;

~~(7)~~ a waiver or modification of the applicability of nonbankruptcy law relating to the perfection of a lien on property of the estate, or on the foreclosure or other enforcement of the lien;

~~(78)~~ a release, waiver, or limitation on any claim or other cause of action belonging to the estate or the trustee, including any modification of the statute of limitations or other deadline to commence an action;

~~(89)~~ indemnification of any entity;

~~(910)~~ a release, waiver, or limitation of any right under § 506(c); or

~~(101)~~ the writing of a lien on any claim or cause of action arising under § 544, 545, 547, 548, 549, 553(b), 723(a), or 724(a).

(C) ~~Application of Rule 9024.~~ The court may grant appropriate relief under Rule 9024 if it determines that the introductory statement did not adequately disclose a material element of the agreement. ~~(D)~~ Service. The motion shall be served on any party that has requested in writing to the trustee or debtor in possession notice of pleadings filed in the case, any committee elected under § 705 or appointed under § 1102 of the Code or its authorized agent, or, if the case is a chapter 9 municipality case or a chapter 11 reorganization case and no committee of unsecured creditors has been appointed under § 1102, on the creditors included on the list filed under Rule 1007(d), and on such other entities as the court may direct.

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(d) AGREEMENT RELATING TO RELIEF FROM THE AUTOMATIC STAY, PROHIBITING OR CONDITIONING THE USE, SALE, OR LEASE OF PROPERTY, PROVIDING ADEQUATE PROTECTION, USE OF CASH COLLATERAL, AND OBTAINING CREDIT.

(1) *Motion; Service.*

(A) Motion. A motion for approval of an agreement (1) to provide adequate protection, (2) to prohibit or condition the use, sale, or lease of property, (3) to modify or terminate the stay provided for in § 362, (4) to use cash collateral, or (5) between the debtor and an entity that has a lien or interest in property of the estate pursuant to which the entity consents to the creation of a lien senior or equal to the entity's lien or interest in such property shall be accompanied by a copy of the agreement and a proposed form of order.

(B) Contents. The motion shall include ~~an~~ a brief introductory statement, ~~not to exceed three pages, summarizing or table that lists or summarizes~~ all material provisions of the agreement. ~~The introductory statement or table also shall briefly list or summarize each provision~~ motion also shall state whether the relief requested includes any of the provisions of the type listed in subdivision (c)(1)(B), and the body of the motion and, if so, shall describe the nature and extent of each provision, explain the reasons for each provision, and identify the specific location of the provision in each of the proposed form of order, agreement, or other document.

(C) Application of Rule 9024. ~~The court may grant appropriate relief under Rule 9024 if it determines that the introductory statement did not adequately disclose a material element of the agreement.~~ (D) Service. The motion shall be served on any party that has requested in writing to the trustee or debtor in possession notice of pleadings filed in the case, any committee elected under § 705 or appointed under § 1102 of the Code or its authorized agent, or, if the case is a chapter 9 municipality case or a chapter 11 reorganization case and no committee of unsecured creditors has been appointed under § 1102, on the creditors included on the list filed under Rule 1007(4), and on such other entities as the court may direct.

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**PROPOSED AMENDMENTS TO THE
FEDERAL RULES OF BANKRUPTCY PROCEDURE**

Rule 6003. Interim and Final Relief Immediately Following the Commencement of the Case-Applications for Employment, Motions for Use, Sale, or Lease of Property, and Motions for Assumptions, Assignments, and Rejections of Executory Contracts

Except to the extent that relief is necessary to avoid immediate and irreparable harm, the court shall not, within 20 days after the filing of the petition, grant relief regarding the following:

- (a) an application under Rule 2014;
- (b) a motion to use, sell, lease, or otherwise incur an obligation regarding property of the estate, including a motion to pay all or part of a claim that arose before the filing of the petition, but not a motion under Rule 4001, and
- (c) a motion to assume, or assign, ~~or reject~~ an executory contract or unexpired lease in accordance with § 365.

Rule 6006. Assumption, Rejection or Assignment of an Executory Contract or Unexpired Lease

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(e) LIMITATIONS. The trustee shall not seek authority to assume or assign multiple executory contracts or unexpired leases in one motion unless (1) all executory contracts or unexpired leases to be assumed or assigned are between the same parties or are to be assigned to the same assignee or, (2) the trustee seeks to assume, but not assign, unexpired leases of real property with different parties, or (3) the court otherwise authorizes the motion to be filed. Subject to subdivision (f), the trustee may join requests for authority to reject multiple executory contracts or unexpired leases in one motion.

(f) OMNIBUS MOTIONS. A motion to reject or, if permitted under subdivision (e), a motion to assume or assign multiple executory contracts or unexpired leases that are not between the same parties shall:

- (1) state in a conspicuous place that parties receiving the omnibus motion should locate their names and their contracts or leases listed in the motion;
- (2) list parties alphabetically and identify the corresponding contract or lease;

(3) specify the terms, including the curing of defaults, for each requested assumption or assignment;

(4) specify the terms, including, the identity of each assignee and the adequate assurance of future performance by each assignee, for each requested assignment;

(5) be numbered consecutively with other omnibus motions to assume, assign, or reject executory contracts or unexpired leases; and

(6) be limited to no more than 100 executory contracts or unexpired leases.

(g) FINALITY OF DETERMINATION. The finality of any order respecting an executory contract or unexpired lease included in an omnibus motion shall be determined as though such contract or lease had been the subject of a separate motion.

National Bankruptcy Conference

A non-profit, non-partisan, self-supporting organization of approximately sixty lawyers, law professors and bankruptcy judges who are leading scholars and practitioners in the field of bankruptcy law. Its primary purpose is to advise Congress on the operation of bankruptcy and related laws and any proposed changes to those laws.

History. The National Bankruptcy Conference (NBC) was formalized in the 1940s, at the request of Congress, from a nucleus of the nation's leading bankruptcy scholars, who gathered informally in the 1930s to assist Congress in the drafting of the Chandler Act of 1938, the first comprehensive revision of U.S. bankruptcy law since the Bankruptcy Act of 1898. Members of the NBC formed the core of the Commission on the Bankruptcy Laws of the United States, which in 1973 proposed the overhaul of our bankruptcy laws that led to enactment in 1978 of the Bankruptcy Code, and were heavily involved in the work of the National Bankruptcy Review Commission (NBRC) whose 1997 report led to the legislation that overhauled our bankruptcy laws in 2005. The NBC has been active as a resource to Congress on every major piece of bankruptcy legislation since 1978.

Current Members. Membership in the NBC is by invitation only. Among the NBC's 55 active members are leading bankruptcy scholars from major law schools, current and former judges from nine different judicial districts, and practitioners from leading law firms throughout the country who have been involved in most of the major corporate reorganization cases of the last three decades. The NBC also includes leading consumer bankruptcy experts and experts on commercial, employment, pension, mass tort and tax related bankruptcy issues. It also includes former members of the congressional staff who participated in drafting the Bankruptcy Code as originally passed in 1978 and former members and staff of the NBRC.

Policy Positions. The Conference regularly takes substantive positions on issues implicating bankruptcy law and policy. It does not, however, take positions on behalf of any organization or interest group. Instead, the NBC seeks to reach a consensus of its members—who represent a broad spectrum of political and economic perspectives—based on their knowledge and experience as practitioners, judges and scholars. The Conference's positions are considered in light of the stated goals of our bankruptcy system: debtor rehabilitation, equal treatment of similarly situated creditors, preservation of jobs, prevention of fraud and abuse, and economical insolvency administration. Conferees are always mindful of their mutual pledge to "leave their clients at the door" when they participate in the Conference's deliberations. The Conference also provides advisory services to policy makers on technical matters relating to bankruptcy law and practice.