

# Bankruptcy Litigation Committee

## ABI Committee News

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## Recent Amendments to the Federal Rules of Bankruptcy Procedure

### Written by:

**George R. Mesires**

**Barack Ferrazzano Kirschbaum & Nagelberg LLP; Chicago**

**Andrea B. Schwartz**

**Fulbright & Jaworski LLP; New York**

On Dec. 1, 2007, various amendments (the amendments) to the Federal Rules of Bankruptcy Procedure (the Bankruptcy Rules) became effective, including the creation of several new rules. Among the significant changes of which practitioners should be aware, are (1) limitations on the relief that may be granted in the first 20 days of a case, absent a showing of "immediate and irreparable harm," (2) restrictions on the procedure and nature of omnibus claim objections, including the type of relief that may be demanded, (3) restrictions on the procedure and nature of omnibus motions to assume or reject executory contracts and unexpired leases and (4) more extensive notice and disclosure requirements for approval of agreements relating to, among others, the automatic stay, use of cash collateral and obtaining credit.

The amendments modify or create the following rules (in numerical order): **Rule 1014** (Dismissal and Change of Venue); **Rule 3007** (Objections to Claims); **Rule 4001** (Relief from Automatic Stay; Prohibiting or Conditioning the Use, Sale, or Lease of Property; Use of Cash Collateral; Obtaining Credit; Agreements); **Rule 6003** (Interim and Final Relief Immediately Following Commencement of the Case—Applications for Employment; Motions for Use, Sale, or Lease of Property; and Motions for Assumption or Assignment of Executory Contracts); **Rule 6006** (Assumption, Rejection or Assignment of an Executory Contract or Unexpired Lease); **Rule 7007.1** (Corporate Ownership Statement); **Rule 9005.1\*** (Constitutional Challenge to a Statute — Notice, Certification, and Intervention) and **Rule 9037\*** (Privacy Protection for Filings Made with the Court). A synopsis of the amendments follows.

### Rule 1014

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The amendments clarify that the court (after notice to the petitioners and a hearing) may order the change of venue or dismiss a case on its own motion. Although courts have generally held that they have the authority to do so, amended Bankruptcy Rule 1014 now expressly sets forth that authority.

### **Rule 3007**

The amendments effect several changes to Rule 3007, two of which are particularly noteworthy for practitioners. First, a party in interest is prohibited from including in a claim objection a demand for affirmative relief that requires the commencement of an adversary proceeding. The advisory committee note explains that unlike a contested matter, an adversary proceeding requires the service of a summons and complaint and, therefore, puts the party served on notice of potential affirmative recovery. This does not, however, prohibit a court from consolidating a separate objection to a claim with an adversary proceeding for purposes of a trial.

Second, the amendments limit the number of claims that may be included in a single omnibus claim objection to 100, and require that the nature of the objections generally be nonsubstantive. Amended Rule 3007(d) Provides eight claim objections that may be included in an omnibus motion, including that the claim: (1) is duplicative of another, (2) was filed in the wrong case, (3) has been amended, (4) was filed untimely, (5) has been satisfied or released, (6) was not filed in compliance with the rules and the objector cannot determine the validity, (7) is an interest, not a claim and (8) asserts a priority greater than that permitted by Bankruptcy Code §507. Interestingly, the list of objections does not include that the claim does not comport with the debtor's books and records. Amended Rule 3007(c), however, permits the court to authorize such omnibus objections. The amendments further provide certain procedural requirements concerning the form and content for omnibus claim objections. The advisory committee note advises that these changes are directed at ensuring the protection of the due process rights of claimants.

### **Rule 4001**

The amendments to Rule 4001 require more extensive notice to interested parties and greater disclosure by movants in applications for approval of agreements relating to the automatic stay, use of cash collateral, obtaining post-petition credit and other agreements, including that copies of the proposed agreements and a proposed form of order be submitted with these applications. Among other things, these motions must either not exceed five pages, or must begin with a concise statement of the relief requested (not to exceed five pages), that lists or summarizes, and sets out the location within the relevant documents of all material provisions, such as specific references to certain forms of extraordinary relief (e.g., granting superpriority status, priming liens, or liens on avoidance actions), and identifies any provision that is proposed to remain in effect if interim approval is granted, but final relief is denied, as provided under Bankruptcy Rule 4002. The objective of the modifications to Rule 4001 is to enhance the ability of the court and interested parties to find the relevant provisions and understand the nature of the relief requested.

**Rule 6003**

Under new Rule 6003, a bankruptcy court can not within 20 days after the filing of a petition, except to the extent that relief is necessary to avoid immediate and irreparable harm, grant relief with respect to (1) the employment of professionals, (2) payment of prepetition claims (i.e., critical vendor payments) or the use, sale or lease of estate property (other than under Rule 4001 (DIP financing and cash collateral)) and (3) motions to assume or assign executory contracts and unexpired leases under Code §365.

The advisory committee note indicates that the new rule is "intended to alleviate some of the time pressures present at the start of the case so that full and close consideration can be given to matters that may have a fundamental impact on the case." The concern that parties in interest are afforded adequate time to review the often voluminous initial pleadings is heightened because typically, in the early days of a bankruptcy case, the creditors' committee has not been yet formed.

The advisory committee further provides that the "immediate and irreparable harm" standard is taken from Rules 4001(b)(2) and (c)(2), whose interpretative case law should provide guidance to practitioners.

In what appears to be the first (and only) reported decision interpreting new Rule 6003, the court in *In re First NLC Fin. Servs. LLC*, No. 08-10632, 2008 WL 268428 (Bankr. S.D.Fla. Jan. 28, 2008), granted on an interim basis, over the objection of the U.S. Trustee, the debtor's motion, brought within the first 20 days of the case, to employ counsel. The bankruptcy court held that interim relief should be granted because (1) Rules 4001(b)(2) and (c)(2) provide for the bifurcation of interim and final relief, and (2) nothing in the text of Rule 6003 prohibits entry of interim relief. The court reasoned that if interim relief was not granted, "counsel may not be paid if its employment is not first approved by the court." *Id.* at \*3. If interim relief was not granted and the debtor's motion was not approved at the final hearing, "the court would have to first enter an order approving the professional's employment back to the petition date, then allow the compensation for the work performed, and then deny approval of further employment. This is a most unwieldy and peculiar procedural two-step, which is ill advised and is unnecessary as this court reads the Rule." *Id.* at \*3.

**Rule 6006**

The amendments provide for the use of omnibus motions to reject up to a maximum of 100 executory contracts and unexpired leases. The amendments also permit the trustee to file an omnibus motion to assume or assign multiple executory contracts and unexpired leases (up to 100) when (1) the contracts and leases are with a single nondebtor party, (2) the contracts and leases are to be assigned to the same assignee, (3) the trustee seeks to assume, but not assign to more than one assignee, real property leases or (4) the court authorizes such a motion to be filed. Similar to the amendments directed at omnibus claim objections under Rule 3007, the amendments relating to Rule 6006 include various procedural requirements intended to ensure that the nondebtor parties to the contracts and leases receive effective notice of the motion.

**Rule 7007.1**

The amendments clarify that a party must file its corporate ownership statement with the first "paper" filed with the court in an adversary proceeding. Practitioners should bear in mind that a party's first "paper" may not be a "pleading" under Rule 7 of the Federal Rules of Civil Procedure (the civil rules), as made applicable to adversary proceedings by Bankruptcy Rule 7007, but rather may be an appearance, motion, response or other request addressed to the court.

**Rule 9005.1**

New Rule 9005.1 makes civil rule 5.1 applicable to all proceedings within a bankruptcy case. civil rule 5.1 requires a party to file and serve a notice of constitutional question (and certification by the court) when a party's pleading draws into question the constitutionality of a federal or state statute. The notice must be served on the U.S. Attorney General if a federal statute is challenged, or the state attorney general if a state statute is challenged.

Further, Rule 5.1 allows the attorney general to intervene in the proceeding within 60 days of service of the notice of the constitutional question. A party's failure to file and serve the notice pursuant to civil rule 5.1 does not forfeit a constitutional claim or defense if timely asserted.

**Rule 9037**

New Rule 9037 addresses privacy and security concerns regarding certain personal identifying information and data that is filed in a bankruptcy case either in electronic format or paper format. Rule 9037 is adopted in compliance with §205(c)(3) of the E-Government Act of 2002.

Pursuant to Rule 9037(a), a party or non-party may redact certain personal identifying information or data. Under Rule 9037(d), the court has the authority to issue protective orders, for cause, to require redaction of additional information not provided for in Rule 9037(a), or to limit or prohibit a nonparty's remote electronic access to a document filed with the court. Of course, an entity waives the protections of Rule 9037 if the party files its own information without redaction and not under seal.

Counsel is responsible for advising their clients that such information will be available over the Internet if not otherwise redacted. See Rule 9037 Advisory Committee Note—2007 amendment ("Counsel should therefore notify clients of this fact so that an informed decision may be made on what information is to be included in a document filed with the court").

The above summarizes the more significant changes effected by the amendments. Practitioners should review these amended and new rules in their entirety when considering circumstances in which they may apply.