

# Important Changes To Bankruptcy Rules Take Effect

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*Recent changes to the federal Rules of Bankruptcy Procedure will affect bankruptcy practice, as this article explains.*

**O**n December 1st of almost every year, amendments to the Federal Rules of Bankruptcy Procedure — the ones that govern how bankruptcy cases are managed — take effect to address issues identified by an advisory committee made up of federal judges, bankruptcy attorneys, and others. Often the changes are relatively minor and of interest only to bankruptcy practitioners, but this year’s set has made some significant changes that will directly impact debtors, creditors and other stakeholders.

## **OMNIBUS CLAIM OBJECTIONS**

Rule 3007 has traditionally provided the means by which large debtors address standard objections to numerous claims in a single, “omnibus” stroke (usually addressing one issue such as correcting the amount, debtor, or classification, removing duplicate claims or claims covered by a settlement agreement, or claims relating to alleged debts that

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do not appear on a debtor's books and records). The rule, however, has come under heavy criticism for permitting large, inclusive objections that are often difficult for creditors and their counsel to traverse. As a consequence, numerous courts have found that omnibus objections may fail to provide creditors with meaningful notice of objections to their claims, as Rule 3007 placed no cap on the number of claims a debtor could lump together and creditors were often required to wade through numerous objections with layers of exhibits to determine whether the debtor was seeking relief with respect to their claims.<sup>1</sup>

The amendment to Rule 3007 attempts to level the playing field for claimants by generally prohibiting omnibus objections except where (1) all the claims were filed by the same entity or (2) the objection concerns:

- duplicate claims filed;
- claims filed in the wrong case;
- claims amended by subsequently filed proofs of claim;
- claims not timely filed;
- claims satisfied or released during the case in accordance with the Bankruptcy Code, applicable rules, or a court order;
- claims presented in a form that does not comply with applicable rules, and the objection states that the objector is unable to determine the validity of the claim because of the noncompliance;
- interests, rather than claims; or
- claims that assert priority in an amount that exceeds the maximum amount under Section 507 of the Bankruptcy Code.

The amended rule also attempts to ease the burden on creditors and their counsel by, *inter alia*, (i) requiring that claimants be listed alphabetically in omnibus objections, (ii) requiring that omnibus objections state in a conspicuous place that claimants receiving the objection should locate their names and claims in the objection, and (iii) placing a 100 claim cap on the number of claims that may be included in a single omnibus objection.

Notably missing from the list of "permissible" omnibus objections is

the traditional “books and records objection.” A debtor will now have to file individual objections for each claim where the claim amount is inconsistent with the amount shown on its books and records.

From a debtor’s perspective, amended Rule 3007 will significantly impact the claims objection practice. Though this rule is intended to ensure each claimant’s due process rights, it may simultaneously compromise the efficiency of the current claims process. Indeed, a natural consequence of the amendment will be to increase the number of objections to be filed by debtors, which may well result in both higher costs to the estate and a strain upon judicial resources. It remains to be seen, however, whether courts will permit multiple omnibus objections to be made returnable for the same hearing date. This could have the effect of “consolidating” omnibus objections into a combined hearing, which would ease the burden on the debtor and the courts.

From a creditor’s perspective, the amendment should result in a more comprehensible claims reconciliation process and thereby lessening the diligence responsibilities of creditors and their counsel. However, the amendment may also affect the body of law that has developed to permit the reconsideration of claims subject to omnibus objections based on the “excusable neglect” standard. Courts may no longer be as forgiving to creditors who “cannot find their name or their claim” in an omnibus objection. Accordingly, creditors and their counsel should remain diligent in their review of omnibus objections.

Importantly, the amendment limits the use of omnibus claim objections to only those delineated matters “unless otherwise ordered by the court.” Many bankruptcy courts have previously established frameworks for the use of omnibus claim objections through their local rules — some of which seem to conflict with the provisions of amended Rule 3007. At least one bankruptcy court, the Bankruptcy Court for the District of Delaware, has already taken advantage of the “unless otherwise ordered by the court” language to announce that amended Rule 3007 “shall not be applicable to omnibus objections that are filed in accordance with Local Rule 3007-1.”<sup>2</sup> Accordingly, the procedures governing omnibus objections, at least in Delaware cases, may continue to be governed by the local rules of bankruptcy courts.

## **NEW PROCEDURAL REQUIREMENTS FOR DIP, CASH COLLATERAL, SECTION 363 AND AUTOMATIC STAY MOTIONS**

Amended Rule 4001 sets forth new procedural requirements for applications: (i) relating to the automatic stay; (ii) prohibiting or conditioning the use, sale, or lease of property under Section 363 of the Bankruptcy Code; and (iii) relating to the use of cash collateral or obtaining postpetition credit. The amendments require that a movant now provide more extensive notice to parties in interest of the requested relief, as well as greater detail concerning the nature of the relief requested. Movants are now required to include along with their motion a statement (not to exceed five pages) that concisely describes the material provisions of the relief requested as well as a proposed form of order. The rule is primarily designed to ease the burden on bankruptcy courts and parties in interest to review proposed financing and other arrangements that often run hundreds of pages long and contain formulas and other complex provisions.

### **“FIRST-DAY” MOTION PRACTICE**

New Rule 6003 sets limits on the relief that may be granted by a bankruptcy court during the initial stage of a bankruptcy case. Absent a need to avoid “immediate and irreparable harm,” a bankruptcy court is prohibited from granting relief on the following applications within the first 20 days of a case:

- employment of professional persons;
- payment of prepetition claims (*i.e.*, critical vendor payments) or the use, sale or lease of property of the estate (*i.e.*, Section 363 sales) other than such a motion under Rule 4001 (*i.e.*, DIP financing and cash collateral); and
- assumption or assignment of executory contracts and unexpired leases (including commercial leases)

Accordingly, unless there is an emergency (and then only to the extent the relief is truly necessary to avoid irreparable harm), bankruptcy courts

must now defer decisions on these applications until after the 20th day following the commencement of the case. One reason for the amendment is to defer these important issues until after the appointment of a creditors' committee and its selection of counsel. Nevertheless, the Rule 4001 exception dictates that many critical applications — including those concerning the use of cash collateral and DIP financing and the rejection of leases and executory contracts — may still be heard in the initial 20 days of a case. It remains to be seen how bankruptcy courts will interpret the “immediate and irreparable harm” exception to Rule 6003 in the context of a Section 363 sale and critical vendor motions.

## OMNIBUS ASSUMPTION/REJECTION MOTIONS

Similar to the amendment to Rule 3007, Rule 6006 has been amended to establish limits on the use of omnibus motions in the context of executory contracts and unexpired leases. The rule is intended to authorize the use of omnibus motions to reject multiple executory contracts and unexpired leases. The rule is also amended to authorize the use of a single motion to assume or assign executory contracts and unexpired leases when: (i) such contracts and leases are with a single nondebtor party; (ii) such contracts and leases are being assigned to the same assignee (*i.e.*, non-debtor contract and lease parties should still pay particular attention to omnibus assignment motions in Section 363 sale contexts); (iii) the debtor proposes to assume, but not assign to more than one assignee, real property leases; and (iv) the bankruptcy court authorizes the filing of a joint motion to assume or to assume and assign executory contracts and unexpired leases under other circumstances that are not specifically recognized in the rule.

An omnibus motion to assume, assign, or reject multiple executory contracts and unexpired leases must comply with certain procedural requirements set forth under the rule (unless the court orders otherwise), including, *inter alia*, the requirements that an omnibus motion: (i) be limited to no more than 100 contracts or leases; (ii) be numbered consecutively; (iii) state in a conspicuous place that parties receiving the omnibus motion should locate their names and their contracts or leases listed in the

motion; (iv) specify the terms, including the curing of defaults, for each requested assumption or assignment; and (v) specify the terms, including the identity of each assignee and the adequate assurance of future performance to be provided by the assignee, for each requested assignment.

## **ADDITIONAL AMENDMENTS AND NEW RULES**

- Rule 1014 is amended to state explicitly that, after notice and a hearing, the bankruptcy court may *sua sponte* order a change of venue of a bankruptcy case and may do so regardless of whether the case was filed in a proper or improper district.
- Rule 7007.1 is amended to provide that a party must file its corporate ownership statement with the first paper filed with the bankruptcy court in an adversary proceeding.
- New Rule 9005.1 makes Rule 51 of the Federal Rules of Civil Procedure (Instructions to Jury; Objections; Preserving a Claim of Error) applicable to all contested matters and other proceedings in a bankruptcy case.
- New Rule 9037 is adopted in compliance with Section 205(c)(3) of the E-Government Act of 2002 and protects the privacy and security concerns that arise from the filing of documents, both electronically and in paper form, with the court.

## **EFFECTS OF THE CHANGES**

These amendments and new rules implement material procedural changes to how certain objections and motions can be filed and prosecuted. It remains to be seen whether creative debtors will simply file “volumes” of motions at one time in lieu of a single “voluminous” motion. Further, the changes to the “first day motions” adds a new substantive test — immediate and irreparable harm — that could impact the types of claims typically addressed at the outset of bankruptcy cases to stabilize the debtor’s business operations. For example, will courts no longer be permitted to authorize the payment of prepetition wages and benefits

within the first 20 days of a case, or will courts find that stabilizing employee morale satisfies the stringent test? One thing is clear — these new amendments and rules provide bankruptcy courts with an opportunity to test their boundaries and define their scope.

## NOTES

- <sup>1</sup> See *Pro-Tec Servs., LLC v. Inacom Corp. (In re Inacom Corp.)*, 2004 U.S. Dist. Lexis 20822 (D. Del. Oct. 4, 2004) (finding excusable neglect through application of the factors articulated by the United States Supreme Court in *Pioneer Investment Servs., Co. v. Brunswick Assocs. Ltd. Partnership*, 507 U.S. 380 (1993) where claimant failed to respond after not finding its name in an omnibus objection contesting 412 claims in 96 pages of exhibits); *In re Enron*, 325 B.R. 114 (S.D.N.Y. 2005) (holding that failure to read omnibus objection may be excusable neglect when debtor and creditor are involved in months-long negotiation concerning a rejection damages claim); *In re Enron*, 326 B.R. 46 (S.D.N.Y. 2005) (holding that creditor's counsel's failure to review listing of creditors in an omnibus objection for an abbreviation of the creditor's name was excusable neglect due to the existence of other factors).
- <sup>2</sup> See General Order Regarding Applicability of Rule 3007(c) of the Amended Federal Rules of Bankruptcy Procedure (Bankr. D. Del. November 27, 2007) (C.J. Mary F. Walrath).