

Memo from:
Committee on Bankruptcy Litigation,
Commercial and Federal Litigation Section
New York State Bar Association

To: Robert Gavin,
Chief Deputy Clerk,
United States Bankruptcy Court,
271 Cadman Plaza East
Brooklyn, NY 11201
comments@nyeb.uscourts.gov

Date: February 14, 2007

Re: EDNY Local Bankruptcy Rules

In response to a request received from Chief Judge Melanie L. Cyganowski, dated November 28, 2006, we have reviewed the Proposed Revised Eastern District of New York Local Bankruptcy Rules and have the following comments for the Rules' Committee's consideration:

Rule 1002-1(a)(ii): The rule is a case must be filed in the Clerk's Office at either Brooklyn or Central Islip. There could be emergency situations where one of the Clerk's offices is more convenient for filing the case. Thereafter, the Clerk can assign it to the more appropriate office.

Rule 1002-1(d): This rule should exclude situations involving an involuntary case. The rule uses the word "petition" as opposed to "order for relief" and, since a petition can be contested and it may take more than 45 days for the Court to decide whether to order relief, the passage of time from the "petition" date makes no sense in the case of an involuntary petition.

Rule 1007-1: The creditor list should specify the amount of debt "if known."
We all have seen situations where the debt is either too contingent, etc. to specify the amount.

Rule 1007-4(a)(v): The list should only include the 20 largest “general” unsecured claims. All too often we see priority taxes included on this list when we know they will not be asked to serve on the Creditors’ Committee.

Rule 1007-(a)(xiv): This rule should include “members” of a limited liability company.

Rule 1007(a)(xv)(A): This rule should add “or extend the debtor’s time to comply with.”

Rule 1007-(c): The phrase ‘debtor-in-possession’ should be replaced with “debtor.” The petition is always signed and filed by the debtor since the debtor-in-possession does not come into existence until after the filing.

Rule 1073-1(c): The rule does not take into account the circumstance where the Chief Judge is directly involved in the dispute relating to the assignment of the case.

Rule 1074-1(b): The rule incorrectly assumes that all partners must consent. The partnership agreement will usually control the requirement as to the level of consent required. The rule should simply provide for “the requisite number of partners” whose consent is required.

Rule 2002-2(b): Typo on third line, after “York.” The word should be “and.”

Rule 2014-1(a): The rule should clarify that the disclosure is with respect to compensation related to a subject bankruptcy filing and/or debt counseling or provide a time period to be covered by the disclosure requirement.

Rule 2016-1: The rule should exclude committee members or those seeking compensation under § 503 of the Bankruptcy Code.

Rule 2090-2(a): The problem here is that when a Chapter 11 case converts to Chapter 7, the estate will not compensate the attorney for services to the Chapter 7 debtor, but the rule seems to require his continued service. Additionally, the rule places too heavy a burden on the attorney who files a bankruptcy case. There are many areas of specialization that the

bankruptcy attorney is not equipped to handle, but the rule nevertheless requires the attorney for the debtor to defend every type of adversary proceeding. It makes no sense to impose this heavy burden on the unsuspecting bankruptcy attorney.

Rule 2090-2(b): This rule should provide the engagement agreement shall be provided only in the event opposition is raised or upon direction of the Court. In the alternative, an attorney should be permitted to provide a redacted engagement agreement, excluding any items deemed privileged or confidential, subject to further disclosure upon direction by the Court.

Rule 2090-2(b)(iii)(E): This rule appears to be redundant because the attorney would have already excluded such representation in the retainer agreement.

Rule 2090-2(d): The rule should clarify that any such direction will be made only after notice to the attorney and hearing, although we believe this rule will only encourage careful practitioners to exclude many areas from their retention.

Rule 3018-1(a): This rule should include other committee counsel appointed in the case. There could more than one committee.

Rule 3018-1(a)(iii): This rule should include the words “or if the Court permits a proffer of testimony in lieu thereof.”

Rule 3020-1(a): Objections should be in writing and served on the debtor, plan proponent, case trustee, and all committees and their counsel.

Rule 3020-1(b): There may be circumstances where the proponent does not know why an objection was withdrawn.

Rule 3020-2(a): The court should have the flexibility to expand on the official forms.

Rule 3022-1: On the first line, after the word “the” and before “proponent,” insert the word “plan.”

Rule 4001-5(a)(1)(F): On the third line, after the word “retained,” insert the word “by.”

Rule 4001-5(b) On the fourth line, change the word “will” to “may.” There should be the greatest latitude given to the court to deal with unique or dire circumstances. On the last line, after the word “the” and before the word “secured,” insert the words “debtor or.”

Rule 4002-1(f): On the next-to-last line, after the word “describe,” insert a comma, and after the word “information,” insert a comma and the words “the reason for the disclosure.”

Rule 4004-1: After the word “discharge,” add the words “under Section 727 of the Bankruptcy Code.”

Rule 4001-5: This rule should clarify that the listed items under the new local rule will be reviewed by the court on a case-by-case basis and are not *per se* improper.

Rule 4002-1: This rule should clarify that the tax filing procedures are limited to individual debtors, or, if not, clarify applicability for small business debtors subject to tax filing requirements as part of filing of bankruptcy petition.

Rule 5005-1: Insert a provision that if the Clerk’s Office is not open, it is possible in an emergency to file papers with the Judge assigned to the case.

Rule 5005-2(a): On the first line, strike the word “in” and insert the word “before.”

Rules 5005-2 and 9006-1: This rule should clarify that Chambers’ and Clerk’s Office copies of pleadings can be delivered on the next business day if the 24-hour period falls on a weekend or federal holiday and that electronic delivery includes email and/or facsimile.

Rule 6004-1(e): On the first line at the end, insert the word “gross.”

Rule 9005.1-1: On the second line after the word “state,” insert the word “municipal.” On the third line, after the word “statute,” insert the words “or ordinance.”

Rule 9006-1: On the third line from the bottom, after “24,” insert “business.”

Rule 9013-1: This rule should clarify that the memorandum requirement may be waived for routine motion practice that does not implicate any novel legal issues or is based upon settled law in the district.

Rule 9013-1(b): On the second line, after the word “and,” strike the words “and if applicable.”

Rule 9013-1(c): At the end, add the words “unless sufficient grounds exist to waive the filing requirement.”

New Local Rule:

Investment of Estate Funds: We believe that the Committee should consider adding a new local rule that allows investments made under Section 345(b) of the Bankruptcy Code to include mutual funds holding only U.S. government securities, a broader but equally safe investment vehicle.

This would allow access to safe, higher-yield investments, particularly in smaller and medium-size Chapter 7 and 11 cases prevalent in the EDNY, where the debtors do not routinely obtain this relief as part of “first day cash management” orders, either because they are unaware of the alternative, or because the cost of obtaining a court order removes the benefit of the higher yield.

Money market funds holding only U.S. government issues securities are a means whereby smaller investors can hold safe investments at higher yields - - these kinds of funds

currently offer yields of approximately 5%, with funds available within 24 hours. A similar rule has been recommended for approval in Delaware (and is expected to become operative as of February 1, 2007) and, as noted above, is routinely provided for in larger Chapter 11 cases as part of first day orders entered by the court.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Douglas T. Tabachnik", written over a horizontal line.

Douglas T. Tabachnik,
Committee Chair