Position Paper Submitted to the
Judicial Conference of the United States Advisory Committee Rules on Bankruptcy
by the Commercial Law League of America and its Bankruptcy Section

Technical Issues Regarding the Interim Rules for the
Bankruptcy Abuse Prevention and Consumer Protection Act of 2005

The Commercial Law League of America ("CLLA"), founded in 1895, is the nation's oldest organization of attorneys and other experts in credit and finance actively engaged in the field of commercial law, bankruptcy and insolvency. Its membership exceeds 3,100 individuals. The CLLA has long been associated with the representation of creditor interests, while at the same time seeking fair, equitable and efficient administration of bankruptcy cases for all parties in interest.

The Bankruptcy Section of the CLLA is made up of approximately 1,450 bankruptcy lawyers and bankruptcy judges from virtually every state in the United States. Its members include practitioners with both small and large practices, who represent divergent interests in bankruptcy cases. The CLLA has testified on numerous occasions before Congress as experts in the bankruptcy and reorganization fields.

The purpose of this Position Paper is to address technical defects in the Interim Rules for the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.

Rule 1007

As drafted, this Rule refers to "all administrators in foreign proceedings" regarding a Chapter 15 case. Since "administrator[s]" is not a defined term in the revised Code (see Section 101(24)), it would be better to mirror the relevant language of 101(24): "all persons or bodies authorized to administer foreign proceedings of the debtor". The Rule should read as follows.

Lists, Schedules, Statements, and Other Documents; Time Limits

(a) LIST OF CREDITORS AND EQUITY SECURITY HOLDERS, AND CORPORATE OWNERSHIP STATEMENT.

(4) Chapter 15 Case. Unless the court orders otherwise, a foreign representative filing a petition for recognition under chapter 15 shall file with the petition a list containing the name and address of all ~~administrators in~~ persons or bodies authorized to administer foreign proceedings of the debtor, all parties to any litigation in which the debtor is a party and that is pending in the United States at the time of the filing of the petition, and all entities against whom provisional relief is being sought under § 1519 of the Code.

Rule 1010

Service should also be made on all "persons or bodies authorized to administer foreign proceedings of the debtor other than that the person or body petitioning for recognition". In furtherance of the policy purpose of trying to coordinate cross border proceedings and cooperation among them, it is vital that the administrators of those other proceedings have notice and have a chance to appear and be heard if necessary. The Rule should read as follows.

Service of Involuntary Petition and Summons; Petition For Recognition of a Foreign Nonmain Proceeding

On the filing of an involuntary petition or a petition for recognition of a foreign nonmain proceeding the clerk shall forthwith issue a summons for service. When an involuntary petition is filed, service shall be made on the debtor and all persons persons or bodies authorized to administer foreign proceedings of the debtor. When a petition for recognition of a foreign nonmain proceeding is filed, service shall be made on the debtor, all persons persons or bodies authorized to administer foreign proceedings of the debtor, any entity against whom provisional relief is sought under § 1519 of the Code, and on any other parties as the court may direct. The summons shall be served with a copy of the petition in the manner provided for service of a summons and complaint by Rule 7004(a) or (b), provided, however, that service upon a foreign corporation, association or individual may be made in accordance with Rules 4(f) and 4(h) F.R.Civ.P. If service cannot be so made, the court may order that the summons and petition be served by mailing copies to the party's last known address, and by at least one publication in a manner and form directed by the court. The summons and petition may be served on the party anywhere. Rule 7004 (e) and Rule 4 (l) F.R.Civ.P. apply when service is made or attempted under this rule.

Rule 1011

See comment to Rule 1010. The Rule should read as follows.

Responsive Pleading or Motion in Involuntary and Cross-Border Cases

(a) WHO MAY CONTEST PETITION. The debtor named in an involuntary petition, all persons persons or bodies authorized to administer foreign proceedings of the debtor, or a party in interest to a petition for recognition of a foreign proceeding may contest the petition. In the case of a petition against a partnership under Rule 1004, a nonpetitioning general partner, or a person who is alleged to be a general partner but denies the allegation, may contest the petition.

Rules 2002(p)(1) and (p)(2)

This additional accommodation for service on overseas parties should be extended to foreign administrators. The Rule should read as follows.

(p) NOTICE TO A FOREIGN CREDITOR OR FOREIGN ADMINISTRATOR.

(1) If, at the request of a party in interest or the United States trustee, or on its own initiative, the court finds that a notice mailed within the time prescribed by these rules would not be sufficient to give a creditor or a person or body authorized to administer foreign proceedings of the debtor with a foreign address to which notices under these rules are mailed reasonable notice under the circumstances, the court may order that the notice be supplemented with notice by other means or that the time prescribed for the notice by mail be enlarged.

(2) Unless the court for cause orders otherwise, a creditor or a person or body authorized to administer foreign proceedings of the debtor with a foreign address to which notices under this rule are mailed shall be given at least 30 days' notice of the time fixed for filing a proof of claim under Rule 3002(c) or Rule 3003(c).

Rule 2002(q)(1) (q)(2)

Notice should be expanded not only to creditors, but "persons or bodies authorized to administer foreign proceedings of the debtor". See also the comment to Rule 1007. The Rule should read as follows.

Notices to Creditors, Equity Security Holders, Administrators in Foreign Proceedings, Persons Against Whom Provisional Relief is Sought in Ancillary and Other Cross- Border Cases, United States, and United States Trustee

(q) NOTICE OF PETITION FOR RECOGNITION OF FOREIGN PROCEEDING AND OF COURT'S INTENTION TO COMMUNICATE WITH FOREIGN COURTS AND FOREIGN REPRESENTATIVES.

(1) Notice of Petition for Recognition. The clerk, or some other person as the court may direct, shall forthwith give the debtor, all ~~administrators in~~ persons or bodies authorized to administer foreign proceedings of the debtor, all entities against whom provisional relief is being sought under § 1519 of the Code, all parties to any litigation in which the debtor is a party and that is pending in the United States at the time of the filing of the petition, and such other entities as the court may direct, at least 20 days' notice by mail of the hearing on the petition for recognition of a foreign proceeding. The notice shall state whether the petition seeks recognition as a foreign main proceeding or foreign nonmain proceeding.

(2) Notice of Court's Intention to Communicate with Foreign Courts and Foreign Representatives. The clerk, or some other person as the court may direct, shall give the debtor, all ~~administrators in~~ persons or bodies authorized to administer foreign proceedings of the debtor, all entities against whom provisional relief is being sought under § 1519 of the Code, all parties to any litigation in which the debtor is a party and that is pending in the United States at the time of the filing of the petition, and such other entities as the court may direct, notice by mail of the court's intention to communicate with a foreign court or foreign representative as prescribed by Rule 5012.

Rule 6004

The Rule states in subdivision (1) that a "motion for authority to sell or lease personally identifiable information under § 363(b)(1)(B) shall…" The statutory reference should be to "§ 363(b)(1)." Subparagraph (B) concerns court approval of the sale or lease after the appointment of the ombudsman and considerations the court is to take into account, which presumably include the recommendations of the ombudsman.

The Rule may be more restrictive than the statute intends or what is necessary to implement the statute. It's not clear why the debtor should include a "request" for the appointment of an ombudsman because, if there's a hearing on the sale motion, then the court "shall" make the appointment. Accordingly, it may be more appropriate to require a separate notice, rather than a motion, when a sale or lease of personally identifiable information under the new statute is sought.

Rule 8001

8001(f)(2)(B) provides an Official Form that can be used when the appellants and appellees, if any acting jointly, seek such certification. The Rule does not provide if the request is being made by one party or if the request is being made by a majority of the appellants and the majority of the appellees. The Form should be revised accordingly.

8001(f)(3)(B) indicates that the Notice of Filing of the request for certification shall be served in the manner required for service of a Notice of Appeal under FBRP 8004. Rule 8004 speaks of serving all parties of record except for the "appellant". It is possible that certification could be filed before an appeal is filed, therefore the reference to "appellant" should be expanded to the "party requesting certification".

8001(f)(4)(B) is unnecessary, in that a party may file a supplementary short statement of the basis for certification within ten (10) days after the certification. This supplemental short statement adds nothing, as the request for certification already contains the information required in 8001(f)(3)(C). This section to the Rule should be deleted.

Conclusion

The CLLA and its Bankruptcy Section appreciate your consideration of the concerns expressed herein. We would be happy to respond to any additional inquiries or concerns that you may have with respect to achieving meaningful bankruptcy reform legislation.

Respectfully submitted,

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