

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES
FROM: JEFF MORRIS, REPORTER
RE: CROSS BORDER INSOLVENCY RULES
DATE: JULY 24, 2005

The 2005 amendments to the Bankruptcy Code included an entirely new chapter. Chapter 15 replaces former § 304 that governed ancillary cases. Chapter 15 governs ancillary and other cross border insolvency cases, and its primary purpose is to foster cooperation and coordination between United States courts and the foreign courts in which there are pending insolvency proceedings of the same debtor. A case under chapter 15 is commenced by a foreign representative who files a petition for recognition of the foreign proceeding. Upon recognition, limited relief is automatically provided such as the imposition of the automatic stay, and several other sections of the Code become applicable. See Bankruptcy Code § 1520. Section 304(b)(1) authorized the court to provide this type relief rather than making it automatic. Interim or provisional relief is also available prior to recognition in appropriate circumstances. See Bankruptcy Code § 1519.

Some of the amendments to the rules as proposed by the Subcommittee on Technology and Cross Border Insolvency are technical changes to note the repeal of § 304 and the enactment of chapter 15. See, e.g., Rules 1010 and 1011 (changes necessary to reflect repeal of § 304 and introduction of new terms by chapter 15). The proposed amendments in Rule 1007(a)(4) and 2002(q) are necessary to provide notice of the case to entities whose rights may be affected by the commencement of the case or the court's order recognizing the foreign proceeding. The

amendments to Rule 2015 and the new proposed Rules 1002.1 and 5012 are necessary because of new requirements contained in chapter 15.

Amended Rule 2015(d) governs the foreign representative's obligation under § 1518 to file reports that inform the chapter 15 court of any significant changes occurring in the foreign proceeding. The statute requires that the reports be filed "promptly", and the proposed rule simply establishes a more specific deadline for the submission of the report. The amendment also designates the existing subdivision (d) of the Rule as (e). While we try to avoid redesignating subdivisions of the rules that make future research more difficult, this particular change is unlikely to have any such effect.

Rule 5012 implements § 1525 of the Code. That section requires the chapter 15 court to cooperate with the foreign representative and the foreign court "to the maximum extent possible" and to communicate directly with those entities. The statute further provides that parties in interest have a right to notice and participate in the communication. The rule sets out the notice requirements for those communications to ensure that parties can participate as required under the Code. The rule excludes from the notice requirement any communications undertaken solely for scheduling and administrative purposes.

The Subcommittee could not resolve by consensus the proper form of proposed Rule 1002.1. That rule implements § 1511 of the Code that permits a foreign representative in a case in which the court has entered a recognition order to commence a case under § 301, 302, or 303 of the Code. Such action initiates a case for full relief under United States bankruptcy laws as compared to a case under chapter 15 that does not include fundamental aspects of a case such as the distribution of assets and the prioritizing of claims. Section 1511(b) requires the foreign

representative to notify the court that previously granted recognition that a “substantive” case is going to be filed. In the absence of Subcommittee consensus, three options are offered to the Advisory Committee on the issue. The options are to propose no rule on the basis that the statute is sufficiently directive that no rule is necessary, propose a rule requiring notice only to the court and within a specific time, or propose a rule with wider notice requirements. The proposals are preceded by a discussion of these options.