COMMERCIAL LAW LEAGUE OF AMERICA®

Miller Statement

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Comment of the Commercial Law League of America and its Bankruptcy Section on Proposed Amendments to the Federal Rules of Bankruptcy Procedure Submitted to the Committee on Rules of Practice and Procedure Judicial Conference of the United States

January 26, 2001

The Commercial Law League of America ("League"), 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 reorganization. Its membership exceeds 4,600 individuals. The League 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 League is made up of approximately 1,600 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 League has testified on numerous occasions before Congress as experts in the bankruptcy and reorganization fields.

The League provides this position paper to express its concerns relating to certain proposed changes to the Federal Rules of Bankruptcy Procedure submitted for public comment by the Judicial Conference Committee on Rules of Practice and Procedure (the "Committee") in August 2000. Specifically, these comments will address the proposed amendments to Rules 2014 and 9014. Additionally, the League addresses the need for an amendment to Rule 7026 necessitated by a recent amendment to Rule 26 of the Federal Rules of Civil Procedure that became effective on December 1, 2000.

Rule 2014

Rule 2014 governs the employment of professional persons, requiring an application by the trustee or committee and an accompanying verified statement by the person for whom approval of employment is sought. Among the changes to Rule 2014 is language requiring that the verified statement, disclosing interests of the professional that may be adverse to the bankruptcy estate, be made according to the best of the professional person's "knowledge, information and belief, formed after an inquiry reasonable under the circumstances." Current requirements for employment under Rule 2014 mandate disclosure of any potential conflict with the bankruptcy estate "to the best of the applicant's knowledge," but do not include the express inquiry or the standard now proposed to be established under this rule.

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The rule now requires the professional to undertake an affirmative inquiry to determine whether employment is permitted. While the League accepts this express duty, nevertheless, it is concerned about the lack of a clearly defined standard from which the reasonableness of the inquiry may be reviewed . Required to disclose potential conflicts under current practice, professionals are sensitive to the unique importance of disinterestedness in bankruptcy and take seriously their presently imposed duties. Professionals are also well aware of the sanctions courts have been willing to impose, including denial of compensation and disgorgement of fees already paid, *see e.g., 11 U.S.C. § 328(c)*, and therefore, are careful to ensure the veracity of their assertions of disinterestedness. Although the proposed rule appears to expressly require what already is implicit within the rule and actually occurs in practice, it does so without providing a necessary standard or safe harbor to adequately protect professionals from hindsight review. Therefore, the League recommends that the Committee make clear in the text or the comments to the rule that an inquiry shall be deemed reasonable under the circumstances if undertaken in good faith by the professional.

Without some guidelines, whether in the text of Rule 2014 itself or in the Committee's Advisory Notes, accompanied by a form of safe harbor protecting good faith inquiries that later may prove inaccurate, the proposed rule may set a trap for the unwary. This is particularly so in light of the additional duty to supplement the verified statement. Should the professional become aware of a potential conflict that existed at the time of the initial application, the proposed rule will trigger an after the fact review, judging with the benefit of hindsight, not the conflict and its effect on the estate, but the reasonableness of the inquiry under the circumstances.

Rule 9014

The League is sympathetic to the Committee's goal of eliminating "hidden rules" emanating from the variance in local practice from one court to another, and appreciates the Committee's attempt to level the playing field by creating national standards for contested proceedings. However, the proposed solution may create its own problems. Most notably, the proposed amendment to Rule 9014 appears to require an evidentiary hearing whenever there is a disputed issue of fact. To be effective, this amendment must be limited to requiring such hearings only when those facts at issue are "material" to the dispute. Moreover, the courts should be given discretion to determine whether an evidentiary hearing need be held. Otherwise, resources of the parties, the estate and the courts may be needlessly expended.

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Rule 7026

Rule 26 of the Federal Rules of Civil Procedure was recently amended to require mandatory disclosures of information, the meeting of adverse parties to develop discovery plans and the conduct of status conference in all cases. Moreover, until such action is completed, the parties are not permitted to commence undertaking discovery, thereby delaying the process. The rule has also eliminated the court's discretion to order that the rule not apply or that such disclosure is unnecessary. This rule is made applicable to adversary proceedings in bankruptcy through Rule 7026.

When amended, the effect of Rule 26 on bankruptcy cases was apparently not considered. The majority of adversary proceedings are filed in consumer cases and involve issues concerning dischargeability, avoidance actions (e.g., preferences and fraudulent transfers) and the like. Most often in such case, discovery is either unnecessary or beyond the financial resources of one or more of the litigants. It simply makes no sense to require the Rule 26 disclosures when the litigation is relatively straightforward and routine, or when the parties, the consumer debtors in particular, cannot afford to comply.

The League suggests that Rule 7026 be amended such that Rule 26 is made inapplicable to adversary proceedings. In the alternative, the court should be given the discretion to determine whether Rule 26 disclosures are necessary on a case-by-case basis.

Conclusion

The League appreciates the opportunity to further discuss the proposed amendments to the Federal Rules of Bankruptcy Procedure, as well as any other aspects of the proposed amendments generally. We would be happy to address any of the positions taken by the League and its Bankruptcy Section and respond to questions or concerns raised by these comments.

Respectfully submitted,

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EDUCATION
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Judith Greenstone Miller's practice at Raymond & Prokop, P.C. focuses upon bankruptcy and insolvency, creditors' rights and commercial litigation. Her practice has involved representation of debtors, secured and unsecured creditors, creditors' committees and trustees in bankruptcy proceedings, primarily involving Chapter 11 reorganizations. She also represents parties in litigation in complex commercial disputes. She is a member of the State Bar of Michigan, the United States District Court for the Eastern District of Michigan and the United States Court of Appeals for the Sixth Circuit. She has also been admitted to practice before the United States District Court for the Eastern District of Wisconsin, the United States District Court for the Northern District of Illinois and the United States District Court for the Southern District of New York. Ms. Miller is a shareholder of the Firm.

Ms. Miller is a graduate of the University of Michigan. While at the University of Michigan, Ms. Miller served as a member of the Academic Judiciary for the College of Literature, Science and the Arts, and volunteered at the Washtenaw County Legal Aid as a paralegal assistant. Ms. Miller was also recognized as a Horace B. Angell Honor Student. Thereafter, she attended Wayne State University Law School, obtained her law degree and received the Creditors' Rights Book Award.

Ms. Miller is a member of the Commercial Law League of America ("League"), and its Bankruptcy and Creditors' Rights Sections. She serves on the Legislative Committee (Co-Chair, 1998-2001), Education Committee (Co-Chair 1997-1998) and Executive Council of the Bankruptcy Section (Secretary, 2000). She also served as a Working Group Leader for the Government (Non-Tax) Working Group and Co-Leader of the Government (Tax) Working Group for the League's activities before the National Bankruptcy Review Commission ("Commission"). She is also a member of the League's Blue Ribbon Legislative Task Force. She has prepared various position papers and testified before the Commission on numerous occasions to address these legislative concerns. She also testified as a witness at the Commission's Plenary Session on Single Asset Real Estate Cases. Ms. Miller has also testified before the Subcommittee on Commercial and Administrative Law on the Judiciary Committee of the United States House of Representatives and the Subcommittee on Administrative Oversight and the Courts on the Judiciary Committee of the United States Senate on recently proposed bankruptcy legislation. Ms. Miller is also a member of the American Bankruptcy Institute and on its Board for the Central States Workshop.

Ms. Miller is a member of the American Bar Association (Business Law Section; Business Bankruptcy Committee; Vice Chair, Litigation Subcommittee of the Business Bankruptcy Committee); Federal Bar Association for the Eastern District of Michigan; Detroit Metropolitan Bar Association (Chair, Debtor/Creditor Section, 1997-2000; Chairperson of the Year, 1998); and the State Bar of Michigan (Co-Chair, Debtor/Creditor Rights Committee of the Business Law Section; Member of the Business Council; and Member of the Debtor/Creditor Committee of the Real Property Law Section). She is also a member of the Bankruptcy Court Advisory Committee and the Mediation Panel for the Eastern District of Michigan, Southern Division. She was honored by the Michigan Consumer Bankruptcy Association in December 2000 as a local practitioner that is a nationally recognized bankruptcy leader.

Ms. Miller is a frequent lecturer nationally and has authored numerous articles dealing with issues relating to bankruptcy practice: *Valuation After*

Commercial Associates Corp. v. Rash; *Landlord Beware! What Happens to the Option to Renew When the Tenant Files Bankruptcy*, 24 Mich. Real Property Review 135 (1997); *Recent Developments in New Value and Single Asset Real Estate Cases*, 24 Mich. Real Property Review 23 (1998); *U.S. Supreme Court Rules on "New Value," or Does It?*, 26 Mich. Real Property Review 67 (1999); *Sales of Real Estate and Other Property of Bankruptcy Estates Under the Revised Local Bankruptcy Rules of the U.S. Bankruptcy Court for the Eastern District of Michigan*, 26 Mich. Real Property Review 19 (1999); *The "New Value" Exception: Myth or Reality After Bank of America National Trust & Savings Association v. 203 N. LaSalle Street Partnership?*, 104 Com. L.J. 147 (1999); *Waivers of Automatic Stay*, 26 Mich. Real Property Review 195 (2000).

Ms. Miller is originally from Detroit, and currently resides in Bloomfield Hills. Ms. Miller is very involved in community activities. She serves as a member of the Founders Junior Council of the Detroit Institute of Arts (Advisory Board Member; Co-Chair, Fash Bash, 1982). Ms. Miller has also been active with Temple Beth El (Religious School Education Committee; Chair, Evaluations and Standards Sub-Committee; Rabbinical Search Committee; Co-Chair of the Educational Director's Search Committee). She has also been very active in volunteer activities at Cranbrook Educational Community (Member, Parent Alumni Executive Transition Committee; Vice-President and President of the Cranbrook Kingswood Middle Schools Mothers' Council). She also serves on the Board of Directors of the Detroit Chapter of the American Jewish Committee and its Executive Committee (Treasurer, 2000-2001) and the Eisenhower Dance Company and its Finance Committee. Her interests include gardening, skiing, traveling, cooking and needlework.

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