#4800

97-BK-F

FAX COVER SHEET

TO: Hon. Adrian G. Duplantiar Fax No. 504-589-4479
Hon. A. Thomas Small Fax No. 919-856-4693
Peter G. McCabe Fax No. 202-273-1826

FROM: Prof. Alan N. Resnick
Telephone: 516-463-5872
Fax Number: 516-249-6827

DATE: August 18, 1997

NO. OF PAGES (INCLUDING THIS ONE): 6

COMMENTS: I received by fax the enclosed letter from Karen Cordry of the National Association of Attorneys General regarding proposals on government noticing. I suggest that Peter send Ms. Cordry a letter acknowledging receipt and that this letter be circulated to the Advisory Committee before our September meeting. If you disagree, please let me know. Thanks.

14:29 AUG 14, 1997

NATIONAL ASSOCIATION OF ATTORNEYS GENERAL
750 FIRST STREET, N.E. SUITE 1100
WASHINGTON, DC 20002
FAX (202) 408-7014
Phone (202) 326-6000

Please Deliver to:

Prof. Alan Resnick

Fax #: 1 516 463-6091
Company:

From:

Karen Cordry

Fax #: 202-408-7014
Phone:

Pages: 5

Message:

Dear Professor Resnick:

Here are my comments on the draft of the proposed Rule changes. I have tried to avoid repeating points made by Chris Kohn in his comments and limit myself to additional issues and concerns that I have with the current proposal. I deeply appreciate your willingness to consider these views and to pass them on to the other Committee members.

NATIONAL ASSOCIATION OF ATTORNEYS GENERAL
750 FIRST STREET NE SUITE 1100
WASHINGTON, DC 20002
(202) 326-6035
(202) 408-6998 FAX

CHRISTINE I. MILLIKEN
Executive Director
General Counsel

August 14, 1997

Professor Alan Resnick
Reporter
Advisory Committee on Bankruptcy Rules
121 Hofstra University School of Law
Hempstead, NY 11550-1090

Dear Professor Resnick:

As you know, I have been in contact with Chris Kohn of the Justice Department about the proposed changes in the rules to deal with providing better notice to governmental entities. This is a matter with which the states are deeply concerned. Indeed, during my 5 1/2 years doing bankruptcy work for the National Association of Attorneys General, complaints about inadequate or untimely notice have been one of the two or three problems most commonly raised in my discussions with the staff of the Attorneys General. Those concerns have been voiced in previous submissions to this Committee and in filings and appearances before the Bankruptcy Review Commission. We believe these concerns arise largely because of the unique nature of governmental claims and regulatory responsibilities. Thus, providing rules to deal with those special concerns does not give the government a preferred status; rather, it merely assures that the government will be able to participate in the bankruptcy with the same ease and assurance of adequate notice that other parties enjoy.

In this regard, I believe our concerns are fully shared by Congress. As I am sure Chris has reminded you, the legislative history explicitly provides that tax collecting agencies should automatically receive notice and that "where the debtor is subject to regulation, the regulatory agencies with jurisdiction will receive notice." Neither of those statements were tied to the government having the status of a creditor; rather, both assumed that governmental entities, by their very nature, and the nature of their duties and obligations, may have a legitimate need to know when entities subject to their jurisdiction file for bankruptcy. The current rules, however, do not satisfy those expressed sentiments of Congress. The result is harmful not only to the government, but to the debtors, other creditors, and the citizenry as a whole.

In light of the myriad ways in which the governmental regulatory actions may impact on the debtor during and after the case, it benefits no one if the government does not receive adequate notice of the case and its potential claims therein. If no attempt is made to serve the government, and its claim is thereby preserved after confirmation of a plan, the continued existence of such unplanned-for liability may cause major disruption to the debtor and result in the failure of the plan. Even if the

claim is discovered in time to file a late claim, this may still result in confusion and delay in the case. If, on the other hand, a marginal attempt at notice is deemed to be sufficient and the government's claim is cut off, then the public's right to be protected will have been harmed without a fully adequate chance for the government to protect those rights. In short, we believe that providing better notice is not a matter on which the participants in the process should be on "opposite sides;" rather, we believe it is a clearly win-win situation for all parties.

For those reasons, I continue to be deeply concerned both about the limited nature of the proposals which are being submitted, and the underlying policy view that supports those limits. The reluctance to comply with the Congressional mandate to provide notice to regulatory authorities, in particular, is disturbing, especially when this is apparently based on a concern that governmental agencies will be likely to discriminate against a debtor if they receive notice of the bankruptcy. This concern seems misplaced — after all, governmental agencies are the only parties *forbidden* by law to discriminate in awarding grants, licenses, and the like to debtors. All other parties are perfectly free to refuse to deal with a debtor in such matters, yet there is no attempt to conceal notice of a bankruptcy from them. Indeed, it is my understanding that the U.S. Trustee's office has regulations that require that the debtor place a "DIP" notation on its checks, so that all parties with whom it deals post-petition are aware of the debtor's status. To provide that information to those parties while indulging in a presumption that the government will engage in misconduct makes little sense.

Conversely, there is little difficulty in seeing why it is important for regulators to receive notice even if they are not creditors presently known to the debtor. First, while the debtor is normally aware of those with whom it has business dealings and whether it owes them money or not, it is quite common for governmental agencies to conduct confidential investigations. As such, while the agencies may indeed be "creditors," the debtor will not know that and will not, of course, give notice of the case to those agencies. Yet, it is precisely in such cases that it is critical to *both* the government and the debtor that notice be given to the agency so that it does not violate the automatic stay and so that any claim that may result from its investigation can be dealt with during the case. It certainly does no one any good for the government's claim to ride through the case undiscovered, leaving the debtor to cope with its consequences *after* the plan is confirmed and/or the discharge is entered.

It is true that debtors may also have other unknown creditors, such as unidentified tort claimants, but such parties are generally not identifiable by any reasonable means. Thus, publication notice has been found sufficient for such entities, because it is the best practicable means of notice under those circumstances. The debtor, on the other hand, deals with a finite, and known, universe of governmental entities so there is not the same sort of burdensomeness issue if it is required to provide direct notice to those entities. Under *those* circumstances, it is patently inappropriate to force governmental entities to rely on publication notice when they could easily be served directly.

That said, I do recognize that the universe of agencies with *some* regulatory authority over the debtor could be deemed to be quite large, but in most cases there is no occasion for the exercise of that authority. Thus, despite the broad Congressional language suggesting that *any* agency with regulatory authority over the debtor should receive notice, we attempted to find some basis to limit the number of agencies that would automatically receive notice. Thus, the provisions that were included in the original Justice Department proposal that required the listing of permits, licenses, periodic reports, and pending litigation, were meant precisely to isolate those agencies with which the debtor had meaningful, ongoing regulatory contacts at the time the case was filed. Those agencies, then, and *only* those agencies, would be the ones which would receive automatic notice.

Thus, I strongly urge that the proposed addition of subsection (p) to Rule 1007, and a new Question 23 to Bankruptcy Form 7, to deal with notice to nonenvironmental regulatory agencies, should be retained and incorporated into the overall proposal.

By the same token, if the notice of a bankruptcy does cause a regulatory agency to examine the debtor's status, that does not necessarily constitute discrimination, nor does it necessarily harm the debtor. The goal of a bankruptcy filing, after all, is to pull in all possible claims against the debtor and dispose of them at one time; thus, the debtor benefits if the notice of the filing causes an agency to review its files to determine whether it does or does not have any claim that it wishes to raise. Surely it is better for the agency to do so during the case than, as noted above, to force the parties to litigate, postconfirmation, about whether the information known to the agency during the case was sufficient to prove that the claim has "arisen" preconfirmation.

Environmental agencies may also want to review the debtor's operations as a precautionary measure in case there is a motion filed to abandon property or reject leases. Such motions are often filed with only a bare minimum of notice and with little or no information provided by the debtor about the condition of the property. Surely, it is not inappropriate for the agency to obtain the necessary information so that it is not forced to deal with these issues on an emergency basis — and this is true even if, at the time the case is filed, it does not have any reason to believe that it has a present claim. Finally, there are times when a governmental agency does, legitimately, have to consider the financial stability of a debtor, even if the government itself is not a creditor. Making such judgments is *not* the same as discriminating against a debtor because of its filing status, and the government is entitled, and indeed obligated, to take such actions. It cannot do so, however, absent notice of the case, yet these proposals reject any requirement to provide such notice, simply because of the possibility that the government *might* err in some case and overstep the permissible bounds. In the states' view, restricting notice based on such speculation is unfair and indefensible. Accordingly, I urge the committee members to reconsider both their general premises and the conclusions they have drawn about the need for notice to governmental agencies.

With that as background, I have numerous concerns with the specific proposals that have been tentatively suggested. Rather than restate them separately, I will simply adopt the comments and issues raised by Chris Kohn in his earlier letter to you. In addition, though, I am still disturbed about the extent to which the proposed changes are more attuned to the needs and concerns of the federal government, than to those of the states and municipalities. This is particularly evident with respect to the proposed changes to Rule 5003. The new rule would provide for the clerk to maintain a register of addresses but would limit it to only the federal government and the state in which the petition is filed. The proposal excludes *all* municipalities, even in the forum state, and all *other* states. I am, frankly, puzzled by the reasons for the stringent limitation on this concept. In my view, this register should not cause problems for debtors; rather, for any conscientious debtor, it should be a matter of great convenience to find addresses for all of the governmental addresses to whom it needs to provide notice gathered in a single location. By using the book, it will be assured that it has indeed served the proper party at the proper location, thereby reducing the opportunity for litigation on this issue — a result which should be beneficial by anyone's standards.

In this regard, limiting the register to only one state and to only one address for any agency seems unnecessarily restrictive. It is precisely the non-forum states and the smaller municipal entities that are the least likely to have other sources of information about the bankruptcy and who are, thus, the *most* in need of notice. By the same token, the debtor is often less likely to have such information and is in greater need of assistance in that regard. Barring such entities from the register then will,

perversely, harm *both* the government and the debtor. Similarly, while agencies could, presumably, adopt internal means of channeling notices that come to a central location to the correct offices, why not simply allow multiple listings so that the notices go to the right place to begin with? To be sure, these changes will make for a bulkier register, but surely not to the point that it will impinge on operations of the clerk's office. And, a California debtor that is conscientiously trying to find the proper address for service on the environmental agency in Alabama would surely not complain about flipping through such a register, even if it did contain more than just a few pages. Indeed, it is my understanding that the proposals for electronic noticing prominently rely on use of a concordance of addresses for major creditors — which is, in essence, exactly what we propose.

In addition, while there may be some legitimate concerns about the work involved in maintaining an expanded register, this can surely be dealt with by less drastic means than are contained in the current proposal. For instance, all address changes received during a period could simply be held until the last day of the period. The old pages would then be replaced and the new addresses would be effective on the first day of the new period. The old address could be safely used by parties until the time of the next update, regardless of when the clerk's office received the notice. This would require, of course, that the agency ensure that its mail is forwarded during the interim, but this would surely be less problematic than the current system of receiving no notice. If this is the system, though, I would suggest that the update period be quarterly, rather than at six-month intervals, because mail forwarding orders and the like rarely last for as long as six months. The shorter period should ensure that the agency would still get mail that went to the old address during the time period before the next update of the register.

Our goal in making the original proposals was not to seek information merely for its own sake, or to harass the debtor. Rather, there was a careful attempt made to devise rules which would provide the bare minimum of information necessary to allow the government to adequately fulfill its obligation to protect the public health, safety, and welfare. At the same time, we tried to write the rules in ways that were both clear and not unduly burdensome to the debtor or the clerk's office. On the other hand, we did begin with the premise that anyone seeking to be relieved from his existing liabilities, at a minimum, owes an obligation to provide full, clear and adequate notice to those affected by his actions. I deeply appreciate the time and effort shown by the Committee to date in examining these concerns and working towards changes in the Rules but I hope that the modest additional changes that we still seek can be accommodated. Doing so, I firmly believe, is in the best interests of all participants in the system.

I appreciate your willingness to consider these comments and hope that it would be possible for you to circulate them to the other members of the Committee.

Very truly yours,

Karen Cordry, NAAG Bankruptcy Counsel