U.S. Department of Justice 99-BK-H

*Executive Office for United States Trustees*

*901 E Street, N.W.*
*Washington, D.C. 20530*

July 20, 1999

Mr. Peter G. McCabe
Secretary of the Committee on
Rules of Practice and Procedure
Administrative Office of the United States Courts
Washington, D.C. 20544

**Re: Recommendations for Amendments to Federal Rules of Bankruptcy Procedure 2010, 2015, and 4004**

Dear Mr. McCabe:

On behalf of the United States Trustee Program, I submit the following suggestions for amendments to the Federal Rules of Bankruptcy Procedure (Rules) 2010, 2015, and 4004 and respectfully request that they be considered by the Bankruptcy Rules Committee at its September 27-28, 1999 meeting.

I. Suggested Amendment to Rule 4004 to Provide for a Delay in Entry of Discharge When a Motion to Dismiss Under 11 U.S.C. § 707(a) is Filed

There currently is no provision in the Bankruptcy Code or Rules that permits a court to defer entry of a chapter 7 discharge upon the filing of a motion to dismiss a case "for cause" under 11 U.S.C. 707(a). We urge the Committee to resolve this apparent oversight. Rule 4004(c) provides that the court shall grant a discharge "forthwith" unless, among other things, a complaint objecting to discharge is filed, a motion to extend the time for filing a complaint is filed, or a motion to dismiss the case pursuant to Rule 1017(e) is pending. Rule 1017(e) deals only with section 707(b) motions.

The failure of Rule 4004 to address a pending section 707(a) motion has adversely impacted our ability to seek dismissal of cases "for cause." Unless the court can rule on a section 707(a) motion before the expiration of the time period for filing either a complaint objecting to discharge or a section 707(b) motion, the Rule indicates that a discharge must be entered "forthwith." Several courts have held that the discharge must be entered even though it moots a pending section 707(a) motion. See In re Tanenbaum, 210 B.R. 182 (Bankr. D. Colo. 1997)(finding clerk's practice of

delaying discharge when United States Trustee's section 707(a) motion to dismiss was pending to be inappropriate); In re Adams, 203 B.R. 240 (Bankr. E.D. Va. 1996)(finding discharge was properly entered with creditor's section 707(a) motion to dismiss pending).

In Tanenbaum, the United States Trustee filed a motion to dismiss the case under section 707(a). The bankruptcy clerk delayed entry of the discharge, as was the clerk's regular practice whenever a section 707(a) or 707(b) motion was pending prior to the expiration of the time to object to discharge. Although the court agreed that the debtors acted in bad faith, the court found that the clerk's practice was impermissible as to a section 707(a) motion because there was nothing in the Code or Rules to prevent the discharge from being entered. Tanenbaum, 210 B.R. at 188 (quoting Adams, 203 B.R. at 241). Accordingly, the United States Trustee's motion was dismissed as moot. The prospects of obtaining a different result on appeal appear unlikely. Collier notes, for example, the following:

> The language of Rule 4004(c) does not permit the court to delay granting the discharge for any reason not set forth in the rule. Unless a complaint objecting to discharge or a motion to dismiss under Rule 1017(e) has been timely filed, the filing fees have not been paid in full, or the debtor requests a delay, the court must enter the chapter 7 discharge order as soon as possible. Therefore, the rule could appear to preclude the delay of a discharge for any other purposes, to as permitting a creditor time to obtain a lien on joint property.

9 COLLIER ON BANKRUPTCY ¶ 4004.04[1], at 4004-14 (15th ed. rev. 1999). This is consistent with the strict enforcement of Rule deadlines generally. See Taylor v. Freeland & Kronz, 112 S.Ct. 1644, 1648 (1992) (affirming denial of an objection to exemption that was not filed within the 30 days required by Rule 4003(b)).

Thus, until Rule 4004 is amended, the filing of a section 707(a) motion is a practical impossibility in those districts that refuse to depart from a strict reading of the text. To accomplish this change, we recommend that Rule 4004(c)(1)(d) be amended by deleting the reference to "Rule 1017(e)"and inserting in its place "§ 707". Rule 4004(c)(1)(d) would then read in pertinent part as follows:

> (1) In a chapter 7 case, on expiration of the time fixed for filing a complaint objecting to discharge and the time fixed for filing a motion to dismiss the case pursuant to Rule 1017(e), the court shall forthwith grant the discharge unless:
>
> > (d) a motion to dismiss the case pursuant to ~~Rule 1017(e)~~ § 707 is pending;

II. Suggested Amendment to Rule 2015(a)(5) to Clarify the Requirement to File Post-Confirmation Quarterly Reports in all Pending Chapter 11 Cases.

Effective as of January 27, 1996, Congress amended 28 U.S.C. 1930(a)(6), pursuant to Pub. L. No. 104-91, § 101(a) and 104-99, § 211, 110 Stat. 37 (1996) to extend chapter 11 debtors' obligation to pay quarterly fees into the post-confirmation period of the case.[1] The change sparked a flurry of litigation regarding the extent of the post-confirmation fee, but virtually all of the cases have now been resolved on appeal in favor of the United States Trustees' position.[2]

In light of this change in the law and the body of case law that has been developed, we ask that Rule 2015(a)(5) be amended to conform with 28 U.S.C. § 1930(a)(6) and to reflect the fact that quarterly fees must now be paid as long as the case is pending. We recommend amending subsection (a)(5) by striking the phrase "until a plan is confirmed or the case is converted or dismissed" and inserting in its place "in which the case is pending." The paragraph would then read as follows:

> (5) in a chapter 11 reorganization case, on or before the last day of the month after each calendar quarter ~~until a plan is confirmed or the case is converted or dismissed~~ **in which the case is pending**, file and transmit to the United States trustee a statement of disbursements

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[1] Congress later enacted clarifying legislation in the Omnibus Consolidated Appropriations Act for Fiscal Year 1997, Pub. L. No. 104-208, § 109(d), 110 Stat. 3009, 3009-19 (1996).

[2] *See, e.g.*, In re Gryphon at the Stone Mansion, Inc., 204 B.R. 460 (Bankr. W.D. Pa. 1997) (en banc), *rev'd sub nom* United States Trustee v. Gryphon at the Stone Mansion, Inc., 216 B.R. 764 (W.D. Pa.), *aff'd*, 166 F.3d 552 (3d Cir. 1999); In re CF&I Fabricators of Utah, Inc., 199 B.R. 986 (Bankr. D. Utah 1996), *rev'd*, 214 B.R. 16 (D. Utah 1997), *aff'd*, 150 F.3d 1233 (10th Cir. 1998); Vergos v. Gregg's Enters., 159 F.3d 989 (6th Cir. 1998); In re Precision Autocraft, Inc., 197 B.R. 901 (Bankr. W.D. Wash. 1996), *rev'd*, United States Trustee vs. Precision Autocraft, Inc., 207 B.R. 692 (W.D. Wash. 1997); United States Trustee v. Uncle Bud's, Inc., 1998 WL 652542 (M.D. Tenn.,1998); United States Trustee v. Harness, 218 B.R. 163 (D. Kan. 1998); In re Maruko, Inc., 206 B.R. 225 (Bankr. S.D. Cal. 1997) *aff'd in part, rev'd in part on other grounds*, 219 B.R. 567 (S.D. Cal. 1998);United States Trustee v. Harness, 218 B.R. 163 (D. Kan. 1998); U. S. Trustee v. Boulders on the River, Inc., 218 B.R. 528 (D. Or. 1997); Robiner v. Beechknoll Nursing Homes, Inc., 216 B.R. 925 (S.D. Ohio 1997); *see also* In re A.H. Robins Co., 219 B.R. 145 (Bankr. E.D. Va. 1998); In re Campesinos Unidos, Inc., 219 B.R. 886 (Bankr. S.D. Cal. 1998); In re Central Copters, Inc., 226 B.R. 447 (Bankr. D. Mont. 1998); In re Postconfirmation Fees, 224 B.R. 793 (Bankr. E.D. Wash. 1998); In re Pudgie's Dev. of New York, 223 B.R. 421 (Bankr. S.D. N.Y. 1998). *But see* Tiffany v. Celebrity Duplicating Services, Inc., 216 B.R. 942 (C.D. Cal. 1997), *appeal pending*, (9th Cir.) (since there is no estate post-confirmation, there are no disbursements on which to base the fee; therefore, only minimal fee is due).

> made during such calendar quarter and a statement of the amount of the fee required pursuant to 28 U.S.C. § 1930(a)(6) that has been paid for such calendar quarter.

III. Suggested Amendment to Rule 2010(b) to Include Procedures for Bringing Suits on Bonds in Favor of the United States

The procedures for bringing suit on a trustee's bond provided under 11 U.S.C. § 322 are set forth in Rule 2010(b) as follows:

> *Proceeding on Bond.* A proceeding on the trustee's bond may be brought by any party in interest in the name of the United States for the use of the entity injured by the breach of the condition.

The rule makes clear that any party in interest can bring a proceeding on the bond in the name of the United States. Unfortunately, there is no similar provision that addresses suits on a depository bond described in 11 U.S.C. § 345 or any other bonds that may be posted in the name of the United States in connection with a bankruptcy case.[3] The lack of an express provision in the rules or statute raises questions about the proper proceeding for bringing suit on such bonds, including who can bring the action. Although suits on these types of bonds are rare, we believe the rules should be amended to ensure that injured parties can bring suit without unnecessary difficulty.

In the absence of a rule or statute, the law generally indicates that the intended beneficiary of a contract may sue for breach of that contract. See Restatement (Second) of Contracts, §§ 302-315 (1982); Restatement (Third) of Suretyship & Guaranty § 69 (1996). Rule 7017 also provides that an action must be brought by the person who, under substantive law, is entitled to enforce the right at issue. 4 J. Moore, Moore's Federal Practice §§ 17.01, 17.10 (3rd ed. 1999). Even if we can assume that the case trustee is an "intended beneficiary" who could prosecute an action on behalf of the estate to recover on a bond, like a § 345 depository bond or an auctioneer's bond, the question still remains whether the United States is a necessary party to the action.[4]

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[3] Another bond in favor of the United States that is required in many districts is an auctioneer's bond. Also needed on occasion is a bond for an examiner who is given expanded powers.

[4] One commentator has stated that "in cases in which the beneficiary is a party, the courts uniformly reject the argument that all of the original parties to the contract must be joined." 7 C. Wright, A. Miller & M. Kane, Federal Practice and Procedure § 1613 at 186 (1986). See also Trans-Bay Engineers & Builders Inc. v. Hills, 551 F.2d 370, 376 (D.C. Cir. 1976)(owner of project not necessary party in suit by contractor against mortgagee holding retainage). But see Swerhum v. General Motors Corp., 141 F.R.D. 342, 347 (M.D. Fla. 1992)(other shareholders and franchisee corporation necessary parties in action by shareholder against franchisor).

In the unreported case of Williams v. Wells Fargo Bank (In re Cardinal Well Service), Civ. Action No. H-95-5554 (S.D. Tex. Nov. 25, 1996), the chapter 7 trustee brought suit against a depository bank to recover under the depository agreement that the bank had entered into with the United States Trustee pursuant to § 345. The trustee sought to add the United States Trustee as an involuntary plaintiff under Fed. R. Civ. P. 19 because it was the contracting party. The court denied the motion, noting that no law or express agreement obligates the United States Trustee to be a named plaintiff.[5] The court also found that it could not order the United States Trustee to enforce its rights under the depository agreement because his enforcement decisions are discretionary and protected by sovereign immunity. Although the suit was settled before the court could resolve the issue of whether the trustee was a proper party to bring the action, the case brought to light the uncertainty surrounding these kinds of suits. In the absence of a rule or statute, it is entirely possible that a court could hold that ***only*** the United States Trustee (or United States) can bring suit on the depository bond.

The Committee may recall that Rule 5008(d) formerly addressed proceedings on bonds or on agreements for the deposit of securities pursuant to 11 U.S.C. § 345. It was abrogated by the Supreme Court in 1991 in view of the amendments to section 345(b) which gave the United States Trustee bond-approving authority. 1991 Advisory Committee Note to Former Rule 5008. Similar to Rule 2010(b), former Rule 5008(d) stated:

> Proceedings on a bond given pursuant to § 345(b) of the Code or on an agreement for deposit of securities required by subdivision (c) of this rule shall be in the name of the United States for the use of the estate or any entity injured by a breach of the condition.

The Rule made clear that suit could be brought on the bond in the name of the United States "for the use of the estate or any entity injured by a breach of the condition."[6] We urge the Committee to incorporate a similar provision back into Rule 2010 to minimize litigation issues and to clarify that intended beneficiaries can bring appropriate actions on the bond in the name of the United States.

A proposed amendment to Rule 2010(b) is set forth below, although the Committee may also want to consider whether it would be more appropriate to have a separate rule to address this topic.[7]

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[5] Involuntary joinder of a plaintiff is used almost exclusively in patent and copyright infringement cases. Caprio v. Wilson, 513 F.2d 837, 839 (9th Cir. 1975); See, e.g., Sheldon v. West Bend Corp., 718 F.2d 603, 606 (3rd Cir.1983).

[6] This comports with the legislative history to section 345 which states that a bond or deposit of securities is required "to protect the creditors." H.R. Rep. No. 595, 95th Cong., 1st Sess. 333 (1977).

[7] Care should be taken, however to distinguish the various types of bonds. For example, Rule 9025 entitled "Security: Proceedings Against Sureties" covers all bonds including those required

The language of this proposal would also permit suits on other bonds in favor of the United States to address the growing number of districts that require bonded auctioneers.

> (b) Proceeding on Bond. A proceeding on (i) the a trustee's bond under section 322 of the Code, (ii) a depository bond under section 345 of the Code, or (iii) a bond provided in connection with the appointment or employment of a person to provide services in a case under the Code, may be brought by any party in interest in the name of the United States for the use of the entity injured by the breach of the condition.

Please do not hesitate to contact me if I can provide the Committee with further information on these proposals. Thank you for your cooperation and assistance.

Sincerely,

Martha L. Davis
General Counsel

cc: Professor Alan N. Resnick, Reporter
Patricia Sugrue Channon

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by §§ 322 and 345. Our suggestion would not apply to all bonds but only to those that are written in favor of the United States where it is unclear who can bring suit on the bond.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544



July 30, 1999

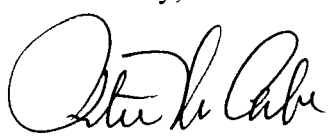
Martha L. Davis
General Counsel
U.S. Department of Justice
Executive Office for United States Trustees
901 E Street, N.W.
Washington, D.C. 20530

Dear Ms. Davis:

Thank you for your suggestion to amend Bankruptcy Rules 2010, 2015, and 4004. A copy of your letter will be sent to the chair and reporter of the Advisory Committee on Bankruptcy Rules for their consideration.

We welcome your suggestion and appreciate your interest in the rulemaking process.

Sincerely,



Peter G. McCabe
Secretary

cc: Honorable Adrian G. Duplantier
Professor Alan N. Resnick
Professor Jeffrey W. Morris