

NATIONAL BANKRUPTCY CONFERENCE

*A Voluntary Organization Composed of Persons Interested in the
Improvement of the Bankruptcy Code and Its Administration*

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August 26, 2011

Advisory Committee on Bankruptcy Rules
c/o Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
Washington, DC 20544

To the Members of the Advisory Committee:

I write on behalf of the National Bankruptcy Conference (the "Conference") to express the views of the Conference regarding proposed Rule 4009 of the Federal Rules of Bankruptcy Procedure, suggested by the Institute for Legal Reform.¹ I have attached a description of the Conference as Appendix "A".

The Conference does not support the adoption of a Rule such as proposed Rule 4009, largely for the reasons set forth in the statement of the Future Claims Representatives, which has been submitted to the Advisory Committee. From the perspective of the chapter 11 process, the need for claimant information should end when litigation over estimation of asbestos claims ends, usually by settlement on the amount and nature of trust funding among the claimants' committee, the debtor, the futures claims representative and other creditors. There does not appear to be any bankruptcy need for post-effective date trust claim information.

If the Advisory Committee nevertheless determines to propose such a Rule to the Committee on Rules of Practice and Procedure, the Conference suggests revision of the proposed Rule as shown in Appendix "B" to this letter, which also includes a Explanatory Statement describing the revisions. Appendix "C" shows a comparison of the Conference's proposal to the Rule originally proposed by the Institute for Legal Reform. The proposed revision addresses most (though not all) of the concerns that the Future Claims Representatives have identified with the proposed Rule.

The Conference appreciates the Advisory Committee's consideration of our views. We are available to answer any questions the Committee may have

Very truly yours,

s/ Richard Levin

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¹ The views expressed in this letter are those of the Conference, on whose behalf this letter is being written, and do not necessarily reflect either my personal views or those of my law firm, Cravath, Swaine & Moore LLP.

NATIONAL BANKRUPTCY CONFERENCE

A non-profit, non-partisan, self-supporting organization of approximately sixty lawyers, law professors and bankruptcy judges who are leading scholars and practitioners in the field of bankruptcy law. Its primary purpose is to advise Congress on the operation of bankruptcy and related laws and any proposed changes to those laws.

History. The National Bankruptcy Conference (NBC) was formed from a nucleus of the nation's leading bankruptcy scholars and practitioners, who gathered informally in the 1930's at the request of Congress to assist in the drafting of major Depression-era bankruptcy law amendments, ultimately resulting in the Chandler Act of 1938. The NBC was formalized in the 1940's and has been a resource to Congress on every significant piece of bankruptcy legislation since that time. Members of the NBC formed the core of the Commission on the Bankruptcy Laws of the United States, which in 1973 proposed the overhaul of our bankruptcy laws that led to enactment of the Bankruptcy Code in 1978, and were heavily involved in the work of the National Bankruptcy Review Commission (NBRC), whose 1997 report initiated the process that led to significant amendments to the Bankruptcy Code in 2005.

Current Members. Membership in the NBC is by invitation only. Among the NBC's 60 active members are leading bankruptcy scholars at major law schools, as well as current and former judges from eleven different judicial districts and practitioners from leading law firms throughout the country who have been involved in most of the major corporate reorganization cases of the last three decades. The NBC includes leading consumer bankruptcy experts and experts on commercial, employment, pension, mass tort and tax related bankruptcy issues. It also includes former members of the congressional staff who participated in drafting the Bankruptcy Code as originally passed in 1978 and former members and staff of the NBRC. The current members of the NBC and their affiliations are set forth on the second page of this fact sheet.

Policy Positions. The Conference regularly takes substantive positions on issues implicating bankruptcy law and policy. It does not, however, take positions on behalf of any organization or interest group. Instead, the NBC seeks to reach a consensus of its members - who represent a broad spectrum of political and economic perspectives - based on their knowledge and experience as practitioners, judges and scholars. The Conference's positions are considered in light of the stated goals of our bankruptcy system: debtor rehabilitation, equal treatment of similarly situated creditors, preservation of jobs, prevention of fraud and abuse, and economical insolvency administration. Conferees are always mindful of their mutual pledge to "leave their clients at the door" when they participate in the deliberations of the Conference.

Technical and Advisory Services to Congress. To facilitate the work of Congress, the NBC offers members of Congress, Congressional Committees and their staffs the services of its Conferees as non-partisan technical advisors. These services are offered without regard to any substantive positions the NBC may take on matters of bankruptcy law and policy.

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APPENDIX “B”

**NATIONAL BANKRUPTCY CONFERENCE
REPORT ON PROPOSED BANKRUPTCY RULE 4009
(Asbestos Trust Payment Reporting)**

August 26, 2011

Rule 4009. Reports from Trusts Established Under Section 524(g)

In addition to performing such other duties and preparing or filing such other reports as are prescribed by the Bankruptcy Code, these Rules, and any order of the court or agreement applicable to such trust, and subject to reasonable privacy safeguards, a trust established under Section 524(g) shall prepare quarterly reports, in a form prescribed by the Judicial Conference, which shall include the name and address of each party who has made a demand for payment against the trust since the trust was formed and, with respect to each such demand, the amount (if any) paid by the trust on account of such demand. Each such quarterly report shall also include such other information as the court may direct; provided, however, that such reports shall not include confidential medical records or claimant social security numbers. The trust shall make each such quarterly report available only to (i) any person who has made a demand for payment against the trust who represents in writing (a) that no asbestos claim has been asserted against such person and (b) that such person intends to use such reports only to monitor and evaluate the activities of the trust; and (ii) a person against whom an asbestos claim has been asserted and who contemporaneously provides a comparable current report to the trust setting forth all asbestos claims asserted against such person, including the name and address of, and amount paid to, each person that has asserted an asbestos claim against the person requesting the report; *provided, however*, that the trust shall provide

any such report to any person described in the foregoing clause (i) or (ii) only if such person agrees in writing not to disclose the contents of any such reports received from the trust to any other person, except on terms that are approved by the court in the order authorizing or providing for the creation of the trust. As used in this Rule, the term “asbestos claim” shall mean a claim for personal injury, wrongful death or property damage seeking recovery for damages allegedly caused by the presence of, or exposure to, asbestos or asbestos containing products, whether or not such claim has been asserted in a judicial action or proceeding. The ability of any party to any state or federal court action to obtain or compel the production from a trust established under Section 524(g) of information related to demands against such trust by, or payments by such trust to, any party to any such action shall be governed by the applicable non-bankruptcy law governing discovery in such state or federal court action.

EXPLANATORY STATEMENT

The following are the principal changes reflected in the revisions to proposed Rule 4009 suggested by the National Bankruptcy Conference.

1. The revision would eliminate the provision that would require a Section 524(g) trust to provide information to parties to state or federal court asbestos litigation to which the Section 524(g) trust is not a party (“Third Party Litigation”) that the trust could not otherwise be compelled to produce under the rules governing discovery in the Third Party Litigation. There is no reason why a section 524(g) trust should be subject to greater or more burdensome discovery requirements in connection with Third Party Litigation than the requirements that would apply to a non-bankrupt defendant in other asbestos suits who was served with discovery in the Third Party Litigation. Accordingly, the phrase, “if trust payments or demands are relevant to an action in any state or federal court, the trust established under Section 524(g) shall provide information related to demands and payments to any party to such action, upon written request and subject to protective orders as appropriate” has been replaced with the phrase, “the ability of any party to any state or federal court action to obtain or compel the production from a trust established under Section 524(g) of information related to demands against such trust by, or payments by such trust to, any party to any such action shall be governed by the applicable non-bankruptcy law governing discovery in such state or federal court action.” The quoted language is also intended to prevent the bankruptcy court or the terms of a plan of reorganization or trust agreement from immunizing a Section 524(g) trust from discovery to which it would otherwise be subject under the third-party discovery rules applicable in the state or federal court where the Third Party Litigation is pending.

2. The proposed revision would eliminate the requirement that the trust's quarterly reports “describe, with particularity, each demand for payment that the trust received during the reporting period, including exposure history, . . .” (emphasis added) A Section 524(g) trust may face tens (or even hundreds) of thousands of individual “demands for payment,” and it would be unduly burdensome to require the trust to file reports which describe “with particularity” the “exposure history” of each individual claimant. Instead, under the revised version of the proposed Rule, the trust would prepare reports that identify each claimant against the trust and disclose the payments received by each claimant. The trust should already have and maintain such information in a computerized and easily accessible and producible format. If a party to a Third Party Action determines, based on the trust’s quarterly reports, that persons who are asserting asbestos claims against the trust are also asserting asbestos claims against defendants in the Third Party Litigation, parties to such Third Party Litigation can seek targeted third-party discovery against the trust with respect to “exposure history” and other arguably relevant information pertaining to the persons who have actually asserted

claims against both the trust and one or more other parties, in accordance with the discovery rules applicable in the Third Party Action in which the information is sought.

3. The addition of the phrase, “Each such quarterly report shall also include such other information as the court may direct, . . .” in the revision is designed to prevent any negative implication that the information to be provided in quarterly trust reports is limited to that specified in the proposed rule.

4. An additional shortcoming in the proposed Rule as originally written is that it is a “one way street” that favors non-chapter 11 asbestos defendants over Section 524(g) trusts. As written, the proposed Rule would require Section 524(g) trusts to make information about claims against the trusts publicly available—including to non-chapter 11 asbestos defendants to help them resist the claims of claimants who assert potentially duplicative or inconsistent claims against multiple parties. However, the converse is not true, i.e., there is nothing in the proposed rule as originally written that requires non-chapter 11 asbestos defendants to provide lists of persons asserting claims against them to Section 524(g) trusts, so that such trusts can also address and seek to reduce the claims against such trusts of claimants who assert potentially duplicative and/or inconsistent claims against them. To remedy this asymmetry, the revised Rule would not require a Section 524(g) trust to make the specified claims reports public, but would instead limit the production of such reports to parties who either (i) represent in writing that they are not the subject of asbestos claims and intend to use such reports only to monitor and evaluate the activities of the trusts or (ii) in the case of asbestos defendants, agree in writing to provide comparable reports of asbestos claims against such defendants to the trust, including name, address and amount paid to the claimant.

Rule 4009. Reports from Trusts Established Under Section 524(g)

In addition to performing such other duties and preparing or filing such other reports as are prescribed by the Bankruptcy Code, these Rules, and ~~the rules~~ any order of the court or agreement applicable to such trust, and subject to reasonable privacy safeguards, a trust established under Section 524(g) shall ~~file periodic~~ prepare quarterly reports, ~~available to the public and~~ in a form prescribed by the Judicial Conference, ~~on a quarterly basis. Such reports shall describe, with particularity, each demand for payment the trust received during the reporting period, including exposure history, as well as each amount paid for demands during the report period. Such~~ which shall include the name and address of each party who has made a demand for payment against the trust since the trust was formed and, with respect to each such demand, the amount (if any) paid by the trust on account of such demand. Each such quarterly report shall also include such other information as the court may direct; provided, however, that such reports shall not include confidential medical records or claimant social security numbers. ~~If trust payments or demands are relevant to an action in~~ The trust shall make each such quarterly report available only to (i) any person who has made a demand for payment against the trust who represents in writing (a) that no asbestos claim has been asserted against such person and (b) that such person intends to use such reports only to monitor and evaluate the activities of the trust; and (ii) a person against whom an asbestos claim has been asserted and who contemporaneously provides a comparable current report to the trust setting forth all asbestos claims asserted against such person, including the name and address of, and amount paid to, each person that has asserted an asbestos claim against the person requesting the report; provided, however, that the trust shall provide any such

report to any person described in the foregoing clause (i) or (ii) only if such person agrees in writing not to disclose the contents of any such reports received from the trust to any other person, except on terms that are approved by the court in the order authorizing or providing for the creation of the trust. As used in this Rule, the term “asbestos claim” shall mean a claim for personal injury, wrongful death or property damage seeking recovery for damages allegedly caused by the presence of, or exposure to, asbestos or asbestos containing products, whether or not such claim has been asserted in a judicial action or proceeding. The ability of any party to any state or federal court, ~~the action to obtain or compel the production from a~~ trust established under Section 524(g) ~~shall provide~~of information related to demands ~~and~~ against such trust by, or payments by such trust to any party to such action, upon written request and subject to protective orders as appropriate, any party to any such action shall be governed by the applicable non-bankruptcy law governing discovery in such state or federal court action.