



Bankruptcy Litigation Committee

ABI Committee News

In This Issue

Volume 4, Number 4 / November 2007

- *Fleming*: Executory Contract Assignment Not Approved When Proposed Assignee Could Not Comply with a Term Deemed Integral to the Bargained-for Exchange
- Practical Pitfalls in Boilerplate Notice Provisions
- ABI's 19th Annual Winter Leadership Conference: Committee Agenda
- Recap of the Southwest Bankruptcy Conference

Practical Pitfalls in Boilerplate Notice Provisions

by: Ted Gavin, CTP
NachmanHaysBrownstein; Wilmington, Del.

With bankruptcy filings back on the rise, it's natural for the more efficiency-minded among us to look for ways in which to speed along the restructuring process. Boilerplate notice provisions in court orders are a common method for accomplishing this task, helping speed cases along to conclusion. If, however, such a provision precedes a fundamental change in a case, such as dismissal, is the boilerplate notice *really* sufficient? In short, does simply *stating* that an order provides sufficient notice under 11 U.S.C. §1112(b)[1] make it so? If notice applies to a case management conference scheduling order, does that notice then extend to *matters that might arise* at a case management conference at some indeterminate time in the future?

These questions were addressed recently in a ruling in *In re Florin Munteanu* (E.D.N.Y., 06 CV 6108 (ADS)). This individual chapter 11 case was filed on March 28, 2006, and on April 4, 2006, the court issued an "order scheduling case management conference" (the scheduling order) setting a conference date of May 18, 2006. The scheduling order provided that, among other things, the court could consider the "*disposition of any motions filed by the U.S. Trustee or on the court's own motion to dismiss or convert the case.*" In addition, the scheduling order contained the following boilerplate language:

This order shall constitute notice to all creditors under §1112(B) that the court may consider and determine any motion to convert, dismiss or appoint a chapter 11 trustee for cause made at the conference by any party in interest or the U.S. Trustee or on the court's own motion.

[Committee Officers](#)

[Upcoming Events](#)

[Contribute to the Newsletter](#)

[ABI World](#)

The scheduling conference on May 18, 2006, was rescheduled to June 22, 2006. The June conference was subsequently rescheduled to July 27, 2006 – and in the docket accompanying the rescheduling notice was placed the statement, “plan to be filed within 90 days,” which also represented an extension of the debtor’s period to file a plan, which originally expired on July 26, 2006. The July 27 hearing was, as the reader might already expect, rescheduled to Sept. 28, 2006, eight days *after* the court’s “deadline” for the debtor to file a plan.

During the intervening period, the debtor was not as dormant as the timeline might suggest. Rather, the debtor acted generally like an individual debtor. Monthly operating reports (MORs) were filed; claims objections and settlements were filed; the debtor sought permission to retain special counsel to handle his divorce from his estranged wife (a tangential aspect of this case—that the debtor and his wife had been estranged for more than 20 years before a divorce proceeding was commenced foreshadows where this tale leads relative to the timely filing of a plan). On Aug. 16, 2006 and again on Sept. 5, 2006, the U.S. Trustee notified the debtor that its MORs lacked required information and requested additional information—which requests went unaddressed by the debtor and which inaction, some might argue, is even *more* consistent with the behavior of an individual debtor!

On Sept. 28, 2006, when the status conference *finally* occurred, the court dismissed the case *sua sponte* for various reasons, including the debtor’s failure to file a plan within the deadlines set by the court, the debtor’s failure to respond to the U.S. Trustee’s information requests and the plan that was ultimately proposed (which, by inference, came into existence between Sept. 21-27) was not proposed in good faith, as it provided creditors insufficient recovery relative to the debtor’s monthly income.

The debtor objected during the hearing on the basis that, as the court both made the motion to dismiss and ruled on the same motion at the same hearing, notice was insufficient under §1112(b). The court overruled the objection, citing the boilerplate language contained in the scheduling order as providing sufficient notice to all parties for any and all matters that were brought before the court—either by a party-in-interest or by the court, *sua sponte*. The debtor appealed the dismissal and, in considering the appeal, the key issue examined by the district court was that of the sufficiency of notice as contained in the scheduling order boilerplate provisions and specifically, whether the language in the boilerplate notice provision in the scheduling order was, as the district court stated, “*sufficient* to put the debtor on *notice* that the case could be dismissed, or whether separate, additional notice and a hearing were required....”

In considering the matter, the district court looked to similar provisions in other cases. *Dinova v. Harris (In re Dinova)*, 212 B.R. 437 (B.A.P. 2d Cir. 1997) contained a similar notice, and the Second Circuit, in reviewing that matter, found that such notice did not arguably meet the requirements of due process. In applying the Second Circuit's standard to the instant case, the district court found the boilerplate warning to be similar to that used in *Dinova*, and therefore subject to the same criticism. The district court noted that, while the boilerplate warning cited §1112(b), which articulates 16 separate circumstances that could be construed as cause for dismissal, the court also correctly pointed out that none of these causes of dismissal had occurred at the time the notice issued, and that at the time of the boilerplate notice, none of the events may have never occurred. In considering those circumstances, the district court found that the boilerplate notice issued by the bankruptcy court early in the case was insufficient because it was not provided at a meaningful time, and therefore denied the debtor a "meaningful opportunity to respond."

What, then, are we to take away from this case? Certainly boilerplate notice provisions that try to cover all possible circumstances in advance are insufficient if the purpose of notice is to give parties a meaningful opportunity to respond to such motions. The inference to be drawn, however, is that once an event occurs and can be pointed to for all parties-in-interest in a case to see, boilerplate provisions may continue to be employed for their intended purpose: to reduce duplicative notice periods and speed the process along.

Had the circumstances been different, however, might that rearrangement of the facts have cured the deficiencies in the instant case? Reviewing the language of the notice provision, there are some improvements to be made. The notice is directed to *creditors*, yet in this matter it was the debtor being called to task. Attorneys considering the use of these provisions might consider a more encompassing terminology. Furthermore, the notice should be specific as to the timing. While it's important to state that the court may use a hearing to consider any motion, including its own motions, the language should be clear as to *when* those matters will be considered: At the same hearing? At a future hearing? At a date to be determined?

For those considering the use of boilerplate notice provisions, this case provides two key lessons. First, don't try to provide notice for something that hasn't occurred yet; and second, don't be too specific or restrictive in the parties to whom your provision is construed to provide notice (*i.e.*, use "all parties-in-interest" rather than "creditors").

1] 11 U.S.C. 1112(b)(1) states "(1) Except as provided in paragraph (2) of this subsection, subsection (c) of this section, and section 1104 (a)(3), on request of a party in interest, and after notice and a hearing, absent unusual circumstances specifically identified by the court that establish that the requested conversion or dismissal is not in the best interests of creditors and the estate, the court shall convert a case under this chapter to a case under chapter 7 or dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, if the movant establishes cause."