NOVEMBER 2015 E-NEWSLETTER

Greetings:

If you were not aware, last Friday was National Love Your Attorney Day. Thanks to all those who showed me the love that day!

In our last issue of our newsletter we explored some recent changes in laws that impact creditor rights. This issue continues in that vein. We explore changes to federal bankruptcy forms and the Federal Rules of Civil Procedure. We also address the subject of whether chapter 7 bankruptcy requires lifestyle changes. Hope these topics are of help to you.

As always, should you have any questions or if we can be of assistance, please feel free to contact me at any time.

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FEDERAL RULES UPDATE: DECEMBER 2015

On December 1, 2015, several amendments to the Federal Rules of Civil Procedure will take effect, including important changes to the rules governing discovery practice. This memo sets out an overview of the key amendments.

I. GENERAL CHANGES

A. Rule 1 (Scope and Purpose)

The new version of Rule 1 adds that the Federal Rules of Civil Procedure should be "construed, administered, *and employed by the court and the parties* to secure the just, speedy, and inexpensive determination of every action and proceeding." Fed. R. Civ. P. 1 (effective Dec. 1, 2015) (emphasis added). This alteration emphasizes the parties' role in reducing the cost and delay in litigation. The language does not create a new source of sanctions. Advisory Comm. Note, 2015 Amendment.

B. Rule 4 (Summons)

Under Rule 4(m), the presumptive time to serve a defendant has been reduced from 120 days to 90 days. The Advisory Committee Note explains that the driving force behind this change is the desire to reduce delay at the beginning of litigation. Advisory Comm. Note, 2015 Amendment. Further, Form 5 (Notice of a Lawsuit and Request to Waive Service of Summons) and Form 6 (Waiver of the Service of Summons) have been incorporated into Rule 4 as a result of the abrogation of Rule 84 (discussed below).

C. Rule 16 (Pretrial Conferences, Scheduling, Management)

The new Rule 16(b)(1)(b) deletes the language allowing a scheduling conference to be held "by telephone, mail, or other means." Fed. R. Civ. P. 16(b)(1)(b) (effective Dec. 1, 2015). The aim of this change is apparently to encourage direct simultaneous communication, which the drafters consider more effective. *See* Advisory Comm. Note, 2015 Amendment. The Advisory Committee Note clarifies, however, that a scheduling conference may still be conducted either "in person, by telephone, or by more sophisticated electronic means." *Id.*

The new Rule 16(b)(2) requires a judge to issue a scheduling order within the earlier of 90 days (rather than 120 days) after any defendant has been served with the complaint or 60 days (rather than 90 days) after any defendant has appeared. This change, like the change in Rule 4(m), was implemented to reduce delay at the inception of litigation.

The new Rule 16(b)(3)(B) makes three changes to the list of provisions that may be set forth within a court's scheduling order. First, a scheduling order may provide for the preservation of electronically stored information. Second, a scheduling order may include agreements reached for asserting claims of privilege, including agreements reached under Federal Rule of Evidence 502, which controls the effects of disclosure of information protected by the attorney-client privilege or work-product protection. Finally, the scheduling order may "direct that before moving for an order relating to discovery, the movant must request a conference with the court." Fed. R. Civ. P. 16(b)(3)(B)(v) (effective Dec. 1, 2015). The Advisory Committee Note explains that such a conference may provide a more efficient manner to resolve discovery disputes without the delay and burden accompanying a formal motion. Advisory Comm. Note, 2015 Amendment.

II. RULES GOVERNING DISCOVERY

A. Rule 26(b) (Discovery Scope and Limits)

The new Rule 26(b) changes the definition of the scope of discovery. For a matter to fall within the scope of discovery as defined in the new rule, it must not only be non-privileged and relevant to a party's claim or defense, but also:

> proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

Fed. R. Civ. P. 26(b)(1) (effective Dec. 1, 2015).

The Advisory Committee Note insists, however, that because the former rule required courts to consider these proportionality factors when determining whether to enter an order limiting discovery, the new definition of the scope of discovery "does not change the existing

responsibilities of the court and the parties to consider proportionality, and the change does not place on the party seeking discovery the burden of addressing all proportionality considerations." Advisory Comm. Note, 2015 Amendment. The proportionality factors were previously located at 26(b)(b)(2)(c)(iii), rather than at Rule 26(b)(1) as part of the definition of the scope of discovery.

Given this narrowed scope of discovery, the new rule provides without qualification that information "need not be admissible in evidence to be discoverable." Fed. R. Civ. P. 26(b)(1) (effective Dec. 1, 2015). Under the old rule, by contrast, relevant information could be discoverable even though not admissible only "if the discovery appear[ed] reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b)(1) (effective until Dec. 1, 2015). This limitation has been eliminated in the new rule.

The new rule also eliminates two other statements from the old rule regarding the scope of discovery. It omits language from the former rule stating that matters within the scope of discovery "includ[e] the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter." Fed. R. Civ. P. 26(b)(1) (effective until Dec. 1, 2015). It also omits language from the old rule authorizing the court, "[f]or good cause," to "order discovery of any matter relevant to the subject-matter involved in the action." *Id.*

Lastly, the new rule alters one of the provisions governing when a court must limit the frequency or extent of discovery otherwise allowed by the Rules or a local rule. Under the old rule, the court would have to limit discovery if it determined that "the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues." Fed. R. Civ. P. 26(b)(2)(C)(iii) (effective until Dec. 1, 2015). But given that the new rule defines the scope of discovery in a way that takes these matters into account, the corresponding provision under the new rule simply requires the court to enter an order limiting discovery if "the proposed discovery is outside the scope permitted by Rule 26(b)(1)." Fed. R. Civ. P. 26(b)(2)(C)(iii) (effective Dec. 1, 2015).

B. Rule 26(d) (Timing and Sequence of Discovery)

The new Rule 26(d) adds a subpart authorizing early Rule 34 requests for production. Under the new subpart, "[m]ore than 21 days after the summons and complaint are served on a party, a request under Rule 34 may be delivered: (i) to that party by any other party, and (ii) by that party to any plaintiff or to any other party that has been served." Fed. R. Civ. P. 26(d)(2)(A) (effective Dec. 1, 2015). However, "[t]he request is considered to have been served at the first Rule 26(f) conference," which means the responding party's deadline for responding does not begin to run until that time. Fed. R. Civ. P. 26(d)(2)(B) (effective Dec. 1, 2015). Minor knits were also made to Rule 26(c)(1)(B) and Rule 26(f)(3)(D).

C. Rule 34 (Producing Documents)

The new Rule 34 contains changes regarding responses and objections to requests for production.

First, the response deadline under Rule 34 is amended to accommodate the new Rule 26(d)'s provision for early requests for production. In this regard, the new Rule 34 provides that responses to requests for production served before a Rule 26(f) conference has been held are due within 30 days after the parties' first Rule 26(f) conference.

Second, the new Rule 34 now requires a responding party wishing to object to a request for production to "state with specificity the grounds for objecting to the request, including the reasons." Fed. R. Civ. P. 34(b)(2)(B) (effective Dec. 1, 2015). The new rule also adds language providing that: "[t]he responding party may state that it will produce copies of documents or of electronically stored information instead of permitting inspection. The production must then be completed no later than the time for inspection specified in the request or another reasonable time specified in the response." *Id.*

Third, the rule contains this new requirement: "An objection must state whether any responsive materials are being withheld on the basis of that objection." Fed. R. Civ. P. 34(b)(2)(C).

D. Rule 37 (Discovery Sanctions)

The new rule 37 overhauls subpart (e), which governs the failure to provide electronically stored information ("ESI").

The soon-to-be former rule 37(e) simply provided that absent exceptional circumstances a court could not impose sanctions for failing to provide ESI lost "as a result of the routine, good-faith operation of an electronic information system." Fed. R. Civ. P. 37(e) (effective until Dec. 1, 2015).

The new rule 37(e) provides guidance on what measures a court may employ "if electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery." Fed. R. Civ. P. 37(e) (effective Dec. 1, 2015).

First, the court, "upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice." Fed. R. Civ. P. 37(e)(1) (effective Dec. 1, 2015).

As an alternative, the court, "upon finding that the party acted with the intent to deprive another party of the information's use in the litigation"—and *only* upon such a finding—may:

(A) presume that the lost information was unfavorable to the party;

(B) instruct the jury that it may or must presume the information was unfavorable to the party; or

(C) dismiss the action or enter a default judgment.

Id.

Thus, the new rule authorizes serious sanctions to remedy instances of spoliation where there was a duty to preserve. The new rule is based on the already-existing common-law duty to preserve evidence and is not an attempt to create a new duty to preserve. Advisory Comm. Note, 2015 Amendment. The rule is designed, however, to provide a uniform standard in federal court for the use of more serious measures when addressing failure to preserve ESI. *Id.* In this regard, the new rule rejects the position of the Second Circuit and other courts that have authorized the giving of an adverse-inference instruction on a finding of negligence or gross negligence. *Id.* Intent to deprive another party of the information is now indisputably a prerequisite to such an instruction. Rule 37(a) contains a minor amendment to reflect the common practice of producing documents, as opposed to just permitting inspection. *See* Fed. R. Civ. P. 37(a)(3)(B)(iv) (effective Dec. 1, 2015).

III. CHANGES REGARDING JUDGMENTS (Rule 55 - Default and Default Judgment)

Rule 55(c) was amended to state the following "[t]he court may set aside an entry of default for good cause, and it may set aside a *final* default judgment under Rule 60(b)." According to the Advisory Committee Note, the term "final" was added to clarify that until a final judgment is entered under Rule 60(b), a default judgment may be revised at any time and the standards of Rule 60(b) do not apply. Advisory Comm. Note, 2015 Amendment.

IV. MISCELLANEOUS (Rule 84 - Appendix of Forms)

This rule has been abrogated. The Advisory Committee Note advises that the rule was originally adopted for the purpose of providing illustrations for the Civil Rules. Advisory Comm. Note, 2015 Amendment. As there are other alternative sources for forms, Rule 84 and the Appendix of Forms are no longer necessary. *Id*.

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CHANGES TO OFFICIAL BANKRUPTCY FORMS, EFFECTIVE DECEMBER 1, 2015

As President Kennedy famously remarked, "Change is the law of life." Nothing is free from the prospect of change.

On December 1, 2015, change befalls the law of bankruptcy as well. As part of the forms modernization project, most Official Bankruptcy Forms will change on December 1. These new forms have been substantially revised, reformatted, and in some cases renumbered, all with the intent to make the forms easier for debtors and creditors to understand and complete. Parties

must use these new forms in all bankruptcy cases as soon as it is "just and practicable" but no later than December 1, 2015.

While the changes include different versions of case opening forms for both individual and non-individual debtors, the following forms—likely used by creditors—will also see changes.

1. Proof of Claim (Official Form 410)

The revisions to the Proof of Claim form attempt to gather more clear and complete information from creditors. For example, the new form (1) addresses setoff rights more directly by asking if the claim is "subject to a right of setoff," (2) asks an entirely new question ("Is this claim based on a lease?"), and (3) directly instructs the creditor to attach a "statement itemizing interest, fees, expenses, or other charges required by Bankruptcy Rule 3001(c)(2)(A)."

Additionally, the new form requires the creditor to write the bankruptcy case name and number, along with the name of the bankruptcy court, in a box on the top of the first page. Failure to include this information could lead to the claim's untimely filing.

2. Mortgage Proof of Claim Attachment (Official Form 410A)

This form has undergone substantial revisions. On the new form, a creditor must provide a loan history that must start on the date of the first default that is still outstanding at the time the bankruptcy case is filed. Furthermore, the Rules Committee responsible for the revisions has stated that the loan history must show "when payments were received, how they were applied, when fees and charges were incurred, and when escrow charges were satisfied."

In addition, the Notice of Mortgage Payment Change (Official Form 410S1) and Notice of Postpetition Mortgage Fees, Expenses, and Changes (Official Form 410S2) forms received some formatting—but not substantive—changes.

3. New Forms - Chapter 13 Trustees and Creditor Communication Concerning Debtor's Final Cure of Default.

The changes include two new forms that satisfy the Bankruptcy Rule 3002.1 obligations of both trustees and creditors to communicate about a debtor's final cure payment on a principal-residence mortgage. For the trustees, there is the Notice of Final Cure Payment (Official Form 4100N), and for creditors, there is the Response to Notice of Final Cure Payment (Official Form 4100R). While these new forms meet the obligations under Rule 3002.1, they are not "required" to be used by trustees and creditors.

4. Revised or Renumbered Reaffirmation Agreement Forms.

As part of the changes, the Reaffirmation Agreement Cover Sheet (Official Form 427) has been revised. The new cover sheet now allows for the calculation of a debtor's monthly net income at the time of filing bankruptcy and at the time of the reaffirmation agreement.

Additionally, the following unofficial reaffirmation agreement forms have been renumbered: Motion for Approval of Reaffirmation Agreement (Form 2400B), Order on Reaffirmation Agreement (Form 2400C), Reaffirmation Agreement (Form 2400A/B ALT), Order on

Reaffirmation Agreement (Form 2400C ALT), and Reaffirmation Documents (Form 2400A). In fact, the Reaffirmation Documents form has also received additional revisions.

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CHAPTER 7 RELIEF REQUIRES LIFESTYLE ADJUSTMENTS

Section 707(a) of the Bankruptcy Code provides that certain conduct on the part of an individual debtor may result in dismissal of the case "for cause." Courts have held that the conduct of a debtor to avoid repayment of his or her debts without adequate reason may justify dismissal of the chapter 7 case under the "for cause" dismissal provision in section 707(a). In *In re Schwartz*, the Seventh Circuit Court of Appeals recently held that where individual debtors continue to live according to the same high financial level they did prior to filing without any effort to "take [their lifestyle] down a peg so that there would be some money for their creditors" may in itself constitute sufficient "cause" for dismissal of their case under section 707(a). In Schwartz, the debtor was employed by and investment firm which advanced him $400,000 which would be gradually forgiven if he continuously worked there for seven years. His employment with the company was terminated in his first year, leaving him owing the company $340,000. He and his wife filed chapter 7 bankruptcy to avoid his company's collection efforts, but not before spending thousands of dollars on non-essential consumer goods and services, including tickets to Disney World for the debtors and their children. The court found that the debtors' failure to make lifestyle changes – they were spending up to $11,000 per month on non-essential items such as private school for their children and a monthly payment of $850 for a luxury vehicle – was sufficient "cause" to justify dismissing their case. In doing so, the court noted that "[b]y spending even more than their substantial income for private purposes, [the debtors] depleted the assets available to pay their creditors. No one is asking them to live in a tent, dress in rags, drive a 1950 Chevy, or emulate Mme. Loisel in Guy de Maupassant's short story 'The Neckless' ('La Parure')…What the [debtors] failed to do was pay as much of their indebtedness as they could without hardship. Their actions were deliberate and selfish, and provide good cause for denying their discharge." From the creditors' perspective: well said.

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Quote of the Month:

"You may never know what results come of your actions, but if you do nothing, there will be no results." - Mahatma Ghandi

Self Deprecating Lawyer Joke of the Month:

Q: What is a lawyer?

A: Someone who writes a 10,000 page document and calls it a brief.