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First-Day Debtor-Filed § 366 Utility Motions Suffer Procedural Deficiencies

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The Federal Rules of Bankruptcy Procedure are crystal clear. To obtain injunctive relief, a party must file an adversary proceeding, i.e., a complaint, not a motion. Further, service of papers on a U.S. corporation may be effectuated through first-class U.S. mail; however, the envelope must be addressed to the corporation through an expressly named officer or agent for service of process (by name and title), and by street address, city, state and Zip code (and not simply at a P.O. Box, city, state and Zip code).

Yet in many debtor-filed motions pursuant to Bankruptcy Code § 366, debtors seek much more relief than merely ensuring that their utilities not be denied postpetition security deposits. (In essence, § 366(a) prohibits utilities from terminating service to a debtor solely due to the existence of a prepetition debt. Sec. 366(b), on the other hand, prohibits utilities from terminating service to a debtor during the first 20 days postpetition; thereafter, unless the debtor provides its utilities with "adequate assurance of payment," e.g., a postpetition security deposit, the 20-day ban against terminations no longer applies, except for instances solely due to prepetition debts, which ban remains in effect.) A wide range of injunctive relief includes but is not limited to:

(a) utilities being enjoined from setting off/recouping prepetition security deposits or their commercial equivalents; e.g., a surety bond or a letter of credit, without further authorization from the bankruptcy court;

(b) the ban in § 366(b) against terminations due to nonpayment of a postpetition utility deposit or other adequate assurance of payment, which should be extended indefinitely;

(c) the ban in § 366(b) against terminations due to nonpayment of postpetition invoices, which is not prohibited in either § 366(a) or § 366(b) but should also be extended indefinitely; and

(d) normal state public utility commission-authorized termination practices and procedures for utilities; e.g., the number of days before a bill is due; the number of days that default notices and the method of providing default notices should cease; instead, debtor-drafted termination procedures should be implemented.

Furthermore, such papers are being mailed to utilities as follows: name of utility, P.O. Box (this typically is where payments for the utility's invoices are mailed), city, state and Zip code. Missing from the address are officer or agent for service of process, by individual name and title and street address.

These practices do not comply with the Bankruptcy Rules. Injunctive relief requires a complaint, not a motion (Rules 7001(7) and 7003). The granting of injunctive relief also requires the movant to satisfy each element necessary therefor (Rule 7065). Finally, service by mail upon a U.S. corporation is permissible if done in a specified manner, which service by name of utility only at a P.O. Box does not satisfy. [Rule 7004(b)(3)].

Recent cases exemplify each of these procedural deficiencies.

Injunctive Relief Requires A Complaint, Not a Motion

In *In re Conxus Communications Inc.*, 262 B.R. 893 (D. Del. 2001), the debtors had not paid nearly $500,000 in postpetition invoices from one of its utilities. The bankruptcy court granted a motion that enjoined the utility from terminating service for several days. It reasoned that under Bankruptcy Code § 105(a)[1], the injunction was appro-

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priate because it only would last for a few days; a secured creditor offered to prepay the utility's charges for those days; and by maintaining service, this would provide an opportunity for parties to bid on the debtors' assets. 262 B.R. at 896.

The utility appealed. By then, the term of the injunction already had expired and the utility had terminated service. The district court held that the dispute was not moot and there still was a matter in controversy remaining for it to adjudicate, because the application of the prepayment made by the secured creditor while the injunction was in effect was in dispute. Unless the entire dispute was resolved now, it was likely that the parties would contest that issue in a subsequent proceeding, and thus, the matter was not moot. 262 B.R. at 898.

Reversing, the district court held that the injunction should not have been issued. While § 105(a) confers some equitable powers on a bankruptcy court, the breath of the application of those powers is limited by express provisions in the Bankruptcy Code. Citing *In re Morristown & Erie R.R. Co.*, 885 F.2d 98, 100 (3d Cir. 1989) and *Southern Ry. Co. v. Johnson Bronze Co.*, 758 F.2d 137, 141 (3d Cir. 1985). "Sec. 105 (a) does not give a bankruptcy court the power to create substantive rights that would otherwise be unavailable under the Code." 262 B.R. at 899.

Additional authorities substantiate this ruling: Sec. 105(a) cannot extend time limits beyond express provisions of the Bankruptcy Code. (Thus, this is why in the context of a first-day debtor-filed § 366 motion, the initial 20-day ban in § 366(b) against utility terminations should not be extended.) *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 206 (1988); and *In re Momentum Mfg. Co.*, 25 F.3d 1132, 1137, n.4 (2d Cir. 1994). (Sec. 105(a) "is not a license to courts to invent remedies that overstep statutory limitations.")

In *Conxus*, Bankruptcy Code § 366(b) was the substantive provision by which the application of § 105(a) is to be governed. The district court followed the directive from *In re Begley*, 760 F.2d 46, 50 (3d Cir. 1985), which ruled that "Sec. 366 does not preclude a utility from terminating services based upon a debtor's postpetition default; [and further, a utility] may commence termination procedures once a postpetition payment is missed." 262 B.R. at 899. Once the debtors failed to timely pay the utility's postpetition invoices, it "had the right under § 366 to terminate service." 262 B.R. at 899. Thus, by expanding debtors' rights beyond the parameters of § 366, the bankruptcy court had misapplied its powers under § 105(a).

Further, *Conxus* rejected the bankruptcy court's reasoning that exigent circumstances favored issuance of the injunction. Under Rule 7001(7), a proceeding to obtain an injunction is an adversary proceeding. (Under Rule 7003, to institute an adversary proceeding, a complaint must be filed). It relied on *In re Best Products Co.*, 203 B.R. 51 (Bankr. E.D. Va. 1996)[2], which held that a bankruptcy court cannot "enjoin [a] utility from pursing its rights under state law if [a] debtor defaulted in its payments postpetition." 262 B.R. at 899.

Additional authorities substantiate *Conxus*' ruling that where a debtor does not pay an invoice for postpetition service, a utility, upon compliance with applicable state termination procedures, can terminate service to a debtor and without bankruptcy court authorization. *Robinson v. Michigan Con. Gas Co.*, 918 F.2d 579 (6th Cir. 1990); *Begley*, 760 F. 2d 46; *Johnson v. Philadelphia Elec. Co.*, 80 B.R. 30 (E.D. Pa. 1987); *Best Products*, 203 B.R. 51; and *In re Am. Investcorp & Dev. Co.*, 155 B.R. 300 (Bankr. D. R.I. 1993).

In *In re Martin*, 268 B.R. 168 (Bankr. E.D. Ark. 2001), the court denied a debtor's request for injunctive relief to prevent the execution upon certain assets made upon motion and not by an adversary proceeding with a complaint, and held that without a complaint no injunctive relief can be granted. Rule 7001(7) "requires that a request to obtain an injunction or other equitable relief be filed as an adversary proceeding." 268 B.R. at 172

Martin's reasoning revolved around notions of due process. The Bankruptcy Rules were designed "to ensure that due process and property rights are preserved." 268 B.R. at 172. Those rules mandate that injunctions be filed in a certain way (Rule 7001: by complaint); be served in a certain way (Rule 7004: U.S. mail will suffice, if done properly); and be granted upon compliance with certain specified elements (Rule 7065: threat of irreparable harm; balance of harms between granting and denying relief sought; probability of success on merits; and public interest). 268 B.R., at 172, and n.6.

As for the first example of injunctive relief sought in debtor-filed § 366 motions, i.e., to enjoin the setoff/recoupment of prepetition security deposits, ample authority exists to reject same. *In re McMahon*, 129 F.3d 93 (2d Cir. 1997); and *In re Brooks Shoe Mfg. Co. Inc.*, 39 B.R. 980 (E.D. Pa. 1984).

Other recent decisions (reviewed only summarily here) illustrate why the last example of injunctive relief sought in debtor-filed § 366 motions—to replace state public utility commission-sanctioned termination procedures with those drafted by the debtors—should be denied: bankruptcy court lacks jurisdiction to issue such relief.

In *In re FCC*, 217 F.3d 125 (2d Cir. 2000), *cert. den.* 69 USLW 3374 (Nov. 28, 2000) (No. 00-447); and *In re Nextwave Personal Comm. Inc.*, 200 F.3d 43 (2d Cir. 1999), *cert. den.* 69 USLW 3257 (Oct. 10, 2000) (No. 99-1980), the U.S. Court of Appeals for the Second Circuit twice held that a bankruptcy court lacks jurisdiction to adjudicate disputes over Federal Communications Commission (FCC) statutes and regulations, and rather, the entity with proper jurisdiction to construe same in the first instance is the FCC, and appeals lie with federal appeals court.

Similarly, a debtor who seeks changes to its utilities' termination procedures, which already have been approved by applicable state laws, should not ask a bankruptcy court to change the terms of such procedures. Under the doctrine of

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failure to exhaust administrative remedies, such challenges belong before the state public utility commissions and then, on appeal, to the state courts. See also *Shalala v. Illinois Council on Long Term Care Inc.*, 120 S.Ct. 1084, 1099 (2000) ("the matter must be presented to the agency prior to review in a federal court"); and *In re Hospital Staffing Services Inc.*, 258 B.R. 53 (S.D. Fla. 2000) (debtor must litigate disputes over federal Medicare statutes before a federal administrative agency, not a bankruptcy court).

Procedural Due Process

As intimated in *Martin*, 268 B.R. 168, one of the hallmarks of the Bankruptcy Rules is procedural due process. In exchange for the convenience and low cost of serving a motion, summons, complaint, order or any other pleading upon a U.S. corporation by first-class U.S. mail (as opposed to personal service by hand using a process server), Rule 7004(b)(3) requires mail service to be addressed to a specific officer or agent for service of process, by express name and title. One case further requires service at a street address and not a P.O. Box. This is a critical problem, because often utilities never receive the debtor-filed § 366 motion and/or the first-day § 366 order or receive them after the deadline to object and/or to make requests for additional assurances, as provided in the order (and sometimes, the underlying motions themselves are not even mailed to the utilities). That is why the due process concerns are so important: To object, a utility needs prior notice; to receive same, by mail, the envelope must be addressed properly.

In *In re Boykin*, 246 B.R. 825, 827-29 (Bankr. E.D. Va. 2000), the issue was whether under Rule 7004(b)(3), service of a debtor's objection to a creditor's proof of claim was proper when mailed to an employee (a paralegal) by specified name and title, and not to an officer or other agent for service of process by specified name and title. The paralegal was not an officer or agent for service of process of the corporation. *Boykin* concluded that service, even upon a specified corporate employee who is not an officer or agent for service of process, does not comply with the due process safeguards required in Rule 7004(b)(3). 246 B.R. at 828.

Additional authorities substantiate that service simply by name of corporation is impermissible and the consequence for improper service. *In re Loloee*, 241 B.R. 655, 660 (9th Cir. BAP 1999) (service upon corporation, addressed to no person, improper); *In re Laughin*, 210 B.R. 659 (1st Cir. BAP 1997) (improperly served order to be vacated); *In re Blutrich Herman & Miller*, 227 B.R. 53 (Bankr. S.D.N.Y. 1998) (order for relief in involuntary case vacated due to nonservice of summons and petition; valid service of process is prerequisite for court's personal jurisdiction); *In re Pittman Mech. Contractors Inc.*, 180 B.R. 453, 456-7 (Bankr. E.D. Va. 1985) (service upon officer only without naming individual improper); and *In re Braden*, 142 B.R. 317 (Bankr. E.D. Ark. 1992) (service at P.O. Box improper).

The due process protection involved here is that by permitting simple and inexpensive service procedures, the address on the envelope must be completed properly—to ensure that the envelope, once it reaches the corporation, will be delivered to a responsible individual at the corporation; e.g., an officer who can take the appropriate steps to respond timely to the legal papers so served. Service of a § 366 motion on a utility at a P.O. Box (typically, a lockbox at a bank that processes thousands of customer payments) is not designed to reach an appropriate, responsible individual at a utility and certainly not in any timely fashion.

Improperly Filed Motions

In view of such crystal clear Bankruptcy Rules, why are so many debtor-filed § 366 motions seeking injunctive relief being filed, and why are these motions being addressed improperly? Perhaps debtors would argue that in major Chapter 11 cases they have so many utilities scattered across the country, it's impractical to obtain the names of the proper officers by title, and the actual street addresses, and it would cost too much to file complaints against so many utilities instead of motions. These may be real practical problems confronting debtors; however, the Bankruptcy Rules do not provide special exemptions for these types of procedural issues in major Chapter 11 cases, and they do not provide exemptions in the instance of litigation under Bankruptcy Code § 366. Utilities, too, have due process rights.

While "it is tempting for bankruptcy courts to cut corners, as there is no other practical way to function, [t]his temptation *must be resisted* when due process is at stake." Eisenberg & Gecker, 10 Bankruptcy Developments Journal at 68 (emphasis added).

(1) Frequently, the first-day motions include first-day proposed orders that are signed by bankruptcy courts on an ex parte basis, meaning without prior notice to utilities. While it is virtually impossible to generalize about every case, typically, debtors are mailing only the first-day signed orders to utilities and not the underlying motions.

(2) In *Best Products*, a debtor filed a first-day § 366(b) motion, and not an injunction, seeking to enjoin all its utilities from terminating services, even for nonpayment of postpetition invoices. The court refused to do so.

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