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Settle Down Y'all: Rule 9019 and Structured Dismissals

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I. What is a Structured Dismissal?

A structured dismissal is a dismissal of a case in which the dismissal order includes provisions such as releases, protocols for payment, "gifting" of funds to junior creditors, and retention of jurisdiction over certain post dismissal matters. *See* Nan R. Eitel et al., *Structured Dismissals, or Cases Dismissed Outside the Code's Structure?*, 30 AM. BANKR. INST. J. 20 (2011). Parties who favor structured dismissals argue that they are cheaper, more flexible, and more efficient than the traditional statutory methods for conclusion of a chapter 11 case. The United States Trustee generally opposes structured dismissals because they fall outside of one of the three traditional paths for concluding a chapter 11 case – confirmation of a plan, conversion to chapter 7, or a "standard" dismissal – thus, sacrificing the safeguards of the traditional statutory scheme. *Id.* Typically, structured dismissals have followed a sale of substantially all of the assets of the debtor-in-possession. Often, however, such dismissals follow a Rule 9019 motion that purports to resolve the bankruptcy case.

II. The Statutory Footing (or Lack Thereof) for Rule 9019

A. Overview of Rule 9019

Federal Rule of Bankruptcy Rule 9019(a) ("Rule 9019") provides that "[o]n motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement." Whether to approve a Rule 9019 compromise is committed to the discretion of the bankruptcy court. *See, e.g.*, *Connecticut Gen. Life Ins. Co. v. United Cos. Fin. Corp. (In re Foster Mortgage Corp.)*, 68 F.3d 914, 917 (5th Cir. 1993) ("*Foster Mortgage*"); *In re AWECO, Inc.*, 725 F.2d 293, 297-98 (5th Cir. 1984) ("*AWECO*"). "The exercise of judicial discretion always carries with it responsibility." *AWECO*, 725 F.2d at 297. Judicial discretion should be "exercised not arbitrarily or willfully, but with regard to what is right and equitable under the circumstances and

law, and directed by the reason and conscience of the judge to a just result." *Id.* at 298 (quoting *Langnes v. Greene*, 282 U.S. 531, 541 (1931)).

In applying such discretion, the bankruptcy court should scrutinize the merits of the compromise, including the probabilities of success upon litigation of the claim, the complexities of the litigation, the likely expense and duration of the litigation, difficulties attendant to collection of any ultimate judgment, and "all other factors relevant to a full and fair assessment of the wisdom of the compromise." *Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424 (1968) ("*TMT Trailer Ferry"*). "Basic to this process in every instance, of course, is the need to compare the terms of the compromise with the likely rewards of litigation." *Id*. at 424-25.

B. Rule 9019 is procedural, not substantive.

Rule 9019 is a procedural mechanism whereby a trustee or a debtor-in-possession may obtain approval of a compromise. *Boyd v. Engman*, 404 B.R. 467, 480 (W.D. Mich. 2009). Rule 9019 is not substantive. As a procedural rule, Rule 9019 "shall not abridge, enlarge, or modify any substantive right." 28 U.S.C. § 2075. "Rule 9019, being merely a rule, can do no more than establish a procedural mechanism for exercising a statutory power." *In re Dow Corning Corp.*, 198 B.R. 214, 246 (Bankr. E.D. Mich. 1996) ("*Dow Corning*"). *See also*, *Northview Motors v. Chrysler Motors Corp.*, 186 F.3d 346, 351 n.4 (3d Cir. 1999) (noting that "as a matter of law, Bankruptcy Rule 9019(a), a rule of procedure, cannot, by itself, create a substantive requirement of judicial approval"); *Hicks, Muse & Co., Inc. v. Brandt (In re Healthco Intern. Inc.)*, 136 F.3d 45, 50 n. 4 (1st Cir. 1998) (citing 28 U.S.C. § 2075).

C. Is Rule 9019 free floating or tied to a statute?

Courts have observed that Rule 9019 is "unique in that it does not have a parallel section in the [Bankruptcy] Code." *Motorola, Inc. v. Official Comm. of Unsecured Creditors (In re*

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