I. Introduction and General Issues

A. Why First-Day Motions?

The filing of a voluntary chapter 11 bankruptcy case by an operating company necessarily affects — and thereby potentially disrupts — the debtor's business.[1] A successful reorganization therefore often depends on actions taken in the initial days following the filing to minimize any disruption.

A debtor will typically address the immediate effects of the bankruptcy filing on its ongoing business operations by seeking emergency relief from the bankruptcy court to enable the debtor to continue normal business operations without interruption. Such relief is generally accomplished by filing first-day motions concurrently with the initial bankruptcy petition or soon thereafter. First-day motions may also address administrative issues and establish certain procedures to be followed in the case. Ultimately, the scope of the relief requested by first-day motions varies depending on the size, nature and exigencies of the case, as well as the specific needs of the debtor and the practices in the debtor's industry.

In addition to supplying the practical relief that allows a debtor to proceed with its bankruptcy case with as little disruption to its

1 This manual does not expressly address involuntary chapter 11 bankruptcy filings, but the entry of an order for relief in an involuntary case effectively constitutes the beginning of the chapter 11 case and could result in the need to file the typical first-day motions addressed herein.

business as possible, the hearing to consider the first-day motions and the ancillary background provided in the pleadings provide the bankruptcy judge an introduction to and first impression of the debtor and some of the hurdles that the debtor will face in its bankruptcy case. The first-day motions are typically the first exposure of the judge to the case, and as such they set the tone for the remainder of the case. Consequently, the debtor must take special care in preparing the first-day motions, and even otherwise noncontroversial administrative requests warrant extra attention if presented as first-day motions.

Although most first-day motions are not intended to be controversial or to engender opposition, even the most routine first-day filings may draw an objection. Neither debtors nor creditors should assume that all first-day requests address routine and noncontroversial matters. Common first-day motions such as debtor-in-possession financing motions may effectively set the course for the bankruptcy case and foreclose alternative reorganization options. Moreover, other motions that are designed to affect substantive rights may be presented as first-day motions both for reasons of necessity to business operations and for strategic advantage because creditors and other affected parties may not have time to fully evaluate the case and present effective objections. Consequently, a debtor must be attentive to the fact that not all motions are routine and that the presentation of even the most routine motions is part of its first impression, and creditors must be attentive to their interests from the outset and not assume that any relief is merely procedural.

This manual is designed to provide an overview of first-day practice by describing the most common first-day motions and summarizing relevant sections of the Bankruptcy Code, applicable

rules[2] and recent case law relating to each motion. The appendix to this manual also provides examples of typical first-day motions in the form of filed motions and entered orders.

B. Case-Preparation Issues

First-day motions appear as a *fait accompli* on or shortly after the petition date, but their production involves a significant investment of time and resources on behalf of both the debtor and its counsel. Most first-day motions involve a level of knowledge about a debtor and its operations not easily or quickly obtained by counsel or organized and compiled by the debtor. Moreover, a company in financial trouble may find it difficult to assign personnel on a regular or dedicated basis to address the information requests of counsel. Personnel that are available may have only limited knowledge, and the debtor may want to limit personnel who have contact with bankruptcy counsel for confidentiality reasons. The burdens associated with preparing first-day motions must not be underestimated. For example, a first-day wages and benefits motion will require knowledge of full and part-time employees, unionized and non-unionized employees, rates and outstanding obligations (which will change on a rolling basis as the petition date approaches) of each of the sometimes numerous benefit programs. These programs may include vacation and sick pay, health and disability insurance, life insurance, expense accounts, auto leases, tuition reimbursement, 401(k) and/or pension plans. To complete such a motion, counsel may need input from a payroll person on outstanding wages, from human resources for certain programs, and of still other departments or

2 Each discussion of a "section" in this manual refers to a section of 11 U.S.C. §§ 101 *et seq.* (the "Bankruptcy Code"), unless otherwise noted. Similarly, each discussion of a "rule" in this manual refers to a rule of the Federal Rules of Bankruptcy Procedure, unless otherwise noted.

professionals for other programs. Many first-day motions can present comparable challenges. Prudent counsel will compile a checklist of necessary information for first-day motions, update it as information is obtained, and not shy from making repeated follow-up requests to press for missing information. Counsel should also be prepared to discuss each of the motions in detail with the client and press back for clarification and further exposition, expecting that the process will necessarily be confusing and potentially frustrating for the company. Questions like, "Is that really all your employees?" frequently yield answers like "all our full time employees — I excluded the part-time ones." "Is there anything else?" is another question that bears frequent repetition.

C. Internet Access to First-Day Motions

Every bankruptcy court is now linked to the Internet through the PACER system (www.pacer.gov), which allows online access to case information and dockets in bankruptcy cases around the country. The federal judiciary's Case Management/Electronic Case Files system (CM/ECF) also allows users to download actual documents filed in bankruptcy cases. Both systems can be accessed by locating the website for the applicable court, and PACER supplies a directory of all PACER and CM/ECF court sites at www.pacer.gov/psco/cgi-bin/links.pl. Both PACER and CM/ECF require registration and payment of a fee. In addition, debtors in large chapter 11 cases often retain claims agents who make filings publicly available for free on their websites. These online resources provide parties affected by first-day motions greater ability to obtain information and participate meaningfully in the process while reducing the strategic advantage often associated with first-day motions.

D. Local Rules and Practice

First-day practice differs significantly from one court to another. Orders that are considered routine in some districts are foreign to others. Attorneys who do not familiarize themselves with local practice may experience considerable frustration, and they may even endanger the reorganization itself when their requests for entry of "routine" orders are delayed or denied outright on the basis of technical deficiencies or substantive objections.

Almost every district and bankruptcy court has adopted local rules that, to one extent or another, affect first-day practice. An increasing number of districts have also adopted local rules or forms that directly address certain types of typical first-day motions. Some judges even have personal procedures with respect to first-day matters that are specific to their courtrooms. Typically, such local rules, general orders or procedures are available electronically on the websites of the various bankruptcy and district courts.

The need for familiarization with the applicable local rules and procedures may seem obvious, but bankruptcy practitioners are often tempted to see the procedures of the District of Delaware or the Southern District of New York as the standard for the nation. To the contrary, the standard for the host court of any case is that set forth in its local rules. Perhaps for this reason, many bankruptcy courts require a debtor to retain local counsel familiar with the local rules, guidelines and practices. As the range of the acceptable and the ordinary varies from jurisdiction to jurisdiction and, indeed, from judge to judge, practitioners neglect the specifics and details of local practice at their peril.

E. Notice of First-Day Motions

First-day motions present unique notice issues, given the need to balance the due-process rights of affected parties with the exigencies of the case and the practical difficulty of providing adequate notice. Ultimately, the notice that should be given depends on the nature of the motion, the urgency of the requested relief and the local practice.

Notice requirements are generally governed by section 102(1) and Bankruptcy Rule 2002. Section 102(1) embodies a flexible and pragmatic approach to notice. This provision defines the Bankruptcy Code's term of art — "after notice and a hearing" — to require "such notice as is appropriate in the particular circumstances." This typically means that notice is provided to certain major players in the case, such as the Office of the U.S. Trustee, the principal secured creditors, the 20 largest unsecured creditors, and anyone specifically requesting notice of the case. In addition, the parties directly affected by a request for relief ordinarily will be given notice of the motion.[3] Effectuating prompt notice of filing of and the hearing upon first-day motions to the parties required to receive notice requires attention to the collection of identifying information — including performing UCC-1 searches and obtaining good addresses, facsimile numbers and, as a last resort, e-mail addresses for parties in interest — in the course of preparing a case for filing, as there is often little or no time to collect such information between the time a case files, a first-day hearing is scheduled and notice must be sent.

3 Keep in mind that an order is generally not effective against parties who were not given proper notice of the motion. *See*, *e.g.*, *In re Mariner Post-Acute Network Inc.*, 267 B.R. 46 (Bankr. D. Del. 2001).

F. Opposing First-Day Motions

Counsel for the debtor enjoys a considerable strategic advantage in first-day motion practice; perhaps for this reason the range of issues presented as first-day motions has been expanding in recent years.

One of the most significant advantages of filing a first-day motion is the element of surprise. Creditors may not expect a debtor to file for bankruptcy and may be ill-prepared to deal with the filing. The debtor, on the other hand, will typically weigh its decision to file a chapter 11 case closely and conduct a lengthy and thorough analysis of its bankruptcy options prior to filing. Debtor's counsel will have identified and considered the issues that will be pursued in the context of first-day motions in advance, will have expended significant efforts in marshaling the factual and legal support for such relief, and will be familiar with the case and the legal and factual positions of the debtor. A creditors' committee will not typically be in existence when the first-day motions are heard, and parties in interest may not even be aware of the bankruptcy filing or the filing of the first-day motions until after preliminary relief has been granted. Even if affected parties are given advance notice of the first-day hearing, they may not have adequate time to obtain counsel or prepare an effective response.

As a result, the most common strategy for opposing a first-day motion is delay. Counsel for a creditor or party in interest could request additional time to respond or to take discovery and to limit the relief that is granted to the minimum necessary to avoid undue prejudice to the debtor. The period of delay typically will be short and will merely reduce, but not eliminate, the tactical advantage of debtor's counsel. A common variation on this theme is for the court to grant the requested relief on an interim basis and establish a short period of time within which

the creditors' committee, or other parties in interest, may consider the relief requested and, if appropriate, file objections. The strategy of delay may not be effective if the court is convinced that immediate relief is critical to the debtor's survival, such as payment of prepetition employee wages.

A related strategy is to argue that the motion is not properly a first-day motion and should be continued because it (a) does not involve matters that must be resolved immediately in order to preserve the debtor's reorganization efforts, and/or (b) requires further notice than is generally occasioned by the first-day context to ensure that all parties in interest receive requisite notice. This tactic may be most effective for unusual motions where it appears that the debtor is using the first-day process strategically or when the debtor cannot demonstrate the urgency of the requested relief. Many courts will raise this argument *sua sponte* and continue certain motions filed as first-day motions as a matter of course (such as a motion to approve a key employee retention program).

Moreover, Bankruptcy Rule 6003 requires a showing that "relief is necessary to avoid immediate and irreparable harm" before a court may grant relief within the 21 days of filing a petition in three categories: (a) a retention application under Bankruptcy Rule 2014, (b) a motion to sell property or pay all or part of a prepetition claim, or (c) a motion to assume or assume and assign an executory contract or unexpired lease under section 365. Consequently, retention applications are generally not within the ambit of first-day motions, and the debtor must make a showing of "immediate and irreparable harm" in order to obtain the relief requested in many first-day motions. A creditor seeking to challenge first-day relief may find fertile ground in the sufficiency or insufficiency of the debtor's evidence of such harm.

Substantive objections to first-day motions usually turn on the specific nature of the relief requested. Most often, however, objections are based on the notion that the motion violates some aspect of bankruptcy law or policy. This manual discusses a number of these arguments below in the sections dealing with the particular first-day motions to which they relate. In general, most substantive objections are based on one of three themes:

- First, the requested relief forecloses other reorganization options and amounts to a *de facto* reorganization plan before parties in interest have had an opportunity to evaluate the case or vote on a plan.
- Second, the requested relief violates a specific provision of the Bankruptcy Code or other law. For example, payment of prepetition wages in excess of the priority cap set forth in section 507(a)(4) violates the Bankruptcy Code's basic rules of priority.
- Third, granting the requested relief subverts some bankruptcy policy or is simply not in the best interest of creditors. For example, the objecting party might argue that a financing order granting a super-priority lien to a shareholder who provides postpetition financing violates the absolute-priority rule.

While there are specific responses to most substantive objections, the debtor's general response to these arguments is the same as its justification for any first-day motion: that the relief must be granted immediately in order to preserve the debtor's going-concern value and reorganization effort. This "common sense" argument relies on the bankruptcy court's equitable powers based on the premise that the creditor body is better off having the debtor's going-concern value preserved, even if that

requires a technical violation of, or an exception to, some bankruptcy principle.

G. Interim and Final Relief

In balancing the interests of debtors in immediate relief and of creditors and other parties in interest in greater noticing and opportunity to respond, certain first-day relief is typically granted on an interim basis pending a final hearing. Under such circumstances, more complete notice is given of the motion, the interim order, the objection deadline with respect to the final relief requested, and the hearing at which final relief will be heard. First-day motions for which only interim relief would be granted often include motions seeking approval of (a) debtor-in-possession financing and/or cash collateral usage,[4] (b) procedures for providing utilities with adequate assurances, (c) waivers of section 345 investment guidelines, (d) approval of certain prepetition compensation programs, especially with respect to insiders, and (e) potentially any payment of prepetition amounts, especially those implicated by a debtors' showing under Bankruptcy Rule 6003.

Even in the absence of orders expressly and on their face entered on an interim basis, some courts provide that *any* order entered in connection with first-day relief is an "interim" order subject to further review.[5] Consequently, parties in interest in receipt

4 Bankruptcy Rule 4001(c) provides that a final hearing on a motion to obtain credit can occur no earlier than 14 days after service of the motion, and Bankruptcy Rule 4001(d) requires at least 7 days' notice to an objecting party of a hearing to consider use of cash collateral.

5 *See, e.g.*, Del. Bankr. L.R. 9013-1(m)(v) (permitting, except as otherwise ordered by the court, any party in interest to move for reconsideration within 30 days of entry of any first-day relief other than relief under sections 363 or 364 with respect to financing/cash collateral); Ariz. Bankr. L.R. 4001-4(d) (providing that upon request for reconsideration of any relief granted on shortened notice, the burden remains with the debtor).

of orders entered on a first-day basis sometimes have access to expanded rights of reconsideration, and even orders lacking the designation "interim" may not be as final as orders entered under more fulsome noticing practice. Debtors should be prepared to sometimes find interim relief to be the best they can obtain, and creditors should expect to find that the capacity to press for orders to be entered on an interim basis, and/or the opportunity to challenge first-day orders, make the first-day process not as final and irreversible as it may at first appear.