Emory Bankruptcy Developments Journal

Volume 32
Issue 2 *The Thirteenth Annual Emory Bankruptcy Developments Journal Symposium*

2016

No Seal No Deal: Amending Federal Rule of Bankruptcy Procedure 9019 to Require Judicial Approval of Settlement Agreements

Linhadley Eljach

NO SEAL NO DEAL: AMENDING FEDERAL RULE OF BANKRUPTCY PROCEDURE 9019 TO REQUIRE JUDICIAL APPROVAL OF SETTLEMENT AGREEMENTS

ABSTRACT

Federal Rule of Bankruptcy Procedure 9019 ("Rule 9019") governs settlements in bankruptcy. Rule 9019 states, "[o]n motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement." Jurisdictions have differing interpretations on whether Rule 9019 is mandatory or permissive because of the Rule's language. The majority of jurisdictions have found Rule 9019 is mandatory and require trustees to file settlements with the court. A minority of jurisdictions have found the Rule is permissive and allows trustees to file settlements with discretion.

The Second, Third, Ninth, and Eleventh Circuits have adopted the mandatory interpretation requiring trustees to file settlement agreements with the court. These circuits reason this interpretation advances the purpose of the Rule and the fair and equitable treatment of creditors. The remaining circuit courts have not addressed this issue, leaving lower courts to decide whether to adopt the mandatory or permissive interpretations of the Rule.

Lower courts that have adopted the permissive interpretation of the Rule explain that requiring the trustee to file settlements with the court might encourage non-settling parties to file "me too" claims against the debtor. The non-settling parties would learn about the settlements because any documents filed with the court become public. To protect themselves from "me too" claims, settling parties may choose to seal the settlement; however, precedent demonstrates courts disfavor sealing settlement agreements.

This Comment advises the Advisory Committee on Rules of Bankruptcy Procedure to amend Rule 9019(a) to reconcile the diverging majority and minority interpretations. Through a historical overview of the Bankruptcy Code ("Code"), case law analysis, and a look at two other provisions of the Code, this Comment will demonstrate that requiring compliance with Rule 9019 adheres to the Rule's purpose and promotes uniformity across the courts.

INTRODUCTION

Typically, bankruptcy is fast-paced because debtors and creditors have a mutual desire to resolve financial disputes quickly.[1] Debtors can expedite the bankruptcy process by compromising and settling with creditors.[2] Trustees can also negotiate terms with creditors and settle claims on behalf of the estate post-petition. Settlements contribute to the efficient administration of the estate because they are privately negotiated and encourage parties to fashion their own remedies.[3]

Settlements are legally binding contracts. Parties to a settlement fashion their own remedies by weighing "various merits and factors at stake in the lawsuit, and come to a negotiated settlement as to the resolution."[4] While settlement agreements explain the terms of the parties' settlement, they do not explain why the parties decided to settle or their negotiation process.[5] Usually, a settlement agreement only contains a short recitation of the background facts of the case and simply state the parties settled.[6]

The Supreme Court has recognized that many disputes in bankruptcy are resolved through settlements, and thus, has promulgated Rule 9019(a). The Rule states, "[o]n motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement."[7] The language of Rule 9019(a) has created a split among courts as to whether this rule requires parties to file settlement agreements with the court to receive judicial approval.[8] The majority of courts require parties to file settlement agreements with the

---

[1] *See* Douglas G. Baird & Edward R. Morrison, *Adversary Proceedings in Bankruptcy: A Sideshow*, 79 AM. BANKR. L.J. 951, 953 (2005).

[2] Reynaldo Anaya Valencia, *The Sanctity of Settlements and the Significance of Court Approval: Discerning Clarity from Bankruptcy Rule 9019*, 78 OR. L. REV. 425, 430 (1999) ("[N]egotiated outcomes save the bankruptcy estate the time and expense of protracted proceedings, perhaps even litigation, regarding the disputed issue or issues.").

[3] *See id*. ("[T]he United States Supreme Court has noted, in administering reorganization proceedings in an economical and practical manner it will often be wise to arrange the settlement of claims as to which there are substantial and reasonable doubts." (quoting *In re* Del Grosso, 106 B.R. 165, 167 (Bankr. N.D. Ill. 1989))).

[4] Richard L. Epling, *Approval of Bankruptcy Compromises and Settlements: A Due Process Analysis*, 1986 NORTON ANN. SURV. OF BANKR. L. 4 (1986).

[5] *See* Gregg Stevens & Lorin Subar, *Confidentiality in a Settlement Agreement is a Virtual Necessity*, 29 GP SOLO (2012), http://www.americanbar.org/publications/gp_solo/2012/november_december2012privacyandconfidentiality/confidentiality_settlement_agreements_is_virtual_necessity.html.

[6] *Id*.

[7] FED. R. BANKR. P. 9019(a).

[8] *See* Valencia, *supra* note 2, at 437.

bankruptcy court where the case is pending.[9] By contrast, the minority view does not require bankruptcy courts to approve settlement agreements unless a trustee initially files a motion requesting the court to review a settlement.[10]

Requiring motion and approval of settlement agreements presumably conflicts with their private nature.[11] Under the Code, the public has a right to inspect and copy judicial records, which are available for examination at reasonable times without charge.[12] Consequently, once a settlement agreement is filed with a bankruptcy court, that settlement is disclosed to the public.[13] The Code provides parties in a bankruptcy case with the option to safeguard a filing by making a motion to seal the settlement agreement.[14] Nonetheless, this protection often does not extend to settlement agreements in bankruptcy.[15]

Sealing often does not extend to settlement agreements because a debtor trades certain privacy rights for the benefit of recovery when filing for bankruptcy.[16] For example, a debtor is required to file a petition attached with schedules of assets, current liabilities, current income and expenditures, executor contracts and unpaid leases, and a statement about the debtor's financial affairs.[17] A debtor is required to disclose such information not only for the benefit of recovery, but also for the benefit of creditors with an interest in the estate.[18] In fact, "bankruptcy law exists because there is a public interest in maximizing available assets for the largest number of creditors to the largest

---

9 *See id.* at 439.

10 *See id.*

11 *See* FED. R. EVID. 408(a).

12 11 U.S.C. § 107(a) (2012) ("[A] paper filed in a case under this title and the dockets of a bankruptcy court are public records and open to examination by an entity at reasonable times without charge.").

13 *Id.* ("[A] paper filed in a case under this title and the dockets of a bankruptcy court are public records and open to examination by an entity at reasonable times without charge.").

14 11 U.S.C. § 107(b) ("On request of a party in interest, the bankruptcy court shall, and on the bankruptcy court's own motion, the bankruptcy court may—protect an entity with respect to a trade secret or confidential research, development, or commercial information; or protect a person with respect to scandalous or defamatory matter contained in a paper filed in a case under this title.").

15 *See* Oliner v. Kontrabecki, 745 F.3d 1024, 1025 (9th Cir. 2014); Neal v. Kan. City Star, 461 F.3d 1048 (8th Cir. 2006); Legal Newsline v. Garlock Sealing Tech. LLC, No. 3:13-CV-00464-MOC, 2014 WL 3696576, at *1 (W.D.N.C. July 23, 2014); Togut v. Deutsche Bank AG (*In re* Anthracite Capital, Inc.), 492 B.R. 162, 172–73 (Bankr. S.D.N.Y. 2013); *In re* Azabu Bldgs. Co., Ltd., No. 05-50011, 2007 Bankr. LEXIS 475, 2 (Bankr. D. Haw. Feb. 7, 2007); *In re* Alterra Healthcare Corp., 353 B.R. 66 (Bankr. D. Del. 2006).

16 *See* 11 U.S.C. § 521(a).

17 *Id.*

18 *See* Stellwagen v. Clum, 245 U.S. 605, 617 (1918) ("Our decisions lay great stress upon this feature of the law—as one not only of private but of great public interest in that it secures to the unfortunate debtor, who surrenders his property for distribution, a new opportunity in life.").

extent."[19] The information the debtor discloses is used to distribute the estate's nonexempt property among creditors.

Further, debtors can use sealing as a tool to leverage their bargaining positions in negotiations with creditors. For example, a debtor may settle a claim with a creditor and file a motion to seal the agreement to avoid negotiating similar claims with other creditors.[20] This tactic undermines bankruptcy's goals of providing transparency and fairness among all creditors. One essential aspect of bankruptcy law is to "facilitate the preservation of value for the collective benefit" of parties with an interest in the estate.[21] Accordingly, bankruptcy courts must ensure bankruptcy plans are "fair and equitable."[22] Thus, not granting motions to seal is consistent with the policy goals underlying bankruptcy law.[23]

Furthermore, permitting public access to settlement agreements preserves judicial integrity through public accountability.[24] For example, *Nixon v.*

---

[19] Robert P. Wasson, Jr., *Remedying Violations of the Discharge Injunction Under Bankruptcy Code 524, Federal Non-Bankruptcy Law, and State Law Comports with Congressional Intent, Federalism, and Supreme Court Jurisprudence for Identifying the Existence of an Implied Right of Action*, 20 BANKR. DEV. J. 77, 190 (2003) (The Constitution grants Congress plenary power over bankruptcy matters for the purpose of achieving "the public interest of maximizing available assets to benefit the greatest number of creditors to the greatest extent through a compulsory and collective bankruptcy process."); *see* U.S. CONST. art. I, § 8, cl. 4 ("The Congress shall have Power . . . to establish . . . uniform Laws on the subject of Bankruptcies throughout the United States.").

[20] *See In re* Oldco M Corp., 466 B.R. 234, 238 (Bankr. S.D.N.Y. 2012) (denying debtor's motion to seal a settlement agreement because "the only reason given for sealing the settlement was that public disclosure would undercut the settling defendant's leverage in negotiating with other claimants").

[21] Charles W. Mooney, Jr., *A Normative Theory of Bankruptcy Law: Bankruptcy as (is) Civil Procedure*, 61 WASH. & LEE L. REV. 931, 951 (2004); *see* 11 U.S.C. § 1123(a)(4) ("[A] plan shall . . . provide the same treatment for each claim or interest of a particular class, unless the holder of a particular claim or interest agrees to a less favorable treatment of such particular claim or interest . . . ."); 11 U.S.C §1322(a)(3) ("The plan shall . . . if the plan classifies claims, shall provide the same treatment for each claim within a particular class . . ."); Adam J. Levitin, *Toward a Federal Common Law of Bankruptcy: Judicial Lawmaking in a Statutory Regime*, 80 AM. BANKR. L.J. 1, 8 (2006) ("[T]he requirement of equal treatment of creditors within the same class is an implementation of the equity maxim that equity is equality—like creditors are to be treated alike. Many of the statutory powers of bankruptcy courts are themselves derived from equity powers.") (quotation marks omitted).

[22] 11 U.S.C. § 1129(b)(1) ("[T]he court, on request of the proponent of the plan, shall confirm the plan notwithstanding the requirements of such paragraph if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan.").

[23] *See, e.g.*, Motorola, Inc. v. Official Comm. of Unsecured Creditors (*In re* Iridium Operating LLC), 478 F.3d 452, 467 (2d Cir. 2007) ("Before pre-plan settlements can take effect, however, they must be approved by the bankruptcy court pursuant to Bankruptcy Rule 9019.").

[24] Legal Newsline v. Garlock Sealing Tech. LLC, No. 3:13-CV-00464-MOC, 2014 WL 3696576, at *1 (W.D.N.C. July 23, 2014) (citing United States v. Cianfrani, 573 F.2d 835, 851 (3d Cir. 1978)).

Warner Communications, Inc. discusses public access to judicial filings.[25] In *Nixon*, the Supreme Court recognized the presumption favoring public access to serve the "citizens' desire to keep a watchful eye on the workings of public agencies."[26] The Bankruptcy Reform Act of 1978 supplanted and codified the holding in *Nixon*.[27] Accordingly, this Comment argues for the adoption of the majority interpretation of Rule 9019(a), requiring the trustee to file settlement agreements with the court to seek judicial approval. This Comment also suggests the Advisory Committee on Bankruptcy Rules to amend Rule 9019(a) to require judicial approval of settlement agreements.

In this Comment, Part I will introduce the majority and minority interpretations of Rule 9019(a) and discuss the Rule's historical development to demonstrate the majority interpretation is consistent with the Rule's original purpose. Part II will discuss the role of disclosure in the bankruptcy process to demonstrate how the majority approach furthers the goals of bankruptcy. Part III compares two sections of the Code, 11 U.S.C. §§ 503 and 506(c), with Rule 9019 to emphasize that the majority's interpretation is consistent with the Code at large. Part IV provides the Advisory Committee on Bankruptcy Rules with a solution to eliminate the conflicting interpretations of Rule 9019.

I. BACKGROUND

Courts disagree on whether Rule 9019(a) regarding judicial approval of compromise or settlement agreements is mandatory or permissive.[28] The majority of courts believe Rule 9019(a) mandates judicial approval.[29] These

---

[25] 435 U.S. 589 (1978).

[26] *Id.* at 598.

[27] *See* 11 U.S.C. § 107(a); 16 COLLIER ON BANKRUPTCY ¶ 107.01 (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2012).

[28] *See* Sears, Roebuck & Co. v. Spivey, 265 B.R. 357, 366 n.6 (Bankr. E.D.N.Y. 2001) ("Courts are split on whether the language of Rule 9019 by itself can require both a motion and judicial approval as preconditions to settlement."); Ann K. Wooser, Annotation, *Construction and Application of Fed. R. Bankr. P. 9019(a), Concerning Judicial Approval of Compromise or Settlement in Bankruptcy Proceeding—Based on Paramount Interest of Creditors*, 35 A.L.R. Fed. 2d 209 ¶ 2 (2009) ("[A] split of authority has resulted as to whether Fed. R. Bankr. P. 9019's provisions relating to bankruptcy court approval of compromise or settlement agreements are mandatory or permissive, with the great weight of authority holding that these requirements are mandatory.").

[29] *See* Valencia, *supra* note 2, at 439 ("[D]espite Rule 9019's inconclusive language, compliance with the Rule is mandatory [in numerous courts]."). *See generally In re* Blehm Land & Cattle Co., 859 F.2d 137, 141 (10th Cir. 1988) ("Under Bankruptcy Rule 9019, a settlement or compromise agreement between the trustee and a party must be approved by the court, after notice and hearing, to be enforceable."); Reynolds v. Comm'r, 861 F.2d 469, 473 (6th Cir. 1988) ("In bankruptcy proceedings, as distinguished from ordinary civil cases, any compromise between the debtor and his creditors must be approved by the court as fair and equitable.");

courts have construed and applied Rule 9019(a) with creditors' interests in mind because they want to prevent undue prejudice to non-settling creditors that could result from an unapproved settlement.[30] By contrast, the minority of courts that interpret Rule 9019(a) as permissive ground their analysis on the language of the Rule's independent clause, which states, "the court *may* approve a compromise or settlement."[31]

The majority of courts use Rule 9019(a) to require the trustee in bankruptcy to seek judicial approval of post-petition settlement agreements between debtors and creditors. These courts rely on a few different rationales for mandating approval.[32] Some courts acknowledge the Rule's language is ambiguous and err on the side of caution by mandating judicial approval of settlement agreements.[33] Other courts look beyond the Rule's language to justify mandatory court approval. These courts explain that unlike settlements outside of bankruptcy, settlements in bankruptcy "between the debtor and one of his individual creditors necessarily affects the rights of other creditors by reducing the assets of the estate available to satisfy other creditors' claims."[34] Thus, judicial approval is necessary to "facilitate the preservation of value for the collective benefit" of parties with an interest in the estate.[35] Additionally, at least one court has determined whether to require approval on a case-by-case basis, allowing extrajudicial settlements to bind all parties to the agreement, as

---

Valucci v. Glickman, Berkovitz, Levinson & Weiner (*In re* Glickman, Berkovitz, Levinson & Weiner), 204 B.R. 450, 455 (E.D. Pa. 1997) ("The bankruptcy court must review the settlement of pre-petition claims under Bankruptcy Rule 9019(a)."); *In re* Leslie Fay Cos., 168 B.R. 294, 305 (Bankr. S.D.N.Y. 1994) ("Compromises may not be made in bankruptcy absent notice and a hearing and a court order.").

[30] Wooser, *supra* note 28; *see also* Eddy v. Nat'l Union Fire Ins. Co. (*In re* Med. Asset Mgmt., Inc.), 249 B.R. 659, 663 (Bankr. W.D. Pa. 2000) ("The fairness to the settling parties of a proposed settlement agreement may not warrant its approval if the rights of others who are not parties to the settlement agreement are unduly prejudiced. We must further determine that no one has been set apart for unfair treatment.") (quotation marks omitted).

[31] FED. R. BANKR. P. 9019(a) (emphasis added).

[32] *See* Valencia, *supra* note 2, at 440–41.

[33] *Id.* at 439 ("Numerous courts have similarly held that, despite Rule 9019's inconclusive language, compliance with the Rule is mandatory.").

[34] *Id.* at 441 (quoting *Reynolds*, 861 F.2d 469).

[35] Mooney, *supra* note 21; *see* 11 U.S.C. § 1123(a)(4) (2012) ("[A] plan shall . . . provide the same treatment for each claim or interest of a particular class, unless the holder of a particular claim or interest agrees to a less favorable treatment of such particular claim or interest . . . ."); 11 U.S.C §1322(a)(3) ("The plan shall . . . if the plan classifies claims, shall provide the same treatment for each claim within a particular class . . ."); Levitin, *supra* note 21 ("[T]he requirement of equal treatment of creditors within the same class is an implementation of the equity maxim that equity is equality—like creditors are to be treated alike. Many of the statutory powers of bankruptcy courts are themselves derived from equity powers.") (quotation marks omitted).

long as all parties that have an interest in the estate "are present or aware of the contemplated settlement."[36]

On the other hand, a minority of courts believe Rule 9019(a) simply permits the trustee to move for judicial approval of party settlement agreements upon the trustee's discretion. For example, in *In re Dalen*, the court emphasized courts retain authority to approve settlement agreements contingent on the trustee filing a motion seeking judicial approval, reasoning "Rule 9019(a) states simply that the court 'may' approve a compromise or settlement 'if' a motion is filed by the trustee. Nothing within Rule 9019(a) actually prohibits a trustee from settling a claim for or against the estate outside the purview of the bankruptcy court."[37] The court focused its analysis on the Rule's language, recognizing that Rule 9019(a) on its face does not expressly require judicial approval of post-petition settlement agreements.

This Comment proposes that the majority interpretation of Rule 9019(a) best suits the Rule's purpose and intent. The proceeding paragraphs demonstrate the purpose and intent behind Rule 9019 by (a) introducing the Rule's statutory predecessor, (b) the discussing pre-Code practices of Rule 9019, (c) reviewing the procedural and evidentiary component of the Rule, (d) discussing bankruptcy courts' authoritative power under the Code, and (e) analyzing the Code's legislative history.

A. A Brief Historical Overview of Rule 9019

Rule 919 is Rule 9019's predecessor. Rule 919 corresponded to a section of the Code,[38] which helped readers understand the purpose and the drafter's intent in writing the Rule. On the other hand, Rule 9019 "does not correspond to a section of the Code. Further, the legislative history relating to the repeal of former 11 U.S.C.[] § 50 affords no insight into the intent behind this discontinuity."[39]

B. Pre-Code Practices

Courts have not intended to depart from pre-Code bankruptcy practices on Rule 9019. Before Congress enacted the Code, a majority of jurisdictions

---

36 Valencia, *supra* note 2, at 440.

37 259 B.R. 586, 598 (Bankr. W.D. Mich. 2001) (emphasis omitted).

38 FED. R. BANKR. P. 919(a) (1982) (repealed 1982); Wooser, *supra* note 28.

39 Wooser, *supra* note 28; *see* FED. R. BANKR. P. 9019(a); FED. R. BANKR. P. 919(a) (1982) (repealed 1982).

required compliance with Rule 9019(a), requiring trustees to seek court approval of settlements entered into post-petition.[40] In one case, a bankruptcy court in Georgia held that a settlement agreement was subject to court approval as required under former Bankruptcy Rule 919(a).[41] In a second case, a District Court in New York found that Rule 919(a) "required authorization of the bankruptcy court regarding the resolution of claims affecting the bankruptcy estate."[42] This continued pre-Code practice indicates courts have understood this provision requires parties to seek court approval of settlement agreements post-petition.

This understanding is also reflected by the substantial similarities between the language of Rule 9019 and its predecessor's language.[43] In fact, the Advisory Committee notes to Rule 9019 explain that two of its subsections "are essentially the same as the provisions of former Bankruptcy Rule 919."[44] In the same vein, the Advisory Committee Notes to former Rule 919 reveal its provisions dealing with compromises and settlements were based on Rule 919's predecessor, Section 27 of the Bankruptcy Act.[45] This consistency in the language of Rule 9019 and its predecessors' language supports the notion that Congress did not mean to deviate from the majority interpretation, which required trustees to move for judicial approval of settlement agreements.[46] Beyond pre-Code practices and the consistency in the language of Rule 9019 and its predecessors, there are other aspects of Rule 9019(a) supporting the majority interpretation.

---

[40] Wooser, *supra* note 28 ("Prior to the enactment of Rule 9019(a), many courts, including the United States Supreme Court, had held that under former [Federal Rule] 919, a compromise or settlement agreement had to be approved by the bankruptcy court before it could be binding or enforceable in the context of a bankruptcy case.").

[41] Providers Benefit Life Ins. Co. v. Tidewater Grp., Inc. (*In re* Tidewater Grp., Inc.), 8 B.R. 930, 933 (Bankr. N.D. Ga. 1981).

[42] Truck Drivers, Local 807 (IBT) v. Bohack Corp., No. 75-C-905, 1975 U.S. Dist. LEXIS 15214, at *7 n.5 (E.D.N.Y. 1975) ("On stipulation of the parties to any controversy affecting the estate the court may authorize the matter to be submitted to final and binding arbitration.").

[43] *Compare* FED. R. BANKR. P. 919(a) (1982) (repealed 1982) ("On application by the trustee or receiver and after hearing on notice to the creditors as provided in Rule 203(a) and to such persons as the court may designate, the court may approve a compromise or settlement."), *with* FED. R. BANKR. P. 9019(a) ("On motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement. Notice shall be given to creditors, the United States trustee, the debtor, and indenture trustees as provided in Rule 2002 and to any other entity as the court may direct.").

[44] FED. R. BANKR. P. 9019(a).

[45] *See* Valencia, *supra* note 2, at 432 n.11.

[46] *See* Karen M. Gebbia-Pinetti, *Interpreting the Bankruptcy Code: An Empirical Study of the Supreme Court's Bankruptcy Decisions*, 3 CHAP. L. REV. 173, 202 (2000) ("[T]he Court will rely upon pre-Code judicial practices only if those practices were well-established before the Bankruptcy Code was enacted.").

C. Procedural and Evidentiary Components of Rule 9019

The Second Circuit has emphasized Rule 9019 is unique because "it does not have a parallel section in the Code."[47] The Code's predecessor, the Bankruptcy Act, "contained a neatly parallel set of substantive and procedural provisions" that required court approval of all proposed compromises and settlements.[48] By contrast, the Code does not contain a "detailed substantive section requiring approval of all proposed compromises and settlements";[49] however, Rule 9019 contains a procedural and an evidentiary component.[50] The procedural component requires the trustee to notify non-settling creditors about the proposed settlement.[51] The evidentiary component is related to the court's authority to "approve a compromise or settlement."[52] Under the evidentiary component of the rule, bankruptcy courts are authorized to approve settlement agreements, if they are both fair and equitable and in the best interest of the estate.[53]

To determine if a settlement is fair and equitable, courts must assess the following three factors: "(1) the probability of success in litigation, with due consideration for the uncertainty in fact and law; (2) the complexity and likely duration of litigation and any attendant expense, inconvenience and delay; and (3) all other factors bearing on the wisdom of the compromise."[54] Under the third factor, courts consider the best interest of the creditors and the extent to

---

47 Motorola, Inc. v. Official Comm. of Unsecured Creditors (*In re* Iridium Operating LLC), 478 F.3d 452, 467 (2d Cir. 2007). *But see* Brad B. Erens & Kelly M. Neff, *Confidentiality in Chapter 11*, 22 EMORY BANKR. DEV. J. 47, 65 (2005) (asserting some courts have found that § 363 requires judicial approval for settlements).

48 Valencia, *supra* note 2, at 436.

49 *Id*.

50 FED. R. BANKR. P. 9019(a).

51 *Id.* ("On motion by the trustee and after notice and a hearing . . . [n]otice shall be given to creditors, the United States trustee, the debtor, and indenture trustees as provided in Rule 2002 and to any other entity as the court may direct.").

52 *Id.* ("On motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement.").

53 *See* Official Comm. of Unsecured Creditors v. Cajun Elec. Power Coop., Inc. (*In re* Cajun Elec. Power Coop., Inc.), 119 F.3d 349, 356 (5th Cir. 1997); Sanford I. Weisburst, *Judicial Review of Settlements and Consent Decrees: An Economic Analysis*, 28 J. LEGAL STUD. 55, 77 (1999) ("[T]he bankruptcy court must weigh the evidence regarding the reasonableness of the settlement to determine if the settlement is 'fair and equitable.'" (citing Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. 414, 424 (1968))).

54 *See* Conn. Gen. Life Ins. Co. v. United Cos. Fin. Corp. (*In re* Foster Mortg. Corp.), 68 F.3d 914, 918 (5th Cir. 1995); *In re Cajun Elec. Power Coop., Inc.*, 119 F.3d at 356.

which the settlement is truly the product of arms-length bargaining and not fraud or collusion.[55]

Under the arms-length consideration, courts determine whether parties are making decisions beyond their reach of personal influence or control.[56] In bankruptcy, arms-length consideration presents the court with an important question when a trustee represents the interest of one creditor favorably. A favorable representation can inadvertently hurt another creditor that is not present during the settlement negotiations.[57] Generally, all creditors want to receive payment from the estate, but the interest of each creditor is different given the amount of their individual claim. One commentator provides the following example: "the trustee may agree to an overly generous settlement on a disputed claim with one creditor, thus reducing (or failing to maximize) the amount of assets available for distribution to the other creditors, who are unrepresented in the settlement negotiations."[58] Further, when parties settle, the facts of the case are not "fully developed by the court."[59] As a result, a non-settling party, who did not have an opportunity to communicate their interest during settlement negotiations, has lost the opportunity to have the court consider whether settling parties made decisions beyond their self-interest. Due to the loss of opportunities, the non-settling party may distrust whether the trustee adequately represented their interests and whether the bankruptcy court is properly carrying out its equitable powers. Thus, when a bankruptcy court reviews a settlement agreement, creditors receive reassurance that the settlement considered the interests of all parties equally, particularly under arms-length consideration.[60]

D. Bankruptcy Courts' Power Under § 105

A trustee has authority to administer the debtor's estate; this authority is limited by the power Congress bestowed on bankruptcy courts under the Code.[61] The Code states the "court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions" of the Code.[62]

---

55 *See In re Cajun Elec. Power Coop., Inc.*, 119 F.3d at 356.

56 *See In re Foster Mortgage Corp.*, 68 F.3d at 919.

57 *See* Weisburst, *supra* note 53, at 76 ("[T]he problem of inadequate representation here lies in the fact that the trustee, who purports to represent the interests of the creditors, may fail in such representation.").

58 *Id.* at 76–77.

59 *Id.* at 77.

60 *See In re Foster Mortg. Corp.*, 68 F.3d at 918.

61 11 U.S.C. § 105(a) (2012).

62 *Id.*

Moreover, the Code grants the court with general power "to tak[e] any action or mak[e] any determination necessary or appropriate to enforce or implement court orders or rules, or prevent an abuse of process."[63] Accordingly, bankruptcy courts may use this power to prevent actions that interfere with the just and fair administration of the estate, as long as the court is acting in a manner prescribed by the Code.[64]

In 2014, the Supreme Court reminded us that though bankruptcy courts may exercise their statutory and inherent powers under the Code, bankruptcy courts "may not contravene specific statutory provisions."[65] In *Law v. Siegel*, the Court addressed an issue that arose between a debtor and a chapter 7 trustee.[66] The trustee claimed the debtor pretended to have obtained a loan "meant to preserve [the debtor's] equity in his residence beyond what he was entitled to exempt by perpetrating a fraud on his creditors and the court."[67] Consequently, the trustee filed a motion to surcharge the debtor's homestead exemption, which allowed the debtor to keep the equity in his residence, making the "funds available to defray [the trustee's] attorney's fees."[68] The bankruptcy court granted the trustee's motion.[69] Nonetheless, the Court held the bankruptcy court contravened with the "express provisions of the Code by ordering that the debtor's exempt property be used to pay debts and expenses for which that property is not liable under the Code."[70] The Court provided two reasons for its decision. First, the Court explained the Code instructs the trustee to make a timely objection.[71] Second, and most importantly, the Court explained the term "may exempt" under the Code is specifically attributed to the trustee and not bankruptcy courts.[72] Thus, the Court reasoned the statute gives the debtor discretion to exempt property.[73] Accordingly, by granting the

---

63 *Id.*

64 *See* Sears, Roebuck & Co. v. Spivey, 265 B.R. 357, 371 (E.D.N.Y. 2001) (noting that § 105 of the Bankruptcy Code "bestows on bankruptcy courts a specific equitable power to act in accordance with principles of justice and fairness," but the court may exercise this power only within the confines of the Code).

65 Law v. Siegel, 134 S. Ct. 1188, 1195 (2014).

66 *Id.* at 1193.

67 *Id.*

68 *Id.*

69 *Id.* at 1193–94.

70 *Id.* at 1195.

71 *Id.* at 1196.

72 11 U.S.C. § 522(d)(1) (2012) ("The following property may be exempted under subsection (b)(2) of this section: []The debtor's aggregate interest, not to exceed $22,975 in value, in real property or personal property that the debtor or a dependent of the debtor uses as a residence, in a cooperative that owns property that the debtor or a dependent of the debtor uses as a residence . . . ."); *Siegel*, 134 S. Ct. at 1196.

73 *Siegel*, 134 S. Ct. at 1196.

trustee's motion to exempt property, the bankruptcy court did not exercise its power within the confines of the Code.[74]

Unlike *Siegel*, where the bankruptcy court contravened with a provision in the Code, the majority of courts that mandate compliance with Rule 9019(a) do not contravene with any express provisions of the Code.[75] As stated above, Rule 9019 does not correspond to a section of the Code.[76] In essence, the majority's interpretation does not contravene with an express provision of the Code because the provision is nonexistent. Moreover, unlike the section of the Code mentioned in *Siegel*, which vests the discretion in the debtor to exempt property of the estate, Rule 9019(a) vests discretion in courts.[77] Under Rule 9019(a), the phrase "may approve" is attributed to courts.[78] Therefore, the majority of courts requiring compliance with Rule 9019(a) are exercising their powers in a manner prescribed by the Code. Moreover, the majority's interpretation of the Rule also aligns perfectly with the Rule's policy.

E. Policy Reasons Behind Rule 9019

There are two policy reasons behind Rule 9019. First, Rule 9019 seeks to prevent debtors and creditors from making secret agreements.[79] Second, Rule

---

[74] *Id.* ("'[W]hatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of' the Bankruptcy Code." (quoting Nw. Bank Worthington v. Ahlers, 485 U.S. 197, 206 (1988))).

[75] *See* Valencia, *supra* note 2, at 439 ("Numerous courts have similarly held that, despite Rule 9019's inconclusive language, compliance with the Rule is mandatory."). *See generally In re* Blehm Land & Cattle Co., 859 F.2d 137, 141 (10th Cir. 1988) ("Under Bankruptcy Rule 9019, a settlement or compromise agreement between the trustee and a party must be approved by the court, after notice and hearing, to be enforceable."); Reynolds v. Comm'r, 861 F.2d 469, 473 (6th Cir. 1988) ("In bankruptcy proceedings, as distinguished from ordinary civil cases, any compromise between the debtor and his creditors must be approved by the court as fair and equitable."); Valucci v. Glickman, Berkovitz, Levinson & Weiner (*In re* Glickman, Berkovitz, Levinson & Weiner), 204 B.R. 450, 455 (E.D. Pa. 1997) ("The bankruptcy court must review the settlement of pre-petition claims under Bankruptcy Rule 9019(a)."); *In re* Leslie Fay Cos., 168 B.R. 294, 305 (Bankr. S.D.N.Y. 1994) ("Compromises may not be made in bankruptcy absent notice and a hearing and a court order.").

[76] Wooser, *supra* note 28 ("[Rule 9019] does not correspond to a section of the Bankruptcy Code like its predecessor, and the legislative history relating to the repeal of former 11 U.S.C.A. § 50 affords no insight into the intent behind this discontinuity . . . .").

[77] FED. R. BANKR. P. 9019(a) ("On motion by the trustee and after notice and hearing, the court may approve a compromise of settlement.").

[78] *Id.* ("On motion by the trustee and after notice and hearing, the court may approve a compromise of settlement.").

[79] *See* Valencia, *supra* note 2, at 433 ("Many courts have noted that the purpose behind Bankruptcy Rule 9019 is to prevent secret agreements between the debtor and other parties, and to provide interested creditors with a right to object to the proposed settlement.").

9019 seeks to provide creditors who have an interest in the estate with an equal opportunity at the bargaining table.[80] In fact, the Second Circuit has explicitly stated Rule 9019 "has a 'clear purpose to . . . prevent the making of concealed agreements which are unknown to the creditors and unevaluated by the court.'"[81]

The majority of courts that mandate judicial approval under Rule 9019(a) are in tune with its purpose.[82] The majority advances the purpose of the Rule for the following reasons: (1) mandating judicial approval ensures that a debtor and a creditor are not settling claims at the expense of non-settling parties who are unaware of the settlement;[83] and (2) mandating approval provides non-settling parties with an opportunity to object to the terms of the proposed settlement.[84]

By contrast, the minority view conflicts with the Rule's purpose. The minority of courts do not mandate approval of settlement agreements. [85] Under the minority view, the trustee is given authority to enter into settlements

---

[80] *See In re* Fortran Printing, Inc., 297 B.R. 89, 97 (Bankr. N.D. Ohio 2003) ("The principal reason for requiring court approval is that creditors must be given notice of the agreement and an opportunity to object and the court must independently review the agreement to ensure that it is in the best interests of the estate."); Valencia, *supra* note 2, at 433.

[81] Motorola, Inc. v. Official Comm. of Unsecured Creditors (*In re* Iridium Operating LLC), 478 F.3d 452, 461 (2d Cir. 2007) (quoting *In re* Masters, Inc., 141 B.R. 13, 16 (Bankr. E.D.N.Y. 1992).

[82] Valencia, *supra* note 2, at 439 ("Numerous courts have similarly held that, despite Rule 9019's inconclusive language, compliance with the Rule is mandatory."). *See generally In re* Blehm Land & Cattle Co., 859 F.2d 137, 141 (10th Cir.1988) ("Under Bankruptcy Rule 9019, a settlement or compromise agreement between the trustee and a party must be approved by the court, after notice and hearing, to be enforceable."); Reynolds v. Comm'r, 861 F.2d 469, 473 (6th Cir. 1988) ("In bankruptcy proceedings, as distinguished from ordinary civil cases, any compromise between the debtor and his creditors must be approved by the court as fair and equitable."); Valucci v. Glickman, Berkovitz, Levinson & Weiner (*In re* Glickman, Berkovitz, Levinson & Weiner), 204 B.R. 450, 455 (E.D. Pa. 1997) ("The bankruptcy court must review the settlement of pre-petition claims under Bankruptcy Rule 9019(a)."); *In re* Leslie Fay Cos., 168 B.R. 294, 305 (Bankr. S.D.N.Y. 1994) ("Compromises may not be made in bankruptcy absent notice and a hearing and a court order.").

[83] *See Reynolds*, 861 F.2d at 473 ("Any settlement between the debtor and one of his individual creditors necessarily affects the rights of other creditors by reducing the assets of the estate available to satisfy other creditors' claims.").

[84] *See* Valencia, *supra* note 2, at 443 (citing Saccurato v. Masters, Inc. (*In re* Masters, Inc.), 149 B.R. 289 (Bankr. E.D.N.Y. 1992)).

[85] *See In re* Dalen, 259 B.R. 586, 595 (Bankr. W.D. Mich. 2001) ("Nothing within Rule 9019(a) actually prohibits a trustee from settling a claim for or against the estate outside the purview of the bankruptcy court."); *In re* Telesphere Commc'ns, 179 B.R. 544, 552 (Bankr. N.D. Ill. 1994) ("Unless the Bankruptcy Code requires court approval for the underlying action that the trustee seeks to accomplish, there should be no need for court approval of a settlement that effectuates that action.").

without the court's oversight.[86] This provides the trustee with an opportunity to enter into secret agreements because the trustee has discretion to forgo judicial approval. These secret agreements may not provide non-settling parties with an equal opportunity at the bargaining table, since the non-settling parties may not know of them. As a result, the minority interpretation of Rule 9019(a) undermines the Rule's purpose.

F. The Bankruptcy Code's Legislative History

To help bankruptcy courts focus on judicial functions, the bankruptcy estate and the estate's property are managed by a trustee in bankruptcy.[87] The trustee helps "gather all of the debtor's property, protect it, maintain it, sell the property for the highest possible price, and distribute the proceeds among the creditors."[88] The Code's legislative history reflects Congress's intention to reduce the courts' active participation in administrating the debtor's estate, helping courts focus on judicial functions.[89]

The House Bill indicates that it removes "many of the supervisory functions from the judge in the first instance, transfers most of them to the trustee [in bankruptcy] and to the United States trustee, and involves the judge only when a dispute arises."[90] By reducing the judge's participation in administering the estate, Congress intended for judges to "become passive arbiters of dispute," and for trustees to assume "the bankruptcy judges' supervisory roles over the conduct of bankruptcy cases."[91] The bill supports this interpretation by stating the following:

---

[86] *See In re Dalen*, 259 B.R. at 603 ("Nothing obligates the trustee to seek court approval of a proposed settlement. It is discretionary.").

[87] *See* ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, LAW OF DEBTORS AND CREDITORS 128 (6th ed. 2009).

[88] *Id*.

[89] Peter J. Davis, *Settlements as Sales Under the Bankruptcy Code*, 78. U. CHI. L. REV. 999, 1005 (2011); *see* Rafael I. Pardo & Kathryn A. Watts, *The Structural Exceptionalism of Bankruptcy Administration*, 60 UCLA L. REV. 384, 447 (2012) (explaining that the reformers of the Code "focused primarily on the management and busywork in the supervision and processing of bankruptcy cases and on concerns about judicial participation in non-judicial administrative tasks"); Rafael I. Pardo, *Eliminating the Judicial Function in Consumer Bankruptcy*, 81 AM. BANKR. L.J. 471, 489 (2007) (explaining that Congress established the Bankruptcy Act Commission to relieve bankruptcy courts of significant administrative functions in the absence of a litigable controversy (citing REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. DOC. NO. 93-137, pt.1, at 6–7 (1973))).

[90] Davis, *supra* note 89.

[91] *Id.* at 999 n.35; *see also* H.R. REP. NO. 95-595, at 107 (1978) *as reprinted in* 1978 U.S.C.C.A.N. 5797.

> The trustee in each case will be responsible for the administration of the case. The bill gives him adequate powers to accomplish what must be done, and relieves him of the necessity for applying to the court and receiving court approval for every action he proposes to take . . . . If an objection to the proposed action is not made, then the trustee may proceed with the same authority as if he had obtained a court order in authorizing the action. If an objection is made, the court will hear the dispute generated by the trustee's proposed action and the objection to it, and make the appropriate orders, either authorizing or prohibiting the trustee's proposed action.[92]

The bill recognizes the parties' desire to exit bankruptcy as quickly as possible, and thereby, acknowledges it is not necessary for the trustee to seek the court's approval for actions that fall under the ordinary administrative duties of the trustee. This recognition is pronounced under the "Code's section governing rules of construction, [which] specifies the phrase 'after notice and hearing' authorizes action without court hearing," provided that a party to a case does not request a hearing;[93] however, the bill does not explicitly state whether settling claims is one of the trustee's administrative duties.[94]

Even if Congress intended to give the trustee authority to settle claims without court approval, the judge does not usurp the trustee's administrative role when a judge determines whether they should approve a settlement agreement.[95] Two scholars have expressed that "[c]ourts routinely engage in a lawmaking function by filling in the gaps of the Bankruptcy Code."[96] Such gaps empower courts to resolve "competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved."[97] For instance, four sections of the Bankruptcy Code describe the trustee's duties in the bankruptcy process.[98] Generally, under chapter 7, the trustee is responsible for performing ministerial acts to ensure creditors receive proper distribution

---

92 H.R. REP. NO. 95-595, at 107–08 (1978) *as reprinted in* 1978 U.S.C.C.A.N. 5797.

93 Pardo, *supra* note 89, at 490; *see* 11 U.S.C. § 102(1)(B)(i) (2012) ("In this title–'after notice and hearing,' or a similar phrase . . . authorizes an act without an actual hearing if such notice is given properly if–such a hearing is not requested by a party in interest."); *see, e.g.*, 11 U.S.C. § 704.

94 *In re* Novak, 383 B.R. 660, 671 n.16 (Bankr. W.D. Mich. 2008) (stating that there is nothing in the Code's legislative history to suggest that the trustee can settle claims without court approval).

95 *See In re* Carla Leather, Inc., 44 B.R. 457, 465 (Bankr. S.D.N.Y. 1984) (finding that the fair and equitable standard bankruptcy courts apply in determining whether to approve a settlement agreement "does not portend substitution of the court's judgment for that of the trustee").

96 Pardo & Watts, *supra* note 89, at 386.

97 *Id.* (quoting Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 865–66 (1984)) (quotation marks omitted).

98 *See* 11 U.S.C. §§ 704(a)(1), 1106 (a)(1), 1202(b), 1302(b).

from the estate.[99] Under chapter 11 and chapter 12, the trustee is given some of the administrative authority given to the trustee under chapter 7.[100] Likewise, chapter 13 also gives the trustee some of the administrative duties under § 704.[101] Yet, these sections do not reference whether the trustee is responsible for ensuring the terms of a settlement agreement are fair to parties outside the agreement.[102] As a result, the court has to fill this gap.

II. ANALYSIS

A. A Collective Procedure Requiring Disclosure

A bankruptcy case is a collective proceeding where a trustee represents the debtor's estate and is responsible for administering the estate to maximize value for creditors.[103] As a result, the trustee must file documents with the court on behalf of the estate, such as filing a motion for fraudulent transfer.[104]

On the eve of bankruptcy, a debtor may wish to keep certain property out of creditors' reach. The debtor may transfer the property to a family member or an acquaintance before they file for bankruptcy. Upon filing, the Office of the U.S. Trustee selects a trustee to administer the debtor's estate, who then gathers all of the debtor's property.[105] If the trustee learns that the debtor tried to keep property from creditors' reach, the trustee may attempt to transfer the property back to the estate by alleging fraudulent transfer.[106] This transfer benefits the creditors who are paid from the estate because the estate's value increases once the property is transferred back. Thus, the transfer promises to generate a higher rate of distribution to creditors.

---

99 *See* 11 U.S.C. § 704(a)(1).

100 *See* 11 U.S.C. §§ 1106 (a)(1), 1202(b).

101 *See* 11 U.S.C. § 1302(b).

102 *See* Lee Way Holding Co. v. Liberty Mut. Ins. Co. (*In re* Lee Way Holding Co.), No. 2-85-00661, 1990 U.S. Dist. LEXIS 20228, at *12 (S.D. Ohio July 11, 1990) ("[T]here is no specific Bankruptcy Code provision authorizing a trustee to settle controversies . . . .").

103 Mooney, *supra* note 21, at 978 ("[T]he core principle of bankruptcy law is the enhancement and vindication of legal entitlements in a collective proceeding.").

104 *See, e.g.*, 11 U.S.C. §§ 363(c)(2)(B), 548(a)(1), 554(a)–(b), 547, 707(b), 727(d)–(e).

105 WARREN & WESTBROOK, *supra* note 87 (For example, in a chapter 7 case, "a government official from the Office of the U.S. Trustee generally selects [the trustee] from a panel of potential appointees that the U.S. has chosen as qualified to serve as [trustees]." (citing 11 U.S.C. § 701(a); 28 U.S.C. § 586(a)(1) (2012))).

106 11 U.S.C. § 548(a)(1).

Once the trustee files certain documents with the court,[107] such as a fraudulent transfer, they become publicly accessible.[108] The right to access filings may concern parties in a bankruptcy case who have the trustee settle claims on behalf of the estate before the bankruptcy case is dismissed. Yet, as the following paragraphs will illustrate, bankruptcy favors disclosure because of its collective nature.

1. Right to Access Under Common Law and the Bankruptcy Code

The underlying policy of Rule 9019, coupled with the policy underlying public access to judicial filings, supports the majority's interpretation of Rule 9019(a), requiring judicial approval of settlement agreements.[109] In fact, the policy reasons behind sealing and Rule 9019 are considerably similar because both policies disfavor concealing filings where third parties might have an interest in knowing the essence of the filings.[110] First, this section will provide background information about the common law right favoring access to judicial filings and the codification of this right under the section of the Code governing public access to filings.[111] Second, this section will discuss case law to demonstrate the reasons courts have used to deny motions to seal settlement agreements are similar to the reasons underlying judicial approval of settlement agreements under Rule 9019.

As courts of equity,[112] bankruptcy courts properly promote their integrity by providing public access to its filings. The right to access filings and judicial

---

107 *See* FED. R. BANKR. P. 5005(a) ("Place of Filing. The lists, schedules, statements, proofs of claim or interest, complaints, motions, applications, objections and other papers required to be filed by these rules, except as provided in 28 U.S.C. §1409, shall be filed with the clerk in the district where the case under the Code is pending. The judge of that court may permit the papers to be filed with the judge, in which event the filing date shall be noted thereon, and they shall be forthwith transmitted to the clerk.").

108 *See* 11 U.S.C. § 107.

109 *See* Nixon v. Warner Commc'ns, Inc., 435 U.S. 589, 592 n.1 (1978); Valencia, *supra* note 2, at 434.

110 *Compare Nixon*, 435 U.S. at 598 ("The interest necessary to support the issuance of a writ compelling access has been found, for example, in the citizen's desire to keep a watchful eye on the workings of public agencies . . . ."), *and* Lloyd Doggett, *Public Access to Public Courts: Discouraging Secrecy in the Public Interest*, 69 TEX. L. REV. 643, 648 (1991) ("[G]reater access to civil judicial records promotes public health and safety."), *with In re* United Shipping Co., No. 4-88-533, 1989 WL 12723 at *1, *5 (Bankr. D. Minn. Feb. 17, 1989) ("The focus of Rule 9019 is to protect other creditors against bad deals made between one creditor and the debtor."), *and* Valencia, *supra* note 2, at 434 ("Many courts have noted that the purpose behind Bankruptcy Rule 9019 is to prevent secret agreements between the debtor and other parties, and to provide interested creditors with a right to object to the proposed settlement.").

111 11 U.S.C. § 107.

112 *See* 11 U.S.C. § 105(a); Larson v. First State Bank of Vienna (*In re* Eggen), 21 F.2d 936, 938 (8th Cir. 1927) ("A court of bankruptcy is a court of equity, and its judicial officers, its judge and its referee in bankruptcy, in deciding and adjudging the rights and duties of parties entitled to their decision, are governed

proceedings "is rooted in the public's First Amendment right to know about the administration of justice."[113] This right is a means by which citizens can monitor the workings of the judicial system to determine whether bankruptcy courts are treating parties with an interest in the estate fairly.[114] Moreover, public access to judicial records affords parties who have an interest in the estate, who might not otherwise know a debtor filed for bankruptcy, with the opportunity to file claims against the debtor. Thus, sealing filings, such as settlement agreements, interferes with the public's right to monitor the judicial system.[115]

In *Nixon v. Warner Communications*, the Court recognized the common law right to access judicial records, including two exceptions to this right.[116] Under common law, courts decided whether the public had a right to access the filings of a bankruptcy case based on the facts and circumstances of each case.[117] In *Nixon*, the Court explained that the right to access was not conditioned on a party's "proprietary interest in the document or upon a need for it as evidence."[118] For example, a party could not file a request to seal a filing or an entire record merely for its own self-interest to conceal information because disclosure of the filing or record caused an immaterial inconvenience to the party. Nonetheless, the Court explained that while access could serve as a vehicle to monitor the workings of the court, it could also serve as a means for improper purposes by non-parties to a bankruptcy case, such as (1) non-parties seeking to invade the privacy of the parties to the case that could give rise to scandal, or (2) non-parties seeking to invade the privacy of the parties to

---

by the principles and rules of equity jurisprudence."); Alan M. Ahart, *The Limited Scope of Implied Powers of a Bankruptcy Judge: A Statutory Court of Bankruptcy, Not a Court of Equity*, 79 AM. BANKR. L.J. 1, 11 (2005); *see also* Levitin, *supra* note 21 ("Courts have often seen bankruptcy equity affecting not just jurisdiction or enforcement of orders, but also rules of decision and dictating how courts should apply their equitable powers." (citing *In re Eggen*, 21 F.2d at 938)).

113 Erens & Neff, *supra* note 47 ("[T]he preference for public access is founded upon the First Amendment right to be informed about the administration of justice and has been called 'fundamental to a democratic state.'" (quoting *In re* Inslaw, Inc., 51 B.R. 298, 299 (Bankr. D.D.C. 1985))).

114 *See* 11 U.S.C. § 1123(a)(4) ("[A] plan shall . . . provide the same treatment for each claim or interest of a particular class, unless the holder of a particular claim or interest agrees to a less favorable treatment of such particular claim or interest . . . ."); 11 U.S.C. § 1322(a)(3) ("[T]he plan . . . if the plan classifies claims, shall provide the same treatment for each claim within a particular class . . . ."); Levitin, *supra* note 21 ("[T]he requirement of equal treatment of creditors within the same class is an implementation of the equity maxim that equity is equality—like creditors are to be treated alike. Many of the statutory powers of bankruptcy courts are themselves derived from equity powers.") (quotation marks omitted).

115 *See* 11 U.S.C. § 107.

116 435 U.S. 589, 597–98 (1978).

117 *See id.* at 599.

118 *Id.* at 597.

the case for the purpose of placing a party at a competitive business disadvantage. Thus, under *Nixon* the "right to inspect and copy judicial records" was not absolute.[119]

The Bankruptcy Reform Act of 1978 codified and supplanted the common law right to access filings and judicial proceedings[120] under § 107 of the Code dealing with public access to papers.[121] Section 107 states, "[e]xcept as provided in subsections (b) and (c) and subject to section 112, a paper filed in a case under this title and the dockets of a bankruptcy court are public records and open to examination by an entity at reasonable times without charge."[122] To determine if a document or record is subject to the right of access, courts consider whether the document or record is a judicial record, meaning whether it has been filed with the court or has been "incorporated or integrated" into the court's adjudicatory proceedings.[123]

Due to the private nature of settlement agreements, issues arise when a settlement agreement is filed with the court because the settlement becomes public. To keep settlements private, parties must move to seal the agreement, which requires meeting the criteria's of sealing.[124] Several cases support this observation.

Togut v. Deutsche Bank AG (In re Anthracite Capital, Inc.) exemplifies the notion that settlement agreements are not entitled to greater protection under the law merely for their private nature.[125] In *Anthracite Capital*, the trustee sought to keep the adversary complaints that were filed by the trustee against

---

[119] *Id.* at 598 ("It is uncontested, however, that the right to inspect and copy judicial records is not absolute. Every court has supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for improper purposes.").

[120] *See id.* at 597 ("It is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents.").

[121] 11 U.S.C. § 107(a) (2012).

[122] *Id.*

[123] *See* Camisha L. Simmons, *The Public's Right to Access Judicial Records and Proceedings in Bankruptcy Court*, 29 AM. BANKR. INST. J. 42, 42 n.1 (2010) ("While filing clearly establishes such status, a document may still be construed as a judicial record, absent filing, if a court interprets or enforces the terms of that document, or requires that it be submitted to the court under seal."); *see also* 16 COLLIER ON BANKRUPTCY, *supra* note 27 at ¶ 107.02 (explaining that § 107 does not extend to certain information that is submitted to the clerk rather than filed to protect a debtor's privacy, such as a verified statement listing the debtor's Social Security number).

[124] *See* 11 U.S.C. § 107(a); Carrie Menkel-Meadow, *Public Access to Private Settlements: Conflicting Legal Policies*, 11 ALTS. TO HIGH COST LITIG. 85 (1993).

[125] *See* 492 B.R. 162, 172–73 (Bankr. S.D.N.Y. 2013).

the defendant private.[126] The trustee argued that public access to the complaint would force the debtor to violate the confidentiality agreement she reached with her creditors.[127] The trustee contended the agreement should qualify for protection under the public access to papers exceptions in the Code.[128] Yet, the Southern District of New York found the trustee made a weak argument because she "fail[ed] to demonstrate that sealing the settlement agreement fell within the articulated exceptions . . . ."[129]

The court in *Anthracite Capital* also discredited the "no seal no deal" condition the debtor imposed on the creditors because the condition sought to override the law and authority of bankruptcy courts.[130] Under the "no seal no deal" condition, the parties agreed not to settle unless the court granted an order to seal the agreement.[131] The court explained that the condition the parties agreed to would remove the analysis under the section of the Code on public access to papers, thus conflicting with the statute and common law.[132] To further support its position, the court emphasized courts play a role in settlement agreements, even when a trustee is seeking to settle a claim on behalf of the estate, by granting the order to seal settlement agreements.[133] Courts play such a role because the "public could hardly make an independent assessment of the facts underlying a judicial disposition, or assess judicial impartiality or bias, without knowing the essence of what the court has approved."[134]

In a different case, the Western District Court of North Carolina alluded to the notion that filings are not entitled to greater protection under the law merely because parties involved in a case want to protect their proprietary interests.[135] In *Legal Newsline v. Garlock Sealing Technologies LLC*, the court explained that access to filings and proceedings "protects the public's ability to

---

126 *Id.* at 179.

127 *Id.* at 179–80 ("[T]he fact that there is a confidentiality order in place does not displace this Court's duty to scrutinize the request for a seal order.").

128 *Id.* at 180.

129 *Id.* at 172 (citing *In re* Hemple, 295 B.R. 200, 202 (Bankr. D. Vt. 2003)).

130 *Id.*

131 *See id.* at 169.

132 *Id.* at 172 (stating that the "no seal no deal" condition conflicted with the legislative history of § 107).

133 *Id.* at 173 ("[T]he notion that the court plays no role in settlements agreements is especially untrue when a trustee is seeking to settle a claim on behalf of the estate.").

134 *Id.* (quoting Geltzer v. Andersen Worldwide, S.C., No. 05 Civ. 3339(GEL), 2007 WL 273526, at *2 (S.D.N.Y. 2007)).

135 Legal Newsline v. Garlock Sealing Tech. LLC, No. 3:13-CV-00464-MOC, 2014 WL 3696576, at *1 (W.D.N.C. July 23, 2014).

oversee and monitor the workings of the federal courts."[136] The court expressed, "public access promotes institutional integrity of the judiciary."[137] Public access to judicial records is a form of public scrutiny, which serves to protect against "impropriety that might or could be raised" and "fosters confidence among creditors regarding the fairness of the bankruptcy system."[138] Thus, to protect citizens' right to access, courts do not grant orders to seal filings merely when parties move to seal settlements as a means to leverage their position in a case.[139]

The fact that courts have chosen not to seal documents filed with the court, such as settlement agreements, reinforces the idea that courts want to afford the public with as much access to judicial filings as possible. If Rule 9019(a) is amended to explicitly require trustees to file a motion for approval of settlement agreements, then this idea would continue to be upheld. Further, the purpose of Rule 9019(a) is to prevent secret agreements that are unknown to creditors and unevaluated by the court.[140] If trustees are required to file settlements with the bankruptcy court, then the public would be afforded access to the settlements agreements, especially non-settling parties who have an interest in the debtor's estate. Thus, requiring the trustee to file settlements with the court advances the purpose of Rule 9019(a) and the purpose of public access to judicial filings.[141]

2. A Form of Sealing: Redaction

At first blush, redaction seems like an attractive alternative for parties seeking to seal a judicial filing. However, redacting settlement agreements is inadequate. The foregoing paragraphs will discuss: (1) redaction's definition

---

136 *Id.*

137 *Id.* (citing United States v. Cianfrani, 573 F.2d 835, 851 (3d Cir. 1978)).

138 Simmons, *supra* note 123, at 42 ("[P]ublic scrutiny is the means by which the persons for whom the justice system is to benefit are able to insure its integrity and protect their rights.").

139 *Legal Newsline*, 2014 WL 3696576, at *1; *see also In re* Alterra Healthcare Corp., 353 B.R. 66, 76 (Bankr. D. Del. 2006) ("An unfair advantage to a tort claimant (creditor) of a debtor, however, does not create an unfair advantage to its market competitors."); *Geltzer*, 2007 WL 273526, at *12 ("There is no discernable public interest, or interest of the bankruptcy estates, in preserving [the defendant's] 'leverage' as against other parties who have sued it.").

140 *See* Motorola, Inc. v. Official Comm. of Unsecured Creditors (*In re* Iridium Operating LLC), 478 F.3d 452, 461 (2d Cir. 2007) (citing *In re* Masters, Inc., 141 B.R. 13, 16 (Bankr. E.D.N.Y. 1992)).

141 *See* Nixon v. Warner Commc'ns, Inc., 435 U.S. 589, 597 (1978) ("It is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents.").

and its purpose; (2) Code exceptions that warrant redaction; [142] and (3) reasons why settlement agreements do not qualify for redaction.

Redaction is a form of sealing that protects information in a judicial filing from public access.[143] When a filing is redacted, the court removes certain information in the filing that it deems worthy of protection.[144] Courts may choose to redact a filing or seal the entire filing.[145] However, courts prefer to redact information in the filing, rather than seal an entire filing, because the public still has access to some information.[146] "The policy favoring public access supports making public as much information as possible while still preserving confidentiality of protectable information."[147] Thus, redacting some portions of a filing is preferred over sealing an entire filing because it neither compromises the movant's position in the case nor deprives the public of the right to monitor the workings of the court.

To qualify for redaction, the information the party seeks to redact must fall under one of the exceptions of Public Access to Judicial Filings in the Code, which are the same exceptions that apply to seal an entire filing.[148] For example, in *In re Borders Group, Inc*., the court explained that the debtors were permitted to redact certain sections of the share purchase agreement if "the redacted information [was] 'commercial information' within the meaning of section 107(b)(1)."[149] Thus, movants who want to redact information from a document filed with the court must still comply with the public access standards.[150]

---

[142] 11 U.S.C. §§ 107(b)(1)–(2) ("On request of a party in interest, the bankruptcy court shall, and on the bankruptcy court's own motion, the bankruptcy court may—(1) protect an entity with respect to a trade secret or confidential research, development, or commercial information; or (2) protect a person with respect to scandalous or defamatory matter contained in a paper filed in a case under this title.").

[143] *See* Togut v. Deutsche Bank AG (*In re* Anthracite Capital, Inc.), 492 B.R. 162, 180 (Bankr. S.D.N.Y. 2013) ("When protection is required under § 107, the Court has discretion in deciding how to protect commercial information as § 107 does not mandate sealing—only protection.").

[144] *See id.* ("Redacting documents to remove only protectable information is preferable to wholesale sealing.") (quotation marks omitted).

[145] *See In re* Borders Grp., Inc., 462 B.R. 42, 47 (Bankr. S.D.N.Y. 2011) ("In cases where protection is required, however, the form of protection that must be granted is not commanded by the statute. The [c]ourt has discretion when deciding how to protect commercial information.").

[146] *See In re Anthracite Capital, Inc.*, 492 B.R. at 180 ("Redacting documents to remove only protectable information is preferable to wholesale sealing.") (quotation marks omitted).

[147] *See In re Borders Grp., Inc.*, 462 B.R. at 47.

[148] *See id.*

[149] *Id.* at 47. (quotation marks omitted).

[150] *Id.* at 48 ("The Debtors have appropriately redacted only commercial information within the meaning of section 107(b)(1). The redacted information primarily relates to the identities of key employees and vendors and confidential financial information of [the debtors].").

Due to the limited content of settlement agreements, there is a very slim possibility settlements qualify for redaction.[151] Settlement agreements do not include the factors that influenced the parties' decision to settle, such as facts, law or issues outside of the lawsuit.[152] Rather, settlements contain a short recitation of the background facts of the case, which provide enough material to know "that a claim or lawsuit has resulted in a given outcome, generally a cash payout."[153] Thus, settlements ordinarily do not provide the necessary information to qualify for redaction.

Opponents of the majority interpretation of Rule 9019 could argue that public access to settlements may leave the public "blissfully unaware of what factors—either in fact or at law—may have influenced" the outcome of a settlement.[154] Such access could cause "the subsequent avalanche of 'me, too' litigation."[155] That onslaught of litigation could be averted if the public has more information at its disposal to know that the outcome of the settlements is fact specific.[156] Accordingly, the public would know that the results of a previous settlement might not accurately reflect the outcome of a subsequent settlement.[157]

B. Similarities between §§ 503 and 506(c) and Rule 9019

Both §§ 503 and 506(c) of the Code contain similar purposes and supporting arguments as Rule 9019. Section 503, dealing with the allowance of administrative expenses, is similar to the majority interpretation of Rule 9019(a) because even though mandatory language is absent from this provision, trustees are required to comply with this section.[158] Compliance is mandated if trustees wish to recover administrative expenses from the unencumbered assets of the estate for out of pocket expenses they incur to preserve the value of the estate.[159] Similarly, § 506(c) "permits a trustee to recover administrative expenses from a secured creditor's collateral if [certain

---

151 *See* Stevens & Subar, *supra* note 5; *see also In re* Blake, 452 B.R. 1, 13 (Bankr. D. Mass. 2011) (denying the creditor's request to redact the creditor's settlement agreement).

152 *See* Stevens & Subar, *supra* note 5.

153 *See id*.

154 *See id*.

155 *See id*.

156 *See id*.

157 *See id*.

158 11 U.S.C. § 503 (2012).

159 *Id*.

conditions are met]."[160] This section is similar to Rule 9019(a) because the language of the section has given rise to different interpretations of what the section really means.[161] Moreover, the reasons supporting the prevailing interpretation of this section parallels this Comment's reasoning in advancing the majority interpretation of Rule 9019(a).[162] The following two subsections of this comment will compare and contrast these two sections of the code with Rule 9019, respectively, to demonstrate why the Advisory Committee on the Rules of Bankruptcy Procedure should amend Rule 9019.

1. Similarities Between § 503 and Rule 9019

Similarities between § 503 of the Code, dealing with Allowance of Administrative Expenses, and Rule 9019 suggest compliance with Rule 9019(a) should be mandatory. This Section will describe § 503's purpose and discuss how courts have interpreted and applied § 503.

While administrating the estate, the trustee might incur necessary expenses to preserve the estate, such as repairing an item belonging to the estate.[163] Generally, repairing the estate maximizes its value, which benefits creditors who receive payment from the estate.[164] The Code describes the measures the trustee must take to recover payment for any administrative expenses incurred by stating, "an entity may timely file a request for payment of an administrative expense, or may tardily file such request if permitted by the court for cause."[165] The Code also states, "after notice and a hearing, there

---

160 1 COLLIER ON BANKRUPTCY 506.05[1] (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2010).

161 11 U.S.C. § 506(c).

162 *See* Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A. 530 U.S. 1 (2000).

163 *See* 11 U.S.C. §§ 704, 1106, 1202, 1302; H.R. REP. NO. 95-595, at 107–08 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 5797, 6069 ("The trustee in each case will be responsible for the administration of the case."); Susan R. DeSimone, Comment, *The Price of Doing Business: Environmental Criminal Fines and the Administrative Expense Solution*, 17 BANKR. DEV. J. 489, 504 (2001) ("[T]wo basic requirements must still be met before an expense may be given administrative priority. First, the expense must occur post-petition; and second, the expense must fit into one of the enumerated categories of § 503. In other words, a debt that arises post-petition does not automatically assume the status of administrative expense priority. Usually, however, courts justify priority for post-petition expenses of the bankrupt estate simply by including them under the catch-all provision.").

164 *See* WARREN & WESTBROOK, *supra* note 87 (explaining chapter 7 trustees also have an "interest in maximizing the value of the estate because they receive a flat fee payment for administering the estate [and] a commission from the amounts distributed to the unsecured creditors." (citing 11 U.S.C. § 326(a) (2006))); *see also* Salgado-Nava v. Asset Acceptance LLC (*In re* Salgado-Nava), 473 B.R. 911 (B.A.P. 9th Cir. 2012) ("Congress has set chapter 7 trustee commission rates rather than the market.").

165 11 U.S.C. § 503(a), (b).

shall be allowed administrative expenses, other than claims allowed under section 502(f) of this title."[166]

Despite the absence of any mandatory language, such as "must" or "shall," courts and commentators have understood that the trustee must file a request if they wish to recover payment for administrative expenses.[167] In fact, § 503 contains the permissive word "may," which simply indicates Congress intended to provide the trustee with an opportunity to receive payment for any out of pocket expenses the trustee incurred, contingent on the trustee filing the request.[168] Otherwise, if the trustee does not file a request, the court will not consider whether the trustee should receive payment.

Congress included a section in the Code for distribution of administrative expenses for two reasons. First, "Congress believed that creditors would refuse to invest money in a business without a fixed guarantee of adequate compensation."[169] Second, Congress believed compensation for administrative expenses was "necessary because debtors have inherently inequitable motives."[170] The remainder of this subsection will focus on the latter reason.

When a debtor files for bankruptcy, they may choose to continue to operate their business.[171] In such a situation, inequitable motives could arise because a debtor would "necessarily desire to compensate only those debts accrued by indispensable creditors of the business."[172] These indispensible creditors are

---

166 11 U.S.C. § 503(b).

167 *See In re* Momenta, Inc., 455 B.R. 353, 364 (Bankr. D.N.H. 2011) ("[I]f a creditor wishes to be granted an administrative priority under § 503(b)(9), then the creditor must, first, file a proof of claim under § 501, second, have the claim allowed under § 502, and then third, request administrative expense priority under § 503(a).") (quotation marks omitted); *see also* H.R. REP. NO. 95-595, at 355 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 5797, 6331 ("Sec. 503. Allowance of Administrative Expenses[.] Subsection (A) of this section permits administrative expense claimants to file with the court a request for payment of an administrative expense."); Michael Ryan Diaz, *Disallowing Administrative Expenses Under Section 502(d): When Claims are not "Claims" under the Bankruptcy Code*, 20 AM. BANKR. INST. L. REV. 397, 405 (2012) ("[F]or payment of administrative expenses, a party must file 'a request.'").

168 *See* 11 U.S.C. §§ 704, 1106, 1202, 1302; H.R. REP. NO. 95-595, at 107–08 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 5797, 6069 ("The trustee in each case will be responsible for the administration of the case.").

169 DeSimone, *supra* note 163, at 495. This Comment will not elaborate on reason one because it is outside the scope of this Comment's analysis.

170 *Id*.

171 *See* 11 U.S.C. § 721 ("The court may authorize the trustee to operate the business of the debtor for a limited period, if such operation is in the best interest of the estate and consistent with the orderly liquidation of the estate."); *see also* 11 U.S.C. § 1108 ("Unless the court, on request of a party in interest and after notice and hearing, orders otherwise, the trustee may operate the debtor's business.").

172 DeSimone, *supra* note 163, at 495.

those who enable the debtor to continue to operate their business. Accordingly, a debtor may be "more inclined to compensate creditors who are vital to the continuing operation of the business than other creditors."[173] Although this compensation scheme benefits the debtor and the debtor's preferred creditors, the scheme "fails to equitably distribute the bankrupt estate's limited wealth."[174]

To prevent this inequitable treatment, "the Code mandates a fixed distribution scheme, setting forth a structured classification of priority levels."[175] These levels ensure the trustee can "expend sums to administer the estate in a manner that maximizes value for the benefit of all creditors."[176] If the court approves the trustee's administrative expense claim, the court protects the claim by entitling the claim to receive high priority in the distribution of the debtor's unencumbered assets.[177]

With these different aspects of § 503 in mind, the following paragraphs will compare § 503 and Rule 9019(a). The comparison will demonstrate that trustees should comply with the Rule, just as trustees comply with § 503.

One similarity between § 503 and Rule 9019(a) is the absence of mandatory language in both provisions.[178] Despite the absence of mandatory language in § 503, it is understood that trustees must comply with the provision if they want to receive repayments. Likewise, despite absence of mandatory language under Rule 9019(a), a majority of courts have understood that compliance with Rule 9019 is required to enforce settlements.[179]

---

173 *Id*.

174 *Id*.

175 *Id*. at 496.

176 Michelle Arnopol Cecil, *A Reappraisal of Attorneys' Fees in Bankruptcy*, 98 KY. L.J. 67, 71 (2009).

177 *See* Diaz, *supra* note 167, at 399 ("The holder of an administrative expense claim will receive higher priority in distribution of the debtor's assets in bankruptcy. In a chapter 7 liquidation, administrative expenses are paid second among unsecured claims." (citing 11 U.S.C. § 507(a)(2) (2006))).

178 *See generally* 11 U.S.C. § 503(a) (2012) ("An entity may timely file a request for payment of an administrative expense, or may tardily file such request if permitted by the court for cause.").

179 *See* Valencia, *supra* note 2, at 439 ("Numerous courts have similarly held that, despite Rule 9019's inconclusive language, compliance with the Rule is mandatory."). *See generally In re* Blehm Land & Cattle Co., 859 F.2d 137, 141 (10th Cir. 1988) ("Under Bankruptcy Rule 9019, a settlement or compromise agreement between the trustee and a party must be approved by the court, after notice and hearing, to be enforceable."); Reynolds v. Comm'r, 861 F.2d 469, 473 (6th Cir. 1988) ("In bankruptcy proceedings, as distinguished from ordinary civil cases, any compromise between the debtor and his creditors must be approved by the court as fair and equitable."); Valucci v. Glickman, Berkovitz, Levinson & Weiner (*In re* Glickman, Berkovitz, Levinson & Weiner), 204 B.R. 450, 455 (E.D. Pa. 1997) ("The bankruptcy court must review the settlement of pre-petition claims under Bankruptcy Rule 9019(a)."); *In re* Leslie Fay Cos., 168 B.R.

Section 503 and Rule 9019 also have a similar purpose. Under § 503, claim priority of administrative expenses ensures that the trustee can incur expenses "to administer the estate in a manner that maximizes value for the benefit of all creditors."[180] As explained above, claim priority is "necessary because debtors have inherently inequitable motives."[181] Similarly, Rule 9019 ensures non-settling creditors are protected "against 'bad deals' made between one creditor and the debtor."[182] In the context of Rule 9019, a "bad deal" is a deal that conceals agreements that are unknown to creditors and unevaluated by the court.[183] Thus, both provisions seek to protect creditors from any of the debtor's inherent inequitable motives unbeknownst to them.

Compliance with each provision also advances each provision's purpose. Compliance with § 503 is required if a trustee wants to receive payment for an administrative expense she incurred out of pocket. The trustee's claim receives protection by giving the claim high priority. Otherwise, a debtor is inclined to compensate only parties that the debtor believes favor the estate.[184] Similarly, trustees should comply with Rule 9019 if the trustee wants to stipulate a settlement agreement. Otherwise, the trustee is inclined to treat the settling parties favorably and could inadvertently disregard the interest of non-settling parties who are not present during settlement negotiations.

The similarities between § 503 and Rule 9019 support the majority's interpretation of Rule 9019(a). Trustees comply with § 503 if they want to receive payment for administrative expenses they incurred. Likewise, trustees should comply with Rule 9019, despite the absence of mandatory language in the Rule. Compliance with the Rule would protect creditors from any of the debtor's advertent or inadvertent inequitable motives and advance the Rule's purpose. Thus, the language of Rule 9019 should be amended to require compliance with the Rule.

294, 305 (Bankr. S.D.N.Y. 1994) ("Compromises may not be made in bankruptcy absent notice and a hearing and a court order").

180 *See* Cecil, *supra* note 176.

181 DeSimone, *supra* note 163, at 495.

182 *In re* United Shipping Co., No. 4-88-533, 1989 WL 12723, at *5 (Bankr. D. Minn. Feb. 17, 1989) ("The focus of Rule 9019 is to protect other creditors against bad deals made between one creditor and the debtor.").

183 Christopher Fong, *Creditors and Rule 9019(a): Casting Doubt on the Trustee's Sole Authority to Settle Claims of the Estate*, 82 AM. BANKR. L.J. 591, 613 (citing *In re* Masters, Inc., 141 B.R. 13, 16 (Bankr. E.D.N.Y. 1992)).

184 *See* DeSimone, *supra* note 163, at 495–96 ("Congress believed that . . . codified claim priority is necessary because debtors have inherently inequitable motive.").

2. Similarities Between § 506(c) and Rule 9019

Section 506(c) determines the secured status of claims. Specifically, § 506(c) allows bankruptcy trustees to recover payment from a secured creditor for expenses they incurred in preserving the value of the property encumbered by the secured creditor's lien.[185] Similar to Rule 9019, the language of this subsection has given rise to different interpretations on whether parties other than the trustee may also recover repayment for preserving a secured creditor's lien.[186] The Supreme Court considered this issue in *Hartford Underwriters Ins. Co. v. Union Planters Bank*.[187]

In *Hartford Underwriters Insurance Co*., the petitioner asserted that § 506(c) included parties other than trustees.[188] The Court determined the petitioner's pre-Code practice and policy arguments were inadequate, and thus, did not support his assertions.[189] As a result, the Court held that parties other than the trustee could not recover payment under § 506(c).[190]

The arguments the petitioner made are similar to the pre-Code practices and policy considerations this Comment addresses to prompt the Advisory Committee on Bankruptcy Rules to amend Rule 9019(a). Accordingly, the following paragraphs will compare and contrast the petitioner's arguments in *Hartford Underwriters Insurance Co*., with the two propositions this Comment addresses. This analysis seeks to demonstrate that unlike *Hartford Underwriters Ins. Co*. the propositions in this Comment support amending Rule 9019, by analyzing pre-Code practice and policy considerations.

---

185 *See* 11 U.S.C. § 506(c) (2012) ("The trustee may recover from property securing an allowed secured claim the reasonable, necessary costs and expenses of preserving, or disposing of, such property to the extent of any benefit to the holder of such claim, including the payment of all ad valorem property taxes with respect to the property.").

186 *See generally* Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A., 530 U.S. 1 (2000).

187 *See id.* at 6–7 ("The question[s] thus becomes whether it is a proper inference that the trustee is the only party empowered to invoke the provision . . . [and] whether petitioner—an administrative claimant—is a proper party to seek recovery under § 506(c).").

188 *See id.* at 5 ("Petitioner argued that this provision entitled it to recover from the property subject to respondent's security interest the unpaid premiums owed by [the debtor].").

189 *See id.* at 9–12.

190 *See id.* at 12 ("We conclude that 11 U.S.C. § 506(c) does not provide an administrative claimant an independent right to use the section to seek payment of its claim.").

First, in *Hartford Underwriters Ins. Co.*, the Court considered the petitioner's pre-Code practice argument.[191] The petitioner relied on Supreme Court cases that allowed "individual claimants to seek recovery from secured assets."[192] The Court explained that these cases involved issues that were not governed by the Code.[193] Moreover, the cases predated the Bankruptcy Act of 1898, which the Code replaced in 1978.[194] The Court also expressed, "it is questionable whether these precedents establish a bankruptcy practice sufficiently widespread and well recognized to justify the conclusion of implicit adoption by the Code."[195] The Court explained pre-Code practices are a tool to help readers understand the Code, when the Code's language is unclear.[196] Nonetheless, it determined the language of § 506(c) left "no room for clarification by pre-Code practice."[197] The Court explained § 506 clearly provides the "particular party by whom the recovery could be pursued."[198] Accordingly, one can infer that the Court focused on not misreading § 506(c) to include "trustee and other parties in interests," when it explicitly states that the "trustee" is the party that may seek recovery.[199]

Second, the Court considered the petitioner's policy arguments. The premise of this argument focused on unjust enrichment resulting from the trustee's failure to pursue payment on behalf of an administrative claimant.[200] The Court conceded the petitioner made a valid policy argument; however, the

---

191 *See id.* at 9 ("Petitioner cites a number of lower court cases, however, in which—without meaningful discussion of the point—parties other than the trustee were permitted to pursue such charges under the Act, sometimes simultaneously with the trustee's pursuit of his own expenses . . . .").

192 *Id.*; *see* Louisville, E. & St. L. R. Co. v. Wilson, 138 U.S. 501, 506 (1891); Burnham v. Bowen, 111 U.S. 776, 779, 783 (1884); N.Y. Dock Co. v. Poznan, 274 U.S. 117, 121 (1927).

193 *See Hartford Underwriters Ins. Co.*, 530 U.S. at 10. The cases involved equity receivership. In the nineteenth century, federal courts created equity receivership as a form of reorganization to help financially distressed railroads reorganize. This form of reorganization under equity receivership is analogous to modern-day chapter 11. *See* Harvey R. Miller & Ronit J. Berkovich, *The Implications of the Third Circuit's Armstrong Decision on Creative Corporate Restructuring: Will Strict Construction of the Absolute Priority Rule Make Chapter 11 Consensus Less Likely?*, 55 AM. U. L. REV. 1345, 1362 (2006).

194 *See Hartford Underwriters Ins. Co.*, 530 U.S. at 10.

195 *Id.*

196 *Id.*

197 *Id.* at 11.

198 *See id.* at 9–11.

199 *Id.* at 11–14; *see* 11 U.S.C. § 506(c) (2012) ("The trustee may recover from property securing an allowed secured claim the reasonable, necessary costs and expenses of preserving, or disposing of, such property to the extent of any benefit to the holder of such claim, including the payment of all ad valorem property taxes with respect to the property.").

200 *See Hartford Underwriters Ins. Co.*, 530 U.S. at 11–14 ("[I]n some cases the trustee may lack an incentive to pursue payment.").

Court explained this argument did not favor the petitioner's position.[201] Even if an administrative claimant could not recover payments under § 506(c), the administrative claimant could still seek recovery for payment under other sections of the Code to prevent unjust enrichment.[202]

The Court also explained that allowing administrative claimants to seek recovery under § 506 would lead to other results that were undesirable to public policy. Such recovery would impair the bankruptcy court's ability to coordinate proceedings and the trustee's ability to administer the estate.[203] In essence, the petitioner's policy argument did not advance the purpose of bankruptcy law, which focuses on providing an efficient procedure marshaled by the trustee to give creditors a fair and equitable distribution from the estate. Lastly, the Court emphasized that Congress is better suited to consider policy arguments.[204] As a result, the Court based its decision on the literal meaning of § 506,[205] determining it could not "provide an administrative claimant an independent right to use the subsection to seek payment of its claim."[206]

One could argue the language of Rule 9019(a) is not ambiguous because a literal reading of the Rule grants the trustee discretion to file the settlement with the court.[207] Further, Rule 9019(a) specifically grants the court discretion to approve the settlement,[208] since the permissive word "may" is used in the independent clause of the rule.[209] Still, a review of pre-Code practice can help reveal whether the trustees have really been granted discretion to file settlement agreements with the court.

Further, in *Hartford Underwriters Insurance Co*., the petitioner could have protected itself from unjust enrichment under other sections of the Code; however, as referenced earlier in this Comment, Rule 9019 is unique because

---

201 *See id.* at 12.

202 *See id*.

203 *See id.* at 13.

204 *See id.* at 13–14 ("Achieving a better policy outcome—if what petitioner urges is that—is a task for Congress, not the courts.").

205 *See id.* at 13.

206 *Id.* at 14.

207 FED. R. BANKR. P. 9019(a) ("On motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement. Notice shall be given to creditors, the United States trustee, the debtor, and indenture trustees as provided in Rule 2002 and to any other entity as the court may direct.").

208 *Id*.

209 *Id*.

"it does not have a parallel section in the Code."[210] Therefore, it is highly unlikely that a non-settling party with an interest in the debtor's estate can protect themselves from inequality resulting from non-compliance with Rule 9019. Additionally, amending the Rule will lead to desirable policy outcomes. Amending the Rule will not impair courts' ability to conduct proceedings. In fact, courts would actively assume their judicial roles by determining whether settlements are fair and equitable.

Ultimately, the Court in *Hartford Underwriters Insurance Co*. stated it was not in the best position to consider the petitioner's policy arguments.[211] As Part III of this Comment will explain, the Advisory Committee on Bankruptcy Procedure is in the best position to consider proposed revisions to the rules and assess the revisions from a policy standpoint.

C. Solution to the Divergent Views of Rule 9019

1. Rulemaking Process to Amend Rule 9019

The Rules Enabling Act grants rulemaking authority to the Supreme Court with respect to bankruptcy cases, and thereby, grants the Court authority to promulgate the Federal Rules of Bankruptcy Procedure.[212] Still, there is "an elaborate system involving several procedural steps and committees results in the presentation to the [nine] Justices of recommendations for specific new rules or modifications of existing rules."[213] This elaborate system includes the participation of the Supreme Court, the Judicial Conference, the Standing Committee, and the Advisory Committee on Bankruptcy Procedure.[214] At the initial stage, the Advisory Committee receives suggested amendments to the rules from various sources including judges, lawyers, scholars, and the

---

[210] Motorola, Inc. v. Official Comm. of Unsecured Creditors (*In re* Iridium Operating LLC), 478 F.3d 452, 460 (2d Cir. 2007). *But see* 11 U.S.C. § 363 (2012); Erens & Neff, *supra* note 47 ("Rather than challenge the necessity of court approval, some of these courts have found the required approval for settlements in 363 of the Bankruptcy Code."); Valencia, *supra* note 2, at 436–37 ("Section 363 is the only substantive Code section which actually requires court approval before entering into a proposed compromise or settlement of the type contemplated therein: settlement of causes of action belonging to the bankruptcy estate."). A discussion of the relationship between § 363 and Rule 9019 is outside the scope of this Comment.

[211] *See* 530 U.S. 1, 13–14 (2000) ("In any event, we do not sit to assess the relative merits of different approaches to various bankruptcy problems. It suffices that the natural reading of the text produces the result we announce. Achieving a better policy outcome—if what petitioner urges is that—is a task for Congress, not the courts.").

[212] 28 U.S.C. § 2075 (2012).

[213] Alan N. Resnick, *The Bankruptcy Rulemaking Process*, 70 AM. BANKR. L.J. 245, 246 (1996).

[214] *Id.* at 266.

Standing Committee.[215] If the Advisory Committee approves, then it will present a draft of the changes to the Standing Committee.[216]

Generally, there are two reasons why the Advisory Committee receives suggestions to amend the rules: (1) ambiguity in the language of the Rules[217] and (2) "uniformity among the different bodies of federal rules."[218] This Comment addresses both of these suggestions to explain why the Advisory Committee should consider amending Rule 9019(a). Accordingly, the following paragraphs will suggest the Advisory Committee to amend Rule 9019(a) to make its language consistent with its purpose and promote uniformity between the Federal Rules of Bankruptcy Procedure and the Federal Rules of Civil Procedure ("FRCP").

2. *Adequate Representation: Uniformity with the Federal Rules of Civil Procedure*

Settlements pose a risk to the adequate representation of non-settling parties.[219] Outside of bankruptcy, the problem of inadequate representation arises in class actions when a representative wants to dismiss the case or settle on behalf of the class.[220] There, a class representative may choose to settle or dismiss the case, but only with court approval.[221] This issue of inadequate representation in class action suits is strikingly similar to the issue of representation in bankruptcy relating to settlement agreements.[222] Moreover, the solution to inadequate representation in class action outside of bankruptcy is much like the majority's interpretation of Rule 9019(a) because they both require the court to approve settlements.

In class actions, a class representative represents the interest of all class members and possesses the power to bind class members to the terms of a

---

215 *Id.* at 250–52."The Enabling Act also provides for the establishment of advisory committees to assist in the rulemaking process. The Advisory Committee on Bankruptcy Rules is one of the five advisory committees . . . ." *Id.* at 248.

216 *Id.* at 265.

217 *See id.* at 250–51.

218 *Id.* at 252.

219 *See* Weisburst, *supra* note 53, at 55.

220 *See id.*

221 FED. R. CIV. P. 23(e); *see, e.g.*, Weisburst, *supra* note 53, at 82 ("[T]he current solution to the inadequate-representation problem is to require judicial review of the merits of any proposed settlement.").

222 *See* Weisburst, *supra* note 53, at 55.

settlement.[223] This is similar to bankruptcy where the trustee represents the interest of the estate and has the authority to bind the estate.[224] The FRCP sets certain requirements to ensure all class members are adequately represented.[225] In particular, FRCP 23(e) states, "[t]he claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval."[226] This requirement resembles Rule 9019 in two respects: (1) it contains a procedural requirement of notice to class members and (2) it contains an evidentiary requirement of review by the court.[227] The only difference between the FRCP 23(e) and Rule 9019(a) is that the FRCP 23(e) explicitly states that a class action may be settled "*only with* the court's approval," whereas Rule 9019(a) makes no literal statement.

In bankruptcy, the issue of inadequate representation is prevalent in chapter 11 cases.[228] "In many [c]hapter 11 cases, the debtor maintains control over the estate as a [debtor-in-possession], but is still responsible for acting in the best interests of the creditors."[229] Thus, in chapter 11, the debtor-in-possession owes a fiduciary duty to both the estate and the creditors.[230] This dual representation creates a conflict of interest because the debtor-in-possession may decide to act solely on their behalf, rather than impartially represent their interest and the estate's interest.[231]

A debtor-in-possession may inadequately represent the interest of non-settling creditors when they use chapter 11 as a strategy plan to stipulate a settlement with an individual creditor.[232] At the moment the debtor-in-

---

223 *Id.* at 82; *see* Daniel R. Nappier, Note, *Blurred Lines: Analyzing an Attorney's Duties to a Fiduciary-Client's Beneficiaries*, 71 WASH. & LEE L. REV. 2609, 2611 (2014) ("It is imperative that an attorney hired to represent a trustee or estate representative understand whom he represents and to whom he owes duties. This is often unclear because of the various individuals involved in handling trust and estate matters, each having distinct interests.").

224 *See, e.g.*, 11 U.S.C. §§ 704(a)(1), 1106(a)(1), 1202(b), 1302(b) (2012).

225 *See* FED. R. CIV. P. 23(a) ("[T]he claims or defense of the representative parties are typical of the claims or defenses of the class; the representative parties will fairly and adequately protect the interests of the class.").

226 Weisburst, *supra* note 53, at 83 (citing FED. R. CIV. P. 23(e)).

227 *See id*.

228 *See In re* Adelphia Commc'ns Corp., 368 B.R. 140, 224 (Bankr. S.D.N.Y. 2007) ("[W]hile a Plan may contain a settlement, any such settlement (like the Fed. R. Bankr. P. 9019 settlements that are more common in chapter 11 cases) must pass muster for fairness, under standards articulated by the Supreme Court, the Second Circuit and lower courts.").

229 Weisburst, *supra* note 53, at 78.

230 *See id*.

231 *See id*.

232 *See id.* at 76.

possession files a petition for relief, the bankruptcy court grants an injunction to prevent creditors from continuing any efforts to collect payment from the estate.[233] Thus, the debtor-in-possession may file for chapter 11 "as a delaying tactic to obtain negotiating leverage in a possible workout" with one creditor at the expense of another creditor.[234]

Moreover, a debtor-in-possession may inadvertently give preference to the interests of the settling creditor over the interests of the non-settling creditors.[235] For example, in a chapter 11 case, the Fifth Circuit reversed the bankruptcy court's decision, which approved a settlement agreement, because "the settlement was not a product of arm's length bargaining—those who negotiated on behalf of the [debtor], the [debtor-in-possession] were also insiders of the parent corporation."[236] Thus, even when settling parties intend to represent their own interest and the interest of the non-settling parties, there is a strong possibility the settling parties did not consider all interests fairly.

The interests of non-settling parties with small claims are also vulnerable to inadequate representation. Rule 9019(a) requires the trustee to notify non-settling parties about a claim she settled on behalf of the estate to provide the non-settling parties with an opportunity to object to the proposed settlement;[237] however, based on a literal reading of Rule 9019(a) and the minority's interpretation of the Rule, the non-settling party is only given a chance to object if the trustee initially files the settlement with the court.[238] One commentator conceded that Rule 9019 helps non-settling parties come "forward to challenge the proposed agreement."[239] Yet, he explained that parties affected by the settlement agreement might be discouraged to challenge

---

[233] 11 U.S.C. § 362(a) (2012) ("[A] petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay . . . .").

[234] Weisburst, *supra* note 53, at 78.

[235] *Id.* at 76–77.

[236] *Id.* at 77 (noting that the Fifth Circuit did not determine that the parties stipulated the settlement in bad faith (citing Conn. Gen. Life Ins. Co. v. United Cos. Fin. Corp. (*In re* Foster Mortg. Corp.), 68 F.3d 914, 918 (5th Cir. 1995))).

[237] FED. R. BANKR. P. 9019(a) ("On motion by the trustee and after notice and hearing the court may approve a compromise or settlement."); *see* Wooser, *supra* note 28 ("[T]he trustee's motion for approval of a proposed settlement should alert creditors, in the event that they probably will receive little or no benefit if the proposed settlement is approved." (citing *In re* Remsen Partners, Ltd., 294 B.R. 557, 560 (Bankr. S.D.N.Y. 2003))).

[238] FED. R. BANKR. P. 9019(a) ("On motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement.").

[239] Weisburst, *supra* note 53, at 79 (explaining that receiving a notice of the pending settlement arguably facilitates the non-settling creditors to challenge the proposed agreement).

the proposed settlement because their claims might be small, "even though a challenge would be worthwhile considering the benefit to the creditors in aggregate."[240] Thus, to prevent this outcome, Rule 9019(a) should require the trustee to file the settlement with the court.

3. Amending Rule 9019 May Prolong the Bankruptcy Process

If the Advisory Committee amends Rule 9019 to require trustees to comply with the Rule, the amendment might prolong the bankruptcy process; however, the Committee should still amend the Rule because bankruptcy courts are accustomed to making quick evaluations. They are also used to considering policy implications quickly.

Bankruptcy proceedings are fast paced because debtors want to resolve their financial distress quickly. Mandating motion and judicial approval of settlement agreements may prolong the bankruptcy process; however, mandating compliance with Rule 9019 does not change this aspect of bankruptcy. "[B]ankruptcy courts are accustomed to making quick valuations of claims, which suggests that decision costs of judicial review to the court may not be so high."[241] Further, judicial review of the settlement would not maximize litigation, as judicial review would not require parties to go to trial. Rather, "[t]he costs of a prolonged trial are avoided by holding a less costly fairness hearing on the proposed settlement, and the court's review assures that inadequately represented parties will not be injured by the settlement."[242]

Opponents might argue that requiring trustees to file settlements with the court interferes with the settling parties' privacy interests. Nonetheless, if citizens want access to judicial filings to monitor the workings of the judicial system, then citizens should tolerate the cost of trustees' filing settlements entered into post-petition with the court.[243] Disclosure has been a long-standing reason in the judicial system, as established in *Nixon v. Warner Communications, Inc*. and codified under the Code.[244] Thus, the Advisory Committee should seek to balance the competing privacy nature of settlement agreements against the public's interest.

---

240 *Id.* at 82.
241 *Id.* at 79.
242 *Id.* at 59.
243 *See* Nixon v. Warner Commc'ns, Inc., 435 U.S. 589 (1978).
244 11 U.S.C. § 107 (2012); 435 U.S. at 596.

CONCLUSION

Rule 9019 addresses whether a bankruptcy trustee is required to file settlement agreements entered into on behalf of the estate with the court. Currently, there are two interpretations to this Rule. The majority of jurisdictions require trustees to file settlement agreements with the court. By contrast, the minority jurisdictions grant trustees discretion to decide whether they should file the agreement with the court. These two different interpretations are a result of the Rule's ambiguous language. Yet, long-standing bankruptcy practice and policy considerations support the majority interpretation of the Rule.

Settlement agreements are known for their private nature. Hence, it is reasonable to argue that requiring compliance with Rule 9019 defeats the purpose of stipulating to a settlement; however, in bankruptcy, multiple non-settling parties may have an interest in the debtor's estate. As a result, they might want to know if the debtor's estate is settling claims that might affect the distribution that the non-settling parties are entitled to receive from the estate. Moreover, under the Code and common law, the public has a right to monitor the workings of the judicial system. The public can monitor the judicial system better by obtaining access to settlement agreements. Due to the public's right, the settling parties should bear the burden to protect information in the settlement agreement that they wish to keep private.

While it is true that settling parties cannot easily protect the settlement agreement from public access under the Code, settling parties could draft better settlement agreements to qualify for Code protection. To qualify for protection, settlement agreement must include information that harms a debtor's reputation or business interest. Generally, settlement agreements contain little information, if any. This is because details about the settlement negotiations, if disclosed, would cause harm to the debtor. Thus, to qualify for protection under the Code, parties can include more adequate information in the settlement.

Since settling parties have this alternative at their disposal, this Comment prompts the Advisory Committee to amend Rule 9019 to reconcile the majority and minority interpretations of the Rule and advance the Rule's purpose. Rule 9019's purpose is "to prevent the making of concealed agreements which are

unknown to the creditors and unevaluated by the court."[245] Amending Rule 9019 to state the trustee is required to file settlement agreements with the court, will promote fairness between the settling party and the non-settling party, which is consistent with the Rule's purpose.

Moreover, amending the Rule would further the notion of creating uniform bodies of law among the federal rules. The FRCP 23(e) allows representatives to settle, but only with court approval, when the rights of multiple parties could affect the rights of the non-settling parties.[246] Similarly,[247] the Advisory Committee could amend Rule 9019 to read as follows: "After notice and hearing, the trustee may compromise or settle the claims of a creditor only with the court's approval. Notice shall be given to creditors, the United States trustee, the debtor, and indenture trustees as provided in Rule 2002 and to any other entity as the court may direct."

There are counterarguments to amending Rule 9019. One argument is the threat of delaying bankruptcy court proceedings; however, bankruptcy courts are accustomed to making quick evaluations. Since filing a settlement with the court would only require a hearing and not a trial, neither the parties nor the court would have to expend more resources than are already required.

The threat of delaying bankruptcy court proceedings is far overshadowed by the harm that standardizing the Rule would cure. Amending the Rule would resolve the current split that is troubling the federal court system. It would also resolve the issue of debtors attempting to hide their settlement agreements behind the courts that are applying the minority interpretation of Rule 9019. Lastly, amending Rule 9019 to require judicial approval of settlement agreements would preserve bankruptcy's inherent fast-paced nature and the Rule's purpose, and support uniformity among federal rules.

LINHADLEY ELJACH*

---

245 Motorola, Inc. v. Official Comm. of Unsecured Creditors (*In re* Iridium Operating LLC), 478 F.3d 452, 461 (2d Cir. 2007).

246 FED. R. CIV. P. 23(e).

247 *Id.*

* Executive Marketing Editor, *Emory Bankruptcy Developments Journal* (2015–2016); J.D. Candidate, Emory University School of Law (2016); B.A., *magna cum laude*, Hunter College (2011). First, I would like to thank my faculty Comment advisor, Professor Rafael Pardo, and the *EBDJ* Editorial Board for their guidance in developing this Comment. Second, I would like to thank my parents, Jaime E. Eljach and Ivonne Gomez, for their love and support. Lastly, I would like to thank Giselle Lara for her encouragement throughout my academic career. The opinions expressed in this Comment are the author's alone and do not reflect on any past, present, or future person or entity associated with the author.