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THE 2015 REVISIONS TO THE FEDERAL RULES OF CIVIL PROCEDURE: IMPACT ON BANKRUPTCY MATTERS

Focusing on the management of e-discovery in bankruptcy, the authors discuss the 2015 amendments to the Federal Rules (incorporated in Bankruptcy Rules) and include discovery under Bankruptcy Rule 2004. The principal subjects are proportionality, objections to requests, and failure to preserve electronically stored information. They close with suggested best practices for debtor's and creditor's counsel.

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The successful resolution of a bankruptcy case demands careful planning for how often very limited resources will be allocated. In the context of resource allocation, one area frequently overlooked or underestimated is how to keep discovery costs in check – an increasing challenge in an era of exponential data growth. Recent amendments to the Federal Rules of Civil Procedure (the “Federal Rules”) – if applied as intended – should help keep e-discovery scope and costs proportional to the discovery issues and available resources in any given bankruptcy proceeding. However, in the year that has passed since their enactment, courts have shown mixed results in applying the amended rules.

Managing e-discovery in the bankruptcy context may present unique challenges where proportionality may directly impact potential distributions to creditors. For example, bankruptcy cases do not originate with a complaint like traditional litigation. Therefore, framing the issues subject to discovery can be difficult, particularly early in the bankruptcy process where certain disputes with creditors or other parties may not

be readily known. Also, preservation obligations may be less clear, and personnel with knowledge about electronically stored information (“ESI”) sources and systems may no longer be available.

Key federal rule amendments enacted at the end of 2015 include changes to ensure the scope of discovery considers proportionality;¹ require more specific objections and responses to document requests;² and clarify the standard for applying sanctions for failure to preserve ESI through a totally revamped Rule 37(e) (as made applicable to bankruptcy proceedings through Federal Rule of Bankruptcy Procedure Rule (“Bankruptcy Rule”) 7037). Other rule changes were

¹ Rule 26(b)(1).

² Rule 34.

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