

9TH CIRCUIT BANKRUPTCY APPELLATE PANEL CONCLUDES

Bankruptcy Trustees Can Utilize Consent Directives to Locate Offshore Assets of the Debtor

Eric (Rick) S. Rein, Esq., Horwood Marcus & Berk Chartered, Chicago, Illinois and
John W. Guzzardo, Esq., Horwood Marcus & Berk Chartered, Chicago, Illinois

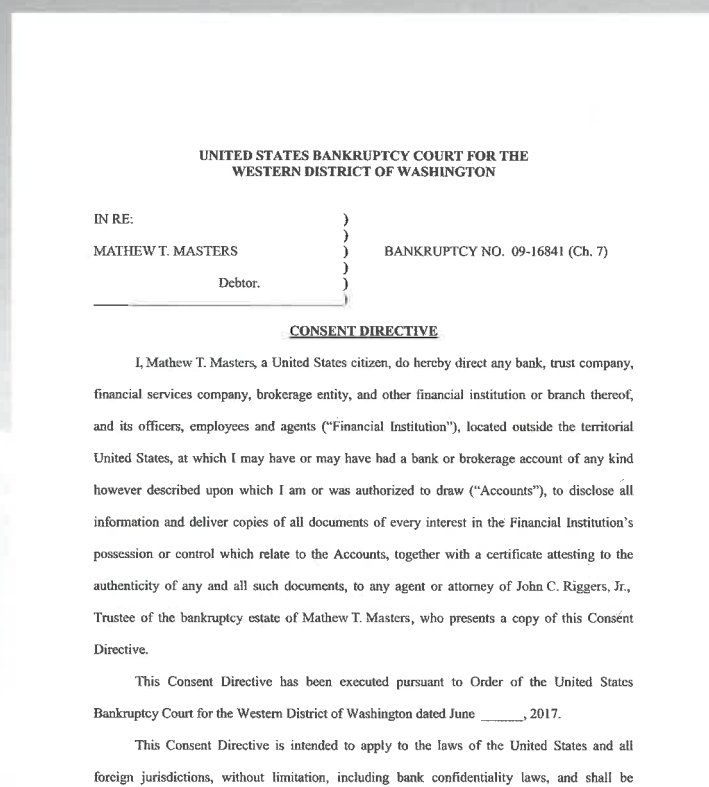


Exhibit A

3788752/13847-000
81190279-v1/45271-006

05/26/17 11:14:00 Pg. 1 of 2

KEY POINTS

1. A consent directive is a discovery tool used to uncover and recover offshore assets protected by foreign bank-secrecy and data-privacy laws.
2. The court compels the defendant to sign and consent to a general release that directs any recipient to disclose any accounts held by that defendant.
3. The Ninth Circuit Bankruptcy Appellate Panel held that bankruptcy trustees may use consent directives in administering their estates. *Rigby v. Mastro*, 585 B.R. 587 (B.A.P. 9th Cir. 2018).

A consent directive is a “rare bird” investigatory tool that litigants in the United States may use to discover assets and information from debtors or third parties located anywhere in the world. Recently, the Ninth Circuit Bankruptcy Appellate Panel held that the Bankruptcy Code, (specifically, 11 U.S.C. §§105(a); 704(a)(1), (4); and 521(a)), permits and authorizes trustees to utilize consent directives in the administration of their estates. It would appear that chapter 7 trustees now have another arrow in their quiver to identify, and ultimately recover, hidden offshore estate assets.

What is a Consent Directive?

A consent directive is an authorization providing for release of information or documents by a foreign third party. Contrary to its name, a consent directive is often not truly consented to, nor consensual. The court compels the defendant to sign and consent to a release that does not either identify the banks or the accounts but, instead, generally directs the recipient to disclose any accounts that may be held by the signatory. In order to protect against abrogation of Fifth Amendment rights, the consent directive form must comply with the requirements set forth in *Doe v. United States*, 487 U.S. 201 (1988). The form must not require the signer to admit to the existence of any account in any bank or institution, over which the party has or may have had control. It merely authorizes the bank or institution to release information regarding any accounts that do or did exist. Further, the form should not identify any specific bank or institution. The form must also state it was executed pursuant to court order. *Id.* Below is sample consent directive based upon applicable legal authority:

Consent Directive

I, [Defendant], a United States citizen, do hereby direct any bank, trust company, financial services company, brokerage entity, and other financial institution or branch thereof, and its officers, employees and agents (“Financial Institution”), located outside the territorial United States, at which I may have or may have had a bank or brokerage account of any kind however described upon which I am or was authorized to draw (“Accounts”), to disclose all information and deliver copies of all documents of every interest in the Financial Institution’s possession or control which relate to the Accounts, together with a certificate attesting to the authenticity of any and all such documents, to any agent or attorney of [Requesting Trustee], Trustee of the bankruptcy estate of [Defendant], who presents a copy of this Consent Directive.

This Consent Directive has been executed pursuant to Order of the United States Bankruptcy Court for the [District], [Date].

This Consent Directive is intended to apply to the laws of the United States and all foreign jurisdictions, without limitation, including bank confidentiality laws, and shall be construed as consent as the same shall apply to any bank and brokerage accounts however described for which I may be or may have been a relevant principal, signatory, controller or beneficiary.

Dated: _____

Signature _____

Why Use a Consent Directive?

Consent directives have evolved as a work-around to foreign bank-secrecy and data-privacy laws that would otherwise prohibit the disclosure of accounts and identities. These “blocking statutes” have proliferated globally over time (at least in part) as a response to the American pretrial discovery rule—where litigants control the investigatory and discovery phases of contested matters.¹ Blocking statutes often impose criminal liability or administrative penalties if the account holder releases information. These penalties give foreign account holders valid reason to resist compliance with standard subpoenas issued from United States soil.

Customer consent, however, is nearly always an exception to blocking statutes.² The consent directive ostensibly provides proof of that consent and permits the account holder to sidestep the conundrum of violating either the foreign privacy laws or United States discovery orders—“the conflicting commands of foreign sovereigns.”³

United States criminal law has a history of using consent directives to compel cooperation in investigations. In 1988, the United States Supreme Court in *Doe* concluded (correctly drafted) consent directives were constitutional, as they were not testimonial in nature nor violative of a signer’s Fifth Amendment privilege. *Id.* After *Doe*, courts relied on various sources of authority to issue consent directives in non-bankruptcy cases. Some courts relied on the All Writs Act, 28 U.S.C. § 1651. *See id.* at n. 3. In criminal proceedings, the recalcitrant witness

continued on next page



About the Authors

Eric (Rick) S. Rein is a partner with Horwood Marcus & Berk Chartered and chair of the firm’s Litigation Group. Rick also concentrates his practice in multijurisdictional litigation, specifically the recovery of foreign claims and assets. He is also

well regarded for his knowledge of international legal systems and frequently serves as special counsel to the financial services industry, corporations, attorneys, accountants, trustees, receivers and high-net-worth individuals. He has handled complex international banking and fraud matters in more than 40 jurisdictions throughout North and South America, Asia, Africa, the Caribbean, and Europe.

John W. Guzzardo is a partner in Horwood Marcus & Berk Chartered’s Bankruptcy, Reorganization and Creditor’s Rights Group. John represents debtors, creditors, trustees and receivers in local, regional and national chapter 11 and 7 proceedings—with an emphasis on representing chapter 7, chapter 11 and liquidation trustees as well as post-confirmation plan administrators in complex bankruptcy cases.

statute, 28 U.S.C. § 1826, emerged as the basis of authority. *In re Grand Jury Proceedings*, 873 F.2d 238 (9th Cir. 1989); *In re Doe*, 860 F.2d 40, 49 (2d Cir. 1988). Federal agencies may obtain consent directives based on their investigatory powers, including the ability to issue subpoenas and compel witness testimony for information outside the United States. In a civil context, courts have authorized consent directives based on their broad discretion to supervise discovery under Federal Rules of Civil Procedure 26. See *S.E.C. v. College Bound*, 155 F.R.D. 1, 2 (D.C. 1994) (district court's authority under Fed R. Civ. P. 26 extends to compelling parties to sign consent directives in civil matters).

New Authority for Bankruptcy Trustees to Use Consent Directives.

On June 5, 2018, in *Rigby v. Mastro*, the 9th Circuit Bankruptcy Appellate Panel decided the first reported case addressing a bankruptcy court's authority to compel a debtor to sign a consent directive at the request of a chapter 7 trustee. 585 B.R. 587 (B.A.P. 9th Cir. 2018). The *Rigby* court opined that a trustee's powers resemble those of governmental agencies. Like those agencies, a trustee has the statutory authority under 11 U.S.C. §704(a)(1), (4) and §521(a) to require the production of foreign account information in furtherance of the duty to investigate the debtor's financial affairs and collect and liquidate the estate.

Likewise, the court held that a debtor's disclosure obligations are analogous to the obligations of witnesses under subpoena. The recalcitrant witness statute requires the production of any "book, paper, document, record ..." 28 U.S.C. §1826(a). Title 11 U.S.C. §521(a)(4) does the same. The *Rigby* court concluded that, to the extent 28 U.S.C. §1826(a) authorizes use of a consent directive, so would §521(a)(4).

The *Rigby* court also held that §105 and Bankruptcy Rule 2004 provide broad authority for a bankruptcy court to enter orders carrying out Bankruptcy Code-imposed obligations. "A consent directive under §105 would enable the trustee's §704 investigation of the debtor's financial affairs; and it is consistent with a debtor's §521 obligation to cooperate with this investigation." In addition, Rule 2004 is the basic discovery device that "enables the financial affairs investigation required by the Code" that is "firmly tethered to the Trustee's §704 statutory duties." *Id.* As Rule 2004 authorizes a trustee to compel production of documents, a trustee may use consent directives as would any governmental agency.

As a result, the *Rigby* court decided that a bankruptcy court is authorized, under §105(a) and Rule 2004, to compel a debtor to sign a consent directive in furtherance of the debtor's §521(a)(4) obligations to provide information of financial affairs to the trustee in furtherance of trustee's duties to investigate those affairs under §704(a).

The consent directive is the authority often required by foreign financial institutions to release financial information. The consent directive alone, however, will not compel those offshore financial institutions to release the information. Other legal mechanisms under the Hague Convention will need to be employed by experienced counsel to obtain foreign account records—such as securing letters rogatory, applying to the court of the foreign country to compel disclosure or moving to compel production domestically under a comity analysis. ■

ENDNOTES:

- ¹ See Note: Strict Enforcement of Extraterritorial Discovery, David E. Teitelbaum, 38 Stan. L. Rev. 841 (Feb. 1986), contrasting the "American Rule" with the European process of court-controlled discovery and also citing the substantial increase in extra-territorial application of U.S. law as a cause of increased enactment of blocking statutes.
- ² See David L. Barres, Compelled Discovery of Foreign Bank Secrecy for Discovery of Records Abroad, *New York Law Journal*, Vol. 249, No. 122, June 26, 2013, discussing bank-privacy laws and customer waiver in the civil discovery context.
- ³ See *In re Grand Jury Proceedings Bank of Nova Scotia*, 740 F.2d 817, 828 (11th Cir. 1984) (where circuit court upheld civil contempt of third-party financial institution that refused, pursuant to Cayman Island bank secrecy laws, to produce documents relevant to a narcotics trade investigation). See also *In re Various Grand Jury Subpoenas*, Case No. 1:12-MC-00381, 2017 U.S. Dist. LEXIS 80519 at *2-3 (S.D.N.Y. May 25, 2017) (where Credit Suisse refused to concede to a consent directive because the directive contained a phrase, required in the Second Circuit, that it "had been compelled by court order." Credit Suisse objected "explaining that by operation of Swiss law [Credit Suisse] could only disclose its records pursuant to a directive omitting such phrase." *Id.* Ultimately, the district court placed the burden on the citizen respondent to comply with the subpoena, as there were other avenues for her to obtain the disputed information from Credit Suisse).



Arthur Lander
CPA & Attorney
(703) 486-0700
cpa@arthurlander.com

Chapter 7, 11, and 13 accounting and taxes

Forty years' experience in public accounting

Thirty years' experience practicing law

Various asset cases exceeding \$250 million

Has worked with numerous trustees over 25 years

Accounting & Tax Preparation • Payroll • 401k Rollovers
MOR • Preferential Payments • Fraudulent Transfers

Let us help you. Visit us at:
arthurlander.com/trustees