ADVISORY COMMITTEE ON BANKRUPTCY RULES

Meeting of October 10-11, 2002
Hyannis, Massachusetts

Minutes

The following members attended the meeting:

Bankruptcy Judge A. Thomas Small, Chairman
District Judge Robert W. Gettleman
District Judge Norman C. Roettger, Jr.
District Judge Ernest C. Torres
District Judge Thomas S. Zilly
District Judge Laura Taylor Swain
Bankruptcy Judge James D. Walker, Jr.
Bankruptcy Judge Christopher M. Klein
Bankruptcy Judge Mark McFeeley
Professor Mary Jo Wiggins
Professor Alan N. Resnick
Eric L. Frank, Esquire
Howard L. Adelman, Esquire
K. John Shaffer, Esquire
J. Christopher Kohn, Esquire

Professor Jeffrey W. Morris, Reporter, attended the meeting. Circuit Judge Anthony J. Scirica, chair of the Committee on Rules of Practice and Procedure (Standing Committee), Professor Daniel Coquillette, reporter of the Standing Committee, and District Judge Thomas W. Thrash, Jr., liaison to the Standing Committee, attended. Bankruptcy Judge A. Jay Cristol, a former member of the Committee, attended. Bankruptcy Judge Wesley W. Steen attended the first day of the meeting as a representative of the Committee on the Administration of the Bankruptcy System (Bankruptcy Committee).

The following additional persons attended all or part of the meeting: Lawrence A. Friedman, Director, Executive Office for United States Trustees (EOUST); Martha L. Davis, Principal Deputy Director, EOUST; James J. Waldron, Clerk, United States Bankruptcy Court for the District of New Jersey; John K. Rabiej, Chief, Rules Committee Support Office, Administrative Office of the United States Courts (Administrative Office); Patricia S. Ketchum and James H. Wannamaker, Bankruptcy Judges Division, Administrative Office; Robert Niemic, Research Division, Federal Judicial Center (FJC); and Ned Diver, law clerk to Judge Scirica.

The following summary of matters discussed at the meeting should be read in conjunction with the various memoranda and other written materials referred to, all of which are on file in the

office of the Secretary of the Standing Committee. Votes and other action taken by the Committee and assignments by the Chairman appear in **bold.**

Introductory Matters

The Chairman introduced Judge Swain, a new member of the Committee, and welcomed all the members, liaisons, advisers, and guests to the meeting. The other new member of the Committee, District Judge Irene M. Keeley, was unable to attend. The Chairman presented a certificate of appreciation to Judge Cristol in recognition of his service as a member of the Committee and as chair of the Technology Subcommittee.

The Committee approved the minutes of the March 2002 meeting.

The Chairman briefed the Committee on June 2002 meeting of the Standing Committee. The Standing Committee approved the six amended rules, one new rule, and 12 amended Bankruptcy Official Forms the Committee had forwarded for adoption and sent them to the Judicial Conference. In addition, the Standing Committee approved the Committee's recommendation to publish a proposed amendment to Rule 9014 for public comment.

Judge Steen reported on the June 2002 meeting of the Bankruptcy Committee. Of the matters currently before that committee, the one most likely to have a major impact on the rules, he said, is the question of venue. The Venue Subcommittee of the Bankruptcy Committee is considering the venue of large corporate bankruptcy cases and has asked the FJC to study what factors affect the debtor's choice of venue and what factors appear to affect the progress of large chapter 11 cases. The Bankruptcy Committee additionally has recommended that bankruptcy judges be allowed to raise the question of venue and to transfer a bankruptcy case sua sponte. At its meeting in September 2002, the Judicial Conference agreed to seek the amendment of the bankruptcy venue statute, 28 U.S.C. § 1412. Judge Steen said the Bankruptcy Committee deferred the issue of whether to request a rules amendment concerning changing venue. Judge Steen stated that Bankruptcy Committee has received comments from other interested committees on the June 2002 report of its Subcommittee on Mass Torts. The report is being revised for presentation at the January 2003 meeting of Bankruptcy Committee.

Action Items

Proposed Amendment to Rule 1009. The proposed amendment was suggested as a means to reinforce the need to serve creditors with notice of the debtor's amended claim of exemptions and to reduce the number of disputes over the timeliness of exemptions claimed by way of amended schedules. Professor Morris noted that the practice in many areas is to serve an amended claim of exemptions only on the trustee, despite the requirement in Rule 1009 that the amendment be served on the trustee and "any entity affected thereby." Pursuant to Rule 4003(b),

a party in interest may file an objection to the list of exemptions within 30 days after the conclusion of the meeting of creditors or within 30 days after any amendment to the list. In the event that the debtor fails to notify all affected parties, the courts generally have held that the time for filing objections does not begin to run. Some courts have held, however, that actual notice of the amendment will trigger commencement of the objection period.

Several members questioned whether it would be more appropriate to amend Rule 4003 to require that an objection be filed within 30 days from when the amendment to the claim of exemptions is filed and served on the trustee and affected creditors. Because the proposed amendment to Rule 1009 applies only to notice of an amended claim of exemptions, one member asked whether there are other circumstances in which all creditors are affected by an amendment to the voluntary petition, list, schedule, or statement. While there may be instances in which other amendments may have an impact on all creditors, the frequency of exemption amendments and their wide ranging impact justify the separate treatment of these amendments. Professor Morris suggested that the Committee Note could be amended to state specifically that the presence of a rule regulating exemption amendments should not be read as suggesting that debtors need not serve copies of amendments to other schedules or statements on affected parties. One member stated that giving notice to all creditors of every amendment is unduly burdensome and that the rule should specify when all creditors should be noticed of any amendment, not just amended claims of exemptions. Mr. Friedman said the debtor's right to amend the petition, schedules, and statements up to the end of the case is a broader problem that presents difficulties for trustees. He said the EOUST would prefer the Committee to consider the whole problem and would present recommendations toward that objective. **The consensus was to do nothing at this time.**

Proposed amendment to Rule 4008. The Bankruptcy Judges Advisory Group had requested that the Committee consider amending Rule 4008 to establish a deadline for filing a reaffirmation agreement. Section 542(c) of the Bankruptcy Code requires that a reaffirmation agreement be in writing, be made before the entry of the debtor's discharge, be approved by the debtor's attorney, and be filed with the court. If the debtor is not represented by counsel, the court must make a finding that the agreement is in the debtor's best interest and does not impose an undue hardship on the debtor. Neither the statute nor the rules set a deadline for filing a reaffirmation agreement with the court. Thus, a reaffirmation agreement could be made before the discharge, but not filed with the court for some time. It appears that late filing of reaffirmation agreements is creating problems for some courts, which must reopen closed cases to permit the filing of these agreements. In addition, setting a deadline in Rule 4008 for filing a reaffirmation agreement would permit the courts to schedule a hearing on any agreement in a pro se case in an orderly fashion.

Professor Resnick stated that the court should have broad discretion to extend the time to file a reaffirmation agreement because a pro se debtor might not know about the filing deadline. He suggested that the Committee Note to the proposed amendment state that a request for extension of the time could be filed before or after the 10-day period. Judge Steen suggested that

the deadline be set at 30 days after the discharge in order to minimize the number of requests for extensions of time. Judge Walker said cases generally are closed shortly after discharge and, therefore, perhaps, the agreements should be filed before discharge. Judge Klein stated that the Court of Appeals for the Ninth Circuit has held, In re Staffer, 306 F.3d 967 (9th Cir. 2002), that closing a bankruptcy case is not jurisdictional and that the bankruptcy court can still entertain a dischargeability action. He added that a case doesn't have to be reopened to file a paper. After discussion, the Committee decided to delete the language of the existing rule that sets deadlines for notices of a discharge and reaffirmation hearing, and to substitute a rule that simply establishes a deadline for filing a reaffirmation agreement with the court. The filing of a reaffirmation agreement will enable the court to determine whether a discharge hearing is necessary, and the court can then schedule the hearing in the most efficient manner. The Committee concluded that getting reaffirmation agreements filed is the most important objective, and leaving discretion to the courts to notice and schedule the hearings permits the courts to set their own calendars in the most efficient manner.

At its March 2002 meeting, the Committee discussed the possibility of a survey of the bankruptcy courts regarding the extent of any problems with the late filing of reaffirmation agreements. Mr. Niemic asked whether the Committee still was interested in a such survey. Chairman Small stated that, if there is a problem, the courts will tell the Committee about it during the comment period on the proposed amendments. Professor Resnick moved to revise the proposed amendment to allow a reaffirmation agreement to be filed not later than 30 days after entry of the discharge, to specify that the court may extend the deadline for cause, to state in the Committee Note that the court has broad discretion to extend the time, and to approve the amendments and the Committee Note, as revised, for publication. The proposed amendment would no longer require the court to hold the hearing within a stated time. **The motion carried without objection.**

Proposed Amendments to Rules 2002 and 3017. Mr. Shaffer had suggested that Rules 2002 and 3017 be amended to establish a shorter notice period for the time to file objections to a disclosure statement than for the time for the hearing to consider approval of the statement. The changes were intended to prevent unnecessary delays at the hearing due to objections that are filed at the hearing. Mr. Shaffer stated that, after reading the Reporter's memorandum on the proposal, he is not sure that the amendments are needed. **The consensus was to take no action.**

Proposed Amendment to Rule 8001. Mr. Richard Friedman, an attorney in the Office of the United States Trustee in Chicago, had suggested that Rule 8001 be amended to address the problem of unperfected appeals. Mr. Friedman noted that in many instances he has faced the situation in which the appellant failed to designate the record under Rule 8006, requiring that he file a motion to dismiss in the district court, wasting time for both the appellee and the appellate court. He suggested that Rule 8001 be amended to allow the bankruptcy court to dismiss the appeal if it has not been docketed in the appellate court and the appellant has failed to take whatever action is necessary to enable the clerk to assemble and transmit the record as provided under Rule 8006.

Professor Morris stated that there is a jurisdictional difficulty with the proposed amendment because, once the notice of appeal is filed, jurisdiction over the appeal is with the appellate court. The Committee members discussed how the situation is handled in different courts. In some courts, the bankruptcy clerk notifies the clerk of the appellate court that the record has not been completed. In others, the bankruptcy clerk transmits the incomplete record or a local rule authorizes the bankruptcy court to dismiss the unperfected appeal. The Committee discussed various approaches, including a model local rule on unperfected appeals, guidance for the clerks and chief judges, a rules amendment providing for the transmission of the incomplete record if the appeal is not perfected in a timely fashion, an amendment providing for the bankruptcy clerk to transmit notice of the filing of the notice of appeal to the appellate court as is provided in Appellate Rule 3(d), and a review of Part VIII rules generally. **The Committee agreed with Chairman Small's suggestion that the matter be referred to the Subcommittee on Appeals.**

Proposed Amendment to Rule 3004. Mr. Frank and Judge Walker each had noted problems with Rule 3004. The rule provides that the trustee or debtor may file a proof of claim on behalf of a creditor if the creditor does not file a proof of claim on or before the first date set for the meeting of creditors. Although the deadline in Rule 3004 for filing such a claim is 30 days after expiration of the time for filing claims pursuant to Rules 3002(c) or 3003(c), the rule provides for a creditor to file a superseding claim "pursuant to Rule 3002 or Rule 3003(c)." Thus, the Reporter stated, the creditor has an earlier deadline for filing a superseding claim than the debtor or trustee has for filing the original claim on behalf of the creditor. The Reporter stated that, by allowing the debtor or trustee to file a proof of claim on behalf of a creditor before the creditor's deadline for filing, Rule 3004 gives the debtor and trustee more power than the statute does. 11 U.S.C. § 501(c) requires that they wait until the creditor's claim would be untimely. Furthermore, the 1983 Committee Note to Rule 3002 and the 1987 Committee Note to Rule 3004 are inaccurate as a result of subsequent changes in the Bankruptcy Code and Rules. The Reporter stated that there is no mechanism for amending or revising a Committee Note in the absence of an amendment to the rule in question.

Several committee members discussed the extent of a creditor's right to amend a proof of claim filed by the debtor or trustee, as delineated by the Court of Appeals for the Fifth Circuit, In re Kolstad, 928 F.2d 171 (5th Cir. 1991), *cert. denied,* 502 U.S. 491 (1991), and contrasted the right to amend with filing a superseding claim or objecting to the claim filed by the debtor or the trustee. The Reporter offered an amendment to Rule 3004 which would permit the debtor or trustee to file a proof of claim for the creditor within 30 days after the expiration of the time for filing pursuant to Rule 3002(c) or 3003(c), whichever is applicable, and would delete the provision for the creditor to file a superseding claim. The proposed Committee Note stated that the rule leaves to the courts the issue of whether to permit subsequent amendment of such claims filed by the debtor or trustee. Judge Steen suggested that the amended rule state that the clerk shall give notice of the claim, rather than mailing notice. Judge Klein said that the Committee Note should state why the provision for superseding claims was deleted. **The Committee approved the revised amendment to Rule 3004 and Committee Note, including Judge**

Steen's and Judge Klein's suggestions, by a 9-1 vote.

Proposed Amendment to Rule 3005. The Reporter offered an amendment deleting the last sentence of Rule 3005 and making stylistic changes so that the rule would be consistent with section 501(b) of the Code and the proposed amendment to Rule 3002. Professor Resnick suggested adding "in a timely manner" to the first line of the amended rule, deleting the phrase "filed by the codebtor" from the last sentence of the first paragraph of the Committee Note, and ending the second paragraph of the Committee Note after the phrase "in the name of the creditor." **The Committee accepted the suggestions and approved the revised amendment to Rule 3005 without objection.**

Amendment to Rule 9031. Chief Bankruptcy Judge David S. Kennedy had written to the Committee inquiring about the possibility of amending Rule 9031 to permit a bankruptcy court to appoint a special master to assist the court in appropriate circumstances. Judge Kennedy enclosed two law review articles which assert generally that since bankruptcy courts adjudicate matters as complex as the matters heard in the district courts, the bankruptcy courts should be able to call upon the expertise of a special master to the same extent as the district courts under Civil Rule 53. The Reporter stated that the complexity of bankruptcy mega cases provides a reason for changing the rule to authorize the use of special masters but that the expanded use of examiners in chapter 11 cases, the absence of a statutory provision for compensating special masters in bankruptcy cases, and the possibility of unintended consequences resulting from a change all are reasons not to change the rule.

Professor Resnick provided some historical background for the changes made to the bankruptcy statute in 1978 which placed the power to appoint trustees and professionals in hands other than those of the judge. He said that it is important to retain that authority in a disinterested official such as the U.S. trustee or bankruptcy administrator rather than the judge. Professor Resnick also provided additional background on the Committee's prior consideration of a proposal to amend Rule 9031 to permit the appointment of special masters. The Committee expressed concerns about the adjudicatory role of a special master who may make findings of fact and conclusions of law, the constitutionality of a special master's appointment by a non-article III judge, and the standard of review of a special master's findings of fact and conclusions of law by the bankruptcy judge and on appeal.

The Committee discussed the use of court appointed experts pursuant to Evidence Rule 706 or the reference of matters to binding arbitration instead of using special masters. A member stated that parties in a case could consume hours of court time arguing about a motion to appoint a special master. Several members questioned the propriety of imposing the cost of a special master on the bankruptcy estate and whether authority would exist to do so. **The Committee determined to take no action at this time.**

Electronic Issuance of Summons. As more courts convert to the Case Management/Electronic Case Files (CM/ECF) system, there is increasing interest in the

possibility of issuing a summons electronically. The chief deputy clerk of the Bankruptcy Court for the Western District of Pennsylvania wrote to the Committee requesting a rules amendment to permit electronic issuance. Mrs. Ketchum stated that the change would save time for the clerk's office and save attorneys a trip to the courthouse. She stated that attorneys complete a blank summons that has been signed and sealed by the clerk.

Mrs. Ketchum noted the difference between issuing summons electronically and serving the summons and complaint electronically. Civil Rule 5 authorizes the service of certain pleadings and cases papers by electronic means if consented to by the person served, but Civil Rule 4, which governs the service of the summons, does not have a provision for electronic service. **The consensus was to study the matter further. Chairman Small referred it to the Subcommittee on Technology and to the Civil Rules Committee.**

Listing Parties to Executory Contracts and Unexpired leases as Creditors. A debtor must list all of its executory contracts and unexpired leases on Schedule G, along with the name and address of the other parties to the contracts and leases. There is a cautionary reminder for the person completing the form that listing a person on Schedule G will not result in that person receiving notice of the bankruptcy case unless the person is also listed on the appropriate schedule of creditors. The difficulty is that many unexpired leases are not in default at the time of the bankruptcy filing and debtors are reluctant to list landlords on the matrix. In addition, if the debtor is a software licensor, it may have thousands of software users who arguably may be parties to an executory contract. Similarly, a manufacturer may have warranty obligations with thousands of customers.

Mr. Frank stated that the presumption should be to give these parties notice. If there are too many of them, the debtor can file a motion to limit notice. Professor Resnick stated that the other parties to executory contracts are creditors and that the current form gives the debtor the erroneous impression that giving them notice is discretionary. Judge Walker stated that requiring a list of creditors, including parties on Schedule G, would imply that the parties to executory contracts are creditors. Professor Resnick stated that requiring a list of creditors and parties to executory contracts would imply that the parties are not creditors. Mr. Frank suggested deleting the note on Schedule G and revising Rule 1007(a)(1) to require that the debtor file a list of creditors and parties listed on Schedule G. **Chairman Small directed the Reporter to draft proposed amendments to Rule 1007 and the Official Form and submit them at the next meeting.**

Exclusion of Certain Kinds of Adversary Proceedings from Mandatory Disclosure under Civil Rule 26. Civil Rule 26, made applicable to adversary proceedings by Rule 7026, requires a series of actions by parties including the disclosure of a variety of information and participation in a discovery conference. The Committee has proposed an amendment to Rule 9014 to exempt contested matters from the mandatory disclosure requirement because many, if not most, contested matters conclude before the mandatory disclosure periods. The question has been raised whether some categories of adversary proceedings likewise should be exempted.

The Reporter stated that his informal survey of attorneys around the country showed that the mandatory disclosure requirements are more honored in the breach than followed. Judge Klein stated that it would be difficult to get adversary proceedings to trial as quickly as is done now if the court followed the time for mandatory disclosure set out in the rule. The judge stated that he issues an order in every adversary proceeding shortening time and exempting the parties from certain disclosure.

Professor Coquillette stated that it would be difficult to get an exemption approved by the Standing Committee without a very good empirical study of whether the mandatory disclosure is needed. Mr. Niemic said the nature of suit categories used in the Administrative Office's closing statistics on adversary proceedings are not specific enough to serve as the basis for such a Rule 26 study. As a result, he said, it probably would be necessary to use the PACER system to review the dockets of a sample of adversary proceedings. Judge Swain suggested a less formal inquiry, such as a questionnaire asking the courts whether there is a problem and, if so, what are the workarounds. **Chairman Small asked Mr. Niemic to make a preliminary inquiry about such a study and to report back at the spring meeting.** Judge Klein said he had received limited responses from the judges to his inquiries about possible exclusions. **The Chairman asked him to continue his work on a list of possible exclusions and to report back at the spring meeting.**

Information Items

Use of False Social Security Numbers. The Director of the EOUST presented a memorandum on recent cases in which the United States trustees have been involved where debtors have used false social security numbers or sought to conceal their true identities. He stated that these cases underscore he need for U.S. trustees, case trustees, and law enforcement personnel to have access to debtors' full social security numbers.

Rule 2002(g). The Administrative Office's Bankruptcy Noticing Working Group has requested that the Committee consider amending Rule 2002(g) so that a creditor receiving notices electronically could change its address centrally, rather than having to do so through each court individually. The request was discussed at the Tucson meeting and was referred by the Chairman to the Technology Subcommittee for further study. The Committee has received additional information from the Noticing Working Group. In addition, there is a provision in the pending bankruptcy legislation that would permit a creditor to specify and change its address centrally. **The Subcommittee on Technology is to report at the spring meeting if there is no legislative action.**

Transfer of Claims. Mrs. Ketchum stated that an industry has arisen that purchases claims against debtors and thereafter files a notice of the transfer of those claims in the debtors' bankruptcy cases. Generally, if a creditor transfers a claim other than for security after filing a proof of claim, Rule 3001(e)(2) requires that the transferee file evidence of the transfer and that the clerk give the alleged transferor notice of the filing and of the time for objecting to the

transfer. Mrs. Ketchum stated that some clerks follow the notice requirements despite the large number of transfers filed by claims consolidators. Other clerks accept waivers of notice signed by the transferors and filed by the transferees.

Professor Resnick stated that the notice requirement was intended to protect against bogus transfers. He stated that he does not know whether bogus transfers are a problem but that he is concerned about doing away with the notice to the transferor. Judge McFeeley stated that, if a transfer is bogus, the representation that the transferor waived notice also could be bogus. Mr. Waldron stated that processing transfers of claims and issuing the notices is a tremendous amount of work for the clerks and a considerable cost for the Judiciary. He stated that the courts are experimenting with filing transfers of claims electronically and giving electronic notice of the filing, especially to institutional creditors. **Chairman Small appointed Judge McFeeley as liaison to the Claims Subcommittee of the Bankruptcy CM/ECF Working Group. Judge McFeeley is to report on the Claims Subcommittee's work at the spring meeting.**

Confirmation of Receipt for Electronic Notices. The Administrative Office's Bankruptcy Noticing Working Group had requested previously that Rule 9036 be amended to eliminate the requirement that the sender of an electronic notice receive an electronic confirmation that the transmission has been received. Mrs. Ketchum stated that the Bankruptcy Noticing Center (BNC) is trying to expand the use of Electronic Bankruptcy Noticing (EBN) over the Internet, which would reduce the Judiciary's printing and postage costs, but that many Internet service providers do not offer the affirmative receipts required by Rule 9036. EBN also speeds the delivery of notices to the parties and facilitates the use of automated processing by recipients.

Mrs. Ketchum stated that the BNC has tested the reliability of negative receipts which are generated when the transmission fails. The negative receipts proved unreliable at times with email containing large file attachments. She stated that the BNC also has tested text email linked to an electronic copy of the of the notice, which appeared to be reliable. In addition, the BNC is considering setting up its own Internet service provider which would offer affirmative receipts. The Chair stated that it may make sense to delete the requirement for an affirmative receipt or to allow creditors to waive the receipt.

Bankruptcy Abuse Prevention and Consumer Protection Act (Bankruptcy Reform Act). The Committee discussed the possibility of the enactment of the pending Bankruptcy Reform Act, which would require amendments to the rules and forms, as well as new forms. Chairman Small stated that, if the legislation is enacted by December 1, 2002, subcommittee meetings or focus group meetings could be held in Washington in December. A public hearing on the proposed amendment to Rule 9014 has been tentatively scheduled for Washington on January 24, 2003. The Chairman stated that the Committee also could use that day to meet or to hold a focus group hearing in Washington and that another opportunity for meeting would arise in conjunction with the FJC workshop for bankruptcy judges scheduled for March 10-12, 2003, in San Francisco.

Administrative Matters

The Chair announced the appointment of Judge Walker as liaison to the Advisory Committee on Civil Rules and the appointment of Judge Klein as liaison the Advisory Committee on Evidence Rules.

The Committee's next scheduled meeting will be at Longboat Key, FL, on April 3-4, 2003. The Committee discussed several West Coast locations as possible sites of the fall 2003 meeting. The Committee agreed on September 18-19 or September 11-12, 2003, as acceptable dates, with the choice to be made based on when the better hotel rates can be obtained.

Respectfully submitted,

James H. Wannamaker, III