UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF VIRGINIA

COMMONWEALTH OF VIRGINIA BUILDING
210 CHURCH AVENUE, S.W., ROOM 209
ROANOKE, VIRGINIA 24011

09-BK-J

CHAMBERS OF
WILLIAM F. STONE, JR.
JUDGE

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December 10, 2009

Honorable Laura Taylor Swain, Chair
Advisory Committee on Bankruptcy Rules
Room 1205, U. S. Courthouse
40 Foley Square
New York, N.Y. 10007

Re: Suggested amendment to Bankruptcy Rule 9013 and/or Bankruptcy Rule 9014 and Rules to provide for applications for administrative expenses

Dear Judge Swain:

I hope that it will not transgress generally accepted protocol for me to address this letter directly to you. If it does, please accept my apology for doing so.

I wish to propose for consideration by the Advisory Committee an amendment to Bankruptcy Rule 9013 and/or Bankruptcy Rule 9014 which would provide that any motion initiating a "contested matter" in which the special interest of any creditor or other party in interest would be affected should be set forth in a motion naming any such party specially affected as a respondent to the motion in the same manner as a complaint initiating an adversary proceeding. A motion to avoid a lien on the ground of exemption impairment pursuant to Bankruptcy Rule 4003(d) would be a common example. It has always struck me as inconsistent that such a motion need not identify the party whose lien will be affected by it in the style of the motion while any other challenge to a lien must be brought by means of an adversary proceeding per Bankruptcy Rule 7001(2) and (10) in which the complaint must name any such party as a defendant on its initial page(s). Other common examples of motions specially affecting the rights of particular creditors are motions to value collateral, motions to sell estate property free and clear of existing liens, and motions to assume or reject leases or other executory contracts or to extend the time for doing so.

We adopted such a provision as a part of one of our local rules in the Western District of Virginia some years ago and have not experienced any problems which have given us any reason to reconsider it. A copy of our local rule in question (see subsection I), which we have designated as Local Rule 9013-1, is enclosed for your convenient reference.

I should note that I have previously made the same recommendation to the Bankruptcy Judges Advisory Group, where I understand it received a mixed reception. Bankruptcy Judge John Waites, the 4th Circuit representative to that group, advised me concerning the discussion in that group as follows:

> Often if there is not a strong consensus on an issue, BJAG will not take a position. On the 9013 suggestion, some judges noted that motions that addressed groups of creditors might have huge and confusing captions. Also some reported the judges in that circuit did not see a lot of due process concerns on this subject. Finally, that you could send it to the Rules Committee directly.

A brief statement outlining the reasons for the proposal and my responses to the points raised in the Bankruptcy Judges Advisory Group is also enclosed.

At the risk of seriously straining the reasonable limits of your patience and graciousness, I would also like to suggest that the Committee consider additional Bankruptcy Rules to provide for applications for the allowance of administrative expenses. To be very succinct, there are detailed Code and Rules provisions governing a class of administrative expenses, namely, the employment and compensation of professionals, but the Rules provide no guidance about whether applications for the allowance of other administrative expenses should be noticed to creditors generally or some subset of creditors, such as a committee or the twenty largest creditors, or at all and appear to leave this to local practice or individual judges' discretion. Similarly, while the Official Forms include one for a proof of a creditor's claim against the estate, there is no form provided for an application for allowance of an administrative expense from that estate. It strikes me that this subject is important enough that the Rules ought to provide for standardized procedures.

Thank you for your consideration and the efforts which you and other Committee members devote to its work.

Sincerely,

William F. Stone, Jr.

WFSJr/ebc
Enclosures
cc: Honorable John E. Waites (with enclosures)
Honorable Elizabeth L. Perris (with enclosures)
Honorable Eugene R. Wedoff (with enclosures)
Honorable Judith H. Wizmur (with enclosures)

LOCAL RULE 9013-1

Motions Practice

A. Requirement of Written Motion: In all cases or proceedings, all non CM/ECF motions shall be in writing and be originally signed by the movant or movant's counsel unless made during a hearing or trial.

B. Grounds and Relief to be Stated: All motions shall state with particularity the grounds therefor and shall set forth the relief or order sought.

C. Address and Telephone Number of Attorney: The lower left-hand portion of the signature page or pleading shall include the name, address, and telephone number of the attorney or *pro se* party filing the same.

D. Return Date, Conference of Counsel: Except as otherwise provided by an order of the Court or by these Local Rules, all motions shall be made returnable to the time obtained from and scheduled by the Court for a hearing thereon. Before requesting a hearing date on any motion, the proponent shall confer with opposing counsel, in person or by telephone, in a good-faith effort to narrow the area of disagreement.

E. Requirement of Proof of Service: At the end of each pleading, motion and other paper required to be served upon a party, there shall be a proof of service signed by counsel (or the *pro se* party) certifying that copies were served and detailing the date, manner of service, and the names and addresses of those served.

F. Extensions: Any request for an extension of time relating to motions must be in writing and approved by the Court.

G. Determination of Motions Without Oral Hearing: In accordance with Rule 78 of the Federal Rules of Civil Procedure, the Court may rule upon motions without an oral hearing, unless otherwise required by the Bankruptcy Code, the Bankruptcy Rules, or these Local Rules.

H. Giving Notice of Motion or Hearing: The party filing a motion, response, or other pleading requiring or requesting a hearing on same, shall make a good-faith effort to contact opposing counsel for dates and then obtain a hearing date from the Court and shall give notice of that hearing date to all parties required to receive notice by the Bankruptcy Rules, these Local Rules, or by order of the Court. The original motion, response, or other pleading, the notice of hearing, and certification that notice of the hearing date has been given must be filed with the Clerk within seven (7) days after the Court has given the hearing date. Failure to file such a certification and notice within the seven (7) days may result in the Court's reassignment, without notice, of the hearing date to other matters.

I. Caption; Names of Parties: Every motion initiating a contested matter pursuant to Bankruptcy Rule 9014 shall contain a caption which conforms with Official Form 16B and an additional caption setting forth the debtor's name as shown on the petition, the assigned motion number, and a designation showing the parties as "Movant", " Respondent"and "Trustee" (when applicable). The following is an example:

UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
_____ DIVISION

IN RE
JOHN B. DOE
Debtor

Chapter _____

Case No._____

U. R. BANK
Movant
v.

Motion No._____

JOHN B. DOE
Respondent
and

I. B. MONEY, TRUSTEE
Respondent

J. Paragraphs; Separate Statements: All averments of claim or defense shall be made in numbered paragraphs, the contents of each of which shall be limited as far as practicable to a statement of a single set of circumstances; and a paragraph may be referred to by number in all succeeding pleadings. Each claim founded upon a separate transaction or occurrence and each defense other than denials shall be stated in a separate count or defense whenever a separation facilitates the clear presentation of the matters set forth.

K. Adoption by Reference; Exhibits: Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion. A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes.

L. Electronic Filings: Service of any pleading filed electronically, other than a complaint and summons initiating an adversary proceeding pursuant to FRBP 7001 or a motion initiating a contested matter pursuant to FRBP 9014, both of which require service pursuant to FRBP 7004, may be made electronically, pursuant to Local Rules 2002-1(D) and 5005-4, upon any attorney or non-represented party who in either case is a registered User of the Electronic Filing System. Service upon others shall be made in accordance with the other provisions of this Rule.

STATEMENT OF RATIONALE SUPPORTING PROPOSED AMENDMENT OF BANKRUPTCY RULES 9013 AND/OR 9014

The proposal, simply stated, is that the Rules be amended to require that motions initiating contested matters which affect the special or individual rights of reasonably identifiable creditors or other parties in interest should have a caption in the nature of what would be required in a complaint initiating an adversary proceeding naming such creditors or other parties in interest as respondents to the motion. The underlying rationale, again simply stated, for this proposal is that naming a person or entity as a respondent on the initial page(s) of the caption of a motion is the best simple and inexpensive way to make such party aware that the motion seeks some manner of relief which affects the particular rights or interests of such party and therefore is a pleading which ought to be reviewed carefully and dealt with promptly.

Such a requirement is likely to reduce the number of instances in which creditors or other parties in interest fail to respond to motions due to a lack of awareness that the relief being sought in the motion affects the property rights or other special interests of such party. A collateral benefit would be that it would compel practitioners before even filing a particular motion to evaluate what parties have rights which would be affected by the granting of the motion, such as, for example, a motion to sell property free and clear of all liens and other interests, and how adequate notice ought to be given to all such parties. Furthermore, such a requirement would assist bankruptcy judges and their law clerks in identifying parties whose interests may be specially affected by such motions and determining whether they have received notice appropriate to the circumstances of the matter and the nature of the relief being sought.

Questions which have been raised so far to this proposal relate to (1) the possibility of large numbers of parties whose interests might be affected by such a motion and therefore necessitating a wordy and confusing caption, and (2) whether due process requires imposition of such a requirement. These points will be addressed in turn:

1. The possibility of a large number of respondents whose interests may be specially affected by a motion is really no different than the possibility that the relief sought in an adversary proceeding might require the naming of numerous defendants in the complaint. This does not seem to have been a problem in the context of adversary proceedings and there is no obvious reason to conclude that it

is likely to become one with respect to motions initiating contested matters. In the overwhelming majority of situations in which this proposal would be applicable the number of respondents who would need to be named in the caption would be few in number and readily apparent to the preparer of the motion. The Rule could certainly be crafted to provide discretion to judges to modify the requirement of naming individual respondents in those rare situations, the A. H. Robbins bankruptcy case springs to mind, in which strict compliance would be overly burdensome or otherwise impractical, by allowing the respondents to be named in descriptive categories. For example, proceedings in state courts to partition property owned by numerous and widely scattered heirs provide for notice to "Parties Unknown" with some identifying information to provide the best possible notice under the circumstances of the case. Otherwise stated, the fact that in some instances such a requirement might require more than nominal effort on the part of the party filing a motion ought to be weighed in the balance with the benefits which would flow generally from its adoption.

2. Whether or not constitutional due process makes such a procedure obligatory ought not to be determinative in considering whether it ought to be established. The goal ought to be to give the clearest and most practically informative notice possible, with a reasonable expenditure of effort, of proceedings which affect the legal interests of some party in interest, not simply the barest minimum which may satisfy requirements of due process. Indeed one of the cardinal foundation blocks of the Bankruptcy Code is the principle that actions be authorized by the court only after notice and an opportunity for a hearing. The proposal would improve the quality of the notice being given to minimize those instances in which a party in interest recognizes the effects of a particular motion upon such party's rights only after the motion has been granted rather than in time to file an objection and ask to be heard.

Thank you for your consideration.