

**ADVISORY COMMITTEE ON BANKRUPTCY RULES**

**Amended Minutes of the Meeting of November 4-5, 1988**

The Advisory Committee on Bankruptcy Rules met in New Orleans, Louisiana, in the courtroom of the Honorable Morey L. Sear. The following members were present:

District Judge Lloyd D. George, Chairman  
Circuit Judge Edward Leavy  
Circuit Judge Edith Hollan Jones  
District Judge Thomas A. Wiseman, Jr.  
District Judge Joseph L. McGlynn, Jr.  
Bankruptcy Judge James J. Barta  
Bankruptcy Judge Paul Mannes  
Ralph R. Mabey, Esquire  
Joseph G. Patchan, Esquire  
Herbert P. Minkel, Esquire  
Bernard Shapiro, Esquire  
Harry D. Dixon, Esquire  
Professor Lawrence P. King  
Professor Alan N. Resnick, Reporter

The following additional persons also attended the meeting:

District Judge Morey L. Sear, Chairman of the Committee on the Administration of the Bankruptcy System, who attended the November 5 session  
W. Reece Bader, Esquire, Committee on Rules of Practice and Procedure  
Peter G. McCabe, Assistant Director for Program Management, Administrative Office  
Patricia S. Channon, Attorney, Bankruptcy Division, Administrative Office  
Richard G. Heltzel, Clerk, U.S. Bankruptcy Court for the Eastern District of California  
Gordon Bermant, Research Division, Federal Judicial Center  
Thomas J. Stanton, Director, Executive Office for United States Trustees, U.S. Department of Justice  
Barbara G. O'Connor, Senior Counsel, Executive Office for United States Trustees, U.S. Department of Justice

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 to the Committee on Rules of Practice and Procedure.

Votes and other action by the Advisory Committee and assignments by the Chairman appear in bold.

**Reappointment of Members King and Patchan**

The Chairman announced that Professor Lawrence P. King and Joseph G. Patchan, Esquire, had been reappointed to the Committee. Chairman George expressed gratitude to the Chief Justice for ensuring that the Committee would not lose its two most experienced members during this time of extensive revision of the Bankruptcy Rules.

**Approval of Minutes of September 1988 Meeting**

The Committee approved the minutes of the September 1988 meeting subject to several minor corrections requested by the Reporter.

**Class Proofs of Claim**

The Justice Department is representing the Securities and Exchange Commission in opposing the granting of certiorari by the Supreme Court in the Standard Metals case. The SEC, although opposing cert. in this case, supports amending the Bankruptcy Rules to permit the filing of class proofs of claim. In the brief, the Solicitor General suggests that issue is under review as part of the current revision of the Rules. This statement in the government's brief had been a matter of concern to several Committee members at the September 1988 meeting. Professor Resnick stated that he had telephoned the Solicitor General' Office informing the Solicitor General that the

Committee does not plan to consider the issue of class proofs of claim.

Amendment to Rule 9006(a)

Professor Resnick reported that four comments had been received to date on the published draft of the amendment reducing from eleven (11) days to eight (8) days the period from which weekends and holidays may be excluded when computing the time. The Reporter and Chairman will respond to the four letters received so far, and the Reporter will circulate all future comment letters together with the Reporter's comments. Peter McCabe, Patricia Channon and the Reporter will coordinate preparation of the "gap" letter transmitting the amendment to the Committee on Rules of Practice and Procedure for the Advisory Committee's approval at the January 1989 meeting.

Passage of New Rules Enabling Act

The Reporter informed the Committee that final passage of a new Rules Enabling Act had come on October 19, 1988, when the House voted favorably on a Senate amendment in the nature of a substitute for an earlier House bill. (The prior House bill was discussed in detail at the September 1988 Committee meeting.)

The bill, as passed by both houses, leaves intact 28 U.S.C. § 2075, the present enabling legislation for bankruptcy rules. Conversely, the new bill expressly permits other rules to supersede procedural statutes. The exclusion of bankruptcy from the types of rules which may supersede statutes, combined with the preserving of the current § 2075 (which does not contain any supersession language), creates an inference that bankruptcy rules cannot supersede even purely procedural statutes. The

legislative history corroborates that Congress intended this restriction.

The Reporter said that one immediate effect of the new bill is to prevent him from recommending that claims in chapter 12 cases be treated as they are in chapter 11 cases, i.e. that a creditor is deemed to have filed a proof of claim if the debtor has scheduled the claim and the claim is not listed as disputed, contingent or unliquidated. This exception to the provision in 11 U.S.C. § 502(a), that the filing of a proof of claim is a prerequisite to allowance of the claim, is provided in § 1111(a), also part of the statute. No such exception was enacted in chapter 12, and § 502(a), therefore, governs. It would appear that the Committee cannot provide by rule for the deemed filing of chapter 12 proofs of claim.

The new bill also requires that all meetings of rules committees, both standing and advisory, be publicly noticed and open to attendance by the public. Chairman George observed that, technically, these provisions do not apply to the Advisory Committee on Bankruptcy Rules because of a drafting error. Judge George indicated, however, that he intended to abide by the new bill's requirements and also anticipated being directed to do so by the standing Committee. Judge George said he also was considering requesting enactment of a technical amendment to provide specific authority for the Committee and bring the Committee formally under the procedural sections of the statute. He requested and received authorization from the Committee to undertake discussion of such an amendment with James E. Macklin, Jr. and Robert E. Feidler of the Administrative Office.

### Local Rules Oversight

Bernard Shapiro reported that he had appointed Judge Barta, Judge Mannes and Ralph Mabey to the local rules subcommittee and that the subcommittee had met October 20, 1988, in Washington, D.C. The subcommittee determined that, initially, the major effort should be to develop a uniform numbering system. The threshold question - whether such a numbering system should track the national Bankruptcy Rules or the Federal Rules of Civil Procedure - is not amenable to easy resolution. Such a system is more complicated to propose for local bankruptcy rules than it was for civil rules, in part because Part VII of the bankruptcy rules incorporates many of the civil rules. The subcommittee will have the benefit of recent research by Judge Mannes' law clerk on the advantages and disadvantages of various numbering systems. **Patricia Channon will prepare a memorandum on alternative uniform numbering systems for the January 1989 meeting.**

The task of developing model local rules or a list of suggested topics for local rules would be massive. If Administrative Office resources can be made available, the subcommittee would like work to begin promptly. Over the long term, the project, if comprehensive in nature, will need a reporter and funding. The subcommittee hopes to devise methods for reducing the volume of material to be analyzed for purposes of model rule development. Implementation of uniform numbering and the soliciting of selected local rules for inclusion in the national rules may help to streamline the work, as both will require bankruptcy courts to reexamine existing local rules.

Patricia Channon was assigned to draft a letter to all bankruptcy judges informing them about the Local Rules Project

recently completed by the standing Committee and inviting them to cooperate in the Advisory Committee's effort to improve local bankruptcy rules.

The draft letter also would invite the bankruptcy judges to submit to the Committee any of their local rules which they believe serve a national need. Professor King questioned whether the Committee has the resources to deal with a large number of such suggestions. He recommended asking the National Conference of Bankruptcy Judges to act as a filter for the Committee if the invitation to submit local rules remains in the letter.

Mr. Shapiro said the subcommittee also has been advised to seek advice from Dean Coquillette and Mary Squiers, who conducted the Local Rules Project, for the standing committee.

Judge George said he saw a potential need for at least three projects: 1) a uniform numbering system, 2) identification of appropriate subjects for local rules, as opposed to those which more properly belong in local practice manuals or guides, and 3) a set of model local rules. The Chairman also said he believes the local bankruptcy rules should be part of the local district court rules and should cover only subjects not treated in the district court rules and the few matters which may require different treatment in the bankruptcy court. Bankruptcy courts should coordinate local rule drafting with their United States trustee offices also, he said.

Commenting on the local rule-making provisions of the new Rules Enabling Act, in particular the imposition upon circuit judicial councils of an affirmative duty to review local rules for consistency with national rules, Professor King said the

judicial councils will not readily be able to spot these inconsistencies in local bankruptcy rules. He suggested that the Administrative Office and members of the Committee should volunteer their services to assist the councils in evaluating local bankruptcy rules.

Chairman George said the Committee should communicate with the chief circuit judges and suggest that they direct the circuit councils to rely on circuit-wide bankruptcy committees to review their local rules for consistency. Such committees should not include the bankruptcy judges who wrote the rules, he added.

Mr. Patchan suggested that the Committee strengthen Rule 9029, adding more restrictions on local rule making and specifying objectives and standards for local rules. Judge George said the Committee needs a system for monitoring local bankruptcy rules, but that no further action toward that goal could be taken at this meeting.

#### Model Local Rule for Chapter 11 Docket Management

Judge Sear stated that he had reviewed the revised drafts sent to him by the Reporter and that draft #2 was a good statement of how courts should manage chapter 11 case. Having reflected further upon the purpose of local rules and the principle that they should not repeat statutes or national rules, however, Judge Sear said he had determined that even draft #2 would defeat that purpose. A bankruptcy judge already has discretion under 11 U.S.C. § 105 to do everything the draft model rule directs, he said. Accordingly, bankruptcy judges should be educated through seminars, manuals and other methods to exercise that discretion.

Judge Sear then **withdrew the model local rule from consideration** and thanked the Committee for its attention to his request and for its assistance with revising the draft.

### Official Forms

Joseph Patchan reported that he had appointed the following persons to serve on the forms subcommittee: Judge Mannes; Barbara O'Connor; Patricia Channon; Robert M. Wily, Acting Clerk of the Bankruptcy Court for the Eastern District of Virginia; and Ted Donovan, Esquire, (former) Assistant Chief of the Bankruptcy Division, Administrative Office. The subcommittee had held two meetings, in Washington, D.C., on October 11, 1988 and the second by conference call, on October 21, 1988.

The subcommittee had reviewed the petitions and schedules and revised them in light of the comments made at the September 1988 meeting. The subcommittee also had made some further revisions of its own. The new versions, however, had come back from the printer in unsatisfactory condition and could not be distributed to the Committee at the meeting. The subcommittee also had made some revisions to the "Schedule of Transfers" and "Statement of Affairs for a Debtor Currently or Formerly Engaged in Business," and new versions of these were available.

Mr. Patchan reported that the subcommittee also had written to the Securities and Exchange Commission concerning the proposals to replace Exhibit "A" to the petition with two questions in the petition itself and with several questions in the "Statement of Affairs for a Debtor Currently or Formerly Engaged in Business." The letter also invites the SEC to comment on the



proposal to reduce from 20 percent to 5 percent the ownership interest that must be disclosed.

The Reporter requested a preliminary vote on the specific proposal to abrogate the separate Chapter 13 Statement, which is part of the overall package of forms revisions. An affirmative vote would enable him to begin deleting references to the statement now in the rules. After a discussion during which Ms. Channon responded to a number of questions from the Committee, the Reporter commented that the members did not appear ready to commit themselves on this question. Accordingly, he withdrew his request for a vote. **The Chairman directed the subcommittee to present a complete new package on the forms at the January 1989 meeting.**

Mr. Patchan also reported that the subcommittee is considering recommending that Rule 9009 be amended to restrict alterations to the forms to those necessary to accommodate the circumstances of a particular case. At present, many courts alter some Official Forms - generally the § 341 notice - for every case filed in that court. Some of these unorthodox § 341 notices contain incorrect statements of the law. The subcommittee would like to provide room on the § 341 notice for courts to add local information, for example on how to request copies from the courts, but prohibit them from otherwise altering the notice.

Herbert Minkel said that the test version of the § 341 notice could result in heavy reprogramming expenses for those chapter 13 trustees who generate their own notices but whose computers are incompatible with the format of the notice now being tested. Chairman George said that such problems should be minimized by putting the emphasis in any tightening up of Rule

9009 on the content, rather than the design, of the forms. Professor King suggested that some forms could be put into the rules as a means of assuring that their content is not altered.

Patricia Channon reported that the questionnaire to evaluate the results of the test of the proposed revised versions of the § 341 notice (Official Form No. 16) and the proof of claim (Official Form No. 19) were ready for mailing to the test courts. There are two questionnaires, one for completion by court personnel and another for completion by practitioners. Chairman George directed that the courts be requested to be sure to send copies of the questionnaire to their local United States trustees.

#### Chapter 12 Rules

The Reporter introduced the discussion by describing generally the procedural framework of chapter 12, which was enacted in 1986 to provide relief for family farmers. Chapter 12 resembles chapter 13, but requires "expedited" noticing and holding of the hearing on confirmation of the plan. Chapter 12 requires the debtor to file a plan within 90 days of commencing the case and the court to hold the confirmation hearing within 45 days thereafter. Apparently, Congress did not foresee that many plans would be filed with the petition, a development which triggers the scheduling of the confirmation hearing five (5) days after the last day permitted for the § 341 meeting of creditors and 85 days prior to the expiration of the time for filing claims.

Committee actions concerning chapter 12 rules, except that taken with respect to Rule 2012(a), refer to the Reporter's draft chapter 12 amendments, Reporter's memorandum dated

September 2, 1988, Docket No. 5.B.(2). All votes were unanimous unless otherwise noted.

Rule 1007. The Reporter has deferred proposing amendments pending action by the Committee on the proposals to revise the official forms of the petition, schedules and statements. Mention of these documents in other rules also has been left alone for the time being.

Rules 1016 and 1017. The Committee approved the Reporter's draft amendments.

Rule 1019. In subdivision (5) of the rule, the Committee voted to follow chapter 11 procedure for the post-conversion reporting of unpaid postpetition debts by inserting "or chapter 12" [case] at line 14 of page 5 and deleting the references to chapter 12 in lines 15 and 17 of page 5. The Committee approved the Reporter's draft otherwise. The Committee discussed revising the Advisory Committee Note to state that both the debtor in possession and the trustee may need to file post-conversion reports if both have something to say and, further, to make it clear that this report is neither the same as nor a substitute for the trustee's final report required under § 704(9). The consensus, however, was that the matter should be left to statutory interpretation by the courts.

Rule 2002(a). In subdivision (a)(5), the Committee voted to restore existing language, add chapter 12 and amend the draft Committee Note accordingly. The Committee also approved the addition of a new subdivision (a)(9) providing for 20 days notice of the hearing on confirmation of a chapter 12 plan rather than the 15 day notice period which the Reporter had suggested in a draft new subdivision (b)(3). The Committee Note

is to say that "expedited" notice of the hearing on confirmation of a chapter 12 plan means 20 days instead of the 25 days provided for confirmation hearings in chapter 11 and chapter 13 cases.

[For additional changes to Rule 2002(a), not related to chapter 12, see discussion below of amendments to Rules 4001 and 2002(a)(3).]

Rule 2002(b). In light of the determination above that 20 days is the appropriate notice period for the hearing on confirmation of a chapter 12 plan, the Committee voted to retain the existing title of this subdivision. The Committee approved the draft otherwise, with the deletion of the Reporter's proposed new subdivision (b)(3) in light of the vote to make the notice period 20 days and include the notice requirement in subdivision (a) of the rule.

Rule 2002(d). The Committee voted not to require notice to equity security holders in chapter 12 cases. The Committee Note is to state that notice is unnecessary, as chapter 12 is restricted to closely held corporations and shareholders generally can be assumed to know about the filing. If the comments received on the preliminary draft indicate a perceived need for notice, the Committee can provide for it in the final draft. In subdivision (d)(2), the Committee voted to change "ordered by the court" to "held," to conform the rule to the amendment to § 341(b) authorizing the United States trustee to convene meetings of equity security holders.

Rule 2002(f). The Committee approved, with two opposed, restoring the previously deleted phrase "chapter 9 or 11" and the

addition of chapter 12 to the list of confirmation orders the docketing of which must be noticed.

Rule 2003(a). By a vote of eight to one, the Committee voted to amend the rule to shorten the time period for holding the § 341 meeting in a chapter 12 case to "20 to 35" days from the filing of the petition. The ten day extension granted when the meeting is held at a location not regularly staffed by the United States trustee or an assistant would not be applicable in a chapter 12 case. The Committee Note is to state that the United States trustee is to give priority to chapter 12 meetings because Congress has "fast-tracked" the chapter 12 confirmation process..

Rules 2004, 2008 and 2009. The Committee approved the Reporter's recommendations. The Committee noted that Rule 2009 needs attention from the style committee.

Rule 2012(a). At the suggestion of Barbara O'Connor, the Reporter drafted the following amendments which were approved by the Committee: "If a trustee is appointed in a Chapter 11 case or the debtor is removed as a debtor in possession in a Chapter 12 case, the trustee is substituted automatically for the debtor in possession as a party in any pending action, proceeding, or matter." (New language underlined.) A Committee Note will be drafted explaining the amendments.

Rule 2015(a)(6) and (a)(7). The Reporter's proposed amendments are designed to make it clear that these subdivisions do not apply in chapter 12 or chapter 13 cases. The Committee discussed a proposal to delete both subdivisions entirely, as they are "honored mainly in the breach" and deal with monitoring functions that could be performed by the United States trustee under existing statutory authority in the absence of a rule.

The Committee approved the Reporter's proposal, subject to reconsideration later. The agenda for the next meeting is to include consideration of whether to abrogate both subdivisions.

[Additional changes to Rule 2015(a), not related to chapter 12, are discussed below.]

Rule 2015(b). This is a new subdivision; existing subdivisions (b) and (c) would be redesignated as (c) and (d). The Committee approved the Reporter's draft with the deletion of the sentence referring to the trustee's duty under subdivision (a)(5) of the rule. [Subdivision (a)(5) would be abrogated pursuant to a separate vote described below.]

Rule 2018. The Committee approved the Reporter's draft.

Rule 3002. A motion to extend from five days to ten the time allowed after the § 341 meeting date for the filing of a proof of claim was defeated by a vote of six to three. By the same vote, six to three, the Committee approved the Reporter's draft.

Rule 3004. The Committee approved the Reporter's draft subject to the following changes:

\* Line 10. The phrase "prescribed by . . . Rule 3003(c)" is incorrect as Rule 3003(c) does not prescribe a time. It should be revised to say "fixed by the court under/pursuant to Rule 3003(c)," the exact wording to be left to the style committee.

\* Lines 12 and 13. Substitute the phrase "prior to the hearing on confirmation of the plan."

Rule 3005. In lines 12 through 14, the Committee approved, with one (1) opposed, the substitution of the phrase "prior to the hearing on confirmation of the plan" for the five day period suggested in the Reporter's draft.

Rules 3007, 3010, 3011 and 3013. The Committee approved the Reporter's draft.

Rule 3015. Concerning proposed subdivision (d), the Committee debated the pros and cons of summaries of plans and the requirement in the draft that any summary transmitted be court approved. Richard Heltzel argued against requiring sending of the complete plan with the § 341 notice on the basis that to do so would frustrate the attempts of the courts to save resources by automating the noticing process. The BANS system, which handles noticing for the 15 courts having the highest volume of filings, cannot produce multi-page notices. Mr. Heltzel's court sends a summary drafted by the debtor's attorney which fits on the notice itself. The Committee voted to delete the reference in the draft rule to court approval of any summary of a plan and to delete the Committee Note which would have restricted use of summaries to those approved by the court.

Rule 3020. The Committee approved the Reporter's draft subject to deletion from subdivision (b)(2) of the new sentence requiring the court to conduct the chapter 12 confirmation hearing within the time prescribed by § 1224 of the Bankruptcy Code. This sentence is to be moved to the Committee Note.

Rule 4007. The Committee discussed a letter which Harry Dixon had received concerning timing of the filing and disposition of dischargeability complaints. The Committee determined that no change in the Reporter's draft is needed as discharge in chapter

12 does not occur until the plan has been completed. The Committee approved the Reporter's draft.

Rules 5010, 6006, 7001 and 7062. The Committee approved the Reporter's draft.

Rule 9024. The Committee approved the Reporter's draft subject to deletion of the final three words.

Rule 2015(a)

The Committee approved the following deletions from this rule:

Title. All identifiers. The title would read, "Duty to Keep Records, Make Reports and Give Notice of Case."

Subdivision (a)(3). At the suggestion of Thomas Stanton, the phrase "within the times fixed by the court and," by a six to five vote. The Committee Note is to state that the clause is deleted, as the Committee recognizes that in most districts the United States trustee fixes the time, while in others the court does so. The Committee leaves the matter to local rule or to be worked out otherwise between the court and the United States trustee. The Committee considers the matter ordinarily to be administrative in nature, but the court will resolve any disputes upon the application of a party for entry of an order by the court.

Subdivision (a)(5). Entire subdivision. The Committee Note need not discuss the change; rather the transmittal letter should note that abrogation is in response to complaints and should highlight for bench and bar the Committee's view that



filing of the notice by the trustee is "prudent but not mandatory."

Amendments to Rules 4001 and 2002(a)(3)

All Committee actions taken concerning these rules refer to the Reporter's memorandum dated October 3, 1988 and draft amendments dated September 30, 1988, which were transmitted to the Committee members on October 6, 1988. [Docket No. 33.A.]

Rule 2002(a)(3). The Committee unanimously approved the Reporter's draft.

Rule 4001(a). The Committee voted, with one opposed, to delete subdivision (a)(2) as serving no purpose. All other changes to subdivision (a) were approved unanimously.

Rules 4001(b) and (c). The Committee unanimously approved the Reporter's draft.

Rule 4001(d). The Committee unanimously approved all changes to subdivisions (1) through (3) and adopted the new subdivision (4), covering agreements, as recommended by the Reporter. Concerning the proposed Committee Note to new subdivision (d), the Committee voted to make three changes: 1) page 6, line 15, substitute "scope" for "terms"; 2) page 6, line 21, substitute "from" for "than"; and 3) delete the final sentence, (beginning at line 35 of page 6 and continuing through the end on line 3 of page 7). The Committee also expressed additional style concerns about the Committee Note and a sense that the Note ought to make clear the intent of the rule that the original notice should have comprehended the terms of the actual agreement.

The Committee discussed a letter from Bankruptcy Judge Wheless concerning the effect of Rule 9006(f) on the 15 day period. Rule 9006(f) affords an additional three days if service is made by mail, effectively extending the time to 18 days. Professor Resnick observed that the 15 day period can be shortened and that the [1987] Committee Note to Rule 4001 states that Rule 9006(f) does not extend the time because the party served is not required to act with the 15 days. Judge George and Ralph Mabey both expressed the view that the [1987] Committee Note may be wrong in this respect.

Professor Resnick suggested, however, that Rule 9006(f) should be revisited because if the three days' mail time is added to the five day objection period, the resulting eight day period would include any intervening weekends if the amendment being proposed to Rule 9006(a) become effective. The Committee agreed informally that the impact of Rule 9006(f) on all of the rules should be examined but that this should be done later, in coordination with the other Advisory Committees.

Motions for Relief under § 363(e). Harry Dixon made a motion to include in Rule 4001 motions "for adequate protection" under § 363(e), which often are combined with § 362 motions for relief from stay in order to trigger the 30 day time periods. Professor King cautioned that drafting of such an amendment should be done carefully, because § 363 relief can be without a hearing, and the Committee should not impose procedural burdens not called for by the Code. The motion passed, with one (1) opposed. The Reporter will present a draft at the next meeting.

Miscellaneous Suggestions Received from the Public

Chairman George said it is clear that the Committee needs a system for handling the large volume of public comments. The Reporter will continue to consider and address all comments in memoranda to the Committee. With the Committee's approval, however, only those suggestions which the Reporter agrees should be adopted would be discussed at Committee meetings unless a member takes exception to a specific recommendation of "no action" by the Reporter. Any such exceptions to the Reporter's recommendations would be discussed. The Committee agreed, and this procedure will be followed at all subsequent Committee meetings.

Suggestion to Delete Descriptions of Chapters

Professor King questioned whether it is necessary to retain the descriptions of the various relief chapters of the Bankruptcy Code when these are mentioned in the rules. He said the descriptions, such as "Chapter 11 Reorganization" and "Chapter 13 Individual's Debt Adjustment Case," were included in earlier versions of the rules to assist parties who were unfamiliar what then was a newly enacted Bankruptcy Code. General knowledge of the various chapters appears now to be widespread, he said, and the rules probably could be stripped of these additional phrases. The Committee took no action on this proposal.

Thanks to Judge Sear

Chairman George thanked Judge Sear for making his courtroom available to the Committee. He said he knew he spoke for all

in thanking both Judge Sear and Mrs. Sear for their generous hospitality at the dinner held in their home the evening prior to the first day of the meeting.

Future Meetings

The Committee agreed to the following schedule for future meetings:

March 10-11, 1989 --- Phoenix, Arizona

May 10-12, 1989 --- Seattle, Washington

Respectfully submitted,

*Patricia S. Channon*  
Patricia S. Channon

Dated: 2/10/89